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Charles R. Strain

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### Recommended Citation

Charles R. Strain, *Permissible Accomodation and Inclusive Pluralism: A Response to Judge Arlin Adams*, 37 DePaul L. Rev. 357 (1988)

Available at: <https://via.library.depaul.edu/law-review/vol37/iss3/4>

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# PERMISSIBLE ACCOMMODATION AND INCLUSIVE PLURALISM: A RESPONSE TO JUDGE ARLIN ADAMS

*Charles R. Strain\**

In a chilling rain early last spring I stood at the Daley Center in Chicago waiting for a chance to view one of the four existing “originals” of the Magna Carta. When my turn to enter the darkened trailer of the traveling exhibition finally came, I saw a vellum sheet whose words, muddled by centuries of oxidation, were indecipherable. Driven to my encyclopedia to retrieve what the Magna Carta actually said, I entered a world whose basic presuppositions were alien even to a person trained as an historian. Yet, I was able to imagine the outrage of those English barons had they known that their definition of “freemen” would be broadened to include the likes of this descendant of Irish peasants.

I preface this discussion to give existential ballast to what I perceive to be the common working assumptions of jurists and scholars of religion: Culture, any culture, is a conversation with its past and an ongoing argument among contemporaries about the meaning of that past. We continue to be shaped by the charter documents of our culture, whether religious or secular, because they are classics in the precise sense that they manifest an enduring power to provoke new forms of thought and action. They are statements written, as the anti-Federalist Richard Henry Lee said of the Bill of Rights, “for ages and nations yet unborn.”<sup>1</sup> But, we also develop revised versions of the past in the necessary attempt to make it not alien but usable.

## I. THE QUEST FOR THE HISTORICAL INTENT OF THE FOUNDERS

Judge Adams, in making his case for a zone of “permissible accommodations” separate and distinct from “forbidden accommodations” and “mandatory accommodations” of religion, immediately interprets both the

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\* Charles R. Strain, B.A., M.A., Duquesne University; Ph.D., University of Chicago. Dr. Strain is an Associate Professor of Religious Studies and Director of the Master of Arts in Liberal Studies Program at DePaul University.

Judge Arlin Adams, United States Court of Appeals for the Third Circuit, 1969-87, spoke at the Fourth Annual Lecture hosted by the DePaul University Center for Church/State Studies on April 2, 1987. Judge Adams was assisted in his written summary of his speech, which appears in this volume, by Sarah Barringer Gordon.

1. T. CURRY, *THE FIRST FREEDOMS: CHURCH AND STATE IN AMERICA TO THE PASSAGE OF THE FIRST AMENDMENT* 193 (1986). For the concept of interpretation as conversation, see H. GADAMER, *TRUTH AND METHOD* 345-51 (1975). On the interpretation of classic texts, see D. TRACY, *THE ANALOGICAL IMAGINATION: CHRISTIAN THEOLOGY AND THE CULTURE OF PLURALISM* 107-30 (1981).

“original intent” underlying the religion clauses of the first amendment and the historical reasons why that intent was necessarily expanded. Jurists engaged in such an endeavor, I believe, can learn a good deal from the similar struggles of religious scholars to interpret the charter documents of their religious communities.

Biblical scholars throughout the nineteenth century, for example, engaged in what is called the “quest for the historical Jesus.” This was, in effect, an attempt to differentiate the “original intent” of the founder of Christianity from subsequent interpretations of the Christian community. Looking back at over a half century of such endeavors, Albert Schweitzer argued that the “historical Jesus” was largely a projection of the psyche of his many interpreters—a face in the bottom of the well.<sup>2</sup> Only by accentuating the differences between the past and present, he insisted, can we guard against the “face in the well” syndrome.<sup>3</sup> In the wake of Schweitzer’s critique, scholars now conclude that valid interpretation involves the conscious effort to fuse the non-congruent horizons of the past and present to form new interpretations specifically designed to meet the needs of the present.<sup>4</sup>

Judge Adams’s reading of the intent underlying the religion clauses is, in effect, an attribution of the face-in-the-well syndrome to those who advocate strict separation of church and state. Like Justice Black in *Everson v. Board of Education*,<sup>5</sup> they project the “wall of separation” metaphor back to the very bottom of the well. But, Judge Adams’s criticisms are also implicitly directed against broad accommodationists. While they accentuate the Founders’ recognition of the necessity of religiously motivated moral behavior for the maintenance of republican institutions, broad accommodationists disregard key aspects of the non-establishment mandate. In other words they see only the desired fragment of the face at the bottom of the well.

It would not be fair to conclude that Judge Adams simply gives us a different version of the face-in-well syndrome. Nor is it accurate to say, as one scholar has, that given the conflict of interpretation over the original scope and meaning of the religion clauses, “[i]n the end the Supreme Court is free to give this language the meaning it chooses.”<sup>6</sup> In Judge Adams’s estimation, the Court must be constrained by a complex reading of the

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2. See A. SCHWEITZER, *THE QUEST OF THE HISTORICAL JESUS* (3d ed. 1954).

3. A. SCHWEITZER, *supra* note 2 at 307, 310-11, 396-401.

4. See H. GADAMER, *supra* note 1, at 269-74. See also Troeltsch, *What Does Essence of Christianity Mean?*, *WRITINGS IN THEOLOGY AND RELIGION* 124-79 (R. Morgan & M. Pye ed. 1977).

5. 330 U.S. 1 (1946) (Court asserted necessity for strict wall of separation but concluded that tax monies expended to transport children to public and Catholic schools did not violate religion clauses). Cf. A. REICHLEY, *RELIGION IN AM. PUB. LIFE* 111-12 (1985) (questions whether the most separationist of the Founders intended anything quite as drastic as what is conveyed in this metaphor).

6. P. KAUPER, *RELIGION AND THE CONSTITUTION* (1964), *quoted in* T. CURRY, *supra* note 1, at vii-viii.

Founders' historical context and by an historically evolved understanding of the State's relationship to society in the present.

The historical context of the Founders, however, is far more complex and ambiguous than I can present here. The Founders' consensus that the federal government should have no power or role in religious matters hid a disparity of opinions over what exactly constitutes an establishment of religion. The Founders' public practice of a civil religion with a decidedly Protestant-Christian cast did not seem to contradict their commitment to religious freedom. The prevailing Protestant ethos represented to these Americans simply "the common coin of civilized living."<sup>7</sup> Those who view the "original intent" of the Founders as a sacred coin to be passed from hand to hand unchanged, misread our ambiguous past. Like religious fundamentalists, they fail to see that the deepest intentions of any charter document can only be preserved dialectically; that is, through a process which exposes what was incomplete or confused in the Founders' thinking, and what was biased in the application of their principles and which synthesizes their contributions with enlarged principles.<sup>8</sup>

## II. ACCOMMODATION AND THREE CORE SOCIAL VALUES

Judge Adams shows how changes in the legal and political landscape expanded the meaning and application of the religion clauses. I believe, however, that a stronger propellant was the change in the social landscape. At the time of the Revolution, Roman Catholics comprised slightly less than one percent of the population and Jews less than one tenth of one percent. While de facto pluralism existed by the mid-nineteenth century, it was not until after World War II that America consciously began to affirm an *inclusive pluralism*.<sup>9</sup> Wedded to pluralism, we took on a dowery of unresolved questions over the application of the religion clauses.

A commitment to inclusive pluralism is the core social value of those who would agree with Judge Adams's argument for an expansion of permissible accommodation of religion *within carefully defined limits*. This inclusive pluralism is expressed in *Wisconsin v. Yoder*.<sup>10</sup> In *Yoder*, members of the old Amish order objected to high school education for their children. The Court accommodated the Amish, reasoning that compulsory education requires them to perform acts undeniably at odds with fundamental tenets of

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7. *Id.* at 208-15. See also R. HANDY, A CHRISTIAN AMERICAN: PROTESTANT HOPES AND HISTORICAL REALITIES 27-28 (1984) (acceptance of disestablishment did not alter desire of most Americans to create Protestant Christian civilization).

8. See generally B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION (1967) (providing powerful illustration of this process by focusing on classic political documents of pre-revolutionary period).

9. 1 S. AHLSTROM, A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE 637, 686 (1972); 2 S. AHLSTROM, A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE 465-66 (1972). See R. HANDY, *supra* note 7 at 159-95.

10. 406 U.S. 205 (1972).

their religious beliefs and thereby threatens to undermine the Amish community.<sup>11</sup> While the decision relates to mandatory accommodation, it exemplifies the Court's acknowledgement that the root metaphor for American society is no longer the melting pot but a mosaic.

Those who would most sharply disagree with Judge Adams are likely to espouse the core social value of *individual liberty*. For this group, religion is preeminently an individual experience and only trustworthy as such. Like Madison, they tend to view a religious community as, if not the archetype, at least a clear example of a faction. Justice Douglas's dissent in *Yoder* is the quintessential modern expression of this vision. He argues that it is not the parents' religious views which must be analyzed. Rather, the analysis should be geared toward their children, because they are individual members of this society.<sup>12</sup> The irony of this position is that its view of an omniscient state as the righteous defender of the individual against a host of subsidiary communities is precisely what Alexis de Tocqueville, almost one hundred and fifty years ago, diagnosed as the blueprint for democratic despotism.<sup>13</sup> Apart from the vigorous interaction and countervailing force of a host of voluntary associations, de Tocqueville saw little hope that the constitutional system of checks and balances could forestall the innate tendency of democracies to centralize power.<sup>14</sup>

If we could draw the lines of debate over permissible accommodation this sharply, a resolution to the conflict might be much easier. My sense, however, is that many of those who support broad and more sweeping accommodations than Judge Adams is willing to sanction are committed to a third core social value—*social order*. This group flaunts Justice Douglas's proclamation in *Zorach v. Clauson*,<sup>15</sup> stating "[w]e are a religious people whose institutions presuppose a Supreme Being."<sup>16</sup> They can appeal to no less of an authority than George Washington for their espousal of religion as a social glue.<sup>17</sup> Contemporary spokespersons for this vision invariably subsume our separate but interrelated religious traditions within a national holding company labelled "Judeo-Christian civilization."<sup>18</sup>

In the opinions of the Court, permissible accommodation motivated by the core value of a harmonious social order appears most strikingly in tax exemption cases.<sup>19</sup> Religious groups are seen as "beneficial and stabilizing

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11. *Id.* at 236.

12. *Id.* at 243 (Douglas, J., dissenting).

13. A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 690-97 (1969).

14. *Id.* at 506-17.

15. 343 U.S. 306 (1952).

16. *Id.* at 313.

17. See A. REICHLEY, *supra* note 5, at 103.

18. See R. HANDY, *supra* note 7, at 204-10 (discussing enlargement in 1970's by conservative Protestants of earlier vision of Protestant Christian American to one which includes Catholics, Jews and Mormons).

19. The Supreme Court's treatment of the "unbroken practice" of opening legislative sessions

influences," existing in a "harmonious relationship to the community at large," fostering "moral or mental improvement" and should not be inhibited in their activities by property taxation.<sup>20</sup> Significantly, the Supreme Court has made it clear in *Bob Jones Univ. v. United States*,<sup>21</sup> that it will disallow tax-exempt status to institutions which engage in racially discriminatory practices because "tax exemption depends on meeting certain common-law standards of charity—namely, that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy."<sup>22</sup>

### III. INCLUSIVE PLURALISM VS. HARMONIOUS SOCIAL ORDER

I would argue that the principle of permissible accommodation is much better served if it is grounded in the core value of inclusive pluralism. From this standpoint, two objections can be raised to accommodation which is done in the service of harmonious social order. The first is a religious objection. The accommodation of religion primarily as a social glue debases authentically transformative religious practice. In *Lynch v. Donnelly*,<sup>23</sup> the Pawtucket creche case, the language of accommodation is used to affirm religious symbols and acts which are part of a national "heritage" and which bolster a community spirit of goodwill by celebrating and depicting the origins of a national holiday.<sup>24</sup> This position ineluctably favors what I can only call a *cultural captivity* of religious symbols and acts.

Although *Lynch* holds that the religious intent of the creche is not wholly neutralized by its Pawtucket setting, Justice O'Connor argues in a concurring opinion that government sponsored celebrations of holidays with strong secular components, like the legislative prayer sanctioned by *Marsh v. Chambers*,<sup>25</sup> serve "the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society."<sup>26</sup>

These are, indeed, legitimate secular purposes but the net result is more than the neutralization of a religious symbol. As an authentically and specifically Christian symbol, the creche proclaims that "confidence in the future" is grounded in a radical faith in a God who chooses to be revealed in the mystery of human birth. Sandwiched between a reindeer, clown, teddy bear, and an elephant, the creche is effectively destroyed as a religious

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with prayer as "a part of the fabric of our society" reveals a similar reverence for this core value. See *Marsh v. Chambers*, 463 U.S. 783 (1983) (practice of opening legislative sessions with prayer has continued for 200 years and has become part of the fabric of our society).

20. See *Waltz v. Comm'n*, 397 U.S. 664 (1970).

21. 461 U.S. 574 (1983).

22. *Id.* at 586.

23. 465 U.S. 668 (1984).

24. *Id.* at 681.

25. 463 U.S. 783 (1983).

26. 465 U.S. at 693 (O'Connor, J., concurring).

symbol. To state the matter bluntly, there may be many activities safeguarded by the principle of permissible accommodation that religious communities should repudiate in order to preserve the integrity of their symbols and practices.

My second objection to permissible accommodation based on the core value of harmonious social order flows from the vision of the good society implicit in the core value of inclusive pluralism. That vision sees democracy sustained more by an ongoing debate than by any consensus about the common good. True to de Tocqueville, it believes that a plurality of *social* organizations rather than governmental institutions should form the matrix of democratic values. In the terminology of recent Catholic social teaching, the principle of subsidiarity—which holds that it is “an injustice and . . . [a] disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do”—should guide the process of democratic decision making.<sup>27</sup> Justice Powell, concurring with the Court’s judgment in *Bob Jones Univ. v. United States*<sup>28</sup> but taking sharp issue with its rationale, eloquently expresses this perspective’s criticism of those who value religion primarily as social glue.

In my opinion [the Court’s argument] ignores the important role played by tax exemptions in encouraging diverse, indeed often sharply conflicting, activities and viewpoints. As Justice Brennan has observed, private, non-profit groups receive tax exemptions because “each group contributes to the diversity of association, viewpoint, and enterprise essential to a vigorous, pluralistic society.” Far from representing an effort to reinforce any perceived “common community conscience”, the provision of tax exemptions to non-profit groups is one indispensable means of limiting the influence of governmental orthodoxy on important areas of community life.<sup>29</sup>

#### IV. CONCLUSION: A THEOLOGICAL RESPONSE

As a scholar of religion, I seek the ultimate grounding for my case on behalf of inclusive pluralism in a theological interpretation of the political order. In conclusion, I simply state it: Human institutions are not divine constructions. Human beings, however, repeatedly overestimate the value and worth of even their best creations. Justice in a society, then, depends upon the ability to relativize and to transform the institutional order. Religious communities which historically have demonstrated a capacity to criticize other institutions and themselves in light of some transcendent norm or

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27. U.S. CONF. OF CATHOLIC BISHOPS, *Economic Justice for All: Catholic Social Teaching and the U.S. Economy*, in 16 ORIGINS 422-23 (1986). For an analysis of public debate versus ideological consensus as the source of social “order”, see C. LASCH, *The Communitarian Critique of Liberalism*, SOUNDINGS 69 (1986).

28. 461 U.S. 574 (1983).

29. *Id.* at 609 (Powell, J., concurring) (quoting *Waltz v. Comm’n*, 397 U.S. 664, 689 (1970) (Brennan, J., concurring)).

reality are, therefore, especially vital to the health of society.<sup>30</sup> In this theological and political framework, permissible accommodations undertaken to enhance the diversity of associations rather than to canonize the presumably religious character of the majority are truly warranted.

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30. See 1 R. NIEBUHR, *THE NATURE AND DESTINY OF MAN*, 178-207 (1941) and 2 R. NIEBUHR, *THE NATURE AND DESTINY OF MAN*, 244-86 (1941) (representing classic theological expression of this position).



In October, 1987, DePaul University College of Law celebrated its seventy-fifth anniversary. As part of the anniversary celebration, the College of Law hosted a symposium to examine the changes in the law and the legal profession that have occurred over the past seventy-five years.

The symposium featured a number of distinguished speakers, including Cynthia Fuchs Epstein and Lester Goodchild. The changing role of women in the legal profession was discussed by Ms. Epstein. Mr. Goodchild spoke on the founding of DePaul University College of Law, and American Catholic legal education as a whole. The DePaul Law Review is pleased to publish these speakers' articles which were adapted from their speeches given in commemoration of the College of Law's seventy-fifth anniversary.

