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RELIGION, STATE AND THE BURGER COURT. By *Leo Pfeffer.* Buffalo: Prometheus Books. 1984. Pp. xiv, 310. $22.95.

There is, I think, no area of constitutional law more in need of solid, creative examination and fresh ideas by the courts, scholars, and practitioners than the issue of what constitutes an establishment of religion. Leo Pfeffer is uniquely qualified to contribute to that effort. In the number and importance of establishment clause cases that he has personally litigated, he probably stands first among living American lawyers. His book, *Religion, State and the Burger Court,* provides a wealth of information concerning the religion cases that have been decided during Chief Justice Burger's tenure on the Supreme Court. As a source of information concerning the details of those cases, the book is all that one would expect from someone of Mr. Pfeffer's competence and experience. I doubt, however, that the book will do much to change the views of very many people, or even cause many people to think about religion issues in different ways.

I had expected to disagree with Mr. Pfeffer's substantive views, and in this regard his book fulfilled my expectations. I had also hoped, however, that this book would inspire — or at least provoke — a debate that might contribute to more solid doctrinal moorings for the establishment and free exercise clauses. My disappointment in this respect probably reveals more about the nature of my expectations than it does about the quality of Mr. Pfeffer's book.

Religion, State and the Burger Court is a complete, probably exhaustive review of Supreme Court decisions dealing either directly or indirectly with establishment clause issues during Chief Justice Burger's tenure. The ten chapters categorize these cases under the following headings: Tax Exemption; Aid to Religious Schools; Religion in Public Schools; Religion in Public Places; Religion in Military, Penal and Legislative Service; Religion in Labor Law; The Free Exercise of Disfavored Religions; Religion in the Family; Inter- and Intra-Church Disputes; and Religion and the Welfare of the Community. His treatment is literally, so far as I can tell, exhaustive. If he missed a case, I am not aware of it.

This book provides an amazing amount of detail about many of the key cases, as well as about others that are not so key. Mr. Pfeffer

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reveals the historical and other background facts, as well as the strategic and tactical considerations that affected the litigating judgments. He knows the players, and he describes them. The descriptions include not only individuals, but also organizations, complete with their genealogical derivations.

I found Chapter Three (Religion in Public Schools) (pp. 59-111) the most interesting; the reason may be that the subject of that chapter is an area of particular interest to me. I found Chapter Four (Religion in Public Places) (pp. 113-39) the most provocative; and the reason, quite clearly, is that it *is* the most provocative. The author asserts, for example, that *Lynch v. Donnelly,*[1] which upheld the constitutionality of a crèche as part of a city's observance of Christmas, belongs in the same category as *Dred Scott v. Sanford.*[2] The reason is that, in his view, "[b]oth are predicated upon the same basic concept: the inherent inferiority of ethnic groups, either because of color of skin or religious commitment" (p. 124). That statement is not only provocative; it is just plain wrong. There is no hint anywhere in the *Lynch* opinion nor in the briefs or argument that the constitutionality of Pawtucket's crèche turned on such categorical assumptions. The assumptions belong to a bygone era and do not deserve to be taken seriously. They are as abhorrent to those who joined the Court's opinion in *Lynch* as they are to all fair-minded people.

My own view is that *Lynch* is correct for a rather simple reason. I start from the premise that the Constitution does not prohibit the federal government from declaring Christmas a national holiday. No one among the parties or amici who participated in *Lynch* disagreed with that premise. It follows from that premise, I believe, that the Constitution does not prohibit a city from announcing that holiday in a way that compels no profession of belief or conduct of any kind on the part of any individual. I would not expect Mr. Pfeffer to subscribe to that enlightened view of *Lynch.* Nevertheless, the proposition that *Lynch* belongs in the same class as *Dred Scott* is too extreme a view to be taken seriously.

One of the great strengths of this book is its extensive, near encyclopedic detail. For many readers, it will also be a shortcoming. One of the highest compliments for any book is that the reader "can hardly lay it down." This one is easy to lay down. Any book dealing with the Supreme Court's establishment of religion cases is destined to be something less than a broad-based captivator. But Mr. Pfeffer has managed to take a subject that is interesting to only a few and shrink its audience even further.[3] Time after time I found myself wishing he would

1. 465 U.S. 668 (1984).

2. 60 U.S. (19 How.) 393 (1857).

3. In the introduction, Mr. Pfeffer describes his intended audience as follows:

The book is not written for constitutional lawyers, or at least not for those alone. It is

get to the point — and then often wondering if he really had one other than a generalized wish for more rigidity in the religion clauses. Reading this book was like having a conversation with a person who talks too much and whose conversation seems to wander.

Religion, State and the Burger Court may accurately be described as encyclopedic not only because of its extensive detail, but also because of its straight-line treatment of every case, every chapter, and every subject. From beginning to end there are no real crescendos or diminuendos — no building to a climax nor clustering of supports for a central and overriding thesis. The book is largely a discussion of one case after another, with no theme other than that the wall of separation between church and state should be higher and tighter. The whole work ends, just like every chapter ends, with a thorough discussion of one more *case — Larkin v. Grendel's Den*[4] (pp. 286-89).

Leo Pfeffer is obviously a person who understands the Supreme Court as an institution. There is a rather widely held view that the Chief Justice occupies a position of importance and influence vis-à-vis other members of the Supreme Court comparable to the relationship between a congressional committee chairman and other members of the committee. The author recognizes, correctly, that the only real power enjoyed by the Chief Justice of the Supreme Court *qua Chief Justice* is the power to decide who will write the Court's opinion when he is in the majority. Accordingly, Pfeffer's use of the label "Burger Court" in his title is a knowledgeable one and is merely a convenient shorthand means of identifying the period of time he has selected to consider the Court's work in a particular area (p. ix).

Still, as is apparent from this book, Chief Justice Burger has been one of the real leaders in the development of the Court's religion doctrines. And there are optimistic signs that the Chief Justice may be a leader in future reforms. For example, he was the author of the Court's opinion in *Lemon v. Kurtzman,*[5] which for the first time formally stated the three-part test for establishment clause cases, and he also authored the Court's 5-4 opinion in *Lynch v. Donnelly,*[6] which contains the best-developed suggestion to date that the three factors may be only helpful guideposts, rather than the ultimate inquiry, in determining whether a particular practice constitutes an establishment

written for a much wider audience, encompassing those whose interests lie in, among other fields, politics, sociology, religion, and journalism. Or, to put it another way, it is written for those who, on occasion, read the text of a Supreme Court opinion as it appears, necessarily abridged, in the *New York Times* and other newspapers or unabridged in periodicals.

P. x. The "wider audience" the author envisions would be far better served by a less exhaustive treatment of cases and a more focused discussion of the doctrinal issues raised in religion clause litigation.

4. 459 U.S. 116 (1982).

5. 403 U.S. 602 (1971).

6. 465 U.S. 668 (1984). *See* text at note 1 *supra.*

of religion. There is every reason to anticipate, therefore, that the Chief Justice, as the author of these two opinions and a member of the five-person majority in *Lynch,* will play a key role if there is to be any significant change in the rigidity of the three-part test.

This book shows an understanding not only of the Supreme Court as an institution, but also of the institutional litigators who frequently appear before the Court. Mr. Pfeffer's own Supreme Court work has involved him with several of those institutional litigators; he would be expected to understand them, and he does. With regard to the work of the Solicitor General's office, he quite correctly and sensitively distinguishes between the considerations that are implicated when the government participates as amicus curiae in cases involving traditional federal interests, and cases in which such interests are lacking. Mr. Pfeffer apparently takes the view (pp. 113-15) that it is never proper for the Solicitor General to participate in the latter category of cases. While I understand and respect that view, I disagree. The Solicitor General is a presidential appointee and part of the executive branch team. And the President — whose objectives may not be limited to the enforcement of existing statutes — is one of his clients. One of the reasons we elect Presidents is to achieve changes in existing laws, and among the most important of our laws are judge-made decisions construing the Constitution. Certainly the President, in fulfilling his article II obligation to see that the laws are faithfully executed, is entitled to present his views concerning the Constitution to the highest court that interprets the Constitution. The Constitution itself is, after all, among the laws the President is charged with faithfully executing. And the President speaks to the Supreme Court only through the Solicitor General.

I wonder whether Mr. Pfeffer's point is really that the Solicitor General should never participate in cases not "having a direct or substantial effect on the government's interest" (p. 114), or whether his argument is more selective. Would he, for example, have approved of Archibald Cox's amicus participation in *Baker v. Carr*?[7] There was no statement of federal interest in the federal government's amicus brief in that case (as there usually is) and the only apparent interest of the federal government was an interest in a sound body of constitutional law dealing with federal courts' jurisdiction to decide whether apportionment schemes violate the equal protection clause of the fourteenth amendment.

While Mr. Pfeffer and I necessarily disagree on whether the federal government should have participated in *Lynch v. Donnelly,* Mr. Pfeffer's more important point — with which I am in complete agreement — is that both the Court and the Solicitor General traditionally have

7. 369 U.S. 186 (1962) (holding state legislative reapportionment disputes justiciable). The Court granted special leave for Solicitor General Cox to participate. 365 U.S. 864 (1961).

distinguished between amicus participation in cases that directly affect the federal government's ability to enforce existing law and such participation in cases that do not. The distinction helps to conserve the federal government's most important litigating advantage: the special stature that the Solicitor General enjoys with the Supreme Court. I believe that one of the reasons the Court treats the Solicitor General differently from other amici is that over the years the holders of that office have behaved differently. It is important that the governmental officer whose task requires him frequently to advocate judicial restraint also be restrained in his own dealings with the Court. Accordingly, while it is proper for the Solicitor General to express the Administration's views as amicus curiae where there is no direct statutory enforcement interest, this must be done with discretion and selectivity, lest the force of his views be disregarded not only in those cases, but more generally as well.

More than a decade has passed since the three-part test for establishment clause cases was formally stated in *Lemon v. Kurtzman,*[8] and freedom of religion doctrine is at an important stage of its development. The Supreme Court is now struggling with the important question of whether failure to satisfy any of the three parts is always tantamount to an establishment clause violation, or whether the three parts of the test (or maybe only two of them) are simply useful guides to ascertaining whether there has been an establishment of religion. Other important doctrinal issues concern the extent to which free exercise values should influence establishment values and whether the relationship between the two clauses need be one of tension or whether we should search for greater harmony between the two.

I had hoped to find discussion of these kinds of issues in Mr. Pfeffer's book, and I did not. He cannot be criticized, however, for writing a book for his purposes, rather than for mine.

8. 403 U.S. 602 (1971).