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Dr. Pfeffer's Rebuttal

Leo Pfeffer
American Jewish Congress

DR. PFEFFER'S REBUTTAL

1. The Language of the Amendment.

The Amendment may prohibit any one or more of three things:

(a) The establishment of a particular church or denomination, as the Anglican Church in England or the Lutheran Church in Sweden. Professor O'Neill and I agree that this is barred by the Amendment.

(b) In addition to (a), the grant of a material benefit to a particular church or religion withheld from other churches or religions—*i. e.*, a sort of equal protection of the laws for religious bodies.[1] We agree that this too is encompassed in the Amendment.

(c) In addition to (a) and (b), the grant of material benefits to all churches or denominations, assuming it were practicable to effect the grant without prefering any one or more over the others. Here we disagree. Professor O'Neill argues that the Amendment goes no further than (a) and (b); I believe it encompasses (c) as well.

Professor O'Neill argues that the language of the Amendment does not expressly bar non-preferential support. True; but neither does it expressly bar only preferential support. If it did either we would have no debate. The language of the Amendment is at least as consistent with a bar of non-preferential support as of preferential support. For if a grant of land to the Baptists is a law respecting an establishment of religion, even though it does not confer upon them the dominant status in church-state relations enjoyed by the Anglicans in England and the Lutherans in Sweden, why is not also a grant of land to all denominations likewise a law respecting an establishment of religion? After all, the Amendment does not say "law respecting an establishment of a particular religion," or even "of *a* religion"; its scope is unparticularized and universal.

Moreover the Amendment bars not only the establishment of religion, but also laws prohibiting its free exercise; and in the latter clause it does not use the word "religion" but merely refers back to the word in the first clause. If religion in the establishment clause is particular, then it must equally be so in the free exercise clause.

It is undoubtedly true that an established church and preferential support of favored sects were evils which the Amendment sought to prevent. It is, however, no less true that they were not

1. *Cf. Fowler v. Rhode Island,* particularly Justice Frankfurter's concurrence, 21 LAW WEEK 4223 (1953).

the only evils sought to be avoided; if they were, the Senate would not have twice rejected proposals to word the Amendment specifically to mention only those evils.

2. The Words and Actions of Jefferson.

(a) The Virginia Statute for Establishing Religious Freedom: The statute was not limited to "mean that no man shall be compelled to attend or support any religion whatsoever *that is selected for his attendance or support by the government.*" On the contrary, the statute not only declares it "sinful and tyranical to compel a man to furnish contributions for the propogation of opinions which he disbelieves and abhors," but also that it is wrong to force him to "support this or that teacher of his own religious persuasion."[2] The statute was enacted after defeat of an assessment measure which permitted the taxpayer to select which denomination was to receive his funds.

(b) Virginia and the federal government: Of course, Jefferson recognized a difference between the powers of the federal government and those of Virginia. But this does not mean, as Professor O'Neill urges, that he may well have opposed use of tax raised funds for religious purposes by Virginia, but not oppose such use by the federal government. On the contrary, he more likely would have opposed such use by the federal government, for to him, as to Jeffersonians generally, the difference between the powers of the States and of the federal government meant greater powers for the former and less for the latter, rather than the converse.[3]

(c) Jefferson's non-interference with congressional chaplaincies: This is of little significance in view of Jefferson's well-known devotion to the principle of the independence of the three branches of the government and his belief that each branch must determine for itself the constitutionality of its actions. What is significant is Jefferson's refusal to issue even non-sectarian Thanksgiving proclamations because of his belief that such actions on his part would violate the Constitution.

(d) The "wall of separation" letter to the Danbury Baptists: This letter expresses the ideological foundation of the First Amendment: the belief "that religion is a matter which lies between man and his God." It was characterized by a unanimous Supreme Court in 1878 "almost as an authoritative declaration of

2. 12 LAWS OF VIRGINIA 84 (Hening 1823).
3. The Virginia Bill is set forth in full as an appendix to Justice Rutledge's dissent in the *Everson* case, 330 U. S. 1, 72 (1947).

the scope and effect of the Amendment."[4] The letter was carefully drawn, and was submitted to Jefferson's attorney-general for examination before it was sent. It furnished "an occasion which [Jefferson] long wished to find of saying why [he did] not proclaim fastings and Thanksgivings, as [his] predecessors did."[5]

3. The Words and Actions of Madison.

(a) The Assessment Bill and the Memorial: Madison's opposition to the Assessment Bill was not based exclusively or even primarily on the fact that it would establish Christianity in preference to other religions. This was but one of fifteen reasons stated in his Memorial for his opposition. The principal reasons—that religion is not within the cognizance of political society and that support of religion must always be voluntary—are equally applicable whether one or all religions are the beneficiaries of governmental support.

Actually, the Virginia Bill was as close to a non-preferential measure as could be conceived. True, it mentioned only "Christain" teachers of religion, and a motion to delete the word "Christian" lost by a narrow vote. But this was purely symbolic; there were no non-Christian teachers of religion in Virginia in 1784;[6] and if "Jews, Mohametans" or others should later have come into the state, Washington at least construed the bill so as to exempt them,[7] just as special provision was contained in the Bill for the "denominations of Quakers and Menonists," who did not have ministers or teachers of religion. Indeed, the Bill went further than what would ordinarily be expected of even a non-preferential measure for religious support, for it permitted the non-religionists to designate that their tax should be used "for the encouragement of seminaries of learning . . . and to no other use or purpose whatsoever."

(b) Virginia and the federal government: As in the case of Jefferson there is no reason to believe that Madison would oppose non-preferential support of religion by the Virginian legislature and not oppose such support by the Congress. Moreover, if, as Professor O'Neill and I agree, one of the reasons he opposed governmental support of Christianity in Virginia was that it *established* Christianity, why then is not a federal law supporting religion a "law respecting an establishment of religion"?

4. *Reynolds v. U. S.*, 98 U. S. 145, 164 (1878).
5. *Letter to Levi Lincoln*, 9 JEFFERSON'S WRITINGS 346-347 (Ford ed.).
6. There were probably not a half-dozen Jewish families in the state. U. S. BUREAU OF CENSUS, A CENTURY OF POPULATION GROWTH, 1790-1900, 116 (1909); GOODMAN, AMERICAN OVERTURE 148-149.
7. 1 STOKES, CHURCH AND STATE IN THE UNITED STATES 390.

4. The Acts of the Presidents and the Congresses.

These can conveniently be treated together as they all constitute the practical construction argument—undoubtedly the strongest argument in support of the non-preference theory. Space restrictions limit me to the following summary comments:[8]

(a) Violation of oath of office: It is argued that the Presidents who issued Thanksgiving proclamations, *etc.*, and the Congressmen who voted for chaplains, *etc.*, could not conceiveably have been violating their oaths to uphold the Constitution; *ergo*, these acts were constitutional. But acceptance of this argument would mean that no act of Congress approved by the President could be judicially declared unconstitutional.

(b) The assumption of constitutionality: Many of the practices assumed to be constitutional may be no more than immune to judicial attack. For example, Congressional and military chaplains were believed by Madison to be unconstitutional,[9] but under our system of jurisprudence there is no practical way in which a judicial declaration of unconstitutionality can be obtained.[10] So, too, there is no way to test judicially the constitutional validity of Presidential thanksgiving proclamations, or the placing of "In God We Trust" on our coins.

(c) The vestiges of establishment: When the attention paid to religious matters by the Continental Congress is considered, it is hardly surprising that a few vestigial remnants should continue. What is significant is, as I have indicated in my main article, how few and comparatively minor these vestiges actually were.

(d) The pressure of politics: In view of the wrath which is visited upon those in political life who refuse to make at least ceremonial obeisance to orthodoxy, it is quite natural that few Presidents would make an issue of so seemingly minor an issue as Thanksgiving proclamations. Strong-willed ones, such as Jefferson and Jackson, braved sectarian wrath and remained steadfast to their convictions of unconstitutionality; but even Jefferson attended chaplain's services in Congress because, in the words of a contemporary, "The political necessity of paying some respect to the religion of the country is felt."[11] Madison admitted that he proclaimed thanksgivings because of political considera-

8. For a fuller discussion see my article, *Church and State: Something Less than Separation*, 19 CHI. L. REV. 1, 22 (1951), and Chapter 5 of my forthcoming book, *Church, State and Freedom.*

9. Fleet, *Madison's "Detached Memoranda,"* 3 WILLIAM & MARY QUARTERLY 534, 558-599 (1946).

10. *Elliott v. White*, 23 F. 2d 997 (D. C. Cir. 1928); *cf. Massachusetts v. Mellon*, 262 U. S. 447 (1923); *Doremus v. Board of Education*, 342 U. S. 429 (1952); *Bull v. Stichman*, 273 App. Div. 311, *aff'd*, 298 N. Y. 516 (1948).

11. STOKES, *op. cit. supra* n. 7 at 500

tions though he believed his act unconstitutional. To appease his conscience, he issued the proclamations in non-sectarian terms, as had Washington; but Adams piously called for a Christian worship, although he would later privately write to Jefferson: "Twenty times in the course of my late reading, have I been on the point of breaking out, 'This would be the best of all possible worlds, if there were no religion in it.' "[12]

(e) Inconsistent practices: If Thanksgiving proclamations are inconsistent with the view that the First Amendment bars non-preferential support of religion, Adams' proclamation is equally inconsistent with the view that it bars only preferential support. Similarly, the several references in Professor O'Neill's article to Congressional expenditures for missionaries to Christianize the Indians are likewise inconsistent with the non-preference theory, since such expenditures are obviously preferential. I find it difficult to reconcile these two sentences in Professor O'Neill's main article: "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."[13]

(f) Tax exemption: I agree that much (though not all) of the tax exemption granted to religious institutions is inconsistent with the interpretation of the First Amendment set forth in the *Everson* and *McCollum* decisions. But the unconstitutionality of tax exemptions to religious institutions was recognized by many constitutional authorities and writers long before the *Everson* and *McCollum* decisions.[14] Even so conservative a writer as Zollman stated: "(W)hile charity and education may be said to be established in the policy of the state, an establishment of religion is expressly prohibited by the Federal Constitution and impliedly by all but one of the State constitutions. The strictly religious features of church societies can therefore furnish no valid reason for this exemption."[15]

(g) The testimony of non-support: With the exception of tax exemption—which, I concede, is substantial—the instances of

12. 10 WORKS OF JOHN ADAMS 254 (1858).
13. Italics added.
14. See, *e. g.*, ADLER, *Historical Origins of the Exemption from Taxation of Charitable Institutions* in TAX EXEMPTIONS ON REAL ESTATE 76 (1922); Stimson, *The Exemption of Churches from Taxation*, 18 TAXES 364 (1940); Stimson, *The Exemption of Property from Taxation in the United States*, 18 MINN. L. REV. 422 (1934). In the last cited article the author writes: "Since the fundamental laws that have been accepted in the United States provide for separation of Church and State, and since the exemption of church property from taxation constitutes a subsidy to the church associations, it is clear that what has been expressly prohibited is being indirectly carried on and that the courts and a large part of the public are sanctioning it."
15. ZOLLMAN, AMERICAN CHURCH LAW 327.