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By Hon. Kenneth W. Starr

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THE RELIGION CLAUSES OF THE CONSTITUTION

by The Honorable Kenneth W. Starr

Let us reflect for a few moments on the Religion Clauses of the First Amendment. The words are majestic in their simplicity:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.

Beginning with *Cantwell v. Connecticut* in 1940, the Supreme Court has applied the First Amendment Religion Clauses to the states through the vehicle of the Fourteenth Amendment's due process clause. After a series of decisions involving in large part the activities of minority religious sects, especially the Jehovah's Witnesses, the Religion Clauses burst onto the national consciousness with particular fury in the landmark school prayer cases of the 1960s. Those opinions made clear that the Supreme Court was vexed by two related concerns: the first was the specter of young and impressionable schoolchildren being coerced, albeit by peer and group pressure, to engage in religious activities that were an affront to their consciences. The same concerns of freedom of mind and freedom of conscience that animated the Supreme Court in the second flag salute case, *West Virginia Board of Education v. Barnette*, lay at the core of those decisions. The Court's second concern in those cases was more separationist in nature--it was not the business of the schools or school authorities to formulate prayers or otherwise mandate religious activities on school premises.

It is this second concern that has proved far more intriguing and difficult in our law than the first--that it is not the business of the state to be involved in religious matters. The underlying idea is that keeping the state out of religion will protect and preserve the sanctity of religion--will keep religion pure and undefiled, in the words of St. Paul--and will protect religious liberty.

Man's Duty to God. This sentiment finds its roots in natural rights history, which undergirded the Declaration of Independence and James Madison's immortal Memorial and Remonstrance, a pre-Constitutional attack on a proposed religious tax in Virginia. Religion, Madison opined, was man's duty to God. In that relationship, the state had no warrant for entering. If man breached his duty to God, that was a matter between the individual and his Creator. The state should remain bound in focus to worldly matters.

This separationist sentiment has been the focal point of the most controversial and bitter legal battles of the last two decades. And part of the reason for the

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frequency of the battle is that government has grown dramatically from its limited compass of the 18th century. As has frequently been noted, the New Deal worked a fundamental restructuring of the basic arrangements of government in the United States. Not only was the relationship of the federal government to the states recast, but the underlying philosophy as to the appropriate extent of government responsibility was fundamentally altered. From the 18th century desire to free the movement of commerce to create free trade zones among the states, governmental responsibility moved in this century to its current sweeping status.

Outside Enumerated Powers. The ubiquity of modern government provides a vastly different environment for application of Madison's principles of natural rights. Madison, and Jefferson as well, adhered to notions of limited government. Although Madison was adamant in his distrust of the states as parochially and selfishly preventing the growth of a vigorous commercial republic, Madison did not envision the new central government as becoming today's welfare and regulatory state. After all, Madison believed that the First Bank of the United States, established by the First Congress, was unconstitutional, as being outside Congress's enumerated powers in Article I.

Thus it is that a strongly separationist approach to First Amendment interpretation has implications that our forebears did not have occasion to consider. If government is ever a greater part of life, then separationist values--encapsulated in Jefferson's letter to the Danbury, Connecticut, Baptists in which he coined the term "wall of separation"--mean that religion is forcibly removed from more and more of life in the modern world. The world, by constitutional mandate, is made increasingly secular.

Newly Minted Doctrine. We have seen the implications of this in recent constitutional litigation. Practices and customs that had long gone unchallenged, traditions that traced their roots to the days of the Founding Fathers, came under constitutional assault. The most dramatic example of this emergence of vigorous separationism was evident in a series of challenges to the practice of legislative chaplaincies, culminating in the Supreme Court's decision in the Nebraska chaplain's case, *Marsh v. Chambers*. Applying recent constitutional doctrine, as most fully enunciated by the Supreme Court in its 1971 decision of *Lemon v. Kurtzman* (setting forth a three-part test for evaluating practices challenged under the Establishment Clause), the Eighth Circuit Court of Appeals in the Nebraska case found that the chaplaincy practice violated all three elements of the test.

The Supreme Court reversed, but it did so only by declining, without explanation, to apply its own newly minted doctrine. In Burkean fashion, the Court relied, quite understandably and unremarkably, on history. And history in this particular was indeed monolithic, going back to the First Congress itself, and beyond, to the colonial experience. And there in the mists of history stood not only the First Congress, which approved and sent to the states for ratification the Religion Clauses of the First Amendment, but more specifically, James Madison himself. Madison, the good friend of religious liberty, was one of a handful of Members of the First House of Representatives appointed to a Committee to consider a way of appointing chaplains.

So it was that the Court in *Marsh* was faced with an historical practice in Congress, which extended without interruption back to 1789. And it was a practice that was carefully focused on. In the earlier Continental Congress, John Jay and John Rutledge had objected to the practice of legislative prayer on the very grounds of religious pluralism. The objection had been considered, and the practice had been approved by that Congress and subsequently by the drafters of the First Amendment itself. How then in reason could a latter-day Supreme Court condemn what history itself so uniformly vindicated?

Notwithstanding the judgment of history, *Marsh v. Chambers* produced a sharply divided Court. In a far-ranging dissent, Justice Brennan condemned the practice of legislative chaplaincies based on recent Supreme Court case law (particularly the three-part test of *Lemon*) and in the process voiced tentative reservations about a time-honored practice in our nation. Armed with a strictly analytical doctrine embodying strongly separationist values, Justice Brennan expressed uncertainty about such mottos as "In God We Trust" and "One Nation Under God."

Religion of Secular Humanism. The Court, of course, continues to visit this difficult and sensitive arena of Religion Clauses litigation. Last year there was the Louisiana creationism case; two years ago, the Court wrestled with the Alabama right-to-silence case; and just last month the Court heard arguments in the latest moment-of-silence case coming out of New Jersey. Meanwhile, the lower courts continue to wrestle with various aspects of the Religion Clauses, as in the Tennessee case when parents challenged a Holt, Rinehart basic reading series used in the public schools of Hawkins County. In like manner, the Eleventh Circuit recently overturned Judge Brevard Hand's judgment finding that certain textbooks in Alabama promoted the religion of secular humanism in violation of the Establishment Clause.

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So what are we to do in this era of uncertainty concerning how constitutional doctrine meets the far-flung reaches of modern-day government. Obviously, it is for the Supreme Court ultimately to say, but there is value, I believe, in turning to the time of the Founding to seek out the values that animated the Framers in fashioning the Religion Clauses.

The Madisonian View. The debate in that First Congress in August of 1789 focused on the establishment issue, bypassing in the main what was then the "rights of conscience" clause and what came to be the free exercise clause. Debating a draft of the proposed Bill of Rights, prepared in large part by Madison, the discussion opened that day with an expression of concern about the Establishment Clause by Congressman Peter Silvester of New York. The Congressman complained that, as drafted, the clause was susceptible to a dangerous interpretation far different from that intended, namely that it might be thought to have a tendency to abolish religion altogether. And this, asserted Congressman Silvester with the support of Congressman Benjamin Huntington of Connecticut, would not do.

Madison promptly thereafter took the floor. He began by setting forth his interpretation of what the Religion Clauses meant. The Madisonian view, like the Clauses themselves, was majestic in its simplicity: "Congress should not establish a

religion," Madison intoned, "and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."

The notion of compulsion was thus at the heart of Madison's interpretation of the Religion Clauses. Compelled religious exercises, not religious exercises *per se*, are what Madison was trying to get at. It shares a value with the Fifth Amendment--there is no protection against self-incrimination, as is loosely thought to be the case. The crucial distinction for constitutional purposes, however, is that the individual is to be free from compelled self-incrimination.

Compulsion Forbidden. Madison yielded the floor. His view was clear. There would not be, as there was in no fewer than five states at that moment, an established church at the national level. Nor would individuals be compelled in matters of religion and conscience, the value that reaches across the span of two centuries to inform the flag salute case and, in part, the landmark school prayer cases. Compulsion--the antithesis of liberty--was to be forbidden.

Congressman Huntington took the floor. He expressed agreement with the Madisonian reading of the clause and felt that the clause was sound. Let us protect ourselves against an established religion, Congressman Huntington said, but let us not while securing the rights of conscience, patronize those who profess no religion at all.

Madison took the floor again. The various concerns with the clause, he felt, could be satisfied if the word "national" were inserted in front of the word "religion." This was not an anti-religion clause, Madison emphasized. Religion would flourish in a society where there was liberty. The sole concern, Madison stated, was that one religious sect might obtain preeminence, or two sects combine together and establish a religion at the seat of government.

"National," a Buzz Word. Madison was trying to revive the language that he had previously drafted and which he thought, quite rightly, would aid clarity. But it was opposed. And why? The opposition, it seems quite clear, was not on the merits of the Clauses or their meaning. It was, rather, based on the overarching issue of the very nature of the new government. "National" was a buzz word. It meant a diminution of the role of the states, a condition that the antifederalists would never brook. The distinction, which was quite sharp in their minds, was one between a national government, on the one hand, and a federal government, on the other. After further debate on that issue, the Annals of Congress records that Madison withdrew his motion, protesting all the while that the term, "national religion," by no means implied that the government was a national one rather than a federal one.

The vote taken on the Religion Clauses was 31 in favor and 20 against. Not, it might seem, an overwhelming vote of confidence in religious liberty, but nonetheless, passage by a comfortable margin.

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Without suggesting that this brief foray into one aspect of constitutional history is by any means definitive, it would appear from this reading of the debates of the

First Congress that the aim of the Religion Clauses was to maximize liberty. They would accomplish this goal by forbidding the establishment of a national church, thus continuing the trend of disestablishment begun during the Revolution itself and destined to be completed, finally, in 1833. And the Clauses also ensured that individuals would be protected from compelled religious observances or other matters pertaining to conscience. It was not to abolish religious practices, but to prevent government compulsion of those practices.

Rigidity of Separationist Doctrine. And thus it can be seen, through the eye of history, a compatibility between the philosophy that animated the First Amendment's crafting and the action of that same Congress, including Mr. Madison's, in establishing legislative chaplaincies. There was no conflict between the two in principle, because the payment of a single chaplain at the seat of government to open legislative sessions with prayer did nothing to establish a church at the seat of power. The legislature was simply carrying on its function within its own halls, ordering its own procedures, not legislating for the nation. There was, upon analysis, only a noncompulsory religious act within the halls of government.

If that principle is to be discerned fairly from the history of the First Amendment and the First Congress, which fashioned it, then it would indicate that the Supreme Court was entirely correct in deciding the "right of access" case the way it did in *Widmar v. Vincent*. There, a voluntary religious student organization was seeking nonpreferential access to campus facilities to carry on its meetings. It was seeking equal access, nothing more. And yet the rigidity of separationist doctrine had beguiled the Court of Appeals to succumb to a truly perverse notion--that all student groups except those with a religious purpose could make use of university facilities. The bedrock constitutional principle of protecting religious liberty had been turned on its head; groups were being singled out for unfavorable, disparate treatment if their purpose was religious in nature.

A Charter of Liberty. The experience in *Widmar*, notwithstanding the correction of constitutional error by an almost unanimous Supreme Court, suggests the reality of the danger of undue doctrinal rigidity in interpreting the Religion Clauses of the First Amendment. The Constitition is, above all, a charter of liberty, by way of structural design and of specific guarantees of particularly important liberties. When the Constitution becomes an instrument for attacking noncompulsory activities embodying acts of religious liberty in this post-New Deal world of ubiquitous government, it must surely be sorrowfully questioned whether we in our modern-day infatuation with legal doctrine have strayed far away from the values that undergird the Constitution and the Bill of Rights--values that bind together the nation in all its diversity.

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