CHAPTER 11

Arguing Against the Act on Religious Grounds Violates the Establishment Clause

When a proponent of an atheistic Establishment Clause points to Thomas Jefferson's famous "wall of separation" letter to the Danbury Baptists, I will point them and, in due turn, the U.S. Supreme Court to this interpretation of the Establishment Clause proffered by highly esteemed Supreme Court Justice and Dane Professor of Constitutional Law at Harvard, Joseph Story:

> An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation. . . . The real object of the amendment was, not to countenance, much less to advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government.[18]

If original public meaning and original intent mean anything to the six current Supreme Court justices who say they hold to that principle of interpretation, then the justices and the Act's "religious opponents" will have to contend with Story's interpretation.

Ironically, those opponents will be asking the court system not only to "countenance" but to "advance . . . infidelity," which was then defined

as "disbelief of the inspiration of the Scriptures, or the divine original of Christianity; unbelief."[19]

In my opinion, it is time for Christians to tell the Supreme Court to stop "prostrating Christianity" so that atheism can "advance." As said in the preceding Chapter, there is no religious neutrality in relation to God. God just does not give us or the Court that option.

What Is "an Establishment" of Religion?

The key to the Establishment Clause should be the original public meaning of the words, "an establishment" of religion, wrongly misquoted by the Supreme Court in 1947 as "the establishment" of religion.[20] There is a huge difference between "an" and "the" in relation to the noun "establishment."

This difference is made clear by another observation by Justice Story about the Establishment Clause: "It was impossible, that there should not arise perpetual strife, and perpetual jealousy on the subject of *ecclesiastical ascendancy* if the national government were left free to create *a religious establishment*.[21] The only security was in extirpating the power."

The italicized words are key to understanding that "an establishment" was not about religious views informing policy decisions but about creating what Story said in the previous quote, a "national ecclesiastical establishment" that would gain "ascendency" to a position from which it would receive the "exclusive patronage" of the federal government.

Thomas Jefferson Weighs in on My Side

I will also offer fans of Jefferson's Danbury Baptist letter another of Jefferson's letters (Sep. 23. 1800) to corroborate Justice Story's interpretation of the Establishment Clause. This letter was to Dr. Benjamin Rush during his campaign for President. To appreciate this letter, you need to remember that Congregationalists, with their theology and form of church polity (ecclesiology) was the established form of Christianity in Connecticut.

> "The clause of the Constitution which … covered … the freedom of religion [note, not the Establishment Clause] **had given to the clergy a very favorite hope of obtaining** ***an establishment of a particular form of Christianity*** through the United States … *especially* the Episcopalians and ***Congregationalists***. … And they believe that **any portion of power confided to me will be exerted in opposition to their schemes.** And they believe rightly."[22]

The possibility of the kind of establishment Story was describing and Jefferson's campaign promise to oppose it is why the Baptists in Connecticut wrote Jefferson in the first place!

In the Association's January 1, 1802, letter to Jefferson, it expressed concern that "what religious privileges we enjoy" from the *Congregationalist Church established in Connecticut*, "we enjoy as favors granted, and not as inalienable rights; and these favors we receive at the expense of such degrading acknowledgements as are inconsistent with the rights of freemen."

In other words, the Congregationalist form of Christianity existing at that time was a form of Puritan Calvinism and its beliefs and polity had the "exclusive patronage" of Connecticut's government. Other forms of Christianity, e.g., Baptist, and other forms of ecclesiastical polity, e.g., episcopal, got only what Connecticut's government would allow to them.

In sum, Jefferson was simply confirming to the Danbury Baptist Association what he had earlier said to Dr. Rush in his presidential campaign—he would oppose any effort by Congregationalists to obtain for its form of Christian theology and ecclesiology the "exclusive patronage" of the national government. Obtaining this patronage was "an establishment of religion," not a citizenry having policy views informed by their religion.

If the Supreme Court wants to use one letter from Thomas Jefferson to aid its interpretation of the Establishment Clause, it should also use his contemporaneous letter to Dr. Rush on the same subject, which illuminates the political history surrounding the Danbury Baptist correspondence. To do otherwise is dishonest in my view.