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Daniel O. Conkle

Indiana University Maurer School of Law, conkle@indiana.edu

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DOES THE UNITED STATES NEED AN ESTABLISHMENT CLAUSE?

GOD LOVETH ADVERBS

*Daniel O. Conkle**

The question I have been asked to address is this: Does the United States need an Establishment Clause? I would like to make three basic points in response to this question. My first point is to answer the question directly, although not entirely directly: “Yes, we need an Establishment Clause,” but I will add, “at least metaphorically.” Second, the Establishment Clause that I have in mind, at least in the foreseeable future, will be interpreted and enforced not so much by the United States Supreme Court, but rather by elected officials at the federal level and by state and local officials of all kinds. Third, in deciding the meaning of this Establishment Clause for the 1990s and beyond, the only understanding that will be viable — both theoretically and in terms of practical acceptance — will be one that takes religion seriously both as a matter of individual self-identification and as a potential source of political and moral truth.

Let me return, then, to my first point. Yes, we need an Establishment Clause, at least metaphorically, if not literally. By this I mean simply that we need a standard or a set of standards for determining the proper relationship between religion and government.

In addition to our judicially interpreted and enforced Establishment Clause, we in the United States also have in place a metaphoric “Establishment Clause” that symbolizes our societal commitment to the separation of church and state. The nature and extent

* Professor of Law and Louis F. Niezer Faculty Fellow, Indiana University School of Law at Bloomington. This is a lightly edited version of remarks presented December 7, 1991, at the Conference on the Bicentennial of the Bill of Rights, sponsored by the Center for Church/State Studies, DePaul University College of Law.

of this commitment are contested, both morally and politically. But at the very least, this commitment means that questions concerning the relationship between religion and government are singled out for special attention. This metaphoric Establishment Clause is part of our public discourse above and beyond the extent to which it is a matter of judicial interpretation and enforcement under the literal Establishment Clause of the First Amendment.

Let me take as an example the case of Judge H. William Constangy.¹ Judge Constangy is a state court judge in North Carolina. After becoming a judge and attending a conference for new judges, Judge Constangy decided that he should open his court with prayer. He composed what he regarded as a "personal prayer,"² and he began to deliver this prayer each morning at the outset of the hearings in his criminal misdemeanor court:

[A]fter the bailiff would cry him on, Judge Constangy would sit down, turn on a light at his bench, and say, "Let us pause for a moment of prayer."

The judge would then bow his head and recite aloud the following prayer:

O Lord, our God, our Father in Heaven, we pray this morning that you will place your divine guiding hand on this courtroom and that with your mighty outstretched arm you will protect the innocent, give justice to those who have been harmed and mercy to us all. Let truth be heard and wisdom be reflected in the light of your presence with us here today. Amen.³

Judge Constangy was sued in federal court on the basis of our literal Establishment Clause.⁴ On appeal, the Fourth Circuit ruled that Judge Constangy's prayer was unconstitutional and could no longer be recited.⁵ The court found that Judge Constangy's practice was different from the opening of legislative sessions with prayer, which the Supreme Court has approved.⁶ It also distinguished the Supreme Court's own opening cry, "God save the United States and this Honorable Court."⁷

I happen to think that the Fourth Circuit's ruling was correct. I believe that Judge Constangy's prayer was in fact unconstitutional, even though I also believe that legislative prayer and the Supreme

1. North Carolina Civil Liberties Union Legal Found. v. Constangy, 947 F.2d 1145 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 3027 (1992).

2. *Id.* at 1151.

3. *Id.* at 1147.

4. *Id.* at 1146.

5. *Id.* at 1152-53.

6. *Id.* at 1147-49 (distinguishing *Marsh v. Chambers*, 463 U.S. 783 (1983)).

7. *Id.* at 1151.

Court's opening cry are not.⁸ Unlike other commentators,⁹ I think that these kinds of constitutional distinctions can and should be made.

But that is not the point I want to make. My point is that regardless of what one thinks of Judge Constangy's prayer, it is clear that there must be a standard — a way of dealing with the relationship between religion and government — and it must be one that somehow recognizes the special character of religion. For Judge Constangy to say, "Let us pause for a moment of prayer," is, I think, quite different than for him to say, "Let us pause for a moment while I explain my courtroom procedures." Prayer is distinctive. Religion is distinctive. And it is because of this distinctiveness that we search for limitations on religion's involvement in government, although we of course disagree concerning what those limitations should be.

Some would regard Judge Constangy's prayer as perfectly acceptable. For those holding this position, we might wish to push the inquiry a bit further. Suppose the prayer were explicitly Christian, or Roman Catholic, or Baptist. Or suppose Judge Constangy had a sign on the front of his bench saying, "God guides the hand of Judge Constangy." Or "Jesus guides the hand of Judge Constangy." Or perhaps, "Jesus saves even the lowliest of criminals."

Others believe, as I do, that Judge Constangy's prayer is unacceptable. For those of us with this opinion, the inquiry should be pushed in another direction. If Judge Constangy cannot recite a courtroom prayer aloud, can he bow his head and pray silently? Can he use his religious values as he decides the cases that come before him? Can he rely upon Christian conceptions of mercy or justice in his sentencing decisions?¹⁰ Can he enforce laws that may be grounded historically or presently on religious understandings of morality?

Questions of this kind simply cannot be avoided in a society, such

8. For a general statement of my views on the Establishment Clause, see Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113 (1988).

9. See, e.g., Jeffrey M. Shaman, *Is Constitutional Jurisprudence Hostile to Religion?*, 42 DEPAUL L. REV. 317 (1992).

10. The Fourth Circuit apparently thinks not. See *United States v. Bakker*, 925 F.2d 728, 740 (4th Cir. 1991) ("Whether or not the trial judge has a religion is irrelevant for purposes of sentencing."). The court in *Constangy* quoted *Bakker* with approval, noting that "the *Bakker* decision . . . reflects the dangers of allowing a judge's religious views to enter the courtroom." *Constangy*, 947 F.2d at 1152.

ours, that is as pervasively religious — perhaps not deeply religious, but pervasively religious. And even in terms of religious depth, we may be more deeply religious than any other Western country.¹¹ Americans in the 1990s may be postmodern, but we are not post-religious. And we are not likely to become post-religious in the years that lie ahead.

So the essence of my first point is this: yes, we need an Establishment Clause, at least metaphorically. We need a standard or a set of standards for dealing with the question of when religion can enter public life, particularly with respect to governmental action. This first point is a normative point. I think it is fairly obvious, almost self-evident.

My second point is not normative, but rather is descriptive, or perhaps predictive. In the foreseeable future, neither the United States Supreme Court nor the federal judiciary in general will be the primary expositor of the proper relationship between religion and government. Although these courts will continue to play some role, they will not be the primary interpreters of our metaphoric Establishment Clause. Instead, the primary interpreters will be people like Judge Constangy. They will be state and local officials of all kinds, including legislators as well as state court judges. They will also include elected officials at the federal level of government. These various officials, and not the federal judiciary, will be making most of the decisions concerning when religion should play a role in government and when it should not.

We have heard much discussion about the Supreme Court's decision in *Employment Division v. Smith*,¹² in which the Court significantly reduced the role of the judiciary under the Free Exercise Clause. *Smith*, I think, could be seen as the Court dropping the first shoe concerning a transfer of decisionmaking power on issues concerning religion, with this power being shifted from federal judges to other officials — in particular, to state and local officials and to elected officials of the federal government. The Supreme Court might drop the second shoe in *Lee v. Weisman*,¹³ in which the Court has been asked to substantially revise its Establishment Clause doctrine.

Whether or not the Supreme Court's existing Establishment

11. See Conkle, *supra* note 8, at 1170 & n.222.

12. 494 U.S. 872 (1990).

13. 111 S. Ct. 1305 (1991), *granting cert. to* 908 F.2d 1090 (1st Cir. 1990).

Clause doctrine falls in *Lee v. Weisman*,¹⁴ the Court has already retreated from a vigorous enforcement of the Establishment Clause. And I believe that this retreat is likely to continue.

I do not applaud this transfer of decisionmaking power. In fact, I think that it is a mistake. I think that the Supreme Court and other federal courts have institutional characteristics, including life tenure, that provide them with an important measure of political insularity. As a result, they can and should play a significant role in checking the excesses of the political process. My point here, however, is not normative. It is merely descriptive or predictive.

As *Smith* indicates, the Supreme Court is not driven by a respect for religious values. Instead, the Court is driven primarily by principles of popular sovereignty and federalism. The Court's implementation of these principles, at least as they relate to issues concerning religion, means that most of the substantive decisions are going to be made not by the federal judiciary, but instead by other officials.

As this transfer of power continues, it is imperative that those who will be making the decisions make them in as informed and as thoughtful a manner as possible. Academics and others should direct their attention to the officials who are going to matter most. Thus, it may be a mistake for academics — particularly, legal academics — to continue to concentrate on the United States Supreme Court, given the direction that the Court has taken and is likely to follow in the future.

Academics obviously cannot dictate the decisions that should be made, but they certainly can participate fully in educational efforts. At the very least, officials should understand what it is that they are deciding. They should be apprised of the competing considerations that might be relevant. I also think that these educational efforts should extend not merely to governmental officials, but also to their constituents, that is, to citizens in general. For good or for ill, the public's opinion on issues concerning the relationship between religion and government will now be playing a larger role than it has in the past.

That, then, is my second point, which is a descriptive or predictive point concerning the primary interpreters of our metaphoric Establishment Clause. As I have discussed, we are in the midst of an

14. In fact, the Court's doctrine did not fall (although it may have been more subtly modified in *Lee v. Weisman*, which was decided after the delivery of these remarks. 112 S. Ct. 2649 (1992)).

important transfer of decisionmaking power. This is a development that has implications for all of us, including those of us who are academics.

I will return to a normative perspective for my third point. This point is more controversial than my first two, but I think it is equally compelling. I want to suggest that as we Americans decide the meaning of our metaphoric Establishment Clause for the 1990s and beyond, the only understanding that will be viable — viable theoretically and in terms of practical acceptance — is an understanding that takes religion seriously in two respects. First, it must take religion seriously as a matter of individual self-identification; religion in this sense is inward-looking. Second, it must take religion seriously as a potential source of political and moral truth; religion in this second sense is likely to look outward, from individual believers to the society at large.

Religion is pervasive in the United States not because people view it as a hobby.¹⁵ Rather, religion is pervasive in the United States because it has truth value. This truth value may not be foundationalist in derivation. It may be more pragmatic. It may take account of historical contingencies and recognize that different people, given their personal and community histories, are rightly attached to different religious traditions. But even from this perspective, religion is true in a fundamental sense. It is not merely a matter of individual taste or personal preference. Religion speaks the truth, both inwardly and outwardly. It tells believers who they are and where they stand.

In its inward sense, religion can define the very essence of an individual's being. "I am a Christian!" or "I am a Jew!" or "I am a Muslim!" Beyond this inward-looking component of truth, moreover, religion typically generates an outward-looking conception of truth, which may have both moral and political implications. My Christianity, my Judaism, or my Islamic faith may affect my opinions on issues of public concern. I may even feel compelled to take political action in accordance with the truths of my religion.

The fact that religion has both inward- and outward-looking components has significant implications. Indeed, these two conceptions of religion, or these two components of religious thought, create a serious tension concerning the proper relationship between religion

15. See Stephen L. Carter, *Evolutionism, Creationism, and Treating Religion as a Hobby*, 1987 DUKE L.J. 977.

and government. This tension may or may not be resolvable.

To fully protect religion in its inner-directed and self-identification sense would require a strict separation of religion and government. Indeed, it would seem to require that religion be excluded from politics and from public life altogether. Any infusion of religion into public life is likely to alienate dissenting religious believers (as well as individuals who may not be religious believers at all). In fact, minority religious believers may suffer not merely alienation, but also humiliation.¹⁶ So if one were to consider only this inward-looking, inner-directed sense of religion, I think that religion would have to stay entirely out of politics and government. Religion would be excluded in order to avoid the psychological assault that can occur when the political community, to use Justice O'Connor's language, acts in a manner that endorses a particular religious faith.¹⁷

On the other hand, if we push religion out of public life in order to protect against the psychological affront and political alienation that it can cause, we have essentially banished religion to the private sphere. And at that point we have denied religion its claims to truth in an outward-looking, other-directed, public-regarding sense. We have deprived religious believers of the full meaning of their religion. We have relegated religious truth to the purely private domain and thereby undercut the religious belief that religion in fact has an outward-looking, other-directed, public-regarding component.

As I have said, this tension may or may not be resolvable. It seems to me, however, that something can be gained by distinguishing, to the extent that we can, between (1) spiritual matters and (2) worldly matters on which religion is brought to bear.

When I refer to spiritual matters, I am referring to aspects of religion that are explicitly directed to worship or related activities, including prayer and ritual. By contrast, when I speak of religion being brought to bear on worldly matters, I mean religion being brought to bear on issues such as race relations and civil rights, environmental policy, and abortion. These are matters that affect the world here and now, rather than acts of worship, prayer, or ritual that are directed to God or to otherworldly concerns.

With respect to worldly matters, I think that religion should be permitted to play a greater role than now seems acceptable under

16. See Richard S. Kay, *The Canadian Constitution and the Dangers of Establishment*, 42 DEPAUL L. REV. 361, 367-68 (1992).

17. See *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).

the metaphoric Establishment Clause of our prevailing political culture. But if we are to permit religion to play an enhanced public role, as I think we should, it simply will not do to treat all religions as equivalent. As I have stated, I believe that religion has truth value. Further, I believe that some religions have more truth value than others. As a result, some religions may have more to offer than others with respect to the resolution of public issues. If we are to let religion play the kind of public role that I have in mind, we have to make distinctions. We have to be willing to evaluate competing religious claims to determine those which have value and those which do not, those which are more valuable and those which are less.¹⁸

With respect to spiritual matters, on the other hand, I think that a relatively strict separation of religion and government should be maintained. Some of the best reasons for this are religious. When spiritual matters are brought into the government's domain, religion can be debased and demeaned. The government can potentially co-opt religion for the government's own purposes. Genuine religion is not likely to benefit from governmentally orchestrated acts of worship, prayer, or ritual. Instead, the major effect is to insult religious minorities. And because the "benefitted" religion gains little if anything, this insult is largely gratuitous.

In summary, when religion and government intersect in connection with spiritual matters, the gain to religion, if any, is likely to be minor. At the same time, this intersection causes obvious harm. When it comes to worldly matters, however, religion cannot be excluded from the public debate if religion is to be respected as a potential source of political and moral truth. Religion has much to offer on questions of public concern, and we would be ill-advised to ignore this source of knowledge and wisdom.

There are various ways to interpret our metaphoric Establishment Clause, and there are various arguments that might be used to defend these interpretations. I have suggested one interpretation, albeit at a very general level. My argument for this interpretation is not grounded in hostility to religion. Instead, it values religion both as a source of self-identification and as a potential source of political and moral truth.

As to spiritual matters, my interpretation calls for a relatively

18. See Daniel O. Conkle, *Different Religions, Different Politics: Evaluating the Role of Competing Religious Traditions in American Politics and Law*, 10 J. L. & RELIGION (forthcoming 1992).

strict separation of religion and government. A similar interpretation might be defended for reasons very different from mine, reasons that would in fact be hostile to religion. Although these two interpretations might be similar in their results, I think that the difference in reasoning matters. It matters first on a practical level, because any proposed interpretation must be acceptable to those who will be deciding the relationship between religion and government in the years to come. We are a pervasively religious society, and officials who are asked to support a doctrine that is hostile to religion simply will not do it. It matters also on a theoretical level, because a theory of the relationship between religion and government must be consistent with the basic character of our society. A theory that is hostile to religion does not meet this criterion. An interpretation based on hostility to religion, therefore, is neither practically acceptable nor theoretically viable. In short, reasons matter.

In his book, *Sources of the Self*,¹⁹ Charles Taylor unearths and retrieves various strands of Western thought, including religious thought, that have not disappeared in Western culture, but that have been reduced to positions of lesser importance, at least in academic and philosophical circles. One of Taylor's chapters is entitled "God Loveth Adverbs." Taylor is quoting Joseph Hall, a Puritan bishop, who used this phrase to capture one of the major insights of the Protestant Reformation: what matters is not just what you do, but the spirit in which you do it.²⁰ What makes a difference is the purpose or the belief that informs the doing. Reasons matter.

As we interpret our metaphoric Establishment Clause for the 1990s and beyond, our arguments and our reasons must be ones that take religion seriously — both as a source of individual self-identification and as a potential source of political and moral truth. Reasons matter. God loveth adverbs.

19. CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF MODERN IDENTITY* (1989).

20. *Id.* at 223-24.

