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Book Review: Religion, State and the Burger Court. by Leo Pfeffer.

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RELIGION, STATE AND THE BURGER COURT. By Leo Pfeffer.¹ New York: Prometheus Books. 1984. Pp. xiv, 310. Clothbound, \$22.95.

*Ernest B. Lowrie*²

“Magisterial” is a word that readily comes to mind as one works through Leo Pfeffer’s *Religion, State and the Burger Court*. As one of America’s foremost authorities on the constitutional history of “church-state” relations in the United States, Pfeffer’s elegant and comprehensive treatment is a delight to read. This book is addressed to the larger intellectual world, a world that witnessed, during the 1984 presidential campaign, the emergence of “religion and politics” as a major issue. The book’s focus is on the Burger Court, or, perhaps, one should say the Burger Courts, for the drama lies in the tension between the decisions made in the 1970’s by Burger Court I and the decisions made in the 1980’s by Burger Court II. The key paragraph should be quoted in full:

At the turn of the present decade Burger Court II began handing down decisions pointing in the direction exactly opposite to that of the preceding decade. With only two exceptions, one dealing with the posting of the Ten Commandments in public schools and the other a very minor one dealing with the proximity to churches of restaurants serving intoxicating liquors, Burger Court II (which came into existence by reason of Lewis F. Powell’s conversion from absolutism to accommodationism) handed down rulings that made the separationists grieve and the accommodationists smile. Like probably all other strict separationists I suffered a period of despondency, convinced that all that had been achieved in the seventies would be vitiated case by case in the eighties. President Ronald Reagan appointed Sandra Day O’Connor to the Court after he made sure that her positions on religion and state, whether they involved abortion, prayer in the public schools, or aid to parochial schools, coincided with his own. The two most ardent separationists today on the bench, William J. Brennan and Thurgood Marshall, are likely to retire within a short period of time and it can safely be assumed that if Reagan is reelected, their successors will be required to pass his accommodationist test; indeed, he made it quite clear that this was his intention.³

Reagan was reelected by a landslide. But in 1985 the Supreme Court did not proceed down this road. This is how the July 15, 1985, issue of *TIME* reported the development:

1. Professor of Political Science, Long Island University, and Special Counsel to the American Jewish Congress.
2. Director, Religious Studies Program, Pennsylvania State University.
3. L. PFEFFER, *supra*, at xiii.

Conservative and liberal observers were agreed. Like it or not, the U.S. Supreme Court in recent years had seemed to favor some erosion of Thomas Jefferson's sturdy "wall of separation between church and state." Both sides expected the trend to continue after the court scheduled new religion cases this term. But last week, as it recessed for the summer, the court confounded the prognosticators. For the third time in a month, the Justices took a tough stand against allowing government and religion to mix.

After the Reagan administration lost each round, the Secretary of Education, William Bennett, accused the Court of harboring a "fastidious disdain for religion."

From internal evidence it would appear that Pfeffer submitted his manuscript immediately prior to this statement by President Reagan (as reported in the *New York Times* on August 24, 1984): "The truth is, politics and morality are inseparable, and as morality's foundation is religion, religion and politics are necessarily related." The lead editorial of the *New York Times* responded in fury on August 25:

President Reagan's prayer breakfast speech in Dallas was a self-righteous assault on those who disagree with his dangerous, devious mixing of religion and politics. Not content to debate the merits of difficult issues like school prayer and abortion, he professed to know the hearts and minds of his opponents, and he found them evil. Mr. Reagan has exceeded the bounds of tolerable debate.

While I cannot prove it, it would not surprise me to discover that Leo Pfeffer wrote that editorial on "The President's Sin". In any event, the key to Pfeffer's thesis lies in his belief that the religious issues are being manipulated by "ambitious politicians."

President Reagan, it should be emphasized, is not alone in his conviction that prior to the 1960's "religion held a special place, occupied a special territory in the hearts of the citizenry."⁴ All that dramatically changed during the tumultuous 1960's, a decade that witnessed, say, the death of God and the rise of the secular city. The President is explicit:

But in the 1960s this began to change. We began to make great steps toward secularizing our nation and removing religion from its honored place. In 1962, the Supreme Court, in the New York prayer case, banned the compulsory saying of prayers. In 1963, the Court banned the reading of the Bible in our public schools.

Because "the climate has changed greatly" since the election of John F. Kennedy as President, "[i]t logically followed," according to President Reagan, "that religion needs defenders against those who care only for the interests of the state." As Public Defender of Religion Number One, President Reagan believes that "we poison

4. All of President Reagan's statements are from the Dallas Prayer Breakfast as reported in the *N. Y. Times*, Aug. 24, 1984, at A11, col. 5.

our society when we remove its theological underpinnings." From this it follows that those who champion a strict separation of church and state are "intolerant of religion."

In pluralistic America, however, the various communities of faith regularly and routinely support "the separation of Church and State." By no means is this support limited to the liberal denominations. The most conservative denominations also submit *amicus curiae* briefs on that side of the issue. By way of example, here is Pfeffer's listing of organizations that supported the Reverend Moon's appeal in 1984:

[T]he National Council of Churches of Christ in the U.S.A.; the Presbyterian Church (USA); the American Baptist Church in the U.S.A.; the African Methodist Episcopal Church; the National Association of Evangelicals; the Christian Legal Society; the American and New York Civil Liberties Union; the Southern Christian Leadership Conference (organized by Martin Luther King); The National Conference of Black Mayors; the National Bar Association (an organization of black lawyers); the Catholic League for Religion and Civil Rights; Church of Jesus Christ of Latter-Day Saints (Mormon Church); the Center for Judicial Studies; the Freeman Institute; The National Emergency Civil Liberties Committee; the American Association of Christian Schools; and the Institute for the Study of American Religions, a scholarly institution that had never before submitted an *amicus curiae* brief.⁵

There is no need to multiply examples to show that Pfeffer is correct in maintaining that Americans across all persuasions on an ideological spectrum are passionate supporters of "religious liberty."

Some of the best parts of Pfeffer's study are his historical clarifications of issues. For example, he knows perfectly well that states such as Connecticut and Massachusetts had religious establishments well into the nineteenth century, long after the adoption of the Bill of Rights. The "separation of Church and State" was *not* secured in the original Constitution or Bill of Rights. That concerned only actions by the federal government. Here is Pfeffer's statement of the decisive constitutional development:

In 1925, a Court, six of whose nine members had been appointed by Republican presidents, handed down a decision (written by a Harding appointee) in the case of *Gitlow v. New York* based upon the premise that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and "liberties" protected by the Due Process Clause of the Fourteenth Amendment from impairment by the states. From this dictum came the series of Supreme Court decisions holding, with only slight exceptions, that all rights protected under the Bill of Rights against national impairment were equally protected against state impairments.⁶

In future editions of this book, I should like to see Pfeffer add a short chapter on the historical development of the larger issues,

5. L. PFEFFER, *supra*, at 214.

6. *Id.* at 238-39.

with special attention given to the Federal Constitutional Convention. He has this material at his finger tips.

For example, he could point out the report of the delegate from Maryland, with the implausible name of Luther Martin, on the “no religious test” clause in article VI. Martin did not like what the Convention came up with, and he was one of the most determined opponents in the struggle over the ratification of the Constitution. His firsthand statement on what transpired in Philadelphia in 1787 is instructive:

The part of the system which provides, that *no religious test* shall ever be required as a qualification to any office or public trust under the United States, was adopted by a great majority of the convention, and without much debate; however, there were some members *so unfashionable* as to think, that a *belief of the existence of a Deity*, and of a *state of future rewards and punishments* would be some security for the good conduct of our rulers, and that, in a Christian country, it would be *at least decent* to hold out some distinction between the professors of Christianity and downright infidelity or paganism.⁷

Martin held no illusions about the fact that “a great majority of the convention” were not prepared to introduce any religious distinctions whatsoever.

Since the Reagan administration has evoked “traditional values” against people like Pfeffer, it would seem prudent for Pfeffer to take up the challenge. After all, in the 1777 Bill for Establishing Religious Freedom in Virginia, Thomas Jefferson maintained that “our civil rights have no dependance [sic] on our religious opinions.”⁸ Throughout the 1760’s and 1770’s New England’s preachers and politicians joined forces to defeat the imperial reform program George Grenville influenced Parliament to adopt in 1764, a reform that would have saddled America with ecclesiastical courts under the civil jurisdiction of bishops, the Lords Spiritual.⁹ (Before the Revolution not a single bishop had ever been installed in any of the American Colonies.) In point of fact, John Adams first entered the revolutionary struggle with his *Dissertation on the Canon and Feudal Law* (1765). In this attack upon the canon law of medieval Christendom, Adams argued straightforwardly that the first generation in New England “knew that government was a plain, simple, intelligible thing founded in nature and reason and

7. 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 227 (M. Farrand ed. 1966).

8. THE PORTABLE THOMAS JEFFERSON 252 (M. Peterson ed. 1974).

9. See C. BRIDENBAUGH, *MITRE AND SCEPTRE: TRANSATLANTIC FAITHS, IDEAS, PERSONALITIES, AND POLITICS (1689-1775)* (1962). The full text of the Stamp Act of 1765 can be found in *PROLOGUE TO REVOLUTION: SOURCES AND DOCUMENTS ON THE STAMP ACT CRISIS, 1764-1766* (E. Morgan ed. 1953).

quite comprehensible by common sense.”¹⁰

I think it would be fair to say that Pfeffer believes that America is a civil society that gives religious beliefs and practices considerable latitude. In a word, he is a secularist who is friendly towards religion but wants to keep religion out of the civil sphere. But what does that do to all those theological underpinnings others find so pervasive in our national life? Pfeffer would deny their importance. Here is his position in a nutshell:

Realistic separationists recognize that the absolute separation of church and state cannot be achieved, else what's a secularist heaven for? Nevertheless, that is the direction they would have constitutional law relating to the Religion Clause take, fully aware that perfection will never be reached.¹¹

What this adds up to is a rejection of any theological underpinnings to the State. It does not follow that religion is unimportant to society, or better put, to the different configurations that make up American society.

But here is the rub. Powerful political forces today are demanding the reintroduction of these theological underpinnings for the State. According to Henry Steele Commager, these forces “have managed to inject religion into politics more wantonly than at any time since the Know-Nothing crusade of the 1850s, and to enlist President Reagan as spokesman.”¹² Furthermore, they come from the left as well. Witness the campaign of the Reverend Jesse Jackson.

The Supreme Court is badly divided today over religion in American life. One year the Court splits five-to-four this way, the next year it splits five-to-four the other way. The split mirrors the split within the American people. The most visible evidence of this split swirls around the noisy controversy between what has come to be called “moral majoritarianism” and “secular humanism.” These polarized postures, furthermore, reflect a split within the minds of many people who make up our American democracy. Serious people are alarmed about what is happening in the religious heart of American culture. Regardless of what position one may take on any of the issues involved, Leo Pfeffer's magnificent statement will set one straight on the unfolding constitutional drama.

10. 1 PAPERS OF JOHN ADAMS 117 (R. Taylor ed. 1977).

11. L. PFEFFER, *supra*, at xi.

12. N. Y. Times, Sept. 16, 1984, at E23, col. 2.