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Book Review of Religion and the State: Essays in Honor of Leo Pfeffer, by James E. Wood, Jr.

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RELIGION AND THE STATE: ESSAYS IN HONOR OF LEO PFEFFER.
Edited by James E. Wood, Jr. Waco, TX: Baylor University Press,
1985. Pp. 596. \$32.50. ISBN: 0-918954-29-0.

In its selection and spectrum of essays, *Religion and the State: Essays in Honor of Leo Pfeffer* pays tribute to Leo Pfeffer, activist, author, advocate, and teacher. Like Pfeffer, the editor of these essays, James Wood, Jr., is an avid student of church-state relations, and thus the Pfeffer Festschrift reflects both the particular interests of the scholar honored by this collection and the principal current debates concerning church-state relations.

In a country where constitutional law in great part is shaped by private parties, Leo Pfeffer is without a doubt the leading architect of our church-state relations. For a modest account of his contribution, one might begin reading this volume in the final section, which includes Pfeffer's autobiographical sketch and a compilation of his work by his wife and lifelong collaborator, Freda. Pfeffer is perhaps best known for his leading role as an advocate for separation of church and state in the landmark challenges to government sponsored school prayer, Bible reading, and religious instruction in the public schools, and in the battle against state aid for parochial schools throughout the 1960s and 1970s. But a reading of Pfeffer's autobiography reveals what is less widely known. A rabbi's son, Yeshiva graduate, congregation-member, Leo Pfeffer is an ardent separationist and an equally avid advocate for the free exercise rights of religious observers. Long before he became staff counsel at American Jewish Congress, Pfeffer challenged New York's Sunday blue laws on behalf of a group of observant Jews.

It is Pfeffer's fierce dedication to religious liberty that connects his separationist positions with his traditional background. And to the extent that Pfeffer carries his Orthodox Jewish tradition into his advocacy, he persuasively demonstrates the possibility for expression of religious values in public forums. For example, in an *amicus* brief on behalf of the Synagogue Council in the landmark public school case, *McCollum v Board of Education*,¹ Pfeffer grounded his argument on the need for religious freedom for school children of all faiths. Long before the Supreme Court declared that all devotional reading

1. 333 US 203 (1948).

of the Bible in public schools is unconstitutional,² Pfeffer, representing a coalition of Catholics and Jews, relied on Old and New Testament sources to challenge the choice of the King James edition and to show the problems inherent in government sponsorship of Bible reading. In the abortion area, Pfeffer filed briefs for a religious coalition and once again grounded his arguments on principles of religious freedom. In opposing the death penalty before the U.S. Supreme Court, Pfeffer's friend-of-the-court brief relied on standards derived from Jewish law.

As a committed Jew and separationist, perhaps Leo Pfeffer's most significant contribution to American church-state relations has been his ability to persuade the Court of the ways in which religion is special, and warrants special constitutional standards. The essays collected in *Religion and the State* reflect this theme both in the United States and abroad.

The largest section of this volume addresses the origins of our American church-state relations. Of the five historical essays, three concern the original understandings about religious liberty, and two address more recent church-state controversies. David Little contributes a particularly interesting essay on Roger Williams that sets out to elucidate the paradox of Roger Williams, which is to some extent also the paradox of Leo Pfeffer, that of the religiously committed separationist. It brings to light historical sources which in addition to showing Williams' unquestioned concern for religious liberties, also reflect a less known but equally weighty concern for the vitality of the state. For Williams, the spiritual and the secular were radically different realms necessitating a sharp separation between religious liberty and state power.

In his effort to explain the original meaning of the Establishment Clause of the First Amendment, Leonard Levy, a separationist historian, pulls together useful research concerning the state practices at the time of the ratification of the Constitution. It is Levy's thesis that the existence of numerous simultaneous or "multiple establishments" in the states demonstrates that the original understanding of the Establishment Clause encompassed not merely a bar on aid to exclusive establishments, but also a prohibition of multiple establishments. Levy takes this argument even further in his recent book,³ where he argues that the "multiple establishments" imply the founders' famili-

2. *Abington Township School District v Schempp*, 374 US 203 (1963); see also *Engel v Vitale*, 370 US 421 (1962) (banning recitation of State-composed prayer in public schools).

3. Leonard Levy, *The Establishment Clause: Religion and the First Amendment*, (Macmillan, 1986). See my review essay of this volume, *Original Intent, History and Levy's Estab-*

arity with, and opposition to, today's concept of nonpreferential aid. Levy has set out to respond to current challenges by a group of intentionalist historians supporting aid to religion. But Levy's historical analogue equating the states' multiple establishments with our modern notion of nonpreferential aid is flawed, and ultimately reflects an important historical inquiry derailed by a contemporary debate.

Leo Pfeffer's essay, "The Deity in American Constitutional History," highlights the blurry line between the relation of church to state and the relation of religion to politics. Leo writes compellingly of an implicit tension. On the one hand, it seems permissible to invoke the deities generally as part of the many acknowledgements of our religiosity as a people in political and legal discourse. On the other hand, it is clearly prohibited — both by the Religious Test provision of Article VI of the Constitution and by the First Amendment Establishment Clause — to require a formal invocation of the deities as a condition for public office-holding. At some level the tension that Pfeffer delineates is the delicate equipoise between the protection of separation of church and state and the legitimate expression of religion in politics.

The middle section of the volume addresses a number of specific problem areas in church-state relations: rights of association, rights for newer religions, religion and the military, religion and public education, and church taxation issues. Kent Greenawalt contributes a very thoughtful essay on conscientious objection. Greenawalt's approach is unusual in that he does not begin by adopting the viewpoint of the religious believer, but instead by assuming the perspective of the state, and questioning governmental justifications for denials of exemptions on grounds of conscientious objection. Greenawalt's essay provides useful analytical categories to distinguish those laws which lend themselves to exemptions on religious grounds. Laws which implicate "the rights of others," Greenawalt maintains, are the least suitable for exemptions. There are two problems with Greenawalt's conclusion. First, Greenawalt makes no distinction among rights. Second, his generic category, "the rights of others" is so potentially expansive that it could include governmental and corporate property rights. Recent Supreme Court decisions denying exemptions to religious adherents have relied precisely on this sort of justification — that individual citizens "cannot tell the government how to run its

ishment Clause, 15 *Law & Social Inquiry* 591 (1991), and the review by Douglas Laycock, 4 *J Law & Relig* 421 (1986).

programs."⁴

Next, Greenawalt looks to "paternalistic legislation," laws protecting against harm to oneself. Because these are arguably opposed by a majority of the population, Greenawalt maintains that the granting of any exemptions whatsoever undermines these laws. This conclusion is troublesome. The problem may be one of characterization. What sort of laws is Greenawalt thinking about? Does he mean laws against suicide, or would Sunday observance laws also be considered paternalistic? It seems to me the justification for denial of exemptions across the board of paternalistic laws needs to be reanalyzed. Other types of laws such as those imposing "shared responsibilities," Greenawalt suggests, do lend themselves to exemptions on religious grounds; but here the objections have been on grounds of fairness. To meet these objections, Greenawalt proposes an "alternative burdens" approach which would require conscientious objectors to bear burdens equal to persons who do comply with the rules.

The section of the volume dealing with public education includes articles by Norman Redlich and David Fellman. Redlich's essay, "Religion and Schools: The New Political Establishment," surveys recent decisions concerning the disputes over public school prayer, Bible clubs, moments of silence, and aid to private religious schools. For many years, Redlich collaborated with Pfeffer at the American Jewish Congress; like Pfeffer, Redlich is a staunch absolutist on the separation of church and state. In this chapter, Redlich persuasively argues that recent challenges to the curriculum in the public schools, to the media and to contemporary mores generally, reflect widespread and mounting opposition to the separationist principle.

In juxtaposition to Redlich's essay, David Fellman's essay, "Religion, the State and the Public University" neatly illustrates the bright lines between the standards governing church-state issues in the elementary and secondary schools, and the principles applicable in higher education. In the university, religion is treated more like other subject matters. Prayer clubs, found impermissible in the secondary school, have been allowed and even required as a matter of First Amendment speech rights in the universities. Similarly, financial government aid barred to parochial schools has been allowed to private universities with religious components. Even religion-related curriculum has been permitted in the public universities.

Part Seven explores the problems of taxation of religious organi-

4. See, e.g., *Bowen v Roy*, 476 US 693 (1986).

zations. Dean Kelley's essay, "Tax Exemption and the Free Exercise of Religion," presents two conflicting theories regarding the exemption of religious organizations from taxation. Under the "tax-base theory," churches are tax-exempt because they are treated just like other non-income producing corporations, and are simply not counted in the tax base. Under the "tax-expenditure" or "quid-pro-quo" theory, tax exemptions to religious organizations are equated with exemptions to non-profits generally, where they are justified as a return for the services they provide to government. One problem with the quid-pro-quo theory is that it raises (or begs) the threshold question of the nature of the services provided to government by the churches. This question is crucial since, under the First Amendment Establishment Clause, government is expressly forbidden from engaging in religious activities. Neither of the theories Kelley discusses account for how religious organizations differ from other non-profits in their organization and under the Constitution. Nor do they explain the special problems posed by the taxation, or the exemption, of religious organizations. The reader is left with an excellent overview about the complex relationship between churches, government, and taxation.

The last two sections of this volume deal with the broader themes of religion and politics, and a comparative look at other models of church-state relations. With the persistent and growing call for greater integration of religious values in public life, the exploration of the relationship between religion and politics is an important section of *Religion and the State*. But the two essays selected, though topical, are ultimately disappointing, particularly in light of the volume of other recent writing in this area. "Religious Liberty, the Free Churches, and Political Action," by Franklin H. Littell, sets out to provide a history of the relationship of religion to politics in the United States and in other countries. That the problems in this area are longstanding ones is evidenced by the founders' enactment of laws disqualifying ministers from public office, and other indications of their deep fears of religious participation in politics. But throughout the essay it is difficult to know if Littell is being descriptive or normative and this is a pity, given the importance of the questions. If Littell is advocating that the present situation in the U.S. is the best of all possible worlds for religious liberty, he has not succeeded. This essay does not well describe the depth of the call for the greater interaction between religion and politics, nor on the other hand, does it address the problems presented by the association of religion with power.

Richard V. Pierard's essay, "Religion and the New Right in the 1980s," is a descriptive piece on the development of the "new Christian right." While Pierard provides a very good compilation of the leading actors and events of the last ten years in the Christian right movement, to the extent that his essay offers a challenge to the activities of the Christian right, it is not sensitive to the difficulties presented for a great number of religions in separating questions of theology from social action.

Leo Pfeffer long recognized that "the greatest single contribution made by American to contemporary civilization is the evolution and successful launching of the uniquely American experiment of religious freedom and the separation of church and state." The uniqueness of the American model of church-state relations is most readily appreciated in a comparative analysis. This is exactly what is undertaken in the section of the volume dealing with religion and world order. Samuel Krislov's "Alternatives to Separation of Church and State in Countries Outside of the United States," sets out to canvass the interactions between religion and state throughout the world. The goal is simply too ambitious; a chapter of this size cannot be comprehensive. More problematic is the lack of useful models for describing the possible relationships between the state and church, mosque, or synagogue. To say that demographics affects the relation of religion to politics seems self-evident, yet this is the type of analysis Krislov proposes.

The second essay is "The UN Declaration on the Elimination of Religious Intolerance and Discrimination: Historical and Legal Perspectives," by Sidney Liskofsky. Liskofsky's essay is a fascinating account of the process over a thirty year period in the United Nation's General Assembly, which culminated in the adoption of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief on November 25, 1981. It also provides us with an important record of the history of international accords and conventions on the subject of religion. The fundamental question for the United Nations, as it has been in the United States, is what standards ought govern religious discrimination. For example, should the treatment be comparable to discrimination on the basis of race? On this point, the Declaration is as interesting for what is included as for what is omitted. Liskofsky offers a comparative perspective of areas where a religious consensus exists, but also those areas where there are differences, and consensus unattainable.

The Declaration provides a much more detailed articulation of

religious liberty than can be found in our First Amendment. This is necessary given the absence of an interpretative body like our Supreme Court at the international level. Article Six, largely a result of American drafting efforts, is the centerpiece of the Declaration. Best considered under the rubric of protection of free exercise, Article Six protects nine religious freedoms: the rights to worship, to congregate, to establish religious institutions, to use religious articles, to disseminate religious publications, to teach religion, to solicit and receive funding, to train and appoint religious leaders, to observe religious holidays, and last, the freedom to communicate on religious matters.

A revealing indication of the diversity in church-state models around the world are the freedoms left out of the Declaration because of the lack of consensus. These include the freedoms to make pilgrimages, to study sacred languages, to be married, divorced, and buried according to the dictates of one's religion, and the freedom to be free from coercion in religious ceremonies or religious oath-taking. Another area conspicuously absent from the Declaration is the relationship of religion to politics. The freedom "to express the implications of one's religion or belief in public life" was promoted by the Vatican and the World Council of Churches, but did not gather a consensus.

After a thirty year wait, perhaps the Declaration should have been delayed even further. Given the new directions in Eastern Europe and in the Soviet Union, one wonders how the Declaration would look if hammered out today. In the current spirit of change, one would want to see an updated comparative analysis soon, particularly regarding the role of religious affiliation and identity in defining the face of Europe and the Soviet Union today.

Religion and the State is strongly recommended for any serious scholar of the area of church-state relations. First and foremost, this volume is valuable for its biographical and autobiographical material on Leo Pfeffer. Further, the book brings together a useful compendium of essays on the intent of the founders on contemporary church and state debates. It also provides helpful histories of the case law in a variety of thorny problem areas concerning conflicts between government interests, church autonomy, and individual religious freedom. Last, with the growing interest in the relationship of religion

and politics, *Religion and the State* offers a glimpse of the future debates in this often stormy and polemical area.

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