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DOES THE CONSTITUTION REQUIRE A PURELY SECULAR SOCIETY?

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"Truth is violated by falsehood, but it is outraged by silence."—Henri Frederic Amiel

The Supreme Court last confronted the establishment clause of the first amendment[1] in 1975, in *Meek v. Pittenger*.[2] There, in a 6-3 decision, the Court held unconstitutional state-rendered auxiliary services such as speech and hearing therapy to handicapped Pennsylvania nonpublic school children. Even though the therapeutic services were given by public school specialists, they were held to violate the establishment clause because they were rendered on parochial school premises. Dissenting from this drastic decision, Justice Rehnquist, joined by Justice White, said:

> The Court apparently believes that the Establishment Clause of the First Amendment not only mandates religious neutrality on the part of government but also requires that this Court go further and throw its weight on the side of those who believe that our society as a whole should be a purely secular one.[3]

How could handicapped children be denied therapeutic aids just because, in fulfillment of obligations of conscience, they were in attendance at nonpublic schools? Would not the constitutional requirement of equal protection of the law seem to mandate a directly contrary result?

The Constitution itself says little about religion. Religious tests for federal officers are precluded,[4] Sundays are exempt as relevant days in limiting the

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In addition to the paper delivered to the AALS Section on Law and Religion, this article is also based on Professor Louisell's Bicentennial Address at the Law School of Loyola University, New Orleans, delivered April 2, 1976.

1. "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. art. I.

2. 421 U.S. 349 (1975). After delivery of the address on which this paper is based, the Court upheld, 5-4, noncategorical aid to eligible religious colleges. Roemer v. Board of Pub. Works, 96 S. Ct. 2337 (1976).

3. 421 U.S. at 395.

4. The Senators and Representatives . . . and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirma-

presidential veto,[5] and the document is dated "in the Year of our Lord." Otherwise, the only reference to religion appears in the first amendment which provides simply: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." How could such language preclude the speech and hearing therapy for nonpublic school children which had been provided by Pennsylvania law for all children?

The religion clauses, like all of the first 10 amendments, were originally intended as limitations on the federal government only, hence the language "Congress shall make no law . . . ." Their assimilation by the due process clause of the fourteenth amendment so as to be operable against the states and their subdivisions is a development of this century.[6] The author cannot here retrace the familiar history save to note that whereas the incorporation of the free exercise clause into due process was a natural evolution in the nationalization of American civil rights after the War Between the States, no one has satisfactorily explained how the due process clause could absorb the establishment of religion clause.[7] After all, the purpose of the establishment clause was to protect then-existing state establishments of religion against federal encroachment.[8]

But taking without question the now accepted doctrine that both religion clauses operate on all units of government in this country, could a prohibition against establishment of religion be construed to deny the same therapy to nonpublic school children that is accorded their peers in the public schools? Note that the question is *not* whether a state is forced by the Constitution to treat all its comparable children alike—which would seem on its face a reasonable proposition in view of the equal protection clause; rather, the question is whether a state is constitutionally prevented from doing so. The Court's answer was "yes," because the therapy was rendered on parochial school premises.

The Chief Justice, also dissenting in *Meek*, observed:

> To hold, as the Court now does, that the Constitution permits the States to give special assistance to some of its children whose handicaps prevent their deriving the benefit normally anticipated

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tion to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

U.S. CONST. art. VI, cl. 3.

5. U.S. CONST. art. I, § 7, cl. 2.

6. *See* Murdock v. Pennsylvania, 319 U.S. 105 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940).

7. *See* Abington School Dist. v. Schempp, 374 U.S. 203, 253-58 (1963) (Brennan, J., concurring).

8. *See* Louisell & Jackson, *Religion, Theology and Public Higher Education*, 50 CALIF. L. REV. 751, 753 n.9 (1962).

> from the education required to become a productive member of society and, at the same time, to deny those benefits to other children *only because* they attend a Lutheran, Catholic or other church-sponsored school does not simply tilt the Constitution against religion; it literally turns the Religion Clauses on their heads.[9]

Is the Court throwing its weight toward a purely secular society and tilting the Constitution against religion? If so, it has performed a considerable *volte-face*, at least as measured against its protestations of even relatively recent years. To recall only several modern cases, in *United States v. Ballard*,[10] decided in 1944, Justice Douglas, writing for the majority, stated that "[t]he First Amendment does not select any one group or any one type of religion for preferred treatment. It puts them all in that position."[11] And a few years later the Court, again speaking through that same staunch protector against fusion of Church and State, said in *Zorach v. Clauson*[12]:

> We are a religious people whose institutions presuppose a Supreme Being . . . . When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions . . . . [W]e 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.[13]

What has happened? Do the dissenters in *Meek v. Pittenger* distort the realities? Or is the Court again "following the election returns" of a perceived twilight of revealed religion, a forthcoming all-pervasive, all-inclusive social secularism?

As the Court's decisions demonstrate, there are few areas where the need for objectivity is as great, and its attainment as difficult, as in the religion cases. If the determinants of one's constitutional views are largely apt to be functions of one's ultimate value judgments, this is especially true in the areas of establishment and free exercise. Here, more so than is often candidly acknowledged, a person's views are likely to be as much or more shaped by his attitude toward religion, or particular religions, than by the establishment and free exercise clauses as historical legal instruments. Hence, the context in which the problem arises may not only set the stage for adjudication, it may almost become the adjudicator itself. Be the problem

9. 421 U.S. at 386-87.
10. 322 U.S. 78 (1944).
11. *Id.* at 87.
12. 343 U.S. 306 (1952).
13. *Id.* at 313-14.

establishment, free exercise, or both, sympathies and antipathies are largely fixed by its context, whether the specific issue at bar concerns prayer in public schools, aid to children in parochial schools, distribution of church property or prerogatives, draft act exemptions, Sunday-closing laws, or some other phase of the perennial conflict between societal claims to regulation and individual claims to freedom.[14]

Perhaps the above point of the significance of the context in which establishment and free exercise cases arise can most briefly be made by noting the attitudes of several Justices. Justice Stewart, dissenting in the New York Regents' prayer case, *Engel v. Vitale*,[15] involving prayer in public schools, said: "I cannot see how an 'official religion' is established by letting those who want to say a prayer say it."[16] It was this same Justice Stewart who recently wrote for the Court in *Meek*,[17] denying speech and hearing therapy to disabled school children just because they were in attendance at parochial schools.

Justice Douglas, in the New York released-time case, *Zorach v. Clauson*,[18] said: "We are a religious people whose institutions presuppose a Supreme Being."[19] It was also Justice Douglas who, concurring in *Lemon v. Kurtzman*,[20] which held unconstitutional state aid for nonpublic school salaries, said: "One can imagine what a religious zealot, as contrasted to a civil libertarian, can do with the Reformation or with the Inquisition."[21] This prompted an historian to comment: "Only civil libertarians, apparently, are fit teachers to be paid from the common treasury."[22]

How has the majority of the Court come to its present stance on the religion clauses? Most of the development is recent, having come during or after World War II. There were a few earlier cases, although some of them, despite their significance, were only peripheral to the religion clauses as such. For example, *Pierce v. Society of Sisters*,[23] decided in 1925, sustained, on the ground of parental rights, a challenge by private and parochial schools to an Oregon law which, in effect, would have abolished them. In 1930, *Cochran v. Louisiana State Board of Education*[24] held that Louisiana

14. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972), which upheld Amish claims to exemption from compulsory public high school attendance.
15. 370 U.S. 421 (1962).
16. *Id.* at 445.
17. 421 U.S. 349 (1975).
18. 343 U.S. 306 (1962).
19. *Id.* at 313.
20. 403 U.S. 602 (1971).
21. *Id.* at 635-36.
22. MORGAN, THE SUPREME COURT AND RELIGION 111 (1972).
23. 268 U.S. 510 (1925).
24. 281 U.S. 370 (1930).

had not violated due process by spending state funds for school books in parochial as well as public schools. True, a few earlier cases did go off on first amendment grounds, as, for example, *Reynolds v. United States*,[25] decided in 1878, which affirmed a conviction for bigamy over the claim of religious freedom. There were also a few early establishment clause cases, such as the Court's 1899 decision in *Bradfield v. Roberts*,[26] which sustained a federal appropriation for the construction of a public ward to be administered as part of a hospital under the control of an order of religious sisters.

This is not the occasion for a detailed review of the holdings and dicta of the earlier cases, which I have attempted elsewhere.[27] In summary, those cases were consonant with the traditional American viewpoint that religion and its practice, when not opposed to the peace and good order of the state, enjoyed a preferred status in accord with the proclamation of the Northwest Ordinance of 1787 which antedated the Constitution. That Ordinance, which provided for government of the Northwest Territory, stated: "Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."[28]

The burgeoning of current establishment clause teaching, and, I submit, the reversal of the historic American judicial approach to religion, occurred in 1947 in *Everson v. Board of Education*.[29] That case upheld, although only by a 5-4 majority, New Jersey's authorization of reimbursement to parents for money spent for the transportion of their parochial school children on buses operated by the public transportation system. Those who took comfort in the actual holding perhaps overlooked the fateful dictum put forth by Justice Black, who wrote for the Court in that case, and who remained for the many years of his tenure the dominant figure on establishment teaching. That dictum, reduced to its essence, is: "Neither a state nor the Federal Government . . . can pass laws which . . . aid all religions."[30]

That dictum has been the Court's lodestar ever since. It controlled the decision a year later in *McCollum v. Board of Education*,[31] where the Court struck down the Illinois plan for released-time voluntary and multi-de-

25. 98 U.S. 145 (1878).
26. 175 U.S. 291 (1899).
27. Louisell & Jackson, *Religion, Theology and Public Higher Education*, 50 CALIF. L. REV. 751 (1962).
28. Northwest Ordinance of 1787, art. III.
29. 330 U.S. 1 (1947).
30. *Id.* at 15-16.
31. 333 U.S. 203 (1948).

nominational religious instruction on public school premises. *Zorach v. Clauson*,[32] with its classic language, "We are a religious people whose institutions presuppose a Supreme Being,"[33] may have engendered for the moment a reasonable expectation that the Court was again back on the traditional path of recognition of the historic realities of American life. *Zorach* allowed released-time religious instruction off the public school premises. But the *Zorach* Court lifted the promise only to break it in the subsequent New York Regents' prayer and Bible-reading cases.[34] Of these cases, Brendan Brown has written:

> In the prayer cases, the Court used the doctrine of judicial supremacy to declare unconstitutional an activity which would strengthen the concept of natural law. It was repudiating the philosophy of those who wrote the Constitution, and the rationale behind the great constitutional decisions of Marshall, Story, and many others in the formative period of the United States. The words of a document like the Constitution take on a meaning only insofar as they are interpreted within the framework of a specific philosophy.[35]

The Lutheran, Peter Berger, pointing out how extensively the new secularism has succeeded in influencing both the courts and other agencies of government even though it is only since World War II that an overtly secularist tendency has developed in America, said, "[T]he decision of the Supreme Court declaring prayer in public school to be unconstitutional was a symbolic climax of this development."[36]

The denouement of the "no aid to religion" dictum, up to this moment at least, is *Meek v. Pittenger*, with which this article began and of which the Chief Justice said: "It literally turns the religion clauses on their heads."[37]

Putting aside, so far as possible, subjective value judgments grounded in attitudes toward religion, perhaps the strongest case for the thesis that the Court is tilting against religion is based upon its use of its new "divisive" teaching. For it now seems to be doctrine that a state violates the establishment clause when it effectuates a policy that results from a political contest

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32. 343 U.S. 306 (1952).

33. *Id.* at 313-14.

34. Engel v. Vitale, 370 U.S. 421 (1962); Abington School Dist. v. Schempp, 374 U.S. 203 (1963). *See* Louisell, *The Man and the Mountain: Douglas on Religious Freedom*, 73 YALE L.J. 975 (1964).

35. Brown, *Individual Liberty and the Common Good—the Balance: Prayer, Capital Punishment, Abortion*, 20 CATH. LAW. 213, 220 (1974).

36. Berger, *Battered Pillars of the American System: Religion*, FORTUNE, Apr. 1975, at 138.

37. 421 U.S. at 387.

wherein some of the politically successful partisans were religiously motivated.[38] This, of course, is only another way of saying that a citizen is effectively precluded from the democratic arena if his motive for entering it is based upon religious conviction. The fact that on its face this doctrine would seem repugnant to the nonreligion provisions of the first amendment, renders it no less significant as a controlling principle of decision. Indeed, one can only be amazed at how a Court so staunch in upholding free speech even in the severest context of direct confrontation with a government's military purposes,[39] could simultaneously innovate the divisive doctrine—unless indeed it is "tilting" against religion and throwing its weight to a purely secular society.

The divisive doctrine may be the psychological root of other less direct but hardly less meaningful "tilts" against religion. What the Court has recently done to the significance of marriage as a relevant juridical factor is the subject of an incisive inquiry by Professor John T. Noonan, Jr.[40] As he noted, the Court has gone far in prohibiting the states from acknowledging marriage as a permissible legal criterion in the regulation of sexual conduct, going out of its way in *Eisenstadt v. Baird*[41] "to deny the legal metaphor, founded on the religious metaphor in Genesis, that man and wife are one flesh."[42] Thus discrimination between the married and the unmarried for purposes of regulating sexual conduct is unconstitutional.[43]

In contrasting *Griswold v. Connecticut*[44] with *Eisenstadt v. Baird,* Professor Noonan pointed out that when the constitutional right to privacy was first announced in *Griswold*, it was a right to marital privacy: there could be no state invasion of the "sacred precincts" of the marital bedroom.[45] He then remarked, "[h]ow quickly marital privacy became procreative privacy. How remarkably a right flowing from the institution of marriage became a barrier to the fostering of the institution."[46]

How far away from the Judaeo-Christian tradition must America move to make sure that it is not establishing religion by effectuating as public policy

38. *See id.* at 372; Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 794 (1973); Lemon v. Kurtzman, 403 U.S. 602, 622 (1971).

39. *See* New York Times Co. v. United States, 403 U.S. 713 (1971) (Pentagon Papers case).

40. Noonan, *The Family and the Supreme Court*, 23 CATH. U.L. REV. 255 (1973).

41. 405 U.S. 438 (1972).

42. Noonan, *supra* note 40, at 260.

43. *See* Stanley v. Illinois, 405 U.S. 645 (1972) (right to hearing on custody of children of an unmarried father).

44. 381 U.S. 479 (1965).

45. *Id.* at 483-85.

46. Noonan, *supra* note 40, at 266.

a viewpoint that ultimately is traceable to the religious conviction of the Judaeo-Christian tradition? How many issues must be removed from the democratic political arena because partisans therein are religiously motivated?

But there is perhaps a more subtle way in which the Court is tilting the Constitution against religion: I refer to the abortion decisions of 1973, *Roe v. Wade*[47] and *Doe v. Bolton*.[48] It is unnecessary to review those decisions in detail here; I have elsewhere undertaken comprehensive review of the law's tragic surrender to permissive abortion forces in general and those decisions in particular.[49] My purpose here is simply to note that in these anti-scientific and anti-biological decisions the Court, under the pretext of disclaiming theological approaches, has fallen into a subjective theologism of its own replacing the historic and venerable theologies of the Western traditions.

Thus Justice Blackmun, writing for the Court in *Roe*, stated:

> We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.[50]

One would expect, in accordance with logic, history, and constitutional doctrine, that the next premise would be: therefore, while lack of certainty prevails, the judgment is necessarily in the legislative domain. But instead, the Court indulged not only in the abjured speculation, but in dogmatic value judgments of its own. The unborn represent only potential human life,[51] and have only partial human personhood;[52] human life, to be worthy of protection, must be "meaningful."[53]

What has the Court's own theologism as to the nature and meaning of human life let loose upon American society? We have by judicial fiat—by "an exercise of raw judicial power," as said by Justices White and Rehnquist dissenting in *Roe*[54]—a permissiveness for abortion unmatched, I believe,

47. 410 U.S. 113 (1973).

48. 410 U.S. 179 (1973). *See also* Planned Parenthood v. Danforth, 96 S. Ct. 2831 (1976).

49. Louisell, *Abortion, the Practice of Medicine and the Due Process of Law*, 16 U.C.L.A.L. REV. 233 (1969); Louisell, *The Burdick Proposal: A Life-Support Amendment*, 1 HUMAN LIFE REV. 9 (1975).

50. 410 U.S. at 159.

51. *Id.* at 162.

52. *Id.* at 157-62.

53. *Id.* at 163. *Cf.* Commonwealth v. Edelin, 45 U.S.L.W. 2312 (Mass. Sup. Jud. Ct. Dec. 17, 1976).

54. 410 U.S. at 222.

anywhere in the world, even by legislative action. Currently, the saline solution to induce later abortions is giving way to prostaglandin, as less injurious to the mother. But prostaglandin frequently causes a living infant to emerge. Eminent gynecologists have informed me that in some places an additional substance is used with the prostaglandin to insure that the fetus will *not* emerge alive. Thus does the new-found constitutional right of "privacy" mature into the deliberate purpose to kill.

But from the viewpoint of the individual conscience, perhaps even more significant than *Roe* and *Doe* themselves, are those cases under their aegis which hold: (1) that the husband has no right to object to an abortion on his wife, nor parents to object to (or even know about) an abortion on a minor daughter;[55] (2) that municipal, tax-supported hospitals must perform elective abortions, however abhorrent they may be to the consciences of certain of the taxpayers;[56] and, (3) that Medicaid under the Social Security Act must pay for elective abortions, or even that, regardless of statutory considerations, equal protection of the law constitutionally requires that elective abortions be paid for by the government.[57] Let us examine the *Roe* and *Doe* teachings and their progeny in the light of the newly formulated divisive doctrine already discussed, that government violates the establishment clause when it effectuates a policy that results from the political process wherein some of the successful partisans were religiously motivated. A telling indication of the results of this doctrine is afforded by the attitude of a number of senators on the Senate Subcommittee on Constitutional Amendments of the Committee on the Judiciary. The Chairman, Senator Bayh of Indiana, and Senator Mathias of Maryland, took the position that although they personally believed that unborn life is indeed human life, they felt restrained from effectuating that belief in law because it was interpretable as grounded in religious opinion. In commenting on this, the distinguished theologian and historian Harold O.J. Brown, in his discussion of the *Ethical Questions in Fetal Research*, has said.

> If the First Amendment is understood (as the Court now seems to understand it) as a prohibition of any governmental recognition of fundamental convictions of a religious origin, then it means

55 *See, e.g.*, Planned Parenthood v. Danforth, 96 S. Ct. 2831 (1976); Baird v. Bellotti, 393 F. Supp. 847 (D. Mass. 1975), *vacated and remanded*, 96 S. Ct. 2857 (1976).

56. *See, e.g.*, Doe v. Poelker, 497 F.2d 1063 (8th Cir. 1974), *affirmed on rehearing*, 515 F.2d 541 (8th Cir. 1975), *cert. granted*, 96 S. Ct. 3220 (1976); Nyberg v. City of Virginia, 495 F.2d 1342 (8th Cir. 1974). Even private hospitals have now been held to be under the sway of all but permissive abortion. *See* Doe v. Bridgeton Hospital Ass'n, 71 N.J. 748, 386 A.2d 641 (N.J. Sup. Ct. 1976).

57. *See, e.g.*, Wulff v. Singleton, 508 F.2d 1211 (8th Cir. 1975), *remanded to dis-*

> something it surely never was intended to mean: the cutting off of American society from its spiritual and cultural roots in the Judaeo-Christian tradition.[58]

One may interject that the Court is not responsible for such senatorial extremism and irresponsibility. But from whence did the position of these senators derive, if not from the Court's new divisive teaching?

But the most startling result of the conjuncture of *Roe* and *Doe* with the divisive teaching is the position taken by the United States Commission on Civil Rights. For we are now told by this organization that attempted correction of *Roe* and *Doe* by an anti-abortion law or constitutional amendment would not pass the muster of the Court's establishment clause doctrine. Lest you think I am only indulging in a professional brain-teaser, note the Commission's exact words:

> In a recent Supreme Court case, Mr. Justice Powell explained the evils protected against by the establishment clause . . . . According to Powell, in order ". . . to pass muster under the Establishment Clause, the law in question, first, must reflect a clearly secular legislative purpose . . . second, must have a primary effect that neither advances nor inhibits religion . . . and, third, must avoid excessive government entanglement with religion . . ." [citing Committee for Public Education v. Nyquist, 413 U.S. 756, 773 (1972)]. An anti-abortion law or constitutional amendment would not pass such muster. There is no clearly secular legislative purpose, there is a primary effect that advances certain religious institutions, and there would be excessive government entanglement with religion in the enactment and ever present in the enforcement of the provisions.[59]

There you have it! *Roe* and *Doe*, which negated the historic and universal American legislative power to restrict abortion, were secular and good; an attempt to correct them by constitutional amendment would be religious and bad.

The Commission's report goes on to attack conscience clauses protecting those opposed to abortion.[60] I submit that it is both ironic and tragic that a commission established to protect minority rights, now, in the name of com-

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trict court for defense on merits, 96 S. Ct. 2868 (1976). The latest incredible doctrine is that Congress is powerless to refuse to appropriate funds for permissive abortions. McRae v. Matthews, 421 F. Supp. 533 (E.D.N.Y. 1976).

58. Brown, *Ethical Questions in Fetal Research*, 1 HUMAN LIFE REV. 118, 124 (1975).

59. CONSTITUTIONAL ASPECTS OF THE RIGHT TO LIMIT CHILDBEARING, REPORT TO THE UNITED STATES COMM'N ON CIVIL RIGHTS 28-29 (April 1975).

60. *Id.* at 12.

pletely unfettered abortion, levies an attack on the most basic of all human rights—that of conscience.

Is the Constitution being tilted against religion? Candor seems to compel an amplification and refinement of the question: Is the motivation for the tilting primarily a particular religion? Professor Victor G. Rosenblum, in his recent testimony on a proposed constitutional amendment on abortion, referred to the Civil Rights Commission report, saying:

> I am concerned deeply . . . over the innuendo that borders on religious prejudice contained in . . . the [Civil Rights] Commission's report . . . that contends, "[a]dditionally, raising a particularly religious view of personhood to the level of constitutionality would be widely regarded as a constraint on the free exercise of religion and an attack upon the Constitution itself." [p. 96]. . . . That the Civil Rights Commission should accept, let alone inject, the issue of religious partisanship into a basic question of humanity is a denigration in my judgment of the Commission's mission and an egregious misconstruction of the central issue posed by abortion.[61]

The frankness of Professor Rosenblum emboldens me to conclude with an unpleasant but important subject, the potential factor of anti-Catholicism, which the historian Arthur Schlesinger, Sr., characterized "as the deepest bias in the history of the American people."[62] The history of intolerance is an unwelcome recollection and observation, especially for Catholics, but neither scholarship nor truth is advanced by blinking at it. Perhaps the spirit of ecumenical cooperation following Vatican II and the election of a Catholic president have lulled Americans into believing that all is for the best in the best of all possible worlds of religious equality and freedom. But we cannot forget, and only euphoria could cause us to overlook, the harsh historical realities of the anti-Catholic tradition in the United States: the burning of the Ursuline Convent in Massachusetts in 1834; the street fighting in Philadelphia 10 years later; the exhortations of Lyman Beecher to resist the Pope's plan to take over the Mississippi Valley; the American Protestant Association of the 1840's; the Order of United Americans of the 1850's; the Order of United American Mechanics (which survived from the middle of the 19th to the middle of this century); the Know-Nothing Party; the American Protective Association (which counted one million secret members in the 1890's); the Blaine Amendment; Al Smith's 1928 campaign for president;

61. *Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. 197 (1976) (testimony of Prof. Victor G. Rosenblum).

62. *See* P. ELLIS, AMERICAN CATHOLICISM 151 (2d ed. 1969).

President Truman's frustrated attempts to maintain a representative at the Vatican; and today's Americans United.[63]

Are strains of the historic American antagonism toward Catholicism at work in the movement to convince the public that abortion is "only a Catholic issue?" The new-found divisive doctrine, of course, arose in the context of cases involving aid to parochial school children or schools. A person must be careful lest his substantive predisposition on that issue becloud his appraisal of the Court's approach as to possible involvement of religious prejudice per se. Let us, therefore, in the interests of objectivity and fairness, turn from cases arguably involving the institutional church, to the Selective Service Act cases, which perhaps best fill the bill for present purposes.

The 1940 Selective Service Act exempted those who "by reason of religious training and belief" were opposed to participation in war.[64] Cases split over exemption claims which cited the promptings of an "inward mentor."[65] In 1948, Congress sought to resolve the problem by exempting claims based on a belief in "a relation to a Supreme Being."[66]

In *United States v. Seeger*,[67] the Court confronted the possibility that the 1948 Act unconstitutionally established religion by insisting on a belief in a relation to a Supreme Being. Defendant Seeger would only say that he preferred to leave the question of such belief open. The Court avoided the confrontation by a striking verbal pirouette:

> We believe that under this construction, the test of belief "in a relation to a Supreme Being" is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption.[68]

In *Welsh v. United States*,[69] the Court heard a defendant who refused to claim any religious belief. He prevailed because, according to Justice Black writing for the Court, his belief that taking life was morally wrong was held with a fervor equal to that of traditional religious convictions, and section 6(j) of the Act required no more.[70]

One year after *Welsh*, Negre, a Catholic with the religious obligation to

63. *See generally* MORGAN, THE SUPREME COURT AND RELIGION 46-52 (1972).
64. Act of September 16, 1940, ch. 720, § 5(g), 54 Stat. 889. (current version at 50 U.S.C. § 456(j) (1970)).
65. *Compare* Berman v. United States, 156 F.2d 377 (9th Cir. 1946), *with* United States v. Kauten, 133 F.2d 703 (2d Cir. 1943).
66. Act of June 24, 1948, ch. 625, § 6(j), 62 Stat. 612-13.
67. 380 U.S. 163 (1965).
68. *Id.* at 165-66.
69. 398 U.S. 333 (1970).
70. *Id.* at 343-44.

distinguish between "just" and "unjust" war and who conscientiously opposed the Vietnam conflict as unjust, might well have approached the Court with confidence.[71] The Court had held in *Sherbert v. Verner*[72] that a Sabbatarian had a first amendment right to participate in a state's unemployment insurance program even though she refused for religious reasons to adhere to the state's requirement that she be willing to work on Saturday in order to participate. Furthermore, in *Sicurella v. United States*,[73] a Jehovah's Witness who opposed participation in secular wars was held to possess the requisite conscientious scruples concerning war, although he was not opposed to participation in a "theocratic" war commanded by Jehovah.[74]

But Negre lost his case; the Court's expansive interpretation of eligibility for draft exemption suddenly became restrictive. He lost because the affirmative purposes underlying conscientious draft exemption were perceived by the Court to be neutral and secular, and the Court felt that valid neutral reasons existed for limiting the exemption to objectors to all wars.[75] While the opinion is a valiant attempt to justify the newly reached strict constructionist mood (it must be acknowledged that on the same day a humanist objector to particular war was also turned down), the result was too much for Justice Douglas, the lone dissenter.[76] Perhaps the real truth is that those charged with raising armies feel that they simply cannot afford to tolerate individual objection to particular wars. But the fact remains that the Court, which had rescued conscientious draft exemption from unconstitutionality by equating belief in God with "sincere and meaningful" nonbelief, refused to acknowledge one of the most venerable and philosophically based of all pacifist traditions, that which distinguishes between just and unjust wars.

I have referred to the late Justice Black as the dominant influence in formulation and effectuation of the "no aid to religion" interpretation of the first amendment. He was one of the ablest legal technicians and shrewdest tacticians ever to sit on the Supreme Court. We are now told by his son, Hugo Black, Jr., in his book about his father:

> The Ku Klux Klan and Daddy, so far as I could tell only had one thing in common. He suspected the Catholic Church. He used to read all of Paul Blanshard's books exposing power abuse in the Catholic Church. He thought the popes and bishops had too much power and property . . . .[77]

71. *See* Negre v. Larson, decided with Gillette v. United States, 401 U.S. 437, 440-41 (1971).
72. 374 U.S. 398 (1963).
73. 348 U.S. 385 (1955).
74. *See also* Clay v. United States, 403 U.S. 698 (1971).
75. 401 U.S. at 453.
76. *Id.* at 470.
77. H. BLACK, JR., MY FATHER: A REMEMBRANCE 104 (1975).

We may have to await a definitive biography of the master craftsman of modern establishment clause teaching to appreciate whether, and to what extent, anti-Catholic bias motivated his "no aid to religion" philosophy.

In this Bicentennial Year we intuitively feel that our Constitution means many things. It is a classic apportionment between local and national, between state and federal, concerns. It contains perhaps mankind's loftiest statement of the ideal of liberty—the Bill of Rights. Most important of all, it has operated as a great bill of peace between widely divergent peoples from coast to coast, conservative to liberal, humanist to religious. As Justice Holmes said in his classic and now vindicated dissent in *Lochner v. New York*:[78] "[A Constitution] is made for people of fundamentally differing views . . . ."

We are in jeopardy of ignoring the motivation for the tilt against religion, but an examination of that motivation must await another time. It is self-evident, however, that we sadly depart from the realities of human psychology and mistake ourselves if we assume that Justices are exempt from the hubris that prompted the warning that all power corrupts, and absolute power corrupts absolutely.

But let us not, like mischievous children, seek to cast all responsibility onto the shoulders of others. A distinguished judge asked me not long ago, referring to some of the decisions I have discussed here, if I thought the Court would have trended the way it has if the strength of religious conviction had not first failed in the hearts and minds of the people? To the extent this is a valid inquiry, it revives the master observer Shakespeare's trenchant perception, which can be paraphrased: "The fault, dear fellow citizen, lies not in our Justices, but in ourselves." For example, why does Congress remain inert in the light of the glaring judicial error of *Roe* and *Doe*, except that we ourselves are passive?

People of religious conviction today often seem quite timid about asserting their legitimate role in the formulation of their country's public philosophy. Of course we all know and acknowledge that the first amendment precludes, and rightly so, preference for any religious denomination. But is there not a core of common religious understanding at the heart of American institutions—are we not in fact, as once proclaimed, "[a] religious people whose institutions presuppose a Supreme Being?" Is there not something of a common denominator that sometimes is identified as America's civil religion? To illustrate this question, I choose the words of no theologian or churchman, but of Benjamin Franklin, commonly regarded as among the least Christian of the founders. Yet he said:

78. 198 U.S. 45, 76 (1905).

> I never was without some religious principles. I never doubted, for instance, the existence of the Deity; that he made the world and govern'd it by his Providence; that the most acceptable service of God was the doing of good to men; that our souls are immortal; and that all crime will be punished, and virtue rewarded either here or hereafter. These I esteemed the essentials of every religion; and, being to be found in all religions we had in our country, I respected them all, tho with different degrees of respect . . . .[79]

Whatever the cause for the tilt against religion, the concern that the Court is no longer guaranteeing neutrality but is actually throwing its weight toward a purely secular society and literally turning the establishment clause on its head is not a trivial one. All fair-minded citizens and believers in the Constitution, not to mention people of religious conviction, have cause for concern in this Bicentennial Year of 1976.

79. R. RICHEY & D. JONES, AMERICAN CIVIL RELIGION 26 (1974), *quoting* B. FRANKLIN, AUTOBIOGRAPHY 46 (1964).