BOOK REVIEW

James Davison Hunter and Os Guinness, eds., *Articles of Faith, Articles of Peace: The Religious Liberty Clauses and the American Public Philosophy* (Washington, D. C.: The Brookings Institution, 1990), Index, 168 pp. Gary Wills, *Under God: Religion and American Politics* (New York: Simon and Schuster, 1990), Index, 445 pp.

Reviewed by W. B. Allen[*]

The Supreme Court's 1990 decision in *Employment Division, Department of Human Resources of Oregon et. al. v. Smith et. al.* inflamed legal experts of the Christian right. They thought themselves betrayed by the "conservative justices" whom they labored to elevate to the bench, while the liberals, whom they had opposed (Blackmun, Marshall, Brennan), and O'Connor, whom they suspected, sprang to the defense of religious liberty.

The shock even produced a not very veiled appeal to the Democrat Party to become "champions of religious liberty" and to discover "an open door to our hearts."[1] This appeal made sense in the context, because religious conservatives are not so strongly affected toward "economic conservatism," which they often regard as the special interest of an elite. The outrage produced by this one decision goes a long way to illustrate confusions surrounding religious freedom issues and the role of religion in American politics.

Justice Scalia wrote for the majority in *Smith*, ruling that, where Oregon had criminalized the use and possession of peyote, such use was sufficient reason to deny unemployment compensation to individuals who had lost their drug counseling jobs because of it. Job-related misconduct is a familiar ground for denying unemployment claims, and the fact that the individuals involved used peyote only as part of a long-standing religious ritual did not alter the case.

There is no exemption for religious practices, Scalia wrote, where laws generally applicable without regard to religion proscribe or prescribe certain conduct. The "free exercise" clause of the First Amendment is not a trump to override otherwise constitutional legislative rules.

The *Smith* decision, in the opinion of certain dissenting or protestant sects, leaves the protection of religious practices up to majority rule political processes, at least where legislatures do not expressly aim to regulate religious practices; for "Congress [and now the States] shall make no law respecting the free exercise of religion."

Justice O'Connor agreed with this criticism, although she too upheld the denial of the unemployment claim in *Smith.* She reasoned that a blanket principle of general laws generally applied paid too little heed to vulnerable "free exercise" claims that might be unintentionally or heedlessly impinged by the state. Accordingly, O'Connor insisted that the Court was obliged to apply its shop-worn "compelling governmental interest" test in order to judge whether the effect of a given general law on particular religious practices in particular cases, should be acceptable. In short, she preferred a case-by-case jurisprudence, the judges weighing Solomon-like each new tension in church-state relations and thereby safeguarding minority religions from heedless majorities.

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[*] Prepared for *Reason*, but not published by them.

[1] Michael Farris, "Conservatives Declare War on Religious Freedom," *The Home School Court Report,* vol. 6, no.2, 1990.

What most interests us in this controversy is the posture of those dissenting and protestant sects—often called fundamentalists—who esteem the O'Connor approach as *necessary* to their enjoyment of religious liberty. As the liberal Court dissenters observed, through Justice Blackmun, Justice Scalia's position effectively depends upon the political process to resolve church-state tensions that do not derive from malignant intentions towards religion. To that extent the *Smith* decision was the most palpable backing away from the *Carolene Products* decision (1938)[2] we have yet seen.

The latter case established the Court as the special protector of religious and racial minority rights and specifically *against* the legitimate outcomes of "ordinary political processes." Thus, the Scalia-led Court would renew faith in ordinary politics to protect minorities. The American Indian religion at stake in *Smith* was just the sort of traditional minority interest the Court heretofore attempted to shield from majority power identified as mainly white and protestant.

It is therefore paradoxical that the main outcry against *Smith*—and the demand for a continued *Carolene*-like Court supervision of minority rights—should have come from mainly white dissenting and protestant sects, of the sort that has characterized the United States from the colonial era.

This observation plainly suggests that the Christian right views itself not as a majority (silent, moral, or otherwise) but a minority, a besieged minority. This outlook naturally suits the historical temper of dissenting and protestant sects, which have generally viewed themselves as besieged remnants, contending against superior numbers in the forces of darkness but with expectation of a final vindication by supra-mundane judgment.

In terms of American politics this means that the Christian right ever sees itself, not as giving the law to society but rather, as resisting with might and main the evil tendencies of laws necessarily imposed by the godless. When such individuals speak of the United States as a Christian nation, they do not thereby offer a scatological opinion poll. They mean rather that it is a nation founded by remnants such as themselves and dedicated ultimately to the glory of God, whether acknowledged by temporal powers or not. They seek, therefore, the most expansive forms of religious liberty, including uninhibited free exercise for dissenting sects. That makes school prayer of special significance. For, in the presence of compulsory education, one enacts thereby the dramaturgy of surrendering one's body to the state while reserving one's soul to God.

Separation of church and state in these terms is not an either/or proposition. It is rather a state of dynamic tension in which public professions of faith grow in significance in direct proportion as the influence of the state expands. We cannot therefore hold to the simple-minded formula, the more state power, the less religion; the more religion, the less state power. Separation of church and state properly understood actually fosters more of each.

This truth eluded Garry Wills in *Under God: Religion and American Politics.* His morality play version of the influence of religion in American life offers almost nothing to think about save for Wills' own generous contempt for much that is American. His gleeful—though not always correct—corrections of the grammatical or philological errors of fundamentalists disclose the temper of his analysis, as his tacit revelation of his "point of view discloses its goal.

Wills anticipates a "cultural war" (borrowing Bork's phrase) in the form of "religious attacks on pornography, homosexuality, abortion, and the eroticism of rock music and television." One need only substitute "defenses against" for the expression "attacks on" in the foregoing quotation to discern Wills' point of view. And his book would doubtless have benefited had he taken the trouble to do so himself—

[2] 304 U. S. 144, 152, n. 4.

that is, to phrase sympathetically the understandings of the people whom he opposes.

Wills quite literally searches for the religion in American politics—i.e., religion as a means to political ends. His analysis does not rise above that narrow view, whether considering Gary Hart or Abraham Lincoln, Jessie Jackson or Thomas Jefferson, despite Wills' recognition of the extraordinary religiosity of the American people. The problem seems to be that he has not conceptualized religion in America—i.e., a religiousness independent of politics. Even as he rehearsed the evolution of fundamentalism he embedded it so deeply in political and legislative considerations that he failed altogether to convey a sense that religion has its own "raison d'état."

Consider, for example, how widely Wills misses the point in one of the most sensible passages in his book:

> The argument for military chaplains often alleges the need for control by military superiors, revealing the actual priority in this matter [James Madison's proposal for voluntary chaplaincies]. When, rarely, a chaplain objects to military actions, he is treated as an ingrate or traitor who has taken the state's money, put on its uniform, and then refused to accept military discipline. Does anyone doubt there would have been more religious freedom to scrutinize the morality of military [read: government] action if its chaplaincies had been voluntary?

Wills in effect understands religious freedom as a dimension of political dissent—the ability to criticize government action for moral reasons akin to criticisms on aesthetic, intellectual, or political grounds. This is of course a highly valued aspect of democratic life, yet it has almost nothing to do with the defense of religious liberty. Rather, here as in the public school debate the point is that man's religious life is independent of the needs of the state. Accordingly, the state *never* has any business taking a man under coercion and forcing him to enter into any practice whatever without the reasonable exercise and accoutrements of his faith. Religion's interest is less to criticize politics than to thrive despite politics.

Although Wills pleads for our taking religion seriously, as having so profoundly and persistently influenced American po1itics, we never know how seriously to take Wills. When he claims that Lincoln's "theological insights" merely "echoed back the black religious tradition," one does not know if he means to derive black religious tradition independently of the powerful dissenting and protestant tradition in the United States, or if he makes such nonsense distinctions for no better reason than to privilege an otherwise patronizing attitude toward black religion. The latter would be indicated if one had to take seriously his broad generalizations—incorrect so far as I know—about black churches, such as, that it was common for bastard offspring there to identify themselves with Jesus. Blasphemy was cause for a slap across the face in my boyhood, not a privilege of the "battered black family, " Jesse Jackson's experiences or claims to the contrary notwithstanding.

America seemed once to be a country in which religious arguments were generally understood. That is no longer the case. It is a serious question, therefore, though one Wills does not ask, whether it is necessary in such an environment for religious principles to generate conflict. On the theory that the opposite of religious or sectarian principles is secular principles, it would follow that conflict between religious and secular exponents must ensue.

It remains a question, however, whether secular advocates assume by right the title of spokesman for the public or the state. The first claim may be readily dismissed: if the principle of religious liberty means in some way the public profession of faith, there is no necessary congruence between secular and public views. The state, next, would not seem to occupy the public realm exclusively, if we are willing to admit that the claim of secular advocates to speak for the state may survive the refutation of their claim to speak for the public. In this new view the public space is a space in which the secular and the sectarian

contend for dominance, the one represented by the state, the other by religion or the church.

This view in turn has its own difficulty; namely, to resign the state to the secular is to deny to the church a claim on the state's powers for non-sectarian purposes. This either/or view of the separation of church and state gives the advantage to secular principles with respect to state power. Little wonder the religious are unwilling to concede that view! They prefer, instead, to see secular views as competing views of the human good and therefore arrayed among all religious views in a contest for moral authority. It is hard to see how secular advocates can avoid that result without forswearing *all* concern whether positive or negative with any moral questions or, what is the same, any questions of ends.

In this view, then, the instrumentalities of the state are open to be wielded by whatever moral authority ultimately predominates. But the separation of church and state would seem to have little purpose on this view, unless, of course, its purpose transcends politics itself and hence the temptations of politics.[3] Religious liberty understood as a decisive, public commitment to the advance of religious sentiment might fulfill such a scheme. That argument states in brief the general thesis of the several essays in *Articles of Faith, Articles of Peace*. Further, the "Williamsburg Charter," which is published as the coda to that work, explicitly interprets religious 1iberty as the guaranteed opening of "every public forum" to religious expression. This collection of essays does precisely what the Wills' book fails to do; it situates religion, not in American politics, but in America as integral to national life. As the Charter expresses it, though there is a distinction, there is "not a separation, between religion and politics."

The essays derive from a national symposium held at the University of Virginia in 1988. Several institutions combined in this Constitution bicentennial project—to wit, the Brookings Institution, The Center on Religion and Society, and the Virginia Commission on the Bicentennial of the U. S. Constitution. The seven essays survey the grounds of religious liberty in the First Amendment. William Miller wrote on the "Moral Project of the American Founders." Harold Berman wrote of "Religious Freedom and the Challenge of the Modern State," while James Hunter wrote of the challenge in regard to "Modern Pluralism." Michael Sandel wrote of "Freedom of Conscience or Freedom of Choice" and Charles Taylor of "Religion in a Free Society." Peter Berger wrote an "Afterword."

In at least one respect the high point of the book occurs in the "Introduction" by editor Os Guinness. He summarized the general aim of the book in terms of three judgments about contemporary politics and religion:

> first, that a period of recurring conflict (most notably between 1979 when the Moral Majority was founded and 1989 when it closed its doors) has left the nation with the urgent need to clarify the role of religion in public life; second, that the best way to clarify this relationship lies in reaffirming the place of religious liberty in the common vision of the common good, ...and third, that the present situation directly confronts Americans with a threefold choice...[to] respond as 'tribes-people,' in the sense of those who seek security in a form of tribal solidarity..., or as 'idiots,'...the totally private person oblivious to the importance of 'civility,' or as 'citizens.'

This constitutes the high point precisely because, while the following essays discuss religion's contribution to the "public philosophy" in ways meant to fulfill this aim, they do not quite arrive at the grounded affirmation this introduction calls for.

Miller shows a set of founders who are properly far-seeing but whose provisions did not suffice to

[3] "*Religious liberty* is rooted in the very nature of man and, when the state recognizes it, the state ipso facto bows before a sovereignty that radically transcends every worldly manifestation of power." Berger in Johnson and Guinness, p. 118.

provide sight for their progeny. It was rather more their vigorous republicanism than any peculiar political or religious insight that accounts for their political success—"creatures of their time," they outlived their time only because they were so strongly committed to living in it thoroughly! Their characters more than their ideas—as Miller cited John Dewey's erroneous view of George Washington—bore the ripe fruit of republicanism.

Harold Berman asked the right question—what did religion mean at the founding—preparatory to undertaking a consideration of religious freedom. Because he pays attention to details he usefully reminds the reader that the First Amendment mentions neither church nor state. This leads ultimately to recovery of the sense that, "in matters of social life that have a significant moral dimension, government [then] was the handmaid of religion," while that relation is reversed in twentieth century America. Nevertheless, Berman implicitly attributed this prior relation to the operation of majority sentiment rather than to any intrinsic virtue in this division of social labor. The pervasiveness of protestantism—consensus—more than principle accounted for this relation. Similarly, *an* increasing diversity of sects since the first years of the republic has attenuated the influence of any religion. A new majority now operates to obstruct or at least minimize religious influence in important social works.

Interestingly, however, the sermons that in the eighteenth or nineteenth centuries justified religious guidance for government never appealed to majority rule; they appealed to "the Christian covenant of works between God and man as well as the mission of public servants to maintain civic virtue." In short, the mere diversification of sects—or the introduction of different views—is insufficient to account for the receding of religion in public life as a matter of principle. Berman ends his essay by recognizing the importance of this question but without taking it up. Thus, we have no further guidance as to why or even how religion and government might cooperate with each other without peril of "establishment" and without restriction upon "free exercise."

After Berman the question is clear: religious, liberty neither requires nor necessarily entails religious pluralism. Thus, the contemporary habit of equating religious freedom with religious pluralism—which Wills shares—is fundamentally misguided. But, if religious freedom does not equate to religious pluralism, what are the acceptable limits of religious pluralism?

It is precisely here that the famed divergence between secular humanists and sectarians emerges most clearly, since the former take unlimited pluralism as exhausting the definition of religious freedom, while the latter read the guarantee of liberty as a guarantee of the active agency of true faith in the public realm. James Hunter writes of this difficulty with illumination, particularly the identification of "mainline" churches with the secular tradition and thus with the new majority opinion or consensus structuring public life.

It is here that we see that what was thought to be true of eighteenth and nineteenth century protestantism—dependence upon majority rule for its influence and as a matter of principle—is indeed true of twentieth century secularism. Indeed, without the shield of government—especially Court supervision—secularism probably could not compete with religion for moral authority, predicated as it is upon skepticism about all moral authority.

Hence, the provisions that guaranteed religious liberty on the assumption of the active agency of religion in the society differ profoundly from such provisions as are compatible with secularism. Perhaps this is summed more clearly as follows: religion claims, and has a right, while secularism forswears, to aim at a privileged position in civil society. In an era when the state is dominated by the secularist view, it may be that this right cannot be preserved by religion except in antagonism to the state.

The essay by Michael Sandel is, in some respects, the best of the collection. It rigorously distin-

guishes “freedom of conscience” from “freedom of choice,” rightly seeing that the latter operates to “privatize” and hence neutralize religious faith. Whereas freedom of conscience may be intrusive—revealing the compulsion of duty, freedom of choice hardly rises above a sentiment. This is most tellingly revealed in the contemporary debate over abortion when males, as a matter of “personal” choice, oppose abortion but defend for others (ideally, females) the freedom to choose!

Peter Berger establishes the just measure of the question here at issue by declaring at the outset of his discussion that no human institution is “more imposing and (at least: potentially) more oppressive” than the modern state. For those who regard religious institutions as superstitious and oppressive it is useful to remember that the ravages of intolerant religion have almost universally been accomplished by means of state power. As a matter of reality, it is far less the bigotry than the power to impose it that has fueled the religious wars. When we are alert to the odor of bigotry but neglect to heed that power that grows far removed from bigotry (to all appearances), we do more to endanger liberty than ever did the too credulous adherents of a vain superstition.

This is the understanding that seems to underlie the Williamsburg Charter. This Charter, was promulgated to the nation by some one hundred signers, whose plea for a reaffirmation of democratic faith and fundamental rights speaks revealingly of current confusions. How else to account for the need to declare, “Religious liberty in a democracy is a right that may not be submitted to vote and depends on the outcome of no election?” Close behind this admonition is the warning that religious liberty is more imperiled by “government control over personal behavior and the institutions of society” than by any direct regulation of religion per se. Such observations, and the principles on which they stand, persuade the signers that religious freedom is the opening to religious renaissance, that a greatly increased religious influence in the society will be the consequence of enhanced religious liberty.

Enhanced religious liberty seems to demand religion acting on its own, and even receding from connection with the contemporary state. It seems further to favor those besieged faiths, otherwise unprivileged in the current political climate. Rather than to rely upon the special protections of a Court whose powers grow hand in hand with those of the state itself, besieged faiths would be better advised both to adhere to a self-denying ordinance with respect to the direct influence of the state and also to inculcate as a matter of doctrine the principle that the state’s authority over social matters of significant moral importance ought to be diminished in proportion as religion’s authority over the state is diminished.

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