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Dr. O'Neill's Rebuttal

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federal governmental support of religion are minor, indeed even relatively trivial. Spread over a period of 160 years since the First Amendment was adopted, they are insignificant. Massive in comparative significance, I submit, is the record of non-support by Congress during that period. In these 160 years Congress has been subsidizing practically every form of American private endeavor *except religion*. Vast sums have been appropriated for every form of *secular* education, including, *inter alia*, nautical education, nurses' training, home economics, agricultural arts, *etc.*¹⁶ Yet, in this entire period, Congress has never enacted a measure for the non-preferential support of religion or church schools. Indeed, as far as I know, such a bill has never even been introduced into Congress. When efforts were made to obtain federal funds for transportation to church schools or similar auxiliary benefits, they were never justified on the ground that non-preferential aid to church schools is constitutionally permissible. On the contrary, they were always justified on the claim that the measures did not aid church schools—except, perhaps, indirectly—but the children.¹⁷ This 160 year record, I submit, is a practical construction of the First Amendment far more cogent than the sporadic, minor incidents of support such as Presidential Thanksgiving proclamations or adding "So help me God" to an official oath.

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The fragments from the religious history of colonial times which Dr. Pfeffer presents are illustrative of the religious intolerance of that period, and this intolerance resulted largely from the activity and influence which were characteristic of established religions in all countries at that time. These fragments from colonial history may offer part of the explanation of the widespread opposition to an establishment of religion, either in a state, or for the United States as a whole, but they contribute little to the interpretation of the specific language of the Constitution which was written and adopted after considerable debate and discussion by the men in the First Congress of the United States.

When Dr. Pfeffer finally gets around to a mention of the deliberations of the First Congress, instead of discussing its work, its concept of the job it had to do on this particular matter, and the purpose of the establishment clause as discussed then and there, he brushes it all aside with the strange remark, "I have elsewhere set forth the reasons for my belief that these debates and proposals

16. Mitchell, *Religion and Federal Aid to Education*, 14 LAW AND CONTEMP. PROB. 113 (1949).

17. *Ibid.*

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do not sustain the contention [that the First Amendment bars only preferential aid], and it is not necessary to repeat them.”

If Dr. Pfeffer thought he found any valid evidence in the work of the First Congress to support his position in this debate, it is unfortunate that he did not present it here. However, I am thoroughly familiar with the article in the *Chicago Law Review* to which he refers. But since the material of that article is not submitted here, and since space is limited, I must refrain from discussing its many errors of fact and interpretation. The article is primarily to be deplored because of its detailed attempt to bring *religion* into a discussion of a constitutional question on which neither Dr. Pfeffer's religion nor mine, nor that of others, has any legitimate bearing.

His remarks about “Catholic spokesmen,” “sectarian circles,” “The support of the Catholic Church,” “the position of the Catholic Church,” and his comments on the cases of *Bradfield v. Roberts*,¹ and *Quick Bear v. Leupp*,² which involved Catholic institutions, are all erroneous. Further, he does me too much honor in referring to the regular, constant, historical interpretation and application of the establishment clause by all Presidents, all Congresses, the leading scholars in Constitutional Law, the Founding Fathers (especially Madison and Jefferson), and all relevant Supreme Court decisions, except the *McColum* decision, as the *O'Neill thesis*. In his article Dr. Pfeffer mentions the O'Neill thesis 17 times, the O'Neill school 17 times, and the O'Neill theory 5 times. He even remarks that “Corwin follows O'Neill”! The fact is that O'Neill follows Corwin, respectfully and with great admiration.

Dr. Pfeffer is quite inaccurate in his statement that “Virginia defeated a bill which would have required all to contribute to the support of some religion or in lieu thereof to education.” The bill to which Dr. Pfeffer is here referring was the bill to establish *Christianity* as the state religion of Virginia instead of the Anglican church. It was defeated by Madison's great *Memorial and Remonstrance* in which Madison characterized the bill he was arguing against, as an effort to “establish Christianity in exclusion of all other religions.” It was a bill giving a preferred and exclusive status to Christianity and as such it was a clear instance of “an establishment of religion” for Virginia. The fact that the individual taxpayer could, if he wished to, take the trouble to specify that his taxes should go to education instead of to the Christian religion, did not cancel the fact that this was an exclusive privilege

1. 175 U. S. 291 (1891).
2. 210 U. S. 50 (1908).

for the teachers of Christianity, and excluded the teachers of any and all other religions. I am confident that if today anyone should propose such a bill to support the teachers of Judaism or Catholicism or Protestantism Dr. Pfeffer would join me in opposing such a bill as a special privilege of the government to one religious group, and as such a violation of the clear intent and purpose of the establishment clause of the First Amendment.

Many of Dr. Pfeffer's comments on the Constitutional Convention are irrelevant to this debate. It is a fact that the Constitution did not mention God, and that it did provide that no religious test should ever be required as a qualification for office under the federal government. But neither of these facts is in dispute, and neither of them determines the meaning of the establishment clause.

The heart of Dr. Pfeffer's argument consists of a number of sweeping assertions for which he offers no evidence whatever, and which, in effect, are assumptions which are equivalent to his total position in this debate. In other words, it appears that one of Dr. Pfeffer's basic techniques is the old fallacy known as "begging the question." He assumes that which he should prove and then offers considerable data and documentation to substantiate items concerning which there is no controversy whatever. For instance, he mentions "the principle—implicit in the constitution of 1787 and explicit in the amendment of 1791—that government has no power to legislate in the domain of religion, either by restricting its free exercise or providing for its support." Clearly, there is no implicit principle to the Constitution that "government" has no power to legislate in the domain of religion. There was implicit in the Constitution, as argued by Hamilton and agreed to by Madison and Jefferson, that the *federal government* had no power to limit the personal freedoms, the civil liberties, of the people of the states. That implicit limitation of the federal government was expressed in words in the Bill of Rights to make explicit there that the federal government could not violate the basic freedoms of the people, or enforce what Jefferson called "civil incapacitations" on the people of the states who did not conform to a particular religious code or form of worship which had the support of the federal government.

Dr. Pfeffer uses frequently in his argument the thoroughly ambiguous phrase "separation of religion and government," or "separation of Church and State." If the men who wrote and adopted the First Amendment, and the generations of Presidents, Congresses, Supreme Court Justices, and legal scholars who interpreted and applied it for some 160 years, knew what the First Amendment meant, then it was only a verbalization of the already

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existing separation between the federal government and the state governments. He says "If separation is conceived as the lack of power on the part of Government to intervene in religious affairs, support of religion is violative of the principle of separation even if all sects agree upon the manner of sharing the State's favors." The First Amendment is not concerned with the power of Government, it is concerned with the activity of the Congress of the United States, which is a more limited area than that of government. There is no principle of separation in the First Amendment concerning the relations of religion and government except that which is plainly expressed in clear, literate, and specific language, viz: that Congress can make no law respecting (which means about or concerning, either for or against) an establishment of religion or prohibiting the free exercise of religion. *This is the American type of separation of Church and State.* It is the only type of separation between religion and government that has ever had constitutional approval of the American people. I do not know of any American who is opposed to it. Dr. Pfeffer submits that "the conceptual foundation of the relationship between church and state instinct in the Constitution and First Amendment [is] the inherent incapacity of political government to concern itself with religious matters." I reject what he submits, and submit in its place that his statement is shown to be false by the record of the First Congress and by the relevant history, legislative, executive and judicial, from 1791 to 1947.

Dr. Pfeffer asserts that "the generation which adopted the Constitution and the Amendment was committed to the proposition that excluded from the powers delegated to the political state any power over religion." What that generation wrote and adopted, which seems to me better evidence as to their beliefs than Dr. Pfeffer's unsupported assumption, was that power to pass laws concerning an establishment of religion (for the United States as a whole, of course) or to prohibit freedom of religion, was excluded from the powers of the Federal Congress, not the political state. This is the constitutional principle (not Dr. Pfeffer's phrasing of the modern substitute) which was, and still is, held substantially without exception by all the American people.

Dr. Pfeffer uses rather loaded words in his argument: "Intervention in religious affairs," "Religion was beyond the jurisdiction of the State," and he quotes from Madison that the federal government did not have "a shadow of right to intermeddle with religion." Of course, the federal government had no right to intermeddle with religion. No one is contending, so far as I know, that the government should *intermeddle*, with religion, or that it should have *jurisdiction over* religion, or that it should *intervene*

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in religious affairs. Jurisdiction means, according to Webster, "the legal power, right, or authority to hear and determine a cause or causes considered either in general or with reference to a particular matter." Jurisdiction is "the authority of a sovereign power to govern or legislate." Authority is "legal or rightful power; a right to command or act; dominion, jurisdiction." To meddle is "to concern one's self improperly or impertinently with the affairs of others." So far as I know, no one in America today advocates the establishment of any religion, or government authority or jurisdiction over, or power to intermeddle or intervene in religious affairs.

Dr. Pfeffer remarks that when the Constitutional Convention convened in Philadelphia in 1787, the overwhelming majority of Americans accepted the proposition that religion was a personal, not political, matter. Quite true, and so far as I know, practically every American today believes the same thing. Apparently all Americans have held this constantly throughout our history, while the federal government and all state governments have been granting, in one form or another, various types of non-preferential aid to religion. Tax exemption for all religious institutions, churches, synagogues, schools, hospitals, *etc.* is certainly no indication that Americans believe that religion is a political matter. Courtship is a personal, not a political matter, but the United States government aids lovers by carrying their ardent epistles from New York to San Francisco for three cents. The idea that the government cannot assist citizens impartially in other than political matters is absurd. Health, too, is as much a personal, and not a political matter, as is religion.

Dr. Pfeffer must obviously be in error when he says that "it was a widespread belief in 1791, both among religionists and rationalists, that no political state had the rightful power to deal with religion on a preferential or non-preferential basis." This is clearly denied by the fact that every American political state (that is, all of the states in the Union, plus the federal government) has exercised the power to deal with religion in various ways from the beginning down to date. In fact, the Rutledge doctrine which Dr. Pfeffer is supporting, of "absolute and complete separation between the spheres of civic authority and religious activity," is a fantastic, modern theory which apparently never occurred to any American until about a decade ago. As a political theory, it is totally unrealistic. No civilized government on earth has ever expressed that theory in words in its constitution and laws, nor has any civilized government on earth ever followed it in action and policy. The idea that political government cannot deal with religion but can deal with education, manufacturing, transportation,

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medicine, farming, and everything else under the sun, seems to me so thoroughly absurd that it is not surprising that no civilized government on earth has ever accepted it, either in theory or in practice.

So far as I know, no one contends that the First Amendment granted the Congress any *power* whatever. I make no such contention. The language stated the *absence* of power in Congress to legislate in any way, either for or against, "an establishment of religion." A specific subject was named and the world was informed that Congress could not legislate on *that subject*. Dr. Pfeffer contends, "This language carried with it a prohibition almost unlimited in scope." I am sorry he did not pause at this point to explain how a prohibition of action on a *specific topic* could possibly be a prohibition *almost unlimited in scope*. His only attempt at justifying this is to assert that it was in substance a prohibition of any legislation on the subject of religion. That I think would take a bit of proving which I do not find in Dr. Pfeffer's argument. I do not see how anyone can believe that the First Congress adopted a statement that Congress had no power to legislate on religion and then immediately began to legislate on religion. They provided for chaplains in the House and Senate, chaplains in the armed forces, and missionaries to teach religion to the Indians. How can these facts, and all the other evidence which I submitted in my main article, be reconciled with such a theory? The idea that "an establishment of religion" means the same thing as "religion" is nonsense, and nonsense of the sort that James Madison could never have written or accepted. In my main argument I dealt with Madison's two carelessly phrased veto messages. Since the implications which Dr. Pfeffer seeks to draw from these two paragraphs are inconsistent with Madison's total record, in the First Congress, as President, and as a citizen of Virginia, and since presidential messages do not overrule the provision of the Constitution, anyway, it seems unnecessary to repeat a discussion of these veto messages here.

Dr. Pfeffer is again guilty of inaccurate reporting when he says that Jefferson considered a presidential Thanksgiving proclamation as a law respecting an establishment of religion. That was not what Jefferson said, and Dr. Pfeffer offers no proof that Jefferson ever thought of such a thing. These are Jefferson's words in his letter to the Reverend Samuel Miller, to which Dr. Pfeffer refers: "I consider the government of the United States as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline or exercises . . . Certainly, no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the general gov-

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ernment . . . But it is only proposed that I should *recommend*, not prescribe, a day of fasting and prayer. That is, that I should *indirectly* assume to the United States an authority over religious exercises . . . Fasting and prayer are religious exercises; the enjoining of them an act of discipline. Every religious society has a right to determine for itself the times for these exercises; and the objects proper for them, according to their own particular tenets; and this right can never be safer than in their own hands, where the Constitution has deposited it." And Jefferson added that he had "no authority to direct the religious exercises of his constituents."

Here Jefferson was expressing his central idea in his many discussions of the relations of government with religion. He objected to the government interfering with religious exercises, discipline, ritual, or worship, and he objected to the punishment of people who did not conform to the government's theory of what was correct in these religious affairs. This is always Jefferson's thesis. Neither Justice Rutledge nor Dr. Pfeffer, nor any of the other protagonists for the modern substitute for the First Amendment, have ever cited a single instance in which Thomas Jefferson specifically objected to the use of impartial government aid in support of religious activities. In his long life as a citizen of Virginia, he never protested against Virginia doing it; and as President of the United States for eight years he did it throughout his administration.

Dr. Pfeffer tries to make something out of the fact that the Blaine amendment (essentially to introduce the Rutledge doctrine into the Constitution) received a majority vote in both Houses, but fell short of the necessary two thirds vote in the Senate. He does not mention the fate of the other 19 or 20 proposals to the same effect which never got even this far in Congress. Senator Blaine was one of the greatest Congressional leaders in American history. He was operating at the time of tremendous power of the Republican party which he represented. Both Presidents Grant and Garfield had much the same idea that Senator Blaine expressed in this amendment. With all that power behind the amendment, it went further than any of the other proposals, but not far enough. As I have shown, Congress has either turned down, or allowed to die in committee, some twenty proposals to put the Rutledge-Pfeffer doctrine into the Constitution. The fact that one out of twenty got a sufficient vote in one House of Congress is not impressive evidence that the American people and their official representatives believe in the Rutledge-Pfeffer doctrine.

I submit that Dr. Pfeffer has presented no valid evidence that the establishment clause forbids non-preferential government aid to religion.