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## Pro-Life Progressivism and the Fourth Option in American Public Life

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Can the Seamless Garment Be Sewn?  
The Future of Pro-Life Progressivism

Christianity and the Secular in  
Modern Public Life

Thomas C. Berg

*Fides et Iustitia*

ARTICLE

CHRISTIANITY AND THE SECULAR IN  
MODERN PUBLIC LIFE

THOMAS C. BERG\*

The title “Christianity and the Secular in Modern Public Life” is indeed a broad one, especially for a short lecture. It reminds me of the time that a faculty colleague asked me if I knew of a good twenty-page article summarizing the history of Christianity. The relation between Christian faith and mission and “the secular” is a huge and complex topic, not the least because the word secular has at least two different meanings that may be relevant. In a modest sense, “secular” simply describes those activities that occur in or relate to the world outside some confine of the Christian community.<sup>1</sup> Thus we speak of secular priests or secular orders, clergy who do not take the vow of poverty or live in a monastic community.

However, the term “secular” has also come to have a far broader meaning—probably the dominant meaning now—of describing an activity or a sphere of life that is not governed by Christian or other religious principles, but is independent of them. Secular priests and orders still are following explicit Christian principles throughout their work and therefore are hardly secular in the broader sense. In the broader vein, people speak of secular schools, meaning that no religious teaching occurs in them, or secularism as an ideology that rules out any religious content in some sphere of life.<sup>2</sup>

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1. See e.g. *The Concise Oxford Dictionary* 1026 (J. B. Sykes ed., 6th ed., Oxford U. Press 1976) (including one definition of “secular” as “concerned with the affairs of this world” and “not monastic”).

2. See *id.* (also including a broader definition of “secular” as “sceptical of religious truth or opposed to religious education”).

The difference between the modest and expansive notions of the secular bears upon my discussion here. As one way to trace Christian attitudes toward the secular in the last forty years, I will use as a foil a variation of theology that became popular among mainline Protestant leaders in the 1960s, loosely called "secular theology." Basically, secular theology embraced the modern world and called for Christians to become active in its movements as the focus of Christian mission. The elements of this theology, I argue, have largely set the terms for social activity by mainline Christian bodies ever since. I will identify those elements and then briefly undertake two further steps. The first is to sketch, from a theological standpoint, the benefits and very real costs of this approach. The second is to suggest, from a constitutional standpoint, that the government ought to leave it up to religious organizations to decide whether to be more or less "secular" in their operations, because such decisions have deep theological implications for such organizations. The government ought not to treat an organization any differently in regulating or funding it because of the organization's decisions about how secular it should be.

### I. THE ELEMENTS OF SECULAR THEOLOGY

The manifesto of secular theology was Harvey Cox's 1965 book *The Secular City*,<sup>3</sup> a bestseller that celebrated complex, modern urban society as the place where God's will was working, and that called on Christians to join in the process. What spurred on this impulse to embrace the world in the early '60s? Doubtless, one factor was people's sense that science and technology had been so successful in improving life and had seemingly endless capacity to bring further improvements.

Another factor, however, was an ethical critique of the Church and a moral vision for its future. Theologians of the early 1960s were powerfully affected by Dietrich Bonhoeffer, the anti-Nazi martyr, especially by the *Letters and Papers from Prison* that he wrote in the months before his execution in 1945. Those materials, first published in the 1950s, rocked the theological world with some passages about how the Christian Church must adapt to a world that arguably was now "religionless"<sup>4</sup> and had "come of age":<sup>5</sup> in which the expansion of human knowledge and capabilities had made the hypothesis of God "superfluous."<sup>6</sup> In the face of this prospect, Bonhoeffer proposed the need for a "religionless Christianity" that could no

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3. Harvey Cox, *The Secular City: Secularization and Urbanization in Theological Perspective* (Macmillan Publ. Co., Inc. 1966).

4. Ltr. from Dietrich Bonhoeffer to Eberhard Bethge (Apr. 30, 1944), in Dietrich Bonhoeffer, *Letters and Papers from Prison* 278, 279-80 (Eberhard Bethge ed., Christian Kaiser Verlag trans., SCM Press Ltd. 1972).

5. Ltr. from Dietrich Bonhoeffer to Eberhard Bethge (June 30, 1944) in Bonhoeffer, *supra* n. 4, at 339, 341.

6. *Id.* at 282.

longer rest on its status as the privileged description of a metaphysical world.<sup>7</sup> The Christian church in this new situation, he wrote, can exist “only when it exists for others”; it “must share in the problems of ordinary human life, not dominating, but helping and serving” the world. To that end, he added, the church should give away its property to the needy, and the clergy should consider supporting themselves through “engag[ing] in some secular calling.”<sup>8</sup>

Inspired by Bonhoeffer’s heroic status, theologians took his short, sometimes enigmatic prison writings and developed them into a theological model for Christian mission, which I would summarize in the motto “the Servant Church in a Secular World.”

The first term in that phrase—“the servant church”—reflected a reaction against the Christianity of the 1950s, which the new theologians perceived as complacent and self-centered, concerned only with numbers on its rolls and comfort for its members. A host of books published around 1960 criticized mainline Protestantism for ignoring the needs of the downtrodden and preaching irrelevant messages about purely interior, personal salvation. Their titles evoke their arguments: *The Comfortable Pew*, *The Suburban Captivity of the Churches*, *The Noise of Solemn Assemblies*.<sup>9</sup> The last of these works, by religious sociologist Peter Berger, referenced the book of Amos—probably the favorite prophet of 1960s theologians—which cried out against the royal-sponsored religion of ancient Israel with the words, “I hate[ ] your feasts, I despise your solemn assemblies. . . . But let justice roll down like waters, and righteousness like an ever-flowing stream.”<sup>10</sup> In the same vein, Colin Williams of the National Council of Churches, whose books were widely read in congregations and seminaries, followed Bonhoeffer in arguing that the church must become a “servant” to the world, caring not for itself but for the needy, focusing on social justice rather than “churchly” concerns.<sup>11</sup>

The civil rights movement gave a boost to this critique. The comfortable white Protestant churches had failed to promote racial equality and at worst, in the South, had fought to preserve the unjust order of segregation. Protestantism’s failure to promote racial justice exemplified its “abject failure to care for others,” said Williams; but the religious grounding of the black freedom movement was a “case study” of how churches could play

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7. *Id.* at 281-82.

8. Dietrich Bonhoeffer, *Outline for a Book* (July/Aug. 1944), in Bonhoeffer, *supra* n. 4, at 380, 382-83.

9. Pierre Berton, *The Comfortable Pew* (6th ed., J.B. Lippincott Co. 1965); Peter L. Berger, *The Noise of Solemn Assemblies* (Doubleday & Co., Inc. 1961); Gibson Winter, *The Suburban Captivity of the Churches* (Doubleday & Co., Inc. 1961).

10. *Amos* 5:21-24 (New Rev. Stand.).

11. Colin W. Williams, *Where in the World? Changing Forms of the Church’s Witness* 24-27, 75-76 (6th ed., Natl. Council of the Churches of Christ in the U.S.A. 1963).

their true role as servants to the needy.<sup>12</sup> Many mainline Protestant clergy and activists who were drawn to the civil rights movement interpreted it in the light of these commands to be a servant church in Bonhoeffer's words.<sup>13</sup>

This new religious attitude among mainline Protestant leaders and theologians was hostile to many of the longstanding features of American civil religion, such as formal school prayers, that mainline Protestants had traditionally championed. In the emerging view, these practices epitomized American religion's self-satisfaction and privileged status; they not only failed to address injustice, but actually hampered the fight by encouraging the illusion that America was a "Christian nation." The Episcopal bishop of Chicago applauded the 1962 Supreme Court school prayer decision precisely because it "dissipates the myth that ours is a Christian country."<sup>14</sup> A leading opponent of school prayers testified to Congress that they were "more akin to a national cult than to the faith of the New Testament."<sup>15</sup> He later added that the widespread mistreatment of America's black citizens in the 1950s proved "the shallowness of the public religious sentiments" of that era.<sup>16</sup> Following in a long tradition of American religious critics from Roger Williams, the secular theologians concluded that the cultural establishment of Protestantism had undermined the church's integrity and mission, and they hailed the death of that establishment.<sup>17</sup>

This critique, however, raised a paradox. The civil rights movement sought social justice rather than churchly privileges, but it was still a significantly religious phenomenon, with preachers as its leaders and congregations as its organizational base. Didn't the movement therefore seek a more *Christian* state rather than a more secular one?

Here the second aspect of secular theology as applied to mission becomes important. The servant church operated "in a secular world." The church served the world's needs on the world's own terms, not demanding that the world conform to the church. To return to Bonhoeffer's language, the church operated in a "religionless" world "come of age." Colin Wil-

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12. Colin W. Williams, *What in the World?* 92, 82-83 (Nat'l. Council of the Churches of Christ in the U.S.A. 1964).

13. See e.g. James F. Findlay, Jr., *Church People in the Struggle: The National Council of Churches and the Black Freedom Movement, 1950-1970*, at 122 (Oxford U. Press 1993) (noting the inspiration of Bonhoeffer's ideas to Protestant theologians and leaders active in the civil rights movement); William Hamilton, *Bonhoeffer: Christology and Ethic United*, 24 *Christianity & Crisis* 195, 195 (Oct. 19, 1964) (noting the importance of Bonhoefferian ideas of "religionlessness" "where Negro and white students are trying to discern the ethical and theological implications of the radical forms of the civil rights movement").

14. Robert S. Alley, *School Prayer: The Court, the Congress, and the First Amendment* 122 (Prometheus Books 1994) (quoting Bishop Gerald Burrill).

15. Robert S. Alley, *Testimony of Robert S. Alley before the Senate Subcommittee on Constitutional Amendments* (Aug. 8, 1966), reprinted in *id.* at 247, app. B, 250.

16. Alley, *supra* n. 14, at 104-05.

17. See e.g. Williams, *supra* n. 12, at 63 n. 1 (applauding "the removal of the scaffolding of 'Christendom' and the 'establishment' and the deliverance of the Christian fellowship into an 'open' world" to seek justice and freedom for all).

Williams's influential motto was to "let the world write the agenda,"<sup>18</sup> to "be out there learning what Christ is doing in the world."<sup>19</sup> He again commended the example of the civil rights movement, where Christians joined with non-Christians to seek justice "on the common secular ground of ethical language."<sup>20</sup> Theologian Gabriel Fackre has summarized the 1960s embrace of the secular in Christianity's public face: "[T]he place for the celebration of orthodox faith was . . . in a 'hidden discipline' in a catacombs church, while up on the surface in the secular world a silent 'Christian presence' in simple acts of mercy and justice was the meaning of mission."<sup>21</sup>

Secular theology often took on a moderate rather than an extreme form. The most extreme variant, the theology based on the asserted "death of God,"<sup>22</sup> fizzled almost by the time it made the cover of *Time* magazine. Not everyone was as high on the secular city as Harvey Cox, and even he moved beyond its boundaries within a couple of years. But the key assertions of secular theology have remained influential ever since, in at least two ways.

First, this theological attitude among liberal Protestants has overlapped with and often supported a common attitude of liberal *political* thinkers toward the role of religion in political debate and legislation. Many liberal writers have deemed it unconstitutional or at least inappropriate in a liberal democracy if a law rests only, or too substantially, on religious rationales. This theme appears in some of the Supreme Court's Establishment Clause decisions striking down legislation on the ground that it lacked a "secular purpose" because it was motivated too heavily by "sectarian" convictions.<sup>23</sup> The theme also shows in the work of writers such as John Rawls, Robert Audi, and Kent Greenawalt, all of whom have argued—in varying degrees—that citizens or legislators may support laws based on subjective religious *motivations*, but that they should justify and defend those laws on nonreligious grounds, nontheological grounds.<sup>24</sup> Sometimes commentators making these arguments draw a distinction between the civil rights move-

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18. Williams, *supra* n. 11, at 75.

19. Williams, *supra* n. 12, at *xix*.

20. Williams, *supra* n. 12, at 84.

21. Gabriel Fackre, *Theology Ephemeral & Durable*, in *Restoring the Center: Essays Evangelical and Ecumenical* 11, 15 (InterVarsity Press 1998).

22. See e.g. Thomas Altizer & William Hamilton, *Radical Theology and the Death of God* (Bobbs-Merrill 1966); Thomas Altizer, *The Gospel of Christian Atheism* (Westminster Press 1966) (welcoming "the death of the Biblical God" so that Christianity could focus on acts of love in this world); see also Thomas Altizer & William Hamilton, *Is God Dead? Toward a Hidden God*, 87 *Time* 14, 82 (Apr. 8, 1966) (discussing rise of "death of God" theology).

23. See e.g. *Epperson v. Ark.*, 393 U.S. 97, 107-08 (1968) (striking down prohibition on the teaching of evolution in schools on grounds that "fundamentalist sectarian conviction was and is the law's reason for existence"); *Webster v. Reprod. Health Services*, 492 U.S. 490, 568 (1989) (Stevens, J., dissenting) (arguing that anti-abortion laws unconstitutionally endorse "a particular religious tenet" about the beginning of human life).

24. See e.g. John Rawls, *Political Liberalism* 250 n. 39 (Columbia U. Press 1993); Kent Greenawalt, *Religious Convictions and Political Choice* (Oxford U. Press 1988); Robert Audi,

ment—which assertedly involved an appropriate religious motivation for secular political activity—and other forms of religious involvement in politics that assertedly involve the inappropriate imposition of a theological viewpoint.<sup>25</sup> Secular theology, as liberal Christianity has appropriated it, has largely harmonized with and lent support to such distinctions made by secular writers. Recall that secular theology emphasized “a silent Christian presence in simple acts of mercy and justice”—done from Christian motivation, but relying on “common secular ethical language.” That line between an underlying subjective motivation that is religious and a public, objective content that is not tracks, to a large extent, the line drawn in much of modern liberal political theory.

Second, the assumptions of secular theology shaped the dominant model of social service for mainline and liberal Christian bodies. Under this model—represented by such major agencies as Catholic Charities and Lutheran Social Services—agencies provide services to the needy motivated by Christian love, but without any explicit Christian preaching, teaching, or visual symbols in their operations.<sup>26</sup> In Bonhoefferian terms, they choose the posture of a “silent Christian presence.” In addition, secular theology assumptions have helped fuel liberal Protestantism’s tendency to support the provision of social services by the government. For Colin Williams, the world’s coming of age meant that the state no longer needed to enforce “churchly” moral norms. Rather, the state’s own social justice activities could directly serve “Christ’s ultimate purpose of bringing the whole creation to unity in him,” and in that light, “the role of the Church is to train the laity for service in these ministries within the State.”<sup>27</sup> Indeed, secular-minded activists of the 1960s generally tended to assert “that public functions should be publicly performed,” that is by government, and “that to leave a matter to ‘private initiative’ [wa]s to insure that it w[ould] be done incompetently, prejudicially or not at all.”<sup>28</sup>

The two key concepts of secular theology also gained prominence in Catholic thought in the ‘60s, although I can only sketch this briefly here. The idea of the “servant Church” is consistent with many of the great affirmations of Vatican II: the primarily collegial rather than hierarchical relationship between the pope and the bishops, the crucial role of the laity as

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*The Place of Religious Argument in a Free and Democratic Society*, 30 San Diego L. Rev. 677, 690-702 (1993).

25. See e.g. Rawls, *supra* n. 23, at 250 n. 39 (explaining why civil rights movement comported with ideals of “public reason”); Peter S. Wenz, *Abortion Rights as Religious Freedom* 188-89 (Temple U. Press 1992) (distinguishing abortion from other issues of religious involvement in politics on ground that personhood of fetus “is a religious matter” while other issues involve “secular values”).

26. See John P. Bartkowski & Helen A. Regis, *Charitable Choices: Religion, Race and Poverty in the Post-Welfare Era* 55-56 (N.Y.U. Press 2003) (describing approach of such agencies).

27. Williams, *supra* n. 11, at 79-80.

28. Richard E. Morgan, *The Politics of Religious Conflict: Church and State in America* 131 (Pegasus 1968).



the People of God, the initiation of respectful discussions with other faiths, and the renunciation of state privileges for the Church in favor of religious freedom for all based on the dignity of the human person.<sup>29</sup> The “secular world” component, too, appeared in statements like John Courtney Murray’s that after Vatican II “[t]he notion of the sacral society is dismissed into history, beyond recall. The free society of today is recognized to be secular.”<sup>30</sup>

Indeed, many Catholics (not including Murray) took the “secular world” concept to the same lengths as did the liberal Protestants. Citing Harvey Cox’s *The Secular City*, for example, Sister Marie Augusta Neal read Vatican II to endorse the making of norms primarily through “experience and commonsense judgment” and “the pursuit of science” rather than “a bishop’s pronouncement.”<sup>31</sup> Catholic colleges in the 1960s began a headlong rush to make themselves look essentially like non-church-affiliated colleges. They did so partly in order to qualify for government funding, as James Burtchaell emphasized in his book *The Dying of the Light*,<sup>32</sup> but also because many of them thought that their proper mission was to offer a secular education out of religious motivation.<sup>33</sup> On the social services side, Catholic Charities and similar agencies tended to develop the same character: a Christian motivation, but one that appeared only implicitly through “acts of mercy and justice.”

One reason for a Catholic openness to secular methods of reasoning was that the natural-law tradition itself affirms a common ethical language not dependent on points of special revelation. Of course, traditional natural-law reasoning, with its emphasis on eternal truths, was substantively and methodologically different from the pragmatic, social-science-oriented methods that the 1960s secular theologians embraced. But many Catholic thinkers in the 1960s were willing to recast natural law in the new, more functional terms. They included then-liberal Michael Novak, who wrote in 1966 that natural law could simply mean the development of moral norms out of “experience, insight, and evidence.”<sup>34</sup> In that sense, he wrote approvingly, “*The Secular City* of pragmatism and profanity seems to be a city of natural law.”<sup>35</sup>

29. See e.g. Robert S. Ellwood, *The Sixties Spiritual Awakening* 148 (1994) (“The church as People of God was a Vatican II idea, . . . [emphasizing that] . . . clergy are not hierarchical leaders but themselves servants of the servant church.”).

30. A. James Reichley, *Religion in American Public Life* 288 (Brookings Instn. 1985) (quoting Walter J. Burghardt, *Religious Freedom: 1965 and 1975*, at 69 (Paulist Press 1977)).

31. Marie Augusta Neal, *Catholicism in America*, in *Religion in America* 323-24 (William G. McLoughlin & Robert N. Bellah eds., Houghton Mifflin 1968).

32. James Tunstead Burtchaell, *The Dying of the Light: The Disengagement of Colleges and Universities from Their Christian Churches* ch. 8 (William B. Eerdmans Publ. 1998).

33. *Id.*

34. Michael Novak, *Secular Style and Natural Law*, in *The Secular City Debate* 81, 82 (Daniel Callahan ed., Macmillan Publ. Co. 1966).

35. *Id.* at 81.

## II. THE BENEFITS AND COSTS OF SECULAR THEOLOGY

Having discussed the influence of secular theology, I first want to make a couple of brief suggestions about it viewed from a theological perspective—acknowledging that I speak as an amateur. It seems to me that the first concept of the secular theology model—“the servant church”—has been largely beneficial, but the second emphasis—“in a secular world”—is ambiguous and at best problematic.

### A.

The “servant church” concept, it seems to me, contained at least two beneficial emphases. One is that the Church should turn from a focus on itself to an engagement with the world and the needs of people in it. The 1960s theologians doubtless overstated the complacency of the 1950s Protestantism, but they surely were correct in saying that the Protestant church had not sufficiently used its weight to push change on the moral issues of segregation, grinding poverty, and others. Even more than Protestant liberals, white Protestant evangelicals needed to hear that message. As of the 1960s, most of the white evangelicals, especially in the South, still maintained a separation from social engagement that offered them a convenient excuse for criticizing the clergy who were immersed in the civil rights movement.<sup>36</sup> But in the last twenty-five years, evangelicals have changed and have engaged the culture publicly—sometimes, though definitely not always, on behalf of the vulnerable, such as the unborn.

The second beneficial emphasis of the “servant” model is that when the Church engages with the world, it should do so not with an assumption that it is privileged, but in an open, free, and honest exchange between citizens who, in a democracy, enjoy equal status. It was good for the Catholic Church, in *Dignitatis Humanae*, to drop the claim that it should enjoy a privileged status with the government. Renouncing any officially preeminent rank, of course, is perfectly consistent with the Church being involved in the political world, seeking to ensure that laws reflect a sound understanding of personal dignity and the common good. We should hope that the Christian church will be an effective voice in public life. But its effectiveness must arise through servanthood and humility, for in Jesus’s words,

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36. The Rev. Jerry Falwell, for example, attacked Dr. Martin Luther King in a 1965 sermon for “mixing religion and politics”:

[Our] message is designed to go right to the heart of man and there meet his deep spiritual need. Nowhere are we commissioned to reform the externals . . . . Believing the Bible as I do, I would find it impossible to stop preaching the pure saving gospel of Jesus Christ, and begin doing anything else—including fighting Communism, or participating in civil-rights reforms.

Rev. Jerry Falwell, Sermon, *Ministers and Marchers* (Mar. 21, 1965) (quoted in Frances Fitzgerald, *Cities on a Hill: A Journey through Contemporary American Cultures* 129 (Simon & Schuster 1986)).

“Whoever wishes to be great among you must be your servant, . . . just as the Son of Man came not to be served but to serve.”<sup>37</sup>

We can all think of instances today where the Christian church or its leaders could act more like servants. The Catholic sex abuse scandal is complicated, but it seems clear that some bishops acted more out of institutional self-preservation than out of care for the vulnerable. To take a different matter, it seems to me that the continuing efforts of some evangelicals to preserve official prayers in schools, or Table One of the Ten Commandments in public buildings, reflect a desire to achieve privileged status rather than to serve. I am not suggesting simple answers to these questions—only that Christians in public life must always examine whether they are truly acting as servants to those in need.

### B.

But the idea that the servant church operates “in the secular world” raises many more difficulties. If by it we mean only that the world is not the church, and that church and state should not be too closely intertwined as institutions, it is unobjectionable. That is the more modest sense of “secular,” and it is likely what Fr. Murray meant when he said that “the free society of today is recognized to be secular,” not sacral. But often in liberal Protestantism, and sometimes in Catholicism, “the secular world” has taken on the broader meaning of a world free of explicit religious norms. Often it has meant that the Church must serve on the world’s own terms, or as I put it earlier, on the “common ground of secular ethics” rather than by the articulation of any explicit, distinctively Christian vision. That step does not follow, and it is fraught with problems.

First, this secular model did not even fit the civil rights movement, notwithstanding the interpretation of some white theologians. The movement was unabashedly religious, not just in its motivation, but in its day-to-day expression and activity. That is the conclusion of the fine new work of civil rights history *A Stone of Hope: Prophetic Religion and the Death of Jim Crow*, by David Chappell, which argues that the pervasive Christian revivalist language was necessary to “ma[ke] civil rights *move*.”<sup>38</sup> This religious vision, Chappell concludes, played indispensable roles in inspiring blacks to face the depths of white sin, develop a realistic strategy of pressure through nonviolent protest, and endure the suffering that this strategy entailed.<sup>39</sup> For all these reasons, “it may be misleading to view the civil rights movement as a social and political event that had religious overtones. The words of many participants suggest that it was, for them, primarily a

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37. *Matthew* 20:26, 28.

38. David L. Chappell, *A Stone of Hope: Prophetic Religion and the Death of Jim Crow* 44 (UNC Press 2004) (emphasis in original).

39. *See id.* at ch. 3 (describing, for example, the influence on the Rev. Martin Luther King of the theologian Reinhold Niebuhr’s theories of original sin).

religious event, whose social and political aspects were, in their minds, secondary or incidental.”<sup>40</sup>

Second, even if the model of “common secular ethical language” succeeded for the civil rights movement, it probably did so only because segregation in the South contravened so many different moral outlooks, Christian, liberal egalitarian, and others. The last part of Chappell’s book shows how even passionate segregationists found it difficult to make any moral case for the system.<sup>41</sup> But many other disputed political and social issues will not be marked by such an overlap among moral views. In many cases, Christian views of the world, the human person, and other fundamental matters will be quite different from secular views, and in those cases, Christians will need to advance their views explicitly. If they confine themselves to “secular ethical language,” they will be proceeding with one arm tied behind their backs.

Finally, when a church adopts the secular model of mission for its schools and social services, it may well destroy its ability to preserve its theological identity and pass it on to the next generation. This has certainly been a problem for the liberal Protestant bodies, which have embraced the secular model in nearly all their social-service and higher-education institutions. It has been a serious problem for Catholic institutions too, as Professor Burchtaell documented with respect to colleges, although the Catholic situation is not as uniform: plenty of Catholic K-12 schools, colleges, and social services have maintained explicit, distinctively Catholic elements in their programs.

### III. THE SECULAR MODEL AND RELIGIOUS ORGANIZATIONS’ SELF-DETERMINATION

Having criticized the secular model from a theological perspective, I now want to close with a countering point. The secular model may be questionable for church agencies theologically, but it should not be disfavored legally. The government’s treatment of a church-affiliated organization should not change because the organization chooses to adopt the secular model or, in contrast, to be more “sectarian”: that is, to incorporate more explicit doctrinal teaching or other religious elements in its programs. The choice between models of mission is full of theological significance, and as much as possible, government ought not to skew that choice; it ought not to favor “secularized” organizations over “sectarian” ones, or vice versa. A corollary of the guarantee of religious freedom under the First Amendment is that government rules with respect to religious bodies ought not to favor one theological viewpoint over others—and different models of how mis-

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40. *Id.* at 87.

41. *See id.* at ch. 6.

sion relates to the secular world certainly reflect different theological viewpoints.

I would make this argument even if the choice between the secular and sectarian models of mission were simple. But in fact the choice is not simple. There are not just two categories of secularized and sectarian; a host of hybrid positions lie in between. Liberal Protestants follow secular norms on many matters, but even they reject the dominant secular ethos on some matters. And even when an organization adopts the norms of secular culture, it may do so ultimately for theological reasons. It may conclude that the world's norms actually show the Church how to be Christian in a deeper sense than it previously realized—as when the secular theologians argued in the '60s that the civil rights movement, originating from outside the white churches, was showing those churches the true meaning of Christian mission. The Church can properly learn from the world, even if what it properly learns cannot be a completely new thing, only a better and deeper understanding of Christian principles themselves.<sup>42</sup>

Unfortunately, the law has often pushed churches to adopt one model of mission or another so as to fit within the state's categories. Let me give two examples. First, for years during the 1970s and '80s, the Supreme Court interpreted the Establishment Clause to forbid "pervasively sectarian" organizations from receiving government aid, while allowing more secularized church-affiliated entities to receive aid.<sup>43</sup> The distinction encouraged religious entities to secularize in order to receive funds and compete with their fully secular counterparts who were subsidized. Catholic colleges hired faculty without regard to religious mission, relaxed their religion courses, and turned to independent lay trustee boards; Catholic Charities affiliates likewise removed explicitly religious elements from their services. The president of Columbia Union College, a Seventh-Day Adventist institution, exemplified such incentives when, after the college was refused Maryland state grants because of its sectarian character, he wrote a letter to state regulators asking, "If we recant, would we qualify?"<sup>44</sup> Liberal Protestants have generally supported such restrictions on government aid, which favored their own, less explicitly religious model of services.

But the law has improved recently in this area. The Supreme Court no longer disqualifies institutions from evenhanded state aid merely because of

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42. See e.g. Angela C. Carmella, *A Theological Critique of Free Exercise Jurisprudence*, 60 *Geo. Wash. L. Rev.* 782 (1992) (offering a similar but more detailed defense of the rights of "acculturated" religious groups).

43. Compare e.g. *Meek v. Pittenger*, 421 U.S. 349 (1975) (disqualifying "pervasively sectarian" parochial K-12 schools from numerous forms of aid) with *Roemer v. Bd. of Public Works of Md.*, 426 U.S. 736 (1976) (permitting Catholic colleges to receive direct money grants from state on grounds that colleges were not pervasively sectarian).

44. *Columbia Union College v. Clarke*, 159 F.3d 151, 177 (4th Cir. 1998) (Wilkinson, C.J., dissenting).

their “sectarian” character.<sup>45</sup> And the so-called charitable-choice statutes allow religious social services—even “pervasively sectarian” ones—to receive federal aid on equal terms while retaining religious practices such as displaying symbols, preferring members of the faith as employees, and so forth.<sup>46</sup> This broadened eligibility has had the consequence of making aid available to, among others, evangelical social services, whether affiliated with white or black churches. These ministries typically reject the secular model of Lutheran Social Services or Catholic Charities and insist that effective assistance must include explicit religious witness so as to be “transformative, helping people to turn their lives around.”<sup>47</sup> Both the Court and the statutes forbid an organization to use direct state grants for inherently religious activities such as worship and proselytization,<sup>48</sup> but charitable choice nevertheless makes a significant improvement over the previous flat disqualification of “sectarian” providers.

The older Supreme Court cases on government aid discriminated against the explicitly religious model of higher education and social services and in favor of the secular model. But in the context of government *regulation*, religious agencies following the more secular model are often disfavored. An example is the recent California Supreme Court decision holding that Catholic Charities of Sacramento could be forced to pay for employees’ contraceptive prescriptions if it covered their employees’ prescriptions at all.<sup>49</sup> The state law requiring contraceptive coverage contains an exemption for “religious employers,” but it defines that term very narrowly. An employer is not “religious” unless it has “inculcation of religious values” as its purpose, “employs primarily persons who share its religious tenets,” and “serves primarily persons who share [its] religious tenets.”<sup>50</sup> Catholic Charities had to meet each of these requirements to be exempt; it flunked each.

This exemption is so narrow that it excludes even agencies with strong explicitly religious elements. Such an organization loses the exemption if it *serves* a large number of people outside the faith. The idea that serving the

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45. See e.g. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (permitting inclusion of sectarian schools in K-12 voucher program); *Mitchell v. Helms*, 530 U.S. 793 (2000) (permitting government aid direct to pervasively sectarian schools as long as the aid is not actually used to teach religion).

46. 42 U.S.C. § 604a(d)(2)(B) (display of symbols); 42 U.S.C. § 604a(f) (employment practices).

47. Stanley W. Carlson-Thies, “Don’t Look to Us”: *The Negative Responses of the Churches to Welfare Reform*, 11 Notre Dame J.L. Ethics & Pub. Policy 667, 682 (1997).

48. See *Mitchell*, 530 U.S. at 840 (O’Connor & Breyer, JJ., concurring in the judgment) (interpreting Establishment Clause to forbid actual use of direct aid for religious purposes); 42 U.S.C. § 604a(j) (forbidding use of direct funds under charitable-choice statute for “sectarian worship, instruction, or proselytization”).

49. *Catholic Charities of Sacramento, Inc. v. Super. Ct.*, 85 P.3d 67 (Cal. 2004), *cert. denied*, 125 S. Ct. 53 (2004).

50. Cal. Health & Safety Code Ann. § 1367.25(b)(1)(A)-(C) (West 2003) (emphasis added).

broader world makes an organization non-religious—that religion is essentially a private club run for the benefit of its members—is ludicrous and offensive. But even without this requirement, Catholic Charities would have failed to qualify for the exemption, because it hires many non-Catholics and does not preach Christian doctrine in providing its services. Those facts, though, should not strip an organization of a religious character either. An organization can make a theological choice to serve others, motivated by Christ’s love but engaging in “simple acts of mercy” rather than explicit teaching. It might think that such a “silent presence” in solidarity with those in need is more consistent with Christian humility, as Bonhoeffer and the secular theologians argued. It might worry that explicit preaching would trigger the so-called “rice Christians” phenomenon, in which people have an incentive to convert, or pretend to convert, simply in order to receive the material assistance they need.<sup>51</sup>

In adopting a more secular model, the organization may be making a theological mistake, but outside of an unusual case, the courts ought not to deem it non-religious for that reason. Catholic Charities should be able to determine that it will use certain methods of secular culture to achieve its religious goals, but that it will not capitulate to secular norms on the issue of supporting the moral evil (in its view) of contraception.<sup>52</sup>

In a recent issue of the religious journal *First Things*, a letter writer applauds the denial of Catholic Charities’ exemption on the ground that the secularized approach of the agency “fails to promote a sense of Catholic identity among American Catholics.”<sup>53</sup> The correspondent concluded that “[w]hen Catholic Charities starts acting like a religious organization then maybe the courts will start treating it like one”—to which the editor, the Rev. Richard Neuhaus, replied in agreement that “if a nominally religious entity has no distinctively religious purpose, . . . it should be entitled neither to religious exemptions in law nor to the support of the pertinent religious constituency.”<sup>54</sup>

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51. In an effort to win and protect Chinese converts, Western missionaries [in the nineteenth century] “resorted to the practice of offering converts monetary subsidies and protection against official and unofficial interference and insult.” . . . [T]hese converts, who were mockingly called *ch’ih-chiao* [literally “eat by religion” or “rice Christians”] were often not well-received by their fellow Chinese.

William P. Alford, *Of Arsenic and Old Laws: Looking Anew at Criminal Justice in Late Imperial China*, 72 Cal. L. Rev. 1180, 1190 n. 44 (1984) (first brackets added, second brackets in original, italics added) (quoting I. Hsu, *The Rise of Modern China* 388, 392 (3d ed., Oxford U. Press 1983)).

52. For an extended, penetrating critique of the Catholic Charities decision along these lines, see Susan J. Stabile, *State Attempts to Define Religion: The Ramifications of Applying Mandatory Prescriptive Contraceptive Coverage Statutes to Religious Employers*, 28 Harv. J.L. & Pub. Policy 741 (2005). See also Thomas C. Berg, *Religious Freedom in the Catacombs*, 190 *American* 19, 21 (June 7, 2004).

53. Leonard Stevens, Correspondence, *Catholic Charities?* 147 *First Things* 4, 4 (Nov. 2004) (available at <http://www.firstthings.com/ftissues/ft0411/correspondence.html#5>).

54. *Id.*

The letter and Fr. Neuhaus's reply reflect a battle in the Church about the extent to which Catholic institutions need to be called back to a distinctively Catholic set of characteristics. I quite sympathize with the point of view of the letter writer and Fr. Neuhaus; but I do not think that the courts should interpret religious freedom doctrine to favor that view. To disqualify religious agencies from free exercise protection because they employ secular methods is wrong<sup>55</sup>—just as wrong as are the effort of liberals to disqualify more *sectarian* agencies from receiving government *aid*. It is important for religious organizations to resist the pull of the highly secular model of mission, for the reasons I've discussed. But the religious organizations should resist that pull themselves, and should not be pressured into doing so by the prospect of losing their rights of religious autonomy.

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55. *Accord Carmella, supra* n. 43.