

GUEST EDITOR'S PREFACE

It is a great honor to welcome to the pages of this journal the Honorable Sandra Day O'Connor, Associate Justice of the Supreme Court of the United States. Justice O'Connor is the first member of the Court to contribute to this journal. In less than a decade on the Court, Justice O'Connor has contributed significantly to the Court's jurisprudence on the Religion Clauses. For example, in her first opinion in this area¹ she suggested that the principal focus of establishment clause analysis should be on government endorsement or approval of religion: "Endorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community. Disapproval sends the opposite message."²

In her foreword to this issue of the *Journal of Law and Religion*, Justice O'Connor notes both that a majority of the Court recently incorporated this perspective into its establishment clause analysis in *Allegheny County v ACLU Greater Pittsburgh Chapter*,³ and that the Court is likely to continue to debate the meaning of this provision of the Constitution for the foreseeable future.

This issue of the *Journal* is devoted to the theme of religion in American public life. Regrettably, this was one of those themes that frequently generated more heat than light in the past decade. In two-year spasms that happened to recur with national elections, tired old saws about the "wall of separation" got trotted out in editorials warning about the danger of religious participation in American politics. One commentator urged that the purpose of the Religion Clause of the First Amendment was "to remove the last vestige of religion from public life." Sounds like something one should do to slavery, not religion. Describing the perspective of those who urge the removal of religion from public discourse, Pastor Richard John Neuhaus coined the phrase, "the naked public square." Such a square, reminded Neuhaus, is a dangerous place for minorities; and in any event it does not remain naked for long, but gets filled up with the discourse and meaning of the state's ideology. Arguing for a Madisonian pluralism of voices, Neuhaus wrote:

-
1. *Lynch v Donnelly*, 465 US 668 (1984).
 2. *Id* at 688 (O'Connor concurring).
 3. 109 S Ct 3086 (1989).

The chief threat [of totalitarianism] comes from a collapse of the idea of freedom and of the social arrangements necessary to sustaining liberal democracy. Crucial to such a democratic order is a public square in which there are many actors. The state is one actor among others. Indispensable to this arrangement are the institutional actors, such as the institutions of religion, that make claims of ultimate or transcendent meaning. The several actors in the public square — government, corporations, education, communications, religion — are there to challenge, check, and compete with one another. They also cooperate with one another, or sometimes one will cooperate with another in competition with the others. In a democracy the role of cooperation is not to be deemed morally superior to the roles of checking and competing.⁴

Perhaps one reason for the confusion in the past decade over the proper role of religion in public life is that, for all our bicentennial celebrations, we suffer as a nation from a massive dose of historical ignorance. I teach law students who do not know that Martin Luther King, Jr., was a pastor. We have forgotten how religion shaped American politics — for good and for ill — from the dawn of the republic. This issue of the journal is meant to provide a healthy antidote to our collective amnesia.

Another reason for the recurrent fear of the religious voice in politics during the past decade might simply be that we need a new scorecard with the names and numbers of the players. Some players who formerly dominated the game, such as the evangelical Christians of the 1920s, moved to the sideline when their hegemony was lost. Now that they are returning to the playing field, their entitlement to a voice in American politics should be acknowledged on an equal basis with the voice of other perspectives.

Because of the phenomenal increase in members of world religions, there are new religious voices in American politics as well. In 1950 Will Herberg helped to shatter the notion that America is a Protestant country with his classic study, *Protestant, Catholic, Jew*. If he were writing this volume in 1990, he would have to acknowledge that there are more Muslims than Jews in America today and that the past decade has witnessed a sharp increase in the number of those

4. Richard John Neuhaus, *The Naked Public Square: Religion and Democracy in America* 84 (Eerdmans, 1984). Editor's note: Because so much of the literature cited in this issue of the journal is "non-legal" in a traditional sense, I have thought it appropriate to give bibliographical references in this issue in the manner indicated by *The University of Chicago Manual of Legal Citation* (Lawyers Co-operative, Bancroft-Whitney & Mead Data Central, 1989) rather than in the traditional "Bluebook" form.

who indicate no religious preference whatever. This dramatic shift in demographics, however, need not erode American values, provided that we maintain a Madisonian commitment to pluralism, and that we work hard to move beyond stereotyping the perspectives of others. For example, when evangelicals and fundamentalists again became active politically in the 1970s, few of their opponents knew or cared to find out about important differences between these groups. The Moral Majority and the 700 Club, the Sojourners and Evangelicals for Social Action — all blurred indistinguishably in the eyes of those who lumped these very different voices together, typically in a derogatory manner and often inaccurately. This issue of the journal tries to set some of these categories straight, in an effort to alleviate the present fear of pluralism of religious voices, whether from the left or the right, whether new or old.

Conflict over religion in public life simmered just below the surface, and when the battle erupted from time to time, it frequently produced anomalies. Liberals sometimes behaved censoriously, forgetting Milton's argument in Cromwell's day that censorship is not a good policy even in wartime. Although religious liberty is an important bulwark against the ever increasing demands of the regulatory state, Conservatives sometimes failed to defend religious liberty with the vigor necessary to safeguard the first of our freedoms.

This issue of the journal features prominently the text of the Williamsburg Charter, one of the most significant efforts of the celebration of the Bicentennial of our Constitution. It has not only helped Americans to appreciate the distinctive historical contribution made by the Religion Clauses of the First Amendment. It has also given new meaning to pluralism by engaging national leaders of a very wide variety of views about religion and politics, from President Jimmy Carter to President Gerald R. Ford, from Senator Edward M. Kennedy (D-Mass.) to Senator Strom Thurmond (R-S.Car.), from Norman Lear of People for the American Way to Beverly LaHaye of Concerned Women of America, from Coretta Scott King to Phyllis Schlafly.

The Charter effort was not bicentennial hoopla or self-congratulation, but a public commitment to serene reflection and decisive action about a matter that has, on occasion, become intensely divisive and destructive of civil discourse and a common purpose in the search for a public philosophy. The list of national signers is included here because it reflects the broad diversity of walks of life — politics, religion, business, education, labor, law, the media, medicine, minorities

and ethnic groups, senior citizens and youth, and voluntary organizations — that came together for the signing of this document.

The articles section explores central themes of the Charter. We have been fortunate to secure the comments of five of the drafters of this document, William Ball, Os Guinness, Dean Kelley, Richard John Neuhaus, and George Weigel.⁵ In “Tribespeople, Idiots or Citizens?,” Dr. Guinness provides a rich introduction to the principal purpose of the Williamsburg Charter, the reforging of American public philosophy through chartered pluralism. Judge Arlin M. Adams and his colleague, Professor Charles J. Emmerich, suggest that although William Penn is not expressly cited or even referred to by name in the Williamsburg Charter, his seminal ideas about religious freedom pervade the document and have made a lasting contribution to the American heritage of religious liberty. J. Bryan Hehir, a prominent Roman Catholic social ethicist, reflects on approaches in his religious tradition to “Responsibilities and Temptations of Power,” proposing three criteria for those who contend in the public sphere over their deepest (religious) differences: technical competency, civil intelligibility and public courtesy. In “The Intermeddling Manifesto,” Dean M. Kelley, a drafter of the Charter who has served as the Executive for Religious Liberty of the National Council of Churches for over three decades, provides a provocative review of the historical involvement of religious bodies in affecting public policy in the United States. Richard John Neuhaus, President of the Institute for Religion and Public Life, who also served as a drafter of the Charter, offers a substantive view of what must be contended for if what he calls “the Pfefferian inversion” of the purpose of the religion clause is to be overcome in the future. Douglas Laycock, a distinguished church-state scholar, comments on the ominous sign in *Employment Division v. Smith*⁶ that religious freedom will not be accorded its previous status as one of the preferred freedoms meriting special judicial concern. Samuel Rabinove, Legal Director of the American Jewish Committee, explains “How and Why American Jews Have Contended for Religious Freedom: The Requirements and Limits of Civility.” William Bentley Ball, a well known litigator in the church-state arena who also served as a drafter of the Charter, rebuts three criticisms of the Charter: that the Charter denigrates the Constitution as law, deni-

5. The only drafter of the Charter who was unable to provide a commentary was Nat Hentoff.

6. 110 S Ct 1595 (1990). It should be noted that Justice O'Connor did not join the Opinion of the Court in *Smith*.

grates the intent of the framers, and sacrifices constitutional principles for the sake of consensus. In keeping with the Charter's commitment to pluralism, I invited John M. Swomley, who chairs the Church-State Committee of the American Civil Liberties Union and who declined to sign the Charter, to explain several things that he finds wrong with the Charter; he rejoices in the very secularity of American society that the Charter seems troubled about. George S. Weigel, Jr., President of the Ethics and Public Policy Center, concludes this section with an essay explaining that disagreement — such as that between Ball and Swomley — is not to be assumed, but must be achieved through a deliberate turn from indifference to authentic pluralism.

The Charter was signed publicly at the First Liberty Summit in Williamsburg, Virginia on June 28, 1988, the bicentennial of the call for a Bill of Rights by the State of Virginia. The next section reproduces the flavor of the celebration and commitment that occurred at that event. Eric Sevareid served as Master of Ceremonies. Irina Ratushinskaya, the Russian poet who served in forced labor, read several of her "Poems of a Prisoner of Conscience." Also included are the brief remarks of representative signers of the Charter: Dr. Benjamin Hooks, Senator Mark O. Hatfield, Dr. Robert P. Dugan, Dr. Arie Brouwer, Dr. James Dunn, Rev. Thomas Gallagher, Very Rev. Leonid Kishkovsky, Mr. Samuel Rabinove, Elder Dallin Oaks, Imam Wareeth Deen Muhammad, Hon. Alonzo L. McDonald, and Mr. William J. Flynn. This section concludes with the keynote address, delivered by Dr. Billy Graham.

In a major effort to stimulate discussion of the principles of the Charter throughout the country, the Williamsburg Charter Foundation sponsored "First Liberty Forums" in Atlanta, Baltimore, Boston, Los Angeles, New York, and San Francisco during the fall and winter of 1988. The next section of the journal contains the remarks of the principal speakers at these civic events: Rev. John Buchanan, Rev. Robert P. Dugan, William J. Flynn, Most Rev. John L. May, Hon. Alonzo L. McDonald, Thomas Neumann, Samuel Rabinove, Kathleen Kennedy Townsend, Elie Wiesel, and myself.

In December, 1987, the Center for Communication Dynamics of Washington, D.C., conducted a national opinion survey on religion and public life. Sponsored by the Williamsburg Charter Foundation, the survey was analyzed and interpreted by Professor James Davison Hunter of the Department of Sociology, University of Virginia. Professor Hunter explains the methodology of the survey and reports the

principal findings of this survey, focusing on the activism of religious leaders, the limits of tolerance in American society, the place of religion in Presidential politics, and on religion in the classroom. Further comments on the survey are provided by Professor Hunter, Rabbi Alan Mittleman, Dr. Guinness, and myself.

After the preparation and dissemination of the Charter itself, the most significant project sponsored by the Williamsburg Charter Foundation was entitled "Living With our Deepest Differences: Religious Liberty in a Pluralistic Society." The centerpiece of this project is a curriculum guide for teaching about religion in the upper elementary, middle, and high school grades of public schools. The fifth section of the journal contains an excerpt from this teacher's guide written by Dr. Charles Haynes. We also reprint two sets of questions and answers concerning teaching about religion in public schools and concerning the observance of religious holidays in public schools. Like the Charter, these documents drew support from a broad coalition of educators, religious organizations, and civil groups active in American public education.

In keeping with the *Journal's* commitment to reproduce the texts of significant documents relating to religion and law, this issue contains the "Statement on Religious Freedom in America" produced by a group of Muslims and Roman Catholics in Los Angeles shortly after the Williamsburg Charter became public. This statement refers to the Charter at several points in its reflections on the mutuality of Muslim and Roman Catholic experiences of religious freedom in this culture. The statement observes the sad reality that both groups have been the victims of religious persecution and bigotry in America, but rejoices in the commitment to religious freedom guaranteed in our constitutional order. This section also contains the text of "God Alone is Lord of the Conscience," a policy statement adopted in 1988 by the 200th General Assembly of the Presbyterian Church (U.S.A.). This statement does not refer expressly to the Charter, but it does reflect the spirit of this document in its treatment of the harmonious interrelation of the two principles of the religion clause, and in its rich treatment of many difficult issues that religious bodies must face if they are to keep their priorities — first of all, the sovereignty of God — intact in contemporary America. Finally, we include here a translation of the Statute on Freedom of Conscience and on Religious Organizations adopted by the Supreme Soviet of the USSR on October 1, 1990. Professor Harold Berman of Emory University School of Law is well known to the readers of this journal as one of the founders

and central figures in the contemporary movement exploring the connections between law and religion. He is also a renowned expert in Soviet law. Professor Berman was instrumental in suggesting improvements on the draft statute that culminated in the text reprinted here.⁷

This issue of the *Journal* is rounded out by a major book review section that comments on all the major literature published in the past decade on religion and public life. No attempt has been made to divide this section into brief reviews and longer review essays. The contributions are organized alphabetically according to the author of the volume under review. Our attempt here was to be inclusive of all major contributions to this theme from a variety of disciplines — history, law, philosophy, political science, sociology, and theology — and to present fair, balanced discussion of these contributions from many points of view. We may have missed one or two significant volumes, and we surely could have heard from more voices, but we can always rectify that in future issues of the *Journal*.

On behalf of all of my colleagues in the *Journal of Law and Religion*, I wish to acknowledge that The Earhart Foundation supported the preparation of this special issue of the *Journal* with a generous grant. We are also grateful to William J. Flynn, Chairman of the Board and Chief Executive Officer, Mutual of America, for generous support from his company that enabled us to distribute this issue of the *Journal* to a wide variety of public officials, teachers, and leaders of the business and religious communities concerned with the vital issues addressed here.

Finally, it has been a pleasure to serve on the editorial board of the *Journal* since its inception in 1982. I am especially grateful to the Senior Editor Emeritus, Michael Scherschligt, for his unflagging leadership and solid commitment to this enterprise. As I conclude this effort as Guest Editor, I note that the first generation of editors has now been succeeded by a new generation. Michael and his co-editor Wilson Yates have turned over their responsibilities to Marie Failinger and Patrick Keifert. I have handed over my responsibilities as Book Editor to Howard Vogel. My hope is that the next generation of *Journal* editors may do a better job than the first, and that the *Journal* will thrive and grow under their guidance and leadership. I

7. See Harold J. Berman, Irwin N. Griswold, and Frank C. Newman, *Draft USSR Law on Freedom of Conscience, with Commentary*, 3 *Harv Human Rts J* 137 (1990).

am pleased to report that every contact that I have had with the new editors over the years gives solidity to this hope.

Edward McGlynn Gaffney, Jr.
Guest Editor