R. Freeman Butts

A History and Civics Lesson for All of Us

Current attempts to reinterpret the historic separation of church and state—and involve schools in religion—will negate our constitutional guarantee of religious freedom.

As chairman of the Commission on the Bicentennial of the U.S. Constitution, former Chief Justice Warren E. Burger urges that the occasion provide "a history and civics lesson for all of us." I heartily agree, but the lesson will depend on which version of history you read—and believe.

From May 1982, when President Reagan advocated adoption of a constitutional amendment to permit organized prayer in public schools, Congress has been bitterly divided during the repeated efforts to pass legislation aimed either at amending the Constitution or stripping the Supreme Court and other federal courts of jurisdiction to decide cases about prayers in the public schools. Similar controversies have arisen over efforts of the Reagan administration to promote vouchers and tuition tax credits to give financial aid to parents choosing to send their children to private religious schools.



Newspaper headlines illustrate contrasting attitudes between the 1940s and today about religion in the public schools.

School/Religion Controversies

I would like to remind educators that the present controversies have a long history, and the way we understand that history makes a difference in our policy judgments. A watershed debate occurred, for example, in 1947 when the Supreme Court spelled out the meaning of the part of the First Amendment which reads, "Congress shall make no law respecting an establishment of religion." The occasion was a challenge to a New Jersey law giving tax money to Catholic parents to send their children by bus to parochial schools. The Court split 5–4 in that case, *Everson* v. *Board of Education*, on whether this practice was, in effect, "an establishment of religion" and thus unconstitutional, but there was no disagreement on the principle. Justice Hugo Black wrote for the majority.

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government 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. . . . 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."[1]

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The *Everson* majority accepted this broad principle, but decided, nevertheless, that bus fares were merely welfare aid to parents and children and not aid to the religious schools themselves. The 1948 *McCollum* case prohibited released time for religious instruction in the public schools of Champaign, Illinois, because it violated the *Everson* principle.

These two cases set off a thunderous denunciation of the Supreme Court and calls for impeachment of the justices. They also sent historians of education scurrying to original sources to see how valid this broad and liberal interpretation was.

Establishment Principle

The two books at that time that gave most attention to the establishment principle as it related to education were James M. O'Neill's *Religion and Education Under the Constitution*[2] and my own, *The American Tradition in Religion and Education*.[3] O'Neill found the Court's interpretation appalling; I found it basically true to Madison and the majority of the framers of the First Amendment. My book was cited in 1971 in the concurring opinions of Justices Brennan, Douglas, and Black in *Lemon* v. *Kurtzman*.[4] Chief Justice Burger summarized for a unanimous court the accumulated precedents since *Everson* and listed three tests of constitutional state action in education: a secular purpose; neither advancement nor inhibition of religion; and no excessive government entanglement with religion.

With that decision, I concluded that my views of the framers' intentions had been pretty well accepted: namely, that "an establishment of religion" in the 1780s was "a multiple establishment" whereby public aid could go to several churches, and that this is what the majority of framers, particularly Madison, intended to prohibit in the First Amendment.

Indeed, single religious establishments had existed in nine of the early colonies, but by 1789 when the First Congress drafted the First Amendment, religious diversity had become such a powerful political force that seven states, which included the vast majority of Americans, had either disestablished their churches or had never established any. Only six state constitutions still permitted "an establishment of religion," and all six provided tax funds for several churches, not just one.[5] Naturally, some representatives and senators from those states did not want their multiple establishment threatened by a Bill of Rights in the new federal government. But Madison did.

Madison had prevented just such a multiple establishment in Virginia in 1785 and 1786 and managed instead the passage of Jefferson's powerful Statute for Religious Freedom. In his speech of 8 June 1789, when he introduced his Bill of Rights proposals in the House, he made a double-barreled approach to religous freedom. He proposed (1) to prohibit Congress from establishing religion on a national basis, and (2) to prohibit the states from infringing "equal rights of conscience."

After considerable discussion and some changes of language, the House of Representatives approved both of Madison's proposals and sent them to the Senate. The Senate, however, did not approve the prohibition on the states. Furthermore, a minority in the Senate made three attempts to narrow the wording of the First Amendment to prohibit Congress from establishing a single church or giving preference to one religious sect or denomination. The majority, however, rejected all such attempts to narrow Madison's proposal, and the Senate finally accepted the wording of Madison's conference committee. This was then finally adopted by both houses. Madison's broad and liberal interpretation of the establishment clause as applied to Congress had won.[6]

Neither Madison nor the majority of framers intended for government to disdain religion. They intended that republican government guarantee equal rights of conscience to all persons, but it took some 150 years before Madison's views were applied



R. Freeman Butts, advocate of complete separation of church and state

specifically to the states through the Fourteenth Amendment. That is what the Supreme Court did in *Everson*.

Framers' Intentions Redefined

But today, "a jurisprudence of original intention" has revived the debates of the 1940s and 1950s, expounding much the same views as those of O'Neill namely that "the framers" intended only to prohibit Congress from establishing a single national church, but would permit aid to all religions on a nonpreferential basis and would even permit the states to establish a single church if they wished. These arguments are now being resurrected or reincarnated (to use the secular meaning of those terms) with even more sophisticated scholarship by such authors as Walter Berns of Georgetown University, Michael Malbin of the American Enterprise Institute, and Robert L. Cord of Northeastern University.[7]

Their works have been cited in legal briefs in several state actions and in at least one federal district court decision, while an increasingly vigorous campaign has been launched by conservative members of Congress and the Reagan administration to appeal to the history of "original intention."

These efforts reached a crescendo of confrontation in summer and fall of 1985, following two Supreme Court decisions. In *Wallace* v. *Jaffree* on 4 June 1985, the Court reversed Federal Judge W. Brevard Hand's decision that Alabama's laws providing for prayer in the public schools were, indeed, permissible and did not violate the First Amendment's prohibition against "an establishment of religion." Relying in part on Cord's version of history, Judge Hand argued that the Supreme Court had long erred in its reading of the original intention of the framers of the First Amendment. He said that they intended solely to prevent the federal government from establishing a single national church such as the Church of England; therefore, the Congress could aid all churches if it did not give preference to any one; that a state was free to establish a state religion if it chose to do so and, thus, could require or permit prayers in its public schools.

The Supreme Court reversed this decision (6–3), and Justice John Paul Stevens, writing for the Court, rebuked Judge Hand by referring to his "newly discovered historical evidence" as a "remarkable conclusion" wholly at odds with the firmly established constitutional provision that "the several States have no greater power to restrain the individual freedoms protected by the First Amendment than does the Congress of the United States." Justice Stevens emphasized that the Court had confirmed and endorsed time and time again the principle of incorporation, by which the Fourteenth Amendment imposes the same limitations on the states that it imposes on Congress regarding protection of civil liberties guaranteed by the First Amendment and the original Bill of Rights.[8]

However, the confrontations between these views of history were not over. In his long dissenting opinion in *Jaffree*, Associate Justice William H. Rehnquist, now Chief Justice, reasserted an "accommodationist" view of church and state relations. Relying on O'Neill's and Cord's version of history, he argued that the "wall of separation between church and state" is a metaphor based on bad history and that the *Everson* principle "should be frankly and explicitly abandoned." Justice Byron R. White's dissent also supported such "a basic reconsideration of our precedents."

Soon after, on 1 July 1985, the Supreme Court ruled in *Aguilar* v. *Fen-*

"I found [the Supreme Court's decisions in two watershed cases in the 1940s] basically true to Madison and the majority of the framers of the First Amendment."

ton (5–4) that the practices of New York City and Grand Rapids, Michigan, in sending public school teachers to private religious schools to teach remedial and enhancement programs for disadvantaged children, were also unconstitutional. Justice William J. Brennan, delivering the Court's opinion, cited the *Everson* principle that the state should remain neutral and not become entangled with churches in administering schools. Dissents were written by the Chief Justice and Justices Sandra Day O'Connor, White, and Rehnquist.[9]

These Supreme Court decisions were greeted with some surprise and considerable elation by liberals and with dismay by conservatives. Attorney General Edwin Meese III quickly and forcefully responded on 10 July 1985 in a speech before the American Bar Association. He explicitly criticized the Court's decisions on religion and education as a misreading of history and commended Justice Rehnquist's call for overruling *Everson*. Secretary of Education William Bennett echoed the complaint that the Supreme Court was misreading history. And, then, in October 1985 Justices Brennan and Stevens both gave speeches sharply criticizing the Attorney General's campaign for a "jurisprudence of original intention."

In addition, the White House, the Attorney General, the Justice Department, the Secretary of Education, the former Republican majority of the Senate Judiciary Committee, the new Chief Justice, and the conservative justices of the Supreme Court, by public statements are now ranged against the liberal and centrist members of the Supreme Court and such notable constitutional scholars as Laurence Tribe of Harvard, Herman Schwartz of American University, A. E. Dick Howard of the University of Virginia, and Leonard W. Levy of the Claremont Graduate School. They all appeal to history, but whose version of history do you read—and believe?

All in all, I think it fair to say that the predominant stream of constitutional, legal, and historical scholarship points to the broader, separatist, and secular meaning of the First Amendment against the narrower, cooperationist, or accommodationist meaning. A nonspecialist cannot encompass the vast literature on this subject, but a valuable and readily available source of evidence is the recently published book by Leonard Levy, professor of humanities and chairman of the Claremont University Graduate Faculty of History. He is editor of the *Encyclopedia of the American Constitution* and the author of a dozen books devoted mostly to the Bill of Rights.

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In his book on the First Amendment's establishment clause Levy concludes, and I fully agree, that the meaning of "an establishment of religion" is as follows:

> After the American Revolution seven of the fourteen states that comprised the Union in 1791 authorized establishments of religion by law. Not one state maintained a single or preferential establishment of religion. An establishment of religion meant to those who framed and ratified the First Amendment what it meant in those seven states, and in all seven it meant public support of religion on a nonpreferential basis. It was specifically this support on a nonpreferential basis that the establishment clause of the First Amendment sought to forbid.[10]

Acceptance of a narrow, accommodationist view of the history of the establishment clause must not be allowed to be turned into public policies that serve to increase public support for religious schools in any form: vouchers, tax credits, or aid for extremes of "parental choice." They must not be allowed to increase the role of religion in public schools by organized prayer, teaching of Creationism, censorship of textbooks on the basis of their "secular humanism," or "opting out" of required studies in citizenship on the grounds that they offend any sincerely held religious belief, as ruled by Federal District Judge Thomas Hull in Greeneville, Tennessee, in October 1986.[11]

These practices not only violate good public policy, but they also vitiate the thrust toward separation of church and state which, with minor exceptions, marked the entire careers of Madison and Jefferson. William Lee Miller, professor of religious studies at the University of Virginia, wrote the following succinct summary of their views:

> Did "religious freedom" for Jefferson and Madison extend to atheists? Yes. To agnostics, unbelievers, and pagans? Yes. To heretics and blasphemers and the sacrilegious? Yes. To "the Jew and the Gentile, the Christian and Mohametan, the Hindoo, and infidel of every denomination"? Yes. To people who want freedom *from* religion? Yes. To people who want freedom *against* religion? Yes.
>
> Did this liberty of belief for Jefferson and Madison entail separation of church and state? Yes. A ban on tax aid to religion? Yes. On state help to religion? Yes. Even religion-in-general? Yes. Even if it were extended without any favoritism among religious groups? Yes. The completely voluntary way in religion? Yes.
>
> Did all the founders agree with Jefferson and Madison? Certainly not. Otherwise there wouldn't have been a fight.[12]

The fight not only continues, but seems to be intensifying on many fronts. So, it behooves educators to study these issues in depth, to consider the best historical scholarship available, and to judge present issues of religion and education accordingly.□

1. *Everson* v. *Board of Education*, 330 U.S. 1 (1947). Black was joined by Chief Justice Vinson and Justices Douglas, Murphy, and Reed.

2. James M. O'Neill, *Religion and Education Under the Constitution* (New York: Harper, 1949). O'Neill was chairman of the department of speech at Queens College, New York. See also Wilfrid Parsons, S. J.,

The First Freedom: Considerations on Church and State in the United States (New York: Declan X. McMullen, 1948).

3. R. Freeman Butts, *The American Tradition in Religion and Education* (Boston: Beacon Press, 1950). I was professor of education at Teachers College, Columbia University, teaching courses in the history of education. See O'Neill's review of my book in *America*, 9 September 1950, pp. 579–583. See also Leo Pfeffer, *Church, State, and Freedom* (Boston: Beacon Press, 1953) for views similar to mine.

4. *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). The law struck down in Pennsylvania would have paid part of the salaries of private school teachers of nonreligious subjects.

5. Those six states were Massachusetts, Connecticut, New Hampshire, Maryland, South Carolina, and Georgia.

6. R. Freeman Butts, *Religion, Education, and the First Amendment: The Appeal to History* (Washington, D.C.: People for the American Way, 1985), 35. R. Freeman Butts, "James Madison, the Bill of Rights, and Education," *Teachers College Record* 60, 3 (December 1958): 123–128.

7. Walter Berns, *The First Amendment and the Future of American Democracy* (New York: Basic Books, 1976). 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) with a Foreword by William F. Buckley, Jr.

8. *Wallace* v. *Jaffree*, 105 S.Ct. 2479 (1985).

9. *Aguilar* v. *Felton*, 105 S.Ct. 3232 (1985).

10. Leonard W. Levy, *The Establishment Clause: Religion and the First Amendment* (New York: Macmillan, 1986), p. xvi.

11. *Mozert* v. *Hawkins*, U.S. District Court for Eastern District of Tennessee, 24 October 1986.

12. *The Washington Post National Weekly Edition*, 13 October 1986, pp. 23–24.

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