

## PREFACE

Much has been written about the relationship between religion and government. Why is another treatise needed, let alone such a voluminous one? There is no other work that does what this one seeks to do: provide a survey of the relationships between religious bodies and the instrumentalities of government in the United States as reflected in two centuries of case law viewed from the perspective of the needs and interests of the religious enterprise.

It also seeks to be comprehensive (though not exhaustive), contemporary and coherent in the sense of (1) recognizing the inherent tensions between the institutions that promulgate ultimate meaning and the institutions that regulate societal relationships; (2) appreciating the stabilizing of those tensions by the unique institutional arrangement worked out in the United States (often sloganized as “the separation of church and state”) and summarized in the two religion clauses of the First Amendment of the Constitution; (3) exploring the formation and formulation of boundary settlements in that arrangement arrived at by courts and legislatures up to the time of writing.

In so doing, this work offers a number of windows through which one can view various episodes of the history of churches, governments and cultures in America, caught in cross-section by judicial pen and preserved for posterity in the public domain of case law. Whether it be the Quaker, Castner Hanway, tried for “treason” before Supreme Court Justice Robert C. Grier for refusing to help a squad of slave-catchers enforce the Fugitive Slave Law, or a Catholic priest named Cummings fined for refusal to take the expurgatory oath in the constitution of post-Civil War Missouri, the court records offer a glimpse of encounters between important interests addressed by the fundamental law of the nation and the several states.

It is the aim of this work to offer a conceptual framework for addressing the border disputes that continually arise at the interface between these two great and venerable institutional orders, to trace emerging trends and potential problems along the zone of sharpest and most articulate encounter—the law of church and state—and to suggest modes of mutual understanding and resolution that will be compatible with both the American legal tradition and the needs and interests of religious bodies.

The focus will be more on the *collective* than the *individual* “free exercise of religion,” since the law of *church* and *state* refers to an *institutional* rather than an *interpersonal* level of discourse. Although much of the case law arises in response to the claims or predicaments of individuals, it cannot be adequately understood without viewing it as the resultant of larger and longer influences, any more than the

physics of turbulence can be understood by studying only the behavior of individual grains of sand or drops of water without looking at currents, tides and sand bars.

Therefore this work is structured around important functions or aspects of the religious enterprise. *Volume I* deals with the *autonomy* of religious bodies, that is, their rights to manage their own internal affairs. *Volume II* deals with the *outreach activities* of religious bodies as they relate to the external world. *Volume III* treats of the *inculcation of the faith* by or on behalf of religious bodies (and a wide array of educational practices pertaining to religion in public schools). *Volume IV* studies the patterns of *protecting the practice of the faith* by the faithful in the secular world. And *Volume V* focuses on *state shelters for religion*—institutionalized provisions for “protecting” religion, such as legal exemptions (as from taxation), governmental “proprietary” (such as chaplaincies), folk-practices of civil religion or the public cultus that become enmeshed with state action, and the perplexities of governmental efforts to define (or to avoid defining) “religion” and “church.”

Each section begins with an effort to explain *how religious bodies work* in each area discussed: what is historically recognized religious behavior, at least in Western culture, and what are the optimum conditions for its flourishing. Many people—including lawyers and judges (and even some practitioners of religion)—do not seem to be aware of what the practice of religion legitimately includes. They sometimes appear to think that religion is what goes on inside a building with a cross or steeple (or a Star of David or whatever) on certain days of the week, or that it is “spiritual” or “liturgical” as opposed to “material,” “temporal” or “secular” activity. So it is important to point out what religious bodies *do* and have *always* done, in order that such activities should not now cause surprise or consternation. It still may be considered necessary for society to regulate or restrain some forms of “normal” religious behavior, but it should not be done without the clearest showing of “compelling state interest that can be served in no other way.” (The abandonment of that test by the Supreme Court in 1990<sup>1</sup> does not mean that it was not the appropriate test for the free exercise of religion, as Congress recognized in restoring that test by the Religious Freedom Restoration Act in 1993.)

This work is designed primarily for those who are responsible for the conduct of the religious enterprise—at whatever level—and who must make decisions about its course into the future, so that they may have a comprehensive, fact-based, and conceptually coherent resource to assist them in understanding their options under the applicable law of the United States. In this sense it is not so much a *handbook for lawyers* who may be retained to defend a church's interests (though they may find it of some value) as it is a *client's handbook* suggesting what the religious body can and should ask its lawyer to do for it. For this reason it contains extensive excerpts of case law, which attorneys could readily peruse in law libraries, but which non-lawyers might find difficult to locate.

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1. *Oregon v. Smith*, 494 U.S. 872 (1990), discussed at IVD2e.

Lawyers—in this field even more than in some others—are not always well equipped to advise a religious client how its interests can best be advanced at law. All too often in this field neither client nor attorney may have a very clear understanding of what the client's best interests *are*, let alone how to go about advancing them. So the first step is to gain some idea of what are the legitimate expectations that a religious body should have of the law. Then attention can be turned to how to go about actualizing them. Many an attorney, unversed in church-state law (as most attorneys understandably are), will treat a church's legal problems as just another instance of general tort law or property law or contract law without reference to the special protections afforded by the religion clauses of the First Amendment that may be available to the church, and such an attorney may inadvertently abandon valuable claims the church could have asserted.<sup>2</sup>

On the other hand, an attorney may overclaim the legitimate interests of the church, as has been done by one law firm that confines itself to asserting simply that the state has no jurisdiction over the church, seemingly undismayed by the fact that this flat and sweeping claim is invariably not accepted in American courts, whereas a more carefully nuanced one might be. This work is designed to help client and attorney know how not to underclaim or overclaim religious rights under the law of the United States as reflected in existing case law and how to arrive at (realistic) projections of what the law of church and state *ought* to be.

Since that area of law (even more so than some others) is in a constant state of flux and development, this work tries to suggest what the law of church and state could or even *should* be if it takes full cognizance of the legitimate needs and interests of religious bodies within the general scope of existing constitutional law and judicial precedent. From that perspective some existing court decisions will be evaluated herein as inadequate or wrong, even though they may be—for the present—the “law of the land”; they represent trouble-spots to be corrected by future legislation or litigation.

Although the Supreme Court has been deciding an increasing number of cases in the field of church-state law in recent years, many of them are peripheral to the central issues of religious freedom if not actually *trivial* compared to some the court has declined to hear (such as the receivership of the Worldwide Church of God or the conviction of Sun Myung Moon for tax fraud).<sup>3</sup>

But perhaps it is appropriate that many of the court decisions now being delivered are addressed to issues on the *outskirts* of the terrain of religious liberty rather than in the heartland. That is where such battles should be fought: far from the central bastions, which generally have been kept safe from onslaught. One could take more comfort from this thought if it were not for a few small, but significant, invasions that strike at the very core of religious liberty. Because these invasions have been

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2. See e.g., “Squire” v. Elders at § C5b below.

3. Discussed below at §§ E2 and F7, respectively.

localized or disguised or directed (so far) only at small and unpopular new religions, they have not been generally recognized as the serious threats to religious liberty that they are. Among such threats are efforts to reverse by force conversions to unconventional religions.<sup>4</sup>

The Supreme Court of the United States unfortunately has issued a decision that may have effects that are neither small nor insignificant on the reach of the Free Exercise Clause. On April 17, 1990, it announced that the “compelling interest” test of Free Exercise—thought to be settled law since *Sherbert v. Verner* (1963)—no longer need be met by governments enforcing “laws of general application” having only an “incidental effect” of burdening religious practices.<sup>5</sup> This holding, if not modified, can do an immense amount of damage to the high estate of religious liberty in this country, and must be kept in mind in viewing all of the case law of the preceding 27 years that was based on the *Sherbert* standard. Whether the Religious Freedom Restoration Act passed by Congress in 1993 will succeed in correcting this breach remains to be seen.

It may be helpful to explain what this work is *not*. It is not a nuts-and-bolts “how-to” manual for pastors or lawyers; that important and legitimate role is performed by Richard Hammar's excellent *Pastor, Church and Law* (1991).<sup>6</sup> Anyone wanting to know how to cope with Social Security or unemployment compensation, taxes or liability insurance for churches should look there, not here. This work aims more at problems of constitutional dimension. Neither is this a guide to specialized areas of law, such as zoning, securities, insurance or tax law, except as these bear on questions of religious liberty. Anyone wanting to know how a church can issue investment certificates or set up a unitrust or annuity scheme or attract contributions of appreciated property will not get much help here. There are also some border issues of the taxation of parsonages, parking lots, summer camps or a clergyperson's cash housing allowance that are of minimal concern here. State regulation of church-related institutions of health, welfare and education is another mixed question where the issue of religious liberty shades off into operational issues common to secular institutions of the same ilk and to that degree of diminishing interest here.<sup>7</sup>

This is not a casebook on constitutional law, though there is much case material in it. Those wanting a reference-work giving (almost) the full text of (almost) all Supreme Court decisions on church and state with minimal expository annotation (and no footnotes) are referred to the very useful compendium by Miller and

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4. See discussion at IIB.

5. Cf. n. 1, *supra*.

6. 2d ed. (Matthews, N.C.: Christian Ministry Resources, 1991), 1004 pp.

7. The reader is referred to more specialized works such as Philip R. Moots and E.M. Gaffney, *Church and Campus*, (1979) and Edward McGlynn Gaffney and P.R. Moots, *Government and Campus* (1982) (both University of Notre Dame Press), for guidance in the field of higher education, for instance.

Flowers, *Toward Benevolent Neutrality: Church, State and the Supreme Court*.<sup>8</sup> Unlike that volume, this work includes virtually *all* the Supreme Court's decisions bearing on the free exercise of religion, including some that are not even mentioned in most other literature on the subject, such as *Bouldin v. Alexander* (1872)<sup>9</sup> and *Cummings v. Missouri* (1866),<sup>10</sup> though it does not provide the entire text of any of them. (A table listing all of the Supreme Court decisions on religion—and how each justice voted—is appended to this volume.)

This work also contains a large amount of case law from lower courts on subjects that the Supreme Court has not addressed, and even on some subjects that it has. For instance, state cases dealing with religious practices in public schools<sup>11</sup> have been included to illustrate the point that this was a highly controverted subject prior to the Supreme Court's decisions of 1962 and 1963, contrary to the assertions of the Supreme Court's critics.

In other areas, relatively few cases are dealt with in detail compared to the plethora of cases available (as in zoning or prisoners' rights); the objective in such instances has been to suggest the kinds of litigation that arise and how some courts have dealt with them. Some readers may feel that more has been told them than they want to know about some cases, particularly nineteenth-century cases that have been rendered largely obsolete by more recent developments in the law. But some of these not only have their own intrinsic interest as windows on a bygone world, but also contain the seeds from which later pillars of the law developed (either in conformity to, or reaction against, them). Some, like *Minor v. Board of Education* (Ohio, 1872)<sup>12</sup> or *Permoli v. New Orleans* (1845),<sup>13</sup> contain statements advocating religious liberty that have not been surpassed in more modern times and are worth preserving and re-reading.

The intention in all excerpts has been to illustrate *how the courts have dealt with claims of religious liberty*, not just in terms of legal mechanics, but in terms of human and religious values. Whereas in a casebook the focus is primarily on the legal issues involved, here the focus is primarily on the nature of the *religious* claim at issue and how it was understood, explained, evaluated and weighed against other considerations. Each lawsuit is a human drama in which personal interests, social norms, freedom and justice contend for recognition, and the particulars of court procedure and legal protocol are of less concern to laymen in the law. While this work has sought to include the legal particulars where pertinent to its principal purpose, it has not been more punctilious than has the Supreme Court itself in its occasional disregard of questions of standing or jurisdiction when it wanted to reach

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8. (Waco, Texas: Markham Press Fund of Baylor University Press, 1977, 1982, 1987, 1992, 1997).

9. Discussed at § C3 below.

10. Discussed at § D1b below.

11. See IIIC2a.

12. 23 Ohio St. 211, discussed at IIIC2a(4).

13. 3 How. 589, discussd at § D1a below.

the merits. Since the author is not an attorney and is not writing primarily for attorneys, perhaps those attorneys who (it is hoped) will nevertheless find this work of some use will forgive that shortcoming.

Throughout this work reference will occasionally be made to Christian experience, institutions and interpretations, since they have made a major contribution to Western history, culture and law, but efforts will be made to generalize from these to the needs and interests of all religious bodies, and where not explicit such generalization should be understood as intended or implicit, since a work that speaks only to or for Christians would not only be partial and sectarian but would not do justice to the richness of the spectrum of religious behavior and the importance of optimizing the religious liberty of *all*.

It is hoped that at least some lawyers and religionists will find this subject matter as absorbing and edifying as the author found it, and that it will redound to a better understanding and appreciation of the law of church and state in the United States.

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Dean M. Kelley