

CONCORDIA  
THEOLOGICAL  
QUARTERLY

CTQ

January 1977  
Volume 41, Number 1

Cornerstone of Religious Liberty.....	Eugene F. Klug 3
The Problems of Inerrancy and Historicity in Connection with Genesis 1-3.....	David P. Scaer 21
Luther's Impact on Modern Views of Man.....	Lewis W. Spitz 26
Killing with Kindness.....	K. Marquart 44
Theological Observer.....	50
Homiletical Studies.....	53
Book Reviews.....	84

---

# Cornerstone of Religious Liberty

EUGENE F. KLUG

More than national custom prompts speaking of our country's roots as closely intertwined with religion, specifically Christian faith. "This is a Christian nation," stated Justice Brewer in 1892, in the case of *Church of the Holy Trinity v. United States* (143 U.S. 457, 471). No one denies, of course, that some of the founding fathers, notably Jefferson, opposed this notion and deliberately worked to prevent Christian principles from being written into the fabric of our country's laws and Constitution. In a June 5, 1824, letter Jefferson dared to call it a "judicial forgery" that Christianity and Biblical precepts had been written "into the common law" (cited in *State v. Chandler*, 183, 2 Delaware 553, 558). However, history must judge how accurate was his judgement. The opposite view persists as strongly. As recently as the *Everson* case, 1947, Justice Jackson noted the close link that our public educational system had with Christian influence and labeled it specifically "a product of Protestantism" (330 U.S. 1, 23-24).

The idea is not that Christianity itself was written into our laws. Nothing could be farther from the fact. But, as Peter Marshall, long-time and well-loved Senate chaplain, put it: Our country recognized "its dependence upon God and responsibility toward God. This nation was so born. God was recognized as the source of human rights. The Declaration of Independence says so."<sup>1</sup> James Madison, who stood for strict separation of church and state, readily admitted Christianity's contribution. "There is nothing incongruous in this situation," stated Alex Zollmann, one of our country's ablest students of church law; and it was his considered judgment that "a civil government which avails itself only of its own powers is extremely defective."<sup>2</sup> Arnold Toynbee described democracy as a leaf torn out of Christianity. Reinhold Niebuhr doubted that a democracy like ours could long survive without Christianity, though he did not feel that the reverse was also true.

## THE BUDDING NATION AND RELIGION

As the struggling nation grew into sturdy manhood, foreigners noted the "miracle" taking place on our shores and not least they admired the remarkable way in which our fathers had worked out

the church-state relation. Alexis de Tocqueville was one of those analysts and his comments are worth repeating:

There is no country in the world where the Christian religion retains a greater influence over the souls of men than in America. . . In the United States religion exercises but little influence upon the laws and upon the details of public opinion, but it directs the customs of the community, and, by regulating domestic life, it regulates the State . . . Religion in America takes no direct part in the government of society, but it must be regarded as the first of their political institutions; for if it does not impart a taste for freedom, it facilitates the use of it . . . Despotism may govern without faith, but liberty cannot. Religion is much more necessary in the republic than in the monarchy. . . How is it possible that society should escape destruction if the moral tie is not strengthened in proportion as the political tie is relaxed? What can be done with a people who are their own masters if they are not submissive to the Deity?<sup>3</sup>

What de Tocqueville observed then is pretty much what men like Niebuhr were saying in our own time. Little is gained, moreover, in arguing over which institution benefits most in our American system of separation of church and state, the churches or the government? Leo Pfeffer thinks that it is the churches, but the weight of the evidence appears to go the other way.<sup>4</sup> History has shown over and over again that Christian faith can survive under the most trying and adverse conditions. Solzhenitsyn, survivor of the infamous Gulag Archipelago, documents this in his *One Day in the Life of Ivan Denisovich* with his reference to Alyosha who took his Christianity seriously and gained the respect of his fellow-prisoners because of his buoyant spirit. How long can a nation like ours survive? James Russell Lowell answered: "Just as long as the ideals and principles of its founders remain dominant in the hearts of its people."<sup>5</sup> The record shows that those ideals and principles were not divorced from a deep sense of dependence upon Almighty God as taught in Holy Writ, but rested there with very close interlocking.

## RELIGION AND THE CONSTITUTION

The motives influencing the various parties who framed our Constitution were not all alike by any means. Some were avowed freethinkers. Some stood for establishment of religion as an integral part of the government. Others agitated for religious toleration and separation of the functions of church and state. Most had come to these shores seeking the latter. Though there

were some ambiguities and many inconsistencies in the manner of each man's pursuit of freedom, the fact remained that it was a country cradled in religion. On the day after the very first session of the Continental Congress, hence on September 6, 1774, a motion carried in the assembly urging that each session be opened with prayer. All objections to the idea because of the diverse religious affiliations of the delegates and fears of sectarianism were quickly quashed. A chaplain was promptly elected to open each day's session with prayer.<sup>6</sup>

Admittedly there was considerable fumbling around on the church-state question in those early years, a fumbling which to some extent has continued to our day as various interpretations of the First Amendment continue to appear. But the direction our country was to take became clear very early. Though most of the states in 1776 were still far from a satisfactory settlement of the church establishment question (Massachusetts, e.g., did not yield on this matter until 1837!) nevertheless the direction they would go became clearer all the time. Evidence for this is the famous Northwest Ordinance adopted by the last Congress assembled under the Articles of Confederation, on July 13, 1787. Article 1 of this Ordinance very clearly stated the states' concern for religious freedom on the frontier: "No person demeaning himself in a peaceable and orderly manner shall ever be molested on account of his mode of worship, or religious sentiments, in said territories" - eventually Ohio, Indiana, Illinois, Michigan, Wisconsin, and part of Minnesota.<sup>7</sup> The thinking embraced in this ordinance anticipated Article VI in the country's new Constitution which was about to be adopted and which provided that "no religious test shall ever be required as a qualification to any office or public trust under the United States."

Some advocates of strict, absolutist separation of church and state are quick to point out that this was the *only* reference to religion in the new Constitution, a negative one at that. But Zollmann takes some of the steam out of those who exult over the almost totally secular character of the Constitution by pointing out that while the venerable document may have been sparse on invocation of the Almighty, it was not on doxology, for it was dated on "the Seventeenth Day of September in the year of *our Lord*, 1787."

## BACKGROUND OF FIRST AMENDMENT

No single religious denomination among the Christian churches, nor any single religious leader can take credit in a blaze of glory for what our founding fathers fashioned in the Bill of Rights. The religious question was understandably a touchy issue, what

with so many different denominational loyalties represented at the Constitutional Convention which convened towards the end of May, 1787. The delegates were somewhat nonplussed when the aged Benjamin Franklin - a most unlikely person! - suggested at a low point in the proceedings that "hereafter prayers, imploring the assistance of Heaven and its blessings on our deliberations, be held in this assembly every morning before we proceed to business, and that one or more of the clergy of this city (Philadelphia) be requested to officiate in that service."<sup>8</sup>

When James Madison later, in 1834, reminisced concerning those days, he pointed out that no action was taken then on Franklin's motion, but only because the convention had not yet settled the larger question of incorporating religious freedom and individual rights into the Bill of Rights, not because they were opposed to religion.<sup>9</sup> Those who had helped to write the Constitution, like Madison, knew that in addition to the "no-test principle" of Article VI, the country would need a bill of rights guaranteeing each man's religious liberty. Thus in the State of Virginia, where Madison led the struggle for the adoption of the Federal Constitution, he did so in conjunction with a bill of rights for the State of Virginia which stated among other things:

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, and therefore all men have an equal, natural and unalienable right to the free exercise of religion according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established by law in preference to others.<sup>10</sup>

The implications of this line of reasoning for Virginia are all the more remarkable in view of the fact that that state, as most of the original thirteen, was still requiring tests of religion for officeholders. This made the accomplishment of men like Madison all the more remarkable. While some of the states and their delegates in a sense were eventually "backed into" adoption of the First Amendment and the rest of the Bill of Rights, it took some precedent and some leadership to bring this about. Madison's famous articles on religious freedom had much to do with this triumph.

There were certain earlier precedents that ought not be overlooked. Already in 1775, when Virginia sent troops to help constitute the Revolutionary Army, "dissenting" churches were allowed to send their ministers along with the companies of soldiers as *bona fide* chaplains. Thus Baptists and Methodists received recognition alongside the still established Anglican church by official action of the legislature.<sup>11</sup> The Continental

Congress followed suit and in the summer of 1775 authorized the military chaplaincy as a legal entity, and in November of that same year a chaplaincy for the Navy. A German Lutheran pastor, Christian Streit, was appointed during the following summer (1776) as chaplain for the German-speaking Eighth Regiment of Virginia.

Along with Jefferson and others, Madison led the move towards disestablishment of the Anglican church in Virginia. But it was not until 1779 that the act for parish levies in support of that church was finally repealed. No sooner was that issue laid to rest, however, when "A Bill Establishing A Provision for Teachers of the Christian Religion" came before the Virginia legislature calling for nondiscriminatory support of all religious groups. It won preliminary approval in October 1784. Men like Patrick Henry, George Washington, Richard Henry Lee, and John Marshall stood for it. Jefferson was out of the country when the bill came on the floor for debate. Credit goes to Madison, who had drawn up a brilliant brief against the popular bill, for effective, persuasive arguments that defeated the proposed legislation. "Establishment" in Virginia can be said to have breathed its last in December 1785, as Madison's famous *Memorial and Remonstrance Against Religious Assessments* scored a signal victory. In fact, it signalled what would soon come to be the cornerstone of the Bill of Rights, the First Amendment, guaranteeing that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . ."

### MADISON'S UNIQUE ROLE

Jefferson and Madison are often mentioned in one breath as the architects of American democracy. They were close friends from the time of their first meeting as delegates to the convention that drafted Virginia's first constitution at Williamsburg in 1776. Of one mind on most matters pertaining to the state politic, they actually were quite disparate in other ways. Jefferson was often noted for his aloofness from Christianity; Madison quite the contrary. The one was a lawyer by profession, tall, aristocratic, given to idealistic, almost poetic speech. The other, Madison, was short of stature, a master of clear prose, and, along with men like Washington and Franklin, one of the articulate "laymen" among the founding fathers. Jefferson has been called by some the "poet" of American democracy. If that be granted, Madison certainly must be counted among its ablest prose exegetes.

It was Madison who produced some of the most penetrating, brilliant pieces on American political philosophy and principles, notably many of the *Federalist* papers, which did so much to

shape political opinion in the country's early history. Alexander Hamilton had also contributed to these papers. But unlike Hamilton, who doubted the capacity of a free people to govern themselves, Madison was a moderate who deeply believed in the federal-republic form of government and the need for extending the scope of government to include all of the people under the sovereign right of governing. With keen insight into government's role Madison wrote in 1788:

If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions, . . . (that is) to divide and arrange the several offices in such a manner as that each may be a check on the other - that the private interest of every individual may be a sentinel over the public rights.<sup>12</sup>

But it was probably Madison's *Memorial and Remonstrance* which best of all summed up the thoughts which eventually were to course their way through the country's Bill of Rights like a stream of clear, sparkling water. His thoughts in this famous document were more than sententious; they wove together the very fibers of our country's freedoms and constitutional rights. This was uniquely true as regards religious liberty:

"The religion . . . of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as an unalienable right . . ."

"If religion be exempt from the authority of the Society at large, still less can it be subject to that of the Legislative Body."

It is an arrogant pretension to imply "that the Civil Magistrate is a competent Judge of Religious truth, or that he may employ Religion as an engine of Civil policy . . ."

Christianity does not require the support of the state, "for every page of it disavows a dependence on the powers of this world."

"Experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation."

"The equal right of every citizen to the free exercise of his Religion according to the dictates of conscience, is held

by the same tenure with all our other rights, . . . freedom of the press, . . . trial by jury, . . . right of suffrage . . .”

### GENESIS OF FIRST AMENDMENT

Self-evidently the First Amendment of the Bill of Rights had its genesis in this kind of thinking, so clearly articulated by Madison. Nor was it mere accident of history that it should stand first. The delegates to the Constitutional Convention realized full well what their constituents expected of them. It now came down simply to the best phrasing of what was foremost among the “unalienable rights.” The *Annals of Congress* (Jos. Gales, ed.) detail the fascinating story of its tooling and re-tooling in the lower house, until the committees and delegates finally settled on something very close to its present form. The *Journal of the First Session of the Senate* (Thom. Greenleaf, ed.) tells the story of how the House’s wording of the First Amendment fared in the Senate. Madison was a member of the *ad hoc* committee which finally shaped the amendment in the now familiar form. Both houses of Congress adopted it.

It was one of the sad chapters of history that needs to be added at this point that Madison and his fellow legislators, who felt deeply the need for extending broadly over each citizen the “unalienable rights,” failed to convince the delegates to make the provisions of the Bill of Rights binding also upon the states. So while these first ten amendments, including the first, were incorporated into the federal Constitution, and while individual states approved similar bills (as had Virginia earlier), some states postponed effective action anent the Bill of Rights until Madison and others were long gone from the scene. As a matter of fact, it took a bloody war between the states to bind *all* the states to the federal Bill of Rights. Truly one of the ironies of our nation’s history in its struggle for freedom! It was a chapter in which Abraham Lincoln was finally to play the key role for the preservation of the Union and the securing of the liberties of the Bill of Rights for every man.

The First Amendment has the place of honor in the Bill of Rights for good reason. “This freedom was first in the Bill of Rights,” Justice Jackson wrote in the *Everson*, or New Jersey bus transportation, case, in 1947, “because it was first in the forefathers’ minds” (330 U.S. 1, 26). They had sought for simplicity, clarity, brevity, unambiguity, when they ruled against establishment of religion, on the one hand, and against infringement of each individual’s right to exercise his religion freely, on the other. But had they succeeded? Judge Learned Hand was of the opinion that they had indeed, and that as regards the words



of the First Amendment "their meaning is to be gathered from the words they contain, read in the historical setting in which they were uttered."<sup>13</sup>

### FIRST AMENDMENT'S MEANING

Recourse and reference to the First Amendment by the U.S. Supreme Court have mounted in frequency, especially during the second century of our country's history. In 1889, in the *Davis v. Beason* case, the Supreme Court stated the First Amendment's meaning to be (133 U.S. 333, 342):

to allow every one under the jurisdiction of the United States to entertain such notions respecting his relations to his Maker and the duties they impose, as may be approved by his judgment and conscience, and to exhibit his sentiments in such form of worship as he may think proper, not injurious to the equal rights of others, and to prohibit legislation for the support of any religious tenets or the modes of worship of any sect.

Justice Black referred to this decision in the *Everson* case, underscoring that the First Amendment's meaning "intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute" (330 U.S. 1, 13). This is significant, for justice Black thereby stated the importance of Madison's pilot work on the Virginia bill of rights as precursor to the nation's Bill of Rights. Justice Joseph Story, whose life overlapped partly with Madison's and who served one of the longest terms on the Supreme Court (1811-1846), concurred completely with this view.<sup>14</sup> Justice Jackson, though standing on the minority side of the *Everson* case, expressed virtually the same position on the meaning of the First Amendment for our day (330 U.S. 1, 26f):

It was intended not only to keep the states' hands out of religion, but to keep religion's hands off the state, and above all, to keep bitter controversy out of public life by denying to every denomination any advantage from getting control of public policy or the public purse.

In getting at Madison's intention most justices have apparently had recourse to his famous *Memorial and Remonstrance* of 1785. They look at the First Amendment through this glass and conclude that what Madison hoped to preclude was all forms of establishment, single or multiple; to keep the government neutral as far as religion was concerned, supporting it neither by statute nor by levy or taxation, even on a non-discriminatory basis; and to prevent the government from infringing upon an individual's free exercise of religion, so long as he, in turn, did not impose his views on others and make his liberty into law.

---

## THE "SEPARATION" CLAUSE

While Justice Black had written the majority opinion in the *Everson* case, sustaining the New Jersey courts in allowing bus transportation at public expense for children attending parochial schools, he explicitly ruled out "establishment" in any and every form, stating: "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' " (330 U.S. 1, 16). In the New York Regents' Prayer case, 1962, he ruled in a similar way that "the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of American people to recite as a part of the religious program carried on by government" (*Engel v. Vitale*, 370 U.S. 421, 427).

Justice Black's interpretation that "the clause against establishment of religion by law was intended to erect a 'wall of separation between church and state' " has been the fulcrum of considerable debate. Jefferson had first used the famous metaphor in connection with "establishment" in a letter to the Danbury Baptist Church Association on January 1, 1802, while president of the United States. Among other things he explained his reticence to use his office to establish by proclamation special religious holidays, like Thanksgiving, on the grounds "that religion is a matter which lies solely between man and his God." Quoting the First Amendment, he went on to explain that by it Congress was "building a wall of separation between church and state."<sup>15</sup> This was a considered judgment by Jefferson, one which he carefully tested by first submitting a copy of his response to Levi Lincoln, his attorney general.

It does appear that during the years of their presidencies both Jefferson (1801-1809) and Madison (1809-1817) tended to sharpen the disestablishment side of the First Amendment and, therefore, the policy of strict separation of church and state. Even the so-called "exceptional" or fringe areas, like special days of national thanksgiving, or the congressional and military chaplaincies when supported by public funds, were in their eyes *de facto* infringements of the First Amendment. Later, after his retirement from office, Madison expressed the opinion in his *Detached Memoranda* that the congressional and military chaplaincies were "a palpable violation of equal rights, as well as of Constitutional principles."<sup>16</sup> In his judgment "it would have been a much better proof to their constituents of their pious feeling if the members had contributed for the purpose a pittance from their own pockets." Yet he seemed to be reconciled to the fact that "as

the precedent is not likely to be rescinded, the best that can now be done, may be to apply to the Constitution the maxim of the law, *de minimis non curat*," that is, "the law takes no account of trifles."<sup>17</sup>

The question naturally arises: why did Madison (and Jefferson for that matter) tend towards stricter, more absolutist, interpretation of the First Amendment in his later years? Were not chaplaincies, both in the Congress and in the military, accepted facts or ways of life in the days when the Constitution and Bill of Rights were coming into being? Madison undoubtedly is speaking in behalf of the ideal, fully aware that precedent and long usage had established usages which public sentiment would not likely wish overthrown. Nor can one discount the impact that the continuing "establishments" of religion in some of the states, especially in the New England tier, would have had in coloring his thinking. The federal Bill of Rights had only very slowly begun to be accepted in these states. His strict interpretation of the separation principle would thus seem to be a natural reaction. Under no circumstances can it be claimed that Madison was hostile to religion or that he opted for the extreme secularist position which is defended by some in our day. Rather his attitude is summed up in his own words, according to which he is ready to live with certain accommodations under the First Amendment, viz., that "the precedent is not likely to be rescinded" as regards long-standing and respected institutions.

#### STRICT SEPARATION - MINIMAL AID- BENEVOLENT NEUTRALITY

Interpreters of the First Amendment have generally swung between two extremes: either the strict, absolute separation policy which Jefferson and Madison seemed to adopt in their later years (although not always consistently), or the view favoring minimal aid to religion as long as it is done on a non-preferential basis. Defenders of the latter position have argued that this is the only way to keep our nation from total "deconsecration" or "secularization." Its advocates have lobbied for closer welding together of civil and religious agencies. Needless to say, there is considerable danger in going this direction, not to mention palpable violation of the First Amendment's dictum against "establishment."

There is a third way, and this is the way our courts have regularly interpreted the "mind" of our founding fathers. The separation intended under the First Amendment, they argue, is actually one of neutrality, specifically a benevolent and

wholesome neutrality. It is sympathetic and helpful to religion and the religious institutions by attitude, by not being blindly indifferent towards, nor hostile, nor coldly secularistic. It does not cut down cherished traditions and usages with unthinking sort of ruthlessness, but it is willing to move carefully through marginal areas, especially those that have existed over a long period of time and have been found beneficial to the country's moral fiber.

The military chaplaincies were a case in point and thus have been cited again and again by the Supreme Court as exceptions to the strict, or absolutist, interpretation of the First Amendment. Our founding fathers, they argue, never intended to adopt legislation which would place the government into hostile or unfriendly relation with the churches. Thus they refrained from imposing taxes upon the churches at a time when the law had just removed supportive levies in their behalf. As a result, churches and clergymen still enjoy certain tax advantages under the law. It was a policy of friendly recognition of the churches' influence for good upon the commonwealth. The same rule obtained as far as the chaplaincies were concerned. In supporting them our forefathers considered the "wall of separation" not to be so high as to allow government which called men under arms to infringe upon an individual's right to worship. Accordingly, the "free exercise" clause of the First Amendment had as much weight with our founding fathers as did the "establishment" clause. This fact is somewhat blunted in Harvey Cox's *Military Chaplains*,<sup>18</sup> a rather negative work that was supported by the anti-war organization, Clergy and Laymen Concerned About Vietnam. In turn it has recently been answered definitively by Richard G. Hutcheson's *The Churches and the Chaplaincy*.<sup>19</sup>

A benevolent and friendly neutrality was our founding fathers' answer to the various borderline or grey areas where a critical interacting of state and church, or accommodation, was indicated for the safeguarding of individual rights. Absolute separation could under given circumstances actually infringe an individual's rights, especially his religious liberty. In his concurring opinion for the majority on the New York Regents' Prayer case, Justice Douglas affirmed: "The First Amendment leaves the government in a position not of hostility to religion but of neutrality" (370 U.S. 421, 433). But the court has always thought of this neutrality as benevolent, not inimical or coldly secularistic. Professor Katz states with discernment: "Provisions for religious services in the armed forces are not aids to religion which violate the neutrality principle. They are not designed to promote religion, but to protect the religious freedom of those whom the government isolates from civilian life."<sup>20</sup>

This is not to say that traditions, especially those of long and

respected standing, determine the meaning and applicability of law. But it is to say that such traditions or usages, when acknowledged to be for the common good, may lend an interpretation to statute and article which touches more closely the intent of the laws governing a free people. A government like ours, after all, derives from the consent of the governed. It devolves from that which is higher, the sovereign nation of free people who constitute it. In getting at the meaning and scope of the First Amendment, therefore, Judge Learned Hand stated that it is this principle, "that all political power emanates from the people," which provides the protecting canopy for our government's sanction and charter.<sup>21</sup>

Discreet neutrality in the relation of church and state, coupled with respectful regard for time-honored traditions and usages, is the meaning which our courts have drawn from the First Amendment. Such exceptions as are present have always been understood as allowable under the separation principle, not as instances that allow for greater expansion of church-state involvement. The legality of institutions such as the military chaplaincies has been tested before the courts periodically. Plaintiffs have charged that their rights have been infringed through the use of tax dollars for the support of an institution violating the First Amendment. Even prior to the Civil War there was debate on this issue. In the days of Lincoln, 1863, the House Judiciary Committee handed down an opinion which has since stood every test: "It was pointed out that chaplains were in the Army before the adoption of the Constitution; that the First Congress had appointed chaplains; that the expense of the chaplaincy was slight; that the need for religious guidance was necessary for the 'safety of civil society.'"<sup>22</sup> More recent rulings by courts of law have ended with dismissal of the suit on grounds that the plaintiff "does not have status to maintain the action" and that, moreover, his plea failed to "set forth a cause of action."<sup>23</sup> A couple hundred years of tradition now stand behind this institution, and, as Madison acknowledged, "the precedent is not likely to be rescinded."

#### FIRST AMENDMENT INCORPORATED IN FOURTEENTH

Perhaps the most important development in the interpretation of the First Amendment over the last two hundred years occurred immediately after the Civil War. With the passage of the Fourteenth Amendment states' rights were brought into conformity with the nation's Bill of Rights. In no way could they henceforth contradict its guarantees to the individual citizen. With the

Fourteenth Amendment's due-process clause, the usual judicial construction has been to broaden the base of the Bill of Rights, or the first ten amendments, to apply equally to every American citizen, in whatever state he was domiciled. This began with the famous "Slaughterhouse Cases" in 1873, which involved the question of monopoly on the part of certain favored companies in Louisiana and the restraints placed upon butchers in their occupations and infringement upon their rights. On the basis of the Fourteenth Amendment the Supreme Court distinguished carefully, states legal expert Roy Frank, "between the inherent nature of citizenship in the United States and citizenship in a state and between the relative rights of each."<sup>24</sup> In a similar vein Justice Stephen Field wrote in 1891 that "in our country hostile and discriminating legislation by a state against persons of any class, sect, creed or nation . . . is forbidden by the Fourteenth Amendment" (*12 Federal Cases*, No. 6, 546, 252, 256).

Case upon case followed in that tradition. In *Meyer v. Nebraska*, 1923, the Supreme Court reversed the Nebraska court which had forbidden the teaching of a foreign language (German) in a Lutheran parochial school; and the court cited the Fourteenth Amendment along with the First to uphold the right of each individual "to worship God according to the dictates of his own conscience" (262 U.S. 390, 399). *Pierce v. Society of Sisters*, 1925, upheld the right of parents in Oregon to opt for parochial over public school education for their children, articulating a very precious truth to every American that "the child is not the mere creature of the state" (268 U.S. 510, 535).

### THE CONTROVERSIAL "SCHOOL CASES"

A veritable spate of "school" cases have come before the high court in recent years. *Everson v. Board of Education*, 1947, ruled for bus transportation for parochial school children at public expense. *McCullum v. Board of Education*, 1948, reversed the Illinois court which had ruled in favor of the use of public facilities for released time religion classes. However, *Zorach v. Clauson*, 1952, upheld the New York court in allowing for released time for the teaching of religion as long as public buildings were not used. *Engel v. Vitale*, 1962, ruled against the use of the Regents' prayer in New York schools. *Abington School District v. Schempp*, 1963, upheld the Pennsylvania court which had ruled against Bible reading and the Lord's Prayer in public schools.

In these and other judgements - all of them in some way involving interpretation of the First Amendment as incorporated in the due-process safeguards of the Fourteenth - the Supreme Court

has striven hard to keep the "mind" and "intent" of the founding fathers. It has not succeeded to avoid criticism, some of it very severe. This was especially so in the *Schempp* case, involving Bible reading and the use of the Lord's Prayer in public classrooms. But controversial though some of the rulings have been, one cannot escape the general consistency of thinking nonetheless prevailing among the justices on the controverted issues. A basic, underlying principle, expressed again and again, is the concern for friendliness of the court, or of the government, toward religion, even though it must wall itself off from direct involvement with religion. In the *Zorach* case Justice Douglas, who has distinguished himself both for his longevuity in office (longest in our nation's history) and also for his often controversial and liberal opinions, stated with admirable balance: "We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses." Government, he said, must never come to the dubious position of "preferring those who believe in no religion over those who do believe." Hence the problem was, as he put it, "like many problems in constitutional law, one of degree," and if the separation principle were to be taken in the absolutist sense to mean that "no adjustments" were allowable under any circumstances, the Court would be adopting "a philosophy of hostility to religion," and that would be something we definitely could not "read into the Bill of Rights" (343 U.S. 306, 313ff).

Justice Stewart, the only dissenting voice in the New York Regents' prayer case (*Engel v. Vitale*), felt so keenly about the "free exercise" clause in the First Amendment that he argued that "the Court has misapplied a great constitutional principle." He went on to say: "I cannot see how 'an official' religion is established by letting those who want to say a prayer say it. On the contrary, I think that to deny the wish of these school children to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of our Nation" (370 U.S. 421, 445). He recounted as part of this "heritage" the long-standing chaplaincies in the Congress and in the military; the pledge of allegiance ("one nation under God"); the national days of religious nature; the custom of opening each session of the Supreme Court itself, since the days of John Marshall, with "God save the United States and this honorable Court"; and, not least, the fourth stanza of our national anthem, which reads:

Blest with victory and peace, may the heav'n rescued land  
 Praise the Power that hath made and preserved us a nation!  
 Then conquer we must, when our cause it is just,  
 And this be our motto, "In God is our trust."

Justice Brennan stood with the majority in the above case and

also in the Pennsylvania Bible reading and Lord's Prayer case (*Schempp*). It is significant that as he argued for the majority position (Justice Stewart was again the only dissenting voice), Justice Brennan spoke clearly against an absolutist interpretation of the separation principle, thus with a benevolent attitude towards religion and the churches. He clearly designated the areas of overlap in church-state relations that have come down to us through two hundred years of history (374 U.S. 203, 209):

Hostility, not neutrality, would characterize the refusal to provide chaplains and places of worship for prisoners and soldiers cut off by the State from all civilian opportunities for public communion, the withholding of draft exemptions for ministers and conscientious objectors, or the denial of the temporary use of an empty public building to a congregation whose place of worship has been destroyed by fire or flood. I do not say that government *must* provide chaplains or draft exemptions, or that courts should intercede if it fails to do so.

He concluded by stating that in his opinion the practices so designated "might well represent no involvement of the kind prohibited by the Establishment Clause." What is bothersome, however, in Justice Brennan's line of reasoning, and perhaps that of some of his colleagues on the bench, is that he found grounds for not objecting to some of these traditional usages, not because they fit into the "*de minimis*" category, but because they "no longer have a religious purpose or meaning" beyond that of recalling the historical fact "that our nation was believed to have been founded 'under God' " (374 U.S. 203, 303).

Senator Everett McKinley Dirksen of Illinois led a Senate fight to amend the Constitution to allow for Bible reading and the use of the Lord's Prayer in public schools. His bill failed to muster the required two-thirds majority, but the 49-37 margin was indicative of wide-spread dissatisfaction in our country with the Supreme Court's ruling. Justice Stewart, the only dissenting voice in the *Schempp* case, termed the ruling by his colleagues in their interpretation of the separation of church and state principle a "fallacious oversimplification." "We err," he stated, "if we do not recognize as a matter of history and as a matter of the imperatives of our free society, that religion and government must necessarily interact in countless ways . . . The fact is that while in many contexts the Establishment Clause and the Free Exercise Clause freely complement each other, there are areas in which a doctrinaire reading of the Establishment Clause leads to irreconcilable conflict with the Free Exercise Clause" (374 U.S. 203, 309).



## A GOODLY HERITAGE

While there has been sharp cleavage in interpreting the intent and meaning of the First Amendment, the facts still are that the amendment is sound and good. It has secured the place of religion in this country, and it has, moreover, spelled out carefully the complete separation that the churches have from the political concerns of government. It has also secured the rights and guarantees of the Free Exercise Clause, especially since the time when this guarantee was incorporated with the due-process clause of the Fourteenth Amendment. This guaranteed that the Bill of Rights would also be the basis upon which the states must provide for the individual's rights before the law. Certain problems will undoubtedly always remain, as specific cases come before the high court. Areas of contact, or interaction, between the churches and state have been and will be inevitable. While one might argue that the decisions on the school, Bible reading, and prayer cases were not always consistent, it is likely that a careful study will reveal a greater measure of consistency than at first supposed. "It is quite clear from the Court opinions that chaplaincies, both Congressional and military, charitable institutions, and exemptions of various kinds as they affect the churches, or the clergy, have been rather clearly defined as allowable under constitutional law. The Court has again and again referred directly to the military chaplaincy as an example where the neutrality principle of church-state relations must not be so strictly applied as to suppress or abolish it. The obvious rationale of the Court in so ruling, is that individual rights would thereby be infringed, contrary to the free exercise clause of the First Amendment."<sup>25</sup>

In the land of the free it is not unusual that threats against that freedom should periodically arise, and that individuals in pursuit of their own liberty should be ready to deny it to another. Without question this fact weighed heavily on the minds of our founding fathers two hundred years ago as they began their work on the guarantees incorporated in the First Amendment. Their memories of Europe's injustices and denials of freedom, and the injustices which as a matter of fact still existed in some of the original thirteen states themselves, pressed upon them the urgency of writing indelibly into the Constitution what they considered to be "unalienable rights." The First Amendment was the blessed product of their tireless efforts and persistence. It was born of anguished experience and most careful phrasing. Firsthand study of our Supreme Court's rulings during these two centuries, especially the last, give evidence of equally careful and con-

scientious effort in upholding what our forefathers sought to secure. As a result it can be stated:

The courts have never agreed that freedom of religion means the lack of it, nor the denial of its free use, nor even the refusal to encourage its practice. While government must recognize the right of the agnostic or atheist not to worship God if he so chooses, it at the same time is fully within the limits of the Constitution when the courts resist the motions of groups or individuals who seek to make the man who believes most conform to the way of thinking of the man who believes least or nothing at all.<sup>26</sup>

The First Amendment is the brightest jewel in the golden crown on freedom's head. By this bequest our forefathers have given us an instrument for carefully dividing between the kingdoms of the right hand and the left hand of God, as Luther termed the spheres of church and state. Through the application of this instrument church and state exist meaningfully, safely, and benevolently side by side, each in its God-given sphere.

#### FOOTNOTES

1. Catherine Marshall, *A Man Called Peter* (New York: McGraw-Hill, 1951), p. 281.
2. Alex Zollmann, *American Church Law* (St. Paul; West Publishing Company, 1933), p. 35.
3. Alexis de Tocqueville, *Democracy in America* (New York: Knopp, 1945), I, pp. 303-307, *passim*.
4. "The Case for Separation" in *Religion in America* (New York: Meridian, 1958), p. 93.
5. Quoted in Jos. M. Dawson, *America's Way in Church, State and Society* (New York: Macmillan, 1953), p. 163.
6. Edward F. Humphrey, *Nationalism and Religion in America* (Boston: Chipman, 1924), p. 411.
7. Zollmann, *op. cit.*, p. 4.
8. Max Farrand, *The Records of the Federal Convention of 1787* (New Haven, 1911), I, p. 452.
9. *Ibid.*, III, Appendix A, p. cccxciii.
10. Humphrey, *op. cit.*, p. 473.
11. F. L. Hawks, *Contributions to the Ecclesiastical History of the United States of America*, I., p. 138 (quoting the *Journal of the Convention*, August 16, 1775).
12. *The Federalist*, No. 51, February 8, 1788, quoted in S. Padover, *The Complete Madison* (New York: Harper, 1953), p. 179.
13. Quoted in Philip B. Kurland, *Religion and the Law* (Chicago: Aldine, 1962).
14. Jos. Story, *Commentaries on the Constitution of the United States* (Boston, 1833, abridged ed.), pp. 701f.
15. S. Padover, *The Complete Jefferson* (New York: Duell, Sloan, and Pearce, 1943), pp. 518f.
16. Eliz. Fleet, ed., "Madison's 'Detached Memoranda,'" *William and Mary Quarterly*, Third Series, III, no. 4 (October 1946), p. 558.
17. Gaillard Hunt, ed., *The Writings of James Madison* (New York: Putnam, 1904), IX, p. 100f.

18. New York: American Report Press, 1972.
19. Atlanta: Knox, 1975.
20. *Religion and American Constitutions* (Evanston: Northwestern, 1964), p. 13.
21. Kurland, *op. cit.*, p. 10,
22. Clifford Drury, *The History of the Chaplain Corps, United States Navy* (Washington: U.S. Government Printing Office, 1949), I, p. 65.
23. Religious News Service, December 21, 1955, reporting on a suit brought by Frank Hughes of Minneapolis, a professed atheist.
24. "Religious Liberty in the Constitution" in A. Huegli, ed., *Church and State Under God* (St. Louis: Concordia, 1964), p. 266.
25. E. F. Klug, *The Military Chaplaincy Under the First Amendment* (an unpublished manuscript in the files of the U. S. Army Chaplain Board, Fort George G. Mead, Maryland, and also in the library of Concordia Theological Seminary, Fort Wayne, Indiana, 1967), p. 176.
26. E. F. Klug, "Custom and Law in Church-State Practices" in A. Huegli, ed., *op. cit.*, p. 392.