The Establishment Clause: A Question of Jurisdiction

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Originally Published in
The Forecast, Vol. 1, Nos. 13, 15, 17, 18, 19, 23, 24 (1994)
The Forecast, Vol. 2, Nos. 1-4 (1994-95)

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https://lonang.com

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DEFINING RELIGION

"The realm of religion," Justice John Paul Stevens wrote in *Wolman v. Walter,* 433 U.S. 229, 264 (1977), "is where knowledge leaves off, and where faith begins ...."

With this definition of religion, Justice Stevens confidently concluded that all tax subsidies to any school with a "religious mission" was an unconstitutional establishment of religion, in violation of the First and Fourteenth Amendments of the U.S. Constitution.

While Justice Stevens acknowledged that he had lifted his definition of religion from Clarence Darrow's argument in the Scopes evolution case in Dayton, Tennessee in 1924, he did not explain why a 20th century, atheist defense lawyer's definition should control the meaning of a word contained in an 18th century document.

Nor did Justice Stevens pause to consider whether Darrow's evolutionary epistemology, the product of the Darwinian revolution of the mid-nineteenth century, should be superimposed upon a document written in a day when intelligent men took the Bible, including the book of Genesis, as the fountainhead of knowledge for the establishment of a nation. *W. Davis, Eastern & Western History, Thought and Culture 1600-1815* 241-68 (1993).

For Justice Stevens it was simply axiomatic that the language of the U.S. Constitution should be understood not as it was written, but as it might have been written by men "enlightened" by the most recent developments in science.

Religion and No Establishment

While no other justice joined Justice Stevens in his explicit endorsement of Darrow's dichotomy between knowledge and faith, the High Court has continuously ruled as if Darrow was right. States may use tax money to support "science," but not "religion," defining the latter category as any teaching based upon the Bible as revelation from God. *Cf. Abington School Dist. v. Schempp,* 374 U.S. 203, 223-25 (1963).

Attempts to avoid this constitutional distinction between "science" and "religion" have led Christians to attempt to introduce the Genesis account of the origin of man and the universe as "creation science" and Hindu gurus to claim that transcendental meditation is the "science of creative intelligence."

But the Courts have pierced this scientific veil, uncovering the "true" religious purpose and nature of such efforts, and have held the teaching of such viewpoints in the public schools to be an unconstitutional establishment of religion. *Edwards v. Aguillard,* 482 U.S. 578 (1987); *Malnak v. Yogi,* 592 F. 2d 197 (3d Cir 1979).

Given such rulings it comes as no surprise that prayer is necessarily religious in purpose and effect, whereas the teaching of any subject based upon the scientific method is always assumed to be secular in purpose and effect. The former activities are banned as unconstitutional, whereas the latter are not only permitted, but promoted. L. Tribe, *American Constitutional Law* 1169, 1208-09 (2d ed 1988).

Moreover, legislation may no longer be justified solely on the basis that it conforms with religious norms, but it must have an empirical foundation, lest it too be religious in purpose and effect and, therefore, unconstitutional. *Id.* at 1205.

Religion and Free Exercise

The Court has not, however, employed this secular/religious dichotomy as their working definition of religion in cases implicating the Free Exercise Clause. In *Seeger v. U.S.,* 380 U.S. 163 (1965), Justice Tom C. Clark concluded for a unanimous Court that "religious belief" included the faith of an agnostic so long as he held to beliefs that "occupy the same place as the belief in a traditional deity holds m the lives" of a traditional believer in God.

The borrowed Court this definition of religion from Paul Tillich, a 20th century theologian. Tillich claimed that any matter deemed of "ultimate concern" by any person was that person's religious faith, even if it was not rooted in a belief in any notion of God or immanence as such. P. Tillich, *The Shakings of Foundations* 57 (1948).

Five years later, the Court found that this "ultimate concern" test was met even by a person who explicitly denied that his belief was "religious" or that he believed in a Supreme Being. It was enough that the person held a principled, rather than an expedient, objection to obeying a law. *Welsh v. U.S.,* 398 U.S. 333 (1970).

This subjective approach to defining religion has come to dominate the Court's application of the Free Exercise Clause. In cases like *Sherbert v. Verner,* 374 U.S. 398 (1963) and *Wisconsin v. Yoder,* 406 U.S. 205 (1973), the Court has developed a set of inquiries designed to insure that a person's objection to a particular civil duty is rooted in norms that transcend expedience.

Two Definitions or Only One

Can the Court justify defining religion one way for Establishment Clause cases, but another way for Free Exercise challenges? In his first edition of American Constitutional Law, Harvard professor Laurence Tribe attempted just that, only to abandon the effort as "dubious" in light of the constitutional text. L. Tribe, *American Constitutional Law* 1186 (2d ed. 1988).

But the dual definitional approach to the meaning of religion in the First Amendment is not just doubtful, it is impermissible. The text reads as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise *thereof* ...." (Emphasis added.)

As Justice Wiley B. Rutledge wrote in *Everson v. Board of Education,* 330 U.S. 1, 32 (1947), the single word, "religion," "governs two prohibitions and governs them alike. It does not have two meanings, one narrow to forbid 'an establishment' and another, much broader, for securing 'the free exercise thereof.' 'Thereof' brings down 'religion' with its entire and exact content, no more and no less, from the first into the second guaranty ...."

Not only does the text demand one definition of religion, so do the rules of logic. If a belief may qualify as "religion" for Free Exercise purposes, even if rooted in scientific principle, as the Court implied in *Welsh,* then why should not belief in evolutionary science not also qualify as "religion"

for Establishment purposes. If the Court followed elementary rules of logic, then it should forbid the teaching of science in the public schools by anyone who embraces it as true, or by anyone who claims the scientific method to be the key to all truth.

The Court, however, has avoided this logical dilemma by finessing the question, treating science as self-evidently "secular" and the Bible as self-evidently "religious." Tribe has defended the Court's habit of not defining religion in Establishment Clause cases on the ground that it gives the Court leeway to change its rulings depending upon what popular opinion considers "religiously significant." Because people's views change over time, the Court will never find itself bound by any precedent, having never adopted a definitive meaning of the term. L. Tribe, *American Constitutional Law, supra,* at 1187.

The Original Definition

But America's founders had a very definite meaning in mind when they placed the word, religion, in the First Amendment. As Justice Hugo L. Black wrote for the majority in *Everson v. Board of Education,* 330 U.S. 1 (1947), the First Amendment religion clauses were derived specifically from the constitutional and statutory policy of one of the original thirteen states, the Commonwealth of Virginia.

Justice Black and the Court were right. Only Virginia had adopted the twin principles of free exercise and no establishment of religion. All of the other states had endorsed the policies of toleration, instead of free exercise, and of no preference, instead of no establishment. See Titus, "No Taxation or Subsidization: Two Indispensable Principles of Freedom of Religion," 22 *Cumberland L. Rev.* 505 (1992).

But Justice Black ignored that Virginia had also explicitly defined religion in Article I, Section 16 of its 1776 Constitution. That Section stated that religion was "the duty that we owe to our Creator" which can only be discharged "by reason and conviction, not by force or violence." *Sources of Our Liberties* 312 (Perry, ed. 1978). Only after defining religion objectively, that is, in terms of the nature of the duty owed to the Creator, could Virginia's founding statesmen have guaranteed absolute security for the free exercise of religion.

The other state constitutions afforded absolute protection for "religious worship" [*e.g.*, Section 2, Delaware Declaration of Rights (Sept. 11, 1776) in *Sources of Our Liberties, supra,* at 338], or for "religious profession of sentiments" [*e.g.*, Article II, Massachusetts Declaration of Rights in *Sources of our Liberties, supra,* at 374], but not for religion, per se.

That religion included more than worship, and even more then profession of religious faith, was made abundantly clear in the fight that Thomas Jefferson and James Madison waged to achieve their goal to disestablish religion in Virginia. Titus, "No Taxation or Subsidization," *supra,* 22 *Cumberland L. Rev.* at 506-08, 510-11. In the preamble of his 1786 Bill for Establishing Religious Freedom, Jefferson wrote that all opinions, including religious ones, were outside the jurisdiction of the State. Because Almighty God had created the mind free, he concluded that the State had no power "to compel a man to furnish contributions of money for the propagation of opinions," religious or otherwise.

In support of this position, Madison wrote in his famous *Memorial and Remonstrance* that a man's opinions were within the realm of religion, *i.e.*, subject only to the Great Governor of the universe. Because all opinions, not just religious ones, were subject only to reason and conviction, they were immune from civil power. That immunity, in turn, had been secured by Article I, Section 16 of the Virginia Constitution.

The word, religion, then is a jurisdictional term designed to separate from civil power all duties owed exclusively to the Creator. Those duties, by definition, are the ones subject only to reason and conviction which, according to the revelation of the Creator, include "all truth," not just "religious" truth (John 16:13). As for other duties encompassed by religion, they too are to be determined by the revealed law of the Creator, not by any individual's profession of faith, or by popular perception, as modern Courts and commentators have claimed.

THE MODERN VIEW

The First Amendment protects freedom of religion in two distinct ways. First, it prohibits Congress from passing any law "respecting an establishment of religion." Second, it proscribes any Congressional action "prohibiting the free exercise" of religion.

Since 1947, the United States Supreme Court has applied this language in such a way as to prohibit state and local governments from doing what Congress is prohibiting from doing. *Everson v. Board of Education,* 330 U.S. 1 (1947).

This ruling rested upon the assumption that the Fourteenth Amendment "incorporates" the freedom of religion clauses of the First Amendment and applies them to the States. See *Duncan v. Louisiana,* 391 U.S. 145, 148 (1968). [For a critique of the incorporation doctrine and for an alternative justification for applying the religion clauses to the state and local governments, see Titus, "The Bill of Rights: Its Text, Structure and Scope," (1994).]

Since 1971, the United States Supreme Court has generally applied a 3-part test to determine if a statute or other civil government action violates the Establishment Clause of the First Amendment. First, the statute or action must have a secular purpose. Second, the statute or action must not have as its primary or principal effect the advancement or inhibition of religion. Third, the statute or action must not foster an excessive government entanglement with religion. *Lemon v. Kurtzman,* 403 U.S. 602 (1971).

While the Court has never provided working definitions of "secular" and "religion," it has assumed that secular means empirically verifiable truth, whereas religion means unprovable faith beliefs. This dichotomy between the profane and the sacred is presumed to be self-evident and incontestible, and hence, in need of no explanation or discussion. See, *e.g.*, Tribe, *American Constitutional Law* 1186-88 (2d ed. 1988).

The Court has, therefore, consistently struck down prayer and Bible reading in tax-supported public schools, for having both a religious purpose and primary effect of advancing that purpose. *Abington School District v. Schempp,* 374 U.S. 203 (1963); *Wallace v. Jaffree,* 472 U.S. 38 (1985).

It has also found that the posting of the Ten Commandments on the walls of a public school

classroom has no secular purpose and, consequently, has the primary effect of advancing religion. *Stone v. Graham,* 449 U.S. 39 (1980). Finally, it has ruled that the teaching of creation science in the public schools has no secular purpose. *Edwards v. Aguillard,* 482 U.S. 578 (1987).

Thus, all of these activities are unconstitutional establishments of religion, having violated the first or second prong of the 3-part test. Under the second and third prongs, the Court has invalidated a variety of government programs supporting religious schools, including tax subsidies for the teaching of secular subjects [*e.g.*, *Meek v. Pittenger,* 421 U.S. 349 (1975); and *Wolman v. Walter,* 433 U.S. 229 (1977)] and tax credits and deductions for parents who send their children to religious schools. *e.g.*, *Committee for Public Education v. Nyquist,* 413 U.S. 756 (1973); and *Sloan v. Lemon,* 413 U.S. 825 (1973).

The Court has reasoned that the teaching of secular subjects in a religious setting so infects that teaching that the primary effect necessarily advances the religious objectives of the schools. It has further concluded that no meaningful safeguards can be devised to moderate that effect without excessively entangling civil government in the religious affairs of those schools. See generally Nowak, Rotunda and Young, *Constitutional Law* 1038-4 7 (3d ed. 1986). Thus, religious schools are denied any significant access to tax revenues on the ground that such tax subsidies constitute an unconstitutional establishment of religion.

Outside education, the Court has applied the 3-part test less rigorously. For example, it has generally found that creche scenes on public property are secular in purpose, thus satisfying the test's first prong. Such scenes are perceived by the Court to be an integral part of a largely commercialized holiday season that has lost its religious significance, in much the same way that the religious meaning of the logo, "In God We Trust," on a dollar bill has dissipated. *Lynch v. Donnelly,* 465 U.S. 668, 671, 680, 676, 692-93 (1984).

As for the test's second prong, the Court has scrutinized each situation to determine whether the public display of the creche "endorses" its patently religious message, or merely "accommodates" those who still hold to the religious meaning of Christmas. Compare, *e.g.*, *County of Allegheny v. A.C.L.U.,* 492 U.S. 573, 595-602 (1989) with *Lynch v. Donnelly, supra,* at 681-82, 693-94 .

In only one case in the past 23 years has a Court majority totally disregarded the 3-part test. In *Marsh v. Chambers,* 463 U.S. 783 (1983), the Court upheld the legislative practice of employing and paying chaplains, even though one of their primary tasks was to pray at the opening of legislative sessions.

Former Justice William J. Brennan registered a vigorous protest. Even a law student , Brennan asserted, could tell that the employment of a chaplain to open a legislative session with prayer served no secular purpose: *'To invoke Divine guidance on a public body entrusted with making the laws' ... is nothing but a religious act. Id.* at 797, 800.

As for the primary effect of such a practice, Brennan found it "clearly religious ... [for] invocations in ... legislative halls explicitly link religious belief and observance to the power and prestige of the state." *Id.* at 798.

Excessive entanglement was equally obvious to Justice Brennan as he noted that the legislature must choose the chaplain and oversee his religious activities, which was "precisely the sort of supervision that agencies of the government should if at all possible avoid." *Id.* at 798-99.

Brennan dismissed the majority decision as a "unique exception," allowed solely because the very same Congress that adopted the Bill of Rights also established the legislative chaplaincy that has continued even to the present day. *Id.* at 813-14.

To date, Brennan's characterization of the *Marsh* decision has proved true. A recent effort to extend it to support state-sponsored clergy prayer at public school graduation ceremonies failed. *Lee v. Weisman,* 120 L. Ed 2nd 467 (1992).

In that case, however, five justices (Kennedy, Scalia, White Rehnquist, and Thomas) refused to apply the traditional 3-part test. One other (Souter) declined to join the opinion of three colleagues (Blackmun, Stevens, and O'Connor) who did.

Emerging from the Court's four opinions are two alternative approaches that may dominate Establishment Clause cases in the future. Justice Kennedy and the four dissenters, would substitute a single test for the current tripartite one. The question for them is whether the government policy coerced any one into conformity with a religious policy. The only difference between Kennedy and the four dissenters was how to define coercion.

The dissenters concluded that there was no unconstitutional coercion in a graduation prayer, as contrasted to a classroom prayer, because no student was required by law to attend graduation, whereas he was required to attend classes. (*Id.* at 512-15). Justice Kennedy ruled that there was, in fact, coercion in both cases, because peer, family, and community pressure to attend the graduation ceremony was substantially equivalent to the legal sanction requiring classroom attendance. *Id.* at 482-87 .

The other four justices concurred with Kennedy, not because they found coercion, but because they found that choosing a clergyman to offer a graduation prayer constituted an "endorsement" of the religious views contained in the prayer. Such an endorsement violated the Establishment Clause requirement that the government remain "neutral" about religion. *Id.* at 493-95, 506-09.

The no coercion test was favored by five justices, in part, because it accorded with such long-standing practices as presidential Thanksgiving proclamations, calls to prayer in times of national crises, and legislative chaplaincies. Even Justice Kennedy found such practices non-coercive because they were mere encouragements directed at adults in an undisciplined community setting. *Id.* at 487.

The no endorsement test would place such practices in jeopardy. Justice Souter observed, however, that Thanksgiving proclamations and calls for national prayer may technically violate the Establishment Clause by endorsing religion, but not sufficiently serious for the law to take notice of them, according to the "legal aphorism *de minimis non curat lex*." *Id.* at 508-09.

While *Lee v. Weisman* appears to have sounded the death knell to the 3-part test, it did not overrule it, nor did any of the opinions question the fundamental premises of that test. The dichotomy

between the "secular" and the "religious" remains. And the principle of "neutrality" continues to occupy center stage.

NO PREFERENCE?

In 1947, the U.S. Supreme Court ruled that the Establishment Clause of the First Amendment incorporated the doctrine of "separation of church and state." *Everson v. Board of Education,* 330 U. S. 1 (1947). In *Everson,* the Court embraced for the first time the notion that the Establishment Clause required the State and the National governments to be neutral about religion.

This doctrine of religious neutrality impacted most dramatically upon public education. Two years after *Everson,* the Court began to erect a wall between education and religion, by banning religious education from the premises of the public schools. *McCollum v. Board of Education,* 333 U.S. 203 (1948). By 1987, the Court had raised this wall to ban classroom prayer and Bible reading from the public schools, to secularize the nation's educational curriculum, and to prohibit any significant tax support for religious education in private schools. *Wallace v. Jaffree,* 472 U.S. 38 (1985); *Edwards v. Aguillard,* 482 U.S. 578 (1987); *Grand Rapids School District v. Ball,* 473 U.S. 373 (1985).

These and other rulings virtually eliminated religion from the formulation and implementation of state educational policy. And, if extended to other areas of public policy - such as abortion, the wall of separation threatened to eliminate religion as an effective factor in the formulation of public policy generally. See, *e.g.*, *Harris v. McRae,* 448 U.S. 297 (1980).

So, in the early 1980's, the Court's conservative critics launched a counter-offensive. On the academic front, Professor Robert L. Cord published his critique of the wall of separation of church and state.

After a careful study of the writings and actions of Madison and Jefferson, Cord concluded that the original intent of the framers of the First Amendment's Establishment Clause was "intended to prevent the establishment of a national church or religion, or the giving of any religious sect or denomination preferred status." R. Cord, *Separation of Church and State* 15 (1982).

This "no preference" principle was picked up by Justice William Rehnquist in his dissenting opinion in *Wallace v. Jaffree, supra,* 472 U.S. at 91-114. With Justice Rehnquist's elevation to the chief justiceship, there was great hope that he would lead the Court back to this original position. See R. Cord, "Church-State Separation: Restoring the 'No Preference' Doctrine to the First Amendment," reprinted in *Restoring the Constitution* 295-328 (H. House, ed. (1987).

The Cord/Rehnquist thesis rests, first of all, upon the initial wording of James Madison's proposal to the First Congress which put together the Bill of Rights. That language read as follows:

> *The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed. Sources of Our Liberties* 422 (Perry, ed. 1972).

Even though the text of this original proposal was drastically altered, Cord and Rehnquist contended

that the textual changes did not change the original intent of Madison and his colleagues.

Because no statements could be found in the legislative record explaining the change of text, both Cord and Rehnquist assumed that the textual changes were not substantive. Therefore, they rested their case for the "no preference" principle upon statements made in support of the original proposal. Cord, *supra,* at 3-15; *Wallace v. Jaffree, supra,* 472 U.S. at 92-98.

Both Cord and Rehnquist offered further support for their view by citing a number of acts of the early Congresses and of the Presidents from Washington through Madison. They attributed special significance to the national policy that appropriated tax money to support the religious education of the Indian tribes, especially because Thomas Jefferson concurred in that policy by signing various treaties containing such financial support. Cord, *supra,* at 17-82; *Wallace v. Jaffree, supra,* 472 U.S. at 100-104.

Finally, they rested their case on the commentaries of Joseph Story and Thomas Cooley, two great 19th century expositors of the constitution. Story's view was the most compelling:

> *The real object of the [First] [A]mendment was ... to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government.* 2 J. Story *Commentaries on the Constitution of the United States* 632 (5th ed. 1891).

Resting on all of these nontextual sources, Cord and Rehnquist concluded that the Court's neutrality doctrine was mistaken and that the wall that the Court had erected to separate religion from public policy was in error:

> *It would seem from this evidence that the Establishment Clause... had acquired a well-accepted meaning: It forbade establishment of a national religion, and forbade preference among religious sects and denominations .... The Establishment Clause did not require government neutrality between religion and irreligion nor did it prohibit the Federal Government from providing nondiscriminatory aid to religion. There is simply no historical foundation for the proposition that the Framers intended to build the "wall of separation" that was constitutionalized in Everson. Wallace v. Jaffree, supra,* 472 at 106.

The root difficulty with the Cord/Rehnquist thesis lies with their presupposition that the textual change from Madison's original proposal was of no substantive significance.

In his concurring opinion in *Lee v. Weisman,* 120 L. Ed. 2d 467, 495 (1992), Justice David Souter proves otherwise. First, he documents that Congress considered several textual versions of an establishment clause. Some of these, including Madison's original proposal, would clearly or arguably have endorsed the "no preference" principle. But the final text was derived, not from the Madison proposal, but from one introduced by Fisher Ames of Massachusetts.

The Ames proposal read, in pertinent part, as follows: "Congress shall make no law establishing Religion." The House adopted this language and sent it to the Senate. In doing so, it specifically rejected language that read "that no religion shall be established by law." By rejecting the latter, "which arguably ensured only that 'no religion' enjoyed an official preference over others" the

House "deliberately chose instead a prohibition extending to laws establishing 'religion' in general." *Id.* at 497-98.

The Senate considered a number of Establishment clause texts, one of which clearly endorsed the no preference principle. Finally, it adopted the final House text, only to reject it in favor of a very narrow one prohibiting any law "establishing articles of faith or a mode of worship." This was unacceptable to the House and it called for a joint conference committee. The House conferees prevailed upon the Senate to adopt the text that now appears in the First Amendment. *Id.*

"What is remarkable," Justice Souter wrote, "is that, unlike the earliest House drafts or the final Senate proposal, the prevailing language is not limited to laws respecting an establishment of 'a religion,' 'a national religion,' 'one religious sect,' or specific 'articles of faith.' The Framers repeatedly considered and deliberately rejected such narrow language and instead extended their prohibition to state support for 'religion' in general." *Id.*

Souter completed his textual critique by pointing out that several state constitutions, in existence at the time that the Bill of Rights was being considered, had adopted a non-preferential policy without disestablishing religion. But the language chosen by Congress did not track those state documents. Rather, the text tracked that of Jefferson's Virginia Statute for Religious Freedom which condemned all establishments "however non-preferentialist." *Id.* at 498-99.

To go beyond the constitutional text in search of an original intent, as the Cord/Rehnquist thesis requires, is to elevate the statements of a few over the language of the constitution, itself. This is especially impermissible when the statements contradict the text which requires one to conclude "that the Framers were extraordinarily bad drafters - that they believed one thing but adopted language that said something substantially different, and that they did so after repeatedly attending to the choice of language." Laycock, "'Nonpreferential' Aid to Religion" 27 *Wm. & Mary L. Rev.* 875, 882-83 (1986).

Rejection of the no preference principle, however, does not mean that one must endorse the modem view that the Establishment Clause requires the government to be religiously neutral.

NO JURISDICTION

"Congress shall make no law respecting an establishment of religion ...." The introductory phrase of the First Amendment to the United States Constitution was unprecedented. Nothing like it had theretofore appeared in any English document.

Nor was the text to be found in any State Constitution at the time the Bill of Rights was written. Even the Virginia Constitution of 1776 did not contain a prohibition against the "establishment" of religion. It merely guaranteed the "free exercise" thereof. Section 16 of the Virginia Constitution in *Sources of Our Liberties* 312 (R. Perry, ed., 1972).

But the principle of disestablishing religion had been endorsed by statute in Virginia when, in 1786, the Virginia Assembly adopted Thomas Jefferson's Bill for Establishing Religious Freedom.

That Bill, when coupled with James Madison's supporting Memorial and Remonstrance Against

Religious Assessments of 1785, illumines the purpose and meaning of the prohibition against an establishment of religion. Titus, "No Taxation or Subsidization: Two Indispensable Principles of Freedom of Religion," 22 *Cumberland Law Review* 505, 506-07 (1991-92).

The legislative battle over the disestablishment of religion in Virginia began in the 1784-85 session of the Virginia General Assembly. A bill was introduced in the House of Delegates providing for the legal support of teachers of the Christian religion.

The bill's proponents were persuaded to postpone taking any action until the next session; and, in the meantime, to print the bill and disseminate it for public consideration.

Madison composed the Remonstrance against the Bill for general circulation. It was so extensively signed by people of every religious denomination, that at the ensuing session of the legislature, not only was the original bill defeated, but Jefferson's Bill for Establishing Religious Freedom was enacted into law.

Jefferson's Bill was an unusual piece of legislation. Not only did it contain a specific prohibition against compelling anyone to support any religious ministry, but it declared that the "rights hereby asserted are of the natural rights of mankind." The rights asserted were not written in the operative section, but in the extensive Preamble to the Bill, itself.

Jefferson's Preamble and Madison's Remonstrance, then, are the key sources for understanding the nature of the no establishment principle and the original meaning of the text of the Establishment Clause. Throughout both documents, the principle is singular, namely, that the civil government has no jurisdiction over matters that belong exclusively to God.

Madison put it this way. First, he drew attention to the Virginia Constitution's definition of religion, namely, those duties owed to the Creator which by nature may only be enforced by "reason and conviction," not by "force and violence."

Second, Madison reminded his reader that when any man entered into a civil society he was duty-bound to reserve those duties which he owed exclusively to God from "the claims of Civil Society:"

> *Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of his duty to the general authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving allegiance to the Universal Sovereign.*

Therefore, Madison concluded, "Religion is wholly exempt from ... [the] cognizance [of Civil Society)." And "if religion be exempt from the authority of Society at large, still less can it be subject to that of the Legislative Body." For the"jurisdiction" of any legislative body is derived from the authority of the people. Where the people have no jurisdiction, neither do their representatives.

Having stated the principle, Madison then applied it to the proposed legislation requiring a citizen to pay a tax to the religious teacher of the citizen's own choice. Just because this proposal gave the

taxpayer a choice did not save it from violating the God-given rights of men. If a civil government has authority to "force a citizen to contribute three pence only of his property for the support of one establishment, [it] may force him to conform to any other establishment in all cases."

In other words, Madison saw no middle ground. Either a tax to support religion was within the jurisdiction of the civil government or it was not. The proposed policy of allowing the taxpayer to choose the religion to be supported by the tax did not save the measure, because it still forced the taxpayer to choose. That "freedom [if it] be abused," Madison concluded, "[was] an offence against God, not against man: To God, therefore, not to men, must an account of it be rendered."

Jefferson echoed this conclusion in his Preamble. He maintained "that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical."

It is sinful because God, himself, created the mind free. Even the Holy Author of our religion chose not to subject the mind to "coercion" It is tyrannical, because civil rulers presume to use force to compel performance of duties that God, Himself, refused to son claimed, that they could not be the "object of civil government, nor under its jurisdiction."

This "no jurisdiction" principle was deliberately chosen by the First Congress to limit its powers for one reason. Congress recognized that each State had formulated its own policies concerning religion.

If Congress had any jurisdiction whatsoever over religion, then Congress could displace state law under the Constitution's Supremacy Clause. By denying to Congress all jurisdiction, States were free to adopt policies establishing one religion, plural religions, or none.

With the ratification of the Fourteenth Amendment, however, the states are no longer free to "make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." As I have argued previously, this provision grants national protection from State action abridging the privileges and immunities contained in the First, Second, and Third Amendments of the Constitution. See Titus, "The Bill of Rights: Its Text, Structure and Scope," (1994). Thus, the Establishment Clause applies to the states.

In order to apply the no jurisdiction principle, however, one must return to the definition of religion, a topic that I have addressed above. In the next issue, I will address the topics of education and welfare, and assess current state and national educational and welfare policies against the Establishment Clause.

EDUCATION

Since *Everson v. Board of Education,* 330 U. S. 1 (1947), the United States Supreme Court has assumed that the Establishment Clause does not prohibit the civil government from establishing a system of public education.

Since the 1960's, the Court has insisted, however, that the Establishment Clause requires that the state-supported school system be purged of all religious purposes and activities. *Edwards v.*

Aguillard, 482 U. S. 578 (1987).

All of these rulings rest upon the proposition that the Establishment Clause prohibits state support of the propagation of "religious opinions and beliefs," but not "secular opinions and beliefs." *Stone v. Graham,* 449 U. S. 39 (1980).

This proposition, in turn, rests upon the 1947 *Everson* opinion, in which Justice Hugo Black concluded that the Establishment Clause, like the 1786 Virginia Statute Establishing Religious Freedom, banned state tax support of the church and of religious activities in general.

It is true that the operative section of that 1786 statute denied to the state the power to interfere with the affairs of the church or to support the propagation of religious opinions. But that prohibition did not rest upon a principle that distinguished "opinions in matters of religion" from "opinions in physics or geometry."

To the contrary, the ban on state interference with "religious opinions" was rooted in the proposition that the state had no jurisdiction whatsoever in the realm of opinion generally. Jefferson put the fundamental principle this way:

> *... [T]o suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles, on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty, because he being of course judge of that tendency, will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own* ....

What is tax-supported public education, but state intrusion into the field of opinion, with power to determine what ideas will be taught and for what purposes. Even the Supreme Court has acknowledged that state public schools are:

> *vehicles for "inculcating fundamental values necessary to the maintenance of a democratic political system." Board of Education v. Pico,* 457 U.S. 853, 864 (1982).

To serve this purpose, the Court has expressed:

> *full agreement ... that local school boards must be permitted "to establish and apply their curriculum in such a way as to transmit community values" and that "there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political." Id.*

In order to "inculcate fundamental values" a school board must decide what those fundamental values are and devise a program whereby those values are impressed upon each student. To "inculcate" means to indoctrinate, to fix in the mind. See Titus, "Public School Chaplains: Constitutional Solution to the School Prayer Controversy," 1 *Regent L. Rev.* 19, 29 (1991).

In order to "transmit community values," a school board must again decide what those community values are and devise a program whereby those values are conveyed.

To "transmit" means to pass on by inheritance, to hand down. *Id.* at 30. In order to "promot[e] respect for ... traditional values," a school board must decide what those traditional values are and devise a program whereby those values are furthered or encouraged. To "promote" means to cultivate, feed, or foster. *Id.*

Jefferson's statute, the very one cited by the Supreme Court in *Everson,* condemned these very practices as destructive of "religious liberty," because, given the power to educate the citizenry, the civil ruler will inevitably "make his opinions the rule of judgment" and "approve or condemn" other opinions "only as they shall square with or differ from his own."

Therefore, Jefferson denied to the civil ruler all jurisdiction in the arena of opinion, leaving that arena to the people unimpeded by civil law:

> *... [T]ruth is great and will prevail if left to herself, that she is the proper, and sufficient antagonist to error, and has nothing to fear from the conflict, unless by human interposition disarmed of her natural weapons, free argument and debate, errors ceasing to be dangerous when it is permitted freely to contradict them ....*

The only power the civil ruler had, Jefferson contended, was to protect the community "when principles break out into overt acts against peace and good order," not to intrude upon "the field of opinion" so as to prevent such acts from occurring.

Not only did Jefferson's principle deny to the state any jurisdiction to teach its citizenry, but it denied to the state the power to tax to support any general education program He stated this part of the principle succinctly:

> *That to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical....*

What are taxes raised to support a public school system but forced contributions of money to support the propagation of opinions. In Jefferson's time, the education of the citizenry was in the hands of the family and the church. The church had relied on the power of the state to enforce the tithe in order to support its teaching, as well as its worship, ministry. See, *e.g.*, Constitution of Massachusetts, Declaration of Rights, Art. III in *Sources of Our Liberties* 374 (R. Perry, ed., Rev. Ed. 1978) and see generally Titus, "Education, Caesar's or God's: A Constitutional Question of Jurisdiction," 1982 *J. of Christian Juris.* 101, 130-142.

Jefferson's principle denied that the civil ruler had any such authority. Indeed, he went so far as to deny to the state the power to exact the tithe, even if the person taxed had the choice of giving his tithe to the church of his choice. See Titus, "School Choice," *The Forecast* 3-4 (Dec. 1, 1993).

Jefferson's opposition was not based on the notion that the state could not enforce the tithe because it was being used to support the propagation of "religious opinions." Rather, it was because he had concluded that man's mind had been created to be "free" and free it must remain from "all attempts to influence it by temporal ... burthens," including taxes for the purpose of supporting the propagation of beliefs of all kinds.

Jefferson put the foundational proposition this way:

> *Well aware that Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy or meanness, and are a departure from the plan of the Holy Author of our religion, who, being Lord both of body and propagate it by coercions on either, as was in his Almighty power to do ....*

If God, Himself, who has all power and authority, has chosen not to use force to impose the true religion upon mankind, Jefferson observed, how dare men "assume dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible."

That they have done so, Jefferson claimed, was based upon "the impious presumption of legislators and rulers, civil as well as ecclesiastical, who, being themselves but fallible and uninspired men .. established and maintained false religions over the greatest part of the world, and through all time ...."

Religion, to Jefferson, meant the entire realm of opinion, not just the subjects of salvation, redemption, and other religious matters. His world was not divided into the "religious" and the "secular," as is the case with twentieth century men. See Titus, "Education, Caesar's or God's: A Constitutional Question of Jurisdiction," 1982 J. *of Christian Juris., supra,* at 142-163.

This was so because Jefferson, like all of America's founders, acknowledged that God was the Creator of the universe and all mankind and, as the Creator, had laid out a regime of law governing all of his creatures. See Titus, *God, Man and Law: The Biblical Principles* 41 (Inst. of Basic Life Principles 1994).

This meant that America's founders sought to discover God's law in order to bring civil law into conformity with it Thus, the meaning of religion and the right to freedom of religion arose first in relation to God and God's law.

Thus, Section 16 of the 1776 Bill of Rights of the Virginia Constitution defined religion as "the duty which we owe to our Creator" and freedom of religion as those duties which, by nature, can only be enforced by "reason and conviction, not by force or violence." These definitions would not have been possible if Virginia's statesmen did not hold to a Biblical world view which acknowledges the realm of the Holy Spirit (John 16:8) and the realm of the civil ruler (Rom. 13:4).

Jefferson concluded that one of the duties that lay outside the realm of the civil ruler was the responsibility to believe and to profess "truth."

From this, he concluded that God created the mind free from all civil jurisdiction He did not confine that liberty to just those matters of the mind that some civil ruler might label "religious."

But Jefferson's creation world view is not the one now held by the Supreme Court. Rather, the justices, liberal and conservative, live in a world defined by the Darwinian revolution, not by the Book of Genesis. Consequently, they do not recognize God as the Author of law. Rather, they assume that laws are either made by men or imposed upon them by an impersonal force in nature.

See Titus, "Religious Freedom: The War Between Two Faiths."

Having no foundation for drawing a jurisdictional distinction between duties owed exclusively to God and duties also owed to a civil ruler, the Court has carved out its own division between the "religious" and the "secular." ln doing so, the Court has deprived the American people of their true legacy of freedom of religion by putting the constitutional stamp of approval on state-financed and administered secular education, thereby enabling the civil government to dominate men's minds.

Even the 19th century pragmatist, John Stuart Mill, warned that an education system dominated by the state

> *is a mere contrivance for molding people to be exactly like one another; and as the mold in which it casts them is that which pleases the predominant power in the government - whether this be a monarch, a priesthood, an aristocracy, or the majority of the existing generation - in proportion as it is efficient and successful, it establishes a despotism over the mind, leading by natural tendency to one over the body.* J.S. Mill, *On Liberty* 129 (Liberal Arts Press 1956).

WELFARE

In recent years, government welfare programs have been challenged under the Free Exercise Clause of the First Amendment. These challenges have been of two types.

First, there is the claim that government welfare must be administered in such a way as not to unduly burden a person's religious faith and practice. The leading case is *Sherbert v. Verner,* 374 U.S. 398 (1963) where the Court ruled that a Seventh-Day Adventist could not be denied unemployment benefits by a rule requiring her to accept work on Saturdays.

Second, there is the claim that a tax supporting a welfare program infringes the free exercise of religion when imposed upon a person who, because of religious conscience, cannot receive any of the welfare benefits supported by his taxes. The leading case is *United States v. Lee,* 455 U.S. 252 (1982) where the Court ruled that a member of the Old Order Amish could not be relieved from payment of the social security tax even though "the Amish believe it sinful not to provide for their own elderly ..." and, therefore, presumably would never receive social security benefits.

The *Lee* ruling has escaped serious criticism. The *Sherbert* holding, however, has been questioned by some as violating the Establishment Clause. To force the government to treat a religious objection to Saturday work different from a non-religious one violates the Establishment Clause principle of neutrality, and is tantamount to subsidizing a religious practice with taxpayers' money. Kurland, Of Church and State and the Supreme Court, 29 *U. Chi. L. Rev.* 1, 5 (1961).

But as I have previously demonstrated, the Establishment Clause principle is not one of religious neutrality, but of jurisdiction. Properly understood, all welfare programs violate the Establishment Clause principle of jurisdiction, because welfare is a "duty ... owe[d] to [the] Creator," enforceable "only by reason and conviction, not by force or violence." See Titus, Defining Religion, *The Forecast* 7 (Apr. 1, 1994).

The Virginia Bill of Rights of 1776 explicitly acknowledged that the duty "of all to practise Christian forbearance, love, and charity towards each other" was a "mutual" duty, not a civil one. Constitution of Virginia Section 16 (June 12, 1776), *Sources of Our Liberties* 312 (R. Perry ed. 1978) (Hereinafter *Sources).* By definition, a duty to be "mutual" must be reciprocal. That is, it must be performed interchangeably with one or more persons giving and one or more persons receiving, each acting in return or correspondence to the other. Webster, *American Dictionary of the English Language* (1828).

To illustrate the nature of mutuality, Noah Webster provided two examples:

> *Mutual love is that which is entertained by two persons each for the other; mutual advantage is that which is conferred by one person on another, and received by him in return. Id.*

The essence of mutuality is voluntariness, unencumbered by threat of force. It is one thing for a well-off person or group of persons freely to give money to a needy person or group of persons. It is quite another for the State to impose a tax upon the well-off and distribute the money raised to the poor.

To be a mutual duty, people must be left alone to decide whether or not to enter into a relationship, and if they do, to set the terms of that relationship. Any outside interference by the State with the performance of such an activity will transform a "mutual duty" into a "civil one."

In contrast with the VirginiaBill of Rights, the Matyland Declaration of Rights treated welfare as a civil matter. The Maryland Constitution did so because it had adopted quite a different policy with regard to religious freedom.

First, only those persons "professing the Christian religion" were entitled to religious liberty and even they could not freely exercise their religious faith if it "disturb[ed] the good order, peace or safety of the State." Constitution of Maryland, Article XXXIII (Nov. 3, 1776), *Sources, supra* at 349. In contrast, the Virginia Constitution guaranteed the free exercise of religion to all without limitation. Constitution of Virginia, Section 16, *Sources, supra* at 312. See Titus, No Taxation or Subsidization: Two Indispensable Principles of Freedom of Religion, 22 *Cumb. L. Rev. 505,* 506-07 (1991-92) (Hereinafter Titus, No Taxation).

Second, the Maryland Constitution authorized "the Legislature ... to lay a general and equal tax, for the support of the Christian religion," provided that the taxpayer was left with "the power of appointing the payment over of the money, collected from him, to support ... [the] particular place of worship or minister" of his choosing. Constitution of Maryland, Article XXXIII in *Sources, supra* at 349. In contrast, the Virginia guarantee was applied in such a way as to prohibit the State from imposing any tax to support any religion. Titus, No Taxation, *supra* at 506-08.

Finally, the Maryland Constitution explicitly recognized that care for the poor was a matter concerning religion. The full text read, as follows:

> *[T]he Legislature may, in their discretion, lay a general and equal tax, for the support of the Christian religion; leaving to each individual the power of appointing the payment*

> *over of money, collected from him, to the support of any particular place of worship or minister, or for the benefit of the poor of his own denomination, or the poor in general of any particular county....* Constitution of Maryland, Article XXXIII, *Sources, supra,* at 349.

In other words, the Maryland legislature had the power to establish a tax-supported welfare program for the poor, because it endorsed a policy of supporting religion with its taxing power. In contrast, Virginia denied to the State any jurisdiction over "charity" because it had endorsed a policy of denying all tax support for religion.

The First Amendment religion guarantees conform to the Virginia legacy, not the Maryland one. *Everson v. Board of Education,* 330 U.S. 1 (1947); See also Titus, No Taxation, *supra* at 505-06. Therefore, the prohibition of any law respecting an establishment of religion should be construed according to the Virginia principle of no jurisdiction, not the Maryland principle of jurisdiction, but no preference.

The Virginia legacy that "Christian forbearance, love, and charity" lie outside the jurisdiction of the State is consistent with the general principle that religious duties, *i.e.*, those duties enforceable only by reason and conviction, belong exclusively to the Creator.

Even in theocratic Israel, the duty to care for the poor was not backed by civil sanction. To the contrary, giving to the poor was a matter of the heart:

> *If there be among you a poor man ... thou shalt not harden thine heart, nor shut thine hand from thy poor brother ... Thou shalt open thine hand wide unto thy brother, to thy poor, and to thy needy, in thy land* (Deut. 15 :7, 11).

Instead of reinforcing this duty by civil penalty or tax, people were encouraged to take care of the poor by divine incentive:

> *Thou shalt surely give him, and thine heart shall not be grieved when thou givest him: because that for this thing the Lord thy God shall bless thee in all thy works, and in all that thou puttest thine hand unto* (Deut. 15:10).

Pursuant to these general principles, the Law required payment of a special three-year "tithe" specially designated for the poor. This duty was not backed by civil sanction, but encouraged by divine incentive:

> *At the end of three years thou shalt bring forth all the tithe of thine increase ... and shall lay it up within thy gates: And the Levite ... and the stranger and the fatherless and the widow, which are within thy gates, shall come, and shall eat and be satisfied; that the Lord thy God may bless thee in all the work of thine hand which thou doest.* (Deut. 14:29-30).

The duty to help the needy, voluntary by nature, was a universal one, not just required of God's chosen people. The writer of Proverbs, for example, pronounced blessing upon all who show "mercy" by giving to the poor and needy (Prov. 14:21; 22:9). The writer of Proverbs also attested

that this duty to the poor is owed by all, because it is a duty owed to God as Creator:

> *He that oppresseth the poor reproacheth his Maker: but he that honoreth him (i.e., his Maker) has mercy on the poor* (Prov. 14:31 Cf. Prov. 17:5).

Thus, the drafters of the Virginia Constitution concluded that the duty "to practise Christian forbearance, love, and charity towards each other" was a "duty of all," Christian and non-Christian alike. That duty, therefore, was within the realm of religion, not the State, and both Christian and non-Christian were to be free of the State's coercive power in the performance or nonperformance of it.

"Pure religion and undefiled," wrote James under the inspiration of the Holy Spirit, "before God *and* the Father is this, To visit the fatherless and widows in their affliction ..." (James 1: 27) (Emphasis added).

Under this analysis, then, not only are the Old Order Amish to be freed from paying the Social Security tax, but all people are constitutionally immune from forced payments of any kind to subsidize any welfare program benefitting the poor, the unemployed, the elderly, or any other "needy" class.

The Virginia and Maryland Religion Clauses

Section 16, Constitution of Virginia (June 12, 1776)

That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience; and that it is the mutual duty of all to practise Christian forbearance, love, and charity towards each other.

Article XXXIII, Constitution of Maryland (November 3, 1776)

That, as it is the duty of every man to worship God in such manner as he thinks most acceptable to him; all persons, professing the Christian religion, are equally entitled to protection in their religious liberty; wherefore no person ought by any law to be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice; unless, under colour of religion, any man shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others, in their natural, civil, or religious rights; nor ought any person to be compelled to frequent or maintain, or contribute, unless on contract, to maintain any particular place of worship, or any particular ministry; yet the Legislature may, in their discretion, lay a general and equal tax, for the support of any particular place of worship or minister, or for the benefit of the poor of his own denomination, or the poor in general of any particular county ....

NO RELIGIOUS TEST

Back in 1988 Harvard Law Professor Alan Dershowitz challenged Pat Robertson, at the time a candidate for President, to defend his claim that only Christians and Jews are fit to hold civil office in America. Robertson did not back down:

> *Would you want a president who believed that women should commit suttee and jump on the funeral pyre of their husbands? ... If you are a strong Muslim ... you believe that Allah has determined the destiny of all people. Therefore it is not necessary to alleviate the plight of the poor.* Dershowitz, *Chutzpah* 336-37 (1991).

Robertson's point was obvious. One's religious faith does influence one's politics. Dershowitz's counterpoint was more subtle. Just because one may believe a particular religious doctrine does not mean that one will act upon that tenet in performing the duties of public office.

Dershowitz went on to support his position that one's personal religious faith cannot be relevant because the Constitution forbids the use of any "religious test" to determine if a person is qualified to hold any civil office. *Id.* at 337.

What Dershowitz failed to point out, however, is that the Constitution forbids the *civil government* from applying any religious test in setting the terms of eligibility for public office. It does not prevent the people, as electors, from considering a candidate's religious faith as one factor in assessing his fitness for office.

In other words, the prohibition against religious tests is not designed to insulate government from religious influence, but is designed to protect the government from disqualifying candidates for civil office on the basis of any civil religious orthodoxy.

State Churches

Until 1961, it was generally assumed that the United States Constitution offered such protection only to persons seeking a federal government position On June 19 of that year, however, the United States Supreme Court struck down Maryland's constitutional requirement that a personal belief in God was prerequisite to holding the office of notary public in the state. *Torcaso v. Watkins,* 367 U.S. 488 (1961).

Because the text of the Constitution is clear, banning any religious test as a qualification for "an "office or public trust under the United States," the Court turned elsewhere to determine the constitutionality of the Maryland requirement. Relying on t11e First Amendment religion clauses, Justice Hugo Black ruled that such a religious test invaded an office seeker's "freedom of belief and religion." *Id.* at 496.

Although Justice Black did not rest his case squarely upon the Establishment Clause, he did note that religious tests for holding civil office had historically been associated with civil orders with official churches. *Id.* at 490.

The Maryland religious test was a case in point. The oath invalidated in *Torcaso* originated in the very first Maryland Constitution. Article XXXV of that 1776 document read:

> *That no other test or qualification ought to be required, on admission to any office of trust ... , than such oath of support and fidelity to this State ... and a declaration of belief in the Christian religion. Sources of Our Liberties* 350 (R. Perry, ed. 1978).

To require a civil officer to affirm a personal faith in Jesus Christ, as well as fealty to the civil order, made sense at the time. Article XXXIII of the Maryland Constitution authorized the legislature to "lay a general and equal tax, for the support of the Christian religion." *Id.* at 349. Article XXXIV gave to the legislature power to void any "gift, sale, or devise of lands, to any minister ... or preacher of the gospel...or to any religious sect, order, or denomination." *Id.* at 350.

With such governing authority over the tithes and offerings to the church, how could one hold civil office if one did not profess faith in the established Christian religion?

And so it was in Maryland's sister states where there was some form of an established church. For example, the Vermont Constitution protected the "civil rights" of "any man who professes the protestant religion."

At the same time, it provided that "every sect or denomination of people ought to observe the Sabbath, or Lord's Day, and keep up, and support, some sort of religious worship ...." Article III, Constitution of Vermont (1777) in *Id.* at 365.

English Origins

The religious test for office was rooted in English law, an established church order. According to Blackstone, England united church and state from the very beginning:

> *[I]n the time of our Saxon ancestors there was no sort of distinction between the lay and ecclesiastical jurisdiction: the county court was as much a spiritual as a temporal tribunal: the rights of the church were ascertained and asserted at the same time and by the same judges as the rights of the laity. For this purpose the bishop of the diocese, and the alderman, or in his absence the sheriff of the county used to sit together in the county court, and had there cognizance of all causes as well ecclesiastical as civil...* III Blackstone, *Commentaries on the Laws of England* 61 (1768).

Blackstone extolled "[t]his union of power" as "very advantageous" to both state and church:

> *[T]he presence of the bishop added weight and reverence to the sheriff's proceedings; and the authority of the sheriff was equally useful to the bishop, by enforcing obedience to his decrees in such refractory offenders, as would otherwise have despised the thunder of mere ecclesiastical censures. Id.* at 61-62.

This union of power was protested by the church in Rome. At first the church succeeded in separating the ecclesiastical from the civil jurisdiction, but that ended when King Henry VIII established himself "as Supreme head of the English church" *(Id* at 65) and "when all the jurisdiction usurped by the pope in matters ecclesiastical was restored to the crown, to which it originally belonged ...." *Id.* at 67.

But the controversy did not end there. From the time of Henry VIII through the reign of James II (1685-89) religious divisions in England threatened the very survival of the polity. King James n brought matters to a head by placing "Catholics into every branch of the government ... until no Protestant felt safe in his office unless he was prepared to apostasize."

To compound the problem, James II issued Declarations of Indulgence granting liberty of worship to "the Catholic and Protestant dissenters" and dispensing with religious tests for civil office. *Sources of Our Liberties* 225 (R. Perry, ed. 1978).

This threat to the established church order came to an end with James II's abdication of the throne in 1688. *Id.* at 222. In 1689 William and Mary were proclaimed king and queen of England under a Bill of Rights that restored the Church of England to its preferred position and barred any Catholic from ever occupying the throne. To that end, kings and queens of England were required to swear an oath of fealty to the Church of England and to submit to "the sacraments according to the rites" of that church. *Id.* at 225, 249-50.

As for religious freedom for adherents to the Catholic faith, there was none. Protestant dissenters fared better under the Toleration Act of 1689, but they faced numerous "civil disabilities ..., the principal one being that the Nonconformists could not hold public office." *Id* at 240.

Colonial Heritage

This English heritage of religious conformity backed by civil power was brought to America under the various colonial charters. Nowhere was this more pronounced than in the colony of Massachusetts Bay founded by the Nonconformist Puritans. From the beginning only those whose religious beliefs conformed to that of the established church "could hold office and take part in civic affairs." *Id.* at 78.

As in England, the reason for the religious test for civil office was that the jurisdiction of the state extended to the governance of the church. Thus, the Massachusetts Body of Liberties of 1641 proclaimed:

> *Civill Authoritie hath power and libertie to see the peace, ordinances and Rules of Christ observed in every church according to his word, so it be done in a Civill and not in an Ecclesiastical way. Id.* at 154

The established Nonconformist Puritans soon faced, as had the Church of England, religious dissenters in their midst. In 1635 and 1636 the Reverend Thomas Hooker led groups of settlers to Connecticut. While these left Massachusetts primarily in protest of the "wide discretionary powers of the magistrates," it is also likely that the emigration was prompted by "religious differences." *Id.* at 115.

The Preamble to the Fundamental Orders of Connecticut of 1639 indicate that one of the purposes of the founding of the new colony was "to maintain and preserve the liberty and purity of the gospel of our Lord Jesus." The Orders also spelled out the oaths of office of the governor and civil magistrates. Both oaths required the office holder to swear in the name of God, to rule in accordance with "God's word," and to call on God for help. But neither required an affirmation of any personal belief in God or of adherence to any particular tenets of the Christian faith. *Id.* at 123-24.

In 1636 Roger Williams led another group of religious dissenters to found the settlement of Providence. Religious Separatists, these dissenters drew up a "written covenant... provid[ing] that

the authority of civil government should not extend to religious matters." *ld* at 164.

Williams later secured a charter from King Charles II guaranteeing that no person in the colony of Providence and Rhode Island would be required to "take or subscribe" to any personal religious oath in order to hold civil office. *Id.* at 170, 173.

This principle was adopted in 1677 in the Concessions of West New Jersey. Drawn up by William Penn, the fundamental law of that colony provided that "no person could be disqualified from holding public office because of his religious convictions." *Id.* 182-83.

Virginia Legacy

Following the War for Independence, the differences over the legitimacy of religious tests for civil office continued. Rhode Island stood firmly against such tests.

Pennsylvania watered down its test from a requirement of profession of faith in Jesus Christ to an acknowledgment in "the being of a God." *Id.* at 329. Contrast XXXIV of the 1862 Frame of Government of Pennsylvania. *Id* at 220.

The differences in the early state constitutions appeared directly proportional to the extent of jurisdiction that the new State governments exercised over the church. The more limited the jurisdiction, the less restrictive the religious test.

In Virginia, the state had been denied all jurisdiction in matters of religion. Because one's faith in God and in the Christian religion belonged exclusively to God, Jefferson and Madison both maintained that to require a religious test for civil office would illegitimately encroach upon God's exclusive authority, and consequently upon man's civil liberty.

Jefferson put it this way in his preamble to his 1786 Act for Establishing Religious Freedom:

> *Well aware that Almighty God created the mind free ... that the impious presumption of legislators and rulers, civil as well as ecclesiastical, who, being themselves but fallible and uninspired men, have assumed dominion over the faith of others ... that therefore the proscribing any citizen as unworthy the public confidence by laying upon him an incapacity of being called to offices of trust ... , unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which in common with his follow citizens he has a natural right ....*

Christianity and America

Gary North has asserted that Jefferson's Act "was the capstone of Madison's 15- year war against religious test oaths" [North, *Political Polytheism* 449 (1989)] and that Madison's opposition to such oaths was central to "his long-term goal of separating Christianity from civil government - not just separating Church from State, but Christianity from civil government:"

> *He knew what had to be done in order to accomplish this goal: the severing of the binding power of Trinitarian religious oaths that were required of state officers in several states.*

Id. at 443.

North is wrong. Madison opposed the religious test oaths, not because they were "Trinitarian," for many of them were not. If his goal was to sever Christianity from civil government, he could have accomplished that by simply supporting innocuous religious tests such as belief in God.

But he opposed all religious test oaths because he believed them to be outside the "cognizance of civil power." That is, he believed that a man's opinion about Jesus Christ belonged exclusively to God, not to God as mediated by Caesar no matter how Trinitarian Caesar may be:

> *Whilst we assert for ourselves a freedom to embrace, to profess, and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us. If this freedom be abused, it is an offence against God, not against man: To God, therefore, not to man, must an account of it be rendered.*

With this statement, Madison positioned himself squarely within the teaching of Jesus Christ who proclaimed that one was to render unto Caesar only that which belongs to Caesar and to God that which belongs to God (Luke 20:25). He also took his stand with the early church which refused to bow down to the "religious department" of the Roman empire and continued to teach in the name of Jesus: "We ought to obey God rather than men" (Acts 5:29).

Madison demonstrated further that his opposition to religious test oaths was jurisdictional, not substantive, when he opposed efforts by Jefferson to disqualify clergymen from holding civil office in Virginia:

> *Does not the exclusion of Ministers of the Gospel as such violate a fundamental principle of liberty by punishing a religious profession with the privation of a civil right? does it [not] violate ... (Article 16 of the Virginia Constitution) which exempts religion from the cognizance of Civil power? 5 Writings of James Madison* 288 (G. Hunted. 1904).

The essence of Madison's position was this. Whether or not a minister of the gospel could legitimately serve as a civil officer was a matter of church doctrine to be settled by the church, not by the state. Otherwise, the government authorities would be "insinuating themselves in ecclesiastical affairs or disputes." *McDaniel v. Paty,* 435 U.S. 618, 638 (1978) (Brennan, J. concurring).

Finally, the text of Article VI, Paragraph 3 itself demonstrates that Madison did not have the Machiavellian purpose attributed to him by North. That provision bans religious tests only in relation "to any office or public trust under the United States." If Madison had the purpose attributed to him by North, then he would have sought a ban on religious test oaths for the holding of state civil office as well.

The ban on religious test oaths was not, then, designed to separate the United States of America from Christianity. Nor was it designed to require that public policy shed its Biblical origins and principles. To the contrary, the ban was dictated by Biblical law that one's personal faith in God is not a legitimate object of civil government.

One could argue that even after ratification of the 14th Amendment, state religious tests have not been prohibited. This is so because that Amendment only prohibits states from abridging "the privileges and immunities of citizens of the United States." Holding a state civil office is hardly such a privilege or immunity.

Therefore, denial of access to such an office on account of a religious test could not constitute an unconstitutional abridgment. See Titus, "The Bill of Rights: Its Text, Structure and Scope" (1994).

PUBLIC POLICY

With the ascendancy of the Ayatollah Khomeini in Iran in the late 1970's, it quickly became common-place in America to raise the spectre of Islamic fundamentalism whenever anyone introduced religious views into the debate and deliberation on matters of public policy.

Harvard Law Professor Alan Dershowitz has contended that "the growing trend toward introducing Christian religious principles into public life" is a threat to Jews and every other religious minority in America. Dershowitz, *Chutzpah* 330 (1991). While Dershowitz found the efforts of the Christian right to influence educational policy particularly reprehensible, he condemned the use of any "religious-political ideology" by anyone (including "the Jewish right") to influence any election or any public policy debate. *Id.* at 313-36.

Relying on the "constitutional doctrine of separation of church and state," Dershowitz has urged that all government policy debates and discussion be conducted in "religiously neutral" terms. That is, without any overt reliance on one's religious views. Such views are to be kept private, inside the church or synagogue or the home.

Fearing that the country would become divided on religious lines or, worse still, would become a religious state like Iran, a goodly number of Americans have been convinced by arguments such as the one put forth by Dershowitz. In their eyes, politically active groups like Jerry Falwell's Moral Majority and Pat Robertson's Christian Coalition are not only wrong- headed, but illegitimate.

Others, like Harvard Law Professor Laurence Tribe, have conceded their legitimacy but only reluctantly. Following the decision of the Supreme Court in *Roe v. Wade,* 410 U.S. 113 (1973), Tribe argued "that the inescapable involvement of religious groups in the debate over abortion rendered the subject [of abortion] inappropriate for political resolution and hence proper only for decision by the woman herself." Tribe, *American Constitutional Law* 1349-50 (2d ed. 1988).

Five years later Tribe changed his mind. In his latest treatise on constitutional law he has admitted that his earlier view gave:

> *too little weight to the value of allowing religious groups freely to express their convictions in the political process, underestimates the power of moral convictions unattached to religious beliefs on this issue, and makes the unrealistic assumption that a constitutional ruling could somehow disentangle religion from future public debate on the question. Id.* at 1350.

Strict Religious Neutrality

While Tribe has acquiesced to religious views in public debate, he has marginalized such views by ruling them illegitimate in the formulation of public policy, except under a very narrow set of circumstances.

In his section on the Establishment Clause, he has insisted that government regulations, if at all possible, be justified on "secular" terms, not religious ones. What is meant by "secular" and "religious" can only be inferred from the examples that Tribe has provided. He, like the courts, have treated the terms as if their meanings are self-evident. *Id.* at 1204-14.

Just because a state law "coincided with the beliefs of a religion, or because it originated in a religion" would not, in Tribe's opinion, disqualify it under the Establishment Clause. Otherwise, he has conceded, his constitutional formula would forbid even "(l)aws against murder ... because they overlap the fifth commandment of the Mosaic Decalogue." Tribe, *American Constitutional Law* 1205 (1988).

But, according to Tribe, such laws must not get their current legitimacy from such religious beliefs or origins. If they did, then they would be unconstitutional. Under this view, no law prohibiting murder could survive Establishment Clause scrutiny if the Bible or Biblical principles were the only foundation for protecting the sanctity of human life.

To illustrate this point, Tribe pointed to the Supreme Court opinion upholding the Sunday closing laws. The Court affirmed their constitutionality on the ground that they no longer served their original religious purpose. *McGowan v. Maryland,* 366 U.S. 420, 445 (1961). Presumably, a state's laws prohibiting murder or sodomy could no longer be justified upon Biblical grounds, as they have traditionally been in Blackstone's *Commentaries* or in early American court opinions. There would have to be modem secular reasons to sustain them.

This follows, Tribe has argued, from the Establishment principle that the government may not convey a '"message of government endorsement or disapproval of religion"' *Id.* at 1284. If a government has available to it "nonreligious" reasons to support its policy choice, but has chosen "religious" reasons instead, then "a message of endorsement is virtually unavoidable." *Id.* at 1285.

"Religious tools" may be used, Tribe has written, to carve out a public policy decision, only if there are no secular ones available and only if the "religious tools will suffice to pursue a relevant free exercise value." *Id* at 1288. To illustrate the application of this exception, Tribe has given this justification for the employment of chaplains in the military service:

> *[G]overnment can facilitate soldiers' free exercise only by hiring military chaplains and, through them, engaging in religious speech and observances; no non-religious alternative is plausible. Id* at 1285-86.

Tribe's views were recently adopted by the Supreme Court in *Board of Education of Kiryas Joel Village School District v. Grumet,* 512 U.S._, 129 L. Ed 2d 546 (1994). In this case the New York state legislature constituted a village, composed solely of Jews of the Satmar Hasidic sect, as a separate public school district. The legislative history revealed that this action had been taken to

enable the people of the village to take advantage of government funds to educate their handicapped children in an atmosphere more suitable to their peculiar religious lifestyle.

Pursuant to the Act, the village did establish a public school, but only for its handicapped children The public school curricula was "secular," with administrators and instructors from outside the village and the Satmar sect. All of its other children attended private schools where they were taught according to their strict religious doctrines.

Justice Souter ruled the New York law unconstitutional because the legislature had made a "purposeful delegation [of power] on the basis of religion," and, therefore, had failed "to exercise governmental authority in a religiously neutral way." *Id.,* 129 L. Ed 2d at 558, 560. He found further that the legislation was not necessary to "accommodate" the free exercise needs of the Satmars:

> *[T]here are several alternatives here for providing ... special education to Satmar children .... Since the Satmars do not claim that separatism is religious mandated, their children may receive ... [such] instruction [through a nearby public school district, and if necessary] at a neutral site near one of the village's parochial schools .... Id.,* 129 L.Ed 2d at 563.

Justice Souter claimed that his ruling was necessitated by history and by precedent as the Establishment Clause requires "the application of a principle like neutrality toward religion as well as among religious sects." *Id.,* 129 L.Ed 2d at 565.

Religious Public Policy

Justice Souter is wrong. His standard of strict religious neutrality in the formulation of public policy is inconsistent with the both history and precedent. This can best be illustrated by an examination of the history and of the current policy governing military and legislative chaplains.

Beginning with the Revolutionary War and continuing to the present day, the military have employed chaplains at taxpayer expense. At the outset this policy was hardly "religiously neutral," and, contrary to Tribe's claim stated above, not at all calculated to insure an individual soldier's need to freely exercise his personal religious faith. See Cord, *Separation of Church and State* 54-55 (1982)

The purpose of the office of the military chaplain was to help train "Christian soldiers." General George Washington made that clear in his initial order, dated July 9, 1776, implementing the appointment of chaplains:

> *The Hon. Continental Congress having been pleased to allow a Chaplain to each Regiment ... The Colonels or commanding officers of each regiment are directed to procure Chaplains accordingly; persons of good Characters and exemplary lives - To see that all inferior officers and soldiers pay them suitable respect and attend carefully upon religious exercises. The blessing and protection of Heaven are at all times necessary but especially so in times of public distress and danger - the General hopes and trusts, that every officer and man will endeavor to so live, and act, as becomes a Christian soldier*

> *defending the dearest Rights and Liberties of his country.* Reprinted in Cousins, *"In God We Trust"* 50-51 (1958).

By requiring his soldiers to "respect" the chaplains and to "attend" religious services conducted by them, Washington hoped to shape his army into a fighting force with "Christian character." Thus, he forbade "profane cursing, swearing, and drunkenness" (General Order July 4, 1775) for "we can have little hopes of the blessing of Heaven on our Arms, if we insult it by our impiety, and folly ...." (General Order August 3, 1776). *Id.*

In addition, he sought to cultivate in his men a Christian lifestyle of worship and thanksgiving to God. Here was his order to the troops from his headquarters in Valley Forge, issued on May 2, 1778:

> *While we are zealously performing the duties of good Citizens and Soldiers we certainly ought not to be inattentive to the higher duties of Religion. To the distinguished Character of Patriot, it would be our highest Glory to add the more distinguished Character of Christian. The signal instances of providential Goodness which we have experienced and which now almost crowned our labours with complete success, demand from us in a peculiar manner the warmest returns of Gratitude and Piety to the Supreme Author of all Good. Id.* at 51.

There is every reason to believe that this decidedly religious reason for the office of the military chaplain continued following the adoption of the Constitution and the First Amendment. On March 3, 1791, the First Congress authorized the President to appoint a chaplain for the appoint a chaplain for the "Military Establishment of the United States." The Second and Third Congresses reaffirmed the office of the military chaplain with appropriations of federal tax money to support it. Cord, *Separation of Church and State* 54 (1982).

During the early history of the American Republic, her national leaders continued through inaugural addresses and proclamations to acknowledge the nation's dependence upon Almighty God. Washington's first Inaugural Address and his first National Thanksgiving Proclamation, for example, read like his earlier Orders when he was commanding the Revolutionary Army:

> *It would be peculiarly improper to omit in this first official Act, my fervent supplications to that Almighty Being who rules over the Universe, who presides in the Councils of Nations, and whose providential aids can supply every human defect, that his benediction may consecrate to the liberties and happiness of the People of the United States....* (Inaugural Address, April 30, 1789). *Whereas it is the duty of all nations to acknowledge the providence of Almighty God, to obey His will, to be grateful for His benefits, and humbly to implore His protection and favor ....* (Thanksgiving Proclamation, October 3, 1789).

Remarkably, the Thanksgiving Proclamation was prompted by a Congressional Resolution requesting the President to issue such a proclamation acknowledging the '"many signal favours of Almighty God ...." The resolution was approved by the House of Representatives on September 25, 1789, "the day following its final approval of the religion clauses." Dreisbach, *Real Threat and*

Mere Shadow 150 (1987).

So America's first President and first Congress did not think that the First Amendment Establishment Clause dictated "religious neutrality" in the conduct of the nation's business, including the continuation of the office of the military chaplain.

The office of chaplain was not confined to the military. The First Congress also established the office of legislative chaplain. This action was not taken, as strict separationist Leo Pfeffer has claimed, "as a matter of course." Rather, as Robert Cord has shown, the matter was carefully considered by a joint House-Senate committee formed for that purpose. Cord, *Separation of Church and State* 23-24 (1982).

The Supreme Court considered this historic fact of great significance when it upheld legislative chaplaincies against a constitutional challenge under the Establishment Clause:

> *On September 25, 1789, three days after Congress authorized the appointment of paid chaplains, final agreement was reached on the language of the Bill of Rights. Clearly the men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress. It has also been followed consistently in most of the states .... Marsh v. Chambers,* 463 U.S. 783, 788-89 (1983).

The Court in *Marsh* deliberately refused to apply the three-part test requiring a secular purpose to justify the office of legislative chaplain. As Justice William J. Brennan protested in dissent, the majority knew that had they applied the test, they would have struck down the practice. *Id.,* 463 U.S. at 797-800.

That is why Tribe has found the *Marsh* precedent "deeply problematic" and that is also why Justice Souter has openly questioned the constitutional legitimacy of tax supported chaplains for the military and the nation's legislatures. *Lee v. Weisman*, at 505 U.S. ---, 120 L.Ed 2d 467, at 505, 508-09 (1992) (concurring opinion).

If Justice Souter does succeed in convincing his Court colleagues to extend the Tribe neutrality formula to the nation's traditional chaplaincy policy, he will do so not because of history and precedent, but despite it. For even the most recent court precedent upholding the military chaplaincy has conceded that "the morale of our soldiers, their willingness to serve, and the efficiency of the Army as an instrument for our national defense rests in substantial part on the military chaplaincy, which is vital to our Army's functioning." *Katcoff v. Marsh,* 755 F. 2d 223, 237 (2d Cir. 1985).

Despite a long-line of cases demanding religious neutrality in public policy, the courts have consistently found tax-supported legislative and military chaplaincies constitutional. *Marsh v. Chambers,* 463 U.S. 783 (1983); *Katcoff v. Marsh,* 755 F. 2d 223 (2d Cir. 1985). Yet the constitutionality of civil chaplaincies remains unsettled.

This is due, in part, to opposition from critics such as Harvard Law Professor Laurence Tribe and to questions raised by skeptics such as Supreme Court Justice David Souter. See Tribe, *American*

Constitutional Law 1284-1297 (2d Ed. 1988) and *Lee v. Weisman,* 505 U.S. ---, 120 L.Ed 2d 467, 505, 508-09 (1992) (concurring opinion).

But the primary reason why the issue has not been resolved is the failure of the courts to embrace a correct understanding of the relationship between the Establishment Clause and public policy.

With the school prayer cases in the 1960's, the Supreme Court began to insist that the Establishment Clause required that state educational policy rest upon a "secular purpose." See *Abington School District v. Schempp,* 374 U.S. 203 (1963). In 1971, the Court enshrined this requirement as the first prong of a three-part test, designed to keep public policy measures religiously neutral. *Lemon v. Kurtzman,* 403 U.S. 602 (1971).

Since the 1970's, the Court has applied this religious neutrality principle to a wide variety of public policy measures, from Christmas displays on public property to tax subsidies for family counseling. See *Lynch v. Donnelly,* 465 U.S. 668 (1984) and *Bowen v. Kendrick,* 487 U.S. 589 (1988).

In the midst of this sea of precedents is *Marsh v. Chambers, supra,* the legislative chaplaincy case. In order to uphold America's longstanding chaplaincy tradition, Chief Justice Warren Burger refused to apply the religious neutrality test. Yet he failed to articulate any alternative to it. Instead, he relied solely on history, thereby relegating the civil office of chaplain to the status of an historical anomaly to be tolerated as an insignificant threat to the religious neutrality principle. *Marsh v. Chambers, supra,* at 791. See Dreisbach, *Real Threat and Mere Shadow* 161-64 (1987).

But the chaplaincy policies enacted by the First Congress are not "*de minimis*" exceptions to an Establishment Clause principle of religious neutrality, as Justice David Souter has recently suggested. *Lee v. Weisman, supra,* 120 L.Ed 2d at 508-09. To the contrary, the Establishment Clause cannot possibly be construed to require religious neutrality in public policy for its very foundation rests upon a Christian view of the relationship between church and state, and between the individual and the civil government.

Since 1947, the Supreme Court has consistently traced the meaning of the Establishment Clause to the Virginia legacy of religious freedom, the chief architects of which were Thomas Jefferson and James Madison. In particular, the Court has claimed that the meaning of the Establishment Clause is rooted in the Virginia Assembly's refusal in 1786 to renew Virginia's tax levy for the support of the established church. *Everson v. Board of Education,* 330 U.S. 1 (1947).

Both Jefferson's statute and Madison's defense of it, demonstrate conclusively that the Virginia measure, divesting the state of jurisdiction to enforce the church tithe, rested upon a religious foundation and embraced a religious purpose. Indeed, both the foundation and the purpose of the Act were explicitly Christian.

A Christian Legacy

In the very first paragraph of the Preamble of his Act for Establishing Religious Freedom, Jefferson laid a Christian base for his public policy proposal. First, he stated that "Almighty God hath created the mind free;" second, he asserted that "the Holy Author of our religion" chose to leave the mind free from all "temporal punishments or burthens, or ... civil incapacitations." From these two

fundamental propositions, Jefferson concluded that it was "presumptuous ... [for] fallible and uninspired men" to exercise forcible "dominion over the faith of others" when God Almighty himself chose not to do so.

This is hardly a religiously neutral claim. Yet it served as Jefferson's threshold justification for a law prohibiting the state from compelling a man "to frequent or support any religious worship, place or ministry ...."

And what was Jefferson's purpose in this? First of all, he sought a policy that would promote true religion by depriving civil and ecclesiastical rulers of the power that had been used to "establish ... and maintain ... false religions over the greatest part of the world, and through all time." By outlawing such power, Jefferson believed that true Christianity would be given room to flourish free from state corruption that bribed through "worldly honors and emoluments, those who will externally profess and conform to it...."

Madison's defense, in his 1785 Memorial and Remonstrance, reinforced both Jefferson's religious rationale and his object. As for the statute's rationale, Madison began that it was "the duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him." From this premise, he reasoned, that no man could enter into a civil society without "a saving of his allegiance to the Universal Sovereign." Such a duty, Madison asserted, was "precedent both in order of time and degree of obligation." According to Madison, then, no man could, without violating the Law of God, concede to the State the power to enforce any duty that God had reserved exclusively to Himself. This is not a religiously neutral claim. Yet it served as the foundational principle upon which Madison denied to the State the right to use its power to collect the church tithe in support of teachers of the Christian religion.

And for what purpose? Madison, like Jefferson, warned that to adopt any other policy would condemn Virginia to repeat the errors of the past, as Rulers "in all ages, and throughout the world" have used the power of the State to promote false religions.

> *During almost fifteen centuries, has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy; ignorance and servility in the laity; in both, superstition, bigotry and persecution.*

Further, Madison claimed that to back up the tithe with civil power was "a contradiction to the Christian Religion itself." It was, Madison wrote, a contradiction in fact:

> *[F]or it is known that this Religion both existed and flourished, not only without the support of human laws, but in spite of every opposition from them ....*

Civil enforcement of the tithe, Madison continued, also contradicted the very tenets of the Christian faith:

> *...[A] religion not invented by human policy, must have pre-existed and been supported, before it was established by human policy.*

Finally, Madison concluded, civil reinforcement of Christian religious duties was a flawed

evangelistic stratagem, "adverse to the diffusion of the light of Christianity:"

> *[for it would] weaken in those who profess this Religion a pious confidence in its innate excellence, and the patronage of its Author; and to foster in those who still reject it, a suspicion that its friends are too conscious of its fallacies, to trust it to its own merits.*

In summary, Madison, like Jefferson, embraced the No Establishment principle because it was dictated by the Christian religion for the purpose of promoting that religion. That is not doing the public's business on religiously neutral terms. Yet modernists claim that religious neutrality is the legacy left by these two men and deposited in the No Establishment Clause of the First Amendment.

A Secular Heresy

It is commonplace for many modem commentators first, to divide Jefferson from Madison and, then, to claim that both endorsed a No Establishment principle of strict religious neutrality. Laurence Tribe is representative of this view.

Tribe contends that Jefferson "saw separation (of church and state) as a means of protecting the state from the church." In support, Tribe notes that Jefferson supported both a law "to disestablish the tax-supported Anglican church" and that he urged that "the clergy be barred from public office." Tribe, *American Constitutional Law, supra,* at 1159.

On the other hand, Tribe concedes that Madison saw separation as benefitting both church and state. But he claims that Madison's solution was to leave each "free from the other within its respective sphere ...." *Id.*

For those who hold to a strict understanding of this view of the Establishment Clause, there is no room for religion to influence politics. Otherwise, the state would become hopelessly entangled in sectarian disputes and become helplessly divided along religious lines. See Dershowitz, *Chutzpah* 313- 42 (1991).

Others, like Tribe, are willing to allow for the active expression of religious views in the political arena - in the name of free speech- but they lift the neutrality line when it comes to the formulation of public policy:

> *[W]hen government uses religious means where nonreligious ones would suffice, it moves from accommodating religion to participating in religion by endorsing it as a preferred path to a desired end..* Tribe, *supra,* at 1284.

In other words, Tribe puts his constitutional stamp of approval only on those public policies that may "acknowledge" the existence of religious belief and religious believers, but only to "accommodate" them, never to "endorse" them by adopting any religious tenet as the basis for any public policy measure. Otherwise, "[b]y adopting the language and precepts of a religion as its own, government implies that non-adherents are outsiders." *Id.* at 1285.

Formulas such as these may relieve functional atheists and agnostics from anxieties over second-class citizenship (See Dershowitz, *Chutzpah, supra),* but they definitely force Christians and other

religious adherents to leave their Biblical or other religious views at home or at church when they enter the legislative chamber, the executive office, or the courtroom.

Such a view, if strictly enforced, would bring down the institution of the legislative chaplaincy, as well as presidential proclamations calling the nation to prayer, invocations calling for God's protection at the start of judicial proceedings in the federal courts, and a number of other historical "endorsements" of God in matters of public policy formulation and administration. See Tribe, *American Constitutional Law, supra,* at 1289-97.

To date, the Supreme Court has not applied its No Establishment neutrality policy to delete "In God We Trust" from America's currency or "one nation, under God" from the Pledge of Allegiance. A number of individual justices (and others) have "cleansed" such slogans by suggesting "that such practices ... can best be understood ... as a form of 'ceremonial deism,' protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content...." *Lynch v. Donnelly, supra,* 465 U.S. at 716 (Brennan, J. dissenting). See also Tribe, *supra,* at 1295, n. 85.

But what does one do with President George Bush's call to the American people for prayer during the 1990 Gulf War or General Norman Schwarzkopf's invocation of the blessings of God on behalf of the troops that he commanded in that conflict. Such acts, if purified of all religious content, become either meaningless or mocking. And so would the traditional prayer - "God save the United States and this Honorable Court" - at the opening of each session of the United States Supreme Court.

Such revisionism has been necessitated only because the Court and its supporters have made a mockery of the No Establishment Clause itself, construing it in such a way as to dictate the surgical excision of religion from American public life. That is not the legacy of Jefferson or Madison. Nor is religious neutrality in public policy required by the constitutional text. Rather, correctly understood, the text permits, although it does not require, the active employment of religious tenets in the formulation and implementation of public policy, but only in those areas where the State has jurisdiction.

Since 1942, when the United States Supreme Court decided *Everson v. Board of Education,* 330 U.S. 1 (1947), there has been little dispute that the meaning of the First Amendment religion clauses is found in the Virginia legacy of religious freedom expounded by Madison and Jefferson.

Those two men deposited that legacy primarily in three documents: Article I, Section 16 of the 1776 Virginia Constitution (as amended by Madison), the 1785 Memorial and Remonstrance Against Religious Assessments (written by Madison), and the 1786 Statute for Establishing Religious Freedom (written by Jefferson). Careful analysis reveals that the latter two documents are explanations and applications of the principles contained in the Constitutional provision.

The question addressed by the Memorial and Remonstrance and the Statute was whether education was religion within the meaning of Article I, Section 16 of the Virginia Constitution? If so, then the state had no jurisdiction to educate or to impose any tax in support of a general educational program.

Both Madison and Jefferson agreed that the state had no authority over education. Jefferson reasoned that Almighty God had created the mind free, "insusceptible to restraint," and that, the mind could not remain free if the State could through its taxing power "compel a man to furnish contributions of money for the propagation of opinions which he disbelieves."

Madison, likewise, determined that "the opinions of men" cannot, by nature, be coerced to conform to the opinions of any other man. What a man believed to be true was a subject belonging exclusively to God. If a man embraced a false opinion, then "it is an offence against God, not against men." Titus, "No Taxation or Subsidization: Two Indispensable Principles of Freedom of Religion," 22 *Cumberland Law Review* 505, 506-16(1991-92).

The key language of the Virginia Constitution, upon which both Jefferson and Madison relied, was its definition of religion. According to Article I, Section 16, "religion" encompassed all of mankind's duties that, by their nature, could only be enforced by "reason and conviction, not by force or violence."

The nature of a duty, whether religious or civil, was determined by the law of the Creator. Madison, therefore, began his Remonstrance with a paragraph devoted to discovering the rule governing the opinions of mankind as laid down by the "Governor of the Universe." Jefferson, likewise, opened the Preamble to his statute with the proposition that "according to the plan of the Holy Author of our religion" the mind of man must be kept completely free from the power of the civil government.

Given this meaning of religion in the First Amendment, every public policy question presents a threshold jurisdictional issue that can only be resolved by reference to the Christian religion. The threshold questions are these: Does this subject belong exclusively to the Creator? Or is it one that the Creator has delegated to civil government? Is the breach of this duty a sin only? Or is the breach of this duty a civil wrong as well?

If a subject belongs exclusively to "reason or conviction," then the duties related to that subject cannot be enforced by the civil ruler. For the civil ruler, by definition, uses "force and violence" to enforce the subjects and duties under its jurisdiction (Rom. 13:4).

Marriage and Polygamy

The United States Supreme Court took this jurisdictional approach when it addressed the constitutionality of a statute outlawing polygamy in the Territory of Utah. The Court recognized that the "word, 'religion' [was] not defined in the Constitution" so that it had to go "elsewhere ... to ascertain its meaning ...." *Reynolds v. United States,* 98 U.S. 145, 162 (1878).

Without hesitation, the Court consulted the writings of Madison and Jefferson, referring first to the 1776 Virginia constitutional definition of religion as "the duty we owe to our Creator" and then to the Preamble to the 1786 Virginia Statute. From both of these references the Court concluded that religion was a jurisdictional term distinguishing that which "belongs to the Church" from that which belongs "to the State." *Id.,* 98 U.S. at 163.

At the outset, the Court noted that a law prohibiting the act of polygamy was not like a law providing for state tax support of education, the subject of the seminal jurisdictional controversy in

the late 18th century in Virginia. The Virginia law dealt with jurisdiction over opinion. As for opinions, the First Amendment, the Court ruled, like Article I, Section 16 of the Virginia Constitution, deprived Congress "of all legislative power over" them. *Id.,* 98 U.S. at 164.

As for acts, the Court launched its own investigation whether the act of entering into a second marriage was a subject within the jurisdiction of civil authorities. It found that the common law not only treated "tile second marriage [as] always void, but "as an offense against society." It found further that, although polygamy had been enforced by the English ecclesiastical courts, it had always been considered a civil offense.

It then turned to the American treatment of polygamy where it found that, without exception, all of the states treated polygamy as a civil offense. In particular, the Court emphasized that in 1788 - after the enactment of Jefferson's Statute for Establishing Religious Freedom - Virginia had enacted an English statute making polygamy a civil crime. *Id.,* 98 U.S. at 164-65.

From this uninterrupted history of Anglo-American jurisprudence, the Court went on to considerations of natural law where it discovered that marriage, although a sacred obligation, is

> *a civil contract, regulated by law. Upon it society may be said to be built, and out of its .fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. Id.,* 98 U.S. at 165.

In addition, the Court discovered that the liberty of all of the people of a nation depended primarily upon whether "monogamous or polygamous marriages are allowed:"

> *...[P]olygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy. Id.,* 98 U.S. at 165-66.

The Court concluded, then, that "it is within the legitimate scope of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion." *Id.*, 98 U.S. at 166.

Eleven years later, the Court reaffirmed its position that tile civil government had jurisdiction over acts in derogation of marriage:

> *Bigamy and polygamy are crimes by the laws of all civilized and Christian countries ... They tend to destroy the purity of the marriage relation, to disturb the peace of families, to degrade woman and to debase man. Davis v. Beason,* 133 U.S. 333, 341 (1889).

Again, the Court reasoned that the practice of polygamy was not a matter of individual conscience, immune from civil sanction. But polygamy was like murder, civil jurisdiction over which was undeniable. *ld,* 133 U.S. at 342-44.

Having concluded that marriage was within the jurisdiction of civil government, the Court did not inquire further. That is, the Court did not ask whether the civil government had adopted its laws prohibiting polygamy for "religious" reasons or for "secular" ones. It recognized implicitly that the

religion clauses of the First Amendment did not prescribe "religious neutrality" in the formulation of public policy. This assumption accorded with a century of practice.

Religious Proclamations

The First House of Representatives, which approved the First Amendment, debated the question whether the Establishment Clause prevented the House from passing a Resolution requesting the President to issue a Thanksgiving Proclamation:

> *recommending to the people o,(the United States a day of public thanksgiving and prayer, to be observed by acknowledging, with grateful hearts, the many signal favors of Almighty God, especially by affording them an opportunity to establish a Constitution of government for their safety and happiness.* Cord, *Separation of Church and State* 27-28 (1982).

No one objected to this Resolution because it called for a religiously oriented proclamation. To the contrary, the question raised was whether such a proclamation was or was not "a business with which Congress have ... [something] to do." *Id* at 28. If giving thanks was a "religious matter," then the Establishment Clause forbade a Presidential Proclamation whatever its content.

This was Thomas Jefferson's point when he broke with the tradition that Washington and Adams had set in issuing presidential Thanksgiving Proclamations. In Jefferson's opinion, such a Proclamation "intermeddled with religious exercises," within the exclusive jurisdiction of private religious societies. *Id* at 40.

On the other hand, Jefferson had no difficulty invoking the name of God in his Second Inaugural Address, a subject within his jurisdiction as President:

> *I shall need the favor of that Being in whose hands we are, Who led our forefathers ... from their native land, and planted them in a country flowing with all the necessaries and comforts of life; Who has covered our infancy with His providence, and our riper years with His wisdom and power ... I ask you to join me in supplication, that He will enlighten the minds of your servants, guide their councils, and prosper their measures, that whatsoever they do shall result in your good, and shall secure to you peace, friendship, and approbation of all nations.*

Nor did he have constitutional difficulty with statutes and treaties designed for the propagation of the Christian gospel among the Indian nations that remained within the territorial jurisdiction of the United States. As Robert Cord has pointed out, not only did Jefferson not veto laws extending the grant of lands to "the society of the United Brethren for propagating the gospel among the heathen" *(Id.* at 42-45), but he asked the Senate to ratify a treaty with the Kaskaskia Indians, one term of which provided for funds from the national treas*ury* to pay the salary of a Catholic priest to the Indians and to build a church for them. *Id.* at 38-39.

Again, Jefferson as president had jurisdiction to negotiate agreements with foreign nations. Pursuant to that authority, he did not consider himself constrained by the Establishment Clause to pursue a "religiously neutral" policy.

To the contrary, if he thought that Christianizing the Indian peoples was the best means of bringing peace, he could implement that as the public policy of the nation.

Today, those who claim that the Establishment Clause calls for strict religious neutrality in the formulation and justification of public policy have chosen to ignore Jefferson's reliance upon Christian principles in discharging his duties as President. In their zeal to promote their vision of a secular America, they have misrepresented the true meaning of the Establishment Clause and its purpose as intended by its two major architects.

The role that the Christian religion once played in the formulation of public policy in America has been all but forgotten. Today, hardly anyone in public life relies on the Bible to justify any policy choice. Very few even refer to the nation's charter, the Declaration of Independence, as the source of civil law and liberty. That document's endorsement of the "laws of nature and of nature's God," of God-given rights, and of God's sovereignty has been drowned in a sea of evolutionary humanism.

Even the "Christian Right" has failed to restore the Bible and the laws of God to the political and public policy arenas. This is so because the leaders of the new Christian conservative movement do not have a theologically based political and legal philosophy to apply to the issues of public policy. Consequently, they have accepted the legal and political turf given to them by their opposition and the rules established by that opposition for determining who occupies the contested ground.

The battle over school prayer is illustrative. A few years back, prayer opponents took their court offensive from the public school classroom (where for two decades they had been consistently victorious) to the graduation ceremony. In 1992, they came away with yet another victory when the U.S. Supreme Court struck down, by a vote of 5-4, clergy-led prayer at graduation exercises. *Lee v. Weisman, 505 U.S. ----, 120 L. Ed. 2d 467 (1992).*

Following the *Weisman* defeat, prayer proponents seized upon language in the court's several opinions that appeared to permit student led voluntary prayer. Armed with this language, they launched a nationwide campaign not only to defend such prayer at graduation time, but to establish in the fall of each year voluntary prayer around the flag pole on school grounds.

Now, with the Republican take-over of the House of Representatives and the Senate, prayer proponents are hoping to enshrine their voluntary student-led prayer movement into the constitution. By doing so, they risk legitimating their opponents' position, namely, that official prayer, including that offered by chaplains paid out of public funds, is a violation of the Establishment Clause.

More significantly, they risk legitimating tax-supported public schools, the constitutionality of which has never been challenged much less sustained. In addition, they leave untouched court precedents that require the removal of all vestiges of a religious worldview from the public school classroom.

Of what significance is a constitutional right for individual students or groups of students to pray - at the beginning of the day or at the end of twelve years of education - when students are taught in their history and government classes as if God does not exist and the Bible is irrelevant? Will not

God and His Law continue to play, at best, a symbolic role in the preparation of America's public school children for citizenship? And will not the privatization of religion in American life continue apace?

By continuing to strengthen the idea that God and the Scriptures belong in the home and the church, and only on the fringes of public life, the school prayer amendment will reinforce the ongoing efforts to remove even the symbols of religion that remain in the public square. To date, no serious court challenge has been waged against the placing of "In God We Trust" on America's "money." Or to remove "under God" from the flag salute. Or to remove the mural of Moses and the Ten Commandments appearing on the wall directly behind the Pennsylvania Supreme Court in the main Capitol Building in Harrisburg.

But, if the Ten Commandments are an unconstitutional establishment of religion, when posted on a public school classroom wall [as the Supreme Court concluded in *Stone v. Graham,* 449 U.S. 39 (1980)], then the precedent is already in place to justify their removal from the courthouse wall.

What is needed in this battle is a new strategy. A strategy that rests upon the constitutional text and its historic meaning.

CONCLUSION

Since *Everson v. Board of Education,* 330 U.S. 1 (1947), the United States Supreme Court has claimed that the meaning of the religion clauses is that which was established in Article I, Section 16 of the 1776 Virginia Constitution, as applied by James Madison and Thomas Jefferson in the battle over state tax support for Christian teachers in Virginia.

Neither Madison nor Jefferson claimed that the No Establishment principle was violated because the proposal to support Christian education failed some kind of religious neutrality test. To the contrary, both resisted state-supported education because matters of"opinion" belonged exclusively to God, outside the jurisdiction of the state. See Titus, "No Taxation or Subsidization: Two Indispensable Principles of Freedom of Religion," 22 *Cumb. L. Rev.* 505 (1991-92).

The true Madison/Jefferson legacy is not religious neutrality in law and politics, but a legal and political separation of the jurisdiction of the church and of the state. That jurisdictional distinction, in sum, rests upon an assessment of the nature of the duty as determined by the laws of God.

If a duty is, by nature, enforcible by "force or violence" - such as the duty to protect the sanctity of human life - then the state has jurisdiction. It could - indeed, it must - adopt the Biblical definition of murder and, upon conviction, impose the penalty of death, as prescribed by the laws of God. See John Jay's Letter to John Martin reprinted on pp. 3-6 *supra.*

If, on the other hand, the duty is, by nature only enforcible by "reason or conviction" - such as education - then the state has no jurisdiction. Any violation of the duty is, as Madison put it in his 1785 *Memorial and Remonstrance,* "an offense against God, not against man: To God, therefore, not to man, must an account of it be rendered."

THE RELIGION CLAUSES: AN EPILOGUE

For several months I have offered a series of essays on the Establishment and Free Exercise Clauses in my ongoing study of the Bill of Rights. The July issue contained my concluding essay on the two clauses. I write this epilogue because the United States Supreme Court issued its opinion in *Rosenberger v. United States,*-- U.S. -, 63 LawWeek 4702 (1995) after the July Forecast had been sent to the printer.

In *Rosenberger,* the Court ruled 5-4 that the University of Virginia violated the free speech rights of students by denying to them funds from mandatory student fees to cover the printing costs of a newspaper from a Christian perspective. The sole basis for the University's denial was that the newspaper "primarily promotes or manifests a particular belief in or about a deity or ultimate reality." The majority found this standard to be impermissible "viewpoint discrimination" under the Freedom of Speech Clause. *Id.,* 63 LW at 4707.

The dissent disagreed that the University had discriminated against the newspaper's Christian viewpoint and, therefore, did not violate the Free Speech rights of the students. More significantly, the dissent claimed that the University's decision not to fund the newspaper was commanded by the prohibition against laws respecting an Establishment of Religion. *Id.,* 63 LW at 4715.

Justice Souter asserted that the majority "for the first time, approves direct funding of core religious activities by an arm of the state." Justice Kennedy countered with the claim that the University subsidy was not designed to promote the religious activities of the newspaper, but the free exchange of ideas. Hence, there was no Establishment Clause violation because the subsidy program, as approved by the Court, was scrupulously neutral regarding the religious content of the paper. *Id.,* 63 LW at 4708.

Justice Souter, in turn, claimed that government "evenhandedness" was not dispositive of the Establishment Clause issue, because "[a]t the heart of the Establishment Clause stands the prohibition against direct funding." In support, Justice Souter cited numerous cases striking down government subsidies of sectarian educational institutions even though such subsidies were part of an "evenhanded" educational policy.

Justice Kennedy tried his best to distinguish this case pointing out that the University of Virginia did not directly fund the student newspaper, but sent the money to a third party, the printing company. But he was hard pressed to carry this argument to its logical conclusion:

> *It is, of course, true that if the State pays a church's bills it is subsidizing it, and we must guard against this abuse. That is not the danger here ... the student newspaper is not a religious institution. Id.,* 63 LW at 4709.

Only Justice Thomas directly challenged the dissent's claim that the Establishment Clause absolutely prohibited all direct funding of religious activities. He noted first that the statement was not historically true:

> *To take but one famous example, both Houses of the First Congress elected chaplains ... and that Congress enacted legislation providing for an annual salary of $500 to be paid out of the Treasury ... This same system of "direct public funding" of congressional*

> *chaplains has "continued without interruption ever since that early session of Congress." Id.,* 63 LW at 4713.

Second, he chided the dissent for making such a big deal out of the form of subsidy:

> *Consistent application of the dissent's "no-aid" principle would require that "a church could not be protected by the police and fire departments ...." Surely the dissent must concede ... that the same result should obtain whether the government provides the populace with fire protection be reimbursing the costs of smoke detectors and overhead sprinkler systems or by establishing a public fire department. If churches may benefit on equal terms with other groups in the latter program that is, if a public fire department may extinguish fires at churches - then they may also benefit on equal terms in the former program. Id.,* 63 LW at 4714.

Finally, he went for the jugular:

> *Under the dissent's view ... the University of Virginia may provide neutral access to the University's own printing press, but may not provide the same service when the press is owned by a third party ... The constitutional demands of the Establishment Clause may be judged against either a baseline of "neutrality" or a baseline of "no aid to religion," but the appropriate baseline surely cannot depend on the fortuitous circumstances surrounding the form of aid. Id.,* 63 LW at 4714-15.

None of Thomas's majority colleagues were so bold. As noted above, Justice Kennedy went out of his way to point out that the money did not go directly to the religious students. In doing so, he reinforced, rather than undermined, the legitimacy of the "no-aid principle" as stated by the dissent.

Justice O'Connor, in her concurring opinion, expressly gave aid and comfort to the dissent's "no-aid principle." She merely disagreed on its application. She found that the case could not be resolved on the basis of the "no-aid principle" without contradicting the "religious neutrality principle" so she sought a middle ground on the specific facts of the case:

> *This case lies at the intersection of the principle of government neutrality and the prohibition on state funding of religious activities ... When bedrock principles so conflict, understandably neither can provide the definitive answer. Id.,* 63 LW at 4710.

She found that the University through public disclaimers and careful control of the funds made it clear that the neutrality principle would be painstakingly observed. Then she pointed out that the no aid principle could be vindicated by allowing a student to opt out of paying the mandatory fee if it was being used "to pay for speech with which she disagrees." *Id.,* 63 L W at 4711.

What is interesting about this latter point is that O'Connor sustained it by citing two cases relieving public employees and lawyers from paying mandatory dues to the extent that those dues were being used to support political views with which the dues payer disagreed. Both of those cases relied upon the Freedom of Speech Clause. See *Keller v. State Bar of California,* 496 U.S. 1, 15 (1990); *Abood* v. *Detroit Board of Education,* 431 U.S. 209, 236 (1977).

Even Justice Kennedy invited students at the University of Virginia "to demand a pro rata return [of

the mandatory fee] to the extent the fee is expended for speech to which he or she does not subscribe." *Id.,* 63 L W at 4708.

By invoking these precedents to satisfy the "no-aid principle," the majority may have opened the door to future claims that the Establishment Clause prohibits direct government subsidization of the propagation of any opinions, religious or otherwise. After all, the *Abood* and *Keller* precedents are rooted historically in a principle embraced by Thomas Jefferson in the preamble to the 1786 Virginia Bill for Establishing Religious Freedom:

> *[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.*

Although the dissent quoted this phrase with approval, and without splicing "religious" in between "of" and "opinions" as has been the court's practice in the past, Justice Souter used the Jeffersonian legacy to perpetuate the myth that he was concerned only about state subsidies of religious opinion. Nothing could be further from the truth.

Jefferson recognized that the no-establishment principle prohibited tax subsidies for the propagation of all opinion, religious or otherwise:

> *that to suffer the civil magistrate (tax-supported public school teacher) to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles, on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty, because he being of course judge of that tendency, will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own.*

Jefferson stated that true religious freedom was the "freedom of the mind," including freedom of the mind in "physics and geometry." That is why he concluded his Preamble to his 1786 statute on Religious Freedom with a portrait of the free marketplace of ideas:

> *that truth is great and will prevail if left to herself, that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict, unless by human interposition disarmed of her natural weapons, free argument and debate, errors ceasing to be dangerous when it is permitted to freely contradict them.*

For years the Court has disregarded this expansive understanding of the Religion Clauses. By limiting those Clauses to "religious" institutions, activities, and speech, they have created a dilemma, not of the constitution's making, but of their own. On the one hand, the Establishment Clause demands that the government not subsidize religious matters; on the other hand, the Freedom of Speech Clause demands no discrimination against the expression of private viewpoints, religious or otherwise.

This dilemma is especially real in cases concerning tax-supported educational institutions. When the government enters the education field, it necessarily enters the business of the propagation of opinions. If religious opinions are excluded from education because of the Establishment Clause, then as Justice Kennedy pointed out:

> *That eventually raises the specter of government censorship, to ensure that all student writings and publications meet some baseline standard of secular orthodoxy. Id.,* 63 LW at 4709.

To the majority's credit, they used the Free Speech clause to counter the University of Virginia's false claim that it had to discriminate against religious viewpoints in order to remain "religiously neutral."

On the other hand, the majority failed to see that so long as the government is in the education business, it must be in the business of censoring ideas. Teachers hired by the state censure the views of students in classrooms every day. School administrators and school boards, likewise, censure the teachers and the libraries. No one can operate any school system - primary, secondary, undergraduate or graduate - without supervising the ideas that are taught and requiring conformity to certain "baseline truths."

The problem with *Rosenberger* is the same as it has always been. Public education cases that have come to the Court under the Establishment Clause have always been argued on a false premise, both factually and legally.

As to fact, both the litigants and the Court have presupposed that one can adhere to the principle of religious neutrality in education. The *Rosenberger* case, if it reveals nothing else, demonstrates that education in America is hardly neutral towards students and faculty who attempt to apply a Biblical perspective to the subject matters taught and discussed. Christian students and faculty have to fight for the right to be heard; non-Christians are not only permitted, but encouraged through tax subsidies, to make their views known.

The claim of religious neutrality in education is simply a myth. This is especially true in a school classroom. In the name of religious neutrality, the Court has excluded prayer and the Bible as the revealed word of God. In doing so the Court has imposed a "secular" world view that "excludes from the public school a Christian philosophy of education because it forbids expressing the fear of the Lord through prayer and hearing the Word of God from the Bible." Titus, *Public School Chaplains: Constitutional Solution to the School Prayer* Controversy 10 (1992).

As for the law, the Religion Clauses were never designed to isolate religious views for special constitutional treatment. To the contrary, the two Clauses were designed to get the government out of the "opinion" business, leaving the exchange of ideas to the voluntary choice of the people.

Religious opinions are but a subset of the general principle that "Almighty God has created the mind free." To preserve that freedom, the Religion Clauses deny absolutely and totally any and all civil jurisdiction over the marketplace of ideas. That marketplace, in the words of James Madison, is to be governed solely by "reason and conviction" - not by force and violence - "because the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men."

Until the Court returns to this basic first principle, it will continue to create constitutional predicaments unresolvable by any defensible principles. The time is ripe to challenge tax-supported education as a violation of the Establishment Clause and to return to the unalienable right of the freedom of the mind envisioned by Thomas Jefferson and James Madison.

Other writings by Herbert W. Titus:

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