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Steven D. Smith

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EQUAL SEPARATION: UNDERSTANDING THE RELIGION CLAUSES OF THE FIRST AMENDMENT.¹ Edited by Paul J. Weber.² Foreword by Martin E. Marty.³ New York: Greenwood Press. 1990. Pp. 180. \$39.95.

ARTICLES OF FAITH, ARTICLES OF PEACE: THE RELIGIOUS LIBERTY CLAUSES AND THE AMERICAN PUBLIC PHILOSOPHY.⁴ Edited by James Davison Hunter⁵ and Os Guinness.⁶ Washington, D.C.: The Brookings Institution. 1990. Pp. 168. \$22.95.

*Steven D. Smith*⁷

These two collections of essays attempt to revive, respectively, an old idea and a still older idea. The old idea, proposed by Philip Kurland three decades ago, is that the first amendment's religion clauses work together to deny religion any special legal treatment either for good or ill. Government is forbidden, as Kurland put it, to use religion as a basis of classification either for conferring benefits or imposing burdens. The older idea, manifest in our Republic since the time of the Founding but less evident in more recent discourse, points to a contrary conclusion; it proposes that religion has a special place and essential function in shaping the public philosophy of our civic order. In this instance, as in so much else, the older idea turns out to be the more timely and interesting.

I

It has often been noted that Kurland's basic idea has a para-

1. This collection consists of the following essays: Paul J. Weber, *Neutrality and First Amendment Interpretation*; Dean M. Kelley, "Strict Neutrality" and the Free Exercise of Religion; James M. Dunn, *Neutrality and the Establishment Clause*; Stephen V. Monsma, *The Neutrality Principle and a Pluralist Concept of Accommodation*; William R. Marty, *To Favor Neither Religion Nor Nonreligion: Schools in a Pluralist Society*; and Robert M. Healey, *Thomas Jefferson's "Wall": Absolute or Serpentine?*

2. Distinguished Teaching Professor and Chair, Department of Political Science, University of Louisville.

3. Fairfax M. Cone Distinguished Service Professor of the History of Modern Christianity, University of Chicago.

4. This collection consists of the following essays: William Lee Miller, *The Moral Project of the American Founders*; Harold J. Berman, *Religious Freedom and the Challenge of the Modern State*; James Davison Hunter, *Religious Freedom and the Challenge of Modern Pluralism*; Michael J. Sandel, *Freedom of Conscience or Freedom of Choice?*; Charles Taylor, *Religion in a Free Society*; and Peter L. Berger, *Afterword*.

5. Professor of Sociology and Religious Studies, University of Virginia.

6. Executive Director, Williamsburg Charter Foundation.

7. Professor of Law, University of Colorado.

doxical—some would say perverse—quality: It insists that when the first amendment singles out religion for special constitutional treatment of some kind, what the amendment really means is that religion *cannot* receive special legal treatment. This paradox is not necessarily vitiating. After all, other interests and institutions *can* receive special legal treatment (special subsidies, special burdens, and so forth); so one might argue that government *does* treat religion specially precisely by singling it out for mandatory *non*-special status. Nonetheless, its facial perversity might lead one to suspect that Kurland's idea provides a less than promising path to a more coherent understanding of constitutional religious freedom. And if one does harbor that suspicion, Paul Weber's book will do nothing to dispel it.

Weber complains in his Preface that the Kurland position, which he designates with the label of "equal separation," has been summarily dismissed by scholars and judges with "very little serious analysis"; the purpose of his book, therefore, is to assess the position "in a more focused manner." Given this prelude, what follows is quite a surprise. Weber's essay attempting to rehabilitate the Kurland position consists of thirteen pages of text. Of these, almost eight pages are devoted to introduction, definitions of alternative positions, and general historical background, leaving about five pages for the promised "serious" and "focused" analysis of the equal separation position. Weber notes, and tries to rebut, five major objections to this position; in most instances both the objection and its supposed refutation are presented within the space of a single paragraph. In short, the chasm dividing what is promised from what is delivered is immense.

Worse yet, in his efforts to rehabilitate the Kurland position, Weber in fact deprives it of its principal virtue—its apparent simplicity. For example, one common criticism of Kurland has been that his view would eliminate the possibility of so-called free exercise exemptions, which have offered a way to protect the rights of conscience of, for example, religious objectors to military service or Amish parents who decline to send their children to public high schools.⁸ Faced with this objection, a faithful follower of Kurland would presumably just bite the bullet and agree that such exemptions, because they use a religious classification to bestow a legal benefit, are unconstitutional. But Weber dislikes this outcome, it

8. The Supreme Court's recent decision in *Employment Division v. Smith*, 110 S. Ct. 1595 (1990), appears for practical purposes to eliminate the possibility of *constitutionally required* free exercise exemptions, but the decision leaves open the possibility of exemptions granted by legislatures.

seems; consequently, he suggests that when a facially neutral law has an adverse impact on religion, the law should be subjected to "strict scrutiny" and invalidated unless the state meets a heavy burden of justification.

Although Weber tosses off this concession almost casually, it in fact amounts to a drastic deviation from both the logic and the simplicity of Kurland's position. And in dealing with other constitutional problems, such as the issue of including religious institutions in state-funded public programs, Weber offers laundry lists of principles or criteria for managing such problems. These criteria are often sensible enough in their own right, but they typically have no discernible relation to Kurland's basic idea. In the end, it is very hard to tell how much of Kurland is actually left. But the elegance and seeming simplicity of his position have clearly been sacrificed.

In offering these criticisms, I do not mean to suggest that Weber's book is utterly without redeeming value. In fact, the book succeeds in being helpful and interesting roughly to the same extent—which is considerable—that it fails in achieving its ostensible purpose. For example, Dean Kelley's criticisms of equal separation are thorough and thoughtful. (Weber protests that Kelley has attacked the original Kurland position, not Weber's rehabilitated version. But given the sketchy and confused quality of the newer version, it seems that Kelley had little choice.) The essays by Stephen Monsma, dealing with issues of neutrality and pluralism, and by William Marty, discussing secularism in the school curriculum, are also insightful.

Indeed, Weber himself has perceptive and sensible things to say when he is responding to contributors' discussions of issues other than equal separation. For instance, he cogently tempers James Dunn's oration invoking selected Jeffersonian rhetoric in support of a "strict separation" position. (Dunn's contribution is noteworthy in its own right, I might add, principally because it shows that the devotees of "strict separation" are not going to be discouraged by anything so trivial as decisive historical evidence contradicting their position.)

In sum, *Equal Separation* is a book worth looking at. Just don't expect much positive illumination about "equal separation."⁹

II

Articles of Faith fits into a body of recent work that seeks to

9. For a more serious and focused attempt to revive Kurland's position, see Mark Tushnet, "Of Church and State and the Supreme Court": *Kurland Revisited*, 1989 Sup. Ct. Rev. 373.

revive the notion that our Republic requires a public philosophy, and that religion must be a major contributor to that philosophy. In part because of its venerable historical pedigree, this notion seems a potentially promising source of insight. In addition, the contributors to *Articles of Faith* include scholars of the first rank, including Charles Taylor, Michael Sandel, Harold Berman, and Peter Berger. These features—excellent scholars exploring a perennially interesting idea—create high expectations for the book.

Such expectations are at least partly fulfilled. The essays in the book are generally scholarly and perspicacious. The chapters by Taylor and Sandel provide short but lucid discussions of the relation of religion to ideals of community, public virtue, and civic freedom. Berger's afterword usefully describes the significance of religion and religious freedom in shoring up the more general conception of limited government against an encroaching statism.

The essays also generally exhibit an admirable balance, eschewing partisan advocacy. James Davison Hunter's effort to sort out and assess the various claims that surround the divisive issue of "secular humanism" is as careful and balanced as any treatment I recall reading. And William Lee Miller attempts to steer a middle course between interpretations that present the Founding either as a secular and secularizing revolution or as the initiation of a "Christian nation."

But like any book, this one has its shortcomings. In a sense, these grow out of its virtues: its balance, and its struggle to occupy a middle ground. An essay can be *so* balanced that it becomes bland. Miller's essay seems to me a case in point: In his effort to give both the "secular republic" and the "religious nation" positions their due, Miller ends up saying, it seems, that both positions are approximately right—except to the extent that they say the other position is wrong. Religion, Miller declares, was *not* a "necessary foundation" for our republican institutions; but it *was* "important." It is hard to know just what this means; such a diagnosis begins to look less like incisive scholarship and more like academic diplomacy.

If balance can lead to blandness, then blandness can nurture a kind of shallow complacency. For example, after a useful discussion of the historical transformations that have given shape to current controversies about religious freedom, Harold Berman notes that these controversies appear in acute form in debates about the public school curriculum. But he hastily reassures: "Yet it is hard to imagine that conflicts among religions, as well as conflicts between theistic religions and various forms of so-called secular humanism, could not be presented in a classroom setting openly and

fairly to all sides.” On the contrary, what is hard to imagine, for me at least, is how Berman can be so sanguine. Nothing in our modern experience would seem to justify such optimism.¹⁰

Blandness, diplomacy, easy optimism—these qualities recur throughout the volume. If there is a single unifying theme to the book, it is that religion can be incorporated into our public philosophy without being offensive. Os Guinness’s introduction calls for the renewal of a “public philosophy” consisting of “a widely shared, almost universal, agreement on what accords with the common ideals and interests of America and Americans.” Although religion will contribute essentially to this “almost universal” agreement (perhaps because it is only religion that can promise the miraculous?), the public philosophy will not be a “civil religion” because it will “not require the common affirmations to be regarded as sacred or semi-sacred in themselves.” The book concludes by reproducing the Williamsburg Charter, which echoes these themes: Religious beliefs should be permitted to influence public policy, but they should be presented in a non-inflammatory way and in the form of “publicly accessible claims.”

In short, religion should be admitted into public discourse; but insofar as religion, or a particular religion, may be grounded in sources that are not “publicly accessible”—sources such as scripture, revelation, or ecclesiastical authority—the price of admission may involve a sacrifice of the religion’s distinctively religious character. But *can* religion be domesticated in this way? And would religious believers even *want* their religious beliefs to be counted on these terms? One can imagine the proponents of the Williamsburg Charter pleading with Isaiah or Jeremiah: “*Of course* we want to hear what you have to say. But could you please just drop all of the ‘Wo unto them’s’ and ‘Thus saith the Lord’s.’ Some people get offended by that stuff.”

One wishes that the contributors had given more careful attention to questions such as these. What underlies the book’s “Articles of Peace” theme is a laudable effort to find common ground in a diverse society—and a cheerful confidence that common ground is there for us if we will just try a little harder to be civil with each other. It would be nice if this were so. But one is entitled to be skeptical. Such skepticism, however, does not negate the contribution of these essays to the exploration of what in our Republic has been and is likely to remain a crucial issue of civic self-definition.

10. The William Marty essay in the Weber collection offers an effective antidote to such complacency on the issue of the school curriculum.