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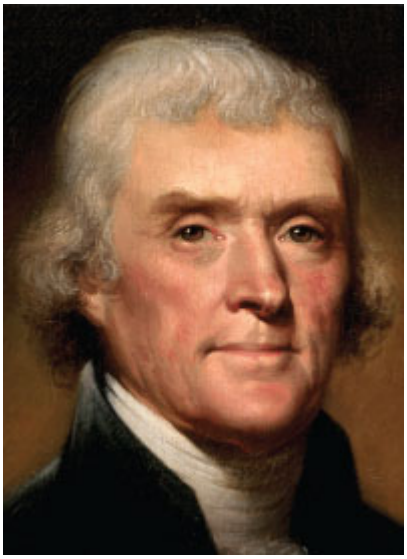
The Establishment Clause



From Article I to the Tenth Amendment, every essential protection of liberty enshrined by our Founding Fathers in the Constitution is being attacked (successfully) and set at nought by those determined to divest the United States of the rule of law and the freedoms it ensures. No single aspect of American constitutional liberty is more misunderstood, misapplied, and manipulated than the First Amendment's defense of religious freedom.

For example, a recent opinion piece published in the *Baltimore Sun* accused the U.S. Naval Academy of "defying the Constitution — specifically the First Amendment."

Specifically, the author (an adjunct instructor at the academy) asserts that the Naval Academy administration is violating the Establishment Clause of the First Amendment through the practice of saying grace before meals. As the author describes the tradition: "They [Naval midshipmen] are marched into the mess hall, called to attention to listen to announcements, and then to prayer by a chaplain before sitting to eat. They are not permitted to leave, and thus they are forced to listen."

To support his accusation, the author cites a Fourth Circuit Court of Appeals decision. He provides the following history of the case:

> That is the opinion of our courts and the compelling reason to end it. In 2003, the U.S. Court of Appeals for the 4th District ruled in *Mellen v. Bunting* that the Virginia Military Institute's suppertime prayer was unconstitutional: "Put simply, VMI's supper prayer exacts an unconstitutional toll on the consciences of religious objectors. While the First Amendment does not in any way prohibit VMI's cadets from praying, before, during or after the supper, the Establishment Clause prohibits VMI from sponsoring such a religious activity."

Moreover, in April 2004, the Supreme Court declined to hear a challenge to the Court of Appeals' ruling, thus affirming the lower court's decision.

After rehearsing this bit of jurisprudential precedent to his end, the author gloats over the fact that the other service academies fell into line and discontinued the practice of preprandial prayer. Then, he provides for the reader the logical (to him) conclusion of the argument he has presented: "The Constitution is the supreme law of the land. Let's get the Naval Academy to act to fully support and defend it — not defy it."

Further proof is found in the story recently published by *The New American* online describing how a federal district court held that "the Medina Valley Independent School District of Texas could not include prayer in its commencement ceremonies, nor use any language perceived to be religious in nature." The lower court ruling was later reversed by the Fifth Circuit Court of Appeals, but the fact

that such a challenge was originally upheld by the district court is disturbing. In the Medina Valley case, the complaint was supported by Americans United for Separation of Church and State, a group dedicated to scouring religion from every nook and cranny of American society.

A Principled Foundation

Regardless of the source of the assault on constitutional principles, constitutionalists should be able to defend those principles by relying on history and reason, without ad hominem disparagement of the attackers. The polestar of defenders of the Constitution is the document itself, not emotional recriminations of those opposed to their position. In an effort to follow that injunction, it is necessary to examine the legitimate purpose and provenance of the so-called Establishment Clause of the First Amendment, the oft-cited "wall of separation" between church and state, and the role of the Supreme Court in defending or destroying those ideas.

First, we must base ourselves firmly on the premise that the Constitution is the supreme law of the land. In fact, the Constitution itself proclaims such in Article VI: "This Constitution … shall be the supreme law of the land." With that, constitutionalists have no quarrel, as it is that supremacy that we long to have recognized and respected by legislators and Presidents. This article, as applied to the issue of the Naval Academy's mealtime prayer, however, does not support the opinion piece's author. Furthermore, those challenging the prayer at school commencements will find no fuel for their fire. To the contrary, the history of Anglo-Saxon law, the words of our own Founding Fathers, and the plain language of the Constitution itself all testify that the Establishment Clause was never enacted to proscribe such piety.

First, the three branches of the federal government have enumerated powers — that is to say, they may not act outside of the defined theaters of action ceded to them in the Constitution. One of these branches, the legislative, is composed of a Congress, and to that Congress is granted by the Constitution "all legislative powers." Therefore, no other branch may make laws.

Furthermore, Congress itself may enact only those laws which address subjects found within the sphere of specifically enumerated powers listed in the Constitution. As there is no grant of power to Congress to legislate with regard to "religion," it may not pass laws in that area.

Second, the Constitution in the First Amendment reads in relevant part: "Congress shall make no law respecting an establishment of religion." The threshold question of this analysis is the understanding of what is meant by the "establishment of religion." We may begin with a cursory review of the history of the practice of establishing religion in England.

Throughout the tumultuous history of the monarchs of England, the official and exclusive recognition of religion has swung (usually violently) between the Roman Catholic faith and the Protestant (Anglican) religion. Whichever of the two denominations held sway in England, the "establishment" thereof consisted chiefly in the mandatory payment of (and forceful collection of) tithes. These "donations" were used to support the church and the clergy.

The critical aspect, then, of the establishment of a religion was the employment of the sword of state in the collection of tithes to support that state-sponsored religion. The people were compelled at the point of a sword (quite literally) to provide the funds necessary to perpetuate the control of the approved clergy through the payment of their living expenses.

In America, the establishment of religion continued in most of the colonies. Non-conformists could be imprisoned or fined (or worse) for failing to pay the mandated tithe. The history of the founding of

America, however, made the establishment of a religion by the civil authorities more difficult than in England. This was to be expected, given that many of the earliest settlers of America fled England to escape the persecution heaped upon them by the crown and its representatives for refusing to support a faith they considered errant and perverted from the straight and narrow.

By the time of the outbreak of the War for Independence, prominent Americans were advocating the end to established religion and the support of religion built on voluntary donations, as made by congregants according to their conscience, without influence or compulsion on the part of the civil authority.

In 1772, Benjamin Franklin of Philadelphia wrote in a letter to a London newspaper:

> Now to determine on the justice of this charge against the present dissenters, particularly those in America, let us consider the following facts. They went from England to establish a new country for themselves, at their own expence, where they might enjoy the free exercise of religion in their own way.

Alexander Hamilton expressed a similar view of history in remarks written three years later:

> While tithes were the free, though customary, gift of the people, as was the case before the passing of the act in question, the Roman Church was only in a state of toleration; but when the law came to take cognizance of them, and, by determining their permanent existence, destroyed the free agency of the people, it then resumed the nature of an establishment, which it had been divested of at the time of the capitulation.

Finally, James Madison, the very man endowed by history with the honorific title of "Father of the Constitution," in 1832 wrote in a letter to a reverend:

> In the Colonial State of the Country, there were four examples, R.I., N.J., Penna., and Delaware, & the greater part of N.Y. where there was no religious Establishments; the support of Religion being left to the voluntary associations & contributions of individuals.

The testimony of these three witnesses corroborate one another and provide compelling evidence that early on in its history, the establishment of religion was contrary to the will of the American people and the spirit of the founding of our nation by those seeking freedom to practice religion according to the dictates of their own conscience, without fear of royal repercussion.

Finally, in light of the steady dissolution of established religions throughout America, it is useful now to read the specific language of the First Amendment so as to understand the metes and bounds of its proscriptions.

A Control Over Congress

A careful reading of the plain language of the 10 amendments that comprise the Bill of Rights reveals that there is one organization that is prohibited from making laws establishing a religion: Congress. Read the First Amendment again: "Congress shall make no law." When this restriction is read in concert with the last of the 10 amendments in the Bill of Rights, it is clear that the states and the people retain the right to establish religions, if that is their desire. In fact, many states retained their established religions after ratification of the Constitution: New Hampshire, Connecticut, and Massachusetts, for example.

To recap the scope of the Establishment Clause, then, the intent is to forbid Congress from establishing a national religion (as was done by the British Crown, often at the point of a sword); Congress is

forbidden from restricting the right of individuals from worshiping as they choose; and Congress, therefore, has no constitutional authority (and, remember, all the authority of Congress is enumerated and is not natural) to infringe at all upon the right of the states and the people to fully and freely exercise their liberty of conscience.

As with so many other matters of constitutional interpretation, the Supreme Court has not bound itself nor based its decisions on the pure principles of freedom as explicated in the Constitution.

In the early years of the 20th century, for example, the high court decided that the 14th Amendment applies not only to the states, but that it incorporates (or imposes) the First Amendment (which, remember, applies only to Congress) on the states, as well. In the case of *Benjamin Gitlow v. People of the State of New York* (1925), the Supreme Court overturned the decision in the case of *Barron v. Baltimore* (1833), that the Bill of Rights applied only to the federal government (Congress) and that, consequently, the federal courts could not stop the enforcement of state laws that restricted the rights enumerated in the Bill of Rights.

The court in *Gitlow* found that the guarantees included in the First Amendment were "fundamental personal rights" and could not be impaired by state governments. That represents a radical revision of American constitutional jurisprudence, the first of many such decisions that would rewrite not only the First Amendment, but redraw the boundaries around the power of Congress to abridge the right of worship.

As for the abolition of prayer from the public school, subsequent Supreme Court decisions piggybacked on *Gitlow* and its progeny to accomplish that end. In *Engel v. Vitale* (1962) the majority (6-1) decided the voluntary recitation of a non-denominational prayer in a New York public school represented the "establishment of religion" as proscribed by the First Amendment. In the majority opinion, "religious activity" was substituted for "establishment of religion," thus outlawing prayer based on a completely unsupportable judicial sleight of hand. All of this damage to the Constitution was done without a single word of explanation of how the definition of an "established religion" (a denomination supported by the civil government) as understood for centuries included the voluntary recitation of a non-denominational prayer. The deed was done.

In 2000, the Supreme Court continued perfecting its skill at misdirection by citing itself in a decision that created a new constitutional standard for the "establishment of religion." *In the case of Santa Fe Independent School District v. Doe*, the majority held that student-led, voluntary, non-denominational prayer was "perceived" government sponsorship of prayer, thus a violation of the Establishment Clause. Further, the court held that any policy that made "nonadherents" feel like "outsiders" was unconstitutional.

The Supreme Court, in defiance of centuries of Anglo-Saxon law, the words of our own Founders, and the plain language of the Constitution itself, had in the course of about 80 years obliterated the Constitution and altered the proper relationship between government and religion. The next plank of the platform was carved from a phrase Thomas Jefferson likely never knew would be so wrested.

Everyone has heard the phrase "separation of church and state." The anti-religious wail those words as a war cry against any "actual" or "perceived" influence of faith on government. As is evident from the analysis presented above, that phrase exists nowhere in the Constitution. It has its origins in a letter sent by our third President in response to one sent to him by a church in Connecticut.

As mentioned above, Connecticut maintained an established religion (the Congregational Church) until

1818. In 1801, members of the Baptist denomination in Danbury sent a letter to Thomas Jefferson, plaintively setting forth their difficulties at being an officially disfavored community of faith.

In his response, Jefferson sympathized with his correspondents and declared his hope that "their [Connecticut's] legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between Church & State."

Far from being advocacy of the relegation of religion to solitary confinement in the private sphere, Jefferson cites the Establishment Clause itself as the model for other legislatures. As President, and as a student of the law, Jefferson undoubtedly understood that the First Amendment applied those restrictions on Congress, not on the church. As a perhaps relevant bit of context, the day after Jefferson penned the letter to the Danbury Baptists (January 3), he attended a worship service conducted in the House of Representatives presided over by a Baptist minister. Hardly the behavior of a man opposed to the offering of prayer in a government venue.

So we see that despite efforts of the Supreme Court to redefine the borders of the First Amendment (and all other articles and amendments of the Constitution), the misunderstanding and misapplication of the clear language of the First Amendment, and the unjustified conflation of the "wall of separation" phrase in a private letter, there is no evidence that the Establishment Clause was included in the Constitution to prevent students from asking the Lord's blessing over their food or from giving Him thanks for it. To the contrary, the Establishment Clause was written into our Constitution to prevent Congress from impinging upon that right.

Graphic: Thomas Jefferson