THE UNIVERSITY OF CHICAGO LAW REVIEW

VOLUME 19

AUTUMN 1951

NUMBER 1

CHURCH AND STATE: SOMETHING LESS THAN SEPARATION*.

LEO PFEFFER†

IN 1947, THE UNITED STATES Supreme Court, in *Everson v. Board of Education*,¹ was required to consider the scope and applicability to the states of that portion of the First Amendment to the Constitution which declares: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." The issue in the *Everson* case was the constitutionality of a New Jersey local law which provided for the reimbursement of children's transportation expenses to a Catholic parochial school. The constitutionality of the law was sustained in a five-to-four decision, but both majority and minority agreed that the restriction imposed upon Congress by the First Amendment was incorporated in the Fourteenth as a restriction upon state power, and that the states, no less than Congress, are prohibited from making "any law respecting an establishment of religion." The majority held that the New Jersey law approached "the verge" of the power retained by the states under the "establishment of religion" restriction; the minority contended that the verge had been transgressed.

All the Justices also agreed that the First Amendment was to be given a broad interpretation and that its intent was not merely to prohibit the establishment of a state church but to preclude any governmental aid to religious groups or dogmas. In words which have now become well known, Justice Black, speaking for the Court, said:

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

* This article is based on an address delivered at the Law School of the University of Chicago on May 10, 1951.

† Associate General Counsel, American Jewish Congress.

¹ 330 U.S. 1 (1947).

laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. 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."²

The decision aroused a storm of controversy, particularly along sectarian lines. Catholic spokesmen hailed the decision as a victory for religious liberty,³ while Protestants criticized it as impairing the principle of separation of church and state.⁴ The significance of the Court's interpretation of the First Amendment was overshadowed by the attention which the specific holding of the case attracted. There were only a few who saw that the broad principle on which the Court had agreed was far more important than the majority's ruling that the First Amendment was not violated by the law under attack. One of these few, James M. O'Neill, a professor of speech at Brooklyn College, deemed the Court's definitive announcement of the broad interpretation of the First Amendment as "historically and semantically indefensible" and wrote a book to establish his contention and that the Constitution did not prohibit nonpreferential governmental aid to all religions.⁵

Several months after the *Everson* decision was announced, the Supreme Court was again required to pass upon a state law which had been challenged under the "establishment of religion" clause of the First Amendment. In *McCollum v. Board of Education*,⁶ a system of released time for religious education in operation in the public school system of Champaign, Illinois was attacked as violating the principles announced in the *Everson* case. It was clear that unless these principles were repudiated, the Champaign system could not stand. Counsel for the Champaign Board of Education used the manuscript of O'Neill's book, and urged the Court to reinterpret the Amendment to conform to the O'Neill thesis. The Court, however, was not convinced and, by a vote of eight to one, invalidated the

² *Ibid.*, at 15-16.

³ See, e.g., Murray, *The Court Upholds Religious Freedom, America*, p. 628 (Mar. 8, 1947).

⁴ See, e.g., Editorial, *The Protestants Get a Licking, The Churchman*, p. 4 (Mar. 1, 1947); Dawson, *Separate Church and State Now* 75 (1948).

⁵ O'Neill, *Religion and Education under the Constitution* (1949).

⁶ 333 U.S. 203 (1948).

released time program. In doing so, it made its position clear by quoting at length the *Everson* decision's definitive interpretation of the First Amendment.⁷ The Court held that, in the words of Justice Frankfurter, "[s]eparation means separation, not something less."⁸

THE ATTACK IS LAUNCHED

Although rejected by the Court, the O'Neill thesis found ready acceptance in sectarian circles and marked the basis of an all-out effort to persuade the American people and ultimately the courts that separation does mean something less. The leadership in the attack was taken and has been retained by the Catholic Church. Indeed, it is not unfair to say that the O'Neill thesis is the official position of the Catholic Church; at least it is the position asserted in a statement by the American Hierarchy. The statement, issued on November 20, 1948 through the National Catholic Welfare Conference, declared:

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 [sic] respecting an establishment of religion or forbidding [sic] the free exercise thereof." The meaning is even clearer in the records of the 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 the cooperation between government and religion—which was simply taken for granted in our country at that 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.

If this practical policy be described by the loose metaphor "a wall of separation between Church and State," that term must be understood in a definite and typically American sense. It would be an utter distortion of American history and law to make that practical policy involve the indifference to religion and the exclusion of cooperation between religion and government implied in the term, "separation of Church and State" as it has become the shibboleth of doctrinaire secularism.⁹

It is not surprising that the O'Neill thesis should command the support of the Catholic Church.¹⁰ While dedicated to the principle that the ideal state is the Christian state in which the Catholic faith is the established religion and the only one entitled to governmental recognition and pro-

⁷ Ibid., at 210-11.

⁸ Ibid., at 231.

⁹ N.Y. Times, p. 63, col. 4 (Nov. 21, 1948).

¹⁰ Besides the statement of the Catholic Bishops see Parsons, *The First Freedom* (1948) (Imprimatur Archbishop O'Boyle); articles by Joseph C. Duggan in *Boston Pilot* (official organ of Boston Archdiocese) (Mar. 17, Apr. 3, Apr. 10, 1948); Murray, *Law or Prepossessions?*, 14 *Law & Contemp. Prob.* 23 (1949); Fahy, *Religion, Education and the Supreme Court*, 14 *Law & Contemp. Prob.* 73 (1949).

tection,¹¹ the Church is nevertheless aware that such a system is not likely to be achieved in the United States in the foreseeable future.¹² The position of the Catholic Church is that governmental support of the Church is not merely desirable but morally obligatory. A constitutional interpretation prohibiting the establishment of a specific church by permitting governmental aid to all churches on a non-preferential basis is more acceptable to the Church than a blanket prohibition against governmental aid to all churches.

Support of the narrow interpretation of the First Amendment is by no means limited to Catholics. Professor Edward S. Corwin, a non-Catholic, has ardently urged this interpretation,¹³ and Professor Alexander Meikeljohn, a non-Catholic, has also adopted the narrow interpretation.¹⁴ It remains true, however, that Catholics represent its most assiduous proponents.

The O'Neill thesis has recently received an unusual form of support. On March 30, 1951, United States Attorney-General J. Howard McGrath stated in an address before the National Catholic Educational Association that:

A [constitutional] amendment, which was intended to prevent the creation of an established church, and a phrase in a letter of Thomas Jefferson have been distorted to create, in the words of United States Supreme Court Justice Black . . . "a wall between the church and state which must be kept high and impregnable." . . . If anything, the state and church must not have any fences between them.¹⁵

This cavalier construction of the Constitution by the country's chief law enforcement officer prompted *The Christian Century*, leading Protestant publication of the nation, to call for Mr. McGrath's removal.¹⁶

It is the purpose of this article to assess the validity of the attacks on

¹¹ Ryan and Boland, *Catholic Principles of Politics* 313-21 (1940). "Justice therefore forbids, and reason itself forbids, the State to be godless; or to adopt a line of action which would end in godlessness—namely, to treat the various religions (as they call them) alike, and to bestow upon them promiscuously equal rights and privileges. Since, then, the profession of one religion is necessary in the State, that religion must be professed which alone is true, and which can be recognized without difficulty, especially in Catholic States, because the marks of truth are, as it were, engraven upon it. This religion, therefore, the rulers of the State must preserve and protect, if they would provide—as they should do—with prudence and usefulness for the good of the community." Pope Leo XIII, *Encyclical on Human Liberty*, in *Great Encyclical Letters* 150-51 (1903).

¹² Ryan and Boland, *op. cit.* supra note 11, at 320-21.

¹³ The Supreme Court as National School Board, 14 *Law & Contemp. Prob.* 3 (1949). The article was originally published in 43 *Thought* 665 (1948).

¹⁴ Educational Cooperation between Church and State, 14 *Law & Contemp. Prob.* 61, 69-71 (1949).

¹⁵ N.Y. Times, p. 16, col. 4 (Mar. 31, 1951).

¹⁶ 63 *Christian Century* 451 (1951).

the Supreme Court's twice-asserted conclusion that the objective of the First Amendment was not merely to prohibit the establishment of a single church but to deprive the government of "all power to tax, to support, or otherwise to assist any or all religions,"¹⁷ and to impose upon it a duty "to be a neutral in its relations with groups of religious believers and non-believers."¹⁸ Since the O'Neill thesis rests primarily on historical data, it is that data which will be examined in this article. No effort will be made to present the affirmative arguments in support of the principle of complete separation. They are fully set forth in the Supreme Court decisions in which the O'Neill thesis was considered and rejected. It is sufficient to say here that the writer believes that the overwhelming majority of Americans agree¹⁹ with the Court that "religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere,"²⁰ that the operations of government must be kept "free from pressures in a realm in which pressures are most resisted and where conflicts are most easily and most bitterly engendered,"²¹ and that this view "does not . . . manifest a governmental hostility to religion or religious teachings."²²

THE THESIS STATED

The principal premise of the O'Neill thesis can be divided into the following elements:

1. "Separation of church and state" or "a wall of separation of church and state" is only a "metaphor,"²³ a "figure of speech,"²⁴ a "spurious slogan,"²⁵ or a "shibboleth"²⁶ which is not part of our American tradition or constitutional history. Its promulgation as constitutional law is a recent invention of the *Everson-McCollum* Court.²⁷

¹⁷ *Everson v. Board of Education*, 330 U.S. 1, 11 (1947).

¹⁸ *Ibid.*, at 18.

¹⁹ See, e.g., Freeman and Bronheim, In the Democratic Tradition, 18 Congress Weekly 4 (1951) for an account of the overwhelming vote in the democratically convened Mid-Century White House Conference on Children and Youth which defeated every carefully planned attempt by sectarian groups to endorse religious instruction in connection with public education.

²⁰ *McCollum v. Board of Education*, 333 U.S. 203, 212 (1948).

²¹ *Ibid.*, at 216.

²² *Ibid.*, at 211.

²³ O'Neill, op. cit. supra note 5, at 82.

²⁴ Fahy, op. cit. supra note 10, at 83.

²⁵ O'Neill, op. cit. supra note 5, at 72.

²⁶ Statement of Catholic Bishops, supra p. 3.

²⁷ O'Neill, op. cit. supra note 5, at 4, 152, 197; Corwin, op. cit. supra note 13, at 9; Parsons, op. cit. supra note 10, at 24, 28, 49, 168, 171; Brief for Appellees at 27, *McCollum v. Board of Education*, 333 U.S. 203 (1945) (cited hereafter as *McCollum* Brief).

2. The First Amendment was not intended to divorce religion from government or to impose governmental neutrality between believers and disbelievers but only to meet in a practical manner the problems raised by a multiplicity of competing sects by prohibiting Congress from establishing any one sect, i.e., granting it "monopolistic recognition" or conferring upon it a preferred or privileged status.²⁸

3. There was no intent on the part of those who drafted and adopted the First Amendment to bar the general support of religion by the federal government, and the First Amendment, therefore, does not prohibit the nonpreferential expenditure for religious purposes of funds raised by general taxation.²⁹

4. The First Amendment does bar preferential treatment of a particular religion or sect short of according it monopolistic recognition of formal dominant status. It was for that reason that President Madison vetoed an act seeking to incorporate the Protestant Episcopal Church in the District of Columbia and another act granting some federally owned land in Mississippi to a Baptist church.³⁰

Construing the Amendment to bar preferential treatment short of establishment is implicit in the recent innovation claim. In 1899, the Supreme Court in *Bradfield v. Roberts*³¹ distinguished between a hospital corporation and the order of nuns which controlled it, and held that a Congressional appropriation to the corporation did not violate the First Amendment. In 1908, the Court in *Quick Bear v. Leupp*³² distinguished between appropriations from governmental funds for the support of reli-

²⁸ O'Neill, op. cit. supra note 5, at 56, 109, and passim; McCollum Brief, at 43, 86, 93, 159; Corwin, op. cit. supra note 13, at 10, 13, 20; Murray, op. cit. supra note 10, at 41; Meikeljohn, op. cit. supra note 14, at 70-71; Fahy, op. cit. supra note 10, at 74, 80-84; Parsons, op. cit. supra note 10, at 23, 28, 42, 145.

²⁹ O'Neill, op. cit. supra note 5, at 58, 74-76; Parsons, op. cit. supra note 10, at 48, 145.

³⁰ O'Neill, op. cit. supra note 5, at 100-101. See also McCollum Brief, at 86: "[T]he action taken by the defendant Board of Education is clearly not within the proscription of the First Amendment. No preference between religions or between sects has been pointed out, and the undisputed testimony is that the same plan is open to all . . ."; and at 93 it was said that "unless there is a preferment of one or more sects or religions over other sects or religions, a law, whether or not it involves a tax or an appropriation, is not a law 'respecting an establishment of religion.'" Corwin, op. cit. supra note 13, at 20: "The historical record shows beyond peradventure that the core idea of 'an establishment of religion' comprises the idea of *preference*; and that any act of public authority favorable to religion cannot, without falsification of history, be brought under the ban of that phrase." Parsons, op. cit. supra note 10, at 28: "If the federal government had any favors for religious groups, these were to be available to them all." Fahy, op. cit. supra note 10, at 81: "Government cooperation with or encouragement of religion, without preference and without interference with individual freedom, has also found expression in exemptions granted to ministers under laws relating to military service."

³¹ 175 U.S. 291 (1891).

³² 210 U.S. 50 (1908).

gious education and appropriations from funds held in trust by the government for the benefit of Indian tribes, and held that such trust funds could be expended for the upkeep of Catholic mission schools at the direction of the Indian beneficial owners. These decisions would have no meaning unless a grant of federal funds to an order of nuns for religious purposes or to Indian mission schools would have been unconstitutional.

IMPLICATIONS OF THE THESIS

Before considering the bases of the O'Neill thesis, its implications should be clearly understood. In the first place, if the "establishment" clause is limited to requiring neutrality among sects, but not as between believers and non-believers, the clause forbidding laws "prohibiting the free exercise" of religion likewise protects only believers. In other words, the Constitution does not guarantee freedom of non-belief.

Father Parsons recognizes this:

As for those who profess no religion, or who repudiate religion, it is difficult to conceive how they can appeal to the First Amendment, since this document was solely concerned with religion itself, not its denial. By its very nature as regards what it says about religion, they are outside its ken.³³

This concept has been put in the form of a maxim which has gained wide acceptance in sectarian circles,³⁴ and has been adopted by at least two courts, which have stated that the First Amendment guarantees "freedom of religion, not freedom from religion."³⁵ Since about half of our population today are not members of any church,³⁶ there is a real danger that under the O'Neill thesis a substantial part of the American people may be adjudged beyond the pale of constitutional protection in respect to religious matters.

Even if it is assumed that atheists, agnostics and other persons without religious affiliations should not be accorded the benefits of the First Amendment, the doctrine that only adherents of religion are constitutionally protected requires government officials to determine what constitutes religion and who are believers. One of the reasons James Madison in 1784 opposed the Virginia Bill Establishing a Provision for Teachers of the Christian Religion was that "it would devolve upon the courts of law to determine what constitutes Christianity, and thus, amid the great diversity of creeds and sects, to set up by their fiat a standard of orthodoxy on

³³ Parsons, *op. cit.* supra note 10, at 79.

³⁴ See, e.g., *ibid.*, at 136.

³⁵ *Zorach v. Clauson*, 99 N.Y.S. 2d 339, 344 (1950); *Gordon v. Board of Education*, 78 Cal. App. 2d 464 (1947).

³⁶ U.S. Dep't of Commerce, *Census of Religious Bodies* 17 (1936).

the one hand and of heresy on the other, which would be destructive of the rights of private conscience."³⁷ Under the O'Neill thesis, the courts would be required to determine only what constitutes "religion" rather than what constitutes Christianity. But when it is remembered that in 1784 Christianity and religion were, as a practical matter, synonymous in Virginia,³⁸ it is obvious that Madison's fears are still relevant. The parallel today would be a statute granting federal or state aid to all teachers of religion. Such a statute would require courts and administrators to determine whether Theosophists, Ethical Culturists, Unitarians, deists, or Jehovah's Witnesses were qualified for aid.³⁹

Acceptance of the O'Neill thesis would permit direct use of federal funds and property for religious purposes, so long as a practicable method could be evolved for the nonpreferential distribution of these benefits among the various sectarian groups. While state constitutions generally prohibit use of public funds for sectarian purposes,⁴⁰ any state could, without violating the federal Constitution, eliminate or amend the state constitutional prohibition and open the treasury to churches seeking to use public funds to spread their sectarian beliefs.

In 1930, the Supreme Court ruled that a state could constitutionally provide parochial schools with secular text books, since the children, and not the parochial school, were the direct beneficiaries of the state's bounty.⁴¹ Similarly, in the *Everson* case, the majority of the court allowed New Jersey to expend public funds to transport children to parochial schools because secular subjects were also taught there.

Under the O'Neill thesis, the limitations implicit in these decisions would be abandoned. Public funds could be used to benefit sectarian schools directly, to pay for their books, sectarian as well as secular, to transport children to schools in which only religious subjects were taught and to pay the salaries of the teachers in such schools.

³⁷ 1 Rives, *History of the Life and Times of James Madison* 604 (2d ed., 1859).

³⁸ There probably were not a half-dozen Jewish families in Virginia in 1784. See U.S. Bureau of Census, *A Century of Population Growth, 1790-1900*, (1909) at 116; Goodman, *American Overture*, 148-49 (1947).

³⁹ See, e.g., Murray, *op. cit.* supra note 10, at 29 n. 29. "Justice Frankfurter in the *McColum* case says that 'the deep religious feeling of James Madison is stamped upon the Remonstrance.' *McColum v. Board of Education*, 333 U.S. 203, 216 (1948). Possibly; it depends on whether one can attribute depth of religious feeling to one steeped in eighteenth-century deism, which I personally consider a rather superficial and conventional form of religion. At all events, it ought to be added that likewise stamped on the Remonstrance is Madison's radically individualistic concept of religion, that is today quite passé."

⁴⁰ *Catholic Schools and Public Money*, 50 *Yale L.J.* 917 (1941); *National Education Association Research Bulletin, The State and Sectarian Education* 11 (1946).

⁴¹ *Cochran v. Louisiana State Board of Education*, 281 U.S. 370 (1930).

Far more important, the doctrine threatens the secular nature of the American public school by depriving it of federal constitutional protection against compulsory religious instruction. Consequences as grave as these should not be accepted without careful consideration of the premises upon which they are based.

THE "ESTABLISHMENT" CLAUSE AS A RESTRICTION ON STATE ACTION

Before we consider the validity of the main aspect of the O'Neill thesis, something should be said of a secondary point. Counsel for the appellees in the *McCullum* case, arguing on the basis of O'Neill's research, urged the Court to reverse its holding in the *Everson* case that the Fourteenth Amendment impliedly incorporates the "establishment of religion" clause of the First as a restriction on state action.⁴² In this they were no more successful than in their plea for a reinterpretation of the "establishment" clause. However, as in the latter case, they found considerable acceptance outside the Court.

The extent, if any, to which the Fourteenth Amendment incorporates as restraints on the states the guarantees of the Bill of Rights as contained in the first eight amendments has been the subject of much controversy⁴³ which cannot be adequately treated here. It is well, however, to point out that while O'Neill denies that any part of the First Amendment is incorporated in the Fourteenth,⁴⁴ other proponents of the narrow interpretation argue that the clause barring laws "prohibiting the free exercise of religion" is incorporated in the Fourteenth Amendment.⁴⁵

The dichotomy is thus expressed by Corwin:

... the Fourteenth Amendment does not authorize the Court to substitute the word "state" for "Congress" in the ban imposed by the First Amendment on "laws respecting an establishment of religion." *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. . . .⁴⁶

Others have expressed the dichotomy in terms of means and end. Father Murray states it this way:

⁴² *McCullum* Brief, at 101-102.

⁴³ See, e.g., *Adamson v. California*, 332 U.S. 46 (1947); Flack, *The Adoption of the Fourteenth Amendment* (1908); Warren, *The New Liberty Under the Fourteenth Amendment*, 39 *Harv. L. Rev.* 431 (1925); Green, *Liberty Under the Fourteenth Amendment*, 27 *Wash. U.L.Q.* 497 (1942); Meyer, *The Blaine Amendment and the Bill of Rights*, 64 *Harv. L. Rev.* 939 (1951).

⁴⁴ O'Neill, *op. cit. supra* note 5, at 124-26.

⁴⁵ *McCullum* Brief, at 109; Meikeljohn, *op. cit. supra* note 14, at 70; Parsons, *op. cit. supra* note 10, at 20-73; Corwin, *op. cit. supra* note 13, at 19.

⁴⁶ Corwin, *op. cit. supra* note 13, at 19.

... separation of church and state ... put in its proper grounds ... in its true relation to the free exercise of religion ... [is] instrumental to freedom, therefore ... a relative, not an absolute in its own right.⁴⁷

Nothing in American constitutional history or tradition justifies this apportionment of values or indeed the dichotomy itself. The draftsmen of the First Amendment regarded freedom of religion as incompatible with an establishment. Whatever may have been the experience in other countries,⁴⁸ the struggle in the United States for religious liberty and for disestablishment were parts of the same evolutionary process which culminated in the First Amendment.

Roger Williams opposed an "enforced uniformity of religion" because it "confounds the Civil and Religious"⁴⁹ and Madison fought a bill establishing a provision for teachers of the Christian religion because it violated the "fundamental and undeniable truth 'that religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence.'"⁵⁰ The proposed versions of the First Amendment submitted by the states and considered by Congress before adopting the Amendment in its final form⁵¹ all combined both aspects of the dual prohibition without any indication that one was superior and the other subordinate.⁵² In 1878, shortly after the Fourteenth Amendment was adopted, the Supreme Court first stated judicially that the First Amendment was intended to erect "a wall of separation between church and State," in a case in which a statute proscribing bigamy was attacked as an infringement of religious liberty.⁵³ In the words of Justice Rutledge in his dissent in the *Everson* case, "'Establishment' and 'free exercise' were correlative and coextensive ideas, representing only different facets of the single great and fundamental freedom."⁵⁴ Whatever consider-

⁴⁷ Murray, *op. cit.* supra note 10, at 32. See also Keehn, *Church-State Relations, Social Action*, p. 31 (Nov. 15, 1948), cited by Murray.

⁴⁸ Corwin points out that contemporary England manages to maintain as complete freedom of religion as exists in this country alongside an establishment. This, however, begs the question. It assumes that Jefferson, for instance, who drafted the Virginia Bill for Establishing Religious Freedom in order to assure that "no man shall be compelled to ... support any religious worship place, or ministry whatsoever," would agree that the English taxpayer enjoys "complete freedom of religion" even though he is required to support the Anglican establishment.

⁴⁹ The Bloody Tenet of Persecution, in Blau, *Cornerstones of Religious Freedom in America* 37 (1949).

⁵⁰ Memorial and Remonstrance, the Virginia Bill Establishing Provision for Teachers of the Christian Religion, in Blau, *ibid.*, at 81.

⁵¹ O'Neill and his disciples make much of these. See *infra* p. 17.

⁵² The several versions are set forth in Parsons, *op. cit.* supra note 10, c. 3.

⁵³ *Reynolds v. United States*, 98 U.S. 145, 164 (1878).

⁵⁴ Dissent in *Everson v. Board of Education*, 330 U.S. 1, 40 (1946).

ations require incorporation of the "free exercise" clause into the Fourteenth Amendment apply equally to the "establishment" clause.

THE ARGUMENTS FOR THE THESIS

The various arguments presented by the O'Neill school to show that the sole effect of the First and Fourteenth Amendments was to prohibit preferential governmental support of religion may now be considered.

1. *Separation, a recent invention.* The O'Neill school argues that the First Amendment does not mention "separation of church and state"; the term is nowhere to be found in the Constitution, but is a mere figure of speech, coined by Jefferson in 1802 in a letter to the Danbury Baptist Association, which was not intended as a characterization of the First Amendment or the American constitutional tradition. Elevation of Jefferson's phrase to the status of a constitutional principle is a recent invention of the *Everson-McCollum* Court.⁵⁵

At first glance there would seem to be little value in much of the argument around the phrase "separation of church and state." No magic attaches to the particular verbalization of an underlying principle or concept. Indeed, the concept at issue here is more accurately expressed in Madison's phrase "separation between Religion and Government,"⁵⁶ or in the popular maxim "religion is a private matter." Nevertheless, the O'Neill school has so strenuously urged that identification of the phrase "separation of church and state" with the Constitution is a recent invention of the *Everson-McCollum* Court that it merits consideration.

It would unduly extend the length of this discussion to set forth even a fraction of the numerous references to the "constitutional principle" or "American tradition" of separation of church and state. Justice Frankfurter, in his concurring opinion in the *McCollum* case, mentioned President Grant's advice, "Keep the church and state forever separated"; Elihu Root referred to "the great American principle of eternal separation between church and state"; and Justice Jeremiah S. Black made the statement that the constitutional fathers "built up a wall of complete and perfect partition between" church and state.⁵⁷ Other representative instances might be added.

Ten years after the First Amendment was adopted, Thomas Jefferson referred, in his letter to the Danbury Baptists, to "that act of the whole

⁵⁵ O'Neill, *op. cit.* supra note 5, at 81-83; Parsons, *op. cit.* supra note 10, at 154; Corwin, *op. cit.* supra note 13, at 14; Fahy, *op. cit.* supra note 10, at 83, 90.

⁵⁶ Fleet, Madison's "Detached Memoranda," 3 William & Mary Quarterly 534, 555 (3d ser., 1946).

⁵⁷ 333 U.S. 203, 218-19 (1948).

American people which declared that their legislators 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."⁵⁸ Jefferson had long waited for a proper occasion to express the views contained in this letter and had, in fact, consulted his Attorney General, Levi Lincoln, in drafting it.⁵⁹

Madison, principal draftsman of the First Amendment, stated that "[s]trongly guarded . . . is the separation between Religion and Government in the Constitution of the United States."⁶⁰ A unanimous Supreme Court in 1878, seventy years before the *Everson-McCollum* decisions, introduced the Jefferson metaphor into a Court opinion, citing it as "an authoritative declaration of the scope and effect of the Amendment."⁶¹ This does not bear out a recent invention theory of separation. Indeed, if identification of the metaphor of separation with the Constitution is an error, the Catholic Church shares in the error, for the most authoritative Catholic text on Church and State in America, published four years before the *Everson* decision, stated: "Our Federal and State constitutions forbid the legal establishment of any form of religion thereby ensuring the separation of Church and State. . . ."⁶²

Nor is the proposition that the Constitution declares religion to be outside the jurisdiction of the Government and requires neutrality between religious belief and disbelief a recent invention. More than half a century before the *Everson* decision, Philip Schaff in his classic work remarked that "the state must be equally just to all forms of belief and unbelief which do not endanger the public safety."⁶³

Francis Lieber, an authority cited by the Supreme Court in *Reynolds v. United States*,⁶⁴ in his work *Civil Liberty and Self-Government*, published in 1852, stated:

It belongs to American liberty to separate entirely that institution which has for its object the support and diffusion of religion from the political government. We have seen already what our constitution says on this point. . . . No worship shall be interfered with, either directly by persecution, or indirectly by disqualifying members of certain sects, or by favoring one sect above others; and no church shall be declared the

⁵⁸ The letter appears in full in O'Neill, op. cit. supra note 5, at 286.

⁵⁹ Butts, *American Tradition in Religion and Education* 93-94 (1950).

⁶⁰ Fleet, op. cit. supra note 56, at 555.

⁶¹ *Reynolds v. United States*, 98 U.S. 145, 163-64 (1878).

⁶² Ryan and Boland, *Catholic Principles of Politics* 312 (1940).

⁶³ *Church and State in the United States* 10 (1888).

⁶⁴ 98 U.S. 145, 166 (1878).

church of the state, or the established church; *nor shall the people be taxed by the government to support the clergy of all churches*, as in the case in France.⁶⁵

James Bryce, in 1889, said:

It is accepted as an axiom by all Americans that civil power ought to be not only neutral and impartial as between different forms of faith, but ought to leave these matters entirely on one side, regarding them no more than it regards the artistic or literary pursuits of the citizens. There seem to be no two opinions on this subject in the United States.⁶⁶

Four years before the *Everson* decision, Charles A. Beard wrote in language anticipatory of the *Everson-McCollum* paragraph interpreting the First Amendment:⁶⁷

Congress can make no law respecting an establishment of religion. This means that Congress cannot adopt any form of religion as the national religion. It cannot set up one church as the national church, establish its creed, lay taxes generally to support it, compel people to attend it, and punish them for nonattendance. Nor can Congress any more vote money for the support of all churches than it can establish one of them as a national church. That would be a form of establishment.

The Constitution is a purely secular document.

The Constitution does not confer upon the Federal Government any power whatever to deal with religion in any form or manner. . . .

The First Amendment merely confirms the intentions of the framers.⁶⁸

2. *The semantic argument.* The O'Neill school argues that the term, "establishment of religion," as used in the First Amendment, had and has a well defined meaning: "A single church or religion enjoying formal, legal, official monopolistic privilege through a union with the government of the state."⁶⁹ The Encyclopedia Britannica is quoted as defining "establishment as of the nature of a monopoly."⁷⁰ It is urged that if the framers

⁶⁵ Quoted in 3 Stokes, Church and State in the United States 716-17 (1950) (emphasis added).

⁶⁶ 2 The American Commonwealth 766 (3d ed., 1894).

⁶⁷ See pp. 1-2 supra.

⁶⁸ Beard, The Republic 165, 166, 170 (1944).

⁶⁹ O'Neill, op. cit. supra note 5, at 204. Substantially similar definitions are found *ibid.*, at 56; Corwin, op. cit. supra note 13, at 13; Catholic Bishops' Statement, p. 3 supra; Parsons, op. cit. supra note 10, at 46. McCollum Brief, at 57; O'Neill, op. cit. supra note 5, at 57; Parsons, op. cit. supra note 10, at 46-47; Fahy, op. cit. supra note 10, at 80.

⁷⁰ The definition, in full, is as follows: "ESTABLISHMENT, a word applied to certain religious bodies in their relation to the State. Perhaps the best definition which can be given and which will cover all cases, is that establishment implies the existence of some definite and distinctive relations between the State and a religious society (or conceivably more than one) other than that which is shared in by other societies of the same general character. It denotes any special connection with the State, or privileges and responsibilities before the law, possessed by one religious society to the exclusion of others; in a word, establishment is of the nature of a monopoly."

of the First Amendment had intended to bar nonpreferential aid to all religions they would have said so in express terms. This argument is subject to a number of basic difficulties.

First: It proves too much. It would permit an outright grant of public funds, property or other aid to a single sectarian group so long as the assistance given falls short of the grant of formal dominant status contemplated by the quoted definitions. Yet, as we have seen, the O'Neill school agrees that such a grant is inhibited by the First Amendment.

Second: It ignores the word "respecting." The amendment does not say "Congress shall make no law establishing religion," but "no law respecting an establishment of religion." It may reasonably be argued that the latter phraseology imposes a broader prohibition than the former.⁷¹

Third: The term "establishment" was used much more loosely in 1791 than it is today. It was used by Jefferson in the title of his Statute for Establishing Religious Freedom. It was used in describing a measure as closely approximating nonpreferential aid to religion as could practicably be conceived—the Virginia Bill Establishing a Provision for Teachers of the Christian Religion. (There were no teachers of non-Christian religion in Virginia in 1784⁷² and taxpayers not desiring that their money go to any Christian sect could direct that it be used for general educational purposes.)⁷³ Madison used the term "establishment" to denote chaplaincy in Congress and again chaplaincy in the armed forces.⁷⁴

Moreover, during the debates preceding adoption of the First Amendment and after its adoption, the term "establishment of religion" was used synonymously with "religious establishment." Roger Sherman argued that the First Amendment was unnecessary because "Congress had no authority whatever delegated to them by the Constitution to make religious establishments."⁷⁵ In vetoing two separate measures, Madison twice referred to the First Amendment as prohibiting any law respecting

⁷¹ See Morrison, *The Separation of Church and State in America* 4.

⁷² See note 34 *supra*.

⁷³ See last paragraph of the Bill in *Everson v. Board of Education*, 330 U.S. 1, 74 (1947) (Appendix).

⁷⁴ Fleet, *op. cit.* *supra* note 56, at 559: "The *establishment* of the chaplainship to [Congress] is a palpable violation of equal rights, as well as of Constitutional principles. . . . Were the *establishment* to be tried by its fruits, are not the daily devotions conducted by these legal Ecclesiastics, already degenerating into a scanty attendance, and a tiresome formality? Better also to disarm in the same way, the precedent of Chaplainships for the army and navy, than erect them into a political authority in matters of religion. The object of this *establishment* is seducing; the motive to it is laudable." (Emphasis added.)

⁷⁵ 1 *Annals of Congress* 732 (1789).

"a religious establishment."⁷⁶ A constitutional prohibition against laws "respecting religious establishments" is obviously not far removed from a prohibition of laws supporting or aiding religious establishments. Most important, Presidents Jefferson, Madison and Jackson interpreted the First Amendment's ban on laws "respecting an establishment of religion" as prohibiting such nonpreferential and nonmonetary aid as a Presidential proclamation of thanksgiving to God.⁷⁷

Fourth: The "if-that's-what-they-wanted-why-did-they-not-say-so?" argument works both ways. If Congress did not expressly bar nonpreferential aid to religion it also did not expressly limit the bar to preferential establishment. It had two occasions to do so and refused both times. Twice when the First Amendment was debated in the Senate it was proposed to substitute the following for the House versions:

Congress shall make no law establishing one Religious Sect or society in preference to others, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.

And:

Congress shall make no law establishing any particular denomination or religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed.

These versions expressly and unambiguously spell out what the O'Neill school says was intended by the First Amendment. Yet both proposals were rejected.⁷⁸

3. *The practices in the states.* It is argued that the prevalent practices among the states when the First Amendment was proposed and adopted

⁷⁶ In vetoing a bill to incorporate the Episcopal Church in the District of Columbia, Madison said: "... the bill exceeds the rightful authority to which governments are limited by the essential distinction between civil and religious functions, and violates in particular the article of the Constitution of the United States which declares that 'Congress shall make no law respecting a religious establishment. . . .' This particular church, therefore, would so far be a religious establishment by law, a legal force and sanction being given to certain articles in its constitution and administration."

One week later he vetoed a bill giving certain land to a Baptist Church, "[b]ecause the bill in reserving a certain parcel of land of the United States for the use of said Baptist Church comprises a principle and a precedent for the appropriation of funds of the United States for the use and support of religious societies, contrary to the article of the Constitution which declares that 'Congress shall make no law respecting a religious establishment.' " 1 Richardson, Messages and Papers of the Presidents 489-90 (1900). (Emphasis added. Note plural "societies.")

⁷⁷ Fleet, op. cit. supra note 56, at 560-62; 1 Stokes, op. cit. supra note 65, at 697; Butts, op. cit. supra note 59, at 94.

⁷⁸ See Journal of the First Session of the United States Senate 116-17 (1820). Neither O'Neill nor any of his disciples mentions these proposals and the Senate's rejection of them.

were to use tax-raised funds for religious purposes, and the Amendment must be construed in harmony with prevailing practices.⁷⁹ This argument also proves too little or too much.

If the practice in Virginia is considered, it proves too little, for that state, as a result of the defeat of the Assessment Bill, did not aid religion even on a nonpreferential basis. If, on the other hand, the practices in Massachusetts or North Carolina are considered, the argument proves too much; for these states maintained just the type of preferred establishment, which, according to the O'Neill school, it was the limited intent of the First Amendment to prevent on a national scale.⁸⁰

In any case, it must be remembered that the First Amendment had no application to the states at the time it was adopted. It established the principles of freedom and separation only for the federal government. It is reasonable to assume and the O'Neill school argues⁸¹ that Congress did not then believe it desirable or practicable to impose these principles on those of the states which still maintained an establishment.

By 1868, however, when the Fourteenth Amendment was adopted, the situation had changed. As noted by Justice Frankfurter in his concurring opinion in the *McCullum* case:

. . . long before the Fourteenth Amendment subjected the States to new limitations, the prohibition of furtherance by the State of religious instruction became the guiding principle, in law and feeling, of the American people. . . .

In this respect the Fourteenth Amendment merely reflected a principle then dominant in our national life. To the extent that the Constitution thus made it binding upon the States, the basis of the restriction is the whole experience of our people. Zealous watchfulness against fusion of secular and religious activities by Government itself, through any of its instruments but especially through its educational agencies, was the democratic response of the American community to the particular needs of a young and growing nation, unique in the composition of its people.⁸²

Thus the prevalent practices among the states when the First Amendment became applicable to them were more consistent with the *Everson-McCollum* interpretation than with the O'Neill theory.

⁷⁹ O'Neill, op. cit. supra note 5, at 58, 46; Parsons, op. cit. supra note 10, at 49.

⁸⁰ The Massachusetts Constitution of 1780 provided for municipal support and maintenance of "public Protestant teachers of piety, religion and morality in all cases where such provision shall not be made Voluntarily." Thorpe, *Constitutions, Colonial Charters and Other Organic Laws*, Art. III (1889). The North Carolina Constitution limited public office to Protestants by providing that "no person who shall deny the being of GOD, or the truth of the Protestant religion, or the divine authority of the Old or New Testament, or who shall hold religious principles incompatible with the freedom and safety of the state, shall be capable of holding any office or place of trust or profit in the civil department within this state." Thorpe, *ibid.*, Art. XXXII.

⁸¹ O'Neill, op. cit. supra note 5, at 97; Parsons, op. cit. supra note 10, at 49.

⁸² *McCullum v. Board of Education*, 330 U.S. 203, 215 (1948).

4. *The prior versions.* The versions of the First Amendment proposed by the states and considered by Congress before adoption of the Amendment in its present form are offered as evidence that the intent of the states and Congress was only to prevent Congress from establishing a national religion and according it the preferential dominant status implied in the term "establishment of religion."

Thus, the first version submitted by Madison and considered by Congress read:

The civil rights of none shall be abridged on account of religious belief, *nor shall any national religion be established*, nor shall the full and equal rights of conscience in any manner or on any pretext be infringed.⁸³

The second version considered by Congress read:

No religion shall be established by law, nor shall the equal rights of conscience be infringed.⁸⁴

The O'Neill school argues that these prior versions of the First Amendment should be considered as showing what Congress intended.

It would seem that unaccepted versions of a bill or constitutional amendment would be more probative of what the legislature intended not to adopt than of what it adopted. However, even if we consider unaccepted prior versions as possessing evidentiary value, the weight of the evidence is small.

In the first place, it helps little to point out that the first version submitted by Madison provided that no "national religion be established" or that the second version provided that "no religion shall be established by law" unless the meanings of these terms are clear—which they are not. It is fairly arguable that "no religion shall be established by law" means what the *Everson-McCollum* Court interpreted "no law respecting an establishment of religion" to mean. Adding the word "national" does not remove the ambiguity. Madison himself used the term "establishment of a national religion" in expressing his opposition to chaplaincies in Congress.⁸⁵

In the second place, if the meaning of the First Amendment is to be found in versions which Congress failed to adopt, all such versions should

⁸³ O'Neill, *op. cit. supra* note 5, at 103; Parsons, *op. cit. supra* note 13, at 30; Corwin, *op. cit. supra* note 13, at 11; McCollum Brief, at 38; Fahy, *op. cit. supra* note 10, at 79; Murray, *op. cit. supra* note 10, at 41. (Emphasis added.)

⁸⁴ Parsons, *op. cit. supra* note 10, at 32; Murray, *op. cit. supra* note 10, at 47; McCollum Brief, at 38-50; Fahy, *op. cit. supra* note 10, at 79.

⁸⁵ "Is the appointment of Chaplains to the two Houses of Congress consistent with the Constitution, and with the pure principles of religious freedom? In strictness the answer on both points must be in the negative. The Constitution of the U.S. forbids everything like an establishment of a national religion." Fleet, *op. cit. supra* note 56, at 558.

be considered, not just some of them. The versions cited by the O'Neill school do not present the whole picture. At the Constitutional Convention itself, Charles Pinckney, who was second only to Madison in his contributions to the framing of the Constitution,⁸⁶ proposed that "The Legislature of the United States shall pass no law on the subject of religion."⁸⁷ The proposal was referred to committee and was apparently dropped—which is not surprising in view of the general agreement that Congress in any event had no jurisdiction over religious matters.⁸⁸

Moreover, if we consider only prior versions of the First Amendment and not of the Constitution itself, certainly at least evidentiary weight equal to that given the first two versions should be accorded to the third version, which was requested by New Hampshire and proposed in the House of Representatives by Samuel Livermore. This version, strikingly similar to Pinckney's original version, read:

Congress shall make no laws touching religion, or infringing the rights of conscience.⁸⁹ Stokes' comment on the Livermore proposal is significant:

This, it will be noticed, is in its first half a more inclusive prohibition than that proposed by Madison, and it had its important influence on the ultimate wording of the First Amendment. Livermore wished not only to prevent a national Church but also the adoption of any federal laws touching religion. Some remarks by Mr. Gerry followed, criticizing Mr. Madison's proposal, principally because he considered the government a federal rather than a national one. Then comes this epoch-making entry: "Mr. Madison withdrew his motion, but observed that the words 'no national religion shall be established by law,' did not imply that the government was a national one, the question was then taken on Livermore's motion, and passed in the affirmative, thirty-one for, and twenty against it." *And so the general form which the religious-freedom guarantee later took in our Federal Bill of Rights was largely due to Samuel Livermore.*⁹⁰

5. *Congressional debates.* The debates in Congress on the proposed First Amendment are offered as proof that the limited interpretation was intended. Most frequently quoted is the following extract from the Annals of Congress:

Mr. Madison said, he apprehended the meaning of the words to be, that Congress should not *establish a religion*, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience. Whether the words are necessary or not, he did not mean to say, but they had been required by some of the State Conventions, which served to entertain an opinion that under the

⁸⁶ 1 Stokes, op. cit. supra note 65, at 351.

⁸⁷ Ibid.

⁸⁸ See infra, p. 11 et seq.

⁸⁹ 1 Annals of Congress 731 (1789).

⁹⁰ 1 Stokes, op. cit. supra note 65, at 317 (emphasis added).

clause of the Constitution which gave power to Congress to make all law necessary and proper to carry into execution the Constitution, and the laws under it, enabled them to make laws of such a nature as might infringe the rights of conscience and *establish a national religion*; to prevent these effects he presumed the Amendment was intended, and he thought it was as well expressed as the nature of the language would admit.⁹¹

This passage, of course, is no freer of ambiguity than the prior versions of the amendment on which O'Neill also relies. Madison's phrases, "establish a religion" and "establish a national religion" cannot be assumed to have on their face the narrow meaning which O'Neill assigns to the term "establishment."

As we have seen, Madison had opposed a bill for the support of religious teachers of education on the ground that it would "establish" the Christian religion.⁹² Later he opposed congressional chaplaincies and vetoed bills which would incorporate a Protestant Episcopal Church and grant federal land to a Baptist Church because he regarded such measures as effecting a "religious establishment."⁹³

Moreover, the Madison extract from the Annals cannot be understood without reference to the remark which evoked it. Justice Rutledge relates the incident and comments as follows:

At one point the wording was proposed: "No religion shall be established by law, nor shall the rights of conscience be infringed." 1 Annals of Congress 729. . . . Representative Huntington of Connecticut feared this might be construed to prevent judicial enforcement of private pledges. He stated "that he feared . . . that the words might be taken in such latitude as to be extremely hurtful to the cause of religion. He understood the amendment to mean what had been expressed by the gentleman from Virginia; but others might find it convenient to put another construction upon it. The ministers of their congregations to the Eastward were maintained by the contributions of those who belonged to their society; the expense of building meeting houses was contributed in the same manner. These things were regulated by by-laws. If an action was brought before a Federal Court on any of these cases, the person who had neglected to perform his engagements could not be compelled to do it; for a support of ministers or building of places of worship might be construed into a religious establishment." 1 Annals of Congress 730.

To avoid any such possibility, Madison suggested inserting the word "national" before "religion," thereby not only again disclaiming intent to bring about the result Huntington feared but also showing unmistakably that "establishment" meant public "support" of religion in the financial sense. 1 Annals of Congress 731.⁹⁴

6. *Friends of religion.* The O'Neill school argue that Americans are and

⁹¹ O'Neill, op. cit. supra note 5, at 96; Murray, op. cit. supra note 10, at 42; Fahy, op. cit. supra note 10, at 79; Parsons, op. cit. supra note 10, at 35; McCollum Brief, at 40-44. (Emphasis added.)

⁹² See pp. 7-8, 10, supra.

⁹³ See p. 6 supra.

⁹⁴ *Everson v. Board of Education*, 330 U.S. 1, 42 n. 34 (1947).

always have been a religious people; that those who framed and adopted the First Amendment were the friends, not the enemies of religion, and that they, therefore, could not have intended to harm religion by depriving it of governmental support.⁹⁵ This argument is misleading if not inaccurate in its premise and a non sequitur in its conclusion.

The premise is misleading because it uses the term religion as synonymous with church or, at least, organized religion. Actually, the period in which our Constitution and the First Amendment were adopted was an era of widespread indifference if not hostility to church religion.⁹⁶ Many of the political leaders of the Revolutionary and post-Revolutionary period had come under the influence of eighteenth century deism and enlightenment and not a few were apathetic to formal religious worship. As the Beards put it:

When the crisis came, Jefferson, Paine, John Adams, Washington, Franklin, Madison and many lesser lights were to be reckoned among either the Unitarians or the Deists. It was not Cotton Mather's God to whom the authors of the Declaration of Independence appealed; it was to "Nature's God."⁹⁷

To the extent that the premise of friendliness to religion is accurate, the conclusion that prohibition of government support of religion could not have been intended does not follow. Madison himself exposed the fallacy of this reasoning during the debate on the Virginia Assessment Bill. The issue, he said, was "not is Religion necessary—but are Religious Establishments necessary for Religion."⁹⁸ In a letter to Edward Livingston in 1822, Madison referred to "the old error, that without some sort of allegiance or coalition between government and Religion neither can be duly supported."⁹⁹ According to Madison, governmental support was not only unnecessary for religion but detrimental thereto. In the same letter to Livingston he referred to the "lesson that Religion flourishes in greater purity, without than with the aid of government."¹⁰⁰ He presented the same argument in the Remonstrance against the Assessment Bill.¹⁰¹ The Pres-

⁹⁵ O'Neill, *op. cit. supra* note 5, at 85; McCollum Brief, at 31, 83, 90; Corwin, *op. cit. supra* note 13, at 14; Fahy, *op. cit. supra* note 10, at 77; Parsons, *op. cit. supra* note 10, at 25, 153.

⁹⁶ Not more than one out of eight Americans, and possibly as few as one out of every twenty-five, then belonged to any church. 1 Stokes, *op. cit. supra* note 65, at 229-30; Garrison, *History of Anti-Catholicism in America*, Social Action, p. 9 (Jan. 15, 1948). Today, about one out of every two Americans is a church member. Census of Religious Bodies, *op. cit. supra* note 36.

⁹⁷ Beard, *Rise of American Civilization* 449 (1927).

⁹⁸ Eckenrode, *Separation of Church and State in Virginia* 85 (1910).

⁹⁹ Blakely, *American State Papers on Religious Freedom* 193 (3d rev. ed., 1943).

¹⁰⁰ *Ibid.*, at 194.

¹⁰¹ "Because experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of religion have had a contrary effect."

bytery of Hanover, in a memorial against the Bill, made the same argument.¹⁰²

The Baptists' resolution in opposition similarly argued "that the holy Author of our religion needs no such compulsive measures for the promotion of his cause; that the gospel want not the feeble arm of man for its support. . . ."¹⁰³ Another petition pointed out that "Christianity was first planted and propagated through the World for three hundred years without and often against the Use of Secular force and that it is plainly denying the power thereof to say it would soon fail if not supported by Tax and Compulsion."¹⁰⁴

Many other contemporaneous statements can be noted to indicate a widespread view that religion does not need government support. They can be summed up in Jefferson's aphorism:

It is error alone which needs the support of government. Truth can stand by itself.¹⁰⁵

7. *Virginia's dissatisfaction.* When the First Amendment in the form in which it was finally adopted was presented for ratification it was opposed by eight members of the Virginia Senate on the ground that

The . . . amendment recommended by Congress does not prohibit the rights of conscience from being violated or infringed; and although it goes to restrain Congress from passing laws establishing any national religion, they might, notwithstanding, levy taxes to any amount for the support of religion or its preachers; and any particular denomination of Christians might be so favored and supported by the general government, as to give it a decided advantage over the others, and in the process of time render it powerful and dangerous as if it was established as the national religion of the country.¹⁰⁶

Notwithstanding this argument, the Virginia legislature ratified the Amendment. From this it is inferred that the Amendment had only the limited intent seen by the eight Virginia Senators and that the states in adopting the amendment accepted that limited interpretation.

Unsuccessful arguments against a measure on the ground that it would have certain consequences may give rise to the inference that those who adopted the measure wanted or at least were willing to accept those consequences. But it is at least equally inferrable that those who adopted the

¹⁰² "[W]e are persuaded that if mankind were left in the quiet possession of their invaluable religious privileges, Christianity would continue to flourish in the greatest purity, by its own natural excellence, and under the all-disposing providence of God." Blakely, op. cit. supra note 99, at 104.

¹⁰³ 1 Stokes, op. cit. supra note 65, at 373.

¹⁰⁴ Ibid., at 363.

¹⁰⁵ Notes on Virginia in Blau, Cornerstones of Religious Freedom 79 (1949).

¹⁰⁶ McCollum Brief, at 53-54; Corwin, op. cit. supra note 13, at 12; Murray, op. cit. supra note 10, at 43 (emphasis added).

measure did not agree that the consequences would follow. In other words, the Virginia legislature may have ratified the amendment, not despite the fact that they believed it would permit Congress to support a particular creed and suppress religious freedom, but because they believed it would have no such effect.¹⁰⁷

Moreover, the latter inference seems more probable. For even under the O'Neill theory, the author of the quoted statement was wrong in saying that "any particular denomination of Christians might be so favored and supported by the general government, as to give it a decided advantage over the others. . . ." It was exactly this consequence which the O'Neill school claims the First Amendment was framed to avoid. The author was also wrong in arguing that the "amendment recommended by Congress does not prohibit the rights of conscience from being violated or infringed." Is it not more probable that the Virginia legislature deemed him wrong entirely than that it was willing to accept from the federal government consequences which but a few years earlier had been rejected when proposed in the state legislature?

8. *Practical construction.* By far the most frequently cited and undoubtedly the most potent argument in support of the O'Neill thesis is the practical construction argument, i.e., that numerous instances of governmental support of religion at the time of the adoption of the Amendment and since then indicate that it could not have been the intent of the Amendment to prohibit such support. Many examples are cited. For the purpose of this discussion, only those most frequently mentioned will be considered. (They are typical and the comments on these are equally applicable to the others.) They are: chaplaincies in Congress; chaplaincies in the armed forces; presidential Thanksgiving proclamations; tax exemption for religious institutions; compulsory chapel attendance at West Point and Annapolis; and the presence of "In God We Trust" on our coins.¹⁰⁸

Some of these items may be constitutional under any view of the First Amendment. Chaplains in the armed forces may be necessary under the constitutional guarantee of freedom of conscience. A soldier drafted into the armed forces and sent to camp far from home is deprived of the opportunity to visit his church. To the extent that such deprivation is necessary to the overriding consideration of national defense, it is constitu-

¹⁰⁷ "The fears and doubts of the opposition are no authoritative guide to the construction of legislation." *Schwegmann Bros. v. Calvert Distillers Corp.*, 71 S. Ct. 745, 750 (1951).

¹⁰⁸ O'Neill, *op. cit. supra* note 5, at 102, 110-11; McCollum Brief, at 61-62, 108; Fahy, *op. cit. supra* note 10, at 80-81; Parsons, *op. cit. supra* note 10, at 123-24, 174.

tional.¹⁰⁹ But the deprivation is constitutional only to the extent that it is necessary, and if the government can practicably furnish a substitute in the form of a traveling church, the soldier may well have a constitutional right thereto. So, too, much of the exemption which religious property enjoys may likewise be justified under the "free exercise" clause.¹¹⁰

Items such as the reference to God on coins¹¹¹ are insignificant almost to the point of being trivial. It is difficult to justify governmental expenditures of tax-raised funds for religious institutions on the basis of so meaningless an act of ceremonial obeisance. Nor is there much probative value to regulations promulgated by superintendents of military academies, the constitutionality of which has never been judicially tested and which is doubtful under any view of the Constitution.¹¹²

Finally, some may not be justified even under the restricted O'Neill interpretation. Thus, while President Washington's proclamation recommending a day of Thanksgiving embraced all who believed in a supreme ruler of the universe, President Adams' proclamation called for a Christian worship.¹¹³

In any event, the probative weight of any of these items is by no means as great as the O'Neill school would have it. The value of practices under a statutory or constitutional provision as evidence of the framers' intent lies in the uncontroverted acceptance of those practices. The value is greatly decreased if not completely vitiated if the statutory or constitutional validity of these practices is seriously contested by persons having responsibility for enforcement of the statute or constitution.

Long before the *Everson-McCollum* decisions, the constitutional validity of every one of these practices was seriously controverted by persons whose views are entitled to great weight in interpreting the First Amendment. Thus Presidents Jefferson, Madison and Jackson all considered Presidential Thanksgiving proclamations to be violative of the First Amendment.¹¹⁴ Madison considered "the appointment of Chaplains to

¹⁰⁹ See *Hamilton v. Regents*, 293 U.S. 245 (1934); *Selective Draft Law Cases*, 245 U.S. 366 (1918).

¹¹⁰ *Jones v. Opelika*, 319 U.S. 103 (1943) vacating 316 U.S. 584 (1942). *Murdock v. Pennsylvania*, 319 U.S. 105 (1943). Cf. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936). It is sometimes a difficult task to determine where "establishment" ends and "free exercise" begins. See Justice Jackson's dissent in *Kunz v. New York*, 340 U.S. 290, 295 (1951). But the difficult task of drawing lines cannot be avoided in constitutional law.

¹¹¹ "In God We Trust" was placed on American coins for the first time in 1864. 3 Stokes, *op. cit. supra* note 65, at 602.

¹¹² U.S. Const., Art. VI provides that "no religious test shall ever be required as a Qualification to any Office or public Trust under the United States."

¹¹³ Fleet, *op. cit. supra* note 56, at 561.

¹¹⁴ See p. 15 *supra*.

the two Houses of Congress" as an "establishment" not "consistent with the Constitution."¹¹⁵ He viewed chaplaincies in the armed forces as an "establishment" prohibited by the Constitution.¹¹⁶ He referred to a proposal "to exempt Houses of Worship from taxes" as an "encroachment" upon "the separation between Religion and Government in the Constitution of the United States."¹¹⁷

Moreover, the practices cited by the O'Neill school, when considered alone, present an incomplete and misleading picture. Contrary practices with respect to other matters are of at least equal evidentiary consequence. Much significance should be attached to the fact that the Constitution contains no invocation to God, nor even mention of God. Indeed, the only mention of religion in the text of the Constitution is the negative one contained in the prohibition of religious tests for office.¹¹⁸ Most significant of all is that in the 160 years since the First Amendment was adopted Congress has never enacted a general appropriation bill for religion on the nonpreferential basis which the O'Neill theory holds constitutionally permissible.

Anyone familiar with the American political scene can readily appreciate that what holders of political office do is not an infallible guide to what they believe. Madison felt it politically unwise to refuse to proclaim a day of thanksgiving even though he believed it inconsistent with the constitutional prohibition of establishment.¹¹⁹ A contemporary of Jefferson commented on the President's attendance at chaplain's services in Congress: "The political necessity of paying some respect to the religion of the country is felt."¹²⁰

Finally, the area of religion and government is not the only one in which practice lags behind principle. The validity of the constitutional principle of freedom of expression is not vitiated by the widespread limitations upon that freedom in actual practice. The Congress which framed the First Amendment's bar on laws abridging freedom of speech or press was pretty much the same Congress which enacted the Alien and Sedition laws. Similarly, the validity of the principle of equality in the Four-

¹¹⁵ Fleet, *op. cit.* supra note 56, at 558.

¹¹⁶ *Ibid.*, at 559.

¹¹⁷ *Ibid.*, at 555. President Grant, too, opposed tax exemption for church property. 3 Stokes, *op. cit.* supra note 65, at 421.

¹¹⁸ U.S. Const., Art. VI. It should be noted that this prohibition is difficult to reconcile with the O'Neill theory of non-preference, since the Constitution does not even permit a requirement of belief in God as a condition of federal office.

¹¹⁹ 1 Stokes, *op. cit.* supra note 65, at 491.

¹²⁰ *Ibid.*, at 500.

teenth Amendment is not destroyed by the widespread unequal treatment accorded to Negroes. Indeed, the gap between principle and practice is far narrower in the area of government-religion relations than in the area of civil liberties and race relations. If the practical construction argument is to be applied universally, not only the "establishment" clause, but all of the First Amendment and the Fourteenth as well might fall.

9. *The Virginia Bill and Madison's Remonstrance.* A basic difficulty with the whole O'Neill theory is the historical fact that Madison, who played so leading a role in the drafting and adoption of the First Amendment, had only a few years earlier successfully led the opposition to a general appropriation bill in Virginia for the support of religion. During the course of this struggle he wrote the great Remonstrance setting forth his arguments against establishment.

Madison's role in the drafting and adoption of the First Amendment is not disputed by the O'Neill school.¹²¹ However, O'Neill meets the problem in two ways: he argues, first, that Madison opposed the Assessment Bill because it would establish the Christian religion, and that he would not have opposed it if it were truly nonpreferential;¹²² and secondly, that his opposition to a general assessment bill in Virginia is not evidence that he opposed similar action by the federal legislature. The Remonstrance is therefore not to be considered relevant in ascertaining his intent with respect to the First Amendment.¹²³

In support of the first argument, O'Neill stresses the following passage in the Remonstrance:

Who does not see that the same authority which would *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*? That the same authority which can force a citizen to contribute three pence only of his property for the support of *any one establishment*, may force him to conform to *any other establishment* in all cases whatsoever.¹²⁴

Madison's Remonstrance, however, presented fifteen arguments against the Assessment Bill. Only this one can be viewed as referring to the exclusive establishment of Christianity. The other arguments are germane whether one or all religions were to be supported by the Assessment. For example, the second argument in the Remonstrance was that "if religion

¹²¹ O'Neill, op. cit. supra note 5, at 87-88; McCollum Brief, at 38-39; Parsons, op. cit. supra note 10, at 30, 36; Meikeljohn, op. cit. supra note 14, at 71; Fahy, op. cit. supra note 10, at 79.

¹²² O'Neill, op. cit. supra note 5, at 59-60, 89-90, 240; McCollum Brief, at 29, 43; Corwin, op. cit. supra note 13, at 10.

¹²³ O'Neill, op. cit. supra note 5, at 103, 194.

¹²⁴ Ibid., at 89.

be exempt from the authority of the society at large, still less can it be subject to that of the legislative body." There is no reason to assume that this argument was considered by Madison of lesser importance than the argument that establishing Christianity permits the establishing of a particular Christian sect.

The position taken by Madison and Jefferson and their supporters during this period was that religion was exempt from and entirely outside of state authority. Their objection to the fact that the Assessment Bill provided for the support of the "Christian Religion" stemmed at least as much from that reason as from opposition to preferential treatment.

Nor can the Assessment Bill realistically be viewed as preferential. Eckenrode in 1910 called it a proposal for "taxing all citizens for the general support of religion."¹²⁵ Washington did not regard the Bill as supporting Christianity only, believing that its terms permitted grants to non-Christian religious teachers.¹²⁶ And the Bill even provided for those who professed no religion, Christian or non-Christian, by permitting them to direct that their tax be used for general educational purposes.¹²⁷

If the Jefferson-Madison group had favored general support of religion and objected to the Bill only because it was preferential, they would not have opposed it in toto. It would have been a simple matter to propose amending the Bill to provide for all religions, particularly since none other than the Christian religion existed in Virginia.¹²⁸ Instead they opposed the fundamental theory of the Bill, as is clear from the fact that they followed the successful campaign against the Bill by bringing about the enactment of Jefferson's Act for Establishing Religious Freedom. The preamble of that Act asserts, *inter alia*, that "Forcing [a person] to support this or that teacher of his own persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern." The Act then provides "that no man shall be compelled to frequent or support *any* religious worship, place or ministry whatsoever." (Emphasis added.)

Jefferson's Act and the struggle against the Assessment Bill which preceded it represented incidents manifesting a growing American tradition of voluntary support of religion which culminated in the adoption of the

¹²⁵ Eckenrode, *op. cit.* supra note 98, at 53.

¹²⁶ 1 Stokes, *op. cit.* supra note 65, at 312. See letter to George Mason commenting on Madison's Remonstrance, in 28 Writings of Washington 285 (Fitzpatrick ed., 1938): "I am not amongst the number of those who are so much alarmed at the thoughts of making people pay towards the support of that which they profess, if of the denomination of Christians; or declare themselves Jews, Mahomitans or otherwise, and thereby obtain proper relief."

¹²⁷ See p. 25 supra.

¹²⁸ See p. 8 supra.

First Amendment. The tradition can be traced back to Milton¹²⁹ and Locke¹³⁰ in England. Roger Williams, Benjamin Franklin¹³¹ and George Mason¹³² were some of the better known molders of public opinion in America who expressed the same tradition. It was because the Assessment Bill violated the principle of voluntariness rather than because Christianity was selected as the exclusive beneficiary of the State's bounty that Jefferson and Madison opposed it so strenuously.

It is therefore not surprising that apparently only Corwin follows O'Neill in arguing that Madison opposed the Assessment Bill only because it was preferential.¹³³ The other supporters of the narrow interpretation rest their argument on the contention that although he opposed non-preferential support by the Virginia legislature, he did not oppose such support by the federal legislature. The considerations he set forth in the Remonstrance are therefore not relevant to a determination of his intent in respect to the First Amendment. In the words of O'Neill:

Even if Madison had advocated legislation in the State of Virginia which totally prohibited any contact between government and religion, any support of religion by public money (which he never did), it would not follow that he believed in similar provisions in the Constitution and laws of the United States.¹³⁴

This reasoning does not prove anything of value if, as has been indicated, Madison used the term "establishment" in the First Amendment as he used it elsewhere to describe the nonpreferential institutions of chaplaincies in Congress and in the armed forces and, above all, the type of support contemplated by the Assessment Bill. There is no reason to believe that Madison favored a narrower restriction on the powers of the federal legislature than on the Virginia legislature. The arguments presented in the Remonstrance would hardly have been less relevant if the Assessment Bill had been introduced in Congress. There is no evidence that Madison changed his views between 1784 and 1791; all the evidence is to the contrary. As Father Murray says:

For Madison, as for John Locke, his master, religion could not by law be made a concern of the commonwealth as such, deserving in any degree of public recognition or

¹²⁹ 1 Stokes, *op. cit.* supra note 65, at 127.

¹³⁰ *Ibid.*, at 143.

¹³¹ *Ibid.*, at 297.

¹³² *Ibid.*, at 305.

¹³³ Corwin, *op. cit.* supra note 13, at 10.

¹³⁴ O'Neill, *op. cit.* supra note 5, at 103, 73, 194. See also McCollum Brief, at 28, 43; Corwin, *op. cit.* supra note 13, at 11, 13; Murray, *op. cit.* supra note 10, at 28-31; Meikeljohn, *op. cit.* supra note 14, at 70-71; Fahy, *op. cit.* supra note 10, at 79-80, 86; Parsons, *op. cit.* supra note 10, at 31, 36-38, 43, 143, 145.

aid, for the essentially theological reason that it is of its nature a personal, private interior matter of the individual conscience, having no relevance to the public concerns of the state.¹³⁵

This was Madison's philosophy, expressed in the Remonstrance in the maxim: "religion is wholly exempt from its [government's] cognizance." It was the philosophy of Locke,¹³⁶ Roger Williams,¹³⁷ Isaac Backus,¹³⁸ Tom Paine,¹³⁹ and Jefferson.¹⁴⁰ That philosophy has become immortalized in Jefferson's "wall of separation between church and state" and has become universally accepted in the popular expression that "religion is a private matter." It has truly become an American tradition. Acceptance of the O'Neill thesis means the destruction of that tradition. The evidence presented by O'Neill and his followers does not justify such a result.

CONCLUSION

Acceptance of the O'Neill thesis would pervert the First Amendment to an end directly opposite to its purpose, for all in the O'Neill school agree that, absent the First Amendment, the federal government had no power to aid religion on a preferential or nonpreferential basis.¹⁴¹ As Madison put it, "there is not a shadow of right in the general government to inter-

¹³⁵ Murray, *op. cit.* supra note 10, at 29.

¹³⁶ "Now that the whole jurisdiction of the magistrate reaches only to these civil concerns, and that all civil power, right and dominion, is bounded and confined to the only care of promoting these things; and that it neither can nor ought in any manner to be extended to the salvation of souls, these following considerations seem unto me abundantly to demonstrate. First, because the care of souls is not committed to the civil magistrate, any more than to other men." *Letters Concerning Toleration* 172 (Appleton-Century ed., 1937). Locke finds the Commonwealth "a society of men constituted only for procuring, preserving, and advancing their own civil interests." *Ibid.*

¹³⁷ "All Civil States with their Officers of Justice, in their respective constitutions and administrations are . . . essentially Civil, and therefore not Judges, Governors, or Defenders of the Spiritual, or Christian, State and Worship." *Bloody Tenet of Persecution*, in Blau, *op. cit.* supra note 49, at 36.

¹³⁸ "That the Representatives in former Assemblies, as well as the present, were elected by virtue only of civil and worldly qualifications, is a truth so evident, that we presume it need not be proved to this Assembly; and for a civil Legislature to impose religious taxes, is, we conceive, a power which their constituents never had to give; and is therefore going entirely out of their jurisdiction. . . ." Resolution of the Warren Association (said to be under the influence of Backus), quoted in 1 Stokes, *op. cit.* supra note 65, at 308.

¹³⁹ "As to religion, I hold it to be the indispensable duty of government to protect all conscientious professors thereof, and I know of no other business which government hath to do therewith." *Common Sense*, in 1 Writings of Thomas Paine 108 (Conway ed., 1894).

¹⁴⁰ "But our rulers can have no authority over such natural rights, only as we have submitted to them. The rights of conscience we never submitted, we could not submit. We are answerable for them to our God. The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbor to say there are twenty gods, or no God." Notes on Virginia, in Blau, *op. cit.* supra note 49, at 78.

¹⁴¹ O'Neill, *op. cit.* supra note 5, at 94; Parsons, *op. cit.* supra note 10, at 19-21, 95; McCollum Brief, at 31, 40; Fahy, *op. cit.* supra note 10, at 78.

meddle with religion.”¹⁴² The purpose of the First Amendment was to make this assurance doubly sure. The result, if the O’Neill school is to be believed, is that by the prohibition *against* laws respecting an establishment of religion, the “shadow of right” which did not exist was made a reality. This is the sum and all of the O’Neill theory.

¹⁴² 5 Madison 176 (Hunt ed., 1920). “The government has no jurisdiction over it.” Ibid., at 132. “Mr. Sherman thought the Amendment altogether unnecessary inasmuch as Congress had no authority whatever delegated to them by the Constitution to make religious establishment.” 1 Annals of Congress 729 (1789). See also 3 Elliot’s Debates 93, 204–205 (1836).