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Los Angeles

The Uses of History in Church-State Litigation

A dissertation submitted in partial satisfaction of the

Requirements for the degree Doctor of Philosophy

in Political Science

by

Kathleen Rose Rabago

2000

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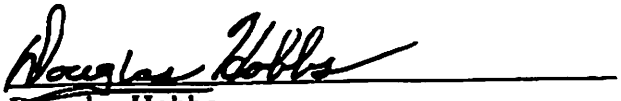

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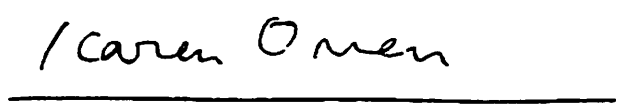

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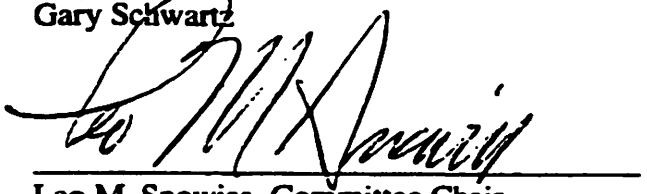

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TABLE OF CONTENTS

INTRODUCTION 1
I. Some Findings 4
A. The Rarity of History 4
B. When It was Found—More Likely in a Dissenting or Concurring Opinion 5
C. The Use of History was Irrelevant to the Legal Outcomes of Most Cases 6
D. If Unpredictable—History Has Not Restrained the Judiciary as Judge Bork had Hoped 7
E. The Changing Social and Historical Contexts of the Uses of History 7
II. The Social and Historical Contexts of the Uses of Original Intent 8
A. The Era of the Early Republic 8
B. The Second Era: State Framers Intent 12
C. The Modern Era: Federal Founders Intent 16
III. History of Original Intent: Some Implications 20
IV. The Plan of the Dissertation 22
Endnotes to Introduction 25

CHAPTER 1. THE EARLY REPUBLIC: THE COMMON LAW AND THE SECULARIZATION OF CHURCH-STATE RELATIONSHIPS 31

Introduction 31
I. Glebe Land Disputes and the Secularization of Church Property 36
II. Tax Clause Controversies: Taxation and Public Policy 41
A. Early State Constitutional Language: Origins and Development 42
1. Origins of State Constitutional Prohibitions 43
2. Conflicting Interpretations of the State's "No Maintenance" Clauses 46
B. Taxation in the American Context: Two Cases 48
1. New Hampshire: Liberty and the Parish Tax 49
2. Massachusetts: The Decline of the Congregational Church 51
3. State Constitutional Change: Theological Disputes Result in Legal Change 53
III. Blasphemy Law and the Secularization of "Fighting Words" 55
A. Was Christianity Part of the Common Law?: Four Traditions 56
B. The Case of New York: Protecting Public Order or Prosecuting Religious Crime? 59
C. The Case of Pennsylvania: Is Christianity Part of the Common Law of Pennsylvania? 61

D. The Case of Delaware: Blasphemy as the Public Peace 62
IV. Sunday Laws and the Secularization of Labor Law 63
V. Conclusion: The Common Law Lawyers--Keepers of the Liberal Tradition 67
Endnotes to Chapter 1 69

CHAPTER 2. FROM LIBERY TO EQUALITY: STATE FRAMERS' INTENT AND THE ORIGINS OF AMERICAN SEPARATIONISM 87

Introduction: A New Principle of Adjudication Emerges 87
I. The Impact of the Public Schools Movement on State Constitutional Reforms: The State Blaine Amendments 91
II. Interpreting State Framers' Intent: Bible Reading in the Public Schools: An Uniquely American Experience 94
A. Treating Bible Reading as Torts 95
B. The Impact of the Northwest Ordinance: Three Cases 97
1. Ohio: Government Cannot Determine Religious Truths 98
2. Illinois: Equality of All Religions Means "No Preference" to One Religion 102
3. Michigan: Is Reading the Bible Teaching the Bible? Dissenting Views 105
D. The Impact of the Western Settlers: The Impulse for Democratic Equality in the Public Schools: Three Cases 108
III. Conclusion: State Framers' Intent and the Origins of American Separationism. 113
Endnotes to Chapter 2 117

CHAPTER 3. FEDERAL FOUNDERS' INTENT: PART I - ACCOMMODATIONISM 127

Introduction 127
I. Accommodationist History: The "List" 128
A. Four Types of "Lists" 129
II. The Evolution of the Accommodationist "List": Early Uses 131
A. The "List" as Public Policy 131
B. The "List" as Colonial Settlers Intent: We are a Christian Nation 132
C. The "List" as State Framers' Intent 134
D. The "List" as Both State and Federal Founders Intent 135
E. The "List" as the "People's" Intent 137
F. Summary: The Early Development of the "List" 138
III. The Turning Point: 1920's and the "List" as Founders Intent to Aid Religion 139
A. Blasphemy 140
B. Sunday Closing Laws 142

C. Bible Reading in the Public Schools: Three Cases 143
D. Summary: The 1920's and the "List" 151
IV. After 1947: Modern Interpretations of the "List." 152
A. The "List" as the Legal Recognition of a "God": Two Cases 153
B. The "List" as American Practices: Justice Reed and the Burger Court 157
C. Conflicting Intents Meet: Three Cases 162
1. The Case of Tennessee: Return to Bible Reading 163
2. The Case of Oklahoma: Private Trusts 164
3. The Case of Kansas: Aid to Church Schools and the Lemon Test 165
D. The Impact of Zorach on Bus Aid, Prayer in School, and Sunday Laws. 167
1. Bus Aid 167
2. School Prayers and Bible Reading in the Public Schools: Two Cases 171
3. A Return to Sunday Laws: Judge McCarthey's Dissent 176
E. When the "List" is Challenged: National Anthem, Good Friday, and Chaplains 177
1. The National Anthem 178
2. Good Friday 179
3. Chaplains 180
F. The Impact of the Lemon Test: Child Placement Law 185
G. When Historians are Taken Seriously: the Jaffree Case 187
1. Judge Hand and Silent Prayers in the Public Schools 187
2. Justice Rehnquist and the Jaffree Case: The "List" as Evidence of Non-Neutrality 190
3. A Comparison and Assessment 192
H. The "List" as Governmental Speech: Crèches 195
I. A Return to the "List" as Acknowledgement of God: Lynch and Allegheny 202
J. The "List" as American Culture: Graduation Prayers 207
1. Zorach Revisited: Graduation Prayers: Two Cases 207
2. Finally, The "List" as American Culture 208
V. Justice Kennedy and the "List" 209
VI. Summary 211
Endnotes to Chapter 3 217

CHAPTER 4 FEDERAL FOUNDERS INTENT: PART II – SEPARATIONISM. 235

Introduction 235
I. Purposes of Separation 236
A. Preventing Persecution 236

B. Guaranteeing Freedom from Religion 237
C. Securing Religious Pluralism 237
II. What Judges Cite as History: The Documentary Sources of Separationism 237
A. Thomas Jefferson and the Wall of Separation 237
1. Early Uses of Jefferson: From No Right to Religious Conscience to No Monetary Aid to Religion 238
B. Civic Virtue: More than Toleration 244
C. James Madison: From Three Pence Warning to No Tax to Religion 244
D. Constitutional Texts: When No Means No 245
E. General History of the Times: History as Experience 245
F. George Washington and the First Congress 246
G. State Judge Thomas Cooley: Contradictory Uses 247
III. Two Roots of Separationist History: From English Common Law to Free Exercise of Religion 247
A. Early Development of Separationist Principle of Neutrality between Government and Religion: English Common Law and Jurisdictional Separation in Church Property Dispute 247
1. The Louisiana Case: Separation as a Check on the Judiciary 247
2. The Celebrated Opinion of Justice Doe: Government is Incompetent to Determine Religious Truths 255
3. The Impact of English Common Law 260
B. The Impact of Free Exercise 262
IV. U.S. Supreme Court and the Meaning of the First Amendment's Establishment Clause 266
A. The Impact of Everson. 272
B. Justice Brennan's Rebuttal to the Court's Critics 273
V. From European History to American Experiences: Bibles in the Public Schools 276
A. The Legacy of Justice Vanderbilt: European History and the Purpose and Effect Test Under State Law 276
1. The Impact of Tudor 279
B. The Legacy of Justice Clark: American History and the Principle of Neutrality 280
C. The Legacy of Washington State: The Bible as Literature 283
VI. The Legacy of English Laws 284
A. Sunday Laws: The Purpose and Effect Test 284
B. The Book of Common Prayer: The Legacy of English Establishments 288
C. Blasphemy Law: From English Establishment to Freedom of Speech. 289
D. Sodomy Law: If it was a Church Crime Then, Is it Now? What a California Court Said 291
VII. Separationist History to Accommodationist Result: Four Cases in the Mismatch of History 292

A. Maryland: Aid to Private Colleges 293
B. North Dakota: Sunday Laws 295
C. New Jersey: Transportation Aid to Catholic Schools 296
D. Text Book Aid to Private Schools: The Legacy of Justice Douglas 298
VIII. The Use of Expert Historians: Religious Symbols 299
IX. From History to Formalism, and Back Again 300
A. Using History to Avoid the Formalism of Lemon 300
B. When Avoiding Lemon Results in Even Stricter Separationism 301
X. Back to James Madison 302
A. Clergy in Public Office: From Establishment to Free Exercise 302
B. Religious Symbols in Public Places 304
C. Nativity Scenes Revisited: The Contribution of Justice Stevens to History 305
XI. The Legacy of Justice Souter 308
XI Summary 310
Endnotes to Chapter 4 316

CHAPTER 5 CONCLUSIONS 339

I. Summary of Findings 341
A. Historisity in the Uses of History: Three Eras–Three Principles of Separation 341
B. Entrenched Principles: Separationist Theory and the Common Law 344
C. The Mismatch of History and Law: Redundant Dicta 350
D. Sanitizing the Dark Side of Religious Liberty: The Development of Accommodationist Theory 353
E. The Impact of State Courts 353
II. The Separationist Consensus and the Appeal of History 355
Endnotes to Conclusions 358

APPENDIX I TABLE OF CASES 366

SELECTED BIBLIOGRAPHY 371

LIST OF FIGURES

Figure 1. Uses of Federal Founders' Intent: Percentage of the Uses of Accommodationist History Compared to the Legal Results in 87 Cases. 351

Figure 2. Uses of Federal Founders' Intent: Percentage of the Uses of Separationist Histories Compared to the Legal Results in 87 Cases. 352

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ABSTRACT OF THE DISSERTATION

The Uses of History in Church-State Litigation

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Scholars of American constitutional adjudication hold that judges should apply the original intent of the Founding fathers in resolving constitutional disputes. This study examined judicial references to history in litigation involving the constitutional guarantee of separation of church and state, i.e., the establishment clause of the First Amendment. A survey of one thousand appellate judicial opinions, both state and federal, found 105 judicial opinions that invoked history or original intent. Rather than testing the truths of the historical meaning of the guarantee of separation and state, this study examined the actual uses of history in legal reasoning.

This study found that the use of history or original intent was mere "window dressing" to the legal outcomes—often appearing in a dissenting or concurring opinion. When observed in a majority opinion, the use of history was irrelevant to the legal

outcomes because it did not correspond to the legal reasoning or because it was redundant dicta. When relevant, history was used to avoid legal formalism. Nevertheless, legal formalism prevailed in American legal thought.

This study found the search for the historical meaning of separation of church and state comprised of three distinct eras in American legal history: Era of the early Republic, when English history and common law prevailed; State framers' intent, when the equalitarian impulses of the Western settlers prevailed; and the Modern era, which is dominated by the separationist ideas of Thomas Jefferson and James Madison as architects of the U.S. Constitution. Two versions of Federal founders' intent involving the meaning of the establishment clause of the First Amendment were found: Accommodationist (that the founders wished to aid religion); and Separationist (that the founders wished to erect a wall between church and state). The accommodationist variety was found to be the most frequently used; however, it has not governed the development of law in this area.

Instead, a core separationist consensus prevailed--that "separation" means government cannot determine religious truths, and no monetary aid to religion. Finally, the use of history had no predictive value, and has not restrained the judges as the constitutional scholars have hoped.