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Church-State Separation and the Public Schools: A Re-evaluation

Supreme Court decisions in cases involving religion in the public schools have been based on a misinterpretation of both the meaning of the First Amendment and the intentions of its framers.

For four decades—since the *Everson v. Board of Education*[1] decision in 1947—a volatile national debate has raged about the meaning and scope of the First Amendment's establishment clause that mandates separation of church and state. Many of the U. S. Supreme Court's decisions about this matter involve education; therefore, their importance is great to school administrators and teachers who establish and execute policy.

Because of the vagueness of Supreme Court decision making in this important area of constitutional law, public school educators have been accused of violating the First Amendment by allowing or disallowing, for example, the posting of the Ten Commandments, a meeting on school property of a student religious club, or a moment of silent meditation and/or prayer. Today even the very textbooks that students read have become a subject of litigation by parents against a school system, a controversy most likely to end before the Supreme Court.

As this national debate rages, most scholars generally agree that the Founding Fathers' intentions regarding church-state separation are still extremely relevant and important. While the framers of the Constitution and the First Amendment could not foresee many twentieth century problems—especially those growing from advanced technology—many church-state concerns that they addressed in 1787 and 1789 are similar to those we face today.

Constitution's Words Not Trivial

Further, if a nation, such as the United States, proclaims that its written Constitution protects individual liberties and truly provides legal restrictions on the actions of government, the words of that organic law—and the principles derived from them—cannot be treated as irrelevant trivia by those who temporarily govern is the surest single way to undo constitutional government, for constitutional government requires that the general power of government be defined and limited by law *in fact* as well as in theory.[2]

Published in 1979 to the praise of many respected constitutional scholars, the encyclopedic *Congressional Quarterly's Guide to the U. S. Supreme Court* provided the following meaning of the establishment clause:

> The two men most responsible for its inclusion in the Bill of Rights construed the clause *absolutely*. Thomas Jefferson and James Madison thought that the prohibition of establishment meant that a presidential proclamation of Thanksgiving Day was just as improper as a tax exemption for churches.[3]

Despite this authoritative statement, the historical facts are that, as President, James Madison issued at least four Thanksgiving Day proclamations—9 July 1812, 23 July 1813, 16 November 1814, and 4 March 1815.[4] If Madison interpreted the establishment clause absolutely, he violated both his oath of office and the very instruments of government that he helped write and labored to have ratified.[5]

Similarly, if President Thomas Jefferson construed the establishment clause absolutely, he also violated his oath of office, his principles, and the Constitution when, in 1802, he signed into federal law tax exemption for the churches in Alexandria County, Virginia.[6]

Since Jefferson and Madison held the concept of separation of church and state most dear, in my judgment,

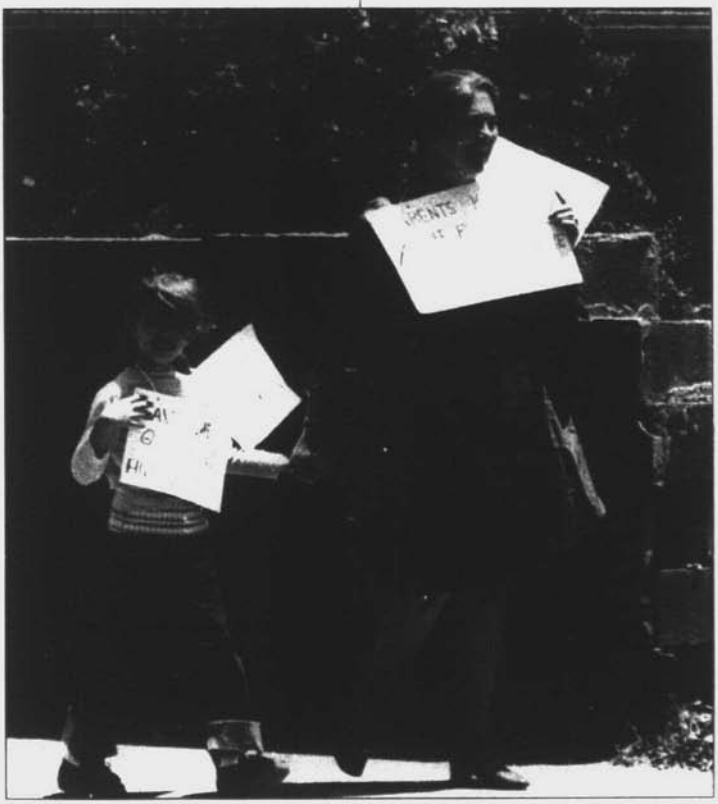
neither man—as president or in any other public office under the federal Constitution—was an absolutist and neither violated his understanding of the First Amendment's establishment clause. For me, it therefore logically follows that President Madison did not think issuing Thanksgiving Day Proclamations violated the constitutional doctrine of church-state separation, and that President Jefferson held the same view about tax exemption for churches.

Whoever wrote the paragraph quoted from the prestigious *Guide to the U. S. Supreme Court*, I assume, did not intend to deceive, but evidently did not check primary historical sources, was ignorant of Madison's and Jefferson's actions when each was president, and mistakenly relied on inadequate secondary historical writings considered authoritative, as no doubt the paragraph from the *Guide* is, too. This indicates that much misunderstanding and/or misinformation exists about the meaning of the constitutional concept of separation of church and state.

In that context, I examine ideas critical of my writing published in a monograph—*Religion, Education, and the First Amendment: The Appeal to History*[4]—by the eminent scholar, R. Freeman Butts. There he characterized my book, *Separation of Church and State: Historical Fact and Current Fiction*, as a manifestation of some "conservative counterreformation," the purpose of which is "to attack once again the [U. S. Supreme] Court's adherence to the principle of separation between church and state" by characterizing that principle as a "myth" or a "fiction" or merely "rhetoric."[7] The very first paragraph of my book refutes this erroneous characterization.

> Separation of Church and State is probably the most distinctive concept that the American constitutional system has contributed to the body of political ideas. In 1791, when the First Amendment's prohibition that "Congress shall make no law respecting an establishment of religion" was added to the United States Constitution, no other country had provided so carefully to prevent the combination of the power of religion with the power of the national government.[8]

While primary historical sources exist that substantiate the Founding Fathers' commitment to church-state separation, other primary sources convince me that much of what the United States Supreme Court and noted scholars have written about it is historically untenable and, in many instances, sheer fiction at odds with the words and actions of the statesmen who placed that very principle in our Constitution.



Photograph courtesy of Tennessee Education Association

Court cases advocating religion in the public schools have dramatically increased during the 1980s. Pictured here is Vicki Frost, a plaintiff in a case charging that textbooks lack her religious viewpoint. Her child's placard reads, "Save Me from Humanism." Hers says, "Parents Have the Right to Protest Offensive School Textbooks."

Absolute Separation v. "No Preference" Doctrine

In the 40-year-old *Everson* case the Supreme Court justices, while splitting 5–4 over the immediate issue, were unanimous in proclaiming that the purpose of the establishment clause—and the intention of its framers in the First Congress—was to create a "high and impregnable" wall of separation between church and state.[9]

Unlike the *Everson* Court, Professor Butts, and all "absolute separationist" scholars, I think the full weight of historical evidence—especially the documented public words and deeds of the First Amendment's framers, including James Madison and our early presidents and Congresses—indicates that they embraced a far narrower concept of church-state separation. In my judgment, they interpreted the First Amendment as prohibiting Congress from (1) creating a national religion or establishment, and (2) placing any one religion, religious sect, or religious tradition in a legally preferred position.[10]

Simply put, the framers of the establishment clause sought to preclude discriminatory government religious partisanship, not nondiscriminatory government accommodation or, in some instances, government collaboration with religion. When this "no religious preference" interpretation of the establishment clause is substituted for the Supreme Court's "high and impregnable wall" interpretation, it is easier to understand many historical documents at odds with the absolutists' position. They substantiate that all our early Congresses, including the one that proposed to the states what subsequently became the First Amendment, and all our early presidents, including Jefferson and Madison, in one way or another used sectarian means to achieve constitutional secular ends.

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***Everson* Case**

In the *Everson* Case, writing the Court's opinion, Justice Black sought to bolster his "high and impregnable wall" dictum with appeals to some carefully chosen actions of Madison, Jefferson, the Virginia Legislature of 1786, and the framers of the First Amendment. Omitted from all of the *Everson* opinions are any historical facts that run counter to that theory. In his writings, I think Professor Butts employs a similar technique of "history by omission." By this I mean that he fails to address indisputable historical facts that are irreconcilable with his absolute separationist views. A few examples will substantiate this extremely important point.

Mentioning Madison's successful Virginia battle against the "Bill Establishing a Provision for Teachers of the Christian Religion" and "Jefferson's historic statute for religious freedom in 1786,"[11] Professor Butts does not explain away Jefferson's Virginia "Bill for Punishing Disturbers of Religious Worship and Sabbath Breakers," which was introduced by Madison in the Virginia Assembly in 1785 and became law in 1786.[12] Further, while he emphasizes Madison's role in introducing and guiding the Bill of Rights through the First Congress,[13] Professor Butts does not explain why the "absolutist" Madison served as one of six members of a Congressional Committee which, without recorded dissent, recommended the establishment of a Congressional Chaplain System. Adopting the Committee's recommendation, the First Congress voted a $500 annual salary from public funds for a Senate chaplain and a like amount for a House chaplain, both of whom were to offer public prayers in Congress.[14]

Nor does Professor Butts explain why, as an absolute separationist, James Madison would, as president, issue discretionary proclamations of Thanksgiving, calling for a day "to be set apart for the devout purposes of rendering the Sovereign of the Universe and the Benefactor of Man [identified earlier in the proclamation by Madison as "Almighty God"] the public homage due to His holy attributes . . ."[15]

". . . much of what the . . . Supreme Court has written about [separation of church and state] is historically untenable and, in many instances, sheer fiction. . . ."

Unexplained also is why Professor Butts' absolute separationist version of Thomas Jefferson would, as president, conclude a treaty with the Kaskaskia Indians which, in part, called for the United States to build them a Roman Catholic Church and pay their priest, and subsequently would urge Congress to appropriate public funds to carry out the terms of the treaty.[16] An understanding of what the framers of our Constitution thought about church-state separation would also be furthered if we had explanations of why Presidents Washington, John Adams, and Jefferson apparently did not think they were breaching the "high and impregnable" wall when they signed into law Congressional bills that, in effect, purchased with enormous grants of federal land, in controlling trusts, the services of the "Society of the United Brethren for propagating the Gospel among the Heathen" to minister to the needs of Christian and other Indians in the Ohio Territory.[17] Like the majority of the Supreme Court, Professor Butts does not comment on these historical documents and events.

When all the historical evidence is considered, I think it relatively clear that the establishment clause was designed to prevent Congress from either establishing a national religion or from putting any one religion, religious sect, or religious tradition into a legally preferred position. In *Everson*, the Supreme Court interpreted the Fourteenth Amendment as prohibiting state legislatures, or their instrumentalities such as school boards, from doing likewise. As a result, the interpretation of the establishment clause by Supreme Court decisions governs the permissible range of both state and federal legislative authority.

Professor Butts thinks my definition of an "establishment of religion" too narrow, and the prohibition which I think the framers intended "plausible but false."[18] Plausible because in the sixteenth and seventeenth centuries, establishments in Europe and in the early American colonies usually meant the establishment of a single church. False because Professor Butts contends that, by the end of the eighteenth century, in America the term "establishment of religion" had taken on a different meaning.

His argument is that "the idea of a single church as constituting 'an establishment of religion' was no longer embedded in the legal framework of any American state when the First Amendment was being debated in Congress in the summer of 1789." Adding that in all of the states that still retained establishments, "multiple establishments were the rule," Professor Butts concludes that "the founders and the framers could not have been ignorant of this fact; they knew very well that this is what the majority in the First Congress intended to prohibit at the federal level."[19]

Butts' Argument Untenable

This argument is simply untenable when considered with the primary historical record. Professor Butts virtually ignored the documents most crucial to an understanding of what the religion clauses were designed to prohibit at the federal level—the suggested constitutional amendments from the various State Ratifying Conventions. Those documents show that they feared, among other things, that important individual rights might be infringed by the powerful new national legislature authorized by the adoption of the federal Constitution.

Their amendments indicate that the states feared interference with the individual's right of conscience and an exclusive religious establishment, *not a multiple national establishment*, as Professor Butts wants us to believe. Typical was the Maryland Ratifying Convention's proposed amendment stating "that there will be no national religion established by law; but that all persons be equally entitled to protection in their religious liberty."[20]

The Virginia Ratifying Convention proposed a "Declaration of Bill of Rights" as amendments to the Constitution that was echoed by North Carolina, Rhode Island, and New York Conventions. Virginia's Article Twenty, adopted 27 June 1788, stated:

> 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 have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience; and that no particular religious sect or society ought to be favored or established, by law, in preference to others.[21]

States Wanted Nonpreference

In short, when it came to religious establishments, the State Ratifying Conventions proposed "nonpreference" amendments.

With these proposals in mind, it is easier to understand the wording of Madison's original religion amendment: "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."[22] Madison wanted the Constitution to forbid the federal government from interfering with the rights of conscience or establish an exclusive national religion—not religions—and the record said so.

The "nonpreference" interpretation is further bolstered by Madison's original wording of his own establishment clause and his later interpretation on the floor of the House of Representatives of the intended prohibitions of the amendment. On 15 August 1789, using virtually the same words employed by the petitioning State Ratifying Conventions,

> Mr. Madison said, he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience. Whether the words are necessary or not, he did not mean to say, but . . . he thought it as well expressed as the nature of the language would admit.[23]

Further, the House record indicates that Madison said that "he believed that the people feared one sect might obtain a preeminence, or two combine together, and establish a religion to which they would compel others to conform."[24] Certainly Madison's statements from the record of the First Congress and the other primary documents mentioned here run contrary to the "multiple establishment" thesis.

Implications for the Public Schools

Professionals in education may wonder appropriately what the impact would be on public education should the U. S. Supreme Court now choose to reverse some of its major rulings and adopt the narrower interpretation of church-state separation which I believe was intended and embraced by the First Amendment's framers.

First, the establishment clause would continue to prohibit Congress and individual states from creating, in Madison's words, "a national religion."

Second, in keeping with the framers' intent, the establishment clause's "no preference" doctrine, applied directly to the federal government and to the states by the Fourteenth Amendment, would constitutionally preclude all governmental entities from placing any one religion, religious sect, or religious tradition into a preferred legal status. As a consequence, in public schools, the recitation of the Lord's Prayer or readings taken solely from the New Testament would continue to be unconstitutional because they place the Christian religion in a preferred position.

Similarly, the posting of the Ten Commandments only or reading only from the Old Testament would place the Judeo-Christian tradition in an unconstitutionally favored religious status. However, unendorsed readings or postings from many writings considered sacred by various religions, such as the Book of Mormon, the interpretative writings of Mary Baker Eddy, the Bible, the Koran, the Analects of Confucius, would not be unconstitutional. A decision to teach only "creationism" or Genesis would be unconstitutional, while a course in cosmology, exploring a full range of beliefs about the origin of life or the nature of the universe—religious, areligious, or nonreligious—would not violate the First Amendment any more than would a course on comparative religions without teacher endorsement.

"Simply put, the framers of the establishment clause sought to preclude discriminatory government religious partisanship, not nondiscriminatory government accommodation or . . . collaboration with religion."

In all circumstances where the state is pursuing a valid educational goal, and is religiously nonpartisan in doing so, the professional leadership of the educational unit would decide, as in any other policy, whether such an activity was educationally appropriate or desirable. This would be the case whether the educational unit was a school, a school district, or an entire state educational system. Consequently, adherence to the "no preference" doctrine would return many policy decisions to the appropriate educational authorities, elected or appointed, and reduce the all too frequent present pattern of government by judiciary.

Third, although the First Amendment's free exercise of religion clause would not be contracted by the "no preference" principle, that interpretation would, in some instances, expand the individual's free exercise of religion and other First Amendment rights. This would happen where "equal access" is currently denied public school students.

Equal Access Act

The Equal Access Act of 1984 (Public Law 98–377) prohibits public high schools receiving federal aid from preventing voluntary student groups, including religious ones, from meeting in school facilities before and after class hours or during a club period, if other extracurricular groups have access.[25] The constitutionality of refusing "equal access" to voluntary student religious organizations was litigated in the lower courts[26] before reaching the U.S. Supreme Court in *Bender* v. *Williamsport* in March 1986.[27]

In deciding equal access cases, the lower federal courts applied the Supreme Court's "three part *Lemon*" test to determine whether the establishment clause had been violated. Under this test, first described in *Lemon* v. *Kurtzman*, the Supreme Court held that in order to pass constitutional muster under the establishment clause, the challenged governmental policy or activity must (1) have a secular purpose, (2) be one that has a principal or primary effect which neither advances nor inhibits religion, and (3) not foster an excessive government entanglement with religion.[28]

The "no preference" doctrine, on the other hand, would provide a relatively clearer and easier-to-apply test. Alleged violations would be measured by two simple questions: (1) Is the governmental action within the constitutional power of the acting public body? and (2) Does the governmental action elevate any one religion, religious sect, or religious tradition into a preferred legal status? Either a "no" to the first question or a "yes" to the second would make the policy unconstitutional.

Unlike the *Lemon* interpretation, the "no preference" interpretation poses less danger to a student's individual First and Fourteenth Amendment liberty. The Third U. S. Circuit Court's decision in *Bender* v. *Williamsport* illustrates this point. There the court held that it was constitutional for a school board to refuse to permit a student-initiated nondenominational prayer club to meet during the regularly scheduled activity period in a public school room.[29] As I see it, that decision subordinated three First Amendment freedoms—free exercise of religion, freedom of speech, and

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voluntary assembly—to one misinterpreted First Amendment guarantee. Under the "no preference" doctrine, equal access would be guaranteed to *all* religious or, for that matter, irreligious student groups under the same conditions that apply to any other voluntary student group.

Application of the "no preference" interpretation also avoids enormous dangers to an "open society" possible under the *Lemon* test. Can we not see that a court which can hold today that a classroom could not be used by a voluntary religious student group because that use may have as its primary effect the advancement of religion, can tomorrow, by the same logic, bar meeting rooms to students who want to discuss atheism or a book negative about religion, such as Bertrand Russell's *Why I Am Not a Christian*, because the primary effect there might be said to inhibit religion. By the use of *Lemon's* "primary effect" test, books about religion or those said to be irreligious can be removed from public school libraries. Is C. S. Lewis' *The Screwtape Letters* safe? And what about *Inherit the Wind*, or Darwin's *Origin of the Species*? Are we so frightened of ourselves that we are willing to disallow, in our institutions of learning, scrutinization of ultimate issues and values because of fear about where an open marketplace of ideas may eventually take the nation?

Finally, while some actions such as an uncoerced moment of silence for mediation and/or prayer in a public schoolroom[30] or the teaching of educationally deprived students from low-income families for several hours each week in a parochial school by public school teachers, recently held unconstitutional,[31] would be constitutional under the "no preference" interpretation, that does not mean they would automatically become educational policy. In all public educational entities, large or small, what would become policy would be up to the legally empowered decision makers in each of those entities.□

1. 330 U. S. 1 (1947).

2. Charles H. McIlwain, *Constitutionalism: Ancient and Modern*, rev. ed. (Ithaca, N.Y.: Great Seal Books, 1958), 19–22.

3. *Congressional Quarterly's Guide to the United States Supreme Court* (Washington, D.C.: Congressional Quarterly, Inc., 1979), 461. Emphasis added. The First Amendment has two religion clauses, the "establishment" clause and the "free exercise" clause. U. S. Constitution Amendment I: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."

4. These proclamations, in their entirety, are published in James D. Richardson, *A Contemplation of the Messages and Papers of the Presidents, 1789–1897*, vol. I (Washington, D.C.: Bureau of National Literature and Art, 1901), 34–35; and Robert L. Cord, *Separation of Church and State: Historical Fact and Current Fiction* (New York: Lambeth Press, 1982), 257–260.

5. After he had left the presidency, and toward the end of his life, Madison wrote a document commonly known as the "Detached Memoranda," which was first published as recently as 1946 in *William and Mary Quarterly* 3 (1946): 534. In it Madison *does* say that Thanksgiving Day proclamations are unconstitutional, as are chaplains in Congress. In light of his actions in public office, these were obviously not his views as a congressman and president. For a fuller discussion of Madison's "Detached Memoranda," see Cord, *Separation*, 29–36.

6. 2 *Statutes at Large* 194, Seventh Congress, Sess. 1, Chap. 52. Jefferson *did* believe Thanksgiving Proclamation violated the First Amendment and, unlike Washington, John Adams, and James Madison, declined to issue them.

7. R. Freeman Butts, *Religion, Education, and the First Amendment: The Appeal to History* (Washington, D.C.: People for the American Way, 1986), 9. Butts, an educational historian, is William F. Russell Professor Emeritus, Teachers College, Columbia University; Senior Fellow of the Kettering Foundation; and Visiting Scholar at the Hoover Institution, Stanford University.

8. Cord, *Separation*, XIII.

9. For an extensive critique of the *Everson* case and its interpretation of the establishment clause, see Cord, *Separation*, 103–133.

10. For in-depth study of the "no preference" principle, see Robert L. Cord, "Church-State Separation: Restoring the 'No Preference' Doctrine of the First Amendment," *Harvard Journal of Law & Public Policy* 9 (1986): 129.

11. Butts, *Religion*, 18.

12. Cord, *Separation*, 215–218.

13. Butts, *Religion*, 18–21.

14. Cord, *Separation*, 22–26.

15. Quoted from President Madison's "Proclamation" of "the 9th day of July A.D. 1812." This proclamation is republished in its entirety in Cord, *Separation*, 257.

16. For the entire text of the treaty, see Ibid., 261–263.

17. The full texts of these laws are republished in Cord, 263–270.

18. Butts, *Religion*, 16.

19. Ibid., 18.

20. Jonathan Elliott, *Debates on the Federal Constitution*, vol. II (Philadelphia: J. B. Lippincott Co., 1901), 553.

21. Ibid., vol. III, 659.

22. *Annals of the Congress of the United States, The Debates and Proceedings in the Congress of the United States*, vol. I, Compiled from Authentic Materials, by Joseph Gales, Senior (Washington, D.C.: Gales and Seaton, 1834), 434.

23. Ibid., 730.

24. Ibid., 731.

25. *Congressional Quarterly Weekly Report*, vols. 42, p. 1545, 1854; 43, p. 1807.

26. *Brandon* v. *Board of Education*, 635 F. 2nd 971 (2d Cir. 1980); *cert. denied*, 454 U. S. 1123 (1981); *Lubbock Civil Liberties Union* v. *Lubbock Independent School District*, 669 F. 2d 1038 (5th Cir. 1982), *cert. denied*, 459 U. S. 1155 (1983).

27. *Bender* v. *Williamsport*, 475 U. S.—, 89 L.Ed. 2d 501 (1986). While the Third Circuit Court dealt with the "equal access" question, the Supreme Court did not reach that constitutional issue because one of the parties to the suit in the Circuit Court lacked standing and, therefore, that Court should have dismissed the case for want of jurisdiction. Ibid., 516.

28. *Lemon* v. *Kurtzman*, 403 U. S. 602, 612, 613 (1971).

29. *Bender* v. *Williamsport*, 741 F. 2d 538, 541 (3rd Cir. 1984).

30. In *Wallace* v. *Jaffree*, 105 S. Ct. 2479 (1985), the U. S. Supreme Court held such a law unconstitutional.

31. In *Grand Rapids* v. *Ball*, 473 U. S.—, 87 L.Ed. 2d 267 (1985) and *Aguilar* v. *Felton*, 473 U.S.—, 87 L.Ed. 2d 290 (1985), the Supreme Court held similar programs unconstitutional.

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