12-1-1996

Opposing Versions of Our Nation's Past: A Selective Look at the Absolutist and Accommodationist Debate over the Proper Interpretation of the Establishment Clause

Angela McMullen
University of Nebraska at Omaha

Opposing Versions of Our Nation's Past: A Selective Look at the Absolutist and Accommodationist Debate over the Proper Interpretation of the Establishment Clause

A Thesis

Presented to the

Department of History

and the

Faculty of the Graduate College

University of Nebraska

In Partial Fulfillment

of the Requirements for the Degree

Masters of Arts

University of Nebraska at Omaha

by

Angela McMullen

December 1996

ProQuest LLC.
789 East Eisenhower Parkway
P.O. Box 1346
Ann Arbor, MI 48106 - 1346

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

Amendment I, *U.S. Constitution*

ACCEPTANCE PAGE

Opposing Versions of Our Nation's Past: A Selective Look at the Absolutist and Accommodationist Debate over the Proper Interpretation of the Establishment Clause

Acceptance for the faculty of the Graduate College, University of Nebraska,in partial fulfillment of the requirements for the degree Master of Arts, University of Nebraska at Omaha.

Committee

Name	Department/School
[signature]	History
[signature]	PHILOSOPHY & RELIGION

Chairperson [signature]

Date Oct. 8, 1996

ABSTRACT

Few sections of the Bill of Rights have prompted more controversy than its initial clause: "Congress shall make no law respecting an establishment of religion." Over the past half-century, judges and legal scholars have sought repeatedly to define the intent of the framers of the clause. Their efforts and their use of historical sources in that pursuit have led to considerable discord and legal confusion.

The modern controversy began with Justice Hugo Black's opinion in *Everson v. Board of Education* (1947) which included an extensive historical essay maintaining that the framers of the First Amendment meant to erect a "wall of separation" between church and state. This formally launched the absolutist position or the belief that all government aid to religion is unconstitutional. A reaction against this decision appeared almost immediately led by the Brooklyn College Communication Professor, James O'Neill, who maintained that the historical record clearly showed that the framers meant to allow government aid to religion as long as no specific sect received preference. This position is called accommodation in this study.

Between 1947 and 1967 the debate was dominated by

absolutists through the efforts of Leo Pfeffer. As an attorney for the American Jewish Congress, he presented many of his arguments before the Supreme Court. Following Pfeffer's semi-retirement from the American Jewish Congress, a new group of accommodationist scholars countered many of his arguments. Scholars like Mark DeWolfe Howe, Michael J. Malbin, Chester Antineau, and Robert L. Cord reinvigorated the accommodationist or equal aid position by examining new sources like state constitutions and the First Congressional debates. After a series of court rulings that incorporated accommodationist ideas, Leonard W. Levy and Thomas Curry attempted to rebuild the absolutist position. This study concludes with a look at the emerging challenge to the use of history as a valid source of legal interpretation.

Table of Contents

Chapter I

Introduction: Building the Wall

Before I built a wall I'd ask to know
What I was walling in or walling out,
And to whom I was like to give offense
Something there is that doesn't love a wall,
That wants it down.

Robert Frost
"Mending Wall"

In 1947, the United States Supreme Court applied the First Amendment's establishment clause to the states in *Everson v. Board of Education of Ewing*.[1] For the first time, the Court was forced to interpret the words, "Congress shall make no law respecting an establishment of religion . . . "[2] The case involved a New Jersey statute that reimbursed parents for transportation fees incurred in sending their children to parochial schools. Hugo Black, writing for a five-four majority, upheld the statute using the child-benefit rule, a standard under which the Court allowed state assistance to children in parochial schools as long as the state aid went primarily to benefit the children rather than the school. In this case, the program was

deemed constitutional because it provided for the safe transport of children under compulsory education laws.[3] Hence it did not violate the First Amendment.

In spite of the Supreme Court's specific holding in the case, Black's opinion contained a lengthy historical essay supporting the proposition that the establishment clause was intended to create a "wall of separation" between church and state. Black's dicta provided a separatist version of history that fixed the parameters of what became an extended debate over the meaning of the establishment clause. The First Amendment, according to Justice Black, developed as a reaction to abuses in Colonial America. He began with the statement that history is filled with "turmoil, civil strife, and persecutions of all denominations, generated in large part by the established sect determined to maintain their absolute political and religious supremacy." Minority sects suffered for refusing to conform to mainstream Christianity: "men and women . . . [were] fined, cast in jail, cruelly tortured, and killed."[4]

As Black saw it, these abuses were "transplanted" to the colonies and "thrived" in North America. Charters issued by the English Crown allowed each colony to establish its own preferred brand of religion. This led to

intolerance, persecution, and growing colonial discontent. One grievance was the general tax levies collected to pay ministers' salaries and to build churches for the established religion.[5]

According to Black, the climax of this discontent occurred on the floor of the Virginia Assembly in 1785-1786. Patrick Henry proposed an assessment bill for the Christian religion that would have required a general tax levy to support Christianity. The legislation's purpose was to correct morals, restrain vices, and preserve the peace. Supported by different religious groups along with Virginia's elite, it seemed destined to pass.[6]

Never a match for Henry's oratorical talent, James Madison sought to block the bill using legislative tactics and gentle persuasion. After securing a recess in the assembly, he wrote his "Memorial and Remonstrance Against the Christian Religion." In this document, Madison argued that religion would flourish best through the natural competition between sects without governmental support. Therefore, the state could best promote religion by leaving it alone. Citizens should not be taxed to support religious institutions because government aid to ecclesiastical organizations inevitably led to persecutions. This powerful

document defeated Henry's bill and resulted in the state legislature's adoption of Thomas Jefferson's "Virginia's Declaration of Rights."[7]

For Black, then, the key to understanding the original intent of the establishment clause lay in Madison's "Memorial and Remonstrance" and Jefferson's "Virginia Declaration." These two documents, plus the subsequent writings of the two Virginians, convinced Black that the clause called for the near complete separation of church and state. His opinion went on to write Jefferson's "wall of separation" metaphor into law:

> The establishment of religion clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another . . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and state."[8]

Black concluded that "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach." Yet by deciding the case in favor of New Jersey, Black

incorporated confusion into establishment clause law.[9]

The dissenting opinions failed to further clarify Black's opinion.[10] Wiley Rutledge carried Black's historical reasoning to its logical conclusion by arguing that the New Jersey law violated the First Amendment. Robert Jackson, however, noted that Black provided facts which were antithetical to his conclusion and took issue with his use of Jefferson's metaphor.[11]

Law review articles were generally favorable toward the *Everson* decision.[12] There was, however, some disagreement. The Jurists, a Jesuit law review, predicted that this signaled the end of Western Civilization.[13] Non-Catholics like Edward S. Corwin, the McCormick Professor of Jurisprudence at Princeton University, called the principle of separation of church and state "illegitimate."[14] In addition, several monographs soon appeared challenging Black's interpretation of history, the most influential of which was James O'Neill's Religion and Education.[15] It was out of this dissention that the absolutist and accommodationist debate began.

Scholars have identified two distinct legal interpretations that developed out of the *Everson* decision.[16] Each offered an alternate view of the framers'

intent of the establishment clause. Although there were variations within each school, each position agreed on certain core principles. It is out of these points of unanimity that each view's distinct characteristics emerged.

Absolutists agreed with Black's historical interpretation, but they disagreed with the case's outcome. Taking their position from Enlightenment rationality, they maintained that religion and the state must be kept separate by an iron wall of separation. Leo Pfeffer, a constitutional scholar and attorney for the American Jewish Congress, emerged in the 1950s as the "leading legal expert on church-state questions" in the United States. His landmark book, Church, State, and the Constitution, set forth the absolutist position and provided credible historical evidence to support the Black-Rutledge interpretation of the framers' intent. Later publications expanded Pfeffer's thesis including works by Leonard W. Levy and Thomas Curry.[17]

Accommodationists, in contrast, argued that the framers wanted to allow aid to religion on an equal, nonpreferential basis. They also believed that the framers intended the First Amendment to restrict the actions of Congress--not the states. They rejected Black's reference to an absolute

"wall of separation" between church and state. Acknowledging the importance of religion in American society, accommodationists argued that religious denominations could receive direct financial support so long as government did not establish or give preference to a single religion. Their most prominent representatives were James O'Neill, Edward S. Corwin, Michael Malbin, Robert L. Cord, and ultimately Justice William Rehnquist. Both views have been reflected in Supreme Court decisions.[18]

The present confusion within the Supreme Court and the scholarly community over the proper interpretation of the establishment clause is a product of what one scholar has called "consistent inconsistencies."[19] This confusion centers on the use of the framers' intent as a source of legal interpretation. Legal scholars and historians have contributed to this confusion by using different sources and presenting alternate historical versions, often to support their own current view of proper state policy. An analysis of this debate suggests the need for a source of interpretation that goes beyond strict reliance on history.

This study is an examination of the historical debate over the interpretation of the establishment clause and its subsequent influence on the Supreme Court. Chapter two

looks at the early accommodationist movement characterized by James O'Neill's Religion and Education under the Constitution. His scholarship during the 1940s was limited to Jefferson's and Madison's writings as interpreted by the *Everson* majority. Chapter three analyzes the separationist response presented by Leo Pfeffer in his Church, State, and Freedom. Broadening the debate to include the entire colonial era, he attempted to prove that the evidence overwhelmingly supported absolute separation between church and state. His version of history was largely endorsed by the Warren Court in a series of controversial rulings in the 1960s. Chapter four explores the new accommodationist research that challenged Pfeffer's conclusions and the Warren Court rulings. This accommodationist research found some support among the justices in the 1980s. Chapter five looks at the final response by the absolutists. This thesis concludes that history alone is an inadequate standard on which to base this area of law.

Notes

1. *Everson v. Board of Education of Ewing Tp.*, 67 S.Ct. 504 (1947).

2. *U.S. Const., amend.* I, sec. 1. Prior to 1946, the Supreme Court dealt with the establishment clause twice in the cases of *Bradfield v. Roberts* (1899) and *Quick Bear v. Leupp* (1908).

3. *Cochran v. Board of Education*, 281 U.S. 370 (1930).

4. *Everson v. Board of Education*, 509.

5. Ibid.

6. Ibid.

7. Ibid., 510.

8. Ibid., 511-512.

9. Ibid., 513.

10. Felix Frankfurter's dissent was never published.

11. *Everson v. Board of Education*, at 513 (Jackson, J. dissenting). The Court's use of this figure of speech, according to the Justice, resulted in a "basic fallacy" by discriminating against religious institutions. The Court's use of Jefferson's "wall," according to the Justice, was analogous to Byron's Julia. "[T]he undertones of the opinion, advocating complete and uncompromising separation of Church and State, seems utterly discordant with its conclusions yielding support to their commingling in educational matters. The case which irresistibly comes to mind as the most fitting precedent is that of Byron's Julia, according to Byron's reports,'Whispering I will ne'er consent,' --consented."

12. For an example of a positive review, see Milton R. Konvitz, "Separation of Church and State: the First Freedom," Law and Contemporary Problems 14 (1949): 44-60.

13. B. J. McEntegart, "Twilight of Christians of the Western World," Jurists 7 (January 1947): 45-59.

14. Edward S. Corwin, "The Supreme Court as a National School Board," Law and Contemporary Problems 14 (1949): 3-22.

15. James O'Neill, Religion and Education under the Constitution (New York: Harper and Brothers, 1949).

16. See Paul G. Kauper, Religion and the Constitution (Louisiana: Louisiana State Press, 1964); Frank J. Sourauf, The Wall of Separation: Constitutional Politics of Church and State (Princeton: Princeton University Press, 1976); James A. Reichley, Religion in American Public Life (Washington, D.C.: Brookings Institute, 1985); Richard E. Morgan, The Politics of the Religious Conflict (New York: Pegasus, 1968); Robert Booth Fowler, Religion and Politics in America (Metuchen: Scarecrow, 1985).

17. Leo Pfeffer, Church, State, and Freedom (Boston: Beacon Press, 1953); Leonard W. Levy, The Establishment Clause: Religion and the First Amendment (New York: Macmillian, 1986); Thomas J. Curry, The First Freedoms: Church and State to the Passage of the First Amendment (New York: Oxford University Press, 1986).

18. Aside from O'Neill, the major accommodationist works include: John C. Murray, "Law and Prepossessions," Law and Contemporary Problems 14 (Winter 1948): 23-43; and Winfrid Parsons, The First Freedom: Considerations on Church and State in the United States (New York: Declan X. McMullen, 1948); Mark DeWolfe Howe, The Garden and the Wilderness: Religion and Government in American Constitutional History (Chicago: University of Chicago Press, 1965); Chester James Antineau, Arthur T. Downey, et al., Freedom From Federal Establishment: Formation and Early History of the First Amendment Religion Clauses (Milwaukee: The Bruce Publishing Co., 1964); Michael J. Malbin, Religion and Politics: The Intentions of the Authors of the First Amendment (Washington, D.C.: American Enterprise Institute, 1978); Robert L. Cord, Separation of Church and State: Historical Fact and Current Fiction (New York: Lambeth Press, 1982).

19. Christine Hyde Citron, "Consistent Inconsistency: Supreme Court Decisions on Public Aid to Private Education," ESC Law and Education Center Footnotes 8 (October 1981): 10.

CHAPTER II

The O'Neill Thesis

A rule of law should not
be derived from a figure of speech.

Stanley Reed
McCollum v. Board of Education
(1948)

Less than a year after *Everson*, the Supreme Court again examined the establishment clause in *McCollum v. Board of Education*.[1] The case dealt with a released-time program in Champaign, Illinois that allowed religious instruction in the local public schools at a specified period during the school day. Although religious organizations provided the instruction and paid all related expenses, the Court ruled that this program was unconstitutional. Hugo Black, writing for an eight-one majority, argued that this type of aid violated the First Amendment because it "afforded groups invaluable aid" in that state compulsory education laws provided a "captive audience."[2] This ruling had the effect of solidifying the "wall of separation" marking the debate's second stage.

Stanley Reed wrote the sole dissenting opinion in this case

signifying the first time a justice explicitly disagreed with the "wall of separation" metaphor. Reed's opinion was influenced by the appellee's brief in *McCollum* which was written by John L. Franklin and Owen Rall. They, in turn, drew parts of their reasoning and much of their history from Brooklyn College Communication Professor James O'Neill's Religion and Education under the Constitution (1949).[3] O'Neill argued that the framers of the First Amendment intended to allow government aid to religion distributed on an equal basis; his objective was to refute Black's historical dicta in *Everson*.[4]

To O'Neill, the central question was the meaning of "an establishment of religion." He interpreted this phrase to mean "a formal legal union of a single church or religion with government, giving the one church or religion an exclusive position of power and favor over all other churches or denominations."[5] Clearly, the Constitution prohibited such establishments. Yet it did not require the absolute "separation of church and state."[6] That phrase was a modern slogan that distorted the historical record and confused current jurisprudence. O'Neill began his argument by refuting Black's historical interpretation of Jefferson's and Madison's positions. Contrary to Black, O'Neill argued that many of Jefferson's writings supported the equal aid concept. One example was

Jefferson's "Bill for Religious Freedom." This document was enacted into law on January 16, 1786 as a result of Madison's "Memorial and Remonstrance."[7] O'Neill interpreted Jefferson's Bill as specifying four points:

1. That states could not compel a person "to attend or support" religious institutions.
2. That no person could "be punished or interfered with by" the state for his particular beliefs.
3. That a person was free to profess his own beliefs.
4. That expressing these beliefs should not effect his "civil capacities."[8]

All four points, according to O'Neill, forbade government intrusion on individual rights. They did not prohibit government aid to religion on an equal basis. Jefferson, O'Neill argued, only intended to protect individual rights, not extinguish religion from everyday life.[9]

O'Neill emphasized that Jefferson was a states' rights advocate, who consistently supported the preservation of state authority and restrictions on federal power. His warnings against government involvement in religion were targeted at Congress, not the states. In his second inaugural address on March 4, 1805, Jefferson remarked that "in matters of religion, I have considered that its free exercise is placed by the Constitution independent of the powers of the general government."[10] As President, Jefferson refrained from making religious proclamations because the Constitution left religion

under "state or church control."[11]

The phrase "wall of separation," according to O'Neill, was misused by the Vinson Court. It appeared in Jefferson's address to the Danbury, Connecticut Baptist Association on January 1, 1802. The relevant section read:

> Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between church and State.[12]

O'Neill accused the Court of "trying to substitute this phrase" for the establishment clause.[13]

O'Neill maintained that Black and the other justices had both misunderstood and overestimated the importance of Jefferson's metaphor. Jefferson was not discussing the "establishment of religion by law," but simply "establishments created by Congress."[14] This meant that while Congress was restricted, state legislatures were free to enact ordinances concerning religion and supporting all religions. Moreover, Jefferson used this metaphor as a figure of speech in a presidential address he made for the purpose of "congratulations and good wishes."[15] It was not intended as a statement of constitutional principles. The Court, O'Neill argued, failed to

understand the significance of this statement because it neglected to look carefully at the original sources.[16]

The Northwest Ordinance, in O'Neill's view, also supported the equal aid position. Drafted by Jefferson in the 1780s to outline long-term policy for settling the territory west of the Appalachian Mountains, it contained a provision for government support of religion. The third article stated: "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall be encouraged."[17] Jefferson's linking of religion and education in the Northwest Ordinance convinced O'Neill that the Virginian could not have supported absolute separation between church and state.[18]

Madison's views, O'Neill maintained, had also been misinterpreted by the Court. O'Neill pointed to Madison's practices after the adoption of the First Amendment to illustrate his support for religion. While President of the United States, Madison issued four proclamations calling for days of thanksgiving and fasting. Although later, in retirement, Madison wrote that he believed such statements violated the establishment clause, O'Neill claimed that there was no indication that he accepted this interpretation during the Constitutional Era. During his active career, Madison's actions indicated that he

believed there was a necessary connection between government and religion.[19]

O'Neill also argued that the First Amendment was never intended by the framers to apply to the states. Throughout the Nineteenth century, the Court consistently rejected the position that the states were restricted by the Bill of Rights.[20] In *Gitlow v. New York* in 1925, the Court stepped back from that stance by adopting the argument that the guarantee of liberty against state action in the Fourteenth Amendment had applied some elements of the Bill of Rights to the states. O'Neill felt this process of incorporation was flawed.[21] To O'Neill, the Fourteenth Amendment had been improperly used as a "carrying clause" to destroy state authority, thus distorting the framers' intent. No part of this amendment, in his view, was meant to apply to the establishment clause to the states.[22]

O'Neill attempted to justify his assertion by showing how the post-Civil War Congress reacted to proposals for church-state separation authored by Presidents James A. Garfield and Ulysses S. Grant. The former's acceptance speech for the Republican nomination for President on July 10, 1880 suggested that " . . . it would be unjust to our people and dangerous to our institutions to apply any portion of the revenues of the nation or of the states to . . . support. . . sectarian schools. The

separation of church and state must be absolute." O'Neill argued that since Congress failed to act on this proposal, it meant Garfield's colleagues believed that it was beyond the federal government's power.[23]

In the latter case, O'Neill used Grant's message to Congress delivered on December 7, 1875. Grant called for a constitutional amendment to be sent to the states that would create "free public schools." The President added to his proposal that taxes should be levied on all church property creating an exemption only for cemeteries.[24] His recommendations were embodied in Senator James Blaine's proposal for an amendment to eliminate state religious support. Congress' repudiation of this legislation eleven times in a short period showed that this body never intended the federal government to exercise such control over state governments.[25]

An important part of O'Neill's argument was his appeal to alternate sources of authority. The *Everson* opinion, he argued, overlooked Josiah Story's Commentaries on the Constitution (1833), a source regarded as a standard in constitutional interpretation. Josiah Story witnessed the First Amendment's adoption and played a major role in its implementation after his appointment to the Supreme Court by James Madison in 1811. In this capacity, he concluded that the Amendment was meant only ".

. . 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."[26] In O'Neill's view, this showed that the *Everson* decision was extremely misguided.[27]

O'Neill's thesis quickly gained acceptance among leaders of the Catholic Church. Even before his work was published, the American Catholic Bishops had adopted a statement agreeing with many of O'Neill's points.

> To one who knows something of history and law, the meaning of the First Amendment is clear enough from its own words: "Congress shall make no laws respecting an establishment of religion or forbidding the free exercise thereof." The meaning is even clearer in the records of the First Congress that enacted it. Then, and throughout English and Colonial history, "an establishment of religion" meant the setting up by law of an official Church which would receive from the government favors not equally accorded to others in cooperation between government and religion--which was simply taken for granted in our country at the time and has, in many ways, continued to this day. Under the First Amendment, the Federal Government could not extend this type of preferential treatment to one religion as against another, nor could it compel or forbid any state to do so.[28]

Others like Robert I. Gannon described separation of church and state as a "fraud."[29] This view climaxed when President Truman's Attorney-General, J. Howard McGrath, addressed the National Catholic Educational Association and accused the Court of distorting the First Amendment.[30]

A genre of literature developed from O'Neill's thesis. A

Washington Cardinal and former Secretary of Yale University, Anson Phelps Stokes, compiled a multi-volume work called Church and State in the United States (1950). Stokes described the purpose of his study as "an historical survey, source book, and interpretation of documents." Within the text, however, he disinterred forgotten items that endorsed O'Neill's position, including the fact that church services were held in the House of Representatives continuously during the nineteenth century.[31] Important scholars like McCormick Professor of Jurisprudence at Princeton University, Edward S. Corwin, also endorsed O'Neill's thesis. Corwin described O'Neill's work as a "devastating assault" on the Court's reasoning in the *Everson* case.[32] Agreeing with O'Neill, Corwin felt that the Court erred by reading into the Constitution a policy of separation between church and state. Central to this mistake was its misuse of the historical record. Reiterating many of O'Neill's views, he maintained that Madison's writings never indicated support for strict separation between church and state; the founding father affirmed only that the government could not establish a national church.

Turning his attention to Madison's "Memorial and Remonstrance," Corwin described the Vinson Court's reliance on it as "obviously excessive."[33] In reality, he argued, evidence

showed that this document was of little significance. Madison's "Memorial" was written four years prior to the establishment clause's creation; this left open the possibility that his views changed over time. Secondly, Corwin maintained that Madison never submitted this document as a source of interpretation during the First Amendment debates. This meant that Madison's ideas were not specifically incorporated into the establishment clause.[34] Corwin also argued that since Jefferson was not a member of the First Congress that drafted the Amendment, the use of his "wall of separation" metaphor by the Supreme Court was questionable. Corwin maintained that instead of arguing for strict separation, his address to the Danbury Baptists "was not improbably motivated by an impish desire to heave a brick at the Congregationalist-Federalist hierarchy of Connecticut, whose leading members had denounced him two years before as an 'infidel' and an 'atheist.'"[35]

Unlike O'Neill, Corwin believed that the Fourteenth Amendment had been meant to apply certain parts of the Bill of Rights to the states. He argued that "So far as the Fourteenth Amendment is concerned, states are entirely free to establish religions, provided they do not deprive anybody of religious liberty. It is only liberty the Fourteenth Amendment protects."[36]

The ideas of O'Neill and Corwin found welcome support among the new interest groups created to defend accommodationist views in light of the *Everson-McCollum* rulings, particularly the United States Catholic Conference (USCC) and the National Catholic Welfare Conference (NCWC). These groups functioned as an information clearing house for the emerging "Catholic Bar," a group of attorneys who participated in church-state litigation and supported the equal aid interpretation. The list included John Dancher, former Connecticut senator; Paul Butler, former Chairman of the Democratic National Committee; and Charles Fahy, a future Washington, D.C., district judge.[37]

Accommodationist views quickly became influential within the courts in establishment clause cases. Faced with the Cold War and a mounting anti-Communist hysteria, the Vinson Court proved reluctant to press forward the logic of *Everson* and *McCollum*. Jefferson's "wall of separation" could not be maintained. In *Zorach v. Clausen* (1952), the Supreme Court accepted many of O'Neill's arguments.[38] The decision upheld a released-time program that sent children to religious classes off campus during the school day. Justice Douglas attempted to distinguish this case from *McCollum*, but few could miss the dramatic shift implicit in his opinion. Douglas maintained that the First Amendment failed to specify absolute separation between church

and state. Many examples existed of interaction between the government and religion like municipalities providing civil services to religious institutions, legislative prayer, and presidential proclamations. Ruling the New York released-time program unconstitutional, in his view, would have the effect of voiding these otherwise legitimate actions. Douglas argued that striking down this law would create a dangerous precedent forbidding children to participate in religious exercises. An instructor's participation in such events, he stated, constituted "cooperation" instead of a religious establishment.

Douglas concluded with a statement often quoted by accommodationists: "We are a religious people whose institutions presuppose a Supreme Being." American society, in his view, accepted a philosophy that civil authorities must be neutral toward religion while allowing it the opportunity "to flourish." Government accomplished this by encouraging religion. Denying aid to religious groups, he argued, would have the effect of giving governmental preference to atheistic groups. Douglas concluded that "We cannot read into the Bill of Rights . . . a philosophy of hostility to religion."[39]

Although the Court accepted accommodationist views, the Everson-McCollum bloc still existed. This was illustrated in Black's *Zorach* dissent. Citing O'Neill and others, Black stated

that

> With equal conviction and sincerity, others have thought the *McCollum* decision fundamentally wrong and have pledged continuous war against it. The opinions in the court below and the briefs here reflect these diverse viewpoints. In dissenting today, I mean to do more than give routine approval to our *McCollum* decision. I mean also to reaffirm my faith in the fundamental philosophy expressed in *McCollum* and *Everson v. Board of Education*.[40]

Other members of the Court were more pessimistic; Justice Robert Jackson wrote to Felix Frankfurter that "the Battle for separation of church and School is lost."[41]

Accommodationism during this early period ended with the Court accepting many of O'Neill's principles. O'Neill's criticisms against *Everson*'s historical dicta, however, did not go unanswered by advocates of Jefferson's "wall of separation." It was during this period that a strong reaction rose within the American Jewish Congress under the leadership of Leo Pfeffer. This view expanded and reinforced *Everson*'s historical interpretation.

Notes

1. *McCollum v. Board of Education*, 333 U.S. 203 (1948).

2. *McCollum v. Board of Education*, 204.

3. James O'Neill, Religion and Education under the Constitution (New York: Harper and Brothers, 1949). Owen Rall of Chicago, Illinois and John L. Franklin of Champaign, Illinois, the attorneys for the defense in the *McCollum* case, sent O'Neill an unsolicited letter stating that: "Certain striking similarities between Professor O'Neill's work and our own printed arguments, in the Supreme Court, might be discovered by comparing the two. These striking similarities occurred because, by personal consultation with the author in the summer of 1947, by extended correspondence with him while we were preparing our argument, and by our examining a large section of his manuscript, we were enabled to draw freely upon the author's fertile ideas, careful historical research, and even his felicitous mode of expression." O'Neill, xii.

4. It is curious that the founder of a "school" of constitutional interpretation had so little training in legal and historical research. Aside from a brief stint as a law student at Harvard, O'Neill had confined his scholarly pursuits to the field of communication. His previous publications included Classified Models of Speech Composition: Ninety-Five Complete Speeches (New York: Century, 1921); Contemporary Speeches with Floyd K. Riley (New York: Century, 1930); Debate and Oral Discussion, For Schools, Societies, and Clubs (New York: Century, 1931); The Elements of Speech with Andrew Thomas Weaver (New York: Longmans, Green, and Co., 1933); Foundations in Speech with Claude M. Wise, James H. McBurney, et al. (New York: Prentice Hall, 1941), and Extemporaneous Speaking (New York: Harper & Bros., 1946).

5. O'Neill, Religion and Education, 56.

6. Ibid.

7. Ibid.

8. Ibid., 74.

9. Ibid.

10. Thomas Jefferson, "Second Inaugural Address," as reprinted in The Complete Jefferson: Containing his Writings, Published and Unpublished, Except His Letters, ed. Saul K. Padover (New York: Duell, Sloan & Pearce, 1943), 412.

11. O'Neill, Religion and Education, 70.

12. Thomas Jefferson, "To Messrs. Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, A Committee of the Danbury Baptist Association, in the State of Connecticut," as reprinted in O'Neill, Religion and Education, 519.

13. O'Neill, Religion and Education, 75.

14. Ibid., 79.

15. Ibid., 80-81.

16. Ibid., 81.

17. "The Ordinance of 1787 for the Government of the Northwest Territory," quoted in part in Anson Phelps Stokes, Church and State in the United States, vol. I (New York: Harpers & Publishers, 1950), 480.

18. O'Neill, Religion and Education, 70.

19. Ibid., 87.

20. See *Barron v. Baltimore*, 7 Peters 243 (1833).

21. *Gitlow v. New York*, 268 U.S. 652 (1925).

22. O'Neill, Religion and Education, 88.

23. Ibid., 159. O'Neill referred to this methodology as "negative evidence." This meant that "a significant absence to the contrary" proved that an assertion could be correct. O'Neill, Debate and Oral Discussion, 113.

24. O'Neill, Religion and Education, 159.

25. Ibid., 160.

26. Story, quoted in O'Neill, Religion and Education, 63.

27. The author also mentioned Thomas Cooley's Principles of Constitutional Law in which he argued that "It was never intended by the Constitution that the federal government should not be allowed to recognize religion." O'Neill, Religion and Education, 64. Following the publication of his monograph, O'Neill withdrew from establishment clause analysis shortly after he retired from Brooklyn College. Well before his death in 1970, his name faded from this debate. "Professor James O'Neill, 88, Dead; Expert on Church-State Ties," New York Times, September 21, 1970, p. 61.

28. New York Times, March 31, 1951, p. 16.

29. Robert I. Gannon, quoted in Leo Pfeffer, Church, State, and Freedom (Boston: Beacon, 1967, 2nd ed.), 131.

30. John C. Murray, "Law and Prepossessions," Law and Contemporary Problems 14 (Winter 1948): 23-43; and Winfrid Parsons, The First Freedom: Considerations on Church and State in the United States (New York: Declan X. McMullen, 1948).

31. Anson Phelps Stokes, Church and State, Vol. I, 499. Critics like Mark DeWolf Howe unfairly described the book as having "no insight," containing only "reference material." See chapter four for a brief discussion of the importance of Howe's work to this debate. Mark de Wolfe Howe, "Review of Church and State in the United States by Anson Phelps Stokes," Harvard Law Review 64 (1950): 170. Stokes' book was built on sound research. Advocates of Jefferson's "wall of separation" metaphor, realizing they could not refute his scholarship, modeled their studies after and transformed his work to support the absolutist interpretation. See Anson Phelps Stokes and Leo Pfeffer, Church and State in the United States (New York: Harper and Row, 1964) in which Pfeffer updated Stokes' study. It would be this "mildly accommodationist" study that would, in the end, have the greatest influence on the Supreme Court. Leonard W. Levy, The Establishment Clause: Religion and the First Amendment (Chapel Hill: University of North Carolina Press, 1994), 262.

32. Edward S. Corwin, "The Supreme Court as National School Board," Law and Contemporary Problems 14 (Winter 1949), 11.

33. Ibid., 13.

34. Ibid.

35. Ibid., 14.

36. Ibid., 16.

37. Frank J. Sorauf, The Wall of Separation: The Constitutional Politics of Church and State (Princeton: Princeton University Press, 1976), 184.

38. Douglas noted O'Neill's book only once. He justified this lack of citation with this statement: "The briefs and arguments are replete with data bearing on the merits of this type of 'released time.' Views pro and con are expressed, based on practical experience with these programs and with their implications. We do not stop to summarize these materials nor to burden the opinion with an analysis of them." *Zorach v. Clausen*, 72 S.Ct. 679 (1952), 682.

39. *Zorach v. Clausen*, 684.

40. *Zorach v. Clausen*, 685 (Black J. Dissenting).

41. Quoted in Howard Ball and Philip Cooper, Of Power and Right: Hugo Black, William Douglas, and America's Constitutional Revolution (New York: Oxford University Press, 1992), 32.

CHAPTER III

Leo Pfeffer and the Absolutist Interpretation

> The greatest achievement ever made in the cause of human progress is the total and final separation of church and state.
>
> Leo Pfeffer
> Church, State, and Freedom (1953)

Leo Pfeffer, an American Jewish Congress attorney and staunch defender of Jewish rights, was the first person to systematically refute O'Neill's version of history.[1] Building his argument along the same lines as Justice Black and his supporters, Pfeffer viewed the development of the establishment clause as an evolutionary process that culminated in the First Amendment. The attorney's evidence included documents from colonial history, the Virginia debates, and the creation of the establishment clause by the First Congress. The dominant theme in his argument was that religion and government interaction always equaled corruption.

Part of Pfeffer's motivation came from his childhood experiences in New York during the early twentieth-century in which he encountered discrimination because of his Jewish ancestry. His Orthodox Rabbi father brought his family from

Austria-Hungary to the United States in 1911 to obtain a pulpit. The public school which Pfeffer attended began its day by reciting Bible verses. His parents withdrew him from that institution a year later when its administration began to consider a released-time program.[2] In 1933, he earned his law degree at New York University and began practicing that same year. Soon after, he joined the legal staff of the American Jewish Congress' newly created Commission on Law and Social Action (CLSA), taking over the role of General Counsel two years later.[3]

Pfeffer's importance in the church-state debate was based partly on the fact that he presented his historical interpretation before the Supreme Court in *amicus* and appellant briefs. In *McCollum v. Board of Education,* his first Supreme Court brief, he presented a staunch defense of absolutism.[4]

> We regard the principle of separation of church and state as one of the foundations of American democracy. Both political liberty and freedom of religious worship and belief, we are firmly convinced, can remain inviolate only when there exists no intrusion of secular authority in religious affairs or of religious authority in secular affairs. As Americans and as spokesmen for religious bodies, lay and clerical, we therefore deem any breach in the wall separating church and state as jeopardizing the political and religious freedoms that wall was intended to protect.[5]

Fearful of the public reaction to Jewish groups challenging an entrenched religious practice, the American Jewish Committee

and the Anti-Defamation League demanded that Pfeffer insert a disclaimer to show that they did not endorse the atheism contained in *McCollum's* brief. Despite the disclaimer, Pfeffer was proud of the fact that both groups overcame their "natural reluctance to join in a case of which the record is replete with antireligious matter . . . because the importance of the issues to Jews requires intercession regardless of the risk of defamation."[6]

Pfeffer's brief went on to challenge the state's use of O'Neill's non-preferentialist argument. The concept of equal aid, he conceded, did dominate New England in the post-Revolutionary Period. State constitutions in this region did allow the states to provide support for a variety of religious practices. They "guarantee[d] freedom in the choice of the form of . . . worship, but prohibit[ed] preference to any one sect."[7] Pfeffer argued that the true basis of the First Amendment was not New England but Virginia. It was founded on the Virginia model that had evolved out of Jefferson's and Madison's commitment to the absolute separation between church and state. It was this concept, he argued, that was intended to prevent the kind of discrimination which manifested itself in the Illinois released-time program.[8]

In an address delivered at the University of Chicago on May

10, 1951, Pfeffer continued his assault on what he termed the "O'Neill thesis."[9] Using a "slippery slope" argument, Pfeffer discussed the "probable" outcome of the Court's accepting the equal aid paradigm. First of all, he said, under this proposal the Constitution would fail to protect "freedom of non-belief." The problem, in his view, was that almost half of the population had no religious affiliation. Denying the rights of non-believers would have the effect of discriminating against a substantial portion of the population. In addition, Pfeffer specified that abuses would occur when the Court attempted to apply a legal definition to religion. He predicted that the judicial body would establish a Christian definition which would have the effect of sanctioning discrimination. Finally, Pfeffer argued that O'Neill's thesis could result in unlimited financial aid to religious bodies, thereby draining tax dollars from other vital programs.[10]

The next important case was *Zorach v. Clausen.*[11] Because of fears that Jewish involvement in this case would lead to a backlash, other Jewish organizations requested that non-Jews take the role as lead counsel. For the position of head attorney, they chose Kenneth Greenwalt, a prominent Wall Street lawyer.[12] It was agreed that although Pfeffer's name would not appear on the brief, he would work behind the scenes developing the case's

arguments.[13] Although Greenwalt suggested that Pfeffer participate in oral arguments, co-sponsoring Jewish organizations vetoed this proposal.[14]

The AJC and other Jewish groups were stunned by Justice Douglas' ruling in this case. They believed that the Court would extend the *McCollum* ruling against released-time programs so as to prohibit all variations. The Court's reversal, however, led Pfeffer to reassess the value of litigation. He convinced the AJC and other Jewish organizations to refrain from "risky" church-state cases sensing the unfavorable political environment. Instead, he decided to present his ideas to the legal community and the public in a comprehensive monograph designed to bolster support for the complete separation of church and state.[15]

Part of this strategy was the publication of his Church, State, and Freedom in 1953.[16] This book was a lengthy brief in support of the absolutist position; it followed a long line of books calling for separation of church and state published by the Unitarian publishing house, Beacon Press.[17] Writing in the style of the "Brandeis brief" in *Muller v. Oregon,* Pfeffer presented mostly historical arguments instead of relying on legal precedent.[18] The book's purpose was to show that the framers of the Bill of Rights had concluded that mixing religion and government always led to the corruption of both institutions.

Pfeffer later recalled that when writing this book, he sought to present the arguments for and against church-state involvement impartially, but "I left the reader in no doubt as to my own position on each issue."[19]

Pfeffer argued that separation of church and state was an ingrained American tradition. To prove his point, he began his book by going back to American Colonial history. Roger Williams, Pfeffer maintained, was the first to develop the concept of separation of church and state in America. Banished from Massachusetts during the winter of 1635-1636 for teaching "heretical" religious beliefs and the separation of religion from state authority, he settled near Providence. In 1663, he secured a charter from the English crown which specified that

> no person within the said colony . . . shall be in any way molested, punished, disquieted or called in question, for any differences in opinion in matters of religion, and that do not actually disturb the civil peace of our said colony.[20]

According to Pfeffer, Williams expressed this idea in many of his writings, most importantly his The Bloudy Tenant of Persecution for Cause of Conscience, discussed in a Conference between Truth and Peace. In this work, Williams set down his basic premise:

> I must profess, while Heaven and Earth lasts, that no one Tenet that either London, England, or the World doth harbor, is so heretical, blasphemous, seditious, and dangerous to the corporal, to the spiritual, to the

> present, to the Eternal Good of Men, as the bloody Tenet . . . of persecution for the cause of conscience.[21]

Pfeffer emphasized twelve arguments Williams used to prove why it was wrong for civil authorities to force religious conformity. He also drew attention to Williams' declarations that religion existed beyond the civil magistrate's jurisdiction, that taxation should not be used for religious purposes, and that government aid to religious institutions was useless.[22]

Williams' Rhode Island experiment, Pfeffer asserted, was part of a general colonial trend. Pennsylvania, founded by the Quaker William Penn, sought to implement religious toleration. Often victims of persecution, the Quakers recognized the need for separation between church and state. Penn's Great Law of 1682 allowed all individuals who believed in a deity to live and worship in his territory.[23] Calvert's Catholic haven in Maryland also sought to implement religious freedom by passing the Act of Toleration of 1649 that extended equality to all faiths. This legislation, however, was repealed after Protestants gained power and eventually established the Anglican church.[24]

John Locke's Letter on Toleration, according to Pfeffer, had a significant influence on Colonial America. Locke's assertion that individuals had a right to worship God in their own way came to dominate Colonial society. Madison, Pfeffer noted, studied

these ideas at John Witherspoon's Princeton, eventually incorporating many of them into his own political philosophy.[25] Witnessing government persecution of religious minorities who failed to conform to Virginia's Anglican establishment, Madison became convinced that religion and government must remain separate. In a letter to William Bradford, Jr., he stated that the "diabolical Hell conceived principle of persecution rages among some; and to their eternal Infamy, the Clergy can furnish their Quota of Imps for such business."[26] Arguing that religious bondage hinders the mind, he called for absolute, uncompromising separation between church and state. Pfeffer also placed special emphasis on Jefferson's "Bill for Establishing Religious Freedom."[27] Jefferson argued that legislatures corrupted religion through establishments which compelled non-believers to support their tenets. Pfeffer interpreted this document to mean that Jefferson and the legislature meant to prohibit any state intrusion on individual religious rights.[28]

Although Jefferson's "Virginia Declaration of Rights" was an important document in church and state relations, Pfeffer viewed his Notes on Virginia as the strongest defense of religious liberty.[29] Arguing on the basis of Locke's social contract, Jefferson maintained that individuals never relinquished their "rights of conscience."[30] Humans accordingly lacked the

authority to do so because this fell under God's jurisdiction. The only correction for error was the individual's ability to question doctrinal ambiguities. Jefferson believed that government intrusion only hindered this singular avenue to religious truth. He concluded by asking the question: "Is [religious] uniformity attainable?" Answering "yes" to this question, he added that it occurred only through bloodshed.

> Millions of innocent men, women and children, since the introduction of Christianity, have been burnt, tortured, fined, imprisoned; yet we have not advanced one inch towards uniformity. What has been the effect of coercion? To make one half of the world fools, and the other half hypocrites. To support roguery and error all over the earth.[31]

Pfeffer concluded from this document that Jefferson and many of his contemporaries believed that government support of religion always produced evil.

The delegates at the Constitutional Convention, according to Pfeffer, excluded religion from the Federal Constitution of 1787. Aside from the document's date which read "in the Year of our Lord one thousand seven hundred and eighty-seven," the only other reference was Article Six which banned religious oath requirements for public office.[32] To Pfeffer, this was because the framers purposely created a secular government that could not encroach on religious practices. He provided an example of the framers' intent by showing that Benjamin Franklin asked that the

Convention begin each meeting with prayer. Pfeffer noted that Franklin's colleagues kept the meetings religion free by letting the bill die in committee.[33]

Pfeffer then moved his focus to Madison's role in the "Assessment Bill." The formal name of the legislation introduced by Thomas Matthews of Norfolk was a "Bill Establishing a Provision for Teachers of the Christian Religion." This legislation required all individuals "to pay a moderate tax or contribution annually for the support of the Christian religion, or of some Christian church, denomination or communion of Christians or for some Christian worship."[34] Its purpose was to correct the "morals of men, restrain their vices, and preserve the peace" in society. Tax subsidies were limited to Christians as evinced from the writing committee's rejection of a proposed substitution of "religion" for "Christians." It also allowed residents to designate what institutions would receive their tax dollars.[35] Pfeffer argued that Madison, the legislation's chief antagonist, believed that this bill would corrupt religious practices in his state. He argued in the Virginia Assembly that religion and government interaction always brought corruption to each. Societal decay, according to Madison, began with this fatal association. Pfeffer believed that the establishment clause represented Madison's desire to protect the new nation's

stability.[36]

Pfeffer next considered O'Neill's argument against the use of Jefferson's "wall of separation" by the Supreme Court. Although this metaphor failed to appear in the Constitution, Pfeffer felt that it was an essential part of the American tradition of religious liberty set forth by one of that tradition's founding fathers. It was not merely a statement of "congratulations and good wishes," as O'Neill maintained, but an occasion for which Jefferson had long awaited to express his views.[37] Jefferson's cover letter made this clear:

> The Baptist address, now enclosed, admits of a condemnation of the alliance between Church & State, under the authority of the Constitution. It furnishes an occasion too, which I have long wished to find, of saying why I do not proclaim fasting and thanksgivings, as my predecessors did. The address, to be sure, does not point at this, and its introduction is awkward. But I foresee no opportunity of doing it more pertinently.[38]

Two of Madison's veto messages, according to Pfeffer, showed his antagonism toward any government interaction with religion. The first appeared on February 21, 1811, titled "An act incorporating the Protestant Episcopal Church in the town of Alexandria, in the District of Columbia."[39] Madison vetoed this legislation because he believed that it violated the establishment clause by allowing government support of religion. The latter was called "An act for the relief of Richard Tervin,

William Coleman, Edwin Lewis, Samuel Mims, Joseph Wilson, and the Baptist church at Salem Meeting House, in the Mississippi Territory."[40] The bill reserved several acres of land for a Baptist congregation. Madison, Pfeffer asserted, argued that this violated the establishment clause because it provided government support of religion. In Pfeffer's view, these vetoes proved that Madison never supported O'Neill's equal aid principle.

O'Neill had argued that Madison's seat on a committee to establish congressional and military chaplains directly contradicted any assertion that Madison supported the no-aid principle. Pfeffer countered this assertion by pointing to Madison's "Detached Memoranda," a handwritten document discovered in 1948 in the family papers of William C. Rives, which vigorously attacked this form of religious support.[41] Madison, Pfeffer contended, reinforced this position in his letter to Edward Livingstone on July 10, 1822, in which he stated unequivocally that he did not support government financed chaplains in any context.[42]

Pfeffer argued that advocates of the accommodationist position unfairly pointed to Madison's presidential religious proclamations. For example, on August 20, 1812, Madison declared a day of fasting so that "God would guide their public counsels,"

"animate their patriotism," and "bestow a blessing on their arm[sic]."[43] Pfeffer countered such evidence by quoting a later letter to Edward Livingston in which he explained that he was against such proclamations but found them necessary during the war:

> Whilst I was honored with the Executive Trust, I found it necessary on more than one occasion to follow the example of predecessors. But I was always careful to make the Proclamations absolutely indiscriminate, and merely recommendatory; or rather mere designations of a day, on which all who thought proper might unite in consecrating it to religious purposes, according to their own faith & forms. . . . I have no doubt that every new example, will succeed, as every past one has done, in shewing [sic] that religion & Govt. will both exist in greater purity, the less they are mixed together.[44]

Pfeffer noted that by issuing such proclamations, Madison was following a tradition laid down by George Washington and John Adams. Jefferson, however, refused to issue such pronouncements because, in Pfeffer's view, he believed that they violated the establishment clause. Pfeffer gave the example of a letter Jefferson wrote to Reverend Samuel Miller in 1808, in which he maintained that he "considere[d] the government of the U. S. as interdicted by the Constitution from intermeddling with religious institutions, doctrines, discipline, or exercises."[45] The significant point, according to Pfeffer, was that Jefferson considered presidential activities, just like the legislation of Congress, to fall within the restrictions of the Constitution.

Unlike his predecessors, Jefferson took a bold stand against what he believed was unconstitutional.[46]

Pfeffer pointed to many instances in which the government separated itself from religion. Article eleven of the Treaty of Tripoli negotiated under the Washington Administration with Muslim North Africa is one such example. It stipulated:

> As the government of the United States is not in any sense, founded upon the Christian religion; as it has in itself no character of enmity against the law, religion or tranquility of Musselmen; and as the states never have entered into any war or act of hostility against any Mohometan nation, it is declared by the parties that no pretext arising from religious opinions shall ever produce an interruption of harmony existing between the two countries.[47]

O'Neill had argued that since Joel Barlow, U.S. counsel to Algiers, had conducted the negotiations, the treaty reflected his views instead of the government's. According to Pfeffer, this was a fallacious assumption because the treaty itself was submitted to high government officials for approval in 1797. Both Secretary of State Thomas Pickering and President John Adams endorsed this document; the Senate passed the treaty without dispute.[48] This proved, in Pfeffer's view, that the founding generation did not intend to allow religion to interfere with political affairs.

Pfeffer viewed the development of religious freedom as an evolutionary process that began with a reaction in the colonies

against governmental persecution of non-established sects and climaxed with the struggle in the Virginia Assembly over an assessment bill. Out of this debate, two important manifestos on religious liberty were created: Madison's "Memorial and Remonstrance" and Jefferson's "Virginia Declaration of Rights." Each of them called for an absolute right of religious worship beyond government control or support. This principle found its final form in the establishment clause. Madison's and Jefferson's later actions supported this interpretation. Pfeffer argued that scholars like James O'Neill had grossly misinterpreted the establishment clause in an attempt to gain support for their own personal agendas.

Not surprisingly, one of the most adamant critics of Pfeffer's book was James O'Neill. He criticized Pfeffer for not providing a detailed discussion of the First Amendment debates, implying that evidence for Pfeffer's position was nonexistent. He accused Pfeffer of "begging the question" by "assuming that which he should prove and then offering considerable data and documentation to substantiate items concerning which there is no controversy."[49] In response to Pfeffer's belief that the framers intended absolute separation, O'Neill said that this was "totally unrealistic" because "no civilized government has ever expressed that theory in words in its constitution and laws, nor has any

civilized government on earth ever followed it in action or policy." He concluded that Pfeffer had "presented no valid evidence that the establishment clause forbids non-preferential aid to religion."[50]

In 1953, Chief Justice Fred Vinson died and his replacement, Earl Warren, ushered in a new period of judicial activism in the Supreme Court. With this alteration in the Court's make-up, Pfeffer's establishment clause interpretation began to find a friendlier audience. Over the next nine years, the addition of William Brennan, Byron White and Arthur Goldberg to the Court created a solid liberal block which fully adopted Pfeffer's version of history. This is seen in *Engel v. Vitale,* a case that declared state-mandated public school prayers unconstitutional. Initially, Pfeffer attempted to dissuade the ACLU from taking part in this landmark case because he felt that the Regent's Prayer was insufficiently sectarian to allow a judge to overrule the law. The prayer read: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our Country."[51] It was only after persistent overtures from the ACLU that Pfeffer agreed to work behind the scenes in preparing its arguments and briefs.[52]

The Supreme Court handed down the decision on June 25, 1962 at the close of the October 1961 term. Black, writing the

majority opinion, incorporated many of Pfeffer's historical arguments without providing direct citations.[53] He interpreted government sponsored prayer as a corruptive element throughout American history:

> It is a matter of history that this very practice of establishing governmentally composed prayers for religious services was one of the reasons which caused many of our early colonists to leave England and seek religious freedom in America.[54]

He ruled that New York's prayer recitation was "wholly inconsistent with the Establishment Clause."[55]

Black argued that the establishment clause was intended to protect individuals from undue governmental influence in religious matters. Aware of state persecutions, the founding generation attempted to let the individual determine his own method of worship. Black concluded with a statement from Madison's "Memorial and Remonstrance."

> Who does not see that the same authority which can establish Christianity in exclusion of all other religions, may establish with the same ease any particular sect of Christians, in exclusion of all other sects . . . ?[56]

Like Reed in *McCollum,* Potter Stewart was the sole dissenter. He maintained that the court "misapplied" the establishment clause in this case. It was unclear to Stewart how letting individuals pray constituted an "official religion." Conversely, he argued that the court denied children "the

opportunity of sharing in the spiritual heritage of our Nation," by excluding school-sponsored prayer. Perhaps influenced by O'Neill's interpretation, Stewart rejected the same evidence that Black and Douglas presented. He interpreted Congressional and Court Chaplains as evidence that the government had always supported prayer. He concluded: "I do not believe that this Court, or the Congress, or the President has by the actions and practices I have mentioned established an 'official religion' in violation of the Constitution. And I do not believe the State of New York has done so in this case . . . . I dissent."[57]

The Court had purposely postponed its release of this opinion in anticipation of the inevitable controversy that followed. Representative Robert L. Sikes of Florida said: "If the Supreme Court were openly in league with the cause of Communism, they could scarcely advance it more." "They put the Negroes in the Schools," bellowed Representative George W. Andrews of Alabama, "and now they've driven God out."[58] On the same day that the Court struck down this simple prayer, said a horrified representative from Indiana, the Court upheld the right of homosexuals "to receive magazines about their common interests through the mail."[59]

Two months after the ruling, the Jesuit periodical America issued a statement that the Christian Century called a "thinly

veiled threat . . . to frighten Jews into . . . silence on issues involving the constitutional liberties of all citizens including Jews."[60] America warned that:

> The well-publicized Jewish spokesman, Leo Pfeffer, and these Jewish agencies make no secret of their view that "a favorable climate of opinion" will help stop legislation providing grants or loans to church-related institutions of higher learning. Thus, we see that intense efforts are being made in some Jewish quarters to close ranks and to exploit all the resources of group awareness, purposefulness and expertise that are to be found in the Jewish community.
>
> It would be most unfortunate if the entire Jewish community were to be blamed for the unrelenting tactics of a small but vocal segment within it. In our own opinion, therefore, responsible Jewish spokesmen should make known the fact that the all-out campaign to secularize the public schools and public life from top to bottom, as that campaign is conceived and implemented by Mr. Pfeffer and a few organizations, does not represent the ideas of the whole Jewish community.[61]

A year later, the Court combined two cases dealing with similar issues: *Abington v. Schemmp* and *Murray v. Curtlette.* In the former, the Court struck down a program of daily Bible reading at the start of the school day without comment. In the latter, it rejected both Bible reading and the recitation of the Lord's Prayer.[62]

In 1962, Republican congressman Frank Becker introduced an amendment to allow prayer in public schools. In an article in The Journal of Church and State, Pfeffer offered several reasons why it was important to defeat this bill. The first was that

"[i]t threatened the integrity of the Bill of Rights." To him, this amendment would open the door to further incursions on our fundamental freedoms. A second problem was the disastrous effects this bill could have on Jefferson's "wall" by allowing the states to intrude at will on religious freedom.[63] Perhaps reflecting painful experiences from his childhood, he added that Becker's proposal would force non-Christian children to participate in practices antithetical to their own personal beliefs or suffer the ridicule of their schoolmates. Pfeffer believed that this had the potential of threatening the school system's integrity by introducing divisiveness through creed competition.[64] Finally, he said that this Amendment had the potential to hurt religion by forcing students to recite prayers mechanically which would have the effect of stripping them of their meaning. This would, in his view, reduce such activities to mere rote exercises.[65] He concluded by listing a number of organizations that were antagonistic to the proposed amendment.[66]

In 1964, Pfeffer was invited back by Long Island University's directors to accept the chairmanship of the political science department at its Brooklyn campus. While hoping to accept their offer, he did not want to give up his leadership role in the American Jewish Congress. To solve this dilemma, he proposed that he serve part time in both capacities.

His position in the AJC went from General Counsel to Special Counsel. At the end of this period, his reputation exceeded that of any other commentator on the establishment clause. His views and his version of history had been adopted by the Court and would dominate constitutional interpretation for most of the next two decades.[67]

Leo Pfeffer laid the foundations of the absolutist position by responding to many of O'Neill's arguments. Drawing on his own experiences, he brought to the debate a determination to eradicate what he perceived to be a fundamental violation of religious liberty caused by equal aid to religion. Although Pfeffer built his arguments around Colonial history, the Virginia debates, and the First Congress, he interpreted these documents with a distinctly secular perspective, portraying the framers as having his obsession for absolute separation between church and state. He was convinced that the framers of the First Amendment could never have intended to allow the states or the federal government to force individuals to support or participate in religious activities that violated their beliefs. It was Pfeffer's conviction as much as his legal arguments that contributed to the success of the absolutist position. At the core of his legal reasoning was the maxim that state and religious interaction always equaled corruption.

Notes

1. Frank J. Sourauf, The Wall of Separation: The Constitutional Politics of Church and State (Princeton: Princeton University Press, 1976), 162. An example of Pfeffer's attack on O'Neill appeared in the brief he submitted for the American Jewish Congress in *Doremus v. Board of Education,* 342 U.S. 429 (1952). Citing O'Neill's Religion and Education, he commented that "[it] is unfortunate that considerable bitterness and lack of good taste has characterized much of this discussion." Brief of the American Jewish Congress, Amicus Curiae on Behalf of the Appellants, at 23, ft. 25, as reprinted in United States Court Records and Briefs, Vol. 90 (Washington, D.C.: G.P.O., 1948, text-fiche).

2. Leo Pfeffer, "An Autobiographical Sketch," in Essays in Honor of Leo Pfeffer, ed., James E. Woods (Waco: Baylor University, 1987), 487.

3. Ibid., 488. The American Jewish Congress(AJC) was organized in 1918 by prominent Zionists like Rabbi Stephen Wise, Louis Brandeis, and Felix Frankfurter for the purpose of presenting Jewish goals at the Versailles Peace Conference. Lee O'Brien, American Jewish Organizations & Israel (Washington, D.C.: Institute for Palestinian Studies, 1986), 84. In 1945, its legal department was incorporated into the Commission on Law and Social Action under the leadership of Will Maslow and Alexander H. Pekalias. This Commission's purpose was to fight anti-semitism by direct legal and legislative action. Leo Pfeffer, "Private Attorneys-General: Group Action in the Fight for Civil Liberties," Yale Law Journal 58 (1949): 589.

4. Pfeffer approached Will Maslow, director of the American Jewish Congress, about presenting an amicus brief in *Everson v. Board of Education* in favor of Arch Everson. Officials within the organization refused his request. According to Pfeffer, the reason for this denial was that "Henry Epstein, a prominemt Jewish lawyer who had previously been solicitor-general of the State of New York and now held high office in our organizlation, was the Democratic candidate for the office of associate judge of New York's highest court. The fear was that this organization's participation in the case would alienate Catholic voters that were central to the election." Pfeffer, "An Autobiographical Sketch,"

492.

5. Brief of Amicus Curiae of Synagogue Council of America and National Community Relations Advisory Council, *McCollum v. Board of Education,* 333 U.S. 203 (1948) at 1-2. United States Supreme Court Records and Briefs, Vol. 90.

6. The disclaimer stated that "We wish to make clear our regret that the appellant chose to use the case as a medium for the insemination of her atheistic beliefs and injected into the record the irreligious statements it contains. We wish not only to disassociate ourselves completely from the anti-religious statements of the appellant, but wish to deplore the fact that the sponsors of the original petition chose the case as a means of inscribing such matter on the public record and confusing basic issues in the case by dragging into it the unrelated issues of atheism vs. religion." Brief of Amicus Curiae of Synagogue Council of America and National Community Relations Advisory Council, 6-7.

7. Quoted in Greg Ivers, To Build A Wall: American Jews and the Separation of Church and State (Charlottesville: University of Virginia Press, 1995), 14.

8. Ibid.

9. O'Neill never formally accepted this term. He wrote that his research followed other scholarship in this field. James O'Neill, "No Law Respecting An Establishment of Religion: A Debate," Buffalo Law Review 2 (Spring 1953): 273.

10. Leo Pfeffer, "Church and State: Something Less Than Separation," The University of Chicago Law Review 19 (Autumn 1951): 6-7.

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

12. Kenneth Greenwalt, a member of the American Civil Liberties Union, played a major role in establishment clause litigation during the 1940s and 1950s. His influence, however, declined when John Pemberton became ACLU executive director between 1961 and 1970. Pemberton attempted to lead the organization toward accommodationist views. Sourauf, 161.

13. Striving for absolute authority in this case, Pfeffer failed to inform other Jewish organizations of the case's developments and argued against settled policy. His actions were criticized by ADL leaders: "Pfeffer's approach, his tendency to be a stickler for formality and to split hairs as to the precise meaning of our understanding, is regrettable: especially in view of the fact that he has failed to keep our agencies appraised of important developments in [Zorach], and has even, on occasion, seen fit to argue in opposition to positions previously agreed on by our agencies." Letter, Arnold Foster to Shad Polier, March 8, 1949, Anti-Defamation League Archives, New York. Quoted in Ivers, 98.

14. Ivers, 98.

15. Ibid., 88.

16. Leo Pfeffer, Church and State, and Freedom (Boston: Beacon Press, 1953).

17. Other books published by Beacon during this period were Joseph L. Blau's Cornerstone's of Religious Freedom in America(1949); R. Freeman Butt's The American Tradition in Religion and Education (1948); and V. T. Thayer, The Attack Upon the American Secular State (1951). See Richard E. Morgan, Diabling America: The Rights Industry in Our Time (New York: Basic Books, 1984), 38-39.

18. This brief contained two pages of legal precedents and over one-hundred pages of sociological data showing the detrimental effects that working long hours had on women. *Muller v. Oregon,* 208 U.S. 412 (1908).

19. Pfeffer, "An Autobiographical Sketch," 518.

20. Anson Phelps Stokes, Church and State in the United States, Vol. I (New York: Harper, 1950), 86.

21. Roger Williams, as quoted in Stokes, 86.

22. Pfeffer, Church and State and Freedom, 77.

23. Ibid., 79.

24. Ibid., 73.

25. Ibid., 91.

26. Ibid.

27. Ibid.

28. Ibid., 96.

29. Jefferson's notes were written in 1781; he made corrections the following year. His purpose was to ". . . answer Queries proposed to the Author, by a Foreigner of Distinction, then residing among us." Jefferson, "Advertisement to Notes on Virginia, as reprinted in Thomas Jefferson: Writings, ed. Merrill D. Peterson (New York: Viking, 1984), 124.

30. Jefferson's Notes on Virginia, as reprinted in Peterson, 283.

31. Peterson, 286.

32. The full constitutional text read: The Senators and Representatives before mentioned, and the Members of the several States, shall be bound by Oath or Affirmation, to support this Constitution; no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States. U.S. Constitution, Art. 6, sec. 2.

33. Pfeffer, Church, State, and Freedom, 109.

34. Ibid., 98.

35. Ibid.

36. Ibid.

37. Ibid., 38.

38. Jefferson's letter to Levi Lincoln, as quoted in Pfeffer, Church, State, and Freedom, 120.

39. James Madison, "Veto Message of February 21, 1811, reprinted in A Compilation of the Messages and Papers of the Presidents ed. House and Senate Joint Committee on Printing (New York: New York Bureau of National Liberties, 1892) vol. 2, 475.

40. James Madison, "Veto Message of Feburary 28, 1811, A Compilation of the Messages and Papers of the Presidents, vol. 2, 475.

41. Pfeffer, Church, State, and Freedom, 215.

42. Madison to Edward Livingston, 10 July 1822, as reprinted in Amendments I-XIII, eds., Philip B. Kurland and Ralph Lerner, vol. 5, The Founders Constitition, eds., Philip B. Kurland and Ralph Lerner (Chicago: University of Chicago Press, 1987), 105-106.

43. Madison, Presidential Proclamation of August 12, 1822, quoted in Stokes, 491.

44. Madison's Letter to Edward Livingston, as reprinted in Kurland and Lerner, 105.

45. Thomas Jefferson To Reverend Samuel Miller, 23 January 1808, as reprinted in Kurland and Lerner, 98.

46. Pfeffer, Church, State, and Freedom, 224.

47. Treaty of Tripoli, as quoted in Pfeffer, Church, State, and Freedom, 211.

48. Pfeffer, Church, State, and Freedom, 211.

49. O'Neill, "No Law Respecting An Establishment of Religion," 274. Most reviews of Pfeffer's book were positive. The Nation stated that the monograph "should be on the bookshelf of every working pastor and of thousands of lay officers in our churches." The Nation, September 19, 1953, 236. Anson Stokes also wrote a positive review, although he criticized Pfeffer for not examining nineteenth-century history in depth. Stokes, "Among Our Basic Liberties," New York Times, September 13, 1953, 37.

50. O'Neill, "No Law Respecting An Establishment of Religion," 278.

51. *Engle v.* Vitale, 82 S. Ct. 1261, 1262.

52. Pfeffer, Church, State, and Freedom, 211.

53. Following this case, a lower court judge wrote Pfeffer stating that he was "very much indebted to you for the research and excellent books, articles and oral arguments." Ivers, 133.

54. *Engel v.* Vitale, 1264.

55. *Engle v. Vitale,* 1274.

56. *Engle v. Vitale,* 1270.

57. *Engel v. Vitale,* 1276 (Stewart, J. dissenting).

58. Quoted in "What's Being Said About Court's Ruling," U.S. News and World Report, July 9, 1962, 44.

59. This case was *Manuel* Enterprises v. *Day,* 370 U.S. 478 (1962). John F. Kennedy, the voice of reason, offered a solution to Engel: "[A] very easy remedy is to prayer ourselves, I think it would be a welcome reminder to every American family that we can pray a good deal more at home and attend our churches with a good deal more fidelity." Ibid.

60. "Is America Trying to Bully the Jews?" Christian Century, September 5, 1962, 1057-1058.

61. "To Our Jewish Friends," America, September 1, 1962, 679-680

62. *Murry v.Curtlette,* 374 U.S. 203 (1962) and Abington v. Schempp, 374 U.S. (1963). Pfeffer had serious doubts about the wisdom of pressing the Schemmp case. In an internal memorandum written in 1957, he stated "I think it would be highly desirable if a similar suit sponsored by AJCongress in behalf of a Jewish parent and, if possible, also a Catholic parent, could be brought in a Pennsylvania State court. While I am not sanguine about the outcome of a suit limited to Bible reading, I think a good case can be made to invalidate the Lord's Prayer recitation in a state court. However, we could only have a change at winning if we could establish a record through trial similar to that established in the Gideon Bible case. . . . The complaint in the ACLU's case sets forth no facts requiring a trial and will probably go up on the pleadings. I am certain that we would never have won the Gideon Bible case [Tudor v. Board of Education,

100 A.2d. 370 (1953)] if we would have gone up on the pleadings alone. I therefore recommend that the Philadelphia CLSA . . . be urged to sponsor a suit in the Pennsylvania State Court on Lord's Prayer recitation with which a count of Bible reading could be combined." Memorandum, Leo Pfefer to Shad Polier, April 1, 1957," Leo Pfeffer Papers, box 23, as reprinted in Ivers, 130.

63. Leo Pfeffer, "The Becker Amendment," Journal of Church and State 6 (Autumn 1964): 345.

64. Ibid., 346.

65. Ibid., 347.

66. Ibid.

67. Pfeffer, "An Autobiographical Sketch," 507.

CHAPTER IV

The New Accommodationists

> But the greatest injury of the "wall" notion is its mischievous diversion of judges from the actual intentions of the drafters of the First Amendment. The "wall of separation between church and state" is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned.
>
> Justice William Rehnquist
> *Wallace v. Jaffree* (1985)

The Supreme Court's rulings prohibiting prayer and Bible reading in public schools prompted a scholarly response that originated in the mid 1960s with two influential books: Mark DeWolfe Howe's The Garden and the Wilderness: Religion and Government in American Constitutional History, and Chester James Antineau's Freedom from Federal Establishment: Formation and Early History of the First Amendment Religion Clauses.[1] Both scholars significantly broadened the establishment clause debate by examining new historical sources, and both concluded that

O'Neill had been right, that the framers had intended to allow aid to religious institutions on an equal basis.

The new accommodationists emerged when Harvard Law Professor Mark DeWolfe Howe delivered a series of lectures on the issue of separation of church and state at the Frank L. Weil Institute for Studies in Religion and the Humanities at Hebrew Union College in 1964. These lectures were published the next year under the title of The Garden and the Wilderness. Howe argued that the Supreme Court's attempt to reduce the complex history behind the establishment clause to a single precept calling for absolute separation of church and state represented bad history, bad logic, and bad law. Rejecting this reductionist approach, Howe called on scholars and the Court to broaden their examination of the origins of the First Amendment so as to gain a better understanding of its intent. By focusing only on Virginia sources and a few isolated incidents in the colonial past, the Court had adopted an unrealistic standard and had created chaos in establishment clause interpretation.[2]

Howe went on to point out particular flaws in the Court's, and by implication, Pfeffer's use of history. Most troubling was the justices' assumption that the principle of

separation of church and state was designed to protect religious minorities. Howe re-examined the writings of Roger Williams and concluded not only that Williams had originated the phrase "wall of separation" but also that the idea of separation had emerged to protect the church from state interference. Building on a complex Puritan theology, Williams concluded that an established church inevitably corrupted the faith by forcing both sinners and saints into a single institution. The only way to insure religious purity was to separate church and state. According to Howe, Williams' "wall of separation" was not intended to protect minorities or prevent the government from promoting religious ideas. It was simply designed to insure the purity of the church. "By disregarding the theological roots of the American principle of separation," Howe wrote, "the Supreme Court erred."[3]

Howe also found serious problems with the Court's interpretation of the congressional debates leading to the establishment clause. Reliance on the writings of Madison and Jefferson led the justices to ignore "the prevailing federalism" that shaped these debates. Howe was convinced that a broader examination of the historical context would reveal that the authors of the First Amendment and those who

ratified it in the states only intended the establishment clause to prohibit congress from interfering with state religious practices.[4]

Although Howe's book received mostly favorable reviews, Leo Pfeffer wrote a negative critique of the monograph.[5] Howe, in his view, presented many incisive points; however, his anger directed at the Supreme Court resulted in several historical inaccuracies. The most important of these had to do with a key element in his thesis: the "wall of separation" metaphor originated with Williams and that the Supreme Court should therefore apply his theological interpretation that sanctioned equal aid. To Pfeffer, the idea of separation legitimately belonged to Jefferson so his views should prevail. In addition, Pfeffer stated, Williams' vision of absolute separation between church and state would have prohibited school prayers and other forms of state assistance.[6]

The appearance of Chester James Antineau's Freedom from Federal Establishment: Formation and Early History of the First Amendment Religion Clauses, also in 1964, marked a milestone in the accommodationist position. Like Howe, Antineau and his associates were animated by the recent court rulings. The study's purpose was to "set forth the

American experience and attitudes that are relevant to a clearer understanding of the religion clauses of the First Amendment" independent of controversial Supreme Court decisions.[7] Its findings were based on the research of scholars at the Institute for Church-State Law at Georgetown University, and the copyright was held by the National Catholic Conference.[8]

Antineau's book reshaped the absolutist-accommodationist debate by significantly broadening the historical sources under review. To this point, accommodationist scholars had focused largely on a narrow range of documents used by O'Neill and Pfeffer. Antineau argued that the First Amendment's meaning could be understood only by looking at the "true sense in which it was adopted by the states." This meant that analyzing the debates within the state legislatures which ratified the Bill of Rights would lead to a clearer understanding of the First Amendment's meaning. The problem faced by many scholars, in Antineau's view, was that few documents existed from these assemblies; only Virginia maintained concise debate records. Antineau believed that by analyzing other contemporary records in each state, it was possible to make an educated guess as to what motivated legislators to ratify

the Bill of Rights and what its clauses meant in 1789. This served as the core of his scholarship.[9]

Antineau claimed that contemporary changes made in several state constitutions indicated that the ratifiers accepted the equal aid principle. The Delaware Constitution of 1792 emphasized voluntary participation while allowing state support for religion on a nonpreferential basis. While debating the Bill of Rights, Pennsylvania altered its 1776 Constitution by adding "[t]hat no preference shall ever be given, by law, to any religious establishments or modes of worship." South Carolina's 1778 Constitution emphasized that "[a]ll Protestant Christians shall enjoy equal religious and civil privileges." The rapid ratification of the Bill of Rights by the states and the absence of prolonged debates over phrasing, indicated to Antineau that the state representatives believed that the First Amendment would bring no change in current practices. It would simply insure that the federal government could not interfere with these practices.[10]

In addition, Antineau maintained that constitutional amendments proposed by the state ratifying conventions to the First Congress between 1787 and 1789 illustrated the framers' true intent which supported equal aid. New

Hampshire submitted an amendment stating that "Congress shall make no laws touching religion, or to infringe the rights of conscience." New York submitted a similar amendment stating

> That the people have an equal, natural, and unalienable right freely and peaceably to exercise their religion according to their conscience; and that no religious sect or society ought to be favored or established by law in preference to others.[11]

Virginia proclaimed that "no particular religious sect or society ought to be favored or established, by law, in preference to others."[12] Maryland's submission stated "That there be no national religion established by law." Rhode Island likewise incorporated the statement "that no particular religious sect or society ought to be favored or established, by law, in preference to others" into its constitution.[13]

Further evidence cited by Antineau showed that state constitutions adopted between 1789 and 1825 contained numerous provisions that were favorable to religion. Delaware's 1776 Constitution called for "no establishment of any one sect . . . in preference to another."[14] It was reworded in 1792 to protect its citizens from multiple establishments by adding "nor a preference be given by law to any religious societies, denominations, or modes of

worship." New Jersey presented a similar constitution that called for "no establishment of any one sect in the province in preference of another." New York, North Carolina, and Pennsylvania adopted similar versions of this position.[15]

Antineau also showed that several legislatures authorized church appropriations in the form of lotteries and tax exemptions. Delaware enacted a bill that allowed the trustees of a Presbyterian school to raise the sum of $50,000. The New Jersey legislature summarily passed legislation called "An Act Authorizing the Protestant Episcopal Church to have a Lottery" which maintained that:

> [T]hey are hereby authorized and empowered to raise by lottery, a sum not exceeding three hundred and fifty pounds, to be appropriated . . . towards repairing and completing the Church and Parsonage.[16]

Pennsylvania also enacted legislation allowing a Presbyterian Congregation in Montgomery to establish a lottery to finance a school.[17]

Tax exemptions, Antineau believed, also allowed states to provide money for religion. A Connecticut statute passed in 1702 which remained effective until 1812 exempted property used for the "maintenance of the ministry of the Gospel."[18] A New York statute in 1786 authorized exemptions to one Samuel Kirkland "in trust for any ministry of the gospel, who may hereafter for the time then being be

employed by the Oneida Indians to preach the gospel among them."[19] South Carolina likewise excluded clergymen from its tax rosters in 1812. The next year, the state incorporated a proviso stating: "But nothing in this Act contained shall be construed to impose any tax upon the property or estate of a religious body."[20]

Antineau also provided evidence that states accommodated religion through Sunday Blue Laws designed to enforce the Sabbath's sanctity. A 1784 Pennsylvania Law imposed a five dollar fine or six days imprisonment for participating in regular work activities on Sunday. To keep travelers from disrupting Sunday services, this state also allowed religious institutions "to extend and fasten chains across the street" subjecting individuals to a thirty dollar fine for violating the barrier. Both Massachusetts and New Jersey enacted legislation requiring individuals to attend church service. This illustrated, according to Antineau, state willingness to prosecute individuals who violated religious laws.[21]

Antineau argued that states continued to grant incorporation of churches well after the adoption of the First Amendment. Both Massachusetts and New Hampshire continued to establish Congregational churches denying tax

exemptions to other religious groups like Baptists. States like South Carolina granted legislative charters to Jewish synagogues and Catholic churches because of an alteration in its constitution requiring freedom of worship "without discrimination or preference."[22] Congress similarly attempted to establish a church in the town of Alexandria in the District of Columbia. Madison vetoed this measure but the congressional intent was clear. Members of Congress saw no conflict between their action and the establishment clause.[23]

Antineau broadened the accommodationist argument to include documents and actions by the states which showed, in his view, that the establishment clause allowed ample room for state support of religion on an equal basis. In 1978, Michael J. Malbin carried Antineau's work a step further by focusing new attention of the First Amendment debates in congress.[24] His speech-by-speech analysis led to the same conclusion--the framers intended to allow equal aid to religious groups.

Malbin, a resident journalist at the American Enterprise Institute, drew attention to a number of extraneous factors that helped to shape the congressional debate. By examining the private correspondence of members,

he showed the debate as part of a larger power struggle between Federalists and Anti-Federalists, the former seeking to shape congressional action on the Bill of Rights as a means of gaining popular support for the new Constitution, the latter seeking delay. Malbin also found evidence to suggest that Madison avoided presenting his absolutist views in the debates because of his political vulnerability in his home district. After an extensive discussion of the congressional debates, Malbin concluded that the final language of the establishment clause contained "key compromises on both the nation/state and aid/no aid issues."[25] The most important compromise, in Malbin's view, was the choice of "an" over "the."

> This formation satisfied Madison's desire to prohibit indirect forms of discriminatory religious assistance as well as direct establishment of a national church. At the same time, the phrase "an establishment" seems to ensure the legality of nondiscriminatory religious aid. Had the framers prohibited "the establishment of religion," which would have emphasized the generic word "religion," there might have been some reason for thinking they wanted to prohibit all official preferences of religion over irreligion. But by choosing "an establishment" over "the establishment," they were showing that they wanted to prohibit only those official activities that tended to promote the interests of one or another particular sect.[26]

Malbin concluded that this showed the framers' desire to uphold the equal aid principle.

In the early 1980s, Robert L. Cord drew on the research

and ideas of Howe, Antineau and Malbin to fashion new and comprehensive statement of accommodationist thought. His Separation of Church and State: Current Fact and Historical Fiction directly challenged Pfeffer's interpretation and his evidence.[27] Like a modern day Martin Luther, he called for the Supreme Court to go back to the original sources to correct what he perceived to be heresy. Published by Lambeth Press, a publisher of religious books, Cord's monograph quickly became standard reading material for the New Right. William F. Buckley, Jr. wrote a forward arguing that Cord's work would shatter "beyond recovery the thesis of Professor Leo Pfeffer, adopted by pretty much the last few Supreme Court majorities."[28]

Much of Cord's work concentrated on disputing Pfeffer's contentions regarding Madison and Jefferson. To Pfeffer, Madison's role in drafting the First Amendment was central, so his interpretation of its wording was crucial. In Cord's account, Madison's role is downplayed. Instead of being the motivational force behind the entire process, Madison was simply one of the debate's participants.[29]

Responding to Pfeffer's claim that Madison's "Memorial and Remonstrance" was singularly relevant in determining his interpretation of Colonial establishments, Cord asserted

that this document was irrelevant as a source of instruction for future policy. The "Memorial," according to Cord, was composed of ideological arguments which were typical during the Revolutionary Era and were intended only to refute Henry's bill.

> Taken literally, most of Madison's "ideological" arguments in the "Memorial" seem more derivative of the call to revolution rather than the proper yardstick against which to measure an appropriate separation between Church and State in a real society where both institutions must coexist.[30]

Hence, Cord argued that scholars should rely on the congressional debates to determine the framers' intent.

Next, Cord challenged Pfeffer's argument that Jefferson's views remained constant. A major piece of evidence cited by Cord was Jefferson's proposed treaty to the Senate on October 31, 1803, calling for religious aid to the Kaskaskia Indians.[31] This, in Cord's view, directly contradicted Pfeffer's statement that Jefferson believed that all federal appropriations for religion were unconstitutional. The important part of this treaty was Article Three.

> And whereas, The greater part of the said tribe have been baptized and received into the Catholic church to which they are much attached, the United States will give annually for seven years one hundred dollars towards the support a priest of that religion, who will engage to perform for the said tribe that duties of his office and also to instruct as many of their children

> as possible in the rudiments of literature. And the United States will further give the sum of three hundred dollars to assist the said tribe in erection of a church.[32]

Cord also questioned the relevance of Jefferson's writings in determining original intent because of his absence during the critical constitutional debates. Cord assumed that his influence was minimal although he regularly corresponded with James Madison. If his influence was minimal, then the use of Jefferson's "Wall of Separation" metaphor in current jurisprudence was questionable.[33]

Jefferson's "Bill for Establishing Religious Freedom," in Cord's view, had been taken out of context by Pfeffer. It was the first of five consecutive bills dealing with religion introduced in the Virginia Assembly. Two of these clearly called for government support of religion. The former, "A Bill for Punishing disturbers of religious Worship and Sabbath Breakers," was introduced into the Virginia Assembly on October 31, 1785. This bill prohibited the arrest of clergymen while performing religious services and also authorized the punishment of individuals who labored on Sundays. The third paragraph read:

> If any person on Sunday shall himself be found labouring at his own or any other trade or calling, or shall employ his apprentices, servants or slaves in labour, or other business, except to be in the ordinary household offices of daily necessity, or other work of

> necessity or charity, he shall forfeit the sum of ten shillings for every such offence, deeming every apprentice, servant, or slave so employed, and every day he shall be so employed as constituting a distinct offence.[34]

This legislation also provided governmental enforcement to ensure that individuals attended religious services. It passed the Virginia Assembly in 1786.[35]

The latter was called "A Bill for Appointing Days of Fasting and Thanksgiving." Its provisions allowed the government to specify days of fasting and thanksgiving. There were punitive damages for failure to conform.

> Every minister of the gospel shall on each day so to be appointed, attend and perform divine service and preach a sermon, or discourse, suited to the occasion, in his church, on pain of forfeiting fifty pounds for every failure, not having a reasonable excuse.[36]

While never enacted, this bill, in Cord's view, clearly contradicted Jefferson's refusal to issue Thanksgiving Proclamations during his presidency and Madison's statement against such bills in his "Detached Memoranda." Cord argued that Jefferson's refusal and Madison's "Memoranda" represented a later change in both men's views.[37] Cord believed that, at the time of the adoption of the First Amendment, neither man felt that such proclamations violated an acceptable degree of separation.

Cord and the other new accommodationists clearly

expanded the original O'Neill argument by bringing new evidence to the debate. Howe began this movement by questioning Pfeffer's and the Court's interprctation of the "wall of separation" metaphor. Since it began with Roger Williams, Howe argued that the Court should offer a theological translation which supported equal aid to religion. Antineau's work expanded the debate by introducing evidence from state constitutions before, during, and after the Federal Constitution's creation. Malbin sought to show that the framers intended equal aid to religion. Placing this debate in the context of the Fedealist and Anti-Federalist controversy, he maintained that time considerations prevented a more explicit constitutional statement. The period ended with Cord's work which attempted to show that the Supreme Court erred by distorting the historical record and by failing to consult contemporary sources. These sources provided ammunition for the emerging conservative agenda.

An important factor in the acceptance of accommodationism in establishment clause cases was the election of Ronald Reagan in 1980. A key source of his political support came from the New Right, a conservative movement emerging during the late 1970s that advocated a

return to traditional values. Called the "Great Communicator," Reagan often incorporated the accommodationist interpretation in his speeches. For example, on September 18, 1982, Reagan delivered a radio address in support of the School Prayer Amendment filled with references to the framers' beliefs. He concluded by saying that "The Founding Fathers felt so strongly that they enshrined the principle of freedom of religion in the First Amendment of the Constitution. The purpose of it was to protect religion from the influence of government and to guarantee, in its own words, 'the free Exercise of religion.'"[38]

It is not surprising that a President so able to captivate a nation would alter establishment clause jurisprudence. The Supreme Court began to reflect the President's wishes by using accommodationist history during its 1983-1984 term. The Court ruled that legislative chaplains were constitutional in *Marsh v. Chambers*(1983).[39] Chief Justice Warren Burger held that legislative prayer had an unbroken tradition traced to the Colonial period. In *Lynch v. Donnelly*(1984), the Burger Court more explicitly espoused the equal aid principle by upholding the constitutionality of municipally supported nativity

scenes.[40] The trend climaxed in Justice Rehnquist's dissent in *Wallace v. Jaffree*(1985)in which he adopted much of the accommodationist scholarship.[41] Although the Supreme Court rejected the equal aid principle in the next term, accommodationist research continued to be an important factor in establishment clause law.

Notes

1. Mark DeWolfe Howe, The Garden and the Wilderness: Religion and Government in American Constitutional History (Chicago: University of Chicago Press, 1965); Chester James Antieau, Arthur T. Downey, and Edward C. Roberts. Freedom From Federal Establishment: Formation and Early History of the First Amendment Religious Clauses. (Milwaukee: Bruce, 1964.) Although Antineau was aided by Arthur T. Downey and Edward Roberts, it appears that he deserves much of the credit for the text. The assumption that Antineau was the main author behind this text rests on Leonard W. Levy's reference to this text in his The Establishment Clause: Religion and the First Amendment (New York: Macmillian, 1986) and Levy's other extensive writings on this subject. See chapter five for a discussion of Levy's work.

2. Howe, 8.

3. Howe, 9.

4. Howe, 18-19. Howe died suddenly in 1967 sending shockwaves throughout the academic and legal communities. Although this book went out of print in the late 1960s, the importance of his scholarship is still noted by modern scholars. Some still consider Howe's work to be the best on the subject. Tom Gerety, "Legal Gardening: Mark DeWolfe Howe on Church and State: A Retrospective Essay," Stanford University Law Review 38 (1986): 611. "Mark DeWolfe Howe Is Dead: Law Professor at Harvard," New York Times, March 1, 1967, 43. For remarks delivered at his memorial service, see Harvard Law Review 80 (June 1967): 1629-1637.

5. Leo Pfeffer, "Review of the Garden and the Wilderness: Religion and Government in American Constitutional History, by Mark DeWolfe Howe," Political Science Quarterly 81 (December 1966): 655-56. Some positive reviews were J.E. Curry's review published in the Annals of American Academy 366 (July 1986): 164; R.W. Henderson's in Literary Journal 90 (December 1, 1965): 5298; M.D. Peterson's in Virginia Quarterly Review 42 (Winter 1986): 131.

6. Pfeffer, "Review of the Garden and the Wilderness," 655.

7. Antineau, iii.

8. Ibid.

9. Ibid., ix-x.

10. Ibid., 161.

11. "Amendments Proposed by the New York Convention, July 26, 1788," as reprinted in Creating the Bill of Rights: The Documentary Record from the First Federal Congress, Helen Veit, Kenneth R. Bowling, et al.., eds. (Baltimore: John Hopkins University Press, 1991), 22.

12. "Amendments Proposed by the Virginia Convention, July 27, 1788, as reprinted in Antineau, 19.

13. Antineau, 19.

14. Ibid., 161.

15. Ibid.

16. "An Act Authorizing the Protestant Episcopal Church to have a Lottery," as reprinted in Antineau, 175.

17. Antineau, 175.

18. "Connecticut Revised Statute, Title 56 & 3," as reprinted in Antineau, 175.

19. "Laws of New York, c. 67, May 5, 1966," as reprinted in Antineau, 175.

20. Antineau, 175.

21. Ibid., 186.

22. Ibid., 161.

23. Ibid., 176-177.

24. Michael J. Malbin, Religion and Politics: The Intentions of the Authors of the First Amendment (Washington, D.C.: American Enterprise Institute, 1978).

25. Malbin, 24.

26. Ibid., 25.

27. Robert L. Cord, Separation of Church and State: Historical Fact and Current Fiction (New York: Lambeth Press, 1982). It was not until the 1980s that Cord became interested in establishment clause interpretation. Following the publication of his 1982 book, his work constantly appeared in articles in this area through 1990.

28. Cord, 3. Buckley also commented on the dust jacket that "This compelling study demonstrates that the prevailing view of the religion clauses of the First Amendment is not only unwise but fictional. If heeded by the Supreme Court, Professor Cord's analysis will profoundly alter our constitutional future." As quoted in Leo Pfeffer, "The Establishment Clause: An Absolutist Defense," Notre Dame Journal of Law, Ethics & Public Policy, 4 (1989): 677, ft. 4.

29. Cord, 20.

30. Ibid., 22-23.

31. The Kaskaskia Indians represented all tribes of the Illinois Indians that consisted of the Kaskaskia, Mitchigamia, Cahokia, and Tamoria tribes. Cord, Append. 5, 261.

32. "The Treaty with the Kaskasia Indians and the Other Tribes, 1803," as reprinted in Cord, Append. 5, 261.

33. Cord, 36.

34. "Bill Number 84, A Bill for Punishing Disturbers of Religious Worship and Sabbath Breakers," as reprinted in Cord, 220.

35. Cord, 220.

36. "Bill Number 85, A Bill for Appointing Days of Public Fasting and Thanksgiving," as reprinted in Cord, 220. The two other bills dealt with church property and marriage. The former was "A Bill for Saving the property of the Church Heretofore by Law Established" which gave Anglican Church parishioners control of local parishes. It was intended to protect church property which lost tax subsidies following the American Revolution. The latter was "A Bill Annulling Marriages prohibited by Levitical Law, and Appointing the

Mode of Solemnizing Lawful Marriages." It made only Biblical forms of marriages legal thereby sanctioning their legitimacy and providing local churches with revenues incurred during such services. The former never passed whereas the latter was quickly enacted into law. Daniel Dreisback, "Virginia Statute for Establishing Religious Freedom," The American Journal of Legal History 35 (1991): 192.

37. To support his position, Cord relied on Justice Brennan's concurrence in *Walz v. Tax Commission*: "These arguments were advanced . . . after the adoption of the Establishment Clause. They represent at most an extreme view at that time; there is no evidence that they were shared by others among the Framers and Ratifiers of the Bill of Rights." *Walz v. Tax Commission*, 397 U.S. 664 (1970), 685, ft.5 (Brennan, J. concurring).

38. Ronald Reagan, The First Term, Vol. I, Ronald Reagan's Weekly Radio Addresses: The President Speaks to America, comp. by Fred L. Israel, with intro. by William V. Roth, Jr. (Wellington: Scholarly Resource Inc., 1987), 27.

39. *Marsh v. Chamers*, 103 U.S. 3330 (1983).

40. *Lynch v. Donnelly*, 104 S.Ct. 1355 (1984).

41. *Wallace v. Jaffree*, 472 U.S. 38 (1985).

Chapter V

The Absolutist Response

> A scholar or judge who presents his interpretation [of the establishment clause] as the one and only historical truth, the whole historical truth, and nothing but the historical truth, deludes himself and his readers.
>
> Leonard W. Levy, The Establishment Clause (1986).[1]

From the early 1950s through the 1970s, Leo Pfeffer dominated church-state litigation. His scholarship helped inform the Supreme Court's understanding of the establishment clause and his legal expertise shaped the strategies of the American Jewish Congress and the American Civil Liberties Union in bringing cases before the Court. By the mid 1980s, however, the prominence of the new accommodationist scholarship, the growing complexity of church-state litigation and Pfeffer's declining health diminished his influence. Mark D. Stern, an attorney for the AJC, described both Pfeffer's influence and the new complexity of the field.

> Leo [Pfeffer] used to be the person for the Jewish community. . . . He was the great guru of all this and brought all the other groups along, including the ACLU, which was then still oriented to other civil liberties issues. And that's the way things were for years and years. Leo ran the show.
>
> That's not true anymore and hasn't been for some time. There isn't any dominant personality to direct litigation now--the volume and complexity of litigation makes that impossible. Also--this is important--there are several groups now that have the capacity to litigate in some way, including [the] ADL and [AJ] Committee, plus at least half a dozen other groups outside the Jewish community that I consider competent. We all feel free to disagree with each other because we all think we're right, something that was not the case in Leo's day. People in the other agencies might have felt that way, but that was kept from Leo. Even if it wasn't, he wouldn't hear of it. No one who claimed to be on the same side as Leo Pfeffer dared to tell him that he was wrong in public. Organizational differences that were once hushed out of deference to Leo or because of him are now in the open. And they're legitimate and cannot be denied . . . . [2]

In his absence, the absolutist school struggled to find new direction.

In January 1985, Attorney General Edwin Meese III called on the Supreme Court to abide by "original intent" sparking a new round of debates in establishment clause jurisprudence. He argued that the historical context in which the Constitution was written was well known through "pamphlets, newspapers, and books," that the framers' intent in the First Amendment was relatively easy to define, and that neither document was intended to prevent the states or

the Federal Government from promoting religion.[3] Meese's speech was countered by Justice William Brennan who argued that the historical records were too ambiguous to provide clear answers.[4] While the nonpreferentialists rallied behind Meese, the absolutists united behind William Brennan and the historian Leonard W. Levy. A Pulitzer prize-winning author and Humanities Professor at Claremont, Levy has been referred to as "one of the best constitutional historians" of our time.[5] Levy's The Establishment Clause: Religion and the First Amendment was designed to both revitalize absolutist scholarship and refute the works of Cord, Antineau,and the other accommodationists.[6]

Nonpreferentialists, Levy noted, failed to realize that American establishments differed from European. James O'Neill had defined establishments as "A single church or religion enjoying formal, legal, official, monopolistic privileges through a union with the government of the state," failing to consider, according to Levy, events that transpired in colonial and revolutionary America.[7] Prior to the American Revolution, European-like single establishments existed only in the southern colonies of Virginia, Maryland, North Carolina, and Georgia, where all individuals were taxed to support the Episcopal Church. States like Rhode

Island, Pennsylvania, Delaware, and New Jersey never established a religion. New York, Massachusetts, Connecticut, and New Hampshire had a diversified religious pattern including what have come to be known as "multiple establishments," or state support of several denominations. Levy showed that at least six states developed this technique which relied on taxpayers to designate the Protestant church that as to receive their support. The American interpretation of the term "establishment," in his view, was different from European definitions because of this alternate environment. Levy concluded that "An establishment of religion in America at the time of the framing of the Bill of Rights meant government aid and sponsorship of religion, principally by impartial tax support of the institutions of religion, the churches."[8] This is what the First Amendment sought to prohibit.

He next turned to Cord's argument that Madison supported equal governmental aid to religion. He began by examining the claim that Madison was protesting only against support of a single establishment in his "Memorial and Remonstrance." "Presumably," Levy maintained, "we are supposed to believe that if the bill taxed Jews for the support of a rabbi and Roman Catholics for the support of a

priest, Madison would have supported it." The problem, in his view, was that Jews and Catholics were non-existent in Virginia during the Colonial period. Levy asserted that "as a matter of principle he [Madison] opposed any kind of an 'establishment of religion.'" Madison would have, in his view, offered emendations broadening the bill to include all religions if he supported the equal aid principle.[9] Levy argued that to Madison, "religion was a wholly private matter beyond the scope of civil power either to restrain or support."[10] This meant that all governmental attempts to aid religion were unconstitutional. Levy concluded that two words summed up Madison's entire argument: "pray privately."[11]

Levy maintained that Malbin's reliance on the framers' use of "an" instead of "the" was irrelevant. In Jefferson's letter to Samuel Miller explaining his reasons for refusing to issue Thanksgiving and fasting proclamations, Levy noted that Jefferson misquoted the establishment clause by substituting "the" for "an."[12] In Levy's view, it was revealing that Jefferson believed that Presidential proclamations were illegitimate. Madison likewise failed to properly quote the establishment clause in a presidential address to Congress in which he declared the clause to say

"religious establishments."[13] This showed, in Levy's view, that the framers placed little importance on the exact wording of the clause.

Levy also responded to Cord's argument that Jefferson's treaty with the Kaskaskia Indians which allowed government financial backing of religion showed that Jefferson supported the equal aid principle. Levy noted that Native Americans enjoyed a unique relationship with the federal government which allowed for the legal allotment of such aid. Since Indians were not formally granted citizenship until 1924, the government was not confined by the First Amendment in its relationship with indigenous populations. Levy concluded that Native Americans "had an anomalous status as members of domestic dependent nations, neither citizens nor aliens.[14]

Levy next examined accommodationist arguments that Jefferson intended the "wall of separation" metaphor to prohibit only federal aid to religion. Accommodationists, in his view, properly noted that Jefferson supported aid to religion at the state level in the form of fasts and thanksgiving proclamations. Nonetheless, he asserted that "[t]wo centuries of experience have altered the constitutional status of the original widespread state

support of religion, just as history has wiped out formal state establishments." In addition, Levy argued that the Fourteenth Amendment's incorporation doctrine transformed the First Amendment's relationship to the states. This meant that the actions of the framers of the First Amendment were less important in determining the proper connection between religion and the government of the United States.[15]

Levy's book received sharp criticism from accommodationists. Gerard Bradley described the book as a "sermon preached to a choir of polemicists on one side of the dispute." For all the accusations that Levy made against accommodationists' use of historical sources, Bradley accused him of also failing to correctly interpret the historical record. For instance, Bradley maintained that Levy gave his readers the wrong date concerning Anglican disestablishment in Virginia; he also accused him of failing to note that North Carolina declined to establish a religion after disestablishment. Relying on earlier studies, Bradley argued that Levy erred by stating that the framers took no position in the school issue. He concluded that "Levy positively garbles the South Carolina and Georgia stories, but his most egregious sin is his stubborn refusal to draw the obvious, but inhospitable, conclusions to

stories he does reliably report."[16] Levy wrote a second edition of his work published in 1994 in response to these criticisms.[17]

Most scholars associate Levy's book with Thomas Curry's The First Freedoms: Church and State in America to the Passage of the First Amendment.[18] Curry, an Episcopal priest of the Diocese of Los Angeles, studied under Levy at Claremont Graduate School. Curry's book covered the colonial, revolutionary, and constitutional period that ended with the First Amendment debates in 1791. Following recent scholarship on this subject, he attempted to show the framers' intent by looking at church and state trends in their historical context. His views quickly won the respect of absolutist scholars.[19]

Yet while Curry added refinements to Levy's arguments, he added little new to the substantive debate. By the middle of the 1980s, absolutists and accommodationists were still at odds, and mounting frustration was leading some scholars, like Douglas Laycock, the Fulbright and Jawoski Professor of Law at the University of Texas at Austin, to call for the Court to follow a position of judicial neutrality in establishment clause cases.[20]

Pfeffer, during one of his last public appearances in

1989, predicted the end of the absolutist position.[21] The problem was that this position never fully recovered from the Court's "conservative revolt" during the 1984 term.[22] Although good scholars, neither Levy nor Curry could provide the personal charisma that Pfeffer brought to this position. Instead of reinforcing many of Pfeffer's arguments, they spent most of their energy refuting the new accommodationists' attacks. This involved the framers' actions beyond the debates inside the Virginia Assembly and the First Congress. Both scholars added an absolutist definition to documents that accommodationists perceived as supporting their view. Although their work breathed life into this movement, it could not sustain the position from outside attacks. Absolutism went into the nineties in a weakened form.

Notes

1. Leonard W. Levy, The Establishment Clause: Religion and the First Amendment (New York: Macmillian, 1986), xiii.

2. Interview with Marc D. Stern, May 20, 1988, in Ivers, To Build A Wall, 194.

3. Edwin Meese III, "Interpreting the Constitution," in Interpreting the Constitution: The Debate Over Original Intent, ed., Jack N. Rakove (Boston: Northeastern University Press, 1990), 14.

4. William Brennan, "The Constitution of the United States: Contemporary Ratification," as reprinted in Interpreting the Constitution,23-34.

5. Lawrence M. Friedman, "Mending the Wall," New York Times, October 12, 1986, 30.

6. Levy, The Establishment Clause, 110.

7. Ibid., 61.

8. Ibid., 60.

9. Ibid., 103.

10. John Courtney Murray, as quoted in Levy, 105.

11. Levy, The Establishment Clause, xi.

12. Letter to Samuel Miller, January 23, 1808, as quoted in Thomas Jefferson: Selections, ed. Merrill D. Paterson (New York: Literary Classics of the United States, 1984), 1186.

13. Levy, The Establishment Clause, 94.

14. Ibid., 183.

15. Ibid., 165.

16. Gerard V. Bradley, "Review of The Establishment Clause: Religion and the First Amendment" Journal of Church and State 29 (April 1987): 536.

17. Levy, The Establishment Clause: Religion and the First Amendment 2nd ed. rev. (Chapel Hill: University of North Carolina Press, 1994).

18. Thoms J. Curry, The First Freedoms: Church and State in America to the Passage of the First Amendment (New York: Oxford University Press, 1986).

19. Pfeffer sent Curry a note in support of his position stating that "religious school educators--Orthodox Jewish and Protestant fundamentalists no less than Catholics--must recognize that government finances cannot be received without compromising the religiosity of what is taught in the schools." Leo Pfeffer to Thomas Curry, April 7, 1986, as quoted in Joseph Preville, "Leo Pfeffer and the American Church-State Debate: A Confrontation with Catholicism," Journal of Church and State 33 (1991): 52, Note 61.

20. Douglas Laycock, "Nonpreferential Aid to Religion: A False Claim About Original Intent," William and Mary Law Review 27 (1985-86): 27-89.

21. He said that "for the time being at least strict separationism still lives." Leo Pfeffer, "The Establishment Clause: An Absolutist's Defense," Notre Dame Journal of Law, Ethics & Public Policy 4 (1990): 729. That same year, he acknowledged that "Those defending strict separation recognize that realistically the absolute separation between church and state is not possible." Pfeffer, "The Establishment Clause: The Never-Ending Conflict," An Unsettled Arena: Religion and the Bill of Rights, eds., Ronald G. White, Jr. and Albright G. Zimmernam (Grand Rapids: William B. Eerdmans, 1990), 69.

22. Samuel Walker, In Defense of American Liberties: A History of the ACLU (Oxford: Oxford University Press, 1990), 341.

CHAPTER VI

Constitutional Pluralism and Original Intent

> [W]hen you have eliminated the impossible, whatever remains, however improbable, must be the truth.
>
> Sir Arthur Conan Doyle
> The Complete Sherlock Holmes
> (1930)

A brief survey of the major authors in the absolutist and accommodationist debate over the establishment clause's proper interpretation reveals the difficulty in using history as a legal standard. Each interpretation of the establishment clause has set forth a conflicting version of the past that seems to be equally supported by the historical record. Over the last four decades, each view has uncovered documents that appear to contradict the other's version of American history. The question that remains is: Should the Supreme Court discontinue this form of interpretation?[1]

The absolutist position has the advantage of protecting the American government from excessive entanglement with

religion in which the framers warned against. It is, however, impossible to separate all state and religious interaction because religion is an important part of the American national character. Accommodationist scholars have convincingly shown that the framers advocated some form of aid to religion by their actions in the First Congressional debates, the constitutional changes made by several state legislatures, and the immediate history following the Constitutional Era. To ignore this aspect of history would bypass important American religious and political traditions.

The accommodationist position, however, also suffers from many flaws. First of all, the question arises of how we define religion, and do religions which fail to fit into a specified mold deserve to benefit from this "preferred position." For instance, should the government provide equal aid to religious groups whose practice of animal sacrifice violates animal protection laws or those whose use of controlled substances violate drug laws? Conversely, as Leo Pfeffer argued, the judicial body could establish a Christian definition which would have the effect of sanctioning discrimination against Jews, Moslems, and others. The most important question perhaps is whether

government interaction would heighten or lessen the American religious experience.

Many scholars now maintain that originalism is an unworkable source of constitutional interpretation because the tools for discovering the framers' intent are nonexistent. First of all, it is unclear which historical figures can be designated as the "framers." Are all delegates' views relevant or only a select few? Can the document itself be viewed as expressing the majority's view or does it represent a dominant clique? Does one focus on the Congressional committees that drafted the First Amendment, the members of Congress who approved it, the state legislatures who ratified it, or the general societal attitudes of the era that gave birth to it? And finally, should the views of the Fourteenth Amendment's framers and ratifiers also be considered relevant for their role in shaping the "due process" clause that the Court eventually applied to this area of law?[2]

A second problem, as the absolutist and accommodationist debate highlights, is determining what documents are relevant. Are personal correspondences and unpublished manuscripts as important as official utterances? Should scholars rely on congressional proceedings which have

been edited as the main source for the framers' views? Scholars like Richard Epstein argue that the congressional record is devoid of a clear "intent" for courts to follow. Even if the records were complete, individuals would apply their own interpretation causing chaos in this legal area.[3]

Finally, many argue that the framers could never have anticipated present constitutional issues that have materialized during the twentieth century. To resolve these difficulties, the framers intended the Constitution to evolve over time. Since many of the framers were lawyers educated in the British common law tradition, they expected the Constitution to be interpreted to apply to changing circumstances using current societal assumptions. From their own experiences of a revolution from the mother country, they recognized that they could never write laws that would cover future problems.[4] An example of this appeared when Madison signed the National Bank into law twenty years after he first opposed it on constitutional grounds because of general societal acceptance.[5]

An alternative to original intent is judicial activism or letting judges use their discretion in cases. Although judicial activism is essential to constitutional evolution, many argue that the framers' views are still necessary to

this area of constitutional law for safeguarding the legitimacy of judicial review. First, it requires judges to begin with a "base line" in constitutional interpretation. Secondly, the framers' intent requires that judges employ "core values" which are ingrained in American traditions. Thirdly, it sets forth the boundaries of argument in legal areas like the establishment clause. Although each position in the absolutist and accommodationist debate offers an alternate interpretation to specific documents, its advocates agree to certain parameters that must be followed. Finally, originalism provides objective rules for judges to follow which free them from incorporating personal attitudes into constitutional law.[6]

Many scholars argue that originalism also safeguards our republican form of government. It protects the framers' vision by defending against absolute majority rule. They contend that the Court's role is to protect the Constitution by going back to historical sources when its provisions fail to provide clear answers to legal anomalies. Moreover, it employs lessons of the past that the framers carried into the Constitutional Congress and the First Congress learned by decades of struggle and centuries of religious conflict.[7]

Perhaps the most important reason for staying with

original intent is because it has become a well-established precedent since *Everson*. This mode of interpretation was firmly set by *Engle v. Vitale* when Justice Hugo Black wrote that the framers "knew the anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government's stamp of approval."[8] Sympathetic accommodationist judges like Warren Burger and William Rehnquist have also based their decisions on the historical record. Even William Brennan, an adversary of original intent, supported this view in such cases as *Murray v. Curlette* and *Abington v. Schemmp*.[9] For these reasons, originalism remains an important resource in establishment clause interpretation.

So what is a proper standard for legal interpretation? University of Kentucky Law School Professor John T. Valauri has offered a solution to the present establishment clause conundrum. He believes that the problem with the present theory is that it requires its advocates to give their loyalties to one position over another without considering the important aspects of the other interpretation. Instead, he argues that scholars should take the middle ground, using elements from both positions that conform to a case's particular requirements. This would eliminate the need to

search for absolute answers to constitutional disputes.[10]

The search for this middle ground is likely to continue as is the debate between absolutists and accommodationists. Constitutional commitments, like religious beliefs, allow for only limited compromise, and the historical record is unlikely to provide conclusive answers. Clearly, the Constitution's framers believed that judges should apply its provisions to current problems. Evidence suggests that they supported aid to religion in a moderate form while warning against the abuses that could arise from too much interaction. It was also probably their intent to leave many cases to judicial discretion. So future judges will pick and choose between the absolutist and accommodationist positions much as they have in the past, but it is doubtful that they will ever solve the dilemma of establishment clause interpretation.

Notes

1. The present attack on original intent began with Paul Brest's "The Misconceived Quest for the Original Understanding" which first appeared in Baylor University Law Review in 1980. Unlike earlier criticism, he maintained that the historical record was hopelessly flawed. This position was partially adopted by second generation absolutists.(See chapter five) Paul Brest, "The Misconceived Quest for the Original Understanding," reprinted in Interpreting the Constitution: The Debate over Original Intent, ed. Jack N. Rakove (Boston: Northeastern University Press, 1990): 227-263. One of his most influential disciples was H. Jefferson Powell who wrote the important article, "The Original Understanding of Original Intent," reprinted in Ibid., 53-116.

2. Brest, 234-236.

3. Brest, 229-203.

4. Powell, 58-61.

5. Powell, 68-69.

6. Frank Guiluzza, "The Practical Perils of an Original Intent-Based Philosophy: Originalism and the Church-State Test Case," Drake Law Review 42 (1993): 349.

7. See Earl Maltz, "Foreword: The Appeal of Originalism," Utah Law Review 773 (1987): 773-805.

8. *Engel v. Vitale*, 370 U.S. 421 (1962), 435, ft. 21.

9. *Abington School District v. Schempp*, 374 U.S. 203 (1963), 237-240 (Brennan, J. Concurring).

10. John T. Valauri, "The Concept of Neutrality in Establishment Clause Doctrine," University of Pittsburgh Law Review 48(Fall 1986): 83-151.

Bibliography

Absolutist Literature

Brant, Irving. James Madison: The Father of the Constitution 1787-1800. vol. 3. New York: Bobbs-Merril, 1950.

Curry, Thomas J. The First Freedoms: Church and State in America to the Passage of the First Amendment. New York: Oxford University Press, 1986.

Gunn, T. Jeremy. A Standard for Repair: The Establishment Clause, Equality, and Natural Rights. New York: Garland Publishing, 1992.

Levy, Leonard W. The Establishment Clause: Religion and the First Amendment. New York: Macmillan, 1986.

_____. The Establishment Clause: Relgion and the First Amendment. 2nd ed., rev. Chapel Hill: University of North Carolina Press, 1994.

Pfeffer, Leo. "Amici in Church-State Litigation." Law and Contemporary Problems 44 (1981): 83-110.

_____. "An Autobiographical Sketch," in Religion and the State: Essays in Honor of Leo Pfeffer, ed. James E. Wood, Jr. Waco: Baylor University Press, 1985, 487-534.

_____. Church, State, and Freedom. Boston: Beacon Press, 1953.

_____. "Church and State: Something Less Than Separation." The University of Chicago Law Review 19 (Autumn 1951): 1-21.

_____. "The Establishment Clause: An Absolutist's Defense." Notre Dame Journal of Law, Ethics & Public Policy 4 (Fall-Winter 1990): 699-729.

_____. "The Establishment Clause: The Never-Ending Conflict." An Unsettled Arena: Religion and the Bill of Rights, eds. Ronald G. White, Jr. and Albright G. Zimmerman. Grand Rapids: William B. Eerdmans, 1990, 69-91.

_____. "No Law Respecting An Establishment of Religion." Buffalo Law Review 2 (1952-1953): 225-241.

_____. "Review of the Garden and the Wilderness: Religion and Government in American Constitutional History, by Mark DeWolfe Howe." Political Science Quarterly 81 (December 1966): 655-656.

Stokes, Anson. Church and State in the Uniited States. 3 vols. New York: Harper, 1950.

Stokes, Anson and Leo Pfeffer. Church and State in the United States. New York: Harper and Row, 1964.

Tinling, Marion. "Thomas Lloyd's Reports of the First Federal Congress." William and Mary Quarterly, third ser. (XVIII)(October 1961): 530-38.

Accommodationist Literature

Antieau, Chester James, Arthur T. Downey, and Edward C. Roberts. Freedom From Federal Establishment: Formation and Early History of the First Amendment Religious Clauses. Milwaukee: Bruce, 1964.

Bradley, Gerard V. Church-State Relationships in America. New York: Greenwood Press, 1987.

Cord, Robert L. "Church-State Separation: Restoring the 'No Preference' Doctrine of the First Amendment." Harvard Journal of Law & Public Policy 9 (Winter 1986): 129-172.

_____. "Founding Intentions and the Establishment Clause: Harmonizing Accommodation and Separation." Harvard Journal of Law and Public Policy 10 (Winter 1987): 47-52.

_____. "Interpreting the Establishment Clause of the First Amendment: 'A Non-Absolutist' Approach." Notre Dame Journal of Law & Public Policy 4 (Fall-Winter 1990): 731-747.

_____. "Original Intent jurisprudence and Madison's 'Detached Memoranda.'" Benchmark 3 (January-April 1987): 79-85.

_____. Separation of Church and State: Historical Fact and Current Fiction. New York: Lambeth Press, 1982.

Ball, Howard and Robert L. Cord. "The Separation of Church and State: A Debate." Utah Law Review 4 (Fall 1987): 895-925.

Howe, Mark De Wolfe. The Garden and the Wilderness: Religion and Government in American Constitutional History. Chicago: University of Chicago Press, 1965.

Kruse, Clifton. "The Historical Meaning and Judicial Construction of the Establishment of Religion Clause of the First Amendment." Washburn Law Journal 2 (Winter 1962): 65-141.

Malbin, Michael J. Religion and Politics: The Intentions of the Authors of the First Amendment. Washington: American Enterprise Institute for Public Policy Research, 1978.

Murray, John Courtney. We Hold These Truths: Catholic Reflections on the American Proposition. New York: Steed and Ward, 1960.

Neuhaus, Richard John. "Contending for the Future: Overcoming the Pfefferian Inversion." The Journal of Law and Religion 8 (Winter 1986): 123-139.

_____. The Naked Public Square: Religion and Democracy in America. Grand Rapids: William B. Eerdmans, 1975.

O'Neill, James M. "Nonpreferential Aid to Religion Is Not An Establishment of Religion." Buffalo Law Review 2 (1952-1953): 242-266.

_____. Religion and Education under the Constitution. New York: Harper and Row, 1949.

Van Patten, Jonathan K. "Standing in the Need of Prayer?: The Supreme Court on James Madison and Religious Liberty." Benchmark 3 (January-April 1987): 59-69.

Other Literature

Alley, Robert S. ed. James Madison On Religious Liberty. Buffalo: Prometheus, 1985.

Ball, Howard and Philip Cooper. Of Power and Right: Hugo Black, William Douglas, and America's Constitutional Revolution. New York: Oxford University Press, 1992.

Barrett, Laurence I. Gambling with History: Ronald Reagan in the White House. Garden City: Doubleday, 1983.

Beale, Howard K. A History of Freedom of Teaching in American Schools. Report of the Commission on Social Studies of the American Historical Association. New York: Charles Scribner's and Sons, 1941.

Boston, Robert. Why the Religious Right Is Wrong About Separation of Church and State. Buffalo: Prometheus, 1993.

Buckley, Thomas E. Church and State in Revolutionary Virginia. Charlottesville: University Press of Virginia, 1977.

Butt, Freeman R. The American Tradition in Religion and Education. Boston: Beacon Press, 1948.

Carter, Stephen L. The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion. New York: Basic Books, 1993.

Choper, Jesse. Securing Religious Liberty: Principles for Judicial Interpretation of the Religion Clauses. Chicago: University of Chicago Press, 1995.

Drakeman, Donald L. Church-State Constitutional Issues: Making Sense of the Establishment Clause. New York: Greenwood Press, 1991.

Eckenrode, Hamilton J. Separation of Church and State in Virginia. Virginia State Library Report 1910. Richmond: Davis Bottom, Supt. of Public Printing, 1911.

Epstein, Lee and Thomas G. Walker. Constitutional Law for a Changing America: Rights, Liberties, and Justice. Washington, D.C.: Congressional Quarterly Inc., 1995.

Fowler, Robert Booth. Religion and Politics in America. Metuchen: Scarecrow, 1985.

Gedicks, Frederick Mark. The Rhetoric of Church and State Relations: A Critical Analysis of Religion Clause Jurisprudence. Durham: Duke University Press, 1995.

Hammond, Philip E. The Protestant Presence in Twentieth-Century America: Religion and Political Culture. Albany: State University of New York, 1992.

Ivers, Greg. Redefining the First Freedom: The Supreme Court and the Consolidation of State Power. New Brunswick: Transaction Publishers, 1993.

_____. To Build A Wall: American Jews and the Separation of Church and State. Charlottesville: University of Virginia Press, 1995.

Jones, Charles O. "Renominating Ronald Reagan: The Compleat Politician at Work." The American Elections of 1984, ed. Austin Ranney. Durham: Duke University Press, 1985, 66-99.

Katz, Wilber G. Religion and American Constitutions. Evanston: Northwestern University Press, 1963.

Kauper, Paul G. Religion and the Constitution. Baton Rouge: Louisiana State Press, 1964.

Kurland, Philip B. Religion and the Law: Of Church and State and the Supreme Court. Chicago: Aldine Publishing, 1962.

McCoy, Drew R. The Last of the Fathers: James Madision and the Republican Legacy. New York: Cambridge University Press, 1989.

Miller, William Lee. The Business of Next May: James Madison and the Founding. Charlottesville: Univesity of Virginia Press, 1992.

Moehlman, Conrad Henry. The Wall of Separation Between Church and State: An Historical Study of Recent Criticism of the Religion Clause of the First Amendment. Boston: Beacon, 1951.

Morgan, Richard E. Disabling America: The Rights Industry in Our Time. New York: Basic Books, 1984.

_____. The Politics of the Religion Conflict. New York: Pegasus, 1968.

Noonan, John T. The Believer and the Powers that Are: Cases, History, and Other Data Bearing on the Relation of Religion and Government. New York: Macmillian, 1987.

O'Brien, Lee. American Jewish Organizations and Israel. Washington, D.C.: Institute for Palestinian Studies, 1986.

O'Brien, F. William. Justice Reed and the First Amendment: The Religion Clauses. Washington, DC: Georgetown University Press, 1958.

Pierard, Richard V. "Religion and the New Right in the 1980s." in Religion and State: Essays in Honor of Leo Pfeffer, ed. James E. Wood, Jr. Waco: Baylor University Press, 1985, 393-420.

Powell, H. Jefferson. "The Original Understanding of Original Intent." as reprinted in Interpreting the Constitution: The Debate over Original Intent, ed. Jack N. Rakove. Boston: Northeastern University Press, 1990, 53-116.

Reichley, James A. Religion in American Public Life. Washington, D.C.: Brookings Institute, 1985.

Rice, Charles E. The Supreme Court and Public Prayer: The Need for Restraint. New York: Fordham University Press, 1964.

Smith, Rodney K. Public Prayer and the Constitution: A Case Study in Constitutional Interpretation. Wilmington: Scholarly Resources, 1987.

Smith, Steven D. Forordained Failure: The Quest for a Constitutional Principle of Religious Freedom. New York: Oxford University Press, 1995.

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

Sweet, William Warren. The Story of Religions in America. New York: Harper and Brothers, 1930.

Swomley, John M. Religious Liberty and the Secular State: The Constitutional Context. Buffalo: Prometheus, 1987.

Thayer, V. T. The Attack Upon the American Secular State. Boston: Beacon, 1951.

Walker, Samuel. In Defense of American Liberties: A History of the ACLU. New York: Oxford University Press, 1990.

Wolfe, Christopher. The Rise of Modern Judicial Review: From Constitutional Interpretation to Judge-Made Law. New York: Basic Books, 1986.

Legal and Scholarly Articles

Choper, Gregory. "Toward Rebuilding Jefferson's Wall of Separation Between Church and State." Utah Law Review 1 (Winter 1987): 59-78.

Citron, Christine Hyde. "Consistent Inconsistency: Supreme Court Decisions on Public Aid to Private Education." ESC Law and Education Center Footnotes 8 (October 1981): 10-23.

Curry, Patricia E. "James Madison and the Burger Court: Converging Views of Church-State Separation." Indiana Law Journal 56 (Summer 1981): 615-636.

Drakeman, Donald L. "Religion of the Republic: James Madison and the First Amendment." Journal of Church and State 25 (Autumn 1983): 427-445.

Dreisbach, Daniel L. "A New Perspective on Jefferson's Views on Church-State Relations: The Virginia Statute for Establishing Religious Freedom in its Legislative Context." American Journal of Legal History 35 (April 1991): 172-204.

_____. "Thomas Jefferson and Bills Number 82-86 of the Revision of the Laws of Virginia, 1776-1786: New Light on the Jeffersonian Model of Church-State Relations." North Carolina Law Review 69 (November 1990): 159-211.

Eisgruber, Christopher L. "Madison's Wager: Religious Liberty in the Constitutional Order." Northwestern University Law Review 89 (Winter 1995): 347-410.

Esbeck, Carl H. "A Restatement of the Supreme Court's Law of Religious Freedom: Coherence, Conflict, or Chaos?" Notre Dame Law Review 70 (January 1995): 581-650.

_____. "Five Views of Church-State Relations in Contemporary American Thought." Brigham Young University Law Review 2 (Spring 1986): 371-404.

Fellman, David. "How High the Wall of Separation? Pfeffer on Religion and State." American Bar Foundation Research Journal (Winter 1986): 123-129.

Gerber, Scott D. "Original Intent and Its Obligations: Rediscovering the Principles of the American Founding." Hamline Journal of Public Law and Policy 11 (Spring 1990): 1-14.

Gerety, Tom. "The Garden and the Wilderness: Religion and Government in American Constitutional History." Stanford Law Review 38 (January 1986): 595-614.

Gray, Leslie B. "The Doctrine of Original Intent." Inter-Alia 54 (September-October 1989): 11-12.

Gulizza, Frank. "The Practical Perils of an Original Intent-Based Judicial Philosophy: Originalism and the Church-State Test Case." Drake Law Review 42 (Spring 1993): 343-384.

Ignagni, Joseph A. "Explaining and Predicting Supreme Court Decision Making: The Burger Court's Establishment Clause Decisions." Journal of Church and State 36 (Spring 1994): 301-327.

Katz, Wilber B. "Freedom of Religion and State Neutrality." University of Chicago Law Review 20 (1933): 426-440.

Konvitz, Milton R. "Separation of Church and State: The First Freedom." Law and Contemporary Problems 14 (1949): 44-60.

Kurland, Philip B. "The Origins of the Religion Clauses of the Constitution." William and Mary Law Review 27 (1985-1986): 839-861.

Laycock, Douglas. "Formal, Substantive, and Desegregated Neutrality Toward Religion." De Paul Law Review 39 (1990): 993-1018.

_____. "Nonpreferential Aid to Religion: A False Claim About Original Intent." William and Mary Law Review 27 (1985-86): 27-89.

Loewy, Arnold. "Rethinking Governmental Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight." North Carolina Law Review 64 (1986): 1049-1098.

Lofgren, Charles A. "The Original Understanding of Original Intent?" Constitutional Commentary 5 (Winter 1988): 77-113.

Lynch, Joseph M. "Madison's Religious Proposals Judicially Confounded: A Study in the Constitutional Law of Conscience." Seton Hall Law Review 20 (Spring-Summer 1990): 418-477.

McConnell, Michael. "The Orgins and Historical Understandings of Free Exercise of Religion." Harvard Law Review 103 (May 1990): 1410-1517.

McEntegart, B. J. "Twilight of Christians of the Western World." Jurists 7 (January 1947): 45-59.

Miller, Jeremy M. "A Critique of the Reynolds Decision." Western State University Law Review 11 (Spring 1984): 165-198.

Murray, John C. "Law or Prepossessions." Law and Contemporary Problems 14 (1948): 23-43.

Perry, Barbara A. "Justice Hugo Black and the 'Wall of Separation between Church and State." Journal of Church and State 31 (Winter 1989): 55-72.

Preville, Joseph. "Leo Pfeffer and the American Church-State Debate: A Confrontation with Catholicism." Journal of Church and State 33 (1991): 37-53.

"Private Attorney's-General in the Fight for Civil Liberties." Yale Law Journal 58 (1949): 574-598.

Schaver, Frederick. "Slippery Slopes." Ethics 102 (October 1991): 42-65.

Valauri, John T. "The Concept of Neutrality in Establishment Clause Doctrine." University of Pittsburgh Law Review 48 (Fall 1986): 83-151.

_____. "Everson v. Brown: Hermeneutics, Framers' Intent, and the Establishment Clause." Notre Dame Journal of Law, Ethics & Public Policy 4 (Fall-Winter 1990): 661-681.

Wood, James E. Jr. "A Tribute to Leo Pfeffer." Journal of Church and State 35 (Summer 1993): 605-606.

Primary Sources

A Compilation of the Messages and Papers of the Presidents, ed. House and Senate Joint Committee on Printing. Vol. 2. New York: New York Bureau of National Liberties, 1892.

Jefferson, Thomas. The Complete Jefferson: Containing his Writings, Published and Unpublished, Except His Letters, ed. Saul K. Padover. New York: Duell, Sloan & Pearce, 1943.

_____. Thomas Jefferson: Selections, ed. Merrill D. Peterson. New York: Viking, 1984.

Kurland, Philip B. and Ralph Lerner, eds. Amendments I-XIII. vol. 5. The Founders' Constitution. Chicago: University of Chicago Press, 1987.

Reagan, Ronald. The First Term, Vol. I. In Ronald Reagan's Weekly Radio Addresses: The President Speaks to America. comp. Fred L. Israel. Wilmington: Scholarly Resource Inc., 1987.

U.S. Supreme Court. *Doremus v. Board of Education*, 342 U.S. 429 (1952), Brief of the American Jewish Congress, Amicus Curiae.

_____. *McCollum v. Board of Education*, 333 U.S. 203 (1948), Brief of Synagogue Council, Amicus Curiae.

_____. *Wallace v. Jaffree*, 472 U.S. 38 (1985), Brief of the American Civil Liberties Union and the American Jewish Congress, Amicus Curiae.

_____. *Wallace v. Jaffree*, 472 U.S. 38 (1985), Brief of the Center for Judicial Studies, Amicus Curiae.

Veit, Helen, Kenneth R. Bowling, eds. Creating the Bill of Rights: The Documentary Record from the First Federal Congress. Baltimore: John Hopkins University Press, 1991.

Contemprary Literature.

Chemerinsky, Erwin. "On the Shoulders of Giants: Does Original Intent Matter." The Los Angeles Daily Journal, February 20, 1989, 1.

Curry, J.E. "Review of the Garden and the Wilderness: Religion and Government in American Constitutional History, by Mark DeWolfe Howe." Annals of American Academy 366 (July 1966): 164.

Henderson, R.W. "Review of the Garden and the Wilderness: Religion and Government in American Constitutional History, by Mark DeWolfe Howe." Literary Journal 90 (December 1, 1966): 655-656.

"Is America Trying to Bully the Jews?" Christian Century, September 5, 1962, 1057-1058.

Jost, Kenneth. "Meese's 'Original Intent' Wasn't Madison's." Legal Times, September 21, 1987, 23.

Kaufman, Irving R. "No Way to Interpret the Constitution." The New York Times, January 2, 1987, 25.

"Mark Dewolfe Howe Is Dead: Law Professor at Harvard." New York Times, March 1, 1967, 43.

Peterson, M.D. "Review of the Garden and the Wilderness: Religion and Government in American Constitutional History, by Mark DeWolfe Howe." Virginia Quarterly Review 42 (Winter 1986): 131.

Stokes, Anson. "Among Our Basic Liberties." New York Times, September 13, 1953, 37.

"To Our Jewish Friends." America, September 1, 1962, 679-680.

Winn, William. "Church and State: Learning from Jefferson," The Los Angeles Daily Journal (September 15, 1982), 4.

"What's Being Said About Court's Ruling." New York Times, September 17, 1953, 37.

Supreme Court Cases

Abington v. Schemmp, 374 U.S. 203 (1963).

Aguilar v. Felton, 473 U.S. 402 (1985).

Barron v. Baltimore, 7 Peters 243 (1833).

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

Board of Education of the Westside Community Schools v. Mergens, 496 U.S. 226 (1986).

Bradfield v. Roberts, 175 U.S. 291 (1899).

Caroline Products Co. v. United States, 304 U.S. 144 (1938).

Church of the Lukumi Babaly Aye Inc. v. City of Hialeah, 113 S. Ct. 2217 (1993).

Cochman v. Louisiana Board of Education, 281 U.S. 370 (1930).

Committee For Public Education and Religious Liberty v. Regan, 444 U.S. 646 (1980).

County of Allegeny v. ACLU, 492 U.S. 573 (1989).

Davis v. Beason, 133 U.S. 333 (1990).

Doremus v. Board of Education, 5 N.J. 435 (1950).

Edwards v. Aguillard, 107 S. Ct. 2573 (1987).

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

Engle v. Vitale, 82 S.Ct. 1261 (1962).

Essex v. Wolman, 409 U.S. 808 (1972).

Everson v. Board of Education, 67 S. Ct. 504 (1947).

Gitlow v. New York, 268 U.S. 652 (1925).

Grand Rapids School District v. Ball, 473 U.S. 373 (1985).

Hall v. Bradshaw, 450 U.S. 965 (1981).

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

Lamb's Chapel v. Center Moriches Union Free School District, 113 S.Ct. 2141 (1993).

Larkin v. Grendal's Den, 454 U.S. 1140 (1982).

Larson v. Valente, 456 U.S. 229 (1982).

Lee v. Weisman, 112 S. Ct. 2649 (1992).

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

Lynch v. Donnelly, 104 S.Ct. 1355 (1984).

Manuel Enterprise v. Day, 370 U.S. 478 (1962).

Marsh v. Chambers, 103 U.S. 3330 (1983).

McCollum v. Board of Education, 333 U.S. 203 (1948).

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

Mueller v. Allen, 463 U.S. 203 (1962).

Murry v. Curtlette, 374 U.S. 203 (1962).

Palko v. Connecticut, 302 U.S. 319 (1937).

Pierce v. Society of Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925).

Quick Bear v. Leupp, 210 U.S. 50 (1908).

Reynolds v. United States, 98 U.S. 145 (1879).

Roemar v. Maryland Public Works Board, 426 U.S. 736 (1976).

Stone v. Graham, 449 U.S. 39 (1980).

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

Tudor v. Board of Education, 100 A. 2d. 370 (1953).

Village of Scarsdale v. McCreary, 471 U.S. 481 (1986).

Wallace v. Jaffree, 472 U.S. 38 (1985).

Walz v. Tax Commission, 397 U.S. 664 (1970).

Witters v. Washington, 479 U.S. 481 (1986).

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

Unpublished Materials

Gummerson, William Mitchell. "Severing the Gordian Knot: The Search for a Workable Interpretation of the Establishment and Free Exercise Clauses." Ph.D. diss., University of South Carolina, 1993.

Ivers, Gregg. "Should God Bless America? American Jewish Groups in Supreme Court Religion Cases." Ph.D. diss., Emory University, 1989.