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NONPREFERENTIAL AID TO RELIGION IS NOT AN ESTABLISHMENT OF RELIGION

JAMES M. O’NEILL

I

THE LANGUAGE OF THE ESTABLISHMENT CLAUSE

The First Amendment to the Constitution of the United States provides, in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." This phraseology was designed to meet the wishes of the people of various states who had adopted resolutions, memorials, and petitions, recommending that the Federal Constitution should make clear that "no particular sect or society ought to be favored or established by law in preference to others."

Virginia voted in June, 1788, "no particular religious sect or society ought to be favored or established by law in preference to others"; New York, July, 1788, used the same language except that "particular" was omitted; North Carolina, November 1788, used the same words as Virginia; Rhode Island, in ratifying the Constitution "declared" certain principles, one of which was (with slight variations) identical with the Virginia declaration. Other states used language consistent with the above, but they did not mention public funds to aid religion, government cooperation with religion, religious education, or religion in education. Public education was, of course, not mentioned as it was substantially unknown until many years later.

When the Revolutionary War broke out, there were nine established Protestant churches in nine of the colonies.1 By the time the Bill of Rights was adopted, four of these establishments had been eliminated and five were still in existence. The last of these established Protestant churches disappeared in New England when the Congregational Church lost its favored position among religious groups in Connecticut in 1818, in New Hampshire in 1827, and in Massachusetts in 1833. The First Amendment was neither for nor against these state establishments of religion.2 It simply left "an establishment of religion" for any state where it was left by the original Constitution—in the hands of the people of the states. But since Congress could "make no law respecting [i. e., concerning or about] an establishment of religion" there could be none set up by the Congress for the United States as a whole.

1. SWEET, THE STORY OF RELIGIONS IN AMERICA 274 (1st ed. 1930).
2. O’NEILL, RELIGION AND EDUCATION UNDER THE CONSTITUTION c. 3 (1949).
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Alexander Hamilton and some others had taken the position that there should not be a Bill of Rights in the Constitution. They argued that since the federal government was a government of enumerated powers, and since no power had been given to the federal government to deal with such matters, a Bill of Rights was unnecessary. Thomas Jefferson, who was our minister to Paris at the time, wrote to James Madison that he agreed that Congress had no power to deal with such matters, but he said he wanted a "text" in the Constitution by which to try "the acts of the federal government" if it attempted to interfere in these concerns of the people of the various states. Madison agreed with Hamilton and Jefferson that a Bill of Rights in the Constitution was not necessary, but he "favored it" because he supposed it might be of use, and if properly executed could not be of "disservice."

It was Madison who carefully phrased a Bill of Rights, and submitted it to the First Congress of the United States. His original wording of the establishment clause was "nor shall any national religion be established." This was referred to a committee (of which Madison was a member) which recommended the language "no religion shall be established by law." This clear purpose of making explicit what was implicit in the original Constitution, viz., that the Congress could not grant governmental favor to one religion over all other religions, ran all through the deliberations of the First Congress. It was finally accomplished by recording in the establishment clause that Congress could not touch the subject—could make no law at all, either for or against, an establishment of religion.

It is important to note that the authors of the Bill of Rights "took sides" in regard to freedom of religion, freedom of the press, freedom of speech, and of assembly. They did not say that Congress could not legislate on these subjects, but that Congress could make no law that prohibited or abridged these basic freedoms. But the authors of the First Amendment did not "take sides" in regard to "an establishment of religion." In other words, the phrasing of the First Amendment dealing with an establishment of religion is different from that dealing with freedom of religion. In the writings of Jefferson and Madison, in the language of the Congress at various times, and in Supreme Court decisions, the concept of an establishment of religion has regularly been differentiated from the concept of freedom of religion.

5. 5 The Writings of James Madison 269 (Hunt ed. 1904).
There doubtless would be general agreement that the two concepts are related, but that there could be an establishment of religion with almost as much freedom of religion as is ever possible—since absolute freedom of religion (and of speech and press) has never been allowed in any country. In England, for instance, where the Anglican Church is established, there is substantially as much freedom of religion as there is in the United States where we have no establishment of religion. Obviously, the free exercise of religion can be interfered with in countries in which there is no establishment of religion.

II

THE CURRENT IMPORTANCE OF THE
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In spite of the fact that no American wants an establishment of religion today, the meaning of the establishment clause has taken a place of unusual prominence in recent years. It has been the real (though often largely ignored) issue in certain key controversies which have reached the United States Supreme Court in the last decade. It was the issue in the *Everson* bus case,6 in which the United States Supreme Court decided that using public funds to provide bus transportation for children attending Catholic parochial schools in New Jersey did not constitute "an establishment of religion," and therefore did not violate the Constitution of the United States. It was the issue in the *McCollum* case,7 in which the Supreme Court decided that permitting voluntary religious education, in public school buildings, without expense to the taxpayers in Champaign, Illinois, taught by members of various religious groups for certain children, at the written request of their parents, and available on equal terms to all religious groups, did constitute an establishment of religion. In this case the Justices of the Supreme Court largely ignored the language of the Constitution and gave substantially no justification for taking the position that the released time program in Champaign, Illinois, constituted an establishment of religion. They simply proclaimed it. The establishment clause was also the issue in the *Zorach* case,8 in which the Supreme Court decided that the released time system in New York City, which differed from the Champaign situation only in the fact that the school children left the school buildings to go elsewhere during school hours to receive religious

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instruction, did not constitute an establishment of religion. The Court took this position despite the fact that in the McCollum case the only reference to the use of school buildings being an expense on the taxpayer was dismissed as so infinitesimal as to be irrelevant.

In all of these cases the Justices of the Supreme Court substantially avoided any discussion of the meaning of the language of the Constitution which was before them for interpretation and application. They chose, instead, to talk about the superlatively ambiguous phrase "the separation of Church and state." This phrase, on account of its ambiguity, never can have a specific meaning anywhere unless the specificity is furnished by the context. Since the phrase does not appear in the Constitution of the United States (nor in the Constitution of any state in the Union), it has no constitutional context and therefore cannot possibly have any ascertainable constitutional meaning. The Court, however, in these cases paid considerable attention to a figure of speech taken from the polite correspondence of Thomas Jefferson, viz: "A wall of separation between Church and state." This metaphor has obviously the weakness of all figurative language: it is figurative and not literal. Being figurative it can necessarily have various interpretations and applications, but it can never anywhere have the kind of literal, specific meaning that should always and everywhere characterize the language of constitutions, laws, contracts, and judicial decisions.

III

THE SCOPE OF THE CONTROVERSY

As indicated previously, the distinction between freedom of religion and establishment of religion must be kept in mind in any fundamental discussion, although both concepts might be intermingled in a limited and specific controversy. We are not here discussing the clause about the free exercise of religion. This discussion is concerned only with the meaning of the establishment clause, and specifically with the question whether or not it forbids non-preferential government assistance to religion. Nor are we here concerned with the wisdom or unwisdom of any governmental policy, past, present, or future. Also irrelevant to this discussion are religious doctrines and beliefs, and the propriety of any acts or policies of any religious official or organization. We are debating simply the meaning of certain language which was adopted as part of the Constitution in 1791: on such a question there can be no religious doctrine or position. Finally, Dr. Pfeffer and I
are not here concerned with the desirability or practicability of any of the various kinds of separation of Church and state; specifically, we are not debating the merits of the type of relation between religion and government which is expressed in the Constitution of the United States. So far as I know, all Americans, of every creed, and every party, believe in our American constitutional type of separation of Church and state. If Dr. Pfeffer and I disagree on this matter, it is because he does not subscribe to our American doctrine. I do.

The issue in this discussion is: "Does the establishment clause mean that Congress can make no law on the subject of non-preferential assistance of government to religion?" Or still more specifically, does an "establishment of religion" mean any (even non-preferential) assistance to religion? My answer is "no." The words "an establishment of religion", interpreted in the light of their history, cannot properly be held to mean "any, even non-preferential, assistance to religion."

We must find the answer to our issue by the method of interpretation in the light of history. This is the only scholarly way to find the meaning of any language in any historical document when the meaning is in doubt. In order to follow this method, we must survey two areas. One is the purpose of the language as used by the men who wrote, adopted, and ratified it. The purpose of any language which has a purpose, used anywhere by anyone, has to exist in the mind of the person or persons using the language. Intent, purpose, can exist nowhere else. It is not to be found in the black marks on the printed paper, nor in the preferences of readers of the language, but in the human mind which selects and uses the language. Jefferson wrote that the Constitution should be construed by the Supreme Court,

... according to the plain and ordinary meaning of its language to the common intendment of the time, and of those who framed it. On every question of construction, [we must] carry ourselves back to the time when the constitution was adopted, recollect the spirit manifested in the debates, and instead of trying what meaning may be squeezed out of the text, or invented against it, conform to the probable one in which it was passed. It should be left to the sophisms of advocates, whose trade it is, to prove ... that a power has been given because it ought to have been given.9

Justice Frankfurter, to take a modern example, made a comment that should be heeded by those who seek to find in the

9. The Usurpation of the Supreme Court, in a letter to William Johnson, June 12, 1823. Pardo, op. cit. supra n. 4 at 322-323.
establishment clause various explicit meanings which are not covered by the language or the clear purpose of the authors of this clause. "It would be extraordinarily strange," he says, "for a Constitution to convey such specific commands in such a round-about and inexplicit way. After all, an amendment to the Constitution should be read in a 'sense most obvious to the common understanding at the time of its adoption.' . . . For it was for public adoption that it was proposed."\textsuperscript{10}

Our \textit{first} task, therefore, is to find out what the phrase, "an establishment of religion" meant to eighteenth century Americans in general, and specifically what it meant to men like Thomas Jefferson, James Madison, and the men of the First Congress, who were responsible for the language of the Bill of Rights. Our \textit{second} area of investigation is a survey of the application and interpretation of the establishment clause by those who were in positions of responsibility in regard to its interpretation or application beginning with its ratification in 1791, and following down through its history. An investigation of both of these areas demonstrates that the attempt to ascribe to the establishment clause the meaning of a prohibition of non-preferential assistance by government to religion is a modern invention which has no basis in language, tradition, law or history.

\textbf{IV}

\textbf{NONPREFERENTIAL AID IS NO ESTABLISHMENT OF RELIGION}

\textit{A. The Language of the Clause.} The language was designed simply to express (not to create) the constitutional arrangement which left legislative action concerning an establishment of religion in the hands of the several states. The language, as shown above, only made explicit what was implicit in the existing situation, \textit{i.e.}, Congress could not legislate either for or against an establishment of religion.

\textit{B. The Record of Jefferson's Words and Actions.} While Thomas Jefferson was not a member of the First Congress, his relationship to the movement against the establishment of any religion in this country is so important that a careful discussion of this problem cannot omit consideration of Jefferson's actions and statements. Jefferson touched many times upon some aspect of the relation of government to religion, and it is so important as to be almost conclusive that no scholar has so far ever cited a

\textsuperscript{10} \textit{Adamson v. California}, 332 U. S. 46 (1947).
single, clear, specific statement from Thomas Jefferson in opposition to all, even non-preferential, government aid to religion.

It is clear beyond question that Jefferson was opposed to an establishment of religion in Virginia by the government in Virginia, or in the United States as a whole by the government of the United States. There is no question about that, and today, as far as I know, all Americans agree. As an opponent of an establishment of religion, Jefferson was necessarily opposed to financial governmental favor to the established religion which was not available to other religions. Such exclusive favor is a universal aspect of establishments of religion, as the Catholic in Spain, the Anglican in England, the Presbyterian in Scotland, the Lutheran in Sweden, and the Jewish in Israel.

The passages from Jefferson, which propagandists frequently use in order to promote the idea that Jefferson was opposed to any government aid to religion, are principally his Bill for Religious Freedom in Virginia (1786), and his letter to the Baptists in Danbury, Connecticut (1802).

Jefferson’s Bill for Religious Freedom in Virginia, passed in 1786, is to most Americans a persuasive document. Its legitimate use is above adverse criticism. However, the attempt to get from it any support for the thesis that the First Amendment means, or was designed to mean, a complete separation of church and state in America, or specifically a prohibition of the use of public funds in impartial support of religion, does violence to Jefferson’s language in this bill and to his whole record. There is not a word in the bill that warrants the claim that Jefferson was opposed to impartial government aid to religion.

The inference that what any man advocated as state law he would necessarily believe in as a provision of the Federal Constitution, or as a national law, is obviously bad. Any man, regardless of his personal theory of state-federal relationships, could believe a law good for Virginia and not want it as a constitutional provision binding on all of the several states. When the man in question happens to be Thomas Jefferson, who all his life drew the sharpest line between the federal government and the authority of the states, and who insisted that each state was sovereign in all matters of domestic concern, such an inference becomes wholly ridiculous.

The whole Bill is expressed in one sentence. It “enacts” four things: In Virginia no man shall (1) be compelled by the government to attend or support any religious worship, place, or
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ministry whatsoever, nor (2) be punished or interfered with by the government on account of his religious opinions or beliefs, but (on the contrary) every man shall be free (so far as the government is concerned) (3) to profess and argue for his religious opinions and beliefs, and (4) such activity shall in no way affect his civil capacities.

Note that this law is concerned primarily with prohibiting state laws in regard to opinion, belief, and worship, as these matters were universally covered in laws setting up an "establishment of religion." The Virginia statute has no clear reference of any kind to public money, sectarian schools, religion in education, or the complete separation of church and state.

Not only do these four provisions of the Virginia law deal with the almost invariable features of "an establishment," but the long preamble deals also with theories and practices of churches "established" by governments which make government officials the judges of the validity of religious opinions and make civil rights dependent upon religious belief. In this context the first clause of the law could certainly mean that no man shall be compelled to attend or support any religion whatsoever that is selected for his attendance and support by the government. This is also the burden of the preamble. This is the meaning that best harmonizes with the context of the bill itself, the context of the times, and Jefferson's whole record.

Jefferson's figure of speech, "a wall of separation between church and state," is probably more often misused in the modern attack on the First Amendment than any other phrase in his writings. The present Justices of the Supreme Court are strangely addicted to trying to substitute this phrase for the first clause of the First Amendment. No one should assume that Jefferson was unaware of the difference in authority between Congress and the state legislatures. Anyone who knows Jefferson's history and writing knows that Jefferson was fully aware of the constitutional separation of powers between the federal and state governments. Jefferson, therefore, necessarily knew that the First Amendment was not intended to have any effect whatever on any regulations of any kind, anywhere, covering the relations of any government agency to religion or religious education except a nationally created, exclusively favored position for one religion as against all other religions.

Jefferson did use the phrase "a wall of separation between church and state." He used this figure of speech in a reply which he made as President of the United States to an address of con-
gratulation and good wishes by a committee representing the Danbury, Connecticut, Baptist Association on January 1, 1802. The whole sentence from which this figurative fragment has been taken is absolute proof that President Jefferson could not have been thinking of a wall of any kind, high or low, pregnable or impregnable; which had any relation whatever to most of the matters mentioned in the elaborate rewriting of the first clause of the First Amendment in Justice Black’s dictum in the *Everson* case.\(^{11}\)

Jefferson’s long sentence which included the famous figure of speech, spoke of the First Amendment as “that act of the whole American people which declared that their legislature 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.” His next sentence was: “Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see,” etc. The rights of conscience may be endangered by established churches, but are never endangered by treating all religions equally in regard to support, or nonsupport, by a government that allows religious freedom. Jefferson could have been thinking of the wall separating church and state only in regard to matters which were under the authority of the Congress at that time or were mentioned in the Amendment itself. Such matters did not include authority over religious affairs, education, the relation of religion to education, public support of either, or safety and health provisions for children. Government authority over all such matters, except any laws about a nationally established religion and national restrictions on religious freedom, was, and remained, exclusively and unambiguously the responsibility of the individual states. Jefferson’s metaphor could have no reference at all to these matters.

Jefferson was President of the United States for eight years. Throughout his administration the United States government used federal funds in aid of religion in various ways with no protest from President Jefferson, no recommendation to Congress for constitutional or statutory change, no action by him as Commander-in-Chief of the United States Army or Navy to prohibit the use of government funds for religious activity in the armed forces. It seems clearly impossible for anyone to believe that Thomas Jefferson thought that the First Amendment prohibited even non-preferential government aid to religion without believ-

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\(^{11}\) “The ‘establishment of religion’ clause in the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.” *Everson v. Board of Education*, *supra* n. 6 at 15.
ing that Jefferson lacked sufficient integrity to live up to his oath of office as President of the United States. He either had to believe that such aid was constitutional, or else he had to disregard his oath of office—one or the other.

Further, Thomas Jefferson was a leading citizen of Virginia for forty years after the adoption of his Bill for Religious Freedom, and for thirty-five years after his letter to the Baptists of Danbury. During all that time, and, as a matter of fact, right up to today, the State of Virginia has been rather outstanding in its use of government funds in non-preferential aid to religion. Neither Mr. Pfeffer nor any of his colleagues have ever produced any evidence that Thomas Jefferson ever so much as uttered the slightest protest against these practices of the State of Virginia.

The argument has frequently been made as follows: (1) Jefferson's Bill for Religious Freedom made all government aid to religion illegal in Virginia. (2) The First Amendment must have meant what the Bill for Religious Freedom meant. Therefore, (3) the First Amendment prohibits all government aid to religion. This argument necessarily overlooks the facts that (a) the language was different; (b) the authorship was different (Jefferson was not a member of the First Congress); (c) one was a state law, the other a United States constitutional provision; (d) state and federal governments are different in form and in function; (e) Jefferson was the most ardent advocate of observing and maintaining these differences (the doctrine of states' rights) in his time—if not actually in all American history. This whole argument is worthless, of course, since the Bill for Religious Freedom did not (as we have seen) prohibit impartial government aid to religion. But even if it did, the assumption that the First Amendment must mean what Virginia's law meant, is invalid as inference.

Jefferson's most specific statement in regard to the relation of government to religion is in his statement concerning the Freedom of Religion in the University of Virginia. Jefferson, of course, was for freedom of religion (as Dr. Pfeffer is, and I am, and most Americans of our day). Jefferson was opposed to an establishment of religion, as we all are today. But neither of these positions indicated that he thought that government should not assist religion so long as it did not prefer one religion over all other religions. He wrote:

In the same report of the commissioners of 1818 it was stated by them that in conformity with the principles of constitution,

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12. O'Neal, op. cit. supra n. 2 at 146, 175-177.
13. Id. at 284-285.
which, place all sects of religion on an equal footing, with the jealousies of the different sects in guarding that equality from encroachment or surprise, and with the sentiments of the legislature in freedom of religion, manifested on former occasion they had not proposed that any professorship of divinity should be established in the University; . . . It was not, however, to be understood that instruction in religious opinion and duties was meant to be precluded by the public authorities, as indifferent to the interests of society. On the contrary, the relations which exist between man and his Maker, and the duties resulting from those relations, are the most interesting and important to every human being, and the most incumbent on his study and investigation. The want of instruction in the various creeds of religious faith existing among our citizens presents, therefore, a chasm in a general institution of the useful sciences. But it was thought that this want, and the entrustment to each society of instruction in its own doctrine, were evils of less danger than a permission to the public authorities to dictate modes or principles of religious instruction, or than opportunities furnished them by giving countenance or ascendancy to any one sect over another. A remedy, however, has been suggested of promising aspect, which, while it excludes the public authorities from the domain of religious freedom, will give to the sectarian schools of divinity the full benefit of the public provisions made for instruction in the other branches of science. [Italics supplied.]

C. The Record of Madison. James Madison’s record on this matter almost exactly parallels Jefferson’s. Like Jefferson, Madison never made a clear, explicit statement that he was opposed to any and all (even non-preferential) aid to religion by government. No current attempt to use Madison as a ground for the Rutledge doctrine, which is Dr. Pfeffer’s position, has ever cited such a statement. Clearly, that was not his purpose in the First Amendment, as shown above. Anyone familiar with the history of the time, anyone who has read the Annals of the First Congress, must admit that the one man who had most to do with the phraseology of the First Amendment was James Madison. Anyone who has read the comments of scholars, biographers, and historians, on James Madison, and who has read a half-dozen paragraphs of Madison’s clear, meticulously worded, and often brilliant prose, will doubtless agree that James Madison’s ability to express his thought in the English language was outstanding, and that his ability accurately to phrase political documents, constitutions, and laws was unusual and unquestioned. Therefore, it seems pertinent to ask why, when anyone wants to know what James Madison’s purpose was in the First Amendment, he does not consider and accept the language of James Madison in the Amendment itself, and what Madison said about the purpose of the Amendment in the Annals of the First Congress. Insofar as Justice Rutledge
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went to these sources at all—and he did refer to them here and there—he refused to accept the language of the Amendment, and he omitted to quote Madison's most illuminating passages in regard to its meaning. He gave us Eckenrode's interpretation of something that Madison wrote about some other subject, in trying to arrive at what Madison meant in the First Amendment, but he did not quote Madison himself.14

Madison's position on the First Amendment can be found in any good library—in his letter to Thomas Jefferson in October, 1788,15 in his private notes on his speech on the First Amendment in the First Congress,16 and in the Annals of the First Congress. All these statements are consistent and all of them deny the position taken by Dr. Pfeffer in this discussion.

On June 8, 1789, Madison in the First Congress spoke clearly on the meaning of the establishment clause. After his original wording "nor shall any national religion be established," had been changed to "no religion shall be established by law," Madison said that

... 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 who seemed to fear that Congress might 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 as well expressed as the nature of the language would admit.17

In his Detached Memoranda,18 date unknown, but some time after he had retired from the Presidency in 1817, Madison wrote: "They [the people of the United States] have the noble merit of first unshackling the conscience from persecuting laws, and of establishing among religious sects a legal equality." [Italics supplied.]

Madison's Memorial and Remonstrance19 has been frequently misrepresented as an argument against any government aid to religion. Justice Rutledge characterized it as "a broadside at-

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14. Id. at 60.
15. Hunt, op. cit. supra n. 5 at 269.
16. Id. at 380.
17. 1 ANNALS OF CONGRESS 729-731 (Benton ed. 1858).
19. O'NEILL, op. cit. supra n. 2 at 278-283.
tack upon all forms of 'establishment' of religion, both general and particular, nondiscriminatory or selective." 20 This is like referring to a general, nondiscriminatory monopoly granted to all automobile manufacturers. There has never been a general, nondiscriminatory "establishment of religion," recognized as such in any nation in history. Justice Rutledge also said that the Bill Establishing a Provision for Teachers of the Christian Religion was "nothing more nor less than a taxing measure for the support of religion." This is obviously not true, as anyone can see by reading the Bill or Madison's argument against it. (See quotation below.)

Anyone who believes that a general nondiscriminatory aid to religion constitutes "an establishment of religion" not only finds himself out of step with centuries of scholarship and of religious and political history, Catholic and Protestant, European and American, but he must believe, if well informed, that we have had "an establishment of religion" in the United States and in all of the states in the Union throughout our history. All have given nondiscriminatory aid to religion in various ways. 21

In order to believe that Madison's Memorial and Remonstrance was an argument against any, even impartial government aid to religion, one has to ignore the most pregnant passage in this great document. Here Madison states clearly his understanding that the bill he was fighting was an attempt to "establish Christianity, in exclusion of all other Religions." This was explicitly stated in the language and title of the bill, "A Bill Establishing A Provision for Teachers of the Christian Religion." Madison wrote:

Who does not see that the same authority which can 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? [Italics supplied.]

In his Memorial and Remonstrance Madison presented fifteen numbered reasons "against said bill" for establishing Christianity in Virginia. Not one of the fifteen concerns general financial support of religion. Madison objects only to the state forcing "a citizen to contribute three pence only of his property for the support of any one establishment."

Dr. Pfeffer follows Justice Rutledge in the "general, nondiscriminatory" theory. He writes\textsuperscript{2} of the Memorial and Remonstrance as in "opposition to a general appropriation bill in Virginia for the support of religion." Clearly, as I have just shown, that was not Madison's idea of what he was fighting. Nor was it Jefferson's. Madison's Memorial and Remonstrance is generally credited with killing the bill to establish Christianity (instead of the Anglican Church) as the government favored religion in Virginia. This opened the way for the positive provisions of Jefferson's Bill for Religious Freedom in Virginia. This Jefferson wrote\textsuperscript{23} was "meant to comprehend, within the mantle of its protection, the Jew and the Gentile, the Christian and Mahometan, the Hindoo and the Infidel of every denomination."

Madison was also President of the United States for eight years, and throughout his administration, the United States government used federal funds in various ways in aid of religion on a non-preferential basis; including chaplains in both houses of Congress and in the Army and Navy, money to missionaries to pay them for "teaching the great duties of religion and morality to the Indians."\textsuperscript{24} Madison also was a leading citizen of Virginia for fifty years after the passage of the Virginia Bill for Religious Freedom, and for forty-five years after the Bill of Rights became part of the Constitution. I have never seen any evidence that Madison ever uttered the slightest criticism of the fact that Virginia was using public supported personnel and facilities in aid of religion throughout his lifetime. So he could not have believed that Jefferson's bill made illegal government aid to religion "in any guise, form or degree."

As in Jefferson's case, there were certain passages which Madison wrote (as shown above), which have been, from time to time, inaccurately used in an effort to bolster up the idea that Madison was opposed to any kind of government aid to religion. And again, as in Jefferson's case, no one has ever attempted to resolve the dilemma as to whether Madison, as President of the United States, was ignorant of the meaning of the First Amendment, or was lacking in sufficient integrity to live up to his oath of office to support the Constitution. The chief passages from Madison, in addition to the Memorial and Remonstrance, which are sometimes used in order to promote the idea that he had, despite his lifetime record, been opposed to any government aid to religion, are two brief veto messages,\textsuperscript{25} and a passage in his detached memoranda.

\textsuperscript{22} Church and State: Something Less Than Separation, 47 Liberty, A Magazine of Religious Freedom 36 (1952).
\textsuperscript{23} Padover, op. cit. supra n. 4 at 1147.
\textsuperscript{24} 4 American State Papers 54, 66 (Lowrie and Clark ed. 1932).
\textsuperscript{25} 1 Richardson, Messages of the Presidents 467 (1908).
The veto messages are these: The first, signed February 21, 1811, said: "An act incorporating the Protestant Episcopal Church in the town of Alexandria, in the District of Columbia. The bill enacts into and establishes by law sundry rules and proceedings relative purely to the organization and polity of the church incorporated . . . 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." [Italics supplied.] This is so clearly an exclusive, formal, legal arrangement between the United States government and one church (in fact, one parish) that it obviously has no bearing on equal, impartial assistance to all religions with favor to none (as in tax exemption). It contains the common denominator of all "establishments"—exclusiveness.

The second veto message, signed February 28, 1911, said: "Because the bill in reserving a certain parcel of land of the United States for the use of said Baptist Church comprises a principle and 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.'" [Italics supplied; note misquotation of First Amendment.] Clearly this also concerns a particular church (a specific parish or church organization). As such it is an exclusive favor of government, not an impartial aid to all religions equally. Nor is it payment for services rendered as in Bradfield v. Roberts and other cases. This is sufficient basis for the veto. It must be admitted, however, that the phrase "appropriation for the use and support of religious societies" is ambiguous enough to bear an interpretation that could be used to bolster up the Rutledge doctrine.

This phrase, however, does not prove the correctness of the Rutledge and Pfeffer statements about Madison's beliefs, for the following reasons:

1. It is ambiguous. What sort of appropriation for "use and support"—a gift, or a payment for services? Madison's administration was paying out tax money for use and support of religious societies for services rendered in Christianizing the Indians on Indian reservations with no protest from Madison.

2. Such an interpretation of the establishment clause would be contrary to the records of Jefferson, Madison, and practically all Congressional, Presidential, Supreme Court, and State history—up to March 8, 1948.

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3. It contains (strangely, in a document signed by James Madison) a misquotation of the first clause of the First Amendment. The First Amendment says "an establishment of religion," not "a religious establishment." It may be easy for one unacquainted with eighteenth century American history to assume that "an establishment of religion" means "a religious establishment," as an educational establishment or a financial establishment, or any religious organization or society. But this was demonstrably not the meaning of Madison and of the First Congress, in the First Amendment.

4. It is possible (all things considered, even probable) that Madison considered this exclusive favor to a Baptist church, because of its exclusiveness, at least a partial "establishment of religion" and may have meant just that by what he said. It is also possible, or probable, that a clerk or secretary phrased this message and Madison signed it without carefully checking the language.

Madison's Detached Memoranda27 has some passages related to the First Amendment. However, the weight to be accorded to these passages is a bit hard to determine. The Memoranda was apparently written some time between 1817 and 1832, and is said by Miss Fleet to have been "hastily jotted down . . . to be corrected, expanded, and completed later." The tentative nature of this document is well-indicated by the reference in it to the chaplains in Congress. Here Madison takes the position that the system of Congressional chaplains violates the Constitution. He does this with no indication that it represents a complete change of mind on his part. He took the opposite position in 1789 when he served as a member of the joint committee to plan the chaplain system.28 Also as President from 1809 to 1817 he administered the federal government, whose taxes were used to pay the chaplains, with no word of objection or protest. Whatever weight is to be given to the Detached Memoranda, that weight is in favor of two positions: (a) Madison thought of the First Amendment as forbidding "everything like an establishment of a national religion"29 and (b) any doubt he had about the constitutionality of the chaplain system was based on the thought that it violated equality among the sects and not on the thought that it impartially used public funds in support of religion in general. Of course, nothing in this Memoranda has any application whatever to a possible future Constitutional restriction on the powers of the

27. Fleet, op. cit. supra n. 18.
29. Fleet, op. cit. supra n. 18 at 558.
individual states in the realm of religion. The principal passage on the matter of the chaplain is as follows:

Is the appointment of Chaplains to the two Houses of Congress consistent with the Constitution, and with the pure principle of religious freedom?

In strictness the answer on both points must be in the negative. The Constitution of the United States forbids everything like an establishment of a national religion. The law appointing Chaplains establishes a religious worship for the national representatives, to be performed by Ministers of religion, elected by a majority of them; and these are to be paid out of the national taxes. Does not this involve the principle of a national establishment, applicable to a provision for a religious worship for the Constituent as well as of the representative Body, approved by the majority, and conducted by Ministers of religion paid by the entire nation.

The establishment of the chaplainship to Congress is a palpable violation of equal rights, as well as of Constitutional principles: The tenets of the chaplains elected (by the majority) shut the door of worship against the members whose creeds & consciences forbid a participation in that of the majority. To say nothing of other sects, this is the case with that of Roman Catholics & Quakers who have always had members in one or both of the Legislative branches. Could a Catholic clergyman ever hope to be appointed a Chaplain? To say that his religious principles are obnoxious or that his sect is small, is to lift the evil at once and exhibit in its naked deformity the doctrine that religious truth is to be tested by numbers, or that the major sects have a right to govern the minor.

D. The Total Record of the Presidency. Every President of the United States from George Washington to Harry Truman, including both, have throughout their administrations used federal funds in aid of religion in "various guises, forms and degrees." The First Congress, under Washington and at his recommendation, began using federal funds to support missionaries to Christianize and civilize the Indians. This was carried on without any variation until 1900, when, on account of the changed conditions on the Indian reservations, not because of any constitutional difficulty, the system was somewhat altered. The United States government is still paying federal money to religious schools for certain services which they render the Indians on the reservations.

The First Congress, under Washington, started the chaplain system for the United States Army, and the Third Congress

30. Lowrie and Clark, op. cit. supra n. 24.
31. 1 Stat. 223 (1791).
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adopted it for the United States Navy. Every President since Washington has continued to use government funds impartially in support of religious activities without recommending any change in the Constitution, or any change in congressional legislation, or issuing any countermanding orders as Commander-in-Chief of the army and navy. I am confident that President Eisenhower will continue to use federal funds in impartial aid of religion in various ways.

We have never had a President who took the position which Dr. Pfeffer is taking in this debate; and we have had among the Presidents some men of special competence and experience in regard to the meaning and application of the Constitution. Not only Jefferson and Madison and others who might be called Founding Fathers, but later other men of devotion and scholarship in law, history, and government have been Presidents; for instance, to mention only a few, Lincoln, Garfield, Theodore Roosevelt, William Howard Taft, and Woodrow Wilson. It apparently has never occurred to any President that the Constitution of the United States which he had sworn to uphold made it unconstitutional for the United States government to aid religion, even impartially. Not one of our Presidents (if he was an honest man) could have believed that the First Amendment created "a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support of religion. The prohibition broadly forbids state support, financial or other, of religion in any guise, form, or degree. It outlaws all use of public funds for religious purposes." This is the Rutledge doctrine which Dr. Pfeffer is upholding. It makes every President in our history either ignorant of the First Amendment or dishonest.

E. The Total Record of Congress. The establishment clause of the First Amendment is simply a statement that Congress shall not make any law at all concerning "an establishment of religion." If Dr. Pfeffer is right in his position, any federal aid to religion, even non-preferential, constitutes an establishment of religion. Therefore, any law by any Congress which is concerned with any kind of government aid, even non-preferential, to religious activity is necessarily unconstitutional. This has to be Dr. Pfeffer's position.

If Dr. Pfeffer is right, then every Congress that has ever sat in the history of the United States, has put unconstitutional laws on the statute books, without effective protest from the

32. 1 Stat. 350 (1794).
33. Supra n. 20.
opponents in Congress, without protest from the Presidents, and without anyone successfully taking such violations of the Constitution to the Supreme Court for adjudication. The only decision in the history of the Supreme Court that upholds Dr. Pfeffer's position is that in the McCollum case, and that dealt with state law, not law by Congress.

Under every Congress we have had chaplains in the House and Senate; chaplains in the army and navy, and of course, we have chaplains in such federal institutions as hospitals and asylums. The federal government spent large sums of money appropriated by Congress in support of Christian missionaries to the Indians. The United States government is still using federal funds for impartial support of religious activities.

Not only does the record of the Congress from 1789 to 1953 sweepingly repudiate the Rutledge-Pfeffer doctrine as to the meaning of the establishment clause in laws passed, appropriations made, actions approved, but the Congressional record of disapproval of this doctrine is also clear.

Not only has Congress never put any such theory into practice, but Congress has refused some twenty times to take the first step to allow such a policy to be explicitly expressed in the Constitution. There were eleven formulations of this doctrine presented as proposed amendments in the period 1870-1888, after the passage of the Fourteenth Amendment. It seems to be universally agreed that, as held in Barron v. Baltimore, the Bill of Rights contained restrictions only on the federal government, not on the individual states.

The Fourteenth Amendment (1868) provided: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Beginning with the Slaughter House Cases (1873) and continuing ever since, the Supreme Court has held that the privileges and immunities protected by the Fourteenth Amendment were those derived from United States citizenship—not those of citizenship in a state.

It was not until 1925, fifty-seven years after the adoption of the Fourteenth Amendment, that the Supreme Court assumed

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35. 7 Pet. 243 (U. S. 1833).
36. 16 Wall. 36 (U. S. 1873).
that the words "liberty . . . without due process of law" in the Fourteenth Amendment were a restriction on the state legislatures, preventing them from invading "the fundamental personal rights and liberties" which were "protected by the First Amendment from abridgement by Congress". This was clearly not a statement that the First Amendment, or the Bill of Rights, had been transferred by the Fourteenth Amendment (or absorbed into it) to a position of restriction on the several states, but only that certain basic freedoms, long protected by the First Amendment from invasion by Congress, were now protected by the Fourteenth Amendment from invasion by the states.

A few years later Chief Justice Hughes expressed the same idea. "Since that time the Court has added freedom of religion and freedom of assembly to the list of liberties protected by the due process clause. Thus, by a complete judicial about-face, the Supreme Court quietly imposed on the states at least some of the guarantees of civil liberty in the federal Bill of Rights. It did this, furthermore, without disturbing Chief Justice Marshall's ruling that the Bill of Rights itself does not limit state action. [Italics mine.] Only those civil liberties, however, have been thus read into the term "liberty" in the Fourteenth Amendment which the Court regards as fundamental . . . of the very essence of a scheme of ordered liberty."

In the relevant cases from 1925 to 1948 (the date of the McCollum case) the First Amendment per se was not involved—only the Fourteenth Amendment's phrase "liberty without due process of law." In these cases the Court took the position that only the "fundamental freedoms implicit in a scheme of ordered liberty" which were covered by the word "liberty" in the Fourteenth Amendment were involved. These cases are Stromberg v. California; Near v. Minnesota; Hamilton v. The University of California; Palko v. Connecticut; Cantwell v. Connecticut; Minersville School District v. Gobitis; Adamson v. California; referring back to Palko v. Connecticut; and Twining v. New Jersey.

39. CUSMANN, NEW THREATS TO AMERICAN FREEDOMS 23-25 (Public Affairs Committee 1948).
40. Supra n. 38.
41. 283 U. S. 697 (1931).
42. 293 U. S. 245 (1934).
43. 302 U. S. 319 (1937).
44. 310 U. S. 296 (1940).
45. 310 U. S. 586 (1940).
46. Supra n. 10.
47. Supra n. 43.
48. 211 U. S. 78 (1908).
In the *Adamson* case Justice Frankfurter wrote a strong concurring opinion fervently endorsing the doctrine of the famous *Twining* and *Palko* cases. These cases repeated and emphasized the unvarying doctrine of the Court up to that time: *viz.* (a) that the due process clause of the Fourteenth Amendment "does not draw all of the rights of the Federal Bill of Rights under its protection," but that only "such provisions of the Bill of Rights as were ‘implicit in the concept of ordered liberty’ became secure from state interference by the clause," and (b) the privileges and immunities clause of the Fourteenth Amendment applied only to privileges and immunities arising from *United States citizenship*, and not those "flowing from state citizenship." The *Palko* case reaffirmed both of these doctrines, as did the *Adamson* case in 1947.

In this case long and detailed argument was presented by Justice Black asking for a reversal of the Court’s position through the long line beginning with the *Slaughter House Cases* in 1873. He advocated abandoning the doctrine of the *Twining* case and asked the Court "to extend to all of the people of the nation the complete protection of the Bill of Rights." The Court rejected Justice Black’s argument. Justice Frankfurter, in his concurring majority opinion advocated "keeping the Twining case intact," and opposed the idea that "the Fourteenth Amendment was a shorthand summary of the first eight amendments." He noted the fact that forty-three judges of the Supreme Court had passed on the scope of the Fourteenth Amendment in a period of seventy years and that of these "only one who may respectfully be called an eccentric exception ever indicated the belief" that the Fourteenth Amendment was such a shorthand summary.

One year later in the *McCollum* case, the Court decided that a program of released time for voluntary religious education, in public school buildings in Champaign, Illinois, violated the First Amendment because it constituted "an establishment of religion" —which religion (Protestant, Catholic, or Jewish, all of which were participating) was established, the Court did not divulge. The Court also did not divulge how the establishment clause of the First Amendment became a restriction on the legislature of Illinois. Obviously under the doctrine upheld by the Court for seventy years and emphatically endorsed one year earlier after a detailed argument asking for its discard, freedoms "arising from United States citizenship" as distinct from citizenship of the state of Illinois, could not have been involved. Further, the Cham-
campaign program violated no Illinois law, and was approved by the trial courts, the Supreme Court of the state, the state educational machinery, the local board of education, and the parents of all the one hundred twenty odd children involved in the program; and objected to by the parents of one child who was not in the program.

Under these circumstances it is easy to understand why no Justice was sufficiently incautious as to try to explain how such a program violated "the fundamental freedoms implicit in a scheme of ordered liberty." However, if one wishes to assume, in spite of the English language, and the facts of relevant history, biography, legal scholarship, and previous Supreme Court decisions, that the McCollum case has some constitutional basis, then one must logically assume that the Court has abandoned the seventy year old position, so clearly endorsed the year before, and has decided that the Fourteenth Amendment is a shorthand statement of the first eight amendments.

Before those who may be (or have to be) interested in Supreme Court decisions, get accustomed to this judicial revolution, the Court decided the case of Wolf v. Colorado (1949). In this case, Justice Frankfurter speaking for the Court, again took the old, standard position that the Fourteenth Amendment is not a shorthand summary of the first eight amendments, but only protects the "freedoms implicit in a scheme of ordered liberty." He said:

The notion that the "due process of law" guaranteed by the Fourteenth Amendment is shorthand for the first eight amendments of the Constitution and thereby incorporates them has been rejected by this Court again and again, after impressive consideration. . . . Only the other day [in Adamson v. California] the Court reaffirmed this rejection after thorough re-examination of the scope and function of the Due Process Clause of the Fourteenth Amendment.

This leaves the McCollum decision Dr. Pfeffer’s only support in all Supreme Court history, implicitly disavowed by the Court, one year later as it was largely explicitly abandoned in the Zorach case.  

F. The Record of the States. Significant in showing the total absence of an American tradition consonant with Dr. Pfeffer's position, is the record of the states. However, the question of whether the establishment clause in the First Amendment applies to the several states as well as to Congress, is a question of sub-

51. Supra n. 8.
stantially no importance, because the states in their own constitutions have, many of them in the identical language of the Federal Constitution, explicitly prohibited an establishment of religion. Further, since no one in any state apparently wants an establishment of religion, it seems hardly worthwhile to spend time on whether or not a state could create an establishment of religion if it wanted to.

All the states prohibit an establishment of religion, but every state in the union has, in various ways, given non-preferential government aid to religion, throughout its history. It follows necessarily that in no state has impartial aid to religion been held to constitute "an establishment of religion." All of the states exempt religious property and organizations from taxation. This, of course, is a tremendous, impartial government aid to religion. The financial aid to religion is just as real as though the government collected the money and handed it back in subsidies. The difference is only one of bookkeeping, and the First Amendment has nothing to say on the subject of bookkeeping. If Dr. Pfeffer and his colleagues are right, every state in the union has, in granting tax exemption to religious organizations, been violating its own constitution as well as the Constitution of the United States.

The National Education Association in 1946 published a Research Bulletin setting forth in considerable detail the practices of the various states (a) "in aid to sectarian schools and to sectarianism in public schools" as reported by state superintendents and (b) practices "of supervision of sectarian schools by public school officials" as reported from the same source. All of the items concern cooperative contacts or relations between state government and religion in education. Most of them obviously involve some use of publicly supported personnel and facilities. Practically all of the practices here listed would be illegal if the doctrine enunciated by Justice Rutledge and Dr. Pfeffer should become binding law on all the states in the Union. The result of such a calamity would be complete chaos, because then neither Congress nor any state legislature could pass any law at all concerning religion, or a religious institution, such as a denominational school. We would have complete anarchy in a large part of the educational field in the United States.

The records given in the N.E.A. bulletin are, of course, not up to date now, and are not absolutely complete because there were no returns from the superintendents in some states. Fur-

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ther, I am not making a distinction between practices that are required and practices that are permitted, since the legal question would be the same in either case. The tables in the N.E.A. bulletin show fourteen items of co-operation between the "spheres of religious activity and civic authority" and the universal co-operation of tax exemption was not included. The tables show that all states allowed a number of these items, and that the majority of the states allowed a majority of the items.

G. The View of Legal Scholars. The outstanding scholars in constitutional law throughout our history have consistently treated the establishment clause simply as a way of saying that the federal government could not grant exclusive favors to one religion over other religions, i.e., it could not create "an establishment of religion" for the United States as a whole. I offer three distinguished examples from three widely separated periods.

Justice Story:

The real object of the amendment was . . . to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government. It thus cuts off the means of religious persecution (the vice and pest of former ages), and of the subversion of the rights of conscience in matters of religion, which had been tramped upon almost from the days of the apostles to the present age. [Italics supplied.]

Nowhere in Story's work is there even an intimation that the purpose or effect of the First Amendment was to prevent the use of public property for non-preferential aid to religion.

Judge Thomas M. Cooley in discussing the meaning of an establishment of religion in state constitutions wrote as follows:

The [state] legislatures have not been left at liberty to effect a union of Church and State, or to establish preferences by law in favor of any one religious persuasion or mode of worship. There is not complete religious liberty where any one sect is favored by the State and given an advantage by law over other sects. Whatever establishes a distinction against one class or sect is, to the extent to which the distinction operates unfavorably, a persecution. The extent of the discrimination is not material to the principle; it is enough that it creates an inequality of right or privilege. [Italics supplied.]

Professor Edward S. Corwin writes: "Congress may make no law at all respecting an establishment of religion, nor yet pro-

53. 11 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1873 (5th ed. 1833).
54. COOLEY, CONSTITUTIONAL LIMITATIONS 584 (4th ed. 1878).
hibiting the free exercise of religious belief; and it may not make laws which *abridge* the freedom of speech or of the press "or the rights of assembly and petition." Also, "An establishment of religion means a state church, such as for instance existed in Massachusetts for more than forty years after the adoption of the Constitution."

V

CONCLUSION

I believe that I have shown that Dr. Pfeffer's contention, that the First Amendment prohibits non-preferential government assistance to religion, is denied by:

A. The meaning of the language used.
B. The words and actions of Jefferson.
C. The words and actions of Madison.
D. The official record of all Presidents of the United States.
E. The record of every Congress in our history.
F. The total record of the decisions of the Supreme Court, the *McCollum* case alone excepted.
G. The record of all the states in the United States.
H. The outstanding legal scholars of America.

The conclusion seems inescapable that the First Amendment does not prohibit non-preferential government assistance to religion.