

## MERIDIAN MAGAZINE

### **The Misplaced "Wall" Between Church and the Federal State** by W. Cleon Skousen

*This is the continuation of an article that ran Friday in Meridian called "The Role of Religion in the Founding Father's Thinking." To read the other one, [click here](#).*

When Thomas Jefferson was serving in the Virginia legislature, he introduced a bill to have a day of fasting and prayer; but when he became President, Jefferson said there was no authority in the federal government to proclaim religious holidays. In a letter to the Danbury Baptist Association dated January 1, 1802, he explained his position and said the Constitution had created "a wall of separation between Church and State." 28

In recent years the Supreme Court has used this metaphor as an excuse for meddling [page 682] in the religious issues arising within the various states. As we shall see later, it has not only presumed to take

jurisdiction in these disputes, but has actually forced the states to take the same hands-off position toward religious matters, even though this restriction originally applied only to the federal government. This obvious distortion of the original intent of Jefferson (when he used the metaphor of a "wall" separating church and state) becomes entirely apparent when the statements and actions of Jefferson are examined in their historical context.

It will be recalled that Jefferson and Madison were anxious that the states intervene in religious matters until there was equality among all religions and that all churches or religions assigned preferential

treatment should be disestablished from such preferment. They further joined with the other Founders in expressing an anxiety that all religions be encouraged in order to promote the moral fiber and religious

tone of the people. This, of course, would be impossible if there were an impenetrable "wall" between church and state on the state level. Jefferson's "wall" was obviously intended only for the federal

government, and the Supreme Court application of this metaphor to the states has come under severe criticism. 29

### **Religious Problems Must Be Solved Within the Various States**

In Thomas Jefferson's second inaugural address, he virtually signaled the states to press forward in settling their religious issues, since it was within their jurisdiction and not that of the federal government:

"In matters of religion, I have considered that its free exercise is placed by the Constitution independent of the powers of the general government. I have therefore undertaken, on no occasion, to prescribe the

religious exercises suited to it; but have left them as the Constitution found them, under the

direction and discipline of State or Church authorities acknowledged by the several religious societies." 30

Jefferson, along with the other Founders, believed that it was within the power of the various states to eliminate those inequities which existed between the various faiths and then pursue a policy of

encouraging religious institutions of all kinds, because it was in the public interest to use their influence to provide the moral stability needed for "good government and the happiness of mankind." 31

Jefferson's resolution for disestablishing the Church of England in Virginia was not to set up a wall between the state and the church, but simply, as he explained it, for the purpose of "taking away the privilege and preeminence of one religious sect over another, and thereby [establishing] ... equal ... rights among all." 32

### **Affirmative Programs to Encourage All Religions on the State Level**

In view of the extremely inflexible and rigid position which the U.S. Supreme Court has taken in recent years concerning the raising up of a "wall" between state government and religion, it is remarkable how

radically different the Founders' feelings about such matters were.

Take, for example, the Founders' approval of religious meetings in tax-supported public buildings. The Founders had no objection to using public buildings for religious purposes; that was even to be encouraged. The only question was [page 683] whether or not the facilities could be made

available equally to all denominations desiring them. Notice how Jefferson reflected his deep satisfaction in the way the churches were using the local courthouse in Charlottesville, near Jefferson's home:

"In our village of Charlottesville, there is a good degree of religion, with a small spice only of fanaticism. We have four sects, but without either church or meeting-house. The court-house is the common temple, one Sunday in the month to each. Here, Episcopalian and Presbyterian, Methodist and Baptist, meet together, join in hymning their Maker, listen with attention and devotion to each others' preachers, and all mix in society with perfect harmony." 33

One cannot help asking the modern Supreme Court: Where is the wall of separation between church and state when the courthouse is approved for the common temple of all the religious sects of a village?

Of course, Jefferson would be the first to require some other arrangement if all of the churches could not be accommodated equally, but so long as they were operating equally and harmoniously together, it was

looked upon as a commendable situation. The fact that they were utilizing a tax-supported public building was not even made an issue.

## Jefferson Proposes Accommodations for Religious Instructions at a State School

Not only did the Congress of the Founders' day provide in the Northwest Ordinance that the basic tenets of religion and the fundamentals of morality should be taught in the public schools, but Jefferson proposed that the University of Virginia extend its facilities to the various denominations so that each student could worship and study in the church of his choice. Jefferson wrote:

"Can the liberties of a nation be thought secure when we have removed [by eliminating religious instruction] their only firm basis -- a conviction in the minds of the people that these liberties are ... the

gift of God? That they are not to be violated but with his wrath?" 34

To encourage religious studies by college students of different faiths, Jefferson proposed the following:

1. The responsibility for teaching "the proofs of the being of a God, the creator, preserver, and supreme ruler of the universe, the author of all the relations of morality, and of the laws and obligations these

infer, will be within the province of the professor of ethics." 35

2. If the university faculty will also teach "the developments of these moral obligations, of those in which all sects agree, [together with] a knowledge of the languages, Hebrew, Greek, and Latin, a basis will be

formed common to all sects." 36

3. Encourage "the different religious sections to establish, each for itself, a professorship of their own tenets, on the confines [campus] of the university, so near ... that their students may attend the lectures

there, and have the free use of our library, and every other accommodation we can give them; preserving, however, their independence of us and of each other." 37

4. Enable "students of the University to attend religious exercises with the professor of their particular sect, either in the rooms of the buildings still to be erected [by each denomination on campus] [page 684]

or ... in the lecturing room of such professor." 38

5. Urge students to participate in regular religious exercises but do so without conflicting with the established schedule of the university. Said he: "Should the religious sects of this State, or any of them, according to the invitation held out to them, establish within or adjacent to, the precincts of the University, schools for instruction in the religion of their sect, the students of the University will be free, and expected to attend religious worship at the establishment of their respective sects ... in time to meet their school in the University at its stated hour." 39

## **Summary of Jefferson's Views**

From these various documented sources it is apparent that Thomas Jefferson had a number of clearly defined views which he hoped would become the traditional American life-style with reference to religion and the Constitution. Perhaps these views might be summarized as follows:

1. The First Amendment prohibits the federal government from intermeddling in religious matters in any way. It is not to take any positive action which would tend to create or favor some "establishment

of religion," nor is it to interfere or prohibit the free exercise of any religion.

2. The individual state, however, has the responsibility to see that laws and conditions are such that all religious denominations or sects receive equal treatment.

3. There should be a regularly established policy of teaching the fundamentals of religion and morality in the public schools.

4. In addition, there should be an opportunity, on the university level at least, for each denomination to be invited to build facilities on or adjacent to the campus where the students of that particular denomination could be expected to attend regular worship services and receive instructions in their particular faith.

5. Professors might also hold special services or classes of religious instruction in the rooms assigned to them at the university in order to accommodate the needs of the students belonging to their particular faith.

6. Students studying for the ministry at nearby seminaries should be allowed to have full access to the resources of the university library.

7. However, in spite of all of these efforts to encourage religion indirectly, there must be no use of tax funds to subsidize any religion directly.

## **Jefferson Sees Great Advantages in Following These Guidelines**

By leaving it exclusively to the states to work out the equal encouragement of all religions, at the same time giving them no direct subsidy, Jefferson felt the goals of the Founders would be achieved. He

felt there was a need to fill "the chasm" of religious ignorance which constituted a inability to society and at the same time leave "inviolable the constitutional freedom of religion, the most unalienable and sacred

of all human rights." 40

Jefferson, like other leaders among the Founders, seemed anxious to not only encourage all religious faiths on a basis of equality, but also to have them develop a spirit of toleration for each other. In referring to the university campus and its immediate environs, where all faiths [page 685]

would be invited to provide facilities, Jefferson wrote:

"By bringing the sects together, and mixing them with the mass of other students, we shall soften their aspirates, liberalize and neutralize their prejudices and make the general religion a religion of peace,

reason and morality." 41

### **How the Courts Began Building a Wall Between Religion and the State**

It is a well-known principle of substantive law that the Constitution and the law should be interpreted very strictly according to the original intent of those who created it. As Chief Justice Roger B. Taney stated in

Dred Scott v. Sanford, "It [the Constitution] speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of the framers." 42

In the case of Barron v. Baltimore, 43 Chief Justice Marshall affirmed that the Bill of Rights in the Constitution was a series of prohibitions against the federal government to prevent it from encroaching on the states.

Applying this to worship, the court's decision meant that there was a "wall" between the federal government and any "establishment of religion," just as Jefferson had said.

However, in the case of Gitlow v. New York, 44 the Supreme Court used certain provisions in the federal Bill of Rights and applied them to the states. The court justified this action on the basis of the Fourteenth

Amendment, which provides that "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."

The opponents of traditional theistic religion and morality saw the Gitlow case as an opportunity to invoke the power of the federal courts to build a wall between each of the states and any form of religious

encouragement, even though it was provided indirectly. In other words, they would reverse the Founders' original policy.

The case of Cantwell v. Connecticut 45 was the first ruling of the Supreme Court in which the "Gitlow doctrine" was applied to religious liberty, and Everson v. Board of Education 46 was the first time the

Supreme Court applied the "due process" clause of the Fourteenth Amendment to make the federal wall of separation apply to religious matters among the individual states.

What this amounted to was the actual breaking down of the federal wall set up by the First

Amendment so that the Supreme Court actually usurped jurisdiction over religious matters in the states and began dictating what the states could or could not do with reference to religious questions. Without a doubt, there has been a severe wrenching of the Constitution from its original First Amendment moorings ever since this new trend began.

### **The Supreme Court Prohibits Teaching Religion in Schools**

It is interesting that in the debates over ratification Madison stated the position of the Founders when he said: "There is not a shadow of right in the general government to intermeddle with religion. Its least

interference with it would be a most flagrant usurpation." 47 Nevertheless, in *McCullum v. Board of Education*, 48 the Supreme Court intervened in a religious [page 686] question. It used the *Gitlow*

doctrine to tell a state board of education that it would not allow children, even with their parents' consent, to take religion classes in school. The students had been authorized by the board of education to sign up for these classes, which were being taught by the representatives of their own particular faith. They then attended these classes as part of their regular studies, just as Jefferson had recommended for the University of Virginia. The court ignored the fact that there was equality of opportunity for any of the denominations to provide such classes and used the "wall" doctrine to outlaw use of tax supported

facilities for the teaching of religion by any denomination. There was a strong dissent by Justice Stanley F. Reed.

### **The Supreme Court Approves "Released Time" for Religious Education**

It is of further interest that the Supreme Court took its newly acquired jurisdiction over religious questions in state schools to announce in *Zorach v. Clauson* that it was very solicitous of religion and would

approve classes in religion during the regular school day, providing the classes were held separate from any tax-supported property. Justice William O. Douglas wrote the opinion from the following frame of reference:

"We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for a wide variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma." 49

Justice Douglas went even further to state, "We find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence." 50

### **The Cultural Vacuum Created by the Court: So-Called "Neutrality"**

However, in the case of *Everson v. Board of Education*, 51 the Supreme Court made it clear that

neither the federal government nor a state government could encourage religion in any way. Justice Hugo L. Black spoke for the court and declared in his opinion, "Neither a State nor the Federal government ... can pass laws which aid one religion, aid all religions, or prefer one religion over another." 52

The Founders would have heartily endorsed Justice Black's "no preference" doctrine, but they would, no doubt, have objected vigorously to outlawing indirect aid for, and encouragement to, "all religions." In

the final analysis, it was "all religions" the Founders had said they were relying upon to undergird society with those moral teachings which are "necessary to good government and the happiness of mankind." 53

No doubt they would have further objected to the court's presumptive usurpation in taking jurisdiction over a religious question which had been specifically reserved, by the First and Tenth Amendments, to the states themselves.

The Founders seemed fully aware that failure to encourage "all religions" in their important role of teaching fundamental morality would leave a void or cultural vacuum in their formula for a great new

civilization of freedom and prosperity. It seems that all empirical evidence of history [page 687] and human experience sustains their position. Then why did the court take the position it did?

All of the cases from then until now suggest that the court considered its position of "neutrality" more fair and more correct in administering true justice. What some legal scholars are beginning to point out,

however, is that the position of so-called neutrality has not achieved what the court said it intended. It has indeed given "secularism," or the emphasis of nonspiritual and nonmoral principles, the clear advantage of a virtual monopoly in the arena of public education and the administration of public institutions. 54

### **The Supreme Court Outlaws Prescribed Prayers in Schools**

In the case of *Engel v. Vitale*, 55 the issue was that the New York regents had prepared a nondenominational prayer for use in the public schools. The New York Court of Appeals upheld the prayer, but the Supreme Court once more intermeddled in a religious question of a state by ruling

that a nondenominational prayer prescribed by the officials of the state was "establishing" a religion.

However, contrary to popular belief, the court did not say that prayers were unlawful, providing they were voluntary and not prescribed or set by the state. Nevertheless, this case gave the advocates of secularism an excuse to push through rulings in many states that prayer would not be allowed in the schools.

### **The Supreme Court Outlaws the Lord's Prayer and Bible Reading in the Public Schools**

In *Abington School District v. Schempp*, 56 the Supreme Court ruled that opening exercises at the high school involving the recitation of the Lord's Prayer, as well as reading Bible verses, were unconstitutional. The court rejected the proposition that the opening exercises had a secular purpose, namely, the "promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teachings of literature."

It was pointed out to the court that "unless these religious exercises are permitted, a 'religion of secularism' is established in the schools," but the Court rejected this argument. 57

At this point it appears that for all intents and purposes the design of the founding Fathers to have the public schools teach the fundamental principles of religion and morality is dead.

### **Need for an Amendment**

The intent of the Founding Fathers (and the desires of the vast majority of American parents) to have these ideals taught in the schools will probably never be restored without a constitutional amendment, which must further define the right of the states to have exclusive jurisdiction over the determination of religious questions. At the same time it would undoubtedly be the desire of the overwhelming majority of Americans that the states be required to give equal encouragement to all religions on a non-preference basis.

### **Daniel Webster Describes the Founders' Traditional Goal**

In our own day of accelerating rates of crimes of violence, narcotics addiction, billion-dollar pornography sales, hedonistic sexual aberrations, high divorce rates, and deteriorating family life, the American people might well recall the stirring words of Daniel Webster, which he spoke to the New York Historical Society, February 22, 1852:

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"Unborn ages and visions of glory crowd upon my soul, the realization of all which, however, is in the hands and good pleasure of Almighty God; but, under his divine blessing, it will be dependent on the character and virtues of ourselves and of our posterity.... If we and they shall live always in the fear of God, and shall respect his commandments ... we may have the highest hopes of the future fortunes of our country.... It will have no decline and fall. It will go on prospering.... But if we and our posterity reject religious instruction and authority, violate the rules of eternal justice, trifle with the injunctions of morality, and recklessly destroy the political constitution which holds us together, no man can tell how sudden a catastrophe may overwhelm us, that shall bury all our glory in profound obscurity. Should that catastrophe happen, let it have no history! Let the horrible narrative never be written!"

Unfortunately, unless the present generation of American leadership returns to fundamental values, that history is being written right now.

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