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ARTICLES

SOME THOUGHTS ON THE HISTORICAL ORIGINS OF THE UNITED STATES CONSTITUTION AND THE ESTABLISHMENT CLAUSE*

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On May 17, 1787, the long-awaited Constitutional Convention was scheduled to convene in Philadelphia, a cosmopolitan New World city with a thriving population of 43,000. But it was not until May 25th that a quorum of delegates was assembled at the elegant Pennsylvania State House, now known as Independence Hall. Some arrived late because drenching rains had caused the rivers to rise and the roads to become mud beds. To reach the State House, the delegates were required to slosh through the mud past the Walnut Street Prison and run a gauntlet of inmates who extended poles with attached cans through barred windows and begged for money. Curses greeted all who ignored them. The rain delayed some dele-

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* This article is a lightly footnoted composite of speeches delivered at the Glencoe, Illinois, Bicentennial Celebration on September 17, 1987, and at the Highland Park, Illinois, Bicentennial Celebration on February 20, 1988. In general, I have set forth footnotes only for direct quotations and case citations. There is a plethora of fine sources detailing the historical background of the Constitution, and citations to such sources would be redundant. For more detailed information concerning this period, see generally BOWEN, MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION, MAY TO SEPTEMBER 1787 (1966); E. DUMBAULD, THE CONSTITUTION OF THE UNITED STATES (1964); P. KURLAND & R. LERNER, THE FOUNDERS' CONSTITUTION (1987); L. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT (1986); J. LIEBERMAN, THE ENDURING CONSTITUTION, A BICENTENNIAL PERSPECTIVE (1987); L. MANNING, THE LAW OF CHURCH-STATE RELATIONS (1981); C. ROSSITER, 1787, THE GRAND CONVENTION (1966); C. ROSSITER, 1787, DRAFTING THE U.S. CONSTITUTION (W. Benton ed. 1986); J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (reprint 1987); Bauer, The Declaration of Independence and the U.S. Constitution, 75 ILL. B.J. 602 (1987); Clark, *Bicentennial of the U.S. Constitution Series: Our Constitution: The Next 200 Years*, 76 ILL. B.J. 716 (1987); *James Madison and the Constitution*, 3 BENCHMARK, Jan.-Apr. 1987; Kristol, *The Spirit of '87*, 86 THE PUB. INTEREST 3 (1987).

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gates, but others were deliberately tardy. They knew from experience that public meetings in eighteenth century America never began when scheduled.

Seventy-four delegates—for the most part Revolutionary heroes and politicians—had been appointed, but only fifty-five actually attended the Constitutional Convention. Rhode Island would not appropriate funds for its delegates, so all stayed home. Some appointed from other states, including Patrick Henry of Virginia, the Revolutionary War hero who proclaimed, "Give me liberty or give me death," refused to appear. Twenty-one delegates were under forty years of age; Jonathan Dayton of New Jersey, at twenty-six, was the youngest. Fourteen delegates were fifty or over; Ben Franklin of Pennsylvania, at eighty-one, was the oldest. All but eight delegates were born in the colonies.

In spite of these diversities, the delegates had much in common. Never again in the history of this nation would so many individuals of unparalleled integrity, intellectual capacity and commitment sit in a deliberative body. Thomas Jefferson, author of the Declaration of Independence, who was on a diplomatic mission in France at the time of the Constitutional Convention, later described these delegates, in awe, as "demigods."

The delegates convened in the beautifully appointed State House chambers and sat at wide tables—three or four to a table. As the first order of business, George Washington of Virginia was unanimously elected as the presiding officer. Washington sat at a table on a raised platform in front of the assemblage. He was fifty-five years old, a striking figure—over six feet tall—elegant, energetic and graceful. Among the delegates, and most Americans, Washington had won unparalleled reputation by his service as the commander of the Continental armies. Having suffered through the frustration and bitterness of fighting a war for a nation with no government to lead it, he was committed to the establishment of a firm and permanent government. Although Washington was not an eloquent speaker and spoke little, his presence and example guided the Convention. We have been done a disservice by the failure of succeeding generations to take Washington seriously and by the delight of more than a few pop historians to poke fun at him. In truth, he was, in the words of his biographer, James Flexner, "the indispensable man" at the Constitutional Convention.

Arguably, James Madison of Virginia was just as indispensable. Five-foot, six inches tall, thin and frail, Madison promptly seated himself in front of Washington. Madison, a brilliant scholar, had researched and prepared for two years prior to the convention. He was the first delegate to arrive in Philadelphia and lobbied assiduously for his views with the arriving delegates. Madison attended all

of the meetings, spoke more frequently than any other delegate, and, since there were no official records of the debates, his "notes" became the principal source of information of these extraordinary and secret meetings. Jefferson later described Madison's notes as "the ablest work of this kind ever yet executed . . . a labor of exactness beyond comprehension." In addition, Madison was also one of the principal authors of the final version of the Constitution. Ben Franklin sat, dozing on occasion, near the front of the room. Weakened from gout and a painful kidney stone, Franklin, who the delegates respected as a brilliant philosopher and the conscience of the Convention, traveled to and from the sessions in his glass-sided custom-made-in-Paris sedan chair. Four prisoners from the Walnut Prison were conscripted as polebearers.

Mounds of dirt and raw sewage were placed on the roads around the State House to inhibit noisy horse and carriage traffic which might otherwise disturb the debates. These blockades and puddles of stagnant rain water soon became natural breeding grounds for disease-carrying mosquitoes, flies and other insects. To evade the insects, avoid street noise and assure secrecy during the debates, the windows of the State House remained closed. The chambers soon became uncomfortably hot and stuffy. Outside the State House hordes of insects hovered as the delegates came and went. Some delegates bitterly complained that the ordeal of the convention was ruining their health.

Not every delegate stayed to the end or attended every session. The average number of delegates present at each of the sessions through that hot summer was thirty. Alexander Hamilton of New York left in a pique during the midst of the debates and never returned. The debates over the summer were long and sometimes bitter. But in the end, agreement was reached and the Constitution was completed and signed on September 17, 1787.

The compromises achieved were not easily reached. We know something of the despair of the delegates in July, when the small states threatened to bolt the convention because they regarded their representation in the Congress to be inadequate. We know that in these especially desperate days, Franklin proposed to the delegates that they invite a minister to open each session with a prayer. Franklin's suggestion for an opening prayer was not adopted, nor even put to a vote.[1]

We know of the closeness of some of the votes. Also, from Madison's notes, we know of Franklin's speech to the delegates on the last day of the convention. The speech urged the delegates to

1. 1 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 459 (1911).

sign their names to the document "as a sign of the unanimous consent of the states present," thus downplaying the fact that the Constitution did *not* have the unanimous consent of all the delegates.[2]

Many of the important provisions of the Constitution were the product of long debate and mutual concession by the several interests represented at Philadelphia. For example, interests of merchants and agrarians, large states and small, slave owners and those opposed to slavery were represented.

Most of the compromises reached have served the United States well. Among the compromises were the different bases of electing the Senate and the House of Representatives, a dual system of federal and state courts, the sharing of legislative and executive authority between the President and the Congress, and the powers granted and denied the national and state governments. Other compromises, while perhaps ingenious, have been radically transformed. Among these are the methods of presidential and senatorial selection.

The set of compromises on slavery stand as the most tragic example of the Convention's unfinished business. The Constitution's writers took pains not to use the word "slave" in the document. They thought slavery would suffer a slow but certain death, in part because the Constitution forbade the slave trade after 1808.[3] They knew that, even as they planned its demise, the Confederation Congress was approving the Northeast Ordinance, forbidding slavery in the territory north of the Ohio River. They did not anticipate, however, that slavery's proponents would continue to insist that state sovereignty protected their right to enslave others. They surely could not know that it would take a civil war to settle the question. But they did know that a procedure to amend the Constitution was necessary to address unforeseen problems which might develop in the nation's future. This unprecedented constitutional safety valve, although infrequently utilized, has worked well through the years.

Signing the Constitution, however, hardly ended the fight. The fight had just begun. Congress agreed to submit the Constitution to the states for ratification according to proposed Article VII. Pursuant to proposed Article VII, the people in nine state conventions had to ratify the Constitution. The ratification debates in the states were intense. In December 1787, Delaware was the first to ratify. In June 1788, New Hampshire became the ninth, thus bringing the Constitution technically into existence. But without Virginia and New York, the two largest states, the ratification in the other states would be meaningless. In the Virginia state convention, in addition

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2. 2 M. FARRAND, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 641-43 (1937).

3. U.S. CONST. art. 1, § 9, cl. 1.

to Patrick Henry, who had refused to attend the proceedings in Philadelphia, future president James Monroe fought against ratification. Madison and Edmund Randolph, another non-signer, argued in favor, as did John Marshall, a young lawyer who was destined to become perhaps the most renowned of Supreme Court Justices. The ratification vote in Virginia was 89-79. As soon as that word was out, New York voted in favor by 30-27.

The Constitution as ratified did not include a separate Bill of Rights. Many thought it unnecessary in a Constitution based on the theory that government's goal is to protect liberty.[4]

The opinion that a separate Bill of Rights was not needed, however, was clearly not a widely shared view. The promise to add a Bill of Rights as the first order of business under the new government was necessary to win ratification in several of the states, including Massachusetts, Virginia and New York. Washington, as the nation's first President, urged Congress to act on that promise, and Madison, as a member of the House of Representatives, saw to it that it did. The first ten amendments to the Constitution, now known as the Bill of Rights, became effective when Virginia ratified the document in December of 1791.

One of the freedoms in the Bill of Rights was freedom of religion. The first amendment to the United States Constitution provided that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[5] This amendment guarantees that the individual will be free from governmental imposition of religion. The freedom of religion provision of the first amendment, known as the Establishment Clause, was designed to prevent the national government from controlling and financing an established church like the Church of England to the exclusion of other churches. With few Catholics, Jews and other religious minorities among the colonists at this time, religious freedom in the republic was chiefly concerned with protecting the rights of the various protestant denominations.

Even after its adoption, the first amendment guaranteed only that the federal government would not usurp religious freedom. Because the Bill of Rights applied only to the actions of the federal government, state and local governments were still free to curtail individual liberties, including freedom of religion. Indeed, it was not until 1833 that Massachusetts became the last state to finally give up state-supported religion. The evolution of the American principles of religious liberty and separation of church and state were

4. THE FEDERALIST No. 84, at 264 (A. Hamilton) (R. Fairfield ed. 1966) (Constitution is a bill of rights).

5. U.S. CONST. amend. I.

completed after the Civil War when the fourteenth amendment to the Constitution made the Establishment Clause applicable to the individual states, most of which by that time had enacted freedom of religion provisions in their individual state constitutions.

Courts construing the Establishment Clause through the years have agreed that government, at all levels, should stay out of religious affairs. This principle has been memorialized in Thomas Jefferson's famous metaphor of a "wall of separation" between church and state. Courts have also stated that government must be "neutral" toward religion, meaning not only that government should not favor one religion over another, but that government should not favor religion over nonreligion.[6] Some courts in turn have used this "neutrality" language to temper the "wall of separation" metaphor by warning that government should not be hostile toward religion.

Through these broad principles, the courts have decided many fact-specific freedom of religion cases. Most of the important cases have been decided in the past one hundred years, when mass immigrations of nonprotestants broadened the religious diversity of this country.

As a result, the United States Supreme Court decided new cases which have added depth of meaning to the bare bones language of the Establishment Clause. These cases provide that a governmental practice challenged as violating the Establishment Clause must survive a three-part test. First, the practice must have a secular purpose. Second, its principal or primary effect must be one that neither advances nor inhibits religion. Finally, the practice must not foster an excessive government entanglement with religion.[7] Discussed below are a few recent cases which have applied this test in determining whether specific governmental conduct violates the Establishment Clause.

Lynch v. Donnelly,[8] a 1984 United States Supreme Court decision, involved a challenge to the relatively small amount of government funding used for the placing of a Christmas display in a privately owned park in the heart of the Pawtucket, Rhode Island, shopping district.[9] The display, which had been erected for the past forty years, included many of the traditional symbols and decorations associated with Christmas. These include Santa Claus, reindeer pulling Santa's sleigh, a Christmas tree, carolers, cutout figures of a clown, an elephant and a teddy bear, hundreds of colored lights

6. Wallace v. Jaffree, 472 U.S. 38 (1985).
7. Van Zandt v. Thompson, 649 F. Supp. 583, 588 (N.D. Ill. 1986) (citing Lemon v. Kurtzman, 403 U.S. 602 (1971)), *rev'd*, No. 87-1018 (7th Cir. 1988).
8. 465 U.S. 668 (1984).
9. *Id.* at 671.

and a large banner reading "Seasons Greetings."[10] The exhibit also included a huge creche—the biblical birth scene of Christ complete with Mary and Joseph, angels, shepherds, kings and farm animals.[11] The central question was whether Pawtucket had violated the Establishment Clause by endorsing religion through its display of the creche. The United States Supreme Court held that it had not, since the creche, although supported by government funding, was but one symbol of a broader Christmas display of seasonal symbols exhibited in a private area.[12]

In another creche case, the American Jewish Congress challenged the constitutionality of the practice of erecting a creche as part of a Christmas display inside the Chicago City Hall.[13] The trial court relied on the *Lynch* decision and ruled that the practice was not a violation of the first amendment.[14] The United States Court of Appeals for the Seventh Circuit in a split 2-1 opinion, however, reversed the trial court and said that the display of the Chicago City Hall creche was improper.[15] Unlike the Pawtucket creche in the *Lynch* case, which was one element of a larger display in a privately owned park, the Chicago City Hall creche was self-contained and placed in City Hall, a building symbolizing local government.[16] The court concluded that the "government-approved placement of the nativity scene in Chicago's City Hall unavoidably fostered the inappropriate identification of the City of Chicago with Christianity, and therefore violated the Establishment Clause."[17]

In still another recent decision involving religious symbols, the United States Court of Appeals for the Seventh Circuit addressed the issue of whether the government of St. Charles, Illinois, as part of its Christmas display, could erect a lighted cross on top of its fire department building.[18] The court decided that the display of the cross violated the first amendment and stated that "when prominently displayed on a public building that is clearly marked as and known to be such, the cross dramatically conveys a message of governmental support for Christianity . . . ."[19]

In a case last year, the State of Illinois' attempt to establish a

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10. *Id.*
11. *Id.*
12. *Id.* at 692-93 (O'Connor, J., concurring).
13. American Jewish Congress v. City of Chicago, 827 F.2d 120 (7th Cir. 1987).
14. American Jewish Congress v. City of Chicago, No. 85 C 9471, at 16 (N.D. Ill. Nov. 5, 1986), *rev'd*, 827 F.2d 120 (7th Cir. 1987).
15. *American Jewish Congress*, 827 F.2d at 128.
16. *Id.*
17. *Id.*
18. American Civil Liberties Union v. City of St. Charles, 794 F.2d 265 (7th Cir. 1986).
19. *Id.* at 271.

chapel in the Illinois State Capitol in Springfield was disallowed because this action conveyed the impermissible message of governmental support for all religions.[20] The district court held that the state plan violated the Establishment Clause because it had a secular purpose of endorsing a religious presence in the capitol, and it had the effect of conveying a message to the citizens of Illinois that it endorses prayer in the Capitol.[21]

The Seventh Circuit Court of Appeals disagreed, reversing the district court. The court of appeals held pertinent the fact that it was uncertain the chapel would contain "religious symbols" or that it would be used for "group religious services." The court of appeals warned that its decision "should in no way suggest that further developments in the decoration and use of the prayer room will automatically or routinely pass constitutional muster. The intrusion of sectarian influences and religious emphases could give rise to an establishment clause violation where none presently exists."[22]

Additionally, the Establishment Clause can impact academic freedom and school matters. In the State of New York, a local school district bus driver's union sued the district on behalf of female bus drivers who were not permitted to drive male students to the United Talmudic Academy, a private Hasidic boy's school located in the district.[23] Due to their religious tenets restricting interaction between the sexes, male students would not board buses driven by female drivers. The United States District Court in New York held that the district's accommodation of the tenets of Hasidism was improper, stating:

> [T]he deployment of only male drivers on bus routes encompassing the Village would have the primary effect of advancing Hasidic religious beliefs. While the provision of bus transportation is neutral on its face, the District's use of male drivers would effectively transform this neutral service into a vehicle for promoting the Hasidic tenet that boys must not be in contact with women.[24]

In Kalamazoo, Michigan, the practice of the public high school in commencing and concluding its graduation program with Christian prayer was challenged.[25] Proponents of the graduation prayer argued that it was similar to the "civil" prayer invocations and benedictions which the United States Supreme Court previously ap-

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20. Van Zandt v. Thompson, 649 F. Supp. 583 (N.D. Ill. 1986), *rev'd*, No. 87-1018 (7th Cir. 1988).
21. *Id.* at 594.
22. Van Zandt v. Thompson, No. 87-1018, slip op. at 18 (7th Cir. 1988).
23. Bollenbach v. Board of Educ. of Monroe-Woodbury Cent. School Dist., 659 F. Supp. 1450 (S.D.N.Y. 1987).
24. *Id.* at 1464.
25. Stein v. Plainwell Community Schools, 822 F.2d 1406 (6th Cir. 1987).

proved for use in legislative and judicial sessions.[26] Opponents argued that graduation school prayer was more analogous to prohibited classroom school prayer.[27] The United States Court of Appeals for the Sixth Circuit stated that "[t]he annual graduation exercises here are analogous to the legislative and judicial sessions . . . . Unlike classroom prayer, ceremonial invocations and benedictions present less opportunity for religious indoctrination or peer pressure."[28] However, although "civil" or "neutral" prayer would have been permitted at the graduation ceremony,[29] the court held that denominational prayer was improper.[30] The court stated that Kalamazoo High School's graduation prayer improperly implied government approval of Christianity since the prayers "employ the language of Christian theology and prayer," and "expressly invoke the name of Jesus as the Savior."[31]

The Sixth Circuit also reversed a trial court ruling which had held that a Tennessee school, by requiring the use of specified textbooks, violated the constitutional rights of objecting parents and students.[32] These parents and students were "born again Christians" who objected to various portions of the textbooks.[33] The court of appeals held that the trial court ruling was incorrect and that the school's choice of textbooks could not be dictated by the religious views of the parents and children.[34] The court stated:

> [T]he requirement that public school students study a basal reader series chosen by the school authorities does not create an unconstitutional burden under the Free Exercise Clause when the students are not required to affirm or deny a belief or engage or refrain from engaging in a practice prohibited or required by their religion. There was no evidence that the conduct required of the students was forbidden by their religion.[35]

In another recently decided textbook case, the United States Court of Appeals for the Eleventh Circuit reversed a United States District Court of Alabama's ruling prohibiting the use of certain textbooks, which according to the district court, unconstitutionally established the religion of secular humanism.[36] The Eleventh Circuit Court upheld the school's right to select its textbooks, stating:

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26. *Id.* at 1408.
27. *Id.*
28. *Id.* at 1409.
29. *Id.* at 1409-10.
30. *Id.* at 1410.
31. *Id.*
32. Mozert v. Hawkins County Bd. of Educ., 827 F.2d 1058 (6th Cir. 1987).
33. *Id.* at 1060.
34. *Id.* at 1070.
35. *Id.*
36. Smith v. Board of School Comm'rs of Mobile County, 827 F.2d 684 (11th Cir. 1987).

> [U]se of the challenged textbooks has the primary effect of conveying information that is essentially neutral in its religious content to the school children who utilize the books; none of these books convey a message of governmental approval of secular humanism or governmental disapproval of theism.
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> . . . [I]mplicit in the district court's opinion is the assumption that what the Establishment Clause actually requires is "equal time" for religion.[37]

The district court's opinion in effect turned the Establishment Clause requirement of "lofty neutrality" on the part of the public schools into an affirmative obligation to speak about religion. Such a result clearly was inconsistent with the requirements of the Establishment Clause.

What can be gleaned from these cases and what can be observed with some degree of regularity in our daily newspapers is that there is an ongoing battle being fought in this country to preserve our founding fathers' ideals that this is a religiously neutral nation. There are some religious zealots who will continue to seek to void our first amendment religious freedoms. They will relitigate their courtroom losses and attempt to institutionalize religious practices clearly prohibited under existing constitutional case law. There will even be some judges, like the trial judge in the Alabama school textbook case, who will cooperate with those attempting to turn the Establishment Clause on its ear in order to further a private religious agenda. It is this type of litigation which the *Chicago Tribune* condemned in its August 23, 1987 editorial concerning the Chicago creche case. This editorial concluded: "If we were all more true to the constitutional ideal there would be no need to invoke the authority of the courts and no pleasure when political figures—for reasons often only distantly related to theological concerns—force the issue."[38]

One final thought. It is appropriate on the 200th anniversary of the signing of the United States Constitution to reflect upon the timeless significance of our Constitution. Could the framers of our Constitution have anticipated the way this document would affect future generations? In their wildest dreams, could they have foreseen fifty states comprised of more than 250 million citizens of every race, religion and ethnic origin in the world? Could they have considered that the document they were creating would set the moral tone for the strongest nation in the history of humanity?

There are some who would reduce the lofty principles of our Constitution to the black letter language of the document. They

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37. *Id.* at 690, 695.
38. Chicago Tribune, Aug. 23, 1987, § 4, at 2, col. 2.

would argue that the Constitution cannot be applied to those specific situations not clearly contemplated by our founding fathers. Since the Constitution does not, nor could it be expected to, specifically address many of the complexities of modern life in our industrial and technologically advanced contemporary society, it is contended that constitutional principles need not be applied to these uniquely twentieth century social and political issues.

This narrow reading of the Constitution is neither historically accurate nor in the best interests of our society. The authors designed the Constitution as a living document. The Constitution's scope is broad, and its principles set limits on state and federal government activity as it affects all our citizenry—rich and poor, black and white, Christian and Jew, young and old, weak and strong. It is this universal application of broad constitutional principle that distinguishes our democratic form of government from all others. It is the reason why our revolutions are social, not violent. It is the reason why the power to govern is changed in this nation by rule of law, as opposed to bloody coup. It is the reason why, in spite of all other shortcomings and unresolved problems still troubling our society, this country is—and has been for the past 200 years—the great land of freedom and opportunity for all.