Foreword

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The overriding principle behind the American concept of religious freedom is one of accommodation: the accommodation of churches by the state, of the state by the churches, and of every individual's right to worship as he or she sees fit.

This principle of accommodation is encompassed by two clauses in the First Amendment to the United States Constitution, to wit:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .

We have come to refer to these statements as the "establishment clause" and the "free exercise clause," respectively. These designations are frequently used to categorize disputes in our courts. Cases are pled, argued, and decided as "establishment clause" cases or "free exercise" cases, with the occasional convergence of the two in the same controversy.

Paradoxically, however, when they do converge, they are often viewed as adversaries trapped in a factual setting in which it appears we cannot have one without losing the other.

As a result of these perceived paradoxes, a theory of sorts has developed in which there is recognized a certain tension between the establishment clause and the free exercise clause, and in which the two clauses are occasionally analyzed in a manner suggesting them to be parts with different purposes and sections with separate goals.

The idea of a certain tension existing between the two clauses is sound. Given the increasing presence of government in citizens' daily lives, there are bound to be instances when certain forms of state action, if allowed to exist, will be deemed by some to violate the establishment clause, and, if not permitted to exist, will be deemed by others to violate the free exercise clause. *Lynch v. Donnelly*,[1] the Supreme Court's recent creche case, is an example of this type of situation. At issue was whether a municipality-sponsored nativity scene violated the First Amendment. The primary argument against the creche was that it constituted excessive government involvement in the sponsorship of a religious display in violation of the establishment clause. But, there were also those who contended that if the creche were not allowed, the free exercise rights of certain of the municipalities' residents would be violated.

To the extent that the tension between the two religion clauses is viewed as a real dichotomy, and not just a simple factual tension between implementing clauses intended to achieve the same end, the theory loses merit. Such a strained interpretation may even countervail against the effectiveness of the clauses in providing

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1. 104 S. Ct. 1355 (1984).

meaningful guidance for an atmosphere of full accommodation of all religious beliefs.

Even a cursory analysis of the background behind the concept of religious freedom in this country reveals a goal of a society in which citizens are free from the pressures of the federal government to practice whatever religion they desire. A long and sometimes painful history of religious dominance and intolerance by the state was well known to the framers of the Bill of Rights. Their collective wisdom told them that a climate of truly free worship would be surely and quickly destroyed by the establishment of a national church. Hence, the very first words out of the pen that amended the original Constitution contained the simple prohibition that "Congress shall make no law respecting an establishment of religion," which, of course, became known as the establishment clause.

Having thus taken care of their specific concern over establishment, the drafters of the First Amendment followed with a more general clause proscribing the passage of any law "prohibiting the free exercise" of religion. This became known as the free exercise clause, which reinforced the concept of a society where religious freedom would be a reality in practice as well as on paper.

In effect, the free exercise clause encompasses the establishment clause, there being no question that a law respecting an establishment of religion would do much harm to a climate of free exercise.

To the Founding Fathers it must have seemed inevitable that these two important clauses would on occasion compete with one another in the case by case analyses which would be required to fully implement the contemplated atmosphere of free worship; but the notion that the clauses would ever collide and be viewed in any way as contradictory to their common objective would have seemed unthinkable.

There is no question in my mind that the concept of religious freedom is America's greatest gift to the modern world. To preserve it we must understand it. Just as the dialogue that preceded the First Amendment in the 1780's, this symposium in the 1980's discusses a subject matter as important as any topic in contemporary American law. As long as we remain a republic, issues in religious liberty will continue to be timeless and richly deserving of our constant attention and reasoned study.