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THREAT TO RELIGIOUS LIBERTY BY THE WELFARE STATE: AN ILLUSION

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Professor Richard Epstein's perception of a threat to religious liberty with the advent of the welfare state is largely illusory.¹ Religious institutions and religious adherents enjoy sufficient political clout to forestall the hypothesized evils Epstein depicts. Furthermore, the federal judiciary is eminently capable of drawing constitutional lines that protect against religious oppression, even if those demarcations are not theoretically pure.

The United States has given constitutional blessing to the welfare state since 1937.² Moreover, by dramatic expansion of the concept of interstate commerce, the Supreme Court has empowered Congress to regulate such local activity as home consumption of wheat³ and loansharking.⁴ Thus, for virtually a half-century legislators have enjoyed the power to invade the autonomy of religious institutions by wielding a general welfare sword.

If the welfare state were incompatible with religious liberty, one would expect that by 1989 the death knell for the latter would have rung. But religion is flourishing in the United States today.⁵ Church attendance and church affiliations are blossoming. Millions of children attend religiously-affiliated elementary and secondary schools, and sizeable numbers are enrolled in colleges and universities with sectarian sponsorship. Most churches are not starving for

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1. See Epstein, *Religious Liberty in the Welfare State*, 31 WM. & MARY L. REV. 375 (1990).

2. Beginning with its decision in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937), the United States Supreme Court has shown a consistent willingness to treat deferentially those legislative enactments leading to the creation of a welfare state.

3. *Wickard v. Filburn*, 317 U.S. 111 (1942).

4. *Perez v. United States*, 402 U.S. 146 (1971).

5. See R. ANTOUN & M. HEGLAND, *RELIGIOUS RESURGENCE* 236-51 (1987); C. GLOCK & R. BELLAH, *THE NEW RELIGIOUS CONSCIOUSNESS* 333-66 (1976); *YEARBOOK OF AMERICAN & CANADIAN CHURCHES* (C. Jacquet, Jr. ed. 1988).

funds. Thus, putting aside constitutional doctrine, it seems at least counterintuitive to believe that religious liberty is on a lethal collision course with a 50-year-old welfare state.

The religious affiliations of legislators and routine legislative accommodation or sensitivity to religious institutions and creeds reinforce this skepticism. Virtually every member of Congress enjoys some religious membership. In 1988, for instance, the two Virginia Senators were Episcopalians, and of Virginia's ten House members, two were Episcopalians, two were Baptists, two were Presbyterians, one was Jewish, one was Roman Catholic, one was Methodist, and one was Unitarian.⁶

Federal legislation, unsurprisingly, is generally sympathetic to religion. Thus, in the field of employment, a private employer is barred from discrimination based on religious observance or practice unless he demonstrates that a reasonable accommodation would impose an "undue hardship" on the conduct of the employer's business.⁷ Moreover, section 702 of the 1964 Civil Rights Act exempts religious organizations from Title VII's prohibition against discrimination in employment on the basis of religion, including work in their secular nonprofit activities.⁸

Conscientious objectors to war in any form are exempt from service in the armed forces.⁹ Religious organizations operating educational institutions have been recipients of federal monies to further secular aims, such as the construction of a college library.¹⁰ Congress recently mandated that public schools receiving federal funds make their premises generally available for extracurricular activity without discriminating against religion or religious practices.¹¹ Recipients of federal monies may not discriminate against any health care personnel or physicians for refusing to assist or participate in abortions because of religious convictions.¹² In sum, if the welfare state monster is about to snuff out religious liberty, it seems to have donned a brilliant disguise.

6. *POLITICS IN AMERICA—THE 100TH CONGRESS 1547-78* (A. Ehrenhalt ed. 1987).

7. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e(j), 2000e-2(a) (1982).

8. *Id.* § 2000e-1.

9. 50 U.S.C. § 456(j) (1982).

10. *See Tilton v. Richardson*, 403 U.S. 672 (1971).

11. 20 U.S.C. § 4071 (Supp. V 1987).

12. 42 U.S.C. § 300a-7 (1982).

None of the cases examined by Epstein discredit that observation. In the area of collective bargaining, Epstein worries that if the state is empowered to decide the scope of religious exemption from labor law, then "pressures are put in place to make the scope of religious freedom a good deal narrower" than if religious organizations made the delineation.¹³ But Epstein conspicuously fails to identify these ominous "pressures."

Moreover, the *NLRB v. Catholic Bishop of Chicago*¹⁴ decision that Epstein discusses is at war with that worry. At issue in that case was whether federal labor laws empowered the National Labor Relations Board to hold union elections for the lay instructors at several Catholic parochial schools, and if so, whether such intrusion on religious autonomy violated the free exercise clause of the first amendment.¹⁵ The United States Supreme Court, a secular arm of the state, held that Congress had exempted religiously affiliated elementary and secondary schools from the reach of its collective bargaining laws.¹⁶ Since the ruling, Congress, another secular arm of the state, has forgone any effort to extend unionization laws to religious schools.

Furthermore, providing an exemption from federal labor laws does not confer a general advantage on religious schools over their nonreligious counterparts. The latter are supported by the tax dollars of parents with children enrolled in religious schools, and those same parents also typically pay a hefty private tuition for their children.

Where, then, is Epstein's hypothesized nightmare of a Manichean battle between religious liberty and collective bargaining in the welfare state?

Epstein goes astray when he insists that "[r]eligion conceived by its practitioners may form a total and complete code of human conduct that covers ordinary contracts of sale and employment along with religious rituals."¹⁷ Contrariwise, few if any religious creeds dictate a majority of an individual's choices, such as hair grooming, wardrobe, breakfast cereal, television or radio program-

13. Epstein, *supra* note 1, at 382-83.

14. 440 U.S. 490 (1979).

15. *Id.*

16. *Id.* at 507.

17. Epstein, *supra* note 1, at 383.

ming, occupation, newspapers, choice of friends, auto or house purchases, or location of residence. How many religious creeds are offended by a sales contract to purchase a gallon of gasoline for \$1.10?

In sum, occasions for conflict between religion and secular demands are less impressive than Epstein postulates. Moreover, even when a conflict does arise, subordinating a freedom of religion claim to a countervailing interest of the state seldom, if ever, destroys the core of an individual's religious life.

For instance, laws prohibiting polygamy have not materially inhibited the practice and growth of Mormonism. The Mormon Church dropped polygamy as part of its official creed in 1890 in response to a hostile political environment.¹⁸ But the Mormon religion thrives today, and the handful of adherents that insist on polygamy ordinarily are ignored, not persecuted by law enforcement officials.¹⁹

Likewise, Jehovah's Witnesses did not wither when the Supreme Court upheld application of child labor laws to bar the sales of religious pamphlets by a youthful adherent of the sect.²⁰ The High Court did not crush the practice of Judaism when it rejected the claim of an Orthodox Jewish merchant that he was due an exemption from Sunday closing laws because Saturday was his Sabbath, and he would be economically disadvantaged by closing two days in a week.²¹ And the Amish have not vanished because of the holding in *United States v. Lee*²² that their religious claims could not trump an obligation to pay social security taxes.

To recapitulate, the typical intersections of religion with the welfare state are not as traumatic as Epstein suggests. When a claim of religious freedom loses to a secular interest, the result is virtually never fairly characterized as religious oppression. Moreover, Mormons were legislatively harassed generations before the advent

18. See N. ANDERSON, *DESERT SAINTS* 313-24 (1966); W.E. BERRETT, *THE RESTORED CHURCH* 316-19 (1969).

19. See Japenga, *Arizona Town's Uneasy Marriage To Polygamy; Accepted Religious Tenet to Some Is An Oppressive Doctrine to Others*, L.A. Times, Apr. 13, 1986, § 6, at 1, col. 3.

20. See *Prince v. Massachusetts*, 321 U.S. 158 (1944).

21. See *Braunfeld v. Brown*, 366 U.S. 599 (1961).

22. 455 U.S. 252 (1982).

of the New Deal.²³ The polygamy cases Epstein discusses²⁴ thus are no evidence that the welfare state threatens religious liberty.

Also noteworthy in evaluating freedom of religion claims is that religious tenets are changeable. For instance, since its origin the Roman Catholic Church has altered fundamental tenets in such matters as papal infallibility, celibacy of the priesthood and the centrality of the earth in the universe.²⁵ In the future, women may be admitted into the priesthood.²⁶ The variability of religious precepts undermines the claim that the basic concept of religion is an invariable constellation of beliefs or practices that is fatally wounded by any state-mandated change.

Epstein correctly responds: "It is one thing, however, for a religious institution to yield its traditions through internal change in order to keep the consent and the loyalty of the governed. It is quite another for outsiders to impose their own external standards of right and wrong on these bodies."²⁷ But the danger of squelching religious liberty by enacting secular laws is dramatically reduced by invalidating those whose intent is anti-religious. When anti-religious intent is lacking,²⁸ religious adherents will be less psychologically angered by a compelled subordination of a religious practice to secular law. Further, the cases in which religious practice and secular mandates conflict will be infrequent because of the impressive legislative clout wielded by religious organizations.

Concededly, the free exercise clause is intended to safeguard against certain decisions by legislative majorities. That ideal may be sullied when laws of the welfare state are sustained despite in-

23. See, e.g., *Reynolds v. United States*, 98 U.S. 145, 165 (1878) (constitutional guarantee of religious freedom does not prohibit legislation criminalizing polygamy); see also *Davis v. Beason*, 133 U.S. 333, 342 (1890) (concluding that Idaho statute declaring criminality of bigamy and polygamy regardless of the religious nature of the offense was constitutional); *Romney v. United States*, 136 U.S. 1, 49-50 (1890) (statutory prohibition of polygamy does not burden Mormons' free exercise rights).

24. Epstein, *supra* note 1, at 385-86.

25. See J. DOLAN, *THE AMERICAN CATHOLIC EXPERIENCE, A HISTORY FROM COLONIAL TIMES TO THE PRESENT* 429-54 (1985).

26. See *Woman Consecrated as Episcopal Bishop*, *Boston Globe*, Feb. 12, 1989, at 1; *A New Priest Leaves Home For Ministry*, *N.Y. Times*, Dec. 5, 1981, at 27, col. 1; "Women Preachers"—*The Fight Rages On*, *U.S. NEWS & WORLD REP.*, June 16, 1975, at 30.

27. Epstein, *supra* note 1, at 402.

28. See, e.g., *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983) (tax exempt status denied a religious school practicing racial discrimination).

terference with a religious tenet. But a few wrong-headed decisions or misguided constitutional doctrines are not the equivalent of crushing religious liberty.

Epstein's examination of the first amendment's establishment clause reinforces that conclusion. He worries that welfare state statutes may force the nonreligious to subsidize the religious, which would violate the strict Madisonian view that persons should not be taxed to support a religion they abhor.²⁹

Epstein argues: "Forcing the nonreligious to subsidize the religious . . . injects the possibility of one-way transfers across the deep divide of separate factions or groups—a recipe for political dynamite."³⁰ But if religious groups are so politically potent as to force redistribution of wealth to themselves by statute, why does Epstein assume they are politically impotent to prevent free exercise violations by legislatures? Moreover, the cases of redistribution he cites are laughably inconsequential.³¹

In *Corporation of the Presiding Bishop v. Amos*,³² for instance, the Supreme Court denied an establishment clause challenge to an exemption afforded religious organizations by Title VII of the 1964 Civil Rights Act. The exemption permitted the Mormon Church to discharge a building engineer working in a school gymnasium operated by the Mormons because he was not sufficiently attached to Mormonism.³³ The result in *Amos* provided the Mormons with an advantage over nonreligious organizations under the Civil Rights Act, but its monetary or competitive value was virtually nil.

At issue in *Estate of Thornton v. Caldor, Inc.*,³⁴ was a state law prohibiting an employer from discharging an employee who refused to work on his chosen Sabbath. The Court invalidated the law on the ground that it promoted religious over nonreligious convictions in the workplace in violation of the establishment clause.³⁵ Epstein applauds the decision because the statute placed "religious individuals at a systematic competitive advantage over their non-

29. Epstein, *supra* note 1, at 391.

30. *Id.*

31. *See id.* at 393-406.

32. 483 U.S. 327 (1987).

33. *Id.* at 330.

34. 472 U.S. 703 (1985).

35. *Id.* at 708-09.

religious rivals."³⁶ But a hyperactive imagination would be required to place the monetary value of the advantage beyond a few peppercorns.

In *Sherbert v. Verner*,³⁷ the Court reviewed the denial of unemployment benefits to a Seventh-Day Adventist because she refused to work on her Sabbath. The free exercise clause, the Court reasoned, proscribed the denial because it placed a monetary penalty on religious practice.³⁸ Epstein worries that the result might yield a redistribution of wealth from the nonreligious to the religious worker in violation of the establishment clause if the unemployment records of both groups are identical, except for joblessness caused by refusals to work for religious reasons.³⁹ But the size of the possible redistribution would be tiny at best.

Epstein is profoundly chagrined that the free exercise and establishment clause doctrines fashioned by the Supreme Court are logically untidy and too loose to prevent hypothesized legislative abuses. He deplores the somewhat arbitrary weighing of religious claims against countervailing secular interests.⁴⁰

But the Constitution is an instrument of practical government. Its goals include the preservation of liberty and the advancement of the general welfare, even if constitutional interpretations speaking to these occasionally antagonistic ends seem theoretically adulterated to the scholar. Epstein fails to demonstrate that either the politics of the welfare state or High Court rulings portend any material stifling of religious liberty. As Justice Miller instructed in *United States v. Lee*:⁴¹

Hypothetical cases of great evils may be suggested by a particularly fruitful imagination in regard to almost every law upon which depends the rights of the individual or of the government, and if the existence of laws is to depend upon their capacity to withstand such criticism, the whole fabric of the law must fail.⁴²

36. Epstein, *supra* note 1, at 404.

37. 374 U.S. 398 (1963).

38. *Id.* at 403-06.

39. Epstein, *supra* note 1, at 405.

40. *Id.* at 397-99.

41. 106 U.S. 196 (1882).

42. *Id.* at 217.

In addition, drawing somewhat arbitrary lines between competing interests is the essence of constitutional adjudication. Most distinctions of law are distinctions of degree. As Justice Holmes taught in *Hudson Water Co. v. McCarter*:⁴³

All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached.⁴⁴

Thus, in response to an argument that the power to tax was tantamount to the power to destroy in *Panhandle Oil Co. v. Mississippi ex rel. Knox*,⁴⁵ Justice Holmes answered: "[N]ot . . . while this court sits."⁴⁶

If anyone is seeking to author an epitaph for religious liberty in the United States, he should plan on several lifetimes of unemployment.

43. 209 U.S. 349 (1908).

44. *Id.* at 355.

45. 277 U.S. 218 (1928).

46. *Id.* at 223 (Holmes, J., dissenting).