

6-1-1986

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## Recommended Citation

Gary R. Govert, *Something There Is That Doesn't Love a Wall: Reflections on the History of North Carolina's Religious Test for Public Office*, 64 N.C. L. REV. 1071 (1986).

Available at: <http://scholarship.law.unc.edu/nclr/vol64/iss5/5>

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# SOMETHING THERE IS THAT DOESN'T LOVE A WALL\*: REFLECTIONS ON THE HISTORY OF NORTH CAROLINA'S RELIGIOUS TEST FOR PUBLIC OFFICE

GARY R. GOVERT†

*Decisions of the United States Supreme Court interpreting the establishment clause of the first amendment today provide the primary focus for scholarly debate concerning the place of religion in American public life. State constitutions and statutes, however, are an important source of information on historical attitudes toward the interaction of law and religion. In this Essay, Mr. Govert examines the history and development of one such state law, the religious test for public office in the North Carolina Constitution. Although he concludes that such repressive laws have no place in a democracy, Mr. Govert contends that a total separation of religious concerns from public life is neither possible nor desirable. Because religion encompasses the expression of every individual's deepest convictions, it inevitably permeates all aspects of American law and politics. Thus, Mr. Govert argues, the Supreme Court's attempts to build a wall of separation between religion and government are futile. Rather than attempting to maintain an illusory wall of separation, Mr. Govert suggests that the Supreme Court adopt an approach to the establishment clause that protects the rights of religious minorities by prohibiting government from favoring or disfavoring particular religious groups.*

## I. INTRODUCTION

In August 1985, at a Roman Catholic gathering in Washington, D.C., Secretary of Education William J. Bennett called for a "national conversation and debate on the place of religious belief in our society."<sup>1</sup> A few weeks earlier the United States Supreme Court had issued a set of rulings blocking state aid to sectarian schools,<sup>2</sup> and Bennett was irate. The Court, he said, should stop regarding government involvement with religion "as something akin to entanglement with an infectious disease."<sup>3</sup> The American people, Bennett added, must

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\* R. FROST, MENDING WALL, line 1 (1914).

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1. Address by Secretary Bennett, Knights of Columbus Supreme Council Meeting (Aug. 7, 1985) (available at Dep't of Educ., Washington, D.C.) [hereinafter cited as Address].

2. See *Grand Rapids School Dist. v. Ball*, 105 S. Ct. 3216 (1985); *Aguilar v. Felton*, 105 S. Ct. 3232 (1985). These decisions overturned programs under which public school employees taught classes and provided other services in sectarian schools. The Court held that both programs violated the establishment clause. See *infra* note 9.

3. Address, *supra* note 1, at 8.

understand that "the fate of our democracy is intimately intertwined . . . with the vitality of the Judeo-Christian tradition."<sup>4</sup>

Reaction to Bennett's speech was swift and predictable. A spokesman for the lobby group People for the American Way suggested changing Bennett's title to "secretary of evangelism."<sup>5</sup> A college professor writing in *The New Republic* charged that "defenders of religion want the government to take sides"<sup>6</sup> in support of those who assert "that belief in God [is] not open to question."<sup>7</sup> Columnist George Will, rallying to Bennett's defense, informed his readers that the Secretary was simply reiterating something Abraham Lincoln had said more than a century ago.<sup>8</sup>

The debate over religion's place in American public life tends to focus on the Supreme Court and its establishment clause<sup>9</sup> decisions because, for better or worse, that is where the action has been for the last forty years. Ever since Justice Black's famous "wall of separation" opinion in *Everson v. Board of Education*,<sup>10</sup> taxpayers and citizens' groups have besieged the Court with complaints about the ways in which religious and governmental institutions interact with one another. The Court, however, has been notoriously unsuccessful in its attempts to resolve these cases in a consistent and principled fashion.<sup>11</sup>

The Supreme Court's unpredictability, like the rancorous debate between Secretary Bennett and his detractors, reflects a persistent lack of agreement about the meaning of the establishment clause. Justice Joseph Story, who served on the Court from 1811 to 1845, noted that when the first amendment was adopted "the general, if not the universal, sentiment in America was, that Christianity ought to receive encouragement from the state."<sup>12</sup> No such universal sentiment exists today. Members of the present Supreme Court have taken a wide variety of positions, ranging from strict separationism<sup>13</sup> to the jurispruden-

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4. *Id.* at 1.

5. Will, *Protectors of the 'American Way'*, Washington Post, Aug. 15, 1985, at A21, col. 6.

6. Zaggari, *Founding Intentions*, New Republic, Sept. 9, 1985, at 11, col. 2.

7. *Id.*

8. Will, *supra* note 5.

9. The first amendment states in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

10. 330 U.S. 1 (1947). Justice Black wrote: "In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'" *Id.* at 16.

11. See generally *Wallace v. Jaffree*, 105 S. Ct. 2479, 2518-19 (1985) (Rehnquist, J., dissenting) (list of arguably conflicting decisions). One professor has suggested that the Supreme Court decides its establishment clause cases according to the "T principle": If state aid to a sectarian institution comes in the form of something starting with a T—transportation, textbooks, tax exemptions, and the like—the aid is permissible. Otherwise it is unconstitutional. Interview with Lynn Buzzard, Professor of Law, Campbell University School of Law (Jan. 13, 1986); see also Schotten, *The Establishment Clause and Excessive Governmental-Religious Entanglement: The Constitutional Status of Aid to Nonpublic Elementary and Secondary Schools*, 15 WAKE FOREST L. REV. 207, 209-10 (1979) (quoting Judge Antonin Scalia, who claimed that the Court's establishment clause decisions make "no sense"); Note, *Educational Vouchers: Addressing the Establishment Clause Issue*, 11 PAC. L.J. 1061, 1077-78 (1980) (Court's establishment clause cases "defy logic").

12. 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1868, at 726 (Boston 1833).

13. See *Grand Rapids School Dist. v. Ball*, 105 S. Ct. 3216 (1985); *Aguilar v. Felton*, 105 S. Ct.

tial antiquarianism of Justice Rehnquist, who believes that nothing in the establishment clause prohibits government from favoring religion over "irreligion."<sup>14</sup>

The future of church-state relations in the United States depends largely on whose interpretation of the establishment clause prevails in the Supreme Court. Legal scholars must look beyond the Court and the federal Constitution, however, if they are to understand the complex interplay between law and religion in American society. They should recognize, for example, that during most of the Nation's history, church-state relations were governed almost exclusively by state law.<sup>15</sup>

This Essay traces the history of one of those state laws—the religious test for public office found in the North Carolina Constitution.<sup>16</sup> Although it is now a dead letter,<sup>17</sup> North Carolina's religious test provides strong evidence of the intimate connection between religion and American law, both past and present. At the same time, it illustrates how easily religion can be used as an excuse for denying basic civil rights to disfavored minorities.

The purpose of this Essay is to examine what the history of North Carolina's religious test can contribute to Secretary Bennett's "conversation and debate on the place of religious belief in our society."<sup>18</sup> The Supreme Court's "wall of separation" doctrine<sup>19</sup> will be criticized in light of the North Carolina experience, and the Essay will conclude with a brief look at what may be a better interpretation of the establishment clause.<sup>20</sup>

## II. NORTH CAROLINA'S RELIGIOUS TEST FOR PUBLIC OFFICE

Some of the religious language in the North Carolina Constitution is quite familiar. The notion of inalienable rights endowed by the Creator<sup>21</sup> is lifted directly from the Declaration of Independence. Sections guaranteeing freedom of conscience<sup>22</sup> and permitting tax exemptions for churches<sup>23</sup> are not likely to

3232 (1985). Both of these opinions were written by Justice Brennan and clearly are cast in the *Everson* mold.

14. See *Wallace v. Jaffree*, 105 S. Ct. 2479, 2520 (1985) (Rehnquist, J., dissenting); *supra* text accompanying notes 232-36.

15. It was not until the mid-20th century, when the Court began incorporating the Bill of Rights into the fourteenth amendment, that the establishment clause became relevant to most church-state questions. See Esbeck, *Religion and a Neutral State: Imperative or Impossibility?*, 15 CUM. L. REV. 67, 74 n.17 (1984). The Court incorporated the free exercise clause into the fourteenth amendment's due process clause in *Cantwell v. Connecticut*, 310 U.S. 296 (1940), and made the establishment clause applicable to the states in *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

16. See *infra* text accompanying notes 27-167.

17. See *infra* notes 32 & 156-67 and accompanying text.

18. Address, *supra* note 1.

19. See *Everson*, 330 U.S. at 16.

20. See *infra* text accompanying notes 238-41.

21. N.C. CONST. art. I, § 1. "We hold it to be self-evident that all persons . . . are endowed by their Creator with certain inalienable rights . . ." *Id.*

22. *Id.* § 13. "All persons have a natural and inalienable right to worship Almighty God according to the dictates of their own conscience, and no human authority shall, in any case whatever, control or interfere with the rights of conscience." *Id.*

23. *Id.* art. V, § 2. "The General Assembly may exempt [from taxation] cemeteries and property held for . . . religious purposes . . ." *Id.*

raise many eyebrows.

The average citizen might be a little surprised, however, to learn that the constitution identifies North Carolina as "a Christian state."<sup>24</sup> Religion is said to be "necessary to good government and the happiness of mankind."<sup>25</sup> The constitution's opening paragraph is essentially a prayer of praise to "Almighty God, the Sovereign Ruler of Nations."<sup>26</sup>

But probably the most startling provision in the state constitution—the one most likely to offend modern sensibilities—is the section that denies public office to anyone whose religious opinions are deemed improper. The earliest version of this religious test, found in the North Carolina Constitution of 1776, permitted only Protestants to hold office.<sup>27</sup> Sixty years later Catholics were given the right;<sup>28</sup> then came Jews,<sup>29</sup> and finally all other theists.<sup>30</sup> Currently, "any person who shall deny the being of Almighty God" is disqualified from public office by the North Carolina Constitution.<sup>31</sup> This prohibition is almost certainly unenforceable,<sup>32</sup> but it remains on the books as a reminder of what Justice Douglas said more than thirty years ago: Americans are indeed "a religious people."<sup>33</sup>

#### A. *Origins of the Religious Test*

The origins of North Carolina's religious test for office can be traced to social and political attitudes that flourished in the region from colonial times until at least the early twentieth century. Among the most basic of these attitudes was the nearly universal belief that this was a Christian country.<sup>34</sup> The vast majority of North Carolinians during this period were evangelical Protestants,<sup>35</sup> many of whom were not at all shy about integrating their religious and

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24. *Id.* art. XI, § 4. "Beneficent provision for the poor, the unfortunate, and the orphan is one of the first duties of a civilized and a Christian state." *Id.*

25. *Id.* art. IX, § 1. "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools, libraries, and the means of education shall forever be encouraged." *Id.*

26. The preamble to the North Carolina Constitution states:

We, the people of the State of North Carolina, grateful to Almighty God, the Sovereign Ruler of Nations, for the preservation of the American Union and the existence of our civil, political and religious liberties, and acknowledging our dependence upon Him for the continuance of those blessings to us and our posterity, do, for the more certain security thereof and for the better government of this State, ordain and establish this Constitution.

*Id.* preamble.

27. N.C. CONST. of 1776, art. XXXII.

28. *Id.* (amended 1835).

29. *Id.* (amended 1861).

30. N.C. CONST. of 1868, art. VI, § 5.

31. N.C. CONST. art. VI, § 8.

32. See *Torcaso v. Watkins*, 367 U.S. 488, 495-96 (1961); 41 Op. N.C. Att'y Gen. 727 (1972).

33. *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

34. See 3 J. STORY, *supra* note 12, § 1867, at 724.

35. In 1760 an Anglican cleric in North Carolina noted that a

great number of dissenters of all denominations come & settled amongst us from New Eng[land] Particularly, Anabaptists, Methodist, Quakers and Presbyterians, the anabaptist are obstinate, illiterate & grossly ignorant, the Methodist, ignorant, censorious & uncharitable, the Quakers, Rigid, but the Presbyterians are pretty moderate except here & there a

political points of view.<sup>36</sup>

Prior to 1776, Protestant dissenters waged a long battle against the Anglican establishment in North Carolina.<sup>37</sup> The dissenters eventually won,<sup>38</sup> but their victory did not end government entanglement with religion. In fact, most North Carolinians, like most of their countrymen, thought that belief in God and respect for the Bible were essential to the survival of republican self-government and therefore should be encouraged by the state.<sup>39</sup> "This," Justice Story wrote, "is a point wholly distinct from that of the right of private judgment in matters of religion, and of the freedom of public worship according to the dictates of one's conscience."<sup>40</sup>

Widespread support for religious tests for public office<sup>41</sup> was a natural result of "the ancient common law view that non-conformists and non-believers . . . were *non dignus fide*, not worthy of belief."<sup>42</sup> Nobody wanted to confer public office on someone who could not be trusted. In North Carolina, as in many other states, Roman Catholics were viewed with particular suspicion. Protestants often tried to justify anti-Catholic prejudice by charging that the primary loyalty of Catholics was to a foreign power.<sup>43</sup> Some even suggested that Catholics, if allowed access to public office, might try to establish the Pope as

bigot or rigid Calvinist. As for papists, I cannot learn there are above 9 or 10 in the whole County. I have estimated the number of Infidels & Heathens to be about 1,000.

VI N.C. COLONIAL REC. 265 (1888).

36. See, e.g., M. Miller, David Caldwell: The Forming of a Southern Educator 80 (1979) (unpublished dissertation available in the North Carolina Collection, Wilson Library, University of North Carolina at Chapel Hill). Caldwell, a Presbyterian minister from Guilford County, may have been the author of the religious test for office in North Carolina's 1776 constitution. See *infra* note 65 and accompanying text. His most famous sermon, "The Character and Doom of the Sluggard," was a veritable call to revolution. See Address by David Caldwell (date unknown), reprinted in E. CARUTHERS, A SKETCH OF THE LIFE AND CHARACTER OF THE REV. DAVID CALDWELL, D.D. 273-84 (Greensborough 1842).

37. Colonial governors of North Carolina spent considerable time and energy attempting to secure public financial support for the Anglican church through a series of Vestry Acts. See H. LEFLER & A. NEWSOME, NORTH CAROLINA: THE HISTORY OF A SOUTHERN STATE 133-34 (1973). In addition, the colonial assembly passed a law giving "virtual control of the performance of the marriage ceremony to Anglican clergymen." *Id.* at 136. Laws such as these were the primary source of opposition to an established church in the new nation.

38. See N.C. CONST. of 1776, art. XXXIV (established church prohibited).

39. See 3 J. STORY, *supra* note 12, § 1865, at 722-23. Alexis de Tocqueville put it this way:

I do not know if all Americans have faith in their religion—for who can read the secrets of the heart?—but I am sure that they think it necessary to the maintenance of republican institutions. That is not the view of one class or party among the citizens, but of the whole nation; it is found in all ranks.

A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 293 (G. Lawrence trans. Anchor Books ed. 1969).

40. 3 J. STORY, *supra* note 12, § 1865, at 723.

41. "[A]t the time of the federal constitutional convention, the constitutions of nine of the original states imposed religious conditions on some or all public offices." Comment, *Validity of State Requirement That Public Officers Declare Belief in the Existence of God*, 36 N.Y.U. L. REV. 513, 514 (1961). The nine states were Delaware, Georgia, Maryland, Massachusetts, New Hampshire, New Jersey, North Carolina, Pennsylvania, and South Carolina. *Id.* at 514 n.6.

42. Hartogensis, *Denial of Equal Rights to Religious Minorities and Non-Believers in the United States*, 39 YALE L.J. 659, 667 (1930). Hartogensis was referring to disqualification of witnesses in the passage quoted, but the same rationale applies to religious qualifications for public office. See *infra* text accompanying notes 68-71.

43. See D. Blower, The Orange County and Mecklenburg County Instructions: The Development of Political Individualism in Backcountry North Carolina, 1740-1776, at 85 (1984) (unpub-

head of the civil government.<sup>44</sup>

The first religious tests or qualifications appearing in North Carolina law were contained in the colony's Fundamental Constitutions, written by John Locke for the Lords Proprietors in 1669.<sup>45</sup> In retrospect the provisions seem unbelievably harsh, especially in view of Locke's reputation as an advocate of religious tolerance. No one over the age of seventeen who was not a member of a church could have "any benefit or protection of the law, or be capable of any place of profit or honor."<sup>46</sup> In addition, the Fundamental Constitutions provided that "[n]o man shall be permitted to be a freeman of Carolina, or to have any estate or habitation within it, that doth not acknowledge a God; and that God is publicly and solemnly to be worshipped."<sup>47</sup> Locke's form of government was never put into practical effect,<sup>48</sup> however, and it was not until the American Revolution that North Carolina lawmakers again took up the subject of a religious test for office.

The men who enacted the state's first constitution were members of North Carolina's Fifth Provincial Congress, which convened in Halifax on November 12, 1776.<sup>49</sup> These representatives had been elected by the freemen of their home districts and were charged with writing a constitution for the newly independent state. In some cases delegates carried instructions from their constituents. The instructions taken to the provincial congress by members from Orange<sup>50</sup> and Mecklenburg<sup>51</sup> counties have been preserved and are useful in understanding the religious test that eventually became article XXXII of the new constitution.<sup>52</sup>

The Orange County instructions, in the handwriting of Thomas Burke,<sup>53</sup> required delegates to "insist upon a free and unrestrained exercise of religion."<sup>54</sup>

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lished dissertation available in the North Carolina Collection, Wilson Library, University of North Carolina at Chapel Hill).

44. See 4 J. ELLIOT, *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 198 (District of Columbia 1836) (remarks of Governor Johnston); L. HUHNER, *THE STRUGGLE FOR RELIGIOUS LIBERTY IN NORTH CAROLINA, WITH SPECIAL REFERENCE TO THE JEWS* 42 (1907) (available in the North Carolina Collection, Wilson Library, University of North Carolina at Chapel Hill); *infra* note 76.

45. See 5 F. THORPE, *THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA* 2772 (1909).

46. *Id.* at 2784 (FUNDAMENTAL CONST. OF CAROLINA, art. 101).

47. *Id.* at 2783 (FUNDAMENTAL CONST. OF CAROLINA, art. 95).

48. H. CONNOR & J. CHESHIRE, *THE CONSTITUTION OF THE STATE OF NORTH CAROLINA* ANNOTATED viii (1911).

49. See H. LEFLER & A. NEWSOME, *supra* note 37, at 221.

50. X N.C. COLONIAL RECS. 870f (1890).

51. *Id.* at 870a.

52. See *infra* text accompanying note 66 (full text of article XXXII).

53. Burke, who served as governor of North Carolina during the latter stages of the Revolutionary War, see Haywood, *Thomas Burke*, in 2 *BIOGRAPHICAL HISTORY OF NORTH CAROLINA* 27, 29-31 (S. Ashe ed. 1905), began his political career as a radical democrat and ended it as an advocate of hereditary aristocracy. See Douglass, *Thomas Burke, Disillusioned Democrat*, 26 N.C. HIST. REV. 150, 150 (1949). "In religion Burke was an avowed deist, although probably born a Catholic." *Id.* at 152. The fact that the Orange County instructions are in Burke's handwriting does not prove that he authored them, although some of his biographers claim he did. See D. Blower, *supra* note 43, at 543.

54. X N.C. COLONIAL REC. 870g (1890).

Delegates were directed, however, to keep out of public office anyone who believed in "spiritual infallibility," the sacrament of absolution, or the supremacy of any foreign power.<sup>55</sup>

Mecklenburg's instructions were similar, but more explicit.<sup>56</sup> The revolutionists of that county also favored free exercise of religion, but only by "professing Christians."<sup>57</sup> Section 19 of the Mecklenburg instructions required delegates to

endeavour that any person who shall hereafter profess himself to be an Atheist or deny the Being of God or shall deny or blaspheme any of the persons of the Holy Trinity or shall deny the divine authority of the Old and New Testament or shall be of the Roman Catholic religion shall not sustain, hold or enjoy any office of trust or profit in the State of North Carolina.<sup>58</sup>

A committee-prepared draft of a proposed constitution was read to members of the provincial congress on December 6, 1776.<sup>59</sup> No religious test for office was included in that initial draft.<sup>60</sup> Then, on December 13, Samuel Johnston,<sup>61</sup> an observer at the congress, sent his sister<sup>62</sup> a letter complaining that his return home had been delayed when "one of the members from the back country"<sup>63</sup> suggested inclusion of a religious test in the constitution. "This was carried after a very warm debate," Johnston wrote, "and has blown up such a flame, that everything is in danger of being thrown into confusion."<sup>64</sup>

Hard evidence is lacking, but speculation as to the identity of the "back country" delegate responsible for the religious test has focused on the Reverend David Caldwell, an outspokenly anti-Catholic Presbyterian minister and teacher from Guilford County.<sup>65</sup> Nevertheless, the actual language adopted as article

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55. *Id.*

56. The relevant portions of the Mecklenburg County instructions are in the handwriting of Colonel Waightstill Avery, *id.* at 870a, "an avowed Presbyterian of Puritan extraction." Pearson, *Waightstill Avery*, in 7 BIOGRAPHICAL HISTORY OF NORTH CAROLINA 1, 5 (S. Ashe ed. 1908).

57. X N.C. COLONIAL REC. 870d (1890) (§§ 20-21 of instructions).

58. *Id.*

59. 1 S. ASHE, HISTORY OF NORTH CAROLINA 565 (1908).

60. *Id.*

61. Johnston, one of the leading revolutionaries in North Carolina, had been defeated in his bid for a seat in the provincial congress. He attended anyway and later served as governor of the state. See Ashe, *Samuel Johnston*, in 4 BIOGRAPHICAL HISTORY OF NORTH CAROLINA 241, 250-51 (S. Ashe ed. 1906).

62. Johnston's sister, Hannah, was the wife of James Iredell, see Ashe, *James Iredell*, in 2 BIOGRAPHICAL HISTORY OF NORTH CAROLINA 198, 199 (S. Ashe ed. 1905), whom George Washington appointed to the United States Supreme Court in 1790. *Id.* at 201.

63. Letter from Samuel Johnston to Hannah Johnston Iredell (Dec. 13, 1776), *partially reprinted* in 1 S. ASHE, *supra* note 59, at 566.

64. *Id.*

65. See 1 S. ASHE, *supra* note 59, at 567; E. CARUTHERS, *supra* note 36, at 190; C. Maddry, *The North Carolina Constitution of 1776*, at 39 (1929) (unpublished thesis available in the North Carolina Collection, Wilson Library, University of North Carolina at Chapel Hill). Caldwell considered "popery" slavery. Address, *supra* note 36, at 279. During the North Carolina debates on ratification of the federal Constitution in 1788, Caldwell stated that the provision prohibiting religious tests for office, U.S. CONST. art. VI, § 3, "was an invitation for jews and pagans of every kind, to come among us . . . All those who have any religion are against the emigration of those people from the eastern hemisphere." 3 J. ELLIOT, *supra* note 44, at 176.



XXXII of the constitution appears to have been taken largely from the Mecklenburg instructions:

XXXII. That no person, who shall deny the being of God or the truth of the Protestant religion, or the divine authority of the Old or New Testaments, or who shall hold religious principles incompatible with the freedom and safety of the State, shall be capable of holding any office or place of trust or profit in the civil department within the State.<sup>66</sup>

Catholics were the principal targets of the religious test. In addition to being suspicious of Catholic allegiance to the Pope,<sup>67</sup> many Protestants worried "that the Catholic sacrament of absolution removed the internal sanction of conscience and thus made Catholics capable of anything."<sup>68</sup> This fear of unrestrained licentiousness, however unfounded, provided ammunition to members of the provincial congress who wished to exclude Catholics from public office. Jews, atheists, and others were consigned to the political wilderness for similar reasons: They simply "did not possess internal restraints on behavior recognizable as such by the dominant Protestant sects."<sup>69</sup>

The need for "internal restraints" on officeholders was seldom, if ever, questioned. Revolutionary leaders throughout the new Nation believed that their experiment in self-government would fail unless both citizens and their representatives exhibited a high degree of civic virtue.<sup>70</sup> The source of that virtue was generally thought to be religion, especially the Protestant religion:

While the founding fathers most thoroughly influenced by rationalism—Madison, Jefferson, and a few others—believed that education could replace religion as a civilizing influence in society, the majority of Revolutionary leaders wanted religion to play an enlarged role in the new republic . . . .

[Article XXXII] of the North Carolina Constitution was a part of that larger Revolutionary policy toward religion. The clause did not intend so much to exclude anyone from office, as to stress that governmental power should be handled by those who acknowledged that there was a moral basis to politics. Belief in the Bible and the theology of the Reformation . . . were simply means of defining the moral basis of political life.<sup>71</sup>

The provincial congress that enacted article XXXII also approved constitutional provisions forbidding "establishment of any one religious church or de-

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66. N.C. CONST. of 1776, art. XXXII.

67. See *supra* text accompanying notes 43-44.

68. D. Blower, *supra* note 43, at 85.

69. *Id.*

70. See R. CALHOON, RELIGION AND THE AMERICAN REVOLUTION IN NORTH CAROLINA 69 (1976) (available in the North Carolina Collection, Wilson Library, University of North Carolina at Chapel Hill); see also D. Blower, *supra* note 43, at 86 (N.C. leaders were unwilling to carry religious liberty too far; commonly shared internal values were demanded).

71. R. CALHOON, *supra* note 70, at 69-70. Calhoun is correct in asserting that article XXXII was intended to preserve the "moral basis of political life," but there can be little doubt that many who supported the religious test fully intended to exclude Catholics, Jews, and others from office. See L. HUHNER, *supra* note 44, at 41.

nomination"<sup>72</sup> and guaranteeing to all persons "liberty to exercise their own mode of worship."<sup>73</sup> In addition, the constitution prohibited clergymen from holding office in the Senate, House of Commons, or Council of State.<sup>74</sup> These provisions, viewed in concert with the religious test, indicate that the framers of North Carolina's first constitution were inclined toward a rather narrow view of separation of church and state. Both the "establishment clause" and the political disabilities placed on the clergy indicate a strong commitment to institutional separation—a barrier that would prevent the state from identifying itself too closely with any of the various denominations. But church and state were narrowly defined. The goal was to prevent religious conflict similar to that caused by establishment of the Anglican church during the colonial period, not to insulate government from religion in general. Very few revolutionary leaders advocated separation of religious opinions from political decision making or from the public life of the community.<sup>75</sup> In other words, separation of church and state did not necessarily mean separation of religion and government.<sup>76</sup>

72. N.C. CONST. of 1776, art. XXXIV.

73. *Id.*

74. *Id.* art. XXXI.

75. See *supra* text accompanying notes 70-71.

Though not a North Carolinian, George Washington in many respects epitomized the revolutionary spirit of North Carolinians and their countrymen. In his farewell address, Washington said: "[L]et us with caution indulge the supposition, that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that National morality can prevail in exclusion of religious principle." Address by President Washington (Sept. 17, 1796), reprinted in Bellah, *Civil Religion in America*, in RELIGION IN AMERICA 3, 8 (W. McLoughlin & R. Bellah eds. 1968).

76. North Carolina politicians debated the usefulness of religious tests at least once more during the 18th century when they met to consider ratification of the proposed federal Constitution. The prohibition of religious tests for federal offices, U.S. CONST. art. VI, § 3, was discussed on July 30, 1788, at the state convention in Hillsborough. 4 J. ELLIOT, *supra* note 44, at 191-98. Earlier, pamphlets had been circulated at the convention "pointing out in all seriousness the possible danger of the Pope being elected President, should the Constitution be adopted." L. HUHNER, *supra* note 44, at 42.

Henry Abbot, a Baptist, *id.* at 43, opened the discussion by noting that "[t]he exclusion of religious tests is by many thought dangerous and impolitic. They suppose that if there be no religious test required, pagans, deists, and Mahometans might obtain offices among us, and that the senators and representatives might all be pagans." 4 J. ELLIOT, *supra* note 44, at 192.

James Iredell responded with a long speech to the convention. He pointed out that religious tests could prevent only conscientious persons from taking office; unscrupulous candidates would simply lie about their qualifications. See *id.* at 192-96. Iredell argued that a religious test for office would be contrary to the principle of religious freedom, and he observed that "it is never to be supposed that the people of America will trust their dearest rights to persons who have no religion at all, or a religion materially different from their own." *Id.* at 194. As for suggestions that the Pope might be elected President, Iredell found it "impossible to treat such idle fears with any degree of gravity." *Id.* at 196.

Samuel Johnston, then governor of North Carolina, echoed Iredell's opinions, but David Caldwell, who may have been responsible for the religious test in the state's constitution, see *supra* note 65 and accompanying text, expressed concern about a flood of Jewish and pagan immigrants. 4 J. ELLIOT, *supra* note 44, at 189. Johnston replied that "in all probability, the children even of such people would be Christians; and that this, with the rapid population of the United States, their zeal for religion, and love of liberty, would, he trusted, add to the progress of the Christian religion among us." *Id.* at 200.

The state convention failed to ratify the Constitution during the summer of 1788, and North Carolina did not approve it until November 21, 1789, "exactly seventeen months after ratification by the nine states necessary for the adoption of the new government." W. TORPEY, JUDICIAL DOCTRINES OF RELIGIOUS RIGHTS IN AMERICA 21 (1948).

## B. *The Fight Against the Religious Test*

There is no way of knowing how many people, if any, the religious test discouraged from seeking public office in North Carolina. If anyone was officially denied a position in the government because he was not religiously qualified, the incident has been forgotten.<sup>77</sup> In fact, history records only two instances in which political figures found their careers threatened by the religious test.<sup>78</sup>

Little is known about Jacob Henry, except that he was a Jew elected to the state House of Commons from Carteret County in 1808 and 1809.<sup>79</sup> During Henry's second term a fellow member of the House tried to get him removed from office on account of his faith.<sup>80</sup> Henry responded with a brilliant speech in defense of religious liberty.<sup>81</sup> North Carolinians have a natural and inalienable right to freedom of conscience, he argued, and neither drafters of constitutions nor legislators have the power to abridge that right.<sup>82</sup> Henry asked his colleagues whether they were prepared to "plunge at once from the sublime heights of moral legislation into the gloomy caverns of superstitious ignorance,"<sup>83</sup> and thereby "drive from your shores and from the shelter of your constitution, all who do not lay their oblations on the same altar."<sup>84</sup> He concluded:

Nothing is more easily demonstrated than that the conduct alone is the subject of human laws, and that man ought to suffer civil disqualification for what he does and not for what he thinks . . . What may be the religion of him who made this objection against me, or whether he has any religion or not I am unable to say. I have never considered it my duty to pry into the belief of other members of this house. If their actions are upright and conduct just, the rest is for their own consideration, not for mine.<sup>85</sup>

Henry ultimately retained his seat when the House came up with a rather far-fetched interpretation of article XXXII. By its terms, the religious test ex-

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77. See 2 W. BOYD, *HISTORY OF NORTH CAROLINA: THE FEDERAL PERIOD 1783-1860*, at 146 (1919). The opponents of minister-legislators were apparently more vigilant. At least three persons were expelled from the state legislature because they were clergymen. *Id.* at 145.

78. See *infra* text accompanying notes 79-109.

79. See 2 S. ASHE, *HISTORY OF NORTH CAROLINA* 207 (1925). Henry may have come to North Carolina from Philadelphia, see L. HUHNER, *supra* note 44, at 46-47, and probably was a Federalist. See Schauinger, *William Gaston: Southern Statesman*, 18 N.C. HIST. REV. 99, 106 (1941).

80. See L. HUHNER, *supra* note 44, at 46.

81. The speech was considered "so superior that for several generations parts of it were embodied in books of elocution used in the academies of the country." 2 S. ASHE, *supra* note 79, at 207. The author of the address may have been John L. Taylor, see Schauinger, *supra* note 79, at 106 n.8, a Catholic who, despite his religion, served as a member of the legislature and as Chief Justice of the North Carolina Supreme Court. L. HUHNER, *supra* note 44, at 48 & n.5.

82. Address by Jacob Henry (1809), reprinted in L. HUHNER, *supra* note 44, at 68-69. The Fifth Provincial Congress included freedom of conscience in the declaration of rights it promulgated along with North Carolina's first state constitution. See N.C. DECLARATION OF RIGHTS of 1776, art. XIX. The legal substance of Henry's argument was that this guarantee overruled any contrary provision in the constitution.

83. Address, *supra* note 82, at 70.

84. *Id.*

85. *Id.* at 70-71.

cluded Jews, Catholics, and other supposed undesirables from offices "in any civil department within this State."<sup>86</sup> The House decided that this did not include the legislature, which was superior to the "civil department."<sup>87</sup> Thus, after 1809 "Catholics and Jews could make the laws but could neither execute nor interpret them."<sup>88</sup>

One of Henry's allies in the fight against religious persecution was William Gaston,<sup>89</sup> a Catholic who was to figure prominently in the history of article XXXII.<sup>90</sup> Born in New Bern on September 19, 1778, Gaston saw his patriot father killed there by Tories during the Revolutionary War.<sup>91</sup> After graduating with honors from Princeton in 1796,<sup>92</sup> he embarked on a legal and political career that included several terms in the state legislature and four years in Congress.<sup>93</sup> As a member of the state House of Commons, he supported Henry's bid to retain his seat; no doubt he was gratified by the removal of a potential threat to his own legislative career. The Henry affair, however, was merely the opening skirmish in Gaston's battle against the religious test.

In 1832 Gaston's son was offered an appointment as justice of the peace,<sup>94</sup> an office clearly within the "civil department." Gaston, by then a prosperous lawyer in his mid-fifties, wrote to his friend, Justice Thomas Ruffin of the North Carolina Supreme Court, asking if article XXXII precluded a Catholic from accepting such an appointment.<sup>95</sup> Ruffin replied that it did not:

Probably the intelligent men who drew up the law in order to satisfy bigots, purposely and patriotically framed the clause in such terms as to have no precise ideas affixed to them and it cannot therefore be judicially interpreted in a manner to impose the disability . . . . Terms ought to be perfectly clear when the country imposes upon herself limitations. There is not the least ambiguity in other parts of the Constitution. Finally, who shall say what is the Protestant religion.<sup>96</sup>

Ruffin's analysis may have been somewhat disingenuous, but it contributed to the gradual erosion of article XXXII. In August 1833, North Carolina's chief justice, Leonard Henderson, died at his home in Granville County.<sup>97</sup> Gaston's

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86. N.C. CONST. of 1776, art. XXXII.

87. L. HUHNER, *supra* note 44, at 52.

88. *Id.*

89. Schauinger, *supra* note 79, at 106.

90. Unlike Jacob Henry, Gaston is well-remembered. Gaston County, west of Charlotte, is named for him.

91. See Battle, *William Gaston*, in 2 BIOGRAPHICAL HISTORY OF NORTH CAROLINA 99 (S. Ashe ed. 1905).

92. *Id.* at 100.

93. *Id.* at 101.

94. See Schauinger, *supra* note 79, at 123.

95. See Schauinger, *William Gaston and the Supreme Court of North Carolina*, 21 N.C. HIST. REV. 97, 102 (1944).

96. Letter from Thomas Ruffin to William Gaston (May 23, 1832), *partially reprinted in* Schauinger, *supra* note 95, at 102-03.

97. See Battle, *Memoir of Leonard Henderson*, 9 N.C.U. MAG. 193, 199 (1859) (available in the North Carolina Collection, Wilson Library, University of North Carolina at Chapel Hill).

name headed the list of potential replacements. At least twice before he had refused to serve on the supreme court, but this time the pressure was intense.<sup>98</sup> Governor Swain sent a letter urging Gaston to accept the nomination.<sup>99</sup> Less than a week later Ruffin also wrote, threatening to resign if Gaston did not join him on the court.<sup>100</sup> Ruffin's resignation would have threatened the very existence of the supreme court<sup>101</sup>—then a relatively weak institution with many enemies in the legislature<sup>102</sup>—but still Gaston hesitated. Among other things, he was worried about the religious test for office.<sup>103</sup> Henry Seawell, a superior court judge who coveted a seat on the supreme court, mounted a letter-writing campaign and appeared “to be in great trepidation less [sic] the protestant religion should be endangered”<sup>104</sup> by Gaston's nomination. Although Gaston by this time had convinced himself that Ruffin's interpretation of article XXXII was correct, he wanted to be sure there was adequate support for this position.<sup>105</sup>

Expressions of support came quickly, including one from John Marshall, then Chief Justice of the United States.<sup>106</sup> In September 1833, Gaston permitted his name to be placed in nomination.<sup>107</sup> Two months later he was elected to the court by the legislature, receiving 112 votes to Seawell's 42.<sup>108</sup> Ruffin and Gaston drew lots to see who would be chief justice, and in one of the few setbacks of his remarkable career, Gaston lost.<sup>109</sup>

As a member of the supreme court, Gaston labored to ameliorate the effects of slavery, which he called “the worst evil that afflicted the South.”<sup>110</sup> His battle against the religious test also continued, but not in the court. The next confrontation was during the state constitutional convention of 1835.

Delegates from across North Carolina gathered in June of that year to modernize the form of government established in 1776. The state capitol had burned down four years earlier, and the convention initially met in the governor's mansion, at the foot of Fayetteville Street in Raleigh. The house was too hot, however, and on June 6 the delegates moved to the First Presbyterian Church, at the

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98. See Schauinger, *supra* note 79, at 123.

99. See Schauinger, *supra* note 95, at 101-02.

100. *Id.* at 102.

101. See *id.*

102. See *id.* at 97-98.

103. See Schauinger, *supra* note 79, at 123. An even bigger concern was money. Gaston was \$8000 in debt and faced the prospect of slashing his annual income from about \$6000 to \$2500 if he joined the court. This obstacle was overcome by means of a long-term loan. *Id.* at 124.

104. Letter from George E. Badger to William Gaston (Nov. 14, 1833) (available in the William Gaston Papers, Southern Historical Collection, Wilson Library, University of North Carolina at Chapel Hill).

105. See Schauinger, *supra* note 79, at 123-24.

106. See *id.* at 124.

107. See Letter from William Gaston to T.P. Devereux (Sept. 9, 1833) (available in the William Gaston Papers, Southern Historical Collection, Wilson Library, University of North Carolina at Chapel Hill).

108. Schauinger, *supra* note 79, at 124.

109. See *id.*

110. *Id.*

corner of Salisbury and Morgan Streets.<sup>111</sup> Amidst these ecclesiastical surroundings, the convention, on June 26, began to discuss the future of the religious test for public office.<sup>112</sup>

The debate immediately became the most popular public entertainment in town. Day after day, spectators thronged the gallery and watched through the windows and doors of the church.<sup>113</sup> The speeches were sometimes brilliant and often long. "Little was left unsaid as delegate after delegate rose to say that he would not long detain the convention, then rambled on for hours. Other delegates came from their sickbeds to address the convention but scarcely added anything which had not been said before."<sup>114</sup>

Delegates from the eastern part of the state generally favored abolishing the religious test, whereas those from the west overwhelmingly opposed its elimination.<sup>115</sup> Party politics also played a role. Democrats tended to oppose any amendment of article XXXII, whereas the Whigs, including Gaston, argued for at least some loosening of the restrictions on non-Protestants.<sup>116</sup>

The opponents of reform were led by James Smith of Orange County. Smith noted that there had been no public outcry for an amendment to the religious test.<sup>117</sup> The presence of Catholics in the government, he said, demonstrated that article XXXII had worked no harm, although "the time might come when it would be needed."<sup>118</sup> Referring to "the excitements and disorders of the French Revolution,"<sup>119</sup> Smith urged the convention to retain the religious test "as Sleeping Thunder, to be called up only when necessary to defeat some deep laid scheme of ambition."<sup>120</sup> He added that

he was not willing, by expunging this Article, to let in Turks, Hindoos and Jews. They might call him a bigot as much as they pleased, but he would not consent to this . . . . As an American citizen, and a native son of North-Carolina, he was willing that every sect should indulge in their own peculiar species of worship; but he was not willing that they should fill the high places of the land.<sup>121</sup>

Jesse Cooper, a delegate from Martin County, also referred to the lack of popular support for an amendment,<sup>122</sup> and added a warning about Catholicism: "He had been told by a person who heard a Catholic say, that it made no difference

111. Counihan, *The North Carolina Constitutional Convention of 1835: A Study in Jacksonian Democracy*, 46 N.C. HIST. REV. 335, 339 (1969).

112. See PROCEEDINGS AND DEBATES OF THE CONVENTION OF NORTH-CAROLINA 213 (Raleigh 1836) [hereinafter cited as PROCEEDINGS].

113. See *The Star and North Carolina Gazette*, July 2, 1835, at 3, col. 2 (available in the North Carolina Collection, Wilson Library, University of North Carolina at Chapel Hill).

114. Counihan, *supra* note 111, at 351.

115. See Worsley, *Catholicism in Antebellum North Carolina*, 60 N.C. HIST. REV. 399, 423 (1983).

116. See Counihan, *supra* note 111, at 353.

117. See PROCEEDINGS, *supra* note 112, at 243.

118. *Id.* at 244.

119. *Id.*

120. *Id.*

121. *Id.* at 308.

122. See *id.* at 242.

to him whether he swore on the *New Testament or a Spelling Book!* He did not think that such men ought to be trusted."<sup>123</sup>

Several speakers supported removing the restrictions placed on Catholics but continuing the disqualification of non-Christians.<sup>124</sup> Josiah Crudup, who fifteen years earlier had been kicked out of the legislature for being a clergyman,<sup>125</sup> noted that "[a]ll the institutions of this country . . . acknowledged the truth of the Christian Religion."<sup>126</sup> Jesse Speight, from Greene County, suggested that article XXXII be amended by substituting the word "Christian" for "Protestant."<sup>127</sup>

The longest speeches were given by delegates who wished to abolish the religious test altogether.<sup>128</sup> Some delivered extended defenses of Catholic doctrine and practice.<sup>129</sup> Warren County's Nathaniel Macon said he did not believe in the existence of atheists<sup>130</sup> and thought a Catholic takeover of the government was "half as probable" as a mouse killing a buffalo.<sup>131</sup> Kenneth Rayner, one of the youngest members of the convention,<sup>132</sup> gave an eloquent reply to James Smith's argument for retaining the religious test:

The gentleman from Orange, gave as a reason for retaining this Article, that some Revolution might hereafter arise, as in France, and that this sleeping thunder would then be ready to be hurled at any Danton or Robespierre who might aspire to direct the storm. Sir, when we are ready to receive a Robespierre for a master, all the moth-eaten parchments in our archives . . . will not be able to shield us from slavery.<sup>133</sup>

The longest and most distinguished speech of all was given by William Gaston. Beginning on the morning of June 30, he spoke for several hours<sup>134</sup> about Catholicism<sup>135</sup> and the history of religious persecution.<sup>136</sup> Gaston recalled the Jacob Henry incident<sup>137</sup> and explained why article XXXII, even in its original form, did not apply to Catholics. Echoing Ruffin's letter of the preceding year, he asked who was to say what constitutes the Protestant religion.<sup>138</sup> Catholics affirm all the major Protestant creeds, he argued, so how can it be said that

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123. *Id.* at 243.

124. *See id.* at 242 (Wellborn), 245-46 (Crudup), 248-49 (Speight).

125. *See* 2 W. BOYD, *supra* note 77, at 145.

126. PROCEEDINGS, *supra* note 112, at 245.

127. *Id.* at 249.

128. *See id.* at 214-19 (Edwards), 219-40 (Bryan), 254-64 (Rayner), 264-305 (Gaston).

129. *See id.* at 223-29 (Bryan), 293-302 (Gaston).

130. *See id.* at 247. "It was impossible for any man to look at himself, at the water, at the animal and vegetable kingdom, at the sun, moon or stars, without acknowledging the existence of a GREAT FIRST CAUSE." *Id.*

131. *Id.* at 248.

132. *Id.* at 255. He was about 27 years old.

133. *Id.* at 261.

134. The report of his speech covers 41 pages of small print in the convention journal. *Id.* at 264-305.

135. *See id.* at 293-302.

136. *See id.* at 288-92.

137. *See id.* at 281.

138. *See id.* at 267.

Catholics deny the truth of the Protestant religion?<sup>139</sup> Then, having covered his flank, Gaston recommended abandonment of the religious test:

Shall we afford to the bigots, the fanatics, and the friends of arbitrary power abroad, an apology for claiming this State as an ally in the cause of Intolerance? I hope not. I trust that we shall act *up* to the axiom proclaimed in our Bill of Rights, and permit no man to suffer inconvenience or to incur incapacity, because of religion, whether he be Jew or Gentile, Christian or Infidel, Heretic or Orthodox. Pollute not the ark of God with unholy touch. Divine Truth *needs* not the support of human power, either to convince the understanding or to regulate the heart. Dare not to define divine truth, for it belongs not to your functions, and you may set up falsehood and error in its stead. Prohibit, restrain and punish, as offenses against human society, all practices insulting to the faith, the institutions, and the worship of your people, but offer no bribes to lure men to profess a faith which they do not believe, inflict no penalties to deter them from embracing what their understandings approve, and make no distinction of ranks and orders in the community because of religious opinions.<sup>140</sup>

Reporters present at the convention heaped praise on Gaston's speech. "I looked around in vain for [opponents of reform]," one wrote, "and began to fear that the Pope, in the shape of the Old Boy himself, had spirited them away for abusing the Catholics . . . never was defeat more effectual."<sup>141</sup> Chancellor James Kent of New York, who read the speech later, "highly approved of its logic and admired its whole texture, taste, candor, and eloquence."<sup>142</sup> But in the end, Gaston's eloquence was not enough. After rejecting several attempts to abolish or substantially alter the religious test,<sup>143</sup> the convention approved a compromise amendment and substituted the word "Christian" for "Protestant" in article XXXII.<sup>144</sup> Gaston voted for the compromise,<sup>145</sup> even though it left Jews and other non-Christians out in the cold. It was the best he could get.

Gaston served on the supreme court another eight and one-half years. On January 23, 1844, while listening to oral arguments, he fainted and was taken to his room in Raleigh. He later revived and entertained friends who came to see about his condition. At some point during the evening he told the story of a party he had attended in Washington while a member of Congress. One of the guests, a politician, had bragged about being a "free-thinker" in matters pertaining to religion. Gaston said he had been disgusted by the man's statement.

"A belief in an all-ruling Divinity, who shapes our ends, whose eye is upon

139. See *id.* at 268.

140. *Id.* at 292.

141. Schauinger, *supra* note 79, at 128 (quoting article in *New Bern Spectator*, July 10, 1835); see also *Raleigh Register* and *North Carolina Gazette*, July 7, 1835, at 3, col. 3 ("Judge Gaston's speech, which occupied the best part of two days in the delivery, was decidedly the greatest effort, which it has ever been our good fortune to hear.").

142. Letter from James Kent to William Gaston (Nov. 26, 1835), *partially reprinted in Schauinger, supra* note 79, at 129.

143. See *PROCEEDINGS, supra* note 112, at 309-12.

144. *Id.* at 331-32.

145. *Id.* at 331.



us, and who will reward us according to our deeds, is necessary," the elderly judge told his friends. "We must believe and feel that there is a God All-Wise and Almighty."<sup>146</sup>

The great opponent of religious persecution then rose from his chair, apparently to emphasize his statement affirming the necessity of faith. A moment later he fell dead.<sup>147</sup>

### C. *The Religious Test After 1835*

The post-1835 history of North Carolina's religious test for office is somewhat paradoxical. On the one hand, the religious test quickly became a genuinely dead letter. Public discussion of the test seems virtually to have ceased. It is as if the great debate of 1835 exhausted the issue, and people were then content to forget about it.

On the other hand, the religious test has stubbornly maintained its formal existence. In 1858 a Jewish congregation in Wilmington presented a petition to the legislature asking for removal of the disability placed on Jews.<sup>148</sup> A bill to amend the constitution was filed in the House of Representatives, only to die in the judiciary committee.<sup>149</sup> The committee report stated that the religious test was "a relic of bigotry and intolerance unfit to be associated in our fundamental law with the enlightened principles of representative government,"<sup>150</sup> but concluded that it was not then expedient to alter the constitution.

Three years later Jews finally got relief, even as the state was taking drastic action to protect yet another relic of bigotry and intolerance. At the secession convention of 1861, Judge Ruffin, Gaston's old ally, moved to amend the constitution so that it would bar from office only atheists and those who denied "the divine authority of *both* the Old and New Testaments."<sup>151</sup> The motion passed,<sup>152</sup> and Judaism ceased to be a political liability, at least as far as the religious test was concerned. An effort to eliminate the religious test altogether was soundly defeated.<sup>153</sup>

Following the Civil War, Reconstruction authorities directed North Carolina to frame a new constitution.<sup>154</sup> The convention of 1868 adopted a religious test disqualifying from office "all persons who shall deny the being of Almighty God."<sup>155</sup> Once again, those favoring complete elimination of religious qualifications were in the minority.

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146. Battle, *supra* note 91, at 106.

147. *Id.* at 106-07.

148. See L. HUHNER, *supra* note 44, at 64.

149. See *id.* at 64-65.

150. *Id.* at 65.

151. JOURNAL OF THE CONVENTION 90 (Raleigh 1862) (emphasis added); ORDINANCES AND RESOLUTIONS PASSED BY THE STATE CONVENTION 56 (Raleigh 1862) (emphasis added) [hereinafter cited as ORDINANCES AND RESOLUTIONS].

152. ORDINANCES AND RESOLUTIONS, *supra* note 151, at 56.

153. JOURNAL OF THE CONVENTION, *supra* note 151, at 92.

154. See 5 F. THORPE, *supra* note 45, at 2800 note b.

155. N.C. CONST. of 1868, art. VI, § 5.

Nearly a century later, in 1961, the United States Supreme Court decided the case of *Torcaso v. Watkins*.<sup>156</sup> Torcaso had been appointed a notary public by the governor of Maryland<sup>157</sup> but was denied his commission when he refused to take an oath stating his belief in God.<sup>158</sup> The oath requirement was based on a provision of the Maryland constitution which stated that "no religious test ought ever be required as a qualification for any office . . . other than a declaration of belief in the existence of God."<sup>159</sup> Torcaso filed a petition for a writ of mandamus but lost in the Maryland courts.<sup>160</sup> He appealed to the Supreme Court, claiming a violation of rights protected by the first and fourteenth amendments.<sup>161</sup> The Court, in an opinion by Justice Black, ruled in Torcaso's favor:

We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person "to profess a belief or disbelief in any religion." Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs . . . .

The fact . . . that a person is not compelled to hold public office cannot possibly be an excuse for barring him from office by state-imposed criteria forbidden by the Constitution . . . .

This Maryland religious test for public office unconstitutionally invades the appellant's freedom of belief and religion and therefore cannot be enforced against him.<sup>162</sup>

There can be little doubt that *Torcaso* invalidated North Carolina's religious test as well as Maryland's.<sup>163</sup> Nevertheless, when the North Carolina General Assembly presented a new constitution to the electorate in 1970,<sup>164</sup> the religious test remained intact. No doubt some legislators thought the *Torcaso* decision was wrong or somehow inapplicable. Most probably wished to avoid controversy that might jeopardize approval of more important provisions and therefore chose the path of least resistance.<sup>165</sup> In any event the voters went

156. 367 U.S. 488 (1961).

157. *Id.* at 489.

158. *Constitutional Law—Oath Which Includes Declaration That Taker Believes in God Held To Be a Valid Prerequisite for State Office*, 109 U. PA. L. REV. 611, 611 (1961) (reviewing Maryland Court of Appeals decision later reversed by Supreme Court) [hereinafter cited as *Oath*].

159. *Torcaso*, 367 U.S. at 489.

160. *See Oath*, *supra* note 158, at 611.

161. *See id.*

162. *Torcaso*, 367 U.S. at 495-96.

163. *See* 41 Op. N.C. Att'y Gen. 727 (1972).

164. *See Sanders, A Brief History of the Constitutions of North Carolina*, in *THE CONSTITUTION OF THE STATE OF NORTH CAROLINA: ITS HISTORY AND CONTENT* 8 (1983).

165. Interview with John L. Sanders, Director of the Institute of Government, University of North Carolina at Chapel Hill (Oct. 22, 1985); Interview with Joseph S. Ferrell, Professor of Public Law and Government, Institute of Government, University of North Carolina at Chapel Hill (Nov. 18, 1985). Professor Ferrell stated that elimination of the religious test would have raised "red flags," thereby making the revision vulnerable to charges that the legislature was trying to "remove God from the constitution." The provision was a dead letter anyway, so it was easier to ignore it. *Id.*

along with the legislature,<sup>166</sup> and to this day the state constitution, however ineffectually, bars nonbelievers from public office.<sup>167</sup>

### III. THE ROLE OF RELIGION IN AMERICAN PUBLIC LIFE

#### A. *Inevitable Entanglement*

North Carolina's religious test for public office in many respects symbolizes the dark side of American democracy. The drafters of article XXXII succumbed to a form of crude majoritarianism that was singularly inappropriate to the creation of a free society. Later attempts to justify the religious test were generally founded on ignorance and prejudice. Supporters of the test seemed to have forgotten that democratic constitutions protect minorities by granting equal rights to all. Similarly, the putative defenders of religion ignored the fact that today's majority may be tomorrow's minority, liable to have done unto them as they have done unto others.

Ultimately the religious test proved to be such an embarrassment that no one had the heart to enforce it. New frontiers of legal sophistry were explored in the search for reasons why the test did not apply to Jacob Henry or William Gaston. It was sophistry in the service of liberty, however, and few complained. Those charged with enforcing the constitution seemed to realize that Kenneth Rayner had been right about religious tests: When a people is willing to accept untrustworthy or despotic leaders, "all the moth-eaten parchments in our archives . . . will not be able to shield us from slavery."<sup>168</sup>

North Carolina's religious test for public office represents an attempt to use religion as a club against dissenters and minorities. As a weapon, it belongs in the dustbin of history. Reformers must take care, however, to avoid overreacting. Many people have responded to histories such as this one by asserting the need for separation of religion and government, religion and politics, and religion and law. Religion, many of these separationists believe, is politically dysfunctional and should be kept out of the social and legal process that Americans call government.<sup>169</sup>

Though well-intentioned, the separationist response goes too far. If nothing else, it fails to consider what the history of North Carolina's religious test teaches about the human condition and the role of religion in a democratic society. In short, it ignores the fact that religion, properly understood, is histori-

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166. The electorate approved the new constitution by a vote of 393,759 to 251,132. Sanders, *supra* note 164, at 8.

167. See N.C. CONST. art. VI, § 8.

168. PROCEEDINGS, *supra* note 112, at 261; see *supra* text accompanying note 133. Judge Learned Hand once expressed a similar sentiment:

I often wonder whether we do not rest our hopes too much upon constitutions, upon laws and upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no constitution, no law, no court can even do much to help it.

L. HAND, *THE SPIRIT OF LIBERTY* 189-90 (1960).

169. See Esbeck, *supra* note 15, at 75-76.

cally, intrinsically, and unavoidably entangled both in our fundamental law and in the lawmaking process.

Richard John Neuhaus, a Lutheran theologian and social critic, has described the relationship between religion and politics as follows:

[P]olitics is in large part a function of culture. . . . [A]t the heart of culture is religion. In this connection "religion" is meant comprehensively. It includes not just those ideas and activities and attitudes that we ordinarily call religious, but all the ways we think and act and interact with respect to what we believe is ultimately true and important. There is nothing frightfully original in this way of connecting politics, culture, and religion. A host of thinkers, including Tillich, Hegel, and Plato, have made the connection in a similar way. With astonishing frequency, however, the connection is neglected in writing about religion and politics today.<sup>170</sup>

Strict separationism is closely tied to a definition of religion that largely ignores the connections mentioned by Neuhaus. Conditioned by several centuries of pietistic Christianity, Americans and other Westerners tend to identify religion with churches, dogma, sacred ritual, and other incidents of traditional theism.<sup>171</sup> Understood in these terms, religion can be neatly separated—in theory, at least—from purportedly secular activities and institutions such as politics and government.

Churchgoers and theists, however, do not have a monopoly on religious expression. Deeply personal and often unprovable assumptions about the nature of reality and the meaning of life guide the thoughts and actions of every individual, not just those who believe in God or attend a recognized church.<sup>172</sup> Collec-

170. R. NEUHAUS, *THE NAKED PUBLIC SQUARE* 27-28 (1984).

Law is not only a body of rules; it is people legislating, adjudicating, administering, negotiating—it is a living process of allocating rights and duties and thereby resolving conflicts and creating channels of cooperation. Religion is not only a set of doctrines and exercises; it is people manifesting a collective concern for the ultimate meaning and purpose of life—it is a shared intuition of and commitment to transcendent values. Law helps to give society the structure, the gestalt, it needs to maintain inner cohesion; law fights against anarchy. Religion helps to give society the faith it needs to face the future; religion fights against decadence.

H. BERMAN, *THE INTERACTION OF LAW AND RELIGION* 24 (1974) (emphasis omitted).

171. Cf. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 826 (1978) ("At least through the nineteenth century . . . 'religion' referred to theistic notions respecting divinity, morality, and worship, and was recognized as legitimate and protected only insofar as it was generally accepted as 'civilized' by Western standards.")

172. The late Paul Tillich, one of this century's foremost Protestant theologians, argued that traditional definitions of God and religion are inadequate:

The name of this infinite and inexhaustible depth and ground of all being is *God*. That depth is what the word *God* means. And if that word has not much meaning for you, translate it, and speak of the depths of your life, of the source of your being, of your ultimate concern . . . .

P. TILlich, *THE SHAKING OF THE FOUNDATIONS* 63 (1962).

Tillich's definition of God may be suspect from the point of view of orthodox Christianity, but his approach to religion as the expression of one's ultimate concern is slowly finding its way into constitutional jurisprudence. Professor Tribe mentions with approval the Supreme Court's gradual acceptance of a broad, arguably Tillichian definition of religion in its free exercise cases. L. TRIBE, *supra* note 171, at 827-33. He notes, however, that "in the age of the affirmative and increasingly pervasive state, a less expansive notion of religion was required for establishment clause purposes lest

tive beliefs about what is ultimately true and important are part and parcel of the lawmaking process; self-government is largely a matter of faith.<sup>173</sup> Religion, in this sense, cannot be put in a box and placed on a shelf marked "personal." Neither the courts nor a constitution can separate religion from public life.<sup>174</sup>

The history of North Carolina's religious test for office illustrates how "the dialectical unity of law and religion"<sup>175</sup> functions in a democracy. At every stage the religious test has mirrored the predominate belief system of the surrounding political community. Initially reflective of an overwhelmingly Protestant majority,<sup>176</sup> the test later evolved into an affirmation of more generalized Christianity.<sup>177</sup> Still later it came to reflect the theistic, quasi-Christian form of civil religion that North Carolinians, along with other Americans, adopted as a public faith during the nineteenth century.<sup>178</sup> The resiliency of that civil religion is evident in the fact that the state legislature, despite having an opportunity to remove the religious test from the constitution as recently as 1970, did

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all 'humane' programs of government be deemed constitutionally suspect." *Id.* at 827-28. Professor Tribe worries, for example, that under a broad definition of religion, the establishment clause might prohibit public schools from teaching meditation or even psychology as electives. *Id.* at 828. One might ask, however, whether a broad definition of religion would present such problems if the Court were not entangled in its separationist interpretation of the establishment clause. See *infra* text accompanying notes 214-41.

173. Cf. H. BERMAN, *LAW AND REVOLUTION* at vii (1983) ("[L]aw has to be believed in or it will not work; it involves not only reason and will but also emotion, intuition, and faith.").

174. Cf. R. MCCARTHY, D. OPPEWAL, W. PETERSON & G. SPYKMAN, *SOCIETY, STATE, & SCHOOLS* 96-97 (1981) (religion is intrinsic to the identities of public institutions as well as private individuals) [hereinafter cited as *SOCIETY, STATE, & SCHOOLS*].

175. H. BERMAN, *supra* note 170, at 137.

176. See *supra* text accompanying notes 34-76.

177. See *supra* text accompanying notes 111-45.

178. See *supra* text accompanying notes 148-55. An easily accessible work on the American civil religion is Bellah, *supra* note 75.

Bellah traces the idea of civil religion (the phrase itself is Rousseau's) to the Founding Fathers. He writes that "from the earliest years of the republic" we have had "a collection of beliefs, symbols, and rituals with respect to sacred things and institutionalized in a collectivity. This religion—there seems no other word for it—while not antithetical to and indeed sharing much in common with Christianity, was neither sectarian nor in any specific sense Christian"—though at first the society itself "was overwhelmingly Christian."

H. BERMAN, *supra* note 170, at 154 n.24 (quoting Bellah, *supra* note 75, at 10).

The content this civil religion had acquired by the mid-19th century—and the degree to which it had captured the American imagination—is perhaps best illustrated by the literature of the period. Herman Melville, one of the towering figures of American letters, published this passage in 1850:

[W]e Americans are the peculiar, chosen people—the Israel of our time; we bear the ark of the liberties of the world. Seventy years ago we escaped from thrall; and, besides our first birthright—embracing one continent of earth—God has given to us, for a future inheritance, the broad domains of the political pagans, that shall yet come and lie down under the shade of our ark, without bloody hands being lifted. God has predestinated, mankind expects, great things from our race; and great things we feel in our souls. The rest of the nations must soon be in our rear. We are the pioneers of the world; the advance guard, sent on through the wilderness of untried things, to break a new path in the New World that is ours. In our youth is our strength; in our inexperience, our wisdom. At a period when other nations have but lisped, our deep voice is heard afar. Long enough have we been sceptics with regard to ourselves, and doubted whether, indeed, the political Messiah had come. But he has come in *us*, if we would but give utterance to his promptings. And let us always remember that with ourselves, almost for the first time in the history of the earth, national selfishness is unbounded philanthropy; for we cannot do a good to America, but we give alms to the world.

H. MELVILLE, *WHITE JACKET* 151 (Grove Press ed. New York 1959) (1st ed. n.p. 1850).

not see fit to do so.<sup>179</sup>

This is not to say that repressive laws such as North Carolina's religious test for office are inevitable in a democracy. The point is that the methods used to prevent the enactment of such laws must be sensitive to the role religion plays in a free society. It is not enough to fantasize about building an imaginary wall between religion and government.<sup>180</sup> As Neuhaus has noted:

Our question can certainly not be the old one of whether religion and politics should be mixed. They inescapably do mix, like it or not. The question is whether we can devise forms for that interaction which can revive rather than destroy the liberal democracy that is required by a society that would be pluralistic and free.<sup>181</sup>

### B. *The Importance of Transcendence*

A little more than fifty years ago the Supreme Court said: "We are a Christian people, according to one another the equal right of religious freedom, and acknowledging with reverence the duty of obedience to the will of God."<sup>182</sup> In 1952 Justice Douglas, whose personal skepticism was no secret, observed that "[w]e are a religious people whose institutions presuppose a Supreme Being."<sup>183</sup>

Twentieth century statements such as these echo the sentiments of earlier judges and scholars. With few exceptions,<sup>184</sup> nineteenth century observers of the American experiment saw traditional, theistic religion as a positive influence on political life. Justice Story believed "that piety, religion, and morality are intimately connected with the well-being of the state, and indispensable to the administration of civil justice."<sup>185</sup> Alexis de Tocqueville thought that religion, by diverting citizens from abject selfishness, made society strong "just at the point where democratic peoples are weak."<sup>186</sup> Thomas Cooley, whose treatise on *Constitutional Limitations*<sup>187</sup> was a standard reference work for decades, believed that government should "foster religious worship and religious institutions, as conservators of the public morals, and valuable, if not indispensable, assistants to the preservation of the public order."<sup>188</sup> The state's dependence on public morality—and the role of theistic religion in preserving that morality—were taken for granted. Prohibitions against state churches were included in some state constitutions,<sup>189</sup> but few people thought government should be relig-

179. See *supra* note 165 and accompanying text.

180. One constitutional scholar has noted that "a complete separation of all the affairs of the state from any and all aspects of religion is possible only in the fevered imaginations of fanatics." D. FELLMAN, *THE LIMITS OF FREEDOM* 42 (1959).

181. R. NEUHAUS, *supra* note 170, at 9.

182. *United States v. MacIntosh*, 283 U.S. 605, 625 (1931).

183. *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

184. See *supra* text accompanying note 71; *infra* text accompanying notes 191-96.

185. 3 J. STORY, *supra* note 12, § 1865, at 722.

186. A. DE TOCQUEVILLE, *supra* note 39, at 445.

187. T. COOLEY, *CONSTITUTIONAL LIMITATIONS*.

188. *Id.* at \*471.

189. See W. TORPEY, *supra* note 76, at 16.

iously neutral in any absolute sense of the term.<sup>190</sup>

Among those few, however, were a handful of scholars and legal theorists destined to leave an indelible mark on the history of American jurisprudence. Thomas Jefferson believed that education could take the place of religion as the guarantor of enlightened self-government.<sup>191</sup> He shared the "anticlerical presuppositions of the Enlightenment"<sup>192</sup> and was anxious to protect the new government from the depredations of organized religion.<sup>193</sup> Jeremy Bentham, John Stuart Mill, and Oliver Wendell Holmes, Jr., the patriarchs of utilitarianism and legal realism, engaged in the historic struggle to distinguish law and government from religion and sectarian morality.<sup>194</sup> Under their tutelage, many lawyers and legal philosophers came to see religion as a private, personal matter,<sup>195</sup> existing quite apart from the "science" of law.<sup>196</sup>

190. See *id.* at 16-17. When people like Justice Story spoke about religion's usefulness to government, they naturally had a specific religion in mind: Christianity, or something very much like it. See *supra* text accompanying note 12. Almost all of the early American religious tests restricted public office to Christians of one sort or another. See W. TORPEY, *supra* note 76, at 16. Later, as waves of immigration altered the demographic landscape, narrowly sectarian religious tests became politically untenable. By the time *Torcaso v. Watkins*, 367 U.S. 488 (1961), was decided, existing religious tests required little more than theism. See Note, *Freedom of Religion, the Atheist, and the Torcaso Case*, 47 VA. L. REV. 315, 315 n.1 (1961).

191. See *supra* text accompanying note 71.

192. M. HOWE, *THE GARDEN AND THE WILDERNESS* 2 (1965).

193. See *id.*

194. See, e.g., Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) (noting the "confusion between morality and law"). In perhaps his most famous example, Justice Holmes attempted to demonstrate that the duty to keep a contract has nothing to do with morality. *Id.* at 462.

195. Cf. *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971) ("The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice."); H. BERMAN, *supra* note 170, at 71-72 ("Christianity itself is losing its public character, its political and legal dimension, and . . . is becoming 'privatized.'").

The authors of a recent book on educational pluralism suggest that Jefferson's notion of separation of church and state was tied to his desire to create a climate in which his own "religion," Enlightenment rationalism, could prosper and eventually drive sectarian faiths from the public arena. See R. MCCARTHY, J. SKILLEN & W. HARPER, *DISESTABLISHMENT A SECOND TIME* 26-27 (1982). The key to success in this endeavor was the privatization of traditional Christianity:

Jefferson's religion could function as the universal common denominator, in the public realm if all other religious groups admitted to its authority while remaining satisfied to hold on to their own peculiar dogmas in a limited, private, nonuniversal realm. If other religions would fade away entirely after their members were converted to the Jeffersonian religion, then clearly Jefferson's hope would be fulfilled. But Jefferson's hope would be realized almost as fully if other religions were . . . willing to live as peculiar "sects" among other peculiar "sects" in an equal fashion, each recognizing in Jefferson's common rational morality the framework which could integrate them all in a universal order. Each religious group would then be free to hold its private dogmas without coercive support or impairment, while Jeffersonians would be free to organize the universal order on a common, rational, moral basis in the hope that gradually the peculiar "opinions" of the sects would wither away under exposure to the light of reason.

*Id.* at 27.

Ironically, the theology of many Christian denominations made them particularly susceptible to this kind of attack:

[M]ost of the Christian groups saw their special religious doctrines and practices as wholly individual matters, involving their relationship to God, their personal relationships locally and in the home, and the condition of their souls. It was not at all strange for them to expect that in the larger realm of social and political order some general, universal moral principles ought to hold. The public political arena was viewed by many Christians as a primarily "secular" (this-worldly, *not* religious), rational, and natural arena. Thus Jeffer-

The secularist jurisprudence of the late nineteenth and early twentieth centuries transformed both legal education and the law itself. At most modern law schools, the law is taught as if it were simply "a system of rules and techniques for resolving disputes and solving social problems";<sup>197</sup> its religious dimension goes largely unnoticed, or at least unremarked.<sup>198</sup> In the courts, what began as a few words in a letter from Jefferson to the Baptists of Danbury, Connecticut<sup>199</sup>—the famous "wall of separation" concept—has become a principle of constitutional law.

The general public, however, has yet to be convinced. American values, including legal values, remain firmly rooted in traditional religions.<sup>200</sup> Three-quarters of the North Carolinians responding to a survey during the 1970s agreed that "[h]uman rights come from God and not merely from laws."<sup>201</sup> The neo-evangelical politics of the 1980s are in part a response to what many perceive as an undemocratic assault—often by judges—on traditional values, including the notion of "God and country." North Carolina's religious test for office remains formally intact not because anyone is eager to enforce it, but because of what its repeal would symbolize.<sup>202</sup>

Lately some legal scholars and social critics have reaffirmed the linkage between traditional religion and democratic government. Harold Berman, formerly James Barr Ames Professor of Law at Harvard, has questioned whether "the great principles of Western jurisprudence,"<sup>203</sup> many of which are derived from Christianity,<sup>204</sup> can withstand a continuing process of secularization. He believes that "law and religion stand or fall together; if we wish law to stand, we shall have to give new life to the essentially religious commitments that give it its ritual, its tradition, and its authority."<sup>205</sup> Richard John Neuhaus, writing in the same vein, has raised the spectre of what he calls "the naked public square".<sup>206</sup>

When religious transcendence is excluded, when the public square has

son's principles for a universal morality could be accepted for that realm as long as they were perceived as part of a rational philosophy rather than as part of a new religion.

*Id.* at 28. This is not to say that these Christian groups believed in separating their belief in divine authority from political life. Jeffersonian rationalism included belief in a god that bears a striking resemblance to the god of the American civil religion. See Bellah, *supra* note 75, at 9-10.

196. See Langdell, *Teaching Law as a Science*, 21 AM. L. REV. 123 (1887).

197. H. BERMAN, *supra* note 170, at 80.

198. The interaction of law and economics or law and politics—even, in rare instances, law and philosophy—is cheerfully acknowledged, but few law school classroom discussions delve any deeper than that.

199. Letter from Thomas Jefferson to Danbury Baptist Association (Jan. 1, 1802), *reprinted in* XVI THE WRITINGS OF THOMAS JEFFERSON 281-82 (1905).

200. See R. NEUHAUS, *supra* note 170, at 21.

201. See *id.* at 81. President John F. Kennedy expressed the same idea in his 1961 inaugural address, when he said: "[T]he rights of man come not from the generosity of the state but from the hand of God." Address by President Kennedy (Jan. 20, 1961), *partially reprinted in* Bellah, *supra* note 75, at 3.

202. See *supra* note 165.

203. H. BERMAN, *supra* note 170, at 72.

204. See *id.* at 52-67.

205. *Id.* at 37.

206. R. NEUHAUS, *supra* note 170, at vii.



been swept clean of divisive sectarianisms, the space is opened to seven demons aspiring to transcendent authority. . . .

[O]nce religion is reduced to nothing more than privatized conscience, the public square has only two actors in it—the state and the individual. Religion as a mediating structure—a community that generates and transmits values—is no longer available as a countervailing force to the ambitions of the state. Whether in Hitler's Third Reich or in today's sundry states professing Marxist-Leninism, the chief attack is not upon individual religious belief. Individual religious belief can be dismissed scornfully as superstition, for it finally poses little threat to the power of the state. No, the chief attack is upon the *institutions* that bear and promulgate belief in a transcendent reality by which the state can be called to judgment.<sup>207</sup>

So perhaps Secretary Bennett was right. Perhaps the fate of American democracy really is "intimately intertwined . . . with the vitality of the Judeo-Christian tradition,"<sup>208</sup> or at least with some notion of transcendent authority. William Gaston<sup>209</sup> and many of his contemporaries<sup>210</sup> certainly thought so. But even if one concedes Bennett's point, important questions remain: How can the vitality of the Judeo-Christian tradition best be preserved? What rules should govern the actions of religious people in a pluralistic democracy?

A constitution that includes or permits the enactment of a religious test for office cannot provide a satisfactory answer. The United States Constitution, however, provides a framework within which all citizens, regardless of their religious opinions, can compete for leadership of the political community. The federal Constitution guarantees free exercise of religion,<sup>211</sup> prohibits the establishment of any particular religion,<sup>212</sup> and forbids religious tests for office.<sup>213</sup> Implicit in this radical declaration of religious freedom is the framers' recognition of religion's important but often problematic role in the political life of a democratic society. Nowhere does the Constitution say anything about a wall.

#### IV. BEYOND THE WALL OF SEPARATION

The Supreme Court's wall of separation jurisprudence has attracted a variety of critics over the years. In 1965 Harvard's Mark De Wolfe Howe faulted the Court for its narrowly Jeffersonian approach to the establishment clause.<sup>214</sup> More recently, Justice Rehnquist reviewed the legislative history of the first

207. *Id.* at 8-9, 82.

208. Address, *supra* note 1, at 1.

209. See *supra* text accompanying note 146.

210. See *supra* text accompanying notes 184-88.

211. U.S. CONST. amend. I.

212. *Id.*

213. *Id.* art. VI, § 3.

214. See M. HOWE, *supra* note 192, at 1-31. Professor Howe characterized the Court's Jeffersonian interpretation as "[i]llusion born of oversimplification," *id.* at 8, because it ignored the antiseccularist approach to separation advocated by Roger Williams. See *id.* at 9.

amendment and found no justification for strict separationism.<sup>215</sup> "It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history," he wrote, "but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly forty years."<sup>216</sup>

Jefferson's letter to the Danbury Baptists literally refers to a "wall of separation between church and state."<sup>217</sup> If the metaphor were taken to mean simply that the government may not set up a state church, few would quibble with the choice of words. Metaphors are like balloons, however, and the Court has not been shy about inflating this one.<sup>218</sup> In cases involving the public schools, for example, the Court has stated that separation of church and state requires separation of religion from government,<sup>219</sup> and even separation of religion from the process of lawmaking.<sup>220</sup> The Court, in other words, has demanded the impossible.<sup>221</sup>

Futile attempts to divorce religion from politics and government have wreaked havoc on the Court's establishment clause jurisprudence. Justice Jackson's post-World War II prophecy has come true: In its zeal to classify various institutions and ideas as either religious or secular,<sup>222</sup> the Court has made its figurative wall of separation "as winding as the famous serpentine wall designed by Mr. Jefferson for the University he founded."<sup>223</sup> A state may bus parochial school students to and from the classroom,<sup>224</sup> but not to and from a museum.<sup>225</sup>

215. See *Wallace v. Jaffree*, 105 S. Ct. 2479, 2509-16 (1985) (Rehnquist, J., dissenting).

216. *Id.* at 2509 (Rehnquist, J., dissenting).

217. Letter, *supra* note 199.

218. Cf. *McCullum v. Board of Educ.*, 333 U.S. 203, 213 (1948) (Frankfurter, J., concurring) ("[T]he meaning of a spacious conception like that of the separation of Church from State is unfolded as appeal is made to the principle from case to case.").

219. See, e.g., *id.* at 212 (majority opinion of Black, J.) ("[T]he First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."); *Everson v. Board of Educ.*, 330 U.S. 1, 31-32 (1947) (Rutledge, J., dissenting) (establishment clause was intended "to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion").

220. See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602, 623 (1971) ("The history of many countries attests to the hazards of religion's intruding into the political arena.").

221. See *supra* text accompanying notes 170-81.

222. The Court, for example, forbids government aid to "religious" schools but allows states to support "secular" institutions. See, e.g., *Grand Rapids School Dist. v. Ball*, 105 S. Ct. 3216 (1985); *Agular v. Felton*, 105 S. Ct. 3232 (1985). This approach makes sense only in the context of what might be described as a dualistic world view. If the Court supposes (as it does) that the activities of individuals or institutions may be either religious or secular,

then the identification of church with religion and state with secular is a meaningful position. But if one holds to a nondualistic . . . view of life, such an identification does not correspond with that person's view of reality. . . .

This latter perspective rests on the assumption that religion is not a thing in itself. Religion is always intrinsic to the life of an individual or the identity of an institution. It is impossible, from this perspective, to separate religion from life, to call one individual or institution religious and another secular in the sense of nonreligious.

SOCIETY, STATE, & SCHOOLS, *supra* note 174, at 96-97.

223. *McCullum v. Board of Educ.*, 333 U.S. 203, 238 (1948) (Jackson, J., concurring).

224. See *Everson v. Board of Educ.*, 330 U.S. 1, 17 (1947).

225. See *Wolman v. Walter*, 433 U.S. 229 (1977).

The government may lend the same students textbooks,<sup>226</sup> but may not lend the school a map.<sup>227</sup> As Justice Rehnquist wrote in 1985:

[I]n the 38 years since *Everson* our Establishment Clause cases have been neither principled nor unified. Our recent opinions, many of them hopelessly divided pluralities, have with embarrassing candor conceded that the "wall of separation" is merely "a blurred, indistinct, and variable barrier," which "is not wholly accurate" and can only be "dimly perceived."<sup>228</sup>

Some have charged that the Court, in its confusion, has driven a wedge between government and those Americans who still believe in God.<sup>229</sup> Certainly the danger of such alienation exists. As long as the Court clings to its separationist metaphor and continues to treat religion as if it were the province of people who belong to churches and send their children to sectarian schools,<sup>230</sup> religious traditionalists will be in peril. Attempts to build walls between government and religion inevitably lead to barriers between government and *particular forms* of religion. Theism, if only because it looks like what the Court generally takes to be religion, will be particularly at risk.

Criticism of the Court's separationist jurisprudence does not necessarily imply that every establishment clause decision since *Everson v. Board of Education*<sup>231</sup> has been wrong. Several, including the controversial school prayer rulings of the 1960s, are eminently defensible.<sup>232</sup> The Court, however, is not likely to achieve consistency or fairness in its establishment clause cases until it abandons the wall metaphor and adopts an approach that more accurately reflects American history and the role of religion in a democratic society.

Justice Rehnquist believes that "nothing in the Establishment Clause re-

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226. See *Board of Educ. v. Allen*, 392 U.S. 236 (1968).

227. See *Meek v. Pittenger*, 421 U.S. 349 (1975).

228. *Wallace v. Jaffree*, 105 S. Ct. 2479, 2516 (1985) (Rehnquist, J., dissenting) (quoting *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947); *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971); *Tilton v. Richardson*, 403 U.S. 672, 678 (1971); *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984)).

229. See, for example, *SOCIETY, STATE, & SCHOOLS*, *supra* note 174, at 103:

The entanglement test represents the full fruition of the Enlightenment mind, and it is expressed by the highest Court in the land. In the name of constitutionality the entanglement test forbids even the possibility that religious beliefs may enter the public arena and cause "political strife" . . . [Thus], the Supreme Court has clarified itself into exposing its basic bias. It has driven a theistic world-view . . . into the wilderness, far from the public arena where only that which is "secular" may enter.

230. The Court, of course, has recognized the existence of nontheistic religions. See *Torcaso*, 367 U.S. at 495 n.11. Nevertheless, it persists in trying to divide the world into secular and religious individuals and institutions. As the Court's education decisions make abundantly clear, those individuals and institutions that can be identified with denominations, churches, or doctrinal statements inevitably are classified as religious, and those that cannot be so identified are deemed secular and therefore beyond the reach of the establishment clause. See *supra* note 222.

231. 330 U.S. 1 (1947).

232. The Court's decisions in *Engel v. Vitale*, 370 U.S. 421 (1962), and *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963), were correct insofar as they prohibited state endorsement of a particular form of religion. See *infra* text accompanying notes 238-41. The Court's rationale for these holdings was faulty, however, to the extent that it was based on the wall of separation concept. See, e.g., *Schempp*, 374 U.S. at 216-17. State-sponsored prayers and religious observances such as those involved in *Engel* and *Schempp* are unconstitutional because they "convey a message that . . . a particular religious belief is favored or preferred" by the state, *Wallace v. Jaffree*, 105 S. Ct. 2479, 2497 (1985) (O'Connor, J., concurring), not because they breach the separationists' mythical wall.

quires government to be strictly neutral between religion and irreligion."<sup>233</sup> Justice Story said essentially the same thing early in the nineteenth century.<sup>234</sup> The framers of North Carolina's first state constitution completed their labors long before the first amendment was adopted, but most of them would have agreed that the government should favor Christianity and discourage "irreligion."<sup>235</sup>

Justice Rehnquist's construction of the establishment clause nonetheless is defective on at least two counts. First, it ignores the essentially religious character of what he calls "irreligion." Atheism, for example, would presumably fall into this disfavored category. But atheism may be just as religious as theism—just as much an expression of an individual's convictions about the nature of ultimate reality.<sup>236</sup> Second, and more important, Justice Rehnquist's interpretation of the establishment clause opens the door to religious oppression. North Carolina's current religious test for office appears to do nothing more heinous than favor "religion" over "irreligion."<sup>237</sup>

Among current members of the Supreme Court, Justice O'Connor's approach to the establishment clause seems to be the most promising:

[R]eligious liberty protected by the Establishment Clause is infringed when the government makes adherence to religion relevant to a person's standing in the political community. Direct government action endorsing religion or a particular religious practice is invalid under this approach because it "sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." . . .

. . . .

The endorsement test does not preclude government from acknowledging religion or from taking religion into account in making law and policy. It does preclude government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred.<sup>238</sup>

Equality of standing in the political community is the crucial point. Justice O'Connor's interpretation of the establishment clause prohibits the government from favoring or disfavoring particular religious groups,<sup>239</sup> including those that embrace what traditionally has been called "irreligion." Consistently and

233. *Wallace v. Jaffree*, 105 S. Ct. 2479, 2520 (1985) (Rehnquist, J., dissenting). The establishment clause, in Justice Rehnquist's view, merely prohibits government from "establishing a religion or discriminating between sects." *Id.* (emphasis added).

234. See *supra* text accompanying note 12.

235. See *supra* text accompanying notes 49-76.

236. See *supra* notes 170-74 and accompanying text.

237. The federal Constitution's prohibition of religious tests, U.S. CONST. art. VI, § 3, has never been made applicable to the states. See *Torcaso*, 367 U.S. at 489 n.1.

238. *Wallace v. Jaffree*, 105 S. Ct. 2479, 2497 (1985) (O'Connor, J., concurring) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)).

239. See *Lynch v. Donnelly*, 465 U.S. 668, 687-89 (1984) (O'Connor, J., concurring). It must be clear, of course, that the endorsement test is intended to ensure the fundamental political equality of religiously identified individuals and groups, not the ultimate worth or propriety of their ideas. The expression of those ideas is protected by the free speech clause, U.S. CONST. amend. I, but legislation would be next to impossible if government could not at some point choose between religious ideas.

thoughtfully applied, this approach would protect the rights of religious minorities while recognizing the important and intrinsic role played by religion in American society.<sup>240</sup> Surely the establishment clause requires no more—and no less—than that.

## V. CONCLUSION

Some religions may be better than others, but the Constitution cannot permit some religions to be more equal than others in the eyes of the law. When a democratic constitution distinguishes between religions in the distribution of civil rights—as it does when it creates or permits a religious test for office—it fails in one of its essential purposes: to create a framework within which the majority can rule without riding roughshod over the fundamental rights of minorities. Freedom of religion is one of those fundamental rights, and it should be available on an equal basis to all.

The purpose of the establishment clause cannot be to protect government from religious contamination. Instead, the establishment clause should be seen as a complement to the free exercise clause—an ingenious device that enables every individual, regardless of his or her religious opinions, to contribute on an equal basis to the political life of the community. By the same token, religion cannot be narrowly and conveniently defined in terms of belief in God or dogma or ritual; it is the expression of every individual's deepest convictions, and it exists at the heart of political culture.

The Court must resist pressure to put any group's God "back" in the Constitution. This is no longer, if it ever was, a Christian country. The jurisprudence of two centuries ago is, in every sense of the word, history. Christianity, Judaism, atheism, and all other forms of religion must be equal before the law so that every citizen, now and in the future, will have an equal opportunity to bring his or her religious vision to the tribunal of public opinion. Religious tests for office and similar instruments of oppression and exclusion have no place in a free society.

Even so, the Court must remember Justice Cardozo's admonition: "Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it."<sup>241</sup> A wall of separation between the institutions of church and state is one thing. But a wall of separation between religion and government, religion and politics, or religion and law is a wall built on an illusion.

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240. For example, state-sponsored prayer in government schools would still be unconstitutional, but nondiscriminatory aid to private schools, including sectarian institutions, probably would be permitted. Thus, the inequities of the current system of school financing could be eliminated, *see* SOCIETY, STATE, & SCHOOLS, *supra* note 174, even as the rights of religious minorities remained protected. In addition, the Court would be freed of making specious distinctions between such things as textbooks lent to children and maps lent to schools. *See supra* text accompanying notes 226-27.

241. *Berkey v. Third Ave. R.R. Co.*, 244 N.Y. 84, 94, 155 N.E. 58, 61 (1926), *quoted in* *Wallace v. Jaffree*, 105 S. Ct. 2479, 2517 (1985) (Rehnquist, J., dissenting).