BOOK NOTES

RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT

JOHN WITTE JR.

WESTVIEW PRESS, 1999

With the increasing number of religious organizations receiving government funding and with the focus on faith-based organizations in the presidential campaigns, John Witte's exploration into the realm of religion and its relation to the Constitution is both timely and useful. As a professor of law and ethics and director of the Law and Religious Program at Emory University, Witte is a specialist in legal history and religious liberty. He is well qualified to speak on this complex topic to those in the legal field and his prose is clear so that the reader does not need a legal background to understand his discussions.

In authoring the words of the First Amendment, "Congress shall make no Law respecting an establishment of Religion, or prohibiting the free exercise thereof,"[1] the drafters of the Constitution felt they were embarking on a "fair" and "novel experiment." However, as inspired as the Amendment's beginnings may have been, the experiment over time has become a confusing and inconsistent mish mash of unworkable tests and ill-defined principles. For example, the State may give a parochial school a textbook on colonial history, but it may not give the school a projector to watch a film about colonial history. Finding relief from what Witte refers to as a kind of "bizarre Byzantine code" and restoring First Amendment law to its rightful place are at the heart of Witte's book.

Witte begins with an introduction to the underlying theological and political themes that were present at the time the drafters wrote the Amendment. While the goal of these chapters is laudable, the language is somewhat static and interest wanes as memories of high school history books loom. Still, the information he presents about the views of Puritans, Evangelicals, the Enlightenment movement,

[1] U.S. CONST. amend. I.

and Civic Republicans is valuable as a snapshot of the basic kinds of concerns the founders would have had. For example, the Evangelicals were concerned especially with the nature of church and state and strongly felt that the two should be separated, while the Civic Republicans felt that the common public square should be "imbue[d] with a common religious ethic and ethos."[2] Witte claims that these four groups provided the corners of a "canopy of opinion" concerning religious liberty in eighteenth-century America. This canopy covered what was considered "the essential rights and liberties of religion." According to Witte, there are six essential rights and liberties of religion: 1) liberty of conscience; 2) free exercise of religion; 3) religious pluralism; 4) religious equality; 5) separation of church and state; and 6) disestablishment of religion.

Witte considers liberty of conscience as the most important because "it was almost universally embraced in the young republic—even by the most rigid of establishmentarians."[3] Liberty of conscience had distinct content and was well defined by three aspects. First, it protected voluntarism, "the unencumbered ability to choose and to change one's religious beliefs and adherences."[4] Second, it protected people against religiously based discrimination. Third, it guaranteed that people would be exempted from civil duties that they could not, in good conscience, uphold and keep.

Witte proposes that one should view the second right, free exercise of religion, in close conjunction with liberty of conscience. As Witte states, "Free exercise of religion was the right to act publicly on the choices of conscience once made, without intruding on or obstructing the right of others or the general peace of the community." Unlike its modern connotation that most often only connects free exercise of religion to speech, historically this right connoted many forms of free public action/religious worship, religious assembly, religious publication, and religious education. Unfortunately, Witte fails to address the fact that while it may have been practical at one time to protect free public action, it is not the case today as government regulation of public and private action has only increased since the eighteenth century. Therefore, the spokespeople for religious liberty may saliently realize that lobbying for greater freedom of religious public action is already a lost cause.

The third right, religious pluralism, was comprised of two ideas. Confessional pluralism stressed the protection of many different forms of religious expression and organization, while social pluralism dealt with the protection of different kinds of associations of religious expression. The first idea gave constitutional protection to "the multiplicity of sects, which pervades America." The second idea extended this protection to include "associations" such as the family, schools, and charities. Interestingly, both of these ideas have found increasing importance in today's heterogeneous society. Witte's clarification is therefore helpful in understanding

---

[2] JOHN WITTE JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 34 (1999).
[3] *Id.* at 39.
[4] *Id.*

his later analysis of Supreme Court cases dealing with "fringe" religious groups and "atypical" religious associations.

As important as these three rights are, they depended on the enforcement of the fourth right, religious equality. Witte emphasizes that the founders' principal concern was equality *among* religions and not *between* religion and non-religion, a distinction that is sometimes lost today.

The fifth (and currently the most troubling) right, separation of church and state, was based in both theological and political theories. For the church, separation from the state allows the "independence and integrity of the internal processes of religious bodies"[5]; for the state, separation from the church allows "protection of individual rights and social cohesion."[6] Witte is again quick to point out that the founders were not talking about separating politics and religion altogether. He adequately supports this sometimes glossed over point with an illuminating example involving Thomas Jefferson. Although Jefferson emphasized the importance of the separation of church and state, he still made religious allusions when he addressed the public. In a public letter, Jefferson offered this prayer, "I reciprocate your kind prayers for the protection and blessing of the common Father and Creator of man."[7]

Some groups of the time also favored the idea of "disestablishment of religion," the sixth right. "Establishment of religion" itself was an ambiguous phrase, but Witte characterizes it as government actions that "settle," "fix," "define," or "set up" the religion of the community. Therefore, those groups (especially the Puritans) who were against the establishment of religion generally sought to outlaw this kind of government action. Disestablishment of religion would serve to protect the liberty of conscience by prohibiting government coercion to practice certain religious beliefs as well as the liberties of equality and pluralism by not allowing the government to prefer one religion to another. Finally, it would also serve to protect separation of church and state by prohibiting the government from meddling with the church's affairs. This background is important because it leads to the controversial issue that remains today, that is, "whether more gentle and generic forms of state support for religion could be countenanced."[8] Apparently, the founders were divided on this question, and this division was reflected in the drafting of the First Amendment as well as the various state constitutions that were drafted later. Witte does not state his views on the situation in this chapter, but it becomes apparent by the end of his analysis in the tax exemption chapter that he believes some kinds of state support must be acceptable.

After establishing these points, Witte delves into a detailed summary of the legislative history behind the First Amendment. He charts the various debates and all previous nineteen versions of the amendment. The lengthy discussion is tedious at times, but the early versions of the amendment, which Witte has kindly

---

[5] *Id.* at 49.

[6] *Id.* at 50.

[7] *Id.* at 50.

[8] JOHN WITTE JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 53 (1999).

numbered and set apart in bold type, are interesting. Of special note is version 2, which takes upon itself the large task of defining religion, as "the duty which we owe to our creator."[9] In a time where religions are increasingly centered on self-absorption, that the founders even contemplated the fact that humanity has a duty to its creator demonstrates how far society has strayed from the drafters' understanding of the purpose of religion.

Witte proceeds to dissect the final text of the amendment, giving first a "thinner" reading, and then giving a "thicker" reading. His "thinner" reading posits that the final text is a compromise agreement only on "the boundaries of appropriate congressional action on religion."[10] This reading is the more flexible and undefined of the two. It leaves open to later discussion what governmental bodies, other than Congress, might be bound by the clause, and what specific governmental action is prohibited. It is interesting to note that Congress chose the broadest terms, "free exercise" and "establishment," to define the boundaries of allowable congressional action because the two terms incorporate all of the first principles Witte discusses earlier.

The "thicker" reading defines each term of the amendment. The third phrase, "Respecting an Establishment," is the subject of much debate, but Witte poses three possible interpretations. First, Congress shall make no law respecting a *state* establishment of religion. Second, Congress shall not establish a religion outright or make laws that would "reflect" such an establishment. Third, Congress shall not demonstrate preferential support for a "national religion" but can show "nonpreferential" support for multiple religions. Although Witte points out pros and cons for all three interpretations, the third option seems to be the most attractive given the over reaching involvement of the government into private life.

"Prohibiting Free Exercise," the fourth phrase, is also the subject of much debate. Witte argues for a looser definition of the word "prohibit" because in eighteenth-century terms it also meant "infringe" or "abridge." As a result, Congress would be under more restraint when enacting legislation that affected religious expression. This would be a valid reading if the third phrase, "Respecting an Establishment," meant allowing nonpreferential support for multiple religions. The two interpretations, acting in conjunction, would provide the appropriate balance between freedom from repression by other religious groups on the one hand, and by the government on the other. Witte's later discussion of the Supreme Court's decisions concerning the First Amendment reflects these different readings.

After a brief history of the various state constitutions and Supreme Court decisions before the 1950's, he examines the modern state of First Amendment doctrine. He first analyzes the state of modern free exercise law and then continues with the state of modern disestablishment law.

Witte argues that the free exercise clause needs to be given a multiprincipled reading. This reading incorporates the principles of liberty of conscience, freedom of religious expression, religious equality and pluralism, and separation of church

---

[9] *Id.* at 64

[10] *Id.* at 73.

from state in the free exercise clause. A multiprincipled reading would, therefore, protect both individuals and groups. Although this was the view that the Supreme Court articulated in one of the first cases interpreting the amendment, *Cantwell v. Connecticut*,[11] the Court's view has since shifted. In *Employment Division v. Smith*,[12] the Court rejected the multiprincipled reading and held that a valid and neutral law that is generally applicable is constitutional, even if it burdens someone's religion. Witte argues that the recognition of this single principle of neutrality does not give enough protection because speech is only one form of religious exercise, and statutory provisions only protect the privileged views of the political majority. Constitutional protection is therefore the greatest guarantee of religious liberty.

Modern disestablishment law has followed the opposite course, from recognizing a single principle, separation of church and state, to incorporating the additional principles of religious equality and liberty of conscience. Witte believes that the reemergence of the mutliprincipled reading holds much promise. While separation of church and state must still be given a strong reading, he argues that a "categorical insistence" on the principle leads to very little. Because of the modern welfare state, where the government touches on almost every aspect of modern life, the "traditional understanding of a minimal state role in the life of society . . . is no longer realistic in practice."[13] Therefore, states should eliminate practices that weaken the principle by forcing it to reach the "unessentials," which Witte characterizes as moments of silence or private displays of the Decalogue in schools.

To more fully illustrate his arguments, Witte examines in detail whether state tax exemptions of religious property are constitutional or just a historical anomaly. Arguing for a more nuanced understanding of the history of tax exemptions, Witte first notes that tax exemptions are rooted both in common law and equity traditions. Additionally, the government granted exemptions for both "religious uses" and "charitable uses." Therefore, Witte foresees a possible solution in only allowing exemptions for religious properties that can show "charitable uses." This would remove any entanglement of religious overtones and religious properties would be exempted only because of the "external, cultural, and social uses to which they are devoted."[14] Additionally, because giving the state power to tax the church would be too much power and a reminder of the religious repression the founders had fled, Witte argues that the *church* should self-censor their claims of exemption. However, in a slight retraction, Witte acknowledges that the "religious use" category of exemptions should not be completely eradicated because of the great social and public value of "religious uses." While this may be true, Witte does not address the fact that this leads back to the very complications he is trying to clarify. For example, who decides which religious properties are of "social" or "public"

---

[11] 310 U.S. 296 (1940).

[12] 494 U.S. 872 (1990).

[13] WITTE, *supra* note 2, at 183.

[14] *Id.* at 214.

value? Moreover, it is difficult to imagine that even supposedly pious bodies will be able to exercise restraint if they are given a "religious uses" option, even if the "social" value standard could be objectively defined.

Witte's final analysis of religious liberty seeks to place the "American experiment" in an international context. He examines three international documents on religious rights. After comparing these documents to American law, he concludes that the law should emphasize the functional and institutional dimensions of religion. This means that the law would protect any religion embracing a creed, cult, code of conduct, and confessional community. While this is a good start at defining religion, it still does not address the very subjective component of religion, sincerity of the believer. Sincerity continues to be an issue as it is always necessary to determine whether the group member truly believes that he is a part of a "religion." And because this decision will still be up to the trier of fact on a case by case basis, it is very difficult to consistently determine which "religions" will get protection, since ultimately it is essentially left to the whimsy of the judge or jury.

In his concluding remarks, Witte exhorts society to find a new constitutional balance for religious liberty. The keys to discovering this balance lie first in recognizing that religion is special and is accorded special protection in the Constitution. Second, the constitutional process must include all voices and values—religious, areligious, and antireligious. Third, the six basic principles of religious liberty that the founders ascribed to must be reinstated and followed. While these "keys" to remember are laudable and supported by Witte's numerous arguments, they are also almost impossible to implement in today's contentious, self-serving society. Witte even concedes in his final statement that walking away from the religion that so offends and exercising "such voluntary self-protection ultimately provide[s] far greater religious freedom for all than pressing yet another tired constitutional case."[15] Unfortunately, in a time when litigation has become commonplace and is the default position, even this wise suggestion may fall on deaf ears.

Angelin J. Ho

[15] *Id.* at 239.