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EXPANDING CONCEPTS OF RELIGIOUS FREEDOM

FOREWORD—CHURCH AND STATE IN THE UNITED STATES: A NEW ERA OF GOOD FEELINGS

PHILIP B. KURLAND*

Ocean tides, I am told, are caused by the gravitational effect of the sun, the moon, and the stars. Tidal reactions to the relative positions of these heavenly bodies are sufficiently regular to be predictable. There are also tides in judicial construction of the Constitution. These, too, for all I know, may be affected by solar, lunar, and stellar activities. But they are far from predictable. We know what has happened. We may be able to ascertain what is happening. But we are essentially at a loss to predict the details of the future on the basis of the data that we do have. Efforts to reduce constitutional law to doctrine are not only ineffectual. They seem to be unwelcome. And this is especially true, we are told, in the emotion-laden area of the application of the religion clauses of the first amendment. It should not be surprising, therefore, that current writing on this subject should emphasize direction rather than doctrine.

The direction of recent judicial decisions on church and state is clearer than the reasons given for them. Tolerance is the shibboleth. Or, if you prefer Mr. Justice Douglas's formulation in the second released-time case, the magic word is "accommodation." Accommodation is neither freedom nor separation. It is, instead, a proposition reminiscent of Professor Thomas Reed Powell's restatement of the law of the commerce clause: the state may assist organized religions, *but not too much*; the state may inhibit religiously justified activities, *but not too much*. How much is too much is beyond the power of restatement.

There are two factors that can be identified in the movement to accommodation. The first is that the smaller the religious group, the greater the requirement that the state accommodate to its needs. (But it must be a religious group and not an individual whose claim is asserted.) Certainly, the smaller the religious group, the lower the price of accommodation and the less the threat of its hegemony. The prime example of this principle, if it can be called such, may be found in the California peyote cases, where it was held that the state could not punish an Indian's use of peyote to attain a hallucinatory state because his religion authorized such use, but it could punish the use of the drug for the same purpose by a nonmember of the sect. To take Professor Kalven's language

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from another context: it is "a sign of how tolerant toward a sharply dissident minority our society could be, if the minority were small and eccentric." But the caveat must be added that the minority must not be too small or too eccentric.

The second identifiable element in the trend of decisions is that the decision of how much is too much is to be that of the judiciary, made largely without providing guidance for other situations. There is, as yet, no calculus that reveals why a sect of X number of members can receive special indulgence to dope themselves with peyote, but a sect of X plus Y members cannot be indulged in their religiously required polygamy.

This direction taken by recent judicial opinions may augur well for the future. With the spirit of ecumenism advancing so rapidly, it may well be that the only assurance of religious freedom and separation of church and state is to be found in affording special protection and privilege to a large number of nonconforming religious organizations. For history reveals that religious freedom has prospered only where there have been a multiplicity of religious beliefs and a large number of nonbelievers. It was in such an atmosphere that religious freedom was born in this country. The maintenance of similar conditions may prove essential to its continued existence. Such protection may be available only from the courts, freed as they are from majority control.

It may well be, as I infer from the articles in this symposium, that a new era of good feelings dominates the usually bitter contest between church and state, that "the voice of the turtle is heard in our land." I should feel better if the turtle's language were less like that of the Delphic oracle. Perhaps it should suffice that the courts offer pragmatic answers to practical problems in applying the religion clauses of the first amendment. Certainly that has been the history of constitutional construction in this country. Why should one expect more now?