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# Introduction to Religion and the State

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# RELIGION AND THE STATE

## INTRODUCTION

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"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."[1] Having struggled with the meaning of those phrases for almost two centuries, constitutionalists could well have been expected to have reached something of a consensus as to their contents. But that has not proved to be the case. Like other majestic generalities of the constitutional charter—due process, equal protection, and freedom of speech, to name only the most obvious—the religion clauses implicate tensions and complexities that undermine their linguistic clarity. As a result, the American law of church and state is far from settled. It even may be the case that, as a nation, the United States is less certain, more torn, and more confused about the meaning of these clauses today than at any time in its past. The road ahead may be even more hazardous than the one behind.

When this Symposium was scheduled in the spring of 1985, the Supreme Court was considering a half dozen or so religion cases, and wise commentators were predicting a wholesale overhaul of the Court's religion jurisprudence. That overhaul, if it came at all, cer-

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1. U.S. CONST. amend. I.

tainly was less than dramatic. The High Court has continued its somewhat grudging process of exclusion and inclusion, attempting to mark the appropriate boundary between religion and government. During the past two terms, the Court has upheld a state financial assistance program for the visually handicapped, even though the funds were used to study for the ministry,[2] and it has sustained a number of government programs against free exercise challenges.[3] But a public school's period of silence "for meditation or voluntary prayer,"[4] a state statute guaranteeing employees the right not to work on their chosen Sabbath,[5] and two separate schemes offering public funding for teaching in sectarian schools,[6] all have fallen to aggressive interpretations of the establishment clause. Clearly, the debate concerning the appropriate separation between church and state has not closed.

Further complicating the picture has been the reemergence of the relationship between church and state as a politically controversial topic. Attorney General Edwin Meese, perhaps bolstered by then-Associate Justice Rehnquist's dissent in *Wallace v. Jaffree*,[7] has argued that the modern religion decisions demanding separation of church and state would have shocked the framers of the first amendment.[8] Painting in brighter tones, Secretary of Education William Bennett characterized forty years of religion decisions as "misguided" attempts at neutrality reflecting "an attitude that regards entanglement with religion as something akin to entanglement with an infectious disease."[9] Toward the other end of the political spectrum, strong separationists have claimed that the

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2. Witters v. Washington Dep't of Servs. for the Blind, 106 S. Ct. 748 (1986).

3. *See, e.g.*, Bowen v. Roy, 106 S. Ct. 2147 (1986) (upholding against a free exercise challenge a requirement to provide a Social Security number to receive welfare benefits); Goldman v. Weinberger, 106 S. Ct. 1310 (1986) (sustaining Air Force dress code against challenge by Orthodox Jew desiring to wear yarmulke while on duty).

4. Wallace v. Jaffree, 472 U.S. 38, 40 (1985).

5. Estate of Thornton v. Caldor, Inc., 472 U.S. 703 (1985).

6. Aguilar v. Felton, 472 U.S. 91-114 (1985); Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216 (1985).

7. 472 U.S. 38, 91-114 (1985) (Rehnquist, J., dissenting).

8. *See* Meese, *The Battle for the Constitution*, POL'Y REV., Winter 1985, at 32; *see also* Taylor, *Meese v. Brennan*, NEW REPUBLIC, Jan. 6 & 13, 1986, at 17-21.

9. N.Y. Times, Aug. 8, 1985, at A18, col. 3.

agenda of the New Right, especially the New Christian Right,[10] poses a substantial threat to democratic ideals.

No matter where one stands on this debate, one may easily conclude that the body of law constructed by the Supreme Court to measure the demands of the religion clauses is unsatisfactory. The centerpiece of the Court's doctrine—the three-part test of *Lemon v. Kurtzman*[11] analyzing purpose, effect, and entanglement—still stands.[12] The health of that test, however, is uncertain, and its shortcomings are well known.[13]

By its terms, *Lemon* casts constitutional doubt on government action designed to serve religious goals. Despite that, the Court upheld a state's paid chaplaincy in *Marsh v. Chambers*[14] and a municipal Christmas creche in *Lynch v. Donnelly*[15]—actions considered religious in nature by most people. The "wall" the Court has erected in the school context between appropriate accommodation and unacceptable intermingling is anything but straight and anything but solid. On occasion, the *Lemon* test seems in conflict with itself, as the Court's decision last year in *Aguilar v. Felton*[16] shows. In that case, the school board, in taking steps to avoid the second prong of the *Lemon* test by assuring that a government program did not promote religion, initiated a program of supervision that resulted in entanglement with religion, violating the third prong.[17]

When *Lemon* is not on a collision course with itself, it often seems to conflict with the demands of the free exercise clause. If the *Lemon* test prohibits the government from acting to aid religion, the free exercise clause is said on occasion to require the government to accommodate religious choice. Another 1985 Supreme Court decision, *Estate of Thornton v. Caldor, Inc.*,[18] exemplifies

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10. *See generally* OUR ENDANGERED RIGHTS 3-71 (N. Dorsen ed. 1984) (essays on constitutional processes in a democratic society).

11. 403 U.S. 602 (1971).

12. The Court applied the *Lemon* test in both Aguilar v. Felton, 105 S. Ct. 3232, 3237-39 (1985), and Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216, 3222 (1985).

13. See, for example, Dean Choper's arguments in Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980).

14. 463 U.S. 783 (1983).

15. 465 U.S. 668 (1984).

16. 105 S. Ct. 3232 (1985).

17. *Id.* at 3236-37.

18. 472 U.S. 703 (1985).

this conflict. In that case, the Court held that Connecticut's apparently overzealous attempt to accommodate religion by guaranteeing employees a day off from work to celebrate their chosen Sabbath violated the establishment clause. The Court probably was correct when it admitted that its religion doctrine "sacrifices clarity and predictability for flexibility."[19]

One doubts that the record of this Symposium, impressive as it is, will solve the problems and contradictions presented by modern American religion jurisprudence. Consensus rarely is achieved on either political or religious issues. When the two are combined, the chances of agreement are even further diminished. It is doubtful, for example, that we could expect Professors Dorsen and McConnell to agree on the proper relationship between church and state no matter how long we deliberated. If we moved beyond the religion context, we would be no more realistic to expect Professors Kurland and Perry to come to terms on the justifiable role of the United States Supreme Court or, for that matter, to expect Professors Tushnet and Schauer to agree even on the value of doctrine. The Articles that follow, however, do represent an impressive attempt to further the inquiry.

The principal speakers, as well as the prestigious scholars who offer comment, consider a broad spectrum of separation issues. Professor Kurland's spirited and crisp essay explores the historical background of the religion clauses,[20] a topic much in vogue of late. Directing our attention to the founding period, he addresses both what can and cannot be said about the Framers' intent. Dean Choper's excellent Article turns to the free exercise clause, proposing a model for deciding such cases and criticizing the Court's work in the area.[21] Professor Greenawalt's effort puts these issues into a somewhat broader perspective. Probing basic principles, he examines the place of religious conviction in the political decisionmaking of a liberal democracy.[22] The record of these collective deliber-

19. Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 662 (1980).

20. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839 (1986).

21. Choper, *The Free Exercise Clause: A Structural Overview and an Appraisal of Recent Developments*, 27 WM. & MARY L. REV. 943 (1986).

22. Greenawalt, *The Limits of Rationality and the Place of Religious Conviction: Protecting Animals and the Environment*, 27 WM. & MARY L. REV. 1011 (1986).

ations will provide enlightenment to any serious student of the religion clauses. It represents, as well, a source of pride for the Institute of Bill of Rights Law and the College of William and Mary.