

5-1-1993

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### Recommended Citation

Richard Stith, *Why the Taint to Religion?: The Interplay of Chance and Reason*, 1993 BYU L. Rev. 467 (1993).  
Available at: <https://digitalcommons.law.byu.edu/lawreview/vol1993/iss2/3>

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# Why the Taint to Religion?: The Interplay of Chance and Reason

*Richard Stith\**

## I. INTRODUCTION

As usual, Professor Durham has offered a profound and careful analysis of the treatment of religion in American society.<sup>1</sup> I want to ask more about why an epistemological privileging of a secular outlook, a tainting of a religious outlook, exists in the United States. Professor Durham cited the creation science cases as excluding plausible theories of biogenesis which betray a religious origin.<sup>2</sup> The phenomenon of exclusion of religion is, however, quite general. There is a taint to religious values, symbols, and organizations whenever they appear in public. Our courts insist that religion can have no public role as part of a state agency or of a private group backed by extensive state involvement.<sup>3</sup> The result, as Professor Durham points out, is that on the one hand religious people feel marginalized and ignored; on the other hand, the whole community is deprived of a resource for implementing public programs that require or instill virtue.<sup>4</sup> The demise of religious schools, for example, would be bad from many secular points of view, yet such schools can receive no public support, even for essential public purposes.

My question is this: Is the taint that we have lived with in this country—growing out of the Establishment Clause—

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\* Professor of Law, Valparaiso University School of Law. Copyright 1993 by Richard Stith. All rights reserved. This article was written in response to that of Professor Cole Durham, *infra* note 1, for the meeting of the International Legal Science Association, Provo, Utah, Sept. 10-13, 1992.

1. See W. Cole Durham, Jr. & Alexander Dushku, *Traditionalism, Secularism, and the Transformative Dimension of Religious Institutions*, 1993 B.Y.U. L. REV. 421.

2. See *id.* at 444-45; see also *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Epperson v. Arkansas*, 393 U.S. 97 (1968).

3. See *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982).

4. See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

accidental to our history, or does it have a rational basis? This question is important because it affects the kind of advice or example that we can give to nations that are developing or reformulating their constitutions. If the values in our Establishment Clause are merely the result of chance historical events, other nations should be able to find alternatives to our constitutional principles. But if the values in our Establishment Clause are fundamental to modern society, perhaps they should be everywhere promulgated.

## II. THE ACCIDENTAL NATURE OF THE RELIGIOUS TAIN

Let me give some examples and reasons why it sometimes appears to me that our situation is accidental. We struggle to keep American public schools free of religion, but the Federal Republic of Germany, a nation with high ideals of individual equality and freedom, lives peacefully with religion being taught in the public schools. This religious presence does not seem to be significantly controversial among Germans. Why does religion in schools raise such bright red flags for Americans? Why should this upset us so much, when it does not upset the Germans?

Another source of possibly unnecessary tension between church and state is the U.S. federal income tax code. Professor Durham did not discuss the code in his paper, although it may be even more important than the Establishment Clause, or *Employment Division v. Smith*,<sup>5</sup> in limiting freedom of religion. No religious group that receives a tax exemption, or whose donors get tax deductions, can be involved in elections.<sup>6</sup> This tremendously inhibits religious groups from participating in public life. Yet it is my understanding that these sections of the tax code were in part *ad hoc* measures intended to strike back at a private *nonreligious* foundation which had dared to support an opponent of Senator Lyndon B. Johnson.<sup>7</sup> The provisions did not express some deliberate, well-thought-out principle meant to place a vise around religious activity. By accident, as it were, the tax code has imposed major limitations on religious freedom.

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5. 494 U.S. 872 (1990); see also Durham & Dushku, *supra* note 1, at 447-55.

6. See I.R.C. §§ 501(c)(3), 170(c)(2) (1988).

7. Edward M. Gaffney, Jr., *On Not Rendering to Caesar: The Unconstitutionality of Tax Regulation of Activities of Religious Organizations Relating to Politics*, 40 DEPAUL L. REV. 1, 23-29 (1990).

Another example comes from my hometown of Valparaiso (Indiana, not Chile). Each Christmas season we have a live nativity scene on the courthouse grounds which is entertaining for the whole town, especially the children. Some local residents dress up as Mary, Joseph, and the shepherds, and there are often live sheep. It gets pretty cold, so I don't think they have a real child, but one year they brought in some camels. Anyway, viewing this community celebration as something that ought to be protested seems to me extraordinarily hypersensitive, if not small-hearted. Yet our law would give such protesters strong backing.<sup>8</sup>

On the other hand, some events at our town courthouse seem much more offensive to persons of ordinary sensibilities; yet our law provides no remedy. A few years ago, we erected what some people call the "Rusty Butterfly" in front of the courthouse. It is a modern sculpture which probably does not agree with the taste of a majority of the people of Valparaiso, and they do not like the fact that public space and public funds have been spent on a sculpture that is meaningless to them. (I should say that I like it; so I'm not grinding my own axe here.) Furthermore, these townspeople are offended by the fact that the sculpture replaced a war memorial. Something quite dear to the hearts of those people whose relatives had died in the First World War was replaced by the Rusty Butterfly. But this intrusion into the public realm of an idiosyncratic aesthetic value, of a particular personal preference for a modern sculpture over a war memorial, is not actionable in the courts. Now, why should we be so sensitive to people who are upset by the nativity scene and not to those upset by the sculpture? This position of our law strikes me *prima facie* as accidental. It does not make sense, if one were designing a polity from scratch, to purposely draw such a line.

Perhaps this strange stance is the result of an accident of incorporation, the Supreme Court's decision to read the First Amendment into the Fourteenth. Mary Ann Glendon and Raul Yanes argued recently that the incorporation cases were not well thought out.<sup>9</sup> They imply that if the Court had been more reflective, it might have incorporated the Establishment Clause

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8. See *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

9. Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 479-92 (1991).

differently.<sup>10</sup> Here, in my opinion, is a more reasonable version of incorporation: The Clause providing that Congress may make no law respecting an establishment of religion was originally intended not only to exclude a federal establishment of religion, but also to forbid federal interference with the various establishments of religion that were then in place at the state level.<sup>11</sup> The Framers did not mean to articulate the principles of a polity but rather, in many ways, the principles of an international treaty. The real foundations of common life, including religion, were left to the several states. Now, it seems to me that when the Establishment Clause was incorporated, the state/local relationship should simply have replaced the federal/state relationship. Thus no state should be able to establish or favor a particular religion. But just as the federal government, at the time of the First Amendment's ratification, had to respect state establishments of religion, state governments should now likewise have to respect towns and other local communities that have a religious identity. Religiously expressive communities should be able to participate in public programs, receive public benefits, and have their symbols part of a public holiday display, as long as there is no pattern of official *state* preference for one particular religion.<sup>12</sup> But the Court missed its chance to adopt this better theory of incorporation.

Did our hostility to public religion really have to happen? Another thought experiment illustrates the seemingly accidental nature of Establishment doctrines. Assume the Framers had been truly farsighted and had realized that in the twentieth century our strongest passion would not be religion but sport. They might have drafted the First Amendment to read, "Congress shall make no law respecting an establishment of sport." (The words of the Free Exercise Clause could have remained almost the same as they are now, but they would

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10. *Id.* at 481.

11. *See id.* at 482.

12. This proposal may seem akin to Professor Worthen's suggestion that the Constitution ought to apply differently to local institutions than to state or national institutions. *See* Kevin J Worthen, *The Role of Local Governments in Striking the Proper Balance Between Individualism and Communitarianism: Lessons for and from Americans*, 1993 B.Y.U. L. REV. 475, 490. My argument is, however, restricted to the Establishment Clause. After incorporation, localities could not claim any special protection from the free speech part of the First Amendment, in my view, because the original unincorporated First Amendment did not in itself provide any protection for states which limited speech.

have guaranteed "the right to exercise freely.") Courts might later have created a high and impregnable wall of separation between sport and state. Such a legal setup could have given rise to genuinely perceived injuries and conflicts. I suppose some Californians would be upset with the current mayor of San Francisco. How dare he try to float public bond issues and do other favors for the Giants in order to keep them in San Francisco?<sup>13</sup> Such actions are none of his business. And what about fairness to basketball fans? Some nonsporty types might even get annoyed when the President of the United States throws out a baseball to start the season. Is he trying to say that baseball is the national pastime?

I am serious in my attempt at humor because I do think we are conditioned, as Mary Ann Glendon puts it, by "the stories told by the law."<sup>14</sup> If the law tells us that we should be offended in certain circumstances, then some of us will discover that we are offended. We all have so many resentments against others—against anything that intrudes upon our preferences—that if we are told that a particular intrusion is illegitimate, we fight back. But what the law tells us may sometimes be a historical accident.

### III. A RATIONAL FOUNDATION FOR THE ESTABLISHMENT DOCTRINE

Professor Durham is also correct, however, in pointing out that some tension between religion and secularity is universal, at least in the modern world.<sup>15</sup> Perhaps the language of the law is only the occasion, rather than the deep cause, of our current hostility toward "establishing" religion. Perhaps the "law's stories" are simply a match tossed into an already flammable public consciousness.

Professor Durham argues that one underlying reason for sacred-secular tensions is a project of the Enlightenment.<sup>16</sup> Enlightened modernity has sought to give final form to the first of the two ways of thinking with which Professor Durham

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13. See Hank Hersch, *Tale of Four Cities: For Giants Fans in Two Bay Areas, It Is the Best of Times, It Is the Worst of Times*, SPORTS ILLUSTRATED, Aug. 24, 1992, at 24.

14. See MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 8-9 (1987).

15. Durham & Dushku, *supra* note 1, at 425, 426-37.

16. See *id.* at 443-44.

begins his paper. It has sought to construct a universally convincing, scientific, political rationality that would maximize the values of efficiency, national unity, and private freedom.<sup>17</sup>

Here I must disagree on one point with Professor Durham and with others whose work I otherwise admire. I do not think the purpose of the Establishment Clause can be limited just to protecting free exercise of religion.<sup>18</sup> If a religion were established, it could interfere with our lives in many nonreligious ways. If a vegetarian religion were enforced, I could no longer eat meat. My religion does not necessarily tell me to eat meat, but maybe I like meat or I think my children need protein in the form of meat to stay healthy. So the Establishment Clause can easily be seen as part of a broader project of excluding religion from public life in order to base lawmaking on rational, universally acknowledged principles. If the irrationalities and traditions of religion are kept out, private freedom will not be unnecessarily restricted. The problem is that this supposed universally convincing rationality does not convince religious adherents. Because they persist in asserting backward, unreasonable beliefs, they must somehow be walled out of the public forum. Since religious adherents cannot be rationally persuaded, they must be delegitimated. Some *ad hominem* argument must provide a reason why the rest of us who are engaged in this enlightened project do not have to listen to them and certainly do not have to take into account their views and votes.

I spent a month in Nepal this past year, and the new constitution of that country shows that this same process has

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17. Alasdair MacIntyre puts the matter this way:

It was a central aspiration of the Enlightenment, an aspiration the formulation of which was itself a great achievement, to provide for debate in the public realm standards and methods of rational justification by which alternative courses of action in every sphere of life could be adjudged just or unjust, rational or irrational, enlightened or unenlightened. So, it was hoped, reason would displace authority and tradition. Rational justification was to appeal to principles undeniable by any rational person and therefore independent of all those social and cultural particularities which the Enlightenment thinkers took to be the mere accidental clothing of reason in particular times and places. And that rational justification could be nothing other than what the thinkers of the Enlightenment had said that it was came to be accepted, at least by the vast majority of educated people, in post-Enlightenment cultural and social orders.

ALASDAIR MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? 6 (1988).

18. *But cf.* Durham & Dushku, *supra* note 1, at 459-60.

recently taken place there. A few years ago, the united forces of the liberals and the leftists nearly overthrew the monarchy.<sup>19</sup> To avoid a complete revolution and preserve himself, the king simply made a deal with these two groups. The leaders of the liberals, leftists, and monarchists negotiated a new constitution; no constituent assembly was ever elected to express the views of the people as a whole. What the three bargaining parties agreed upon included a democratic, constitutional monarchy and national unity. To these ends, they inserted in the constitution a rule that no political party may be based, *inter alia*, on religion, tribe, or region.<sup>20</sup> Of course, those are the loyalties closest to Nepalese hearts; they were excluded, I think, because they were thought to interfere with unity and efficiency.

#### IV. THE ACCIDENTAL NATURE OF THIS RATIONALITY

Let us return to the question of whether it is rational to tolerate the Rusty Butterfly but not the live nativity scene. The deep purpose of the latter intolerance, I submit, is to delegitimize religious arguments and to make it clear that those arguments do not require attention, that they have no public force, that they may not be aired in a public space. Permitting the government to endorse religion, even in a symbolic, noncoercive way, is to give religion public legitimacy, and who knows where that will lead? The nativity scene has to be removed, not because it causes more grievous harm than other public value choices, but because of the supposed rational need to delegitimize religion.

I wonder, however, whether much that passes for rationality is not itself transitory, an accident of history. After all, the Enlightenment's project has failed.<sup>21</sup> The idea of developing a universally valid normative science of society, if it was ever persuasive, is not so anymore. Few of us (at least outside of law and economics) think that neutral, foundational assumptions still exist upon which all reasonable persons of good will can agree and upon the basis of which all problems

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19. For general background, see RISHIKESH SHAHA, *POLITICS IN NEPAL: 1980-1990* (1990).

20. CONST. OF THE KINGDOM OF NEPAL 2047 art. 112(3) (1990); see also Michael Hutt, *Drafting the Nepal Constitution, 1990*, 31 *ASIAN SURV.* 1020, 1028, 1037 (1991).

21. See generally MACINTYRE, *supra* note 17.



can be rationally solved. Hence there is no longer a principled argument for the exclusion of religion. There was once a respectable project which made it right to exclude religion from the public sphere, but most of us have given up on that project.<sup>22</sup>

The skepticism that was used to undermine religion and to clear the way for the rational legislator, at the time of the Enlightenment and thereafter, has now turned back on law and on reason itself. Postmodern skepticism destroys the bright line between the rational and the religious, while undermining any new values we might wish to cheer. Witness the theoretical tension between proponents of minority rights or the rights of women and movements like Critical Legal Studies.<sup>23</sup> Postmodern thought conflicts as much with any sort of objective ideal or principle as it does with religious truth.<sup>24</sup>

Since we are all in the same postmodern boat now, there is no good reason why religion should continue to be treated as an especially irrational and embarrassing part of life. We are all equally naked and vulnerable. To continue to taint religion is purely a political privileging. There is no longer a credible metatheory available that explains why religion should be excluded while feminism or some other doctrine is included in public life. The time has come to stop pretending that there are *a priori* reasons why we do not have to listen to each other.

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22. John Rawls and Ronald Dworkin are two prominent scholars still seeking rationally to disenfranchise certain values and worldviews. They have not succeeded. See Richard Stith, *A Critique of Fairness*, 16 VAL. U. L. REV. 459 (1982); Richard Stith, *Will There Be a Science of Law in the Twenty-First Century?*, 22 REV. GEN. 373 (1991), regarding Rawls and Dworkin respectively.

23. For a description of this tension and an attempt to lessen it, see Dennis Patterson, *Postmodernism/Feminism/Law*, 77 CORNELL L. REV. 254 (1992).

24. Michael Perry now appears to take this position. Although he had previously argued otherwise, he recently stated, "Now I see no good reason to exclude any religious beliefs as a basis for a political choice. . . . [C]ontroversial religious beliefs do not have a different, much less an inferior, epistemological status from controversial beliefs of other sorts . . . ." Michael J. Perry, *The Inclusivist Ideal in Political Choice*, WOODSTOCK REP., Mar. 1993, at 7, 8.