1987

You Can't Tell the Players in Church-State Disputes without a Scorecard

Michael W. McConnell

YOU CAN'T TELL THE PLAYERS IN CHURCH-STATE DISPUTES WITHOUT A SCORECARD

MICHAEL W. MCCONNELL*

Much of the contemporary debate over the religion clauses of the First Amendment consists of manipulation of certain powerful and resonant symbols—especially the ideas of separation of church and state, of religious liberty, and of neutrality. The symbols, however, give only the slightest clue as to the substantive positions being advocated. They are used by quite different people in different ways and toward very different results. Take the example of the separation of church and state. The Supreme Court handed down a series of egregious decisions last term against individual choice in education,[1] against opportunities for silent religious exercise in public schools,[2] and against religious liberty in the workplace.[3] After each one of those decisions, we read in the press that the separation of church and state had been restored, giving one the impression that perhaps the separation of church and state is antithetical to religious liberty.

President Reagan uses the same symbols to quite different effect. During the 1984 presidential campaign, he went from a Dallas prayer breakfast, at which he advocated a constitutional amendment permitting spoken prayer in the public schools, to a meeting of a major Jewish organization, at which he invoked the symbol of the wall of separation between church and state. Similar words—quite different meaning.

It seems that there is a problem of language here. There is a need to sort out the basic principles often obscured by the use of powerful but ambiguous symbolism. I will outline seven ba-

* Assistant Professor of Law, University of Chicago Law School. Mr. McConnell briefed or argued several of the cases discussed below as Assistant to the Solicitor General.

1. Grand Rapids School Dist. v. Ball, 105 S. Ct. 3216 (1985) (program that provided classroom instruction to private-school students at public expense violated Establishment Clause); Aguilar v. Felton, 105 S. Ct. 3232 (1985) (same).

2. Wallace v. Jaffree, 472 U.S. 38 (1985) (Alabama statute that authorized a daily period of silence for voluntary prayer in public schools violated Establishment Clause).

3. Estate of Thornton v. Caldor, Inc., 105 S. Ct. 2914 (1985) (Connecticut statute that provided Sabbath observers with an absolute right not to work on their Sabbath violated Establishment Clause).

sic views that make up the spectrum of church-state controversy. My intention here is not to support one view over another (though I must confess that I find little to say for the first or the seventh). My intention, rather, is to clarify the way in which positions on specific issues fit into a limited number of comprehensive understandings of the Free Exercise and Establishment Clauses, and thus move beyond symbolic noises to serious analysis.[4]

One caveat: Although I have separated the various positions into seven different categories, you may find yourself puzzled by the taxonomy. You may believe that you belong mainly in one particular category, but perhaps you are also moved somewhat by one or two other categories. That is to be expected. Although there are certain consistent threads that run through the area, there are very few people or organizations, I believe, who actually behave consistently in the area of religious liberty. Nonetheless, it is useful to sort out what the logical positions might be.

1. *The No-Aid View.* The first position is the no-aid view. It is the view, usually expressed with a quotation from Justice Black, that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt . . . ."[5] The principle is usually extended to mean that no government benefits, whether or not they cost the taxpayer anything, can be provided to religious organizations, under any circumstances.

The no-aid view is animated by an understanding of public life under which the state must be secular. Religion, to the extent that religion will continue to exist, "must be a private matter for the individual, the family, and the institutions of private choice."[6] In other words, religion is allowed so long as it is kept irrelevant to public life, leading to what Pastor Neuhaus has described as "the naked public square,"[7] stripped of the sym-

4. I express my gratitude to Professor Carl Esbeck, whose earlier taxonomy of positions on church-state issues in part inspired this attempt. *See* Esbeck, *Five Views of Church State Relations in Contemporary American Thought*, 1986 B.Y.U. L. REV. —. My taxonomy is, of course, quite different from his.

5. *See* Everson v. Board of Educ., 330 U.S. 1, 16 (1947).

6. *Grand Rapids School Dist.*, 105 S. Ct. at 3231 (1985) (citing Lemon v. Kurtzman, 403 U.S. 602, 625 (1971)).

7. R. NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION & DEMOCRACY IN AMERICA (1984).

bols and meanings that come from the religious views of the people.

While there is much to be said for most of the views I am about to describe, there is little to be said for this first one. One has to go through enormous contortions to arrive at the no-aid view. Let us focus on the question: Can religion be singled out? If the issue is whether children who choose to go to religious schools may share on equal terms with others in public benefits, such as textbooks, transportation, or remedial education, the no-aid proponents would deny the aid. This, of course, singles out religion for less-favorable treatment. If the children had chosen schools that teach Marxism, existentialism, or any other secular ideology instead of religion, they would have been entitled to books, buses, and remedial help from the state. The justification here is that government and the church must be kept separate, whatever may be the effect on neutrality or freedom of choice.

But consider the no-aid view when the issue shifts to government regulation of church activities. Can the government apply its minimum wage, or truth-in-advertising, or nondiscrimination laws to the activities of religious institutions? According to the no-aid view, to grant an exemption would be to aid the religious organization. This is forbidden. This time, it is the no-aid advocates who protest against singling out religion, where to single out religion would benefit it. And this time, it is the no-aid advocates who are untroubled by entanglement between government and religion; despite the fact that an exemption from regulation would lead to greater separation between church and state, the no-aid advocates support regulation.

Thus, proponents of the no-aid view are inconsistent with regard to whether the government must deal evenhandedly with religion, and also inconsistent with regard to whether the government and the church could be kept separate. The only consistency is that what benefits religion is unconstitutional. This is simply hostility toward religion, dressed up as a constitutional theory.

2. *Genuine Separationism.* The no-aid view can be better understood by contrasting it to the genuine separationist view. The separationists believe strongly in separating the church and the state, whether or not it benefits religious organizations. A key case for genuine separationists is *NLRB v. Catholic Bishop*

of Chicago.[8] The issue was whether Catholic parochial schools could be regulated by the NLRB under the labor laws of the United States. When the Supreme Court has held that such schools cannot constitutionally receive certain forms of government assistance, it has done so on the theory that administration of the aid would so "entangle" the government with the schools as to violate the principle of the separation of church and state.[9] To the genuine separationist, regulation and aid present the same constitutional problem: Both tend to "entangle" government with religious institutions. To the no-aid advocate, by contrast, the problems are different: Aid benefits religion and regulation does not.

In *Catholic Bishop*, the Court took a genuine separationist position. It held that the schools that could not receive aid also could not be regulated under the labor laws, in part because of the potential constitutional difficulties entailed by regulation.[10] The administrative involvement between the government and the schools is virtually the same, whether it is caused by benefits, which the schools desire, or regulation, which the schools resist. A genuine separationist opposes involvement by the government in the affairs of religious organizations, whether the involvement is a benefit or a burden.

Separation of church and state in this sense may sometimes benefit the church and give the church advantages over similar forms of institutions. Such advantages will be offset, however, by ways that churches are disadvantaged by separation. The theory simply is applied on an even-handed basis.

3. *Strict Neutrality*. A third view is that of strict neutrality, which moves away from emphasis upon secularism and separation and concentrates, instead, on even-handed treatment of religion. This view is best expressed by Professor Philip Kurland of the University of Chicago Law School. He explains that the two religion clauses of the First Amendment, when read together, stand for the simple principle that religion cannot be used as a system of classification either for benefits or for burdens.[11] Thus, a religious school should not be denied aid because it is religious; rather, it ought to have just as much right

8. 440 U.S. 490 (1979).

9. The leading case is Lemon v. Kurtzman, 403 U.S. 602 (1971).

10. The Court in *Catholic Bishop* did not reach the constitutional issue, preferring to interpret the statute in a way that avoided constitutional problems.

11. P. KURLAND, RELIGION AND THE LAW 18 (1962); Kurland, *The Irrelevance of the Con-*

to government aid as a secular school and it ought to be subject to regulation just as a secular school would. Further, holders of this view would disagree with the free exercise jurisprudence of the Court, under which some persons are entitled to different treatment from the government than that received by others because of religiously based conscientious decisions.[12] Outside of Professor Kurland there is little support for this position, and no justice of the Supreme Court has ever espoused it. It is an exclusively academic view that does not appear to have any constituency among participants in litigation in the area.

More significantly, the strict neutrality view seems to have little support in the text of the Constitution. Both the Establishment Clause and the Free Exercise Clause treat religion as having special qualities. The institutional relationship between government and religion is different from the relationship between government and other forms of private organization. And the personal and corporate rights of worship, belief, and religiously motivated conduct, under the Free Exercise Clause, are expressly given protection not accorded other forms of private belief and preference. Thus, while neutrality must be an element in analysis of religion clause issues, and while the strict neutrality view has a certain theoretical appeal, it is not ultimately surprising that the view has failed to inspire practical application.[13]

4. *Religious Pluralism.* Those in the fourth category, the pluralists, also move away from the idea of separation and even from the idea of principal reliance upon neutrality. Instead, they place their greatest emphasis upon religious choice and, in the public arena, upon diversity. They are not concerned that government action may sometimes benefit religion or that the people may sometimes act for religious reasons. They believe that the public life ought to reflect the religious mix of the people. The pluralists' principal concern is that the government not throw its weight one way or another to affect the mix of religious views. According to the pluralists, there is no reason for public life to be secular because, in a democracy, the religious views of the people ought to be reflected.

---

stitution: The Religion Clauses of the First Amendment and the Supreme Court, 24 VILL. L. REV. 3, 24 (1978).

12. *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205 (1972) (Amish parents relieved of the responsibility of sending their children to school until age sixteen).

13. *See* McConnell, *Neutrality Under the Religion Clauses*, 81 NW. U.L. REV. — (1986).

Key cases for the pluralists are *Widmar v. Vincent*[14] and *Bender v. Williamsport Area School District*.[15] In *Widmar*, a public university, and in *Bender*, a public high school, allowed voluntary, student-initiated student groups of various types and descriptions to meet on school premises on an equal basis—with one exception. The schools would not allow a group to meet for religious worship or religious teaching. Religion, according to these defendants, must be kept out of public universities and high schools. If people wish to pray or study the Bible, they can do it in the privacy of their homes, churches, or synagogues. Government must be secular.

To the pluralist, this is nonsense, and worse. The principal purpose of the religion clauses, according to the pluralists, is not to make government secular, but to make people free—free to adopt and practice the religion of their choice or none at all. If public schools and universities make their facilities available to student groups, they should not restrict the choice to groups that are secular.[16] To be sure, this means that there will be religious elements within a public setting. But this increases the diversity, and hence the freedom, of public life.

5. *Non-preferentialism.* The fifth group are the non-preferentialists. They are similar to the pluralists in most current controversies, but their underlying premises are different. The key understanding of the non-preferentialists is that the meaning of the religion clauses is that government may not favor one religion over another. The most prominent academic spokesman for this view is Professor Cord and I will leave to him explanation of the bases for this view. But let me clarify the differences between pluralists and non-preferentialists. There are two. First, the pluralists believe that the principal thrust of the religion clauses is freedom of religious choice, while the non-preferentialists believe it is equal treatment of religions. Second, and as a consequence of the first, pluralists are more concerned with the interests of persons with no religion at all. The nonreligious perspective, according to the pluralists, is a legitimate part of the mix of opinions within the community, and is entitled to equal respect. Singling out religion is legiti-

14. 454 U.S. 263 (1981).

15. 106 S. Ct. 1326 (1986).

16. This was the holding of *Widmar*. The Supreme Court did not resolve the high school case in *Bender* because of a jurisdictional defect in the appeal.

mate only where religious scruples create conflicts or burdens nonreligious persons do not face. To the non-preferentialist, however, constitutional norms are satisfied so long as all religions are treated equally, even if this places nonbelievers at a disadvantage.

A hypothetical example where this might be important would be a law granting tuition tax credits for attending a religious private school but not for attending a non-religious private school. As I understand it, the non-preferentalist view would say that that is acceptable. All religions are treated equally. The pluralist, however, would say that this is an unconstitutional restriction on the freedom of choice with respect to religion. The nonbeliever is entitled to his place in a pluralistic world of religious beliefs.

An important case for the non-preferentialists is *Zorach v. Clauson*[17] a 1952 decision written by Justice Douglas, involving a "released time" program. Participating churches set up religious classes, and children were permitted to leave their public schools to go to the churches to receive religious education. The other children remained in the school in a study hall. The Court upheld the program on the theory that it was a noncoercive, even-handed accommodation of religious interests. It was, however, a benefit to religions and not nonreligion, making it an important precedent for the non-preferentialist view.[18]

6. *Latitudinarianism.* The next category, the latitudinarians, have difficulty finding a violation of the religion clauses in any situation. Both free exercise and establishment are given narrow construction. They are the ultimate in judicial restraint in this area of the law. Justice White is the most prominent proponent of this view. For example, he dissented when religious institutions were not regulated in the same way as all other institutions. In *Catholic Bishop of Chicago*, he joined with Justice Brennan in saying that there was no statutory reason that parochial schools should not be subject to the labor laws that applied to everyone else.[19] He also dissented when parochial

17. 343 U.S. 306 (1952).

18. The "released time" program can be defended on pluralist grounds as well, but nothing in the Court's opinion pointed in that direction.

19. *See* NLRB v. Catholic Bishop of Chicago, 440 U.S. 490, 508-18 (Brennan, J., dissenting).

schools were denied benefits because they were religious,[20] and he was the lone dissenter when religious groups were the only groups on college campuses that were not allowed to meet.[21] It does not seem to matter to the latitudinarian whether religious institutions are treated differently as a burden, or as a benefit, or even treated the same as other institutions; any such relationship between the government and the church is allowable.

7. *The "Tension Between the Clauses" View.* At the polar opposite from the latitudinarians are those who have expanded the prohibitions of both the Establishment Clause and the Free Exercise Clause to such an extent that most government conduct touching religion can plausibly be said to violate one Clause or the other, and often both. Under this view, like the no-aid view, the Establishment Clause requires that government action not benefit religion, even if this requires singling out religion for exclusion from generally available benefits. But also under this view, the Free Exercise Clause often requires that the government single out religion for special privileges.

Sherbert v. Verner[22] is a good illustration. In *Sherbert*, the state government determined that unemployment compensation would not be paid to workers who failed, without good cause, to accept suitable work when it was offered. Mrs. Sherbert, a Seventh Day Adventist, refused to work on Saturday, was fired, and was subsequently unable to find work that did not require Saturday labor. The Supreme Court held that the Free Exercise Clause requires that the State pay Mrs. Sherbert unemployment benefits, despite the fact that had she been fired for refusing to work for a secular personal reason she would have been out of luck.

Imagine *Sherbert* as an Establishment Clause case. The state adopts legislation under which only those workers who quit their jobs for religious reasons receive benefits. Applying the usual no-aid Establishment Clause analysis, this would plainly be unconstitutional, as a preference for religion over nonreligion.

20. Committee for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 814 (1973) (White, J., dissenting).

21. Widmar v. Vincent, 454 U.S. 263, 280 (1981) (White, J., dissenting).

22. 374 U.S. 398 (1963).

Under this seventh view, the state cannot win. If it grants the benefits, it has violated the Establishment Clause; if it denies the benefits, it has violated the Free Exercise Clause.

Incredible though it may sound, this final view represents current Supreme Court doctrine. It also appears to represent the view of the most prominent civil liberties organizations. The problem with this view may seem obvious: It reads the two religion clauses not as complementary, but as direct opposites. This is euphemistically called creating a "tension" between the clauses. It would be more accurate to say that it creates an irresolvable inconsistency in the Constitution, under which remedies for violation of one clause necessarily violate the other.

I said at the beginning that the seven possible views each have their attractions, but that the first and the last are difficult to defend. It is an unfortunate reflection on modern jurisprudence that the Supreme Court began its work in this area on the premise of the no-aid view, and has ended with the two clauses at war with each other. It seems to me that any of the other positions would be preferable to the current state of affairs.