WHEN THE RELIGIOUS TURN LITIGIOUS


The Rutherford Institute first gained national notoriety in 1997 when John W. Whitehead, Rutherford’s founder, announced he would represent Paula Jones in her sexual harassment lawsuit against President Bill Clinton. With Jones v. Clinton, the Rutherford Institute, previously known primarily for representing evangelical Christians in religious discrimination and free exercise cases, took a significant step out of its traditional area of expertise and into the harsh spotlight of the religious and political culture wars. For many, the Paula Jones representation was a perplexing move for a religious liberty advocacy group. For others, the decision fit perfectly with the meta-narrative of what then First Lady Hillary Clinton described as a “vast right-wing conspiracy” to bring down a popular President.

As a law student at Emory University in the mid-1990s, I spent a semester researching cases for the Atlanta office of the Institute, and did not at the time fully understand the theological, intellectual and ideological agenda motivating Rutherford’s work. Now, ten years after Jones v. Clinton, R. Jonathan Moore not only explains the rationale behind Whitehead’s decision to represent Paula Jones, but more importantly locates that decision contextually within the theological, legal and cultural history of American evangelical Christianity. With a foreword by Martin E. Marty, a surprisingly informative opening chapter, and extensive footnoting, Moore deconstructs Whitehead and the work of the Institute. The book is structured in three sections: first, a historical review of religion in America; second, an in-depth review of John Whitehead and the Rutherford Institute’s published materials; and finally, a critique of Whitehead and Rutherford’s legal successes and failures. The book provides an unparalleled look at conservative

Christian legal strategies as conceived and implemented by one of the best known (some might say notorious) advocates in the field.

John Whitehead converted to Christianity after reading Hal Lindsey’s apocalyptic end-times novel, *The Late Great Planet Earth* in 1974, when he was fresh out of law school. (37-38) Whitehead morphed from a liberal agnostic (who, ironically, interviewed his future legal adversary Bill Clinton for the local newspaper) to a conservative, evangelical Christian, who dedicated his life’s work to defending his co-religionists in the courts. Whitehead’s first book, *The Separation Illusion*, published three years after his conversion, was a pro-Christian reading of American history, the Constitution and the Bill of Rights. Themes from *The Separation Illusion*—such as the secularization of society and the need for religious revival—would recur throughout Whitehead’s later writings.

Prior to the Paula Jones representation, the Rutherford Institute “rarely strayed from the boundaries of the First Amendment’s religion clauses.” (2) By the time of the Paula Jones case, however, Whitehead “had come to view religious rights as merely one subset of a whole host of freedoms currently threatened by an invasive, omnipresent, and secularist federal government.” (2) Thus, *Jones* provided Whitehead an opportunity to show that Christians cared about issues such as sexual harassment and the rule of law. In Whitehead’s words at the time,

> [o]ur involvement in Paula Jones’s case stems from the fundamental principle that no person—not even the President of the United States—is above the law. . . . This case is not about politics. It is about protecting the guiding philosophy of this country that all people are equal before the law.

Whitehead’s view of the rule of law as a religious principle and government as an oppressive secular behemoth helps to explain why representing Paula Jones made sense.

The hidden treasure of *Suing for America’s Soul* is the introductory chapter, which provides an exceedingly informative and interesting look at the history of evangelical Christianity in America. Three historical “contexts” set the stage for the rise of the Rutherford Institute and clarify why the “religious decided to turn litigious.” (33) Moore shows how “the American histories of voluntary organizations, conservative

Protestantism, and church-state jurisprudence all intersect at the location of Christian legal activism.” (33)

In the first “context,” Moore examines the historical growth and modern ascendancy of para-church organizations in American religious life. From modest beginnings, para-church organizations enjoyed substantial growth over two centuries and by the 1970s outnumbered the Christian denominations. (8) The acceptance of para-church organizations allowed Rutherford to rise to prominence in conservative religious circles.

In the second “context,” Moore explores the ebb and flow of evangelical Protestant influence over two centuries of American history. The nineteenth century was a golden age for evangelicals in America. Evangelical theology was the public religion of the Republic and evangelicals dominated the religious, intellectual, political and cultural life of the young nation. Many states had de facto or de jure religious establishments and few questioned the status quo. The evangelical consensus eventually cracked and crumbled. Increasing numbers of Catholics, liberals, Mormons, dispensationalists, Unitarians, fundamentalists, atheists and agnostics eroded the Protestant, evangelical core of the country. (12-17)

In the final “context,” Moore traces the history of Establishment and Free Exercise Clause jurisprudence from ratification through incorporation and then to the founding of the Institute in 1982. Moore explains how conservative Christians often saw the Supreme Court’s decisions as attacks on Christian faith and traditional American religious values. Coupled with the seemingly ever-expanding reach of the Federal government, these precedents contributed to the perception that Christians were under siege. Understanding this perception of persecution gives the reader additional insight into John Whitehead’s political and legal philosophy.

Where Moore sees sloppy thinking, contradictory reasoning, or unintended consequences, he isn’t afraid thoughtfully to criticize Whitehead. Some of the Institute’s activism was dangerous to the cause. “[I]n pressing cultural issues in the courts, religious conservatives both intellectually compromised treasured beliefs and ultimately fortified the secular order they so wanted to resist.” (5) Moore concludes that Whitehead adopted an “ends justifies the means” philosophy in the courtroom which “has had several unintended consequences,” and that “conservative Protestants may have misplaced their energies, making unintended intellectual compromises and inadvertently feeding the bureaucratic monster they sought to fight.” (34)
In one apparent contradiction, for example, Whitehead supported the display of a crèche—a symbol of religious importance—on public land, while also arguing that the crèche was a part of a public display with a secular purpose (i.e., it was not religious) and therefore should pass constitutional muster. (137-143) Was this just pleading in the alternative, as Moore suggests, or perhaps symbolic of an ends-justifies-the-means philosophy inconsistent with Whitehead’s stated beliefs?

Whitehead also believed the Constitution should be interpreted according to an “originalist” understanding (i.e., that the original intent and understanding should control modern judicial interpretation). But in amicus briefs, Whitehead argued that religious practices (e.g., prayer in school) should be protected, not by the free exercise clause as most originalists would argue, but by the free speech protections of the First Amendment, a decidedly non-originalist understanding of the free speech clause. (136) This “religion as speech” argument also undermines many of Whitehead’s pro-accommodation arguments. If religion is merely another form of speech, why should the law grant special accommodations in the form of tax and hiring exemptions for churches? (143-147, 187) By conflating religious practice with other types of speech (including pornography), Whitehead undercuts his own belief that Christianity is unique and special. As Moore explains, “to preserve religion’s historical importance in American culture TRI sometimes denied that very history.” (186) While these shifts might have been necessary for tactical reasons to secure a favorable outcome in a particular legal case, they also had the effect of weakening the intellectual and philosophical foundations of Whitehead’s argument.

In reviewing Whitehead’s work, Moore misses a few opportunities for critical analysis. Perhaps most glaring, Moore fails to sufficiently investigate and elaborate on Whitehead’s early support of theonomy and his connections with Christian Reconstructionism. Moore does mention that noted theonomist R.J. Rushdoony was an early financial backer of TRI, wrote the outline for The Separation Illusion, and served on the institute’s board of directors for several years. Moore also notes that Whitehead authored the foreword to well-known theonomist Gary DeMar’s Ruler of the Nations and cited Rushdoony favorably in his book, The Second American Revolution. Nonetheless, Moore fails to sufficiently explore the implications of these relationships on either the

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work of The Rutherford Institute or Whitehead’s vision for American society.

Moore writes that Reconstructionism maintained its grip on Whitehead in *The Second American Revolution*. (72) But Moore fails to adequately distinguish between the mainstream Christian belief that Biblical principles, including the Ten Commandments, should serve generally as the basis for civil society, and the more particular Christian Reconstruction view that all the moral and judicial laws of the Old Testament should be legislated. Many Christian political theories rely on the Bible or even the Ten Commandments as the starting point of a Biblical society, while Christian Reconstructionists go much further and argue for the full implementation of the Old Testament criminal and civil law in society.

Moore spends considerable print (approximately one hundred pages) reviewing Whitehead’s writings, with a particular view towards Whitehead’s version of American history. According to Whitehead, America was once a Christian nation, established by the Calvinist covenant we know as the Constitution. Over time, America slipped inexorably into the dangerous pit of secularism, primarily at the hands of an anti-Christian judiciary. Secular historians re-wrote American history to delete the Christian foundations of the Nation. Popular democracy and mob rule usurped the original, constitutionally decreed republican form of government. An overreaching and unconstitutional centralized federal bureaucracy took control of the civil, economic, religious and political affairs of the nation. Reformed Christianity was displaced as America’s public religion. The Federal courts slowly but steadily attacked Christianity, disestablished Christianity at the state level, and established secularism as the official state and federal ideology. Secular, anti-religious courts issued a long string of rulings contrary to an originalist understanding of the First Amendment. Such was the bleak picture of American history painted by Whitehead in his early writings. This historical depiction also clarifies why Whitehead took the Paula Jones case: he was defending the rights of an ordinary American against an agent of the irreligious state.

For Whitehead, the Paula Jones representation was not about politics, it was about showing the world that Christians cared about sexual harassment and the rule of law. This message was mostly lost in the heated partisan political battles surrounding Clinton and his impeachment. Many people interpreted Whitehead’s actions as primarily political in nature: a conservative evangelical Christian going after a liberal Democrat. Because Clinton was a long-time nemesis of
the religious right, the Paula Jones representation seemed to fit nicely with the left-right paradigm. Ironically, Whitehead—who says he never supported Clinton’s impeachment—now writes for the left-of-center Huffington Post and is an outspoken critic of George W. Bush, even going so far as to call for his impeachment. Meanwhile, Rutherford evolved from a simple religious freedom shop and is now “[d]edicated to the Defense of Civil Liberties and Human Rights,” including issues relating to parental rights, free speech, search and seizure and sexual harassment.

R. Jonathan Moore deals fairly with a controversial subject and delivers a scholarly review and objective critique of the subject matter. Moore deconstructs many of the misperceptions surrounding Whitehead and explains how Whitehead’s Christian worldview provided the motivation and justification for his work. *Suing for America’s Soul* is a thoroughly researched survey and summary of Whitehead’s writings, put together in a well-written, informative, and captivating narrative.

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