

Separation of Church and State: The American Dilemma

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Abstract

Government's relationship with religion in the United States is specifically addressed in Article VI, which states that no religious test shall be required as a qualification for any office or public trust in the United States and Amendment I, which states that Congress shall make no law establishing religion or preventing the free exercise of religion. As clear as these constitutional provisions might be, there are four basic questions which continually arise:

1. What led the Framers of the original Constitution and the members of the select committee charged with drafting what became the Bill of Rights to constitutionally preclude an established church of religious dogma?
2. What in the Twentieth Century, particularly beginning with the mid century era, thrust the U.S. Supreme Court onto center stage in issues surrounding both the "free exercise" and "separation clauses"?
3. What factors influence the U.S. Supreme Court to use narrow or strict construction of constitutional language, while at other times the Court applies a more loose or liberal construction?
4. What role has federalism continued to play?

The paper seeks to answer each of these questions by examining the writings of men such as James Madison and Thomas Jefferson, by reflecting upon the important role of the United States Supreme Court in deciding the issue of what is/what is not policy infringing upon the First Amendment, by reviewing relevant cases and their decisions, as these have expanded the meaning of the establishment and free exercise clauses, and ultimately concluding that freedom of and freedom from religion are the two supporting legs of religious freedom and that without both, religious freedom is impossible.

Introduction

The United States Constitution specifically addresses the issue of government's relationship with religion in several places --

Article VI, ". . . no religious Test shall ever be required as a Qualification To any Office or public Trust under the United States."

Amendment I, "Congress shall make no law respecting an establishment of Religion or prohibiting the free exercise thereof. . . ."

By this language, the United States Government is officially bound to reject any attempt to require that members of government must be members of a particular organized religious institution or sect and to reject any attempt to create an established church. The effect of these two constitutional provisions is hailed by many as having built "a strong wall of separation between the government (characterized by some as purely secular) and organized religious belief or lack thereof by citizens and officeholders alike. A fundamental question raised by these tenets is "What led the Framers of the original Constitution and the members of the congressional select committee charged with drafting what became the Bill of Rights to constitutionally preclude an established church or religious dogma?"

The literature is replete with books, articles and pamphlets extolling the religious values of the Founding Fathers, the idea that America is a Christian nation, that the Constitution supports the

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existence of a Christian-based government and similar epithets. The bottom line, however, is that there are many errors in this supposition. For example, many of the historical studies about and writings by the Founding Fathers – Washington, Jefferson, Adams, Madison, Monroe – reflect their acquaintance with and acceptance of deism – the belief born within European Enlightenment which recognizes a belief in God, honors reason as the highest gift which God has given to man and considers Jesus to have been a wise and good man. J. Brent Walker, in his lecture at Campbell University, states

The U.S. is not a Christian nation. It might be Sociologically (@70 – 75% of Americans identify themselves as Christian) b but not in any legal or theological sense.¹

The answer lies primarily in the major motivating factor behind many of the early colonists' decision to leave their homes and venture across the North Atlantic – religious freedom. Whether the focus is upon the pilgrims (who were actually Puritans accorded the moniker “Pilgrims” for their bravery and courage to come to North America in search of religious freedom), Roger Williams, Ann Hutchinson and Thomas Hooker (each of these individuals found life unbearable in Massachusetts Bay Colony, (the Puritan theocratic state where the Puritan religious tenets tolerated no competition of ideas or practice) and were either driven out or left voluntarily, William Penn's colony of Pennsylvania, founded as a haven for Quakers, or Lord Baltimore's Maryland, which was given by the King as a haven for Roman Catholics, the ultimate decision was the same – the desire for religious freedom and tolerance. This conclusion is additionally supported by the thinking of James Madison, frequently given the moniker, “Father of the Constitution of 1787”, whose efforts promoting religious liberty continued throughout his public life. Examples of Madison's efforts to guarantee what today would be classified as promotion of religious liberty can be found in his successful inclusion of language in Virginia's new state constitution in 1776 guaranteeing freedom of conscience rather than mere toleration. In 1785 Madison wrote his anonymous and critically important “Memorial and Remonstrance against Religious Assessments”, which successfully defeated a bill before the Virginia House of Delegates that would have provided state subsidies for religious bodies.²

¹ J. Brent Walker. “Telling The Truth About Church-State Separation.” Lecture at Campbell University, February 6, 2007. Baptist Joint Committee for Religious Liberty. http://papers.ssm.com/so/3/papers.cfm?abstract_id=447883

¹ David L. Homes. *The Faiths of the Founding Fathers*. Oxford, New York: Oxford University Press, 2006, p. 93

Despite the prior assertions, the most fundamental question as yet unaddressed is, “What is wrong with an established church?” Drawing upon American socio-economic and political history, one can say “Nothing, provided the society reflects no diversity.” Yet, Eighteenth, Nineteenth, Twentieth and Twenty-first Century America reflects total diversity. Whether the focus is vocation, avocation, geographical distribution, cultural heritage, political beliefs, ethnicity, language, or religious preference, the result is the same. Americans were and are diverse in each of these areas. The key to linking these diverse characteristics with an established church existing hand-in-hand with government presents critical challenges to the diverse qualities of the American population, especially religious diversity. A major tenet undergirding American constitutional and political heritage is “majority rule plus minority rights”. The language of both the Fifth and Fourteenth Amendments’ due process clauses and the Fourteenth equal protection of the laws clause are commonly-held bases for protection of the minority against predation by the majority.

A further review of James Madison’s writings reveals his overall negative thoughts about an established church. Madison had seen the persecution and jailing of religious dissenters by the Anglican Church in Virginia (the established church of which Madison was at least a nominal member), which cause the young Madison to argue “. . .only liberty of conscience could guarantee civil and political liberty.”³ In effect, this supports the argument that the majority doesn’t need protection, since the majority holds the reins of power. But, the minority certainly does. Never was this truer than in the relationship between the individual citizen or non-majority religious institution and a majority religious institution and government.

The U.S. Supreme Court and The First Amendment

The bulk of the First Amendment cases were heard by the United States Supreme Court beginning in the Twentieth Century, once again giving credence to the language of Chief Justice John Marshall in *Marbury v. Madison*⁴, when he said, “. . .it is the province and duty of this Court to say what the Constitution says. . .”

What in the Twentieth Century, particularly beginning with the mid century era, thrust the Court onto center stage in issues surrounding both the “free exercise” and “separation”: clauses? Part

³ Ibid.

⁴ *Marbury v. Madison*, 1 Cranch 137 (1803).

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of the answer is discovered by determining why people choose to use the courts rather than the more traditional political branches of government – Legislative and Executive. Some individuals and groups, much like the members of the Cherokee Nation, when faced with action by the Georgia Legislature confiscating their property without compensation turned to the federal courts, including the Supreme Court, to gain monetary compensation for their loss.⁵ While the Cherokee National ultimately lost, when President Andrew Jackson refused to enforce the Court's ruling, the case provides a clear example of a segment of American society lacking political clout turning to the courts for protection.

For others, the rise and development of the class action law suit, a process capitalized by the late Thurgood Marshall, former chief counsel for the NAACP, later Solicitor General and Associate Justice of the United States. The class action law suit allows a greater number of litigants to be identified as having grievances, thereby lubricating the wheels of redress via the judicial process. In essence, numbers are important and do influence court decisions.

An additional part of the reason lies in the proactive nature of the U.S. Supreme Court under the leadership of Earl Warren, Chief Justice of the United States, 1953 - 1969. During this time period, the Court was committed to the solving of socio-economic, political and religious issues in landmark liberal decisions in the areas of race relations, rights of the criminally accused and freedom of and from religion. As the Court agreed to review the cases, the process became its own self-fulfilling prophesy. Contemporary literature is filled with comments, both pro and con, addressing the issue whether government in America is an enemy of or in open conflict with the religion. The core question in these discussions is whether separation means that there can be no interference or inclusion of anything religious in the day-to-day operations of government. Robert Jackson, Associate Justice of the United States, writing for the majority in *West Virginia Board of Education v. Barnette*⁶, a case involving Jehovah's Witnesses challenging a state statute requiring all public school students to stand and recite the Pledge of Allegiance at the beginning of the school day, “. . . If there be anything in our constitutional constellation, it is that no public official, no matter how high or how petty, can define what is acceptable religious belief and

⁵ *Worcester v. Georgia*, 6 Peters 515 (U.S. 1832). An interesting discussion as to the veracity of Andrew Jackson actually saying this is discussed in Jon O. Newman, “President Jackson's Famous Retort To Chief Justice Marshall: Did He Really Say It?”, *The Supreme Court Historical Society Quarterly*, XXVII (Summer 2006), p 13 – 14.

⁶ *West Virginia Board of Education v. Barnette*, 310 U.S. 624 (1943).

practice. . . .”⁷ Justice Jackson further warned “. . . [T]hose who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard. . . .”⁸ It must be noted that the Barnett case specifically overruled the court’s earlier decision in *Minersville School District v. Gobitis*⁹, in which the Court had sustained a Pennsylvania flag salute requirement against challenge by Jehovah’s Witnesses.

Despite these events, the Court had found itself time and again being criticized for waffling or being arbitrary and inconsistent in cases revolving around the separation issue. In *Illinois ex rel. McCollum v. Board of Education of Champaign-Urbana*¹⁰, the Court ruled that voluntary participation with parental permission in a released time religious instruction class taught by church representatives in the school violated the separation clause. Yet, in *Zorach v. Clausen*¹¹, where the only difference was that New York specified the students would leave school and attend the voluntary instruction at the various churches in the community, the Warren Court upheld the program. Much of the concern and argument over the Court’s decisions in these two cases focused upon the fact that attendance and truancy reports were used to insure that the students didn’t skip the off-campus classes. The fulcrum used by the Court to differentiate the two cases hinged upon the words “tax-supported capital outlay” in describing where the instruction occurred.

In 1947, prior to *McCollum* and *Zorach*, Justice Hugo Black wrote for the majority in *Everson v. Board of Education of Ewing Township*¹², stating that the New Jersey State Legislature had not violated the First Amendment separation clause when providing parents who allowed their children to ride public transportation – buses, streetcars, trains – to and from private and/or parochial schools could claim the total expense as a tax rebate on their state income tax return. The Court’s rationale was that the children and not any particular religious sect or church were the beneficiaries of the program. Justice Black’s majority opinion in the 5 – 4 decision talks about Thomas Jefferson’s contention that the establishment clause was intended to erect a wall of

⁷ Ibid., 642.

⁸ Ibid, p. 641.

⁹ *Minersville School District v. Gobitis*, 310 U.S. 586 (1940)

¹⁰ *Illinois ex rel. McCollum v. Board of Education of Champaign-Urbana*, 333 U.S. 203 (1948).

¹¹ *Zorach v. Clausen* 343 U.S. 306 (1952).

¹² *Everson v. Board of Education of Ewing Township*, 330 U.S. 1 (1957).

separation between church and state and that despite the decision the wall remains in place.¹³ Yet, following the Court's decision in *Everson*, and when the Court ruled in *Ronald Rosenberger et al. v. Rector & Visitors of The University of Virginia*¹⁴, it was argued that the Court had departed from Jefferson's conception of the wall of separation as a straight wall into one which was serpentine in construct. In effect, the critics were saying the position of the Court was one which provided a means whereby the Court could draw the line as the then majority agreed, in effect a "case-by-case method of construct" smacking of arbitrariness and capriciousness.¹⁵ In contrast, critics of this position argue that the Court's rationale precisely underscores why the First Amendment was created – to prevent any single group or sect from imposing their beliefs, bias, and practices to the exclusion of others.

Free Exercise And Establishment Clauses

The free exercise and establishment clauses have been and continue to be critical tools, both pro and con, as various state and national public policies come under challenge before the Court. At times, we find the Court using narrow or strict construction of constitutional language, while at other times applying a much more loose or liberal construction.¹⁶ We have already seen this in the discussions of *Gobitis*¹⁷ and *Barnette*¹⁸, *McCullum*¹⁹ and *Zorach*²⁰. These approaches have sometimes raised interesting perspectives, such as the result of national, state, or local government prohibitions of the sale and consumption of alcohol. Knowing that some religious sects serve wine during the administration of communion, how should we judge the exemption from compliance with the non-consumption policy by those religious institutions? Is this

¹³ Ibid., pp. 15-16. Also see Library of Congress. Thomas Jefferson's Letter to The Danbury Baptists. <http://www.loc.gov/loc/cib/9806/dampre.html>, in which Jefferson states that the First Amendment created a wall of separation between church and state.

¹⁴ *Ronald W. Rosenberger et al. v. Rector & Visitors of The University of Virginia*, 515 U.S. 819 (1995).

¹⁵ See also J. Brent Walker. "Telling The Truth About Church Separation". Lecture at Campbell University, February 6, 2007, in Baptist Joint Committee for Religious Liberty, http://papers.ssm.com/so/3/papers.cfm?abstract_id=447883, wherein the author states,

Separation of church and state, or 'the wall of separation' is simply a metaphor. . .for expressing a deeper truth that religious liberty is best protected when church and state are institutionally separated and neither tries to perform or interfere with the essential mission and work of the other.

¹⁶ For purposes of this paper, "strict construction" refers to a narrow, literal interpretation/application, while "liberal construction" refers to a broad interpretation/application.

¹⁷ 310 U.S. 586 (1940).

¹⁸ 319 U.S. 624 (1943).

¹⁹ 333 U.S. 203 (1948).

²⁰ 343 U.S. 304 (1952).

government entanglement in matters which are strictly religious, thereby violating the First Amendment? In the narrowest sense, the answer is yes. But, pragmatically what would be the result of strict enforcement, thereby denying those religious sects the privilege of serving wine during communion? The readily identified and often documented ramifications following ratification of Amendment Eighteen regarding prohibition are well-known and easily quoted reasons for government exempting coverage of the use of communion wine. And, the same is true for state statutes establishing a legal age for purchase and consumption of alcohol and the exemption of the taking of communion by persons under the established legal age to purchase and to consume.

In 1964, the California Supreme Court unanimously ruled in *People v. Woody*²¹ that under the free exercise clause of the First Amendment, members of the Native American Church who chew peyote as part of a religious service are immune to prosecution under the controlled substances section of the California Penal Code. Yet, that same person who buys, sells, uses a controlled or illegal substance in a non-religious observance is subject to the full impact of the law. Ultimately, in 1990 the U.S. Supreme Court ruled that Oregon's statute making use and/or possession of peyote or other illegal substances a crime was enforceable against members of the Native American Church.²² Additional Federal Government reaction/response to the Oregon case occurred in November, 1963, when Congress passed the Religious Freedom Restoration Act²³, which gave federal legal sanction to peyote possession/use by members of the Native American Church.

In 1993 the United States Supreme Court ruled in *The Church of Lukumi Babalu Aye v. City of Hialeah*²⁴, a case revolving around several citizens of the city requesting that property rented by members of the Santeria Sect (a blend of African-Christian beliefs which includes ritualistic sacrifice of animals) could not be used as their site of worship. This request, following the NIMBY Principle ("not in my back yard") sought official action to bar the church from use of

²¹ *People v. Woody*, 61 Cal 2d 716 (1964).

²² *Employment Division v. Smith*, 494 U.S. 872 (1990), wherein the Court stated that the peyote exemption established in *People v. Woody* is not a constitutional requirement but merely constitutionally permissible. The decision by the Court was a rejection of the 1963 decision of the Court in *Sherbert v. Verner*, 374 U.S. 398 (1963) and *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Both decisions were based upon the concept that only an established compelling state interest can withstand constitutional challenge under the free exercise concept.

²³ *Religious Freedom Restoration Act*, 42 U.S.C. §2000b. In *City of Boerne v. Flores*, 521 U.S. 507 (1997) the Court declared the Act to be unconstitutional against state and local laws but it still applies against federal statutes and legislation.

²⁴ *The Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993).

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this neighborhood property. The U.S. Supreme Court ruled that if the City of Hialeah were to rezone and prevent the church from occupying and using the property, the City would deprive the Church and its members of their privilege of free exercise under the First Amendment.

Public education in the United States has historically been largely a function of state and local government. In the 1920's, an Oregon statute requiring students between the ages of eight and sixteen to attend public school was overturned via the First Amendment free exercise clause in *Pierce v. Society of Sisters*.²⁵ And, in 1972, the Court ruled in *Wisconsin v. Yoder*²⁶ that Wisconsin's requirement that all children be sent to school until the age of sixteen violated the free exercise privilege of the Amish parents of two children ages fourteen and fifteen. Chief Justice Warren Burger, writing for the Court, contrasted the state's interest in making certain that all children are exposed to a minimum level of education was in direct conflict with what Frank Sorauf sees as two interests of the parents -- how socialization and education profoundly affect their children currently and in the future and the perpetuation of the Amish community and way of life.²⁷ In favoring the parents and their goals, in effect, perpetuation of the Old Amish sect, which Burger concluded qualifies as a set of religious beliefs – deep conviction of parents, organized as a group, and beliefs of the group are intrinsically part of daily living. Thus, the federal constitutional free exercise and establishment clauses required overturn of the application of Wisconsin's policy to the Amish.

During the 1960's, a number of states began to note disparities between curricular offerings, teacher qualifications, and overall quality of education between public and parochial schools and colleges. This cognizance led first to a number of state legislatures addressing the issues by appropriating public money to augment the financial health of the church-related institutions. According to Frank Sorauf, this legislative approach breeds fear on the part of the public institutions that the public resources are more or less fixed and broadening distribution to include

²⁵ *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). This case revolved around an Oregon statute which sought to require that all students in the state had to attend public accredited schools rather than private or parochial schools.

²⁶ *Wisconsin v. Yoder*, 406 U.S. 205 (1972). This was, in effect, based upon the earlier principle in *Sherbert v. Verner*, 374 U.S. 398 (1963), in which the court maintained that the only way a state statute which was alleged to be in conflict with the free exercise clause could withstand constitutional scrutiny was if an identified compelling state interest was being served by the statute. In *Sherbert*, the Court held that South Carolina could not refuse to pay unemployment benefits to a terminated employee who, because of Seventh Day Adventist belief, refused to work on Saturday.

²⁷ Frank J. Sorauf. *The Wall of Separation: The Constitutional Politics of Church and State*. Princeton, NJ: Princeton University Press, 1976. p. 146.

religious institutions will mean fewer available dollars for public education.²⁸ The constitutional argument used is that of the establishment clause. Two cases, *DiCenso v. Robinson*²⁹ and *Lemon v. Kurzman*³⁰, one from Rhode Island and the other from Pennsylvania were both decided using the establishment clause. Both states had attempted to incorporate public dollars into religious schools by way of extra teachers and materials to increase the educational exposure of students. Both required that at no time would teachers incorporate or refer to religious tenets as they taught from the furnished materials. A monitoring system was created to make certain that teachers complied with the policy. The test developed by the Court, otherwise known as “The Lemon Test” required that in order to pass constitutional muster the statute’s **purpose** must be secular, the main **effect** of the policy must neither advance or inhibit religion, and the policy cannot promote **excessive government entanglement** with religion. Any program has to meet each of the test’s three prongs. It was on the third prong which both the Rhode Island and Pennsylvania statutes came up short – the infusion of a monitoring system promoted excessive government entanglement, thus violating the establishment clause. Currently, the Lemon Test continues to be the guidepost in deciding establishment questions, although sometimes the reasoning of the Court may not always be clearly understood or readily accepted.

Returning to the issue of entangling religion and public education, sometimes even what is believed to be government action taken to benefit a physically-challenged group of students who just happen to be members of an orthodox Jewish community, finds itself being challenged as creating excessive entanglement of church and state. This is abundantly clear in the ruling by the U.S. Supreme Court in *Board of Kiryas Joel Village School District v. Louis Grumet et al.*³¹, involving a community populated by Hassidic Jews, many of whose children were physically challenged. Both the physical disabilities and the constraints created by Hassidic Judaism created real hardships for these students in the regular public schools. Hence, the New York Board of Education concluded that creation of a separate school district which would serve only the children of the Hassidic Jewish population (Kiryas Joel Village met this demographic characteristic, and the decision to create a separate school district was the most viable solution, a move which was challenged as a form of direct government support of religion. The United

²⁸ Ibid., p. 49.

²⁹ *Dicenso v. Robinson*, 403 U.S. 602 (1971).

³⁰ *Lemon v. Kurzman*, 403 U.S. 602 (1971)

³¹ *Board of Kiryas Joel Village School District v. Louis Grumet et al.*, 512 U.S. 687 (1994).

States Supreme Court ruled that the New York Board of Education had overstepped the boundary between church and state under the establishment clause using the Lemon Test. Put another way, the Court recognized that the New York Board of Education had used religious preference as the basis for creating and determining who would attend the special school district. In contrast, free exercise has enjoyed a more checkered career, the United States Supreme Court frequently using both free exercise and establishment in their decisions. In public schools, uses of prayers, Bible readings or devotionals at the beginning of the school day were routine events in many states. Returning to the diversity issue, how does one justify required use of religious content materials by students whose religious preference ranges far beyond the Judeo-Christian tradition? The majoritarian argument was similar to the old adage, “When in Rome, do as the Romans do.” But we know that in a number of schools systems throughout the United States, the student population contains people whose religious preferences range from non-Judeo-Christian to atheism.

One of the early cases arose in New York, when the New York Board of Regents adopted and mandated the use of a non-sectarian prayer by every New York public school. This was challenged in *Engel v. Vitale*³², in which Justice Hugo Black’s majority opinion utilized the establishment clause – composition of the prayer by a state agency – as the basis for overturn. According to John Arthur, the words of Justice Black are very similar to those of James Madison, when he pointed out that religious establishment endangers both the political process and religious institutions.³³

But *Engel* was only the beginning. In 1963 the Court heard argument in *Abingdon School District v. Schempp* and *Murray v. Curlett*³⁴, the first a Bible reading case from Pennsylvania and the second a Lord’s Prayer case from Maryland. Associate Justice Tom C. Clark laid the foundation for what became the neutrality test, otherwise known as the Lemon Test³⁵, stating that if the purpose and primary effect of the enactment is to advance or inhibit religion, then the policy goes beyond the scope of legislative power under the establishment clause. This is critical because use of the establishment clause rather than the free exercise clause actually was an

³² *Engel v. Vitale*, 370 U.S. 421 (1962).

³³ John Arthur. *The Unfinished Constitution: Philosophy and Constitutional Practice*. Belmont, CA: Wadsworth Publishing Co., 1989, p. 126.

³⁴ *Abingdon School District v. Schempp, Murray v. Curlett*, 379 U.S. 203 (1963).

³⁵ See discussion of the Lemon Test on pp. 11 – 12.

indicator that the majority preferred to follow the lead of Justice Black in *Everson*, *McCollum*, and *Engel*.³⁶

Compliance with the Schempp decision reflects that it is one thing to draft an opinion and quite another to insure full scale compliance. The record is replete with studies of the compliance rate by various school boards and their administrators and teachers, Richard Johnson³⁷, William K. Muir³⁸, and Stephen L. Wasby³⁹ being some. Johnson concluded that compliance by teachers fell into two categories – public compliance and private non-compliance. An extension of this is found in the content of at least one popular bumper sticker, “As long as teachers give exams, there will be prayer in school”.

Hard on the heels of banning prayer in public schools came the concept of moment of silence. One of the first states to adopt a moment of silence statute was Alabama in 1978. Alabama enacted three statutes, §16-1-20 (1978), which authorized a one minute period of silence in public schools “for meditation”; §16-1-20.1 (1981), which authorized a period of silence “for meditation or voluntary prayer”, and §16-1-20.2 (1982), which authorized teachers to lead “willing students in a prescribed prayer to Almighty God. . .the Creator and Supreme Judge of the world”.⁴⁰ The majority opinion in *Jaffree* makes reference to *Cantwell v. CT*⁴¹, in which Justice Owen Roberts for the majority identified an individual’s freedom of conscience as the central liberty that unifies the clauses of the First Amendment. In reviewing the legislative history behind the Alabama moment of silence statutes, including the statement of the bills’ sponsor, as inserted in the legislative record, there was no secular purpose behind the statute beyond returning voluntary prayer to public schools. For this reason, the Court ruled that §16-1-20 was unconstitutional in light of the First Amendment.

Secular Versus Ecclesiastical Law

Although conflict between secular and ecclesiastical law is generally associated with Western Europe, the Middle Ages, the Renaissance and The Protestant Reformation, when royal power

³⁶ See Richard E. Morgan. *The Supreme Court and Religion*. New York, NY: The Free Press, 1972., p. 135.

³⁷ Richard Johnson. *The Dynamics of Compliance*. Evanston, IL: Northwestern University Press, 1967.

³⁸ William K. Muir. *Prayer in the Public Schools*, Chicago, IL: University of Chicago Press, 1967.

³⁹ Stephen L. Wasby. *The Impact of Supreme Court Decisions*, Homewood, IL: The Dorsey Press, 1970.

⁴⁰ See *Wallace v. Jaffree*. 372 U.S. 30 (1985), p. 41.

⁴¹ *Cantwell v. CT*, 310 U.S. 296 (1940).

confronted the Church, the conflict is still germane to any discussion of separation of church and state.

One of the most recent cases, *Barbara J. Anderson et al. v. Watchtower Bible and Tract Society of New York, Inc., et al.*⁴², involved two former members of the Jehovah's Witnesses suing the church and its leaders for damages resulting from their expulsion from the church. At trial, the Watchtower Bible and Tract Society of New York filed a motion to dismiss the complaint on the ground that civil courts have no jurisdiction over internal church matters. The trial court denied the motion. The Tennessee Court of Appeals adjudged that the trial court erred in not dismissing all of the plaintiffs' claims, because they are barred by the First Amendment protection of purely religious matters against adjudication by secular courts.⁴³ Sometimes called the church autonomy doctrine⁴⁴, the doctrine of ecclesiastical abstention, as it is more commonly known, has been discussed in numerous cases and contexts.⁴⁵ Each of these cases clearly establishes the relevance and existence of the ecclesiastical abstention doctrine in American law. What they do not establish and what continues to be an item without clarity is whether the free exercise clause or the establishment clause or both are the source(s) of the doctrine.⁴⁶ Whether ecclesiastical abstention is based upon free exercise or establishment, one thing is clear – the First Amendment precludes secular courts in America from interfering with purely ecclesiastical issues, including the claims raised by the plaintiffs in *Anderson*.

Conclusions

Separation in the United States is not absolute, for we find the religious phrase “In God We Trust” is placed on American coinage and currency, the oaths or affirmations (depending upon the individual's religious preference) of public office at both the national and state levels end with the phrase, “so help me God”, the United States Supreme Court Marshall opens each session with the words, “God Bless the United States and this Honorable Court”, both houses of

⁴² *Barbara J. Anderson et al. v. Watchtower Bible and Tract Society of New York, Inc., et al.*, Appeal from Circuit Court for Coffee County, No. 32382, TN Court of Appeals, April 14, 2005.

⁴³ *Ibid.*, p. 1.

⁴⁴ *Ibid.*, p. 6.

⁴⁵ *Bryce v. Episcopal Church in the Diocese of Colorado*, 289 F.3d 648 (10th Cir. 2002); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952); *Murrell v. Bentley*, 286 S.W. 2d (Tenn. Ct. App. 1954); *Lewis v. Seventh Day Adventists Lake Region Conference*, 978 F.2d 940 (6th Cir. 1992).

⁴⁶ *Rosati v. Toledo Catholic Diocese*, 233 F.Supp 2d 917 (N.D. Ohio 2002), which held that the doctrine is founded in the free exercise clause.

Congress have a Chaplain as a regular staff member, the Pledge to the American Flag was made an official part of flag use by Congress in 1942 and in 1954 the words “under God) were added by Congress, and all persons testifying before grand juries and in American courts of law swear ”to tell the truth, the whole truth and nothing but the truth, so help me God”. A portion of these references to God were included in official language and practice by individuals whose philosophical and religious heritage, as earlier discussed, was steeped in deism. Other references can be said to be related to custom and usage.

With these concerns and despite the fact that church membership in the United States 1960 – 2003 reflects declines among the so-called “main-line” denominations, other than the Southern Baptist Convention, the issue of separation remains a live issue. While the U.S. Supreme Court has not overruled the child benefit theory, as set forth in *Everson v. Board of Education of Ewing Township*⁴⁷ or the State of New York’s required loan of textbooks to private schools, the majority of which were parochial in *Board of Education v. Allen*⁴⁸, during the tenure of Chief Justice Warren E. Burger the Court did invalidate virtually every type of state aid other than bus transportation and textbook loaning.⁴⁹ At the same time, the Burger Court in *Tilton v. Richardson*⁵⁰ sustained governmental aid programs assisting private higher education institutions – Tilton upheld federal construction grants to four church-related colleges in Connecticut – and the Court permitted South Carolina’s state authority to assist a Baptist-related college to borrow money for construction.⁵¹

Cognizance must also be given to those states, such as Tennessee, which have a history of supporting a fundamentalist religious environment, including a lacuna in the state constitution prohibiting sectarian aid, the State Supreme Court having maintained that the Tennessee State Constitution establishment clause only bars supremacy of one religious sect over another but has no bearing on any type of sectarian assistance.⁵² This action sustaining the ruling by the

⁴⁷ *Everson v. Board of Education of Ewing Township*, 330 U.S. 1 (1947).

⁴⁸ *Board of Education v. Allen*, 392 U.S. 236 (1968).

⁴⁹ See *Virginia Law Review* LXII (June 1976), p. 908, referring to *Lemon v. Kurtzman*, 403 U.S. 602 (1971) – state salary supplements for private school teachers; *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) – maintenance repair grants and tax deductions for parents; *Sloan v. Lemon*, 413 U.S. 823 (1973) – payments to private schools for text books; *Meek v. Pettinger*, 421 U.S. 349 (1975) – use of public school employees to provide such auxiliary services as counseling, psychological testing, speech and hearing therapy.

⁵⁰ *Tilton v. Richardson*, 403 U.S. 672 (1971).

⁵¹ *Hurt v. McNair*, 413 U.S. 734 (1973).

⁵² *Virginia Law Review*, op cit., p. 9097. See *Fort Sanders Presbyterian Hospital v. Health & Education Facilities Board*, 224 Tenn. 240, 254 (1970), compared with the decision of the Tennessee Supreme Court’s interpretation of

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Tennessee Supreme Court regarding free exercise is most interesting when juxtaposed to the Court's ruling in *Pruneyard Shopping Center v. Robins*⁵³, in which the Court ruled a state may grant greater protection to free speech than the federal standard but not less, because the latter is merely the threshold standard. Obviously, free speech seemed to sway the majority of the Court more than the issue of a state not following the minimum standards under federal pertaining to sectarian assistance.

Federalism has had and will continue to play a major role in setting the stage for an on-going state constitutional debate over the relationship between government and religion. As A.E. Dick Howard so eloquently puts it,

A draftsman who has drawn a program he is sure will satisfy
The First Amendment would be foolish to assume, without more that
He has necessarily avoided problems under his state constitution. . . .⁵⁴

Freedom of and Freedom from Religion are the two supporting legs of Religious Freedom. Without both, the latter is impossible.

References

Abington School District v. Schempp, Murray v. Curlett, 379 U.S. 203 (1963).

Amar, Akhil Reed. *America's Constitution: A Biography*. New York, NY: Random House, 2005.

Arthur, John. *The Unfinished Constitution: Philosophy And Constitutional Practice*. Belmont, CA: Wadsworth Publishing Co., 1989.

Barbara J. Anderson et al. v. Watchtower Bible and Tract Society of New York, Inc., et al., Appeal from Circuit Court for Coffee County, No. 32382, TN Court of Appeals, April 14, 2005.

Board of Education v. Allen, 392 U.S. 236 (1968).

Board of Kiyras Joel Village School District v. Louis Grumet et al., 512 U.S. 687 (1994).

Boston, Rob. "Everson At 60". *Church & State* Vol. 60 (January 2007), pp. 4 – 8.

Bryce Episcopal Church in the Diocese of Colorado, 289 F3d 648 (10th Cir. 2002).

Cantwell v. CT, 310 U.S. 296 (1940).

the State's free exercise clause more narrowly than the First Amendment in *State ex rel. Swann v. Peck*, 236 Tenn. 99 (1975), cert. denied 96 S.Ct. 1429 (1976).

⁵³ *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980).

⁵⁴ A.E. Dick Howard. "Two Hundred Years Later: State Courts and Constitutional Rights in the Day of the Burger Court", *Virginia Law Review* LXII (June 1976), p. 912.

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City of Boerne v. Flores, 521 U.S. 507 (1997).

Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

DiCenso v. Robinson, 403 U.S. 602 (1971).

Employment Division v. Smith, 494 U.S. 872 (1990).

Engel v. Vitale, 370 U.S. 421 (1962).

Everson v. Board of Education of Ewing Township, 330 U.S. 1 (1957).

Fort Sanders Presbyterian Hospital v. Health & Education Facilities Board, 224 Ten. 240 (1970).

Holmes, David L. *The Faiths of the Founding Fathers*. Oxford, New York: Oxford University Press, 2006.
Howard, A.E. Dick. "Two Hundred Years Later: State Courts and Constitutional Rights in the Day of the Burger Court", *Virginia Law Review* LXII (June 1976), pp. 874 – 944.

Hurt v. McNair, 413 U.S. 734 (1973).

Illinois ex rel. McCollum v. Board of Education of Champaign-Urbana, 333 U.S. 203 (1948).

Jefferson, Thomas. *Letter to the Danbury Baptists*. Library of Congress.
<http://222.loc.gov/loc/cib/9806/dampre.html>

Johnson, Richard. *The Dynamics of Compliance*. Evanston, IL: Northwestern University Press, 1967.

Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952).

Lemon v. Kurtzman, 403 U.S. 602 (1971).

Lewis v. Seventh Day Adventists Lake Region Conference, 978 F.2d 940 (6th Cir. 1992).

Loss, Richard (ed.) *Corwin On The Constitution*, Vols. I, II, III. Ithaca, NY & London: Cornell University Press, 1988.

Marbury v. Madison, 1 Cranch 137 (1803).

Meek v. Pettinger, 421 U.S. 349 (1975).

Minersville School District v. Gobitis, 310 U.S. 586 (1940).

Morgan, Richard E. *The Supreme Court and Religion*. New York, NY: The Free Press, 1972.

Muir, William K. *Prayer in the Public Schools*. Chicago, IL: University of Chicago Press, 1967.

Murrell v. Bentley, 286 S.W. 2d (Tenn. Ct. App. 1954).

Newman, Jon O. "President Jackson's Famous Retort To Chief Justice Marshall: Did He Really Say It?". *The Supreme Court Historical Society Quarterly*, XXVII ((Summer 2006), pp. 13 – 14.

People v. Woody, 61 Cal 2d 716 (1964).

Pierce v. Society of Sisters, 268 U.S. 510 (1925).

Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980).

Forum on Public Policy

Religious Freedom Restoration Act, 42 U.S.C. §2000b.

Ronald W. Rosenberger et al. v. Rector Rector & Visitors of the University of Virginia, 515 U.S. 819 (1995).

Rosati v. Toledo Catholic Diocese, 233 F.Supp 2d 917 (N>D> Ohio 2002).

Seligman, Dan. “From *Gobitis* to *Barnette*: A Primer: *The Supreme Court Historical Society Quarterly*, XXVII (Summer 2006), pp. 7 – 9.

Sherbert v. Verner, 374 U.S. 398.

Sloan v. Lemon, 413 U.S. 823 (1973).

Sorauf, Frank J. *The Wall of Separation: The Constitutional Politics of Church and State*. Princeton, NJ: Princeton University Press, 1976.

State ex rel. Swann v. Peck 236 Tenn. 99 (1975)., cert. denied 96 S. Ct. 1429 (1976).

The Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993).

Tilton v. Richardson, 403 U.S. 672 (1971).

U.S. Constitution, 1789.

Virginia Law Review, LXII (June 1976), p. 908.

Walker, J. Brent. “Telling The Truth About Church-State Separation.” Lecture at Campbell University, February 6, 2007. Baptist Joint Committee for Religious Liberty. http://papers.ssm.com/so/3/papers.cfm?abstract_id=447883.

Wasby, Stephen L. *The Impact of Supreme Court Decisions*. Homewood, IL: The Dorsey Press, 1970.

West Virginia Board of Education v. Barnette, 310 U.S. 624 (1943)

Wisconsin v. Yoder, 406 U.S. 205 (1972).

Worcester v. Georgia, 6 Peters 515 (U.S. 1832).

Zorach v. Clausen, 343 U.S. 306 (1952).

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