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This article will deal with the appropriate relationship that must exist between religion and government under our constitutional system. I have not employed the dichotomy "church-state" relations because that terminology is "heavily charged with emotional overtones"[1] from which I hope to escape. The "Lord knows," as we used to say, that if any problem needs an escape hatch from emotion it is this one. Moreover, this dichotomy in reality has little relevance to our situation for instead of one religion or sect we have a hundred or so and in the place of one state we have fifty with a federal government system superimposed over the whole. Finally we operate under a written Constitution which we are obliged to recognize and obey. Nor shall I employ the cliché "a wall of separation" that so many say the Founders built between religion and government in our country. As I read our history no such wall has ever existed. Besides, as Robert Frost points out: "Something there is that doesn't love a wall." As I see it, ours is a unique situation; people of more than three score nationalities, having many basic differences in religious beliefs, have come to our shores and formed our national citizenship. Consequently, when confronted by the challenges of this religious pluralism our freedom in such matters can only be protected, as the Constitution dictates — not by a wall between government and religion — but through a wholesome separation of a concordant nature. Otherwise, we will find ourselves in the midst of religious wars that would be destructive of our being. To me the problem is just that simple.

I.

I begin with a statement of Bishop James A. Pike in his Rosenthal Lectures of 1962 (pp. 82-83), wherein he said:

> The individual is more important than the State. He can last longer, indeed for eternity. Therefore, his development, his ability to *be* himself, to articulate, to

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1. DRINAN, RELIGION, THE COURTS AND PUBLIC POLICY (1963).

> gather others around him and to seek to press his ideas is of the utmost importance. This is all very precious in our American tradition.
>
> Further, in this is the most important factor: the right of each individual to have an overview beyond the State, a stance from which to criticize the State, even when it would appear to be at its best. Therefore, it is in our best tradition when we put up with sore thumbs, rocks in the shoe, bulls in the china shop. We put up with inconvenient people. We recognize the right to be wrong — or what the majority may think is wrong.

There can be no doubt that the majority of our people think that the Court was wrong in upholding the exercise of the right of an atheist to do what she thought right but the public believed wrong in the recent school prayer cases. The Gallup Poll, released only recently, found the public overwhelmingly opposed[2] — almost three to one — to the ruling that "religious exercises in public schools are illegal." Indeed, Bishop Pike publicly opposed the Court's opinion, apparently on policy grounds. On the same day of the Gallup Poll release Evangelist Billy Graham declared that "there might be a huge march on Washington that would dwarf the civil rights march if the U.S. Supreme Court continues its trend toward throwing God and the Bible out of our national life." This statement, too, was apparently based on policy considerations rather than constitutional interpretation since the Evangelist is not a lawyer. Mr. Graham also declared that "Secularism is the fastest growing religion in America" which is reminiscent of a contention made during argument of *Engel v. Vitale,* 370 U.S. 421 (1962).

Let me make clear at the outset that I fully recognize the right of the Bishop, the Evangelist, and any other person, to criticize the action of the Court. As was said in the *New York Times* editorial of September 1, 1963:

> Unlimited public discussion is a primary safeguard of our democracy, even when many of those who are

2. This position was one of policy as revealed by the wording of the question, i.e., "The United States Supreme Court has ruled that no state or local government may require the reading of the Lord's Prayer or Bible verses in public schools. What are your views on this?" Answer: Approve 24%; Disapprove 70%; no opinion 6%. The Washington Post, August 30, 1963, p. A-2.

talking loudest do not know what they are talking about. The decisions of the Supreme Court are written by men on paper, not by gods in letters of fire across the sky. Critics may distort them. But the Court will have to trust the good sense of the people, just as the people trust the good sense of the Court.[3]

In addition, I also recognize the impropriety of Justices discussing opinions and I trust that this article will not be construed as in violation of that precedent. What I say here is by way of what the Court could not say but which needs to be said. The article, therefore, expresses only my own views and nowise reflects those of the Court.

II.

In my opinions for the Court I often clear the atmosphere by separating the wheat of the case from the chaff of the contentions of the parties. In this connection I take as "chaff" any claim that the Court — or for that matter any court to my knowledge — has a tendency "toward throwing God and the Bible out of our national life." One has only to read a few short passages from the opinion of the Court in *Abington School District v. Schempp*, 374 U.S. 203, 213 (1963) to see that this is not true:

> The fact that the Founding Fathers believed devoutly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself. This background is evidenced today in our public life through the continuance in our oaths of office from the Presidency to the Alderman of the final supplication "So help me God." Likewise each House of Congress provides through its Chaplain an opening prayer, and the sessions of this Court are declared open by the crier in a short ceremony, the final phrase of which invokes the grace of God. Again, there are such manifestations in our military forces, where those of our citizens who are under the restrictions of the mili-

3. I trust that the TIMES has no objection to this addendum taken from the 4th Chapter, the 8th Verse of *Philippians*: "Finally, my brethren, whatsoever things are true, whatsoever things are honorable, whatsoever things are just, whatsoever things are pure, whatsoever things are lovely, whatsoever things are of good report; if there be any virtue, and if there be any praise, think on these things."

> tary service wish to engage in voluntary worship. Indeed, only last year an official survey of the country indicated that 64% of our people have church membership . . . while less than 3% profess no religion whatever. . . . It can be truly said, therefore, that today, as in the beginning, our national life reflects a religious people who, in the words of Madison, are "earnestly praying, as . . . in duty bound, that the Supreme Lawgiver of the Universe . . . guide them into every measure which may be worthy of his [blessing. . . .]"

Moreover the final paragraph of the opinion (p. 226) demolishes any such assertions in this language:

> The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the State is firmly committed to a position of neutrality.

Finally, the Court's opinion (p. 225) used this language in pointed reference to the charge of promoting a "religion of secularism":

> It is insisted that unless these religious exercises are permitted a "religion of secularism" is established in the schools. We agree of course that the State may not establish a "religion of secularism" in the sense of affirmatively opposing or showing hostility to religion, thus "preferring those who believe in no religion over those who do believe." . . . We do not agree, however, that this decision in any sense has that effect. . . . *It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistent with the First Amendment.* [Emphasis supplied.]

III.

Perhaps the most difficult matter for some to understand regarding the government-religion problem is why the re-

quired recitation of a few verses of the Bible or the reading of the Lord's Prayer in a public school could reach the proportions of "an establishment of religion," prohibited by the First Amendment. It is, therefore, well for us to examine just how an "establishment" can occur.

The phrase "respecting the establishment of religion" prohibits situations where the church and state are one; where the church may control the state and *vice versa;* and where there is some working arrangement between the two. These, of course, are "pure" establishment cases which run counter to the Amendment; however, the Establishment Clause also precludes religious "exercises" prescribed by the state. This interpretation was placed upon the Amendment in the light of the word "respecting" ("Congress shall pass no law *respecting* an establishment of religion . . ." [emphasis supplied]). In *Everson v. Board of Education,* 330 U.S. 1, 18 (1947), the Court held that "State power is no more to be used so as to handicap religions than it is to favor them." This was confirmed at the next Term in *McCollum v. Board of Education,* 333 U.S. 203 (1948). Whether the "exercise" under scrutiny is a "religious" one is a question of fact to be determined by the courts. Finally, the term includes the furnishing of funds or facilities by the state where the purpose and primary effect is to advance religion. In the eight cases in which the Establishment Clause has been directly considered by the Court in its 173 years, the Court has consistently held that the clause withdrew all legislative power respecting religious belief or the expression thereof. It is significant to note that on this point only one Justice has ever dissented.

In addition, many people do not understand the significance of the last phrase of the First Amendment, known as the "Free Exercise Clause": "Congress shall pass no law . . . prohibiting the free exercise thereof [religion]." This prohibition has also been interpreted many times by the Court. The concensus of these cases is that the clause "recognizes the value of religious training, teaching and observance and, more particularly, the right of every person to freely choose his own course with reference thereto [religion], free of any compulsion from the state. . . . Thus, the two clauses [Establishment and Free Exercise] may overlap." *supra,* at p. 222. The Free Exercise Clause secures the individual's

religious liberty by prohibiting state invasion of that sanctuary. It strips the state of all legislative power in the exertion of any restraint on the individual's free exercise of religion. Under the Free Exercise Clause, as opposed to the Establishment Clause, it is necessary for one seeking redress to show some coercive effect upon the practice of his religion. As was said in *Schempp, supra* at p. 223 "The distinction between the two clauses is apparent — a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended."

Another thing that is confusing to many people is the historical incongruity existing in these interpretations of the Amendment. Two legislative enactments restricting freedom of religion were among the causes for the immigration of our forefathers to America: The Conventicle Act, passed during the reign of Charles II (1665), sought to compel attendance at the Established Church by making it a criminal offense for anyone over 16 years of age to attend other church services; the Text Act, adopted during the same reign, required the making of oaths in support of the established religion.

It is strange that the very men who escaped this religious persecution by coming to America began their career in the new land with intolerance and persecution. The Established Church was set up in a number of the Colonies and taxes were levied in its support. Not until Madison and Jefferson waged an all-out battle in 1784 in Virginia was a law adopted declaring "that any interference by the civil authority with religious opinion is against natural right." The same clause had failed of adoption at the Constitutional Convention. It should be pointed out, however, that several of the states had such clauses in their own constitutions calling for religious freedom. At the meeting of the First Congress (1789) Madison introduced a Bill in the House of Representatives that is reflected in the present First Amendment. It was first rejected by the Senate but later reinstated in the Bill of Rights thereafter adopted by the states.

At the time of the adoption of the First Amendment the Catholics were discriminated against in Pennsylvania and Delaware. The Church of England was officially established in five Colonies and substantially supported in New York and New Jersey. The Congregationalist Church was officially

established in Massachusetts, New Hampshire and Connecticut. By 1833, however, all of the established churches had been abolished and direct state support of religion suspended. It is, therefore, fair to say that in writing the First Amendment the Founders did not have in mind a situation comparable to that which confronts us in the public schools today. Indeed, education was then under private sponsorship, almost altogether controlled by the Protestant sects. Not until Andrew Jackson's day was a strong movement organized to free the public schools of sectarian influence. Some states prohibited the giving of religious instruction by forbidding appropriations therefor. See Moehlman, "The Wall of Separation Between Church and State" 132-135. Other states adopted laws prohibiting the use of sectarian material in the schools. Massachusetts started a new approach in 1827 by prohibiting the purchase of any schoolbooks "calculated to favor any particular religious sect or tenet." 2 Stokes, "Church and State in the United States" 53. Other states quickly followed this example. And so we find that at the time of the adoption of the 14th Amendment no state had an established religion — no state offered religious teaching in the public schools (not including higher education) and most states directly prohibited such instruction.

IV.

A third confusing element in the area of government-church relations is occasioned by the fact that laymen cannot understand why the language of the First Amendment applies to the states. The amendment says that *Congress* shall pass no law; not that the states shall not so do. The answer is found in a series of Supreme Court opinions interpreting the due process clause. Beginning in 1925 with *Gitlow v. New York,* 268 U.S. 652 (1925), the Court assumed "that freedom of speech and of the press . . . which are protected by the First Amendment from abridgement by Congress . . . are among the Fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States" [emphasis supplied]. At p. 666. *Grosjean v. American Press Co.,* 297 U.S. 233, 244 (1936) reaffirmed that freedom of the press is included within the protection of the Fourteenth Amendment. Then came *De Jonge v. Oregon,* 299 U.S. 353, 364 (1937) holding that freedom to assemble is protected

against impairment by the states. *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938) again followed *Gitlow*. And in *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), the Court held through Mr. Justice Roberts:

> The fundamental concept of liberty embodied in that Amendment [Fourteenth] embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws.

Nothing could be clearer or more commanding. This Court has reconsidered the question again and again. In each instance it has approved and followed *Cantwell*.[4] Furthermore, although not referred to by the Court in any of these opinions, there can be no doubt that the draftsmen of the Fourteenth Amendment intended it to embrace individual freedom from state governmental involvement in the affairs of religion just as the Establishment Clause had originally foreclosed action on the part of Congress. The report of the Senate Committee indicated clearly its understanding of the First Amendment:

> If Congress has passed any law, or should pass any law which, fairly construed, has in any degree introduced, or should attempt to introduce, in favor of any church, or ecclesiastical association, or system of religious faith, all or any one of these obnoxious particulars . . . endowment at the public expense, peculiar privileges to its members or disadvantages or penalties upon those who should reject its doctrines or belong to other communions . . . such law would be a "law respecting an establishment of religion" and, therefore, in violation of the Constitution. S. Rep. No. 376, 32d Cong., 2d Sess. 1-2.

In 1868, the year in which the Fourteenth Amendment was ratified, the distinguished Thomas M. Cooley restated

4. Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943); Everson v. Board of Education, 330 U.S. 1, 71-72 (1947); Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203, 210-211 (1948); Zorach v. Clauson, 343 U.S. 306, 313 (1952); McGowan v. Maryland, 366 U.S. 420 (1961); Torcaso v. Watkins, 367 U.S. 488 (1961); Engel v. Vitale, 370 U.S. 421, 434 (1962) and Abington School District v. Schempp, 374 U.S. 203 (1963).

the reach of the Fourteenth Amendment in his "Constitutional Limitations":

> Those things which are not lawful under any of the American constitutions may be stated thus:
>
> 1. Any law respecting an establishment of religion. . . .
>
> 2. Compulsory support, by taxation or otherwise, of religious instruction. Not only is no one denomination to be favored at the expense of the rest, but all support of religious instruction must be entirely voluntary. (1st Ed. pp. 469.)

V.

Having explored the scope of the Establishment and Free Exercise Clauses, we now return to a consideration of the unique pluralistic character of our religious heritage which we mentioned heretofore. In most Western Nations religious pluralism was occasioned by the decay of an existing single religion. However, our social character, being made up of so many immigrating nationalities, has emerged with an even greater divergence of religious thought and habit. We often identify aspects of this religious thought and habit with aspects of our diverse social character, thus creating an illusion of a paradoxical religious showcase in which we appear as "the most religious and still the most secular of Nations." Perhaps this fact throws light upon Mr. Graham's declaration that "secularism" is our "fastest growing religion." There is thought, which expatiates further, that "the contemporary tendency to identify prophetic and critical religion with the prevailing aims and norms of American culture," that is, secular interests, results "in a loss of vitality, direction, and identity, both with respect to our American values and national sense of purpose, as well as affect the creative sense of historical responsibility inherent in our religious heritage."[5] In assessing the value of religious pluralism, Professor Wilber G. Katz in a recent issue of "The Episcopalian Magazine" holds that our society has been drifting steadily for some years toward an unofficial "establishment" of a nonsectarian religion. It has, the Professor finds, no particular creed but places its belief in a God

5. STAHMER, RELIGION AND CONTEMPORARY SOCIETY, INTRODUCTION (1963).

that is pro-American. Its orators relate their opposition to particular practices to the "Un-American" character of the latter and in this connotation enshrine "a national faith" of nonsectarian character. This onus of a lack of patriotism would likely fall, the Professor says, upon adherents of particular religious sects or disbelievers as a whole. He recalls, in support of his thesis, that one of the lawyers in the *Schempp* case argued that "public school recitation of the Lord's Prayer is not a religious act but a mere exercise in civic morality." Professor Katz points out that the "danger is that children might regard all prayer in this light." I would only add from my observation that rather than "a danger" the Professor has uncovered a reality. Young people today do not seem to practice prayer. They have been taught a self-reliance that one can only admire. But their average make-up seems devoid of religious background and training.

I believe, however, that we can safely say that a "national faith" is too far in the offing to be given serious consideration today. Likewise, the effort to draft a non-denominational prayer has been put in limbo. Madison himself undertook it without encouragement or success. See 9 Writings of James Madison [Hunt Edition, 1910] 126. And only recently "a common core" prayer has been declared offensive to several powerful groups, i.e., The National Council of the Churches of Christ, the American Council on Education and others which are influential in the field. See 29 TENN. LAW REVIEW 363, 417 (1962). Also 76 HARVARD LAW REVIEW 25, 51 (1962).

Summing up, our government-religion problem is clearly exemplified by the analogy of Professor Harry Jones who likened it to the Biblical expression of the "Great Authority" who said:

> In my Father's house are many mansions;
> if it were not so I would have told you.

As the Professor points out, "Whatever relations may exist somewhere and hereafter among the residents of these many mansions, they are not always good and cordial neighbors on earth." "Religion and Contemporary Society," *supra*, at p. 157. While this observation needs no documentation one need only point to the Presidential campaign of 1960, the

bombings of synagogues of a few years ago and like occurrences.

To some, such practices as recitation of prayers in school are minor encroachments on the prohibition of the First Amendment. However, to others, these identical practices may seem monstrous because they impinge upon religious beliefs or non-beliefs. It is not just the agnostic or the Unitarian or the Jew who objects to such encroachments; my mail indicates that it runs the whole gamut of denominations. But be this as it may, the fact remains that a "trickling stream" of encroachment today might well be a "raging torrent" of "establishment" tomorrow. History reveals nothing more clearly. In any event, the Court has no choice — whether the encroachment be small or monstrous, the First Amendment prohibits all. The cases of this Court going back a score of years have so held. It is, therefore, in no sense a new constitutional interpretation, but merely the same rule applied to existing factual situations.

Moreover, who can say that the establishment here of a single denomination as our official church is a fantastic dream? Established churches are no phenomena in our present day world. Italy, Spain and Austria have a Confessional church; Sweden and Norway, national ones; Pakistan practices the Muslim faith and Burma the Buddhist; and the Church of England still stands as the "establishment" in that land. While no church is presently seeking official status here, there is keen competition among the various faiths for the souls of men. Furthermore, the halls of Congress and the State Legislatures, as well, witness more and more requests for governmental assistance of some type. Who knows but when such enactments — always the result of public or special interest pressures — may contravene the commands of the Amendment. During President Jefferson's administration there were two instances where he vetoed Acts of Congress, presumedly because he believed them to violate the Amendment.

It is in the light of all of these circumstances and conditions that the courts have forged the rule of wholesome neutrality, which Judge Alphonso Taft enunciated almost a hundred years ago (1870) as the ideal of our people. "The government is neutral," he declared, "and, while protecting

all, it prefers none, and it disparages none." This sage pronunciation by the father of Chief Justice Taft has been written into our cases for over two decades and is now and has been all during that period the law of this land.

Present world conditions make it the more imperative that this sacred right of the individual be fully recognized and equally enforced. It may be, as Bishop Pike says, that in affording this recognition that we must "put up with sore thumbs, rocks in the shoe, bulls in the china shop." So what? Who knows "but there goes I" as a sore thumb, rock in the shoe or bull in the china shop!

As I see it government can maintain this wholesome neutrality — provided, and provided only — that Christian leadership does its part. Rather than continually pressuring government into becoming a promoter of religion, leadership must encourage the people to have hearts to conceive ways to strengthen religion in our private lives, to have understanding to direct the improvement of a religious atmosphere among our people and the courage to execute both. There is no better place to develop religion than in the home, at the church and in the Sunday School. In my day it was the job of the parents and the preachers and Sunday School teachers to inculcate and develop a religious atmosphere among children. What we need is more people doing this and fewer passing the buck onto the public schools. One fledgling prayer leader in the home is worth a dozen parroters in the schoolhouse. As one church trustee, who was born an Episcopalian and for some 39 years has by marriage been a Presbyterian, I stand foursquare on the "Presbyterian Memorial" of June 12, 1776, which was enunciated by much wiser and more religious men than I. It said in part:

> Neither can it be made to appear that the gospel needs any such civil aid; [we] rather conceive that, when our blessed Saviour declares his kingdom is not of this world, he renounces all dependence upon State power, and . . . [we] are persuaded that, if mankind were left in the quiet possession of their unalienable religious privileges, Christianity . . . would . . . flourish in the greatest purity by its own native excellence, and under the all-disposing providence of God.[6]

6. HOWE, CASES ON CHURCH AND STATE IN THE UNITED STATES 5 (1952).