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Book Review of Reconsecrating America, by George Goldberg

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RECONSECRATING AMERICA. By George Goldberg.[1] Grand Rapids, Mich.: Wm. B. Eerdmans Publishing Company. 1984. Pp. 145. $9.95.

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A crèche side by side with a menorah, funded by city taxes and erected in city hall, prayers (at least Christian and Jewish) before morning classes in our public schools, tuition tax credits and direct payments to parochial schools and perhaps even churches—nondiscriminatory religion worked into our woefully secularized public life, and approved by our Supreme Court. This is the proposal of George Goldberg's *Reconsecrating America.* One of the more readable of a recent crop of books denouncing the weakened state of religion in our public life,[3] *Reconsecrating America* is an anecdotal layman's casebook of the past forty years of Supreme Court analysis. While always entertaining, it unintentionally supports the very separationist theories it sets out to demolish.

I

According to Goldberg, the Court's basic error, committed some forty years ago, was to stray from the historical meaning of the religion clauses. The Constitution, read literally, only bars establishment by Congress, but Goldberg concedes that in our time any establishment theory applicable to Congress will extend to the states. In other respects, however, he continues to rely on his version of the original understanding. The establishment clause, he asserts, was not meant to ban government aid to religion in general. Instead, it prohibited only preferential aid to a particular religion or religions. So long as religions are treated equally, government assistance is not only permissible but desirable, because it promotes the values enshrined in the free exercise clause. The protection of free exercise means that "every person should be allowed, and wherever possible helped, to worship whatever it is he deems sacred . . . ."[4] More concretely, Goldberg supports aid to parochial schools, Nativity displays, and prayers in the schools. Since his sole

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3. *E.g.*, R. NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA (1984); C. THOMAS, BOOK BURNING (1983).

4. G. GOLDBERG, RECONSECRATING AMERICA 114 (1984).

concern is equal treatment, one supposes that he might even accept federally funded churches.

This theory invites discussion on two levels: first as history, and second as public policy. Goldberg's history is at best questionable. For example, there is no reference to "non-preferential" or "equal" in article IV of the Constitution. It would seem to bar any and all religious oaths or tests for federal office—even were everyone to pick his or her own denomination. Similarly, the framers were against tax support for churches, whether universal or not. The history of disestablishment in Virginia is illustrative. In order to prevent disestablishment, the Anglicans proposed an assessment, with the revenues to be distributed among all the various Christian churches. Yet the Baptists and Presbyterians, helped by "nominal Anglicans" such as James Madison and Thomas Jefferson, opposed this proposal.[5]

Their reasons for opposing aid to religion remain valid today. If the state is to give money to all religions, it must establish an official definition of "religion." With definition there is an attendant loss of religious freedom: unless you satisfy the state's criteria, you aren't eligible for the state's assistance. Obviously, this will not be a problem for the major religions; any official definition will encompass them. It will affect only the small, powerless groups. Goldberg's insensitivity to their problems (he calls them "fringe") is evident throughout the book.

The Goldberg "equal treatment" view of establishment even extends to school prayers. For Goldberg, *McCollum v. Board of Education*[6] was decided incorrectly. *McCollum* was the landmark decision in which the Court held unconstitutional the practice of having outside instructors teach a variety of different religions in the schools. Unbelievably, Goldberg compares the public schools to public parks and finds it contradictory that the Court would bar prayers on one piece of tax-supported property and not on another.[7]

The comparison of the public schools to public parks reflects an insensitivity to problems of church-state entanglement and a strange notion of voluntarism. The *McCollum* Court was more realistic. It saw that the compulsory school attendance laws are designed to serve the governmental purpose of education for citizenship. The Court found it improper for this machinery to be used to

5. Derr, *The First Amendment As a Guide to Church-State Relations,* in CHURCH, STATE, AND POLITICS: FINAL REPORT OF THE CHIEF JUSTICE EARL WARREN CONFERENCE ON ADVOCACY IN THE UNITED STATES 76 (J. Hensel ed. 1981).

6. 333 U.S. 203 (1948) (disallowing multidenominational religion instructors from teaching on public school premises).

7. G. GOLDBERG, *supra* note 4, at 54.

gather a captive audience for religious study. This compulsory attendance, coupled with the inevitable role of teachers in supervising religious activities conducted on school premises during the normal school day, make for a most dubious sort of voluntarism. Such state involvement is utterly absent in the public parks, which are dedicated by government to free individual expression, without instructional overtones, and of course without mandatory attendance.

Aside from these differences in government involvement, what about the obvious difference between children and adults? In case after case, the Justices have considered voluntarism to be especially unattainable where young and impressionable children are involved.[8] Accordingly, in sustaining public prayer in legislative and university settings, the Court has been very careful to distinguish the public schools.[9]

To Goldberg, the child who experiences coercion when there is organized prayer in the schools is an odd fellow who should not be permitted to bestill the prayers of others. For in so doing he may be vetoing some parents' wishes to have prayer in the schools and thus violating Goldberg's "help religion wherever possible" doctrine. He glosses over the harm to the child and the parents who do not want the state to force them to witness or hear prayers. Their problem is solved, Goldberg believes, by offering them their own opportunity to pray. But what of those who do not pray? What of atheists and agnostics? Goldberg pays lip service to equal treatment:

> With tolerance for the beliefs and practices of others, *however foolish they may seem,* and enlisting the aid of the courts not to prevent others from doing what they want but only to enforce one's own right to equal time, the issue of prayers in public school can be resolved without amending the Constitution.[10]

Yes, the Goldberg equality test will protect you—no matter how foolish your beliefs—*just as long as you believe.* He roundly declares: "The idea . . . that agnosticism and even atheism must be

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8. *See, e.g.,* Abington v. Schempp, 374 U.S. 203 (1963) (disallowing teacher-led Bible reading); Engel v. Vitale, 370 U.S. 421 (1962) (disallowing state-prescribed prayer); McCollum v. Bd. of Educ., 333 U.S. 203 (1948) (disallowing religion instructors from teaching on public school premises). *See* Karen B. v. Treen, 653 F.2d 897 (5th Cir. 1981) (disallowing voluntary student prayer), *aff'd,* 455 U.S. 913 (1982).

9. *See, e.g.,* Marsh v. Chambers, — U.S. —, 103 S. Ct. 3330, 3335-36 (1983) (upholding state legislative chaplaincy while distinguishing adults in the legislature "presumably not readily susceptible to 'religious indoctrination' " or "peer pressure" from children in the public schools); Widmar v. Vincent, 454 U.S. 263, 274 n.14 (1981) (upholding student worship clubs in public university while describing university students as "young adults" who are older and "less impressionable" than younger students). *See also* Tilton v. Richardson, 403 U.S. 672 (1971) (upholding federal construction grants to church-related institutions, because university, unlike public school students, would be able to distinguish between the school's secular and religious purposes).

10. G. GOLDBERG, *supra* note 4, at 122 (emphasis added).

given equal constitutional billing with *traditional* religion, is simply false."[11] There is no equality for those who do not believe in a traditional religion, who are offended by religious practices in the schools, and who bring bothersome lawsuits.

II

Goldberg's constitutional views are, as we have seen, largely based on disdain for the interests of minority religions. The same disdain underlies his views about the adjudicatory process. He blames litigation by religious minorities for the modern evolution of church-state doctrine.

Because religious minorities have tended to lose where government was intermingled with religion, they have been able to convince the Court not to allow aid for any religion. Indeed, "fringe" religious minorities have had so much clout with the Court, says Goldberg, that the only exceptions to the rule against government aid to religion—ostensibly on the ground of free exercise—have been made on their behalf. Similarly, free exercise is interpreted in an unduly narrow way, so as to protect only the religious minorities.

Goldberg sees fit to inform us that many of the early free exercise cases were brought by Jehovah's Witnesses, a group that he affectionately deems to be "fringe." The Amish and Seventh Day Adventists also qualify. Jews are "fringe" enough to win and just as often "traditional" enough to lose.[12] In his analysis of *McCollum*, Goldberg takes us back two generations—to discover that the plaintiff's father was so antireligious that he wrote a book in which he called religious worship a disease. We have acquired more evidence that the acorn does not fall far from the tree, but we have learned little else.

The main function of the Bill of Rights is to protect individual and minority rights. We therefore should be neither surprised nor indignant that church-state litigation is initiated by religious minorities.

Again, Goldberg's history is as dubious as his policy. Consider, for instance, the case of *Wisconsin v. Yoder*,[13] in which the Court held that the Amish may not be forced to attend senior high

11. *Id.* at 118 (emphasis added).

12. *Compare* Engel v. Vitale, 370 U.S. 421 (1962) (successful challenge to teacher-led school prayer), *with* McGowan v. State of Maryland, 366 U.S. 420 (1961) (unsuccessful challenge to state blue laws).

13. 406 U.S. 205 (1972) (upholding free exercise right for Amish children to learn at home rather than in the public schools after the eighth grade).

school. Goldberg finds the Court's solicitude for the desire of the Amish to practice their religion inconsistent with its refusal to sanction school prayers. *Yoder* was decided the way it was, Goldberg believes, because the plaintiffs were Amish, and the Court cannot seem to resist "fringe" religions. He offers a similar explanation of *Cantwell v. Connecticut*,[14] recognizing a free exercise right to solicit religious contributions; *West Virginia v. Barnette*,[15] upholding a right not to salute the flag; and *Sherbert v. Verner*,[16] sustaining unemployment benefits for Sabbatarians.

In fact, the Court's free exercise decisions are not adequately explained by Goldberg's theory. Sometimes, embarrassingly, Jehovah's Witnesses lose—and Goldberg doesn't mention these cases. For example, in *Prince v. Massachusetts*,[17] where the state had an important policy against child labor, this interest overrode the Jehovah's Witnesses' desire to have their children spend their days preaching. Without this weighing of religious liberty and other policy interests, how else are we to reconcile *Prince* and *Yoder*? Because Goldberg's own approach to religious freedom leaves no room for balancing competing interests, he is unable to understand what the Court has done.

III

The inadequacy of Goldberg's analysis is starkly revealed by *Lynch v. Donnelly*,[18] the recent Nativity scene case. In *Lynch*, the Solicitor General's amicus brief tied the constitutionality of the crèche to the nation's hundred-year tradition of celebrating Christmas as a national holiday.[19] The Court agreed. In sustaining municipal sponsorship of a crèche, the opinion declared in effect that "you can't take the crèche out of Christmas." The Court's syllogistic reasoning ran something like this: if Christmas is a national holiday, then it is not "religious," but rather is "cultural," and therefore constitutional. If "you can't take the crèche out of Christmas," and Christmas is constitutional, it follows that the crèche, too, is constitutional.

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14. 310 U.S. 296 (1940).

15. 319 U.S. 624 (1943) (declaring right of students not to salute flag).

16. 374 U.S. 398 (1963) (holding unconstitutional application of state unemployment compensation provisions denying benefits to Jehovah's Witnesses who could not work on the Sabbath).

17. 321 U.S. 158 (1944) (upholding child labor laws despite Jehovah's Witness's claim of religious duty to work).

18. — U.S. —, 104 S. Ct. 1355 (1984) (upholding constitutionality of city owned and erected Nativity scene display).

19. *See* Brief for the United States as Amicus Curiae Supporting Reversal, Lynch v. Donnelly, 104 S. Ct. 1355 (1984).

This was the Court's attempt to shoehorn the crèche into an enshrined American tradition, notwithstanding that the crèche had no history of governmental display in the United States, unlike the Christmas tree which seasonally resides in the White House. The crèche is undeniably a religious symbol which celebrates only one religion's Messiah—again unlike the tree, which is arguably secular. Hence public funding of a crèche is not merely government promotion of religion; it discriminatorily promotes only one religion. This preference for Christianity is inherent in the Court's reliance on the crèche's linkage to Christmas as a national or "cultural" holiday, for other religious symbols are not similarly linked to national holidays.

But *Lynch* does not faze Goldberg. "To me, a Jew living in a country where almost everybody else is Christian, there is only one religious issue: equal treatment."[20] As long as *Lynch* is applied non-discriminatorily, it passes Goldberg's test. "If a crèche is displayed during the Christmas season on the lawn of the public library, I want to see a menorah nearby."[21]

The crèche-menorah proposal nicely illustrates the invidious distinctions that are inevitably made by governments that support religion. As his comments on the menorah imply, Goldberg doesn't regard Judaism as an obstreperous minority religion. While other religious minorities are deemed "fringe" as they endeavor to "manipulate"[22] the constitutional rights of others, Jews, though also a minority, are considered to be "traditional." To some, a crèche alone is fine, because "we are a Christian nation." To Goldberg, one gathers, we are a "Christian-Jewish nation," and therefore a menorah must be added.

Does Goldberg think the same amount of funding and space should be given to all religions? That might be unfair to the majority. Perhaps instead the government aid should be allotted on a per capita basis, with more going to the major religions than to the minor ones. This would afford "comparable" prominence, perhaps, though not equality. Yet this approach is hardly preferable, for it would require considerable government inquiry into the religious beliefs of the citizenry, and for little apparent purpose.

This sort of equality of governmental support between majority and minority religions has not heretofore been and should not now

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20. G. GOLDBERG, *supra* note 4, at xiii.

21. *Id.* at xiv. *See* Kristol, *The Political Dilemma of American Jews*, COMMENTARY, July 1984, at 23, 25. *But see* Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 689 (1980).

22. G. GOLDBERG, *supra* note 4, at xiv.

become our objective. Equality is easiest to achieve not by equal assistance, whatever that may mean, but by not assisting religion at all. It is this equality in each religion's relationship with government which enables our religions—both majority and minority, of differing sizes, wealth and membership—to confront each other as equals. The equality among our religions fostered by the separationist principle has nurtured religious pluralism.

At this writing, there are more than 1200 religions and sects in the United States.[23] With this new and ever-growing religious diversity,[24] a moral consensus is more elusive than ever. For Goldberg and others, this stands as an indictment of today's society. Yet the diversity would seem to stand for an altogether different message. As Madison found, it is evidence of America's ever-growing religious freedom[25]—a freedom that requires independence from government.

CONSTITUTIONAL LITIGATION: By Kenneth F. Ripple.[1] Charlottesville, Va.: The Michie Company. 1984. Pp. xxii, 674. $50.00.

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Constitutional law, perhaps more than any other body of law, has long been the preserve of the legal theorist. If "the lot of the constitutional theorist is not easy,"[3] the lot of the lawyer who must merge theory and practice to litigate a constitutional case is even more difficult.

Ripple attempts to improve the lot of the litigator facing his first foray into a realm which intimidates even veterans. Ripple's treatise is, to my knowledge, the first effort to create a constitutional law practitioner's primer. It must, however, compete with more encompassing treatises which between them cover most of the same

23. J. MELTON, A DIRECTORY OF RELIGIOUS BODIES IN THE UNITED STATES xiii (1977).

24. *See* Abington v. Schempp, 374 U.S. 203, 240 (1963) (comparing a relatively homogeneous religious composition during the time of the Founders with its evolving modern diversity).

25. *See* THE FEDERALIST No. 51, at 351-52 (J. Madison) (J. Cooke ed. 1961).

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3. Auerbach, Book Review, 1 CONST. COMM. 137, 163 (1984).