[America's Fabric #11
Bill of Rights/Religious Freedom
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Good morning, and welcome to "America's Fabric," a radio program to encourage love of America. I'm your host for "America's Fabric," John McElroy.

My subject this glorious Easter Sunday morning is freedom of religion: the first freedom protected in the Bill of Rights of the Constitution of the United States.

Regarding freedom of religion, it must be said that it is a bad thing to use the power of government to force a person to support a religion they don't want to support. And it is just as bad to use the power of government to prevent a person from praying when they want to worship God and have a right to do so. In recognition of these truths, the first words of the Bill of Rights of the Constitution stipulate: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." What could be plainer than these limitations on federal power? In regard to the first of these restrictions, let us defined what "an establishment of religion" is.

An establishment of religion is a law laid down by a government declaring that the government supports one religion, which the law names, to the exclusion of all other religions. When a government establishes a religion, it may permit other religions to exist within its jurisdiction, but only the established religion is supported and approved.

Some government benefit is always part of a religious establishment, and only those who belong to the established religion receive the benefits, which are of a kind that only a government could bestow; members of other religions, and persons of no religious

faith, are excluded from receiving thems. Typically, the benefits include financial support from public revenues and the right to vote or hold public office.

No establishment of religion exists when a government treats every religion the same way, when it tolerates the free expression of faith in God both in private and public, and when it enacts no establishment law. When these conditions are present, church and state remain separate.

To claim that an expression of belief in God—for example, a prayer—could be an establishment of religion is foolish. Prayer in itself is merely the free exercise of religion. Without an establishment law and some sort of exclusionary bestowal of a government benefit on members of the established religion, there is no religious establishment. In fact, governments that claim to value and protect religious freedom should not only permit but also encourage prayer, and other expressions and signs of religious belief, *not* forbid them, as the government of the United States has been doing for more than four decades now.

There has been since the 1960's a *movement* in the United States to devalue and marginalize religious beliefs, and this movement has used the power of federal courts to accomplish its purpose.

The First Amendment's establishment clause ("Congress shall make no law respecting an establishment of religion") and its free exercise clause ("[Congress shall make no law] prohibiting the free exercise [of religion]") serve the same end, which is: to forbid the use of federal power to regulate religion.

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To call attention, as I am doing, to the fact that the First Amendment forbids use of *federal* power to make a religious establishment or to prohibit "the free exercise" of religion does not mean religion is entirely exempt from government authority. Obviously, the religious provisions of the First Amendment—the prohibition of a religious establishment by the *federal* government and the prohibition of *federal* interference with the free exercise of religion—prevent only the *federal* government from regulating religious practices. Under the terms of the First Amendment, the power to regulate religion is retained in the governments of the states of the United States, where it has always existed, even when the states were colonies of Great Britain, before they became states of the United States. And the states retained that authority to regulate religion when the first national government of the United States was organized in 1781 under the constitution called the Articles of Confederation and Perpetual Union.

Two considerations are crucial to understanding the provisions for religious freedom in the First Amendment in this way: as freedom from federal authority in religious matters.

First, we must note the purpose of the Bill of Rights, whose leading article protects freedom of religion, speech, press, assembly, and petition—in that order.

In the debates that took place in the states of the United States in 1787-1788, in the specially elected Constitutional Conventions, to consider whether to ratify the proposed federal constitution created in 1787 by other elected representatives of the people, it was repeatedly pointed out that the new constitution provided no protection for the already-existing rights of the people in the states. There was a general fear that the proposed federal government, which was much stronger than the national government

under the Articles of Confederation, might take away the rights of the people in the states if it was not explicitly prohibited from doing so. Some of the state constitutional conventions, in fact, made their ratification of the new constitution conditional on the understanding that "a bill of rights" would be added to the Constitution, specifying the rights of the people in the states which the federal government was forbidden to diminish, and stating the principle that federal authority was limited to the powers enumerated in the Constitution. The First Amendment was the first article in that Bill of Rights, and it was given priority because it contained the five rights that were considered most important. And the first of these was the right to be free of federal authority in religious matters.

Secondly, in regard to the clauses in the First Amendment that protect religion from federal authority, it must be understood that in 1789-1791, the years in which the First Amendment was written and sent to the states for ratification, half the states then in the Union had religious establishments —namely, New Hampshire, Massachusetts, Connecticut, New Jersey, Delaware, Maryland, and South Carolina. Of these seven states, the establishment laws of Maryland and Delaware, supporting all churches of "the Christian faith," were the broadest; probably because Roman Catholics were numerous in Maryland and Delaware. The establishment laws in New Hampshire, New Jersey, and South Carolina supported the churches of "the Protestant faith." Only Massachusetts and Connecticut had strong establishment laws: in the sense that only they supported from the public revenues of their states just one Protestant denomination—the Congregational Church—and made being a member of that denomination a legal requirement for voting and holding public office.

Mathematically, of course, the First Amendment could not have been ratified by three-fourths of the states of the United States had the Amendment not recognized the right of half the states in the Union to retain their religious establishments. By employing the wording: "Congress shall make no law *respecting an* establishment of religion" (italics added), the establishment clause in the First Amendment did two things. It prohibited the federal government from (1) passing an establishment law of its own and (2) from disturbing the religious establishments in the states that had them. If the intention of the establishment clause had been only to prohibit the federal government from establishing a religion, instead of reading, "Congress shall make no law *respecting an* establishment of religion," it would have read: "Congress shall make no law establishing a religion."

Thus the establishment clause in the First Amendment, which two-thirds of both houses of Congress and three-fourths of the legislatures of the states approved in 1789-1791, forbade the federal government both from making a religious establishment of its own and from interfering with any of the establishments of religion then existing in half the states. The restriction on federal power in regard to religious matters was, in other words, so severe that it even prohibited the federal government from moderating, abolishing, or in any way altering an establishment of religion in a state. The establishment clause in the Bill of Rights allowed states in the United States to do what the national government was prohibited from doing, namely to make or to have an establishment of religion.

But religious establishments in the states of the United States died out, of their own accord, after the First Amendment went into effect. One by one, during the forty-

two years from 1791 to 1833, New Hampshire, Massachusetts, Connecticut, New Jersey, Delaware, Maryland, and South Carolina rescinded their establishment laws, and no other establishments of religion were enacted in any other states. Since 1833 no religious establishment has existed anywhere in the United States.

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Despite these salient facts, the Supreme Court announced in 1962 that it had discovered an establishment of religion in the state of New York, and claimed also, in flagrant contradiction of the First Amendment, that the federal government had the power to abolish it. By declaring in *Engel v. Vitale* in 1962 that the recitation of a prayer in the public schools of the state of New York was an establishment of religion, the Supreme Court radically redefined religious establishments and usurped a power that the Constitution withholds from the federal government. This momentous judicial coup unleashed the movement to eliminate religion from public life in America: the movement that reached a point where the Supreme Court even declared in 1985, in *Wallace v. Jaffree*, that *silent* prayer in a public school constituted an establishment of religion if it was condoned by a school official. Here in southern Arizona, Tucson school principals have even prohibited singing songs that mention God and have banned the holiday greeting "Merry Christmas" because these behaviors might convey a sense of believing in God.

This is the prayer the Supreme Court found to be an establishment of religion because it was recited in the public schools of New York with the approval of the state board of education: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our Country."

No student was forced to recite this simple acknowledgment of God as the source of all human blessings. It was recited only by students whose parents or guardians wanted them to recite it. Their recitation of the prayer was a "free exercise" of religion, and as such should have been protected against federal interference by the free exercise clause of the First Amendment. Those who opposed the prayer's recitation did so, they said, because the approval of the exercise by New York's state board of education made it an establishment of religion, even though children of many different religious denominations recited it and participation in the exercise conferred no government benefits on anyone, let alone exclusively on members of a single religion.

Nonetheless, those who brought suit against the use of the prayer said it violated the establishment clause of the First Amendment—never mind that the Supreme Court's decision in *Engel v. Vitale* violated the Amendment's free exercise clause and that both of the First Amendment's religious clauses denied the federal government the power to interfere with or regulate religious practices in a state.

Besides the Supreme Court's willful flaunting in *Engel v. Vitale* of the religious provisions of the First Amendment, the Court was also guilty of preposterous judicial logic in this case. For it must be presumed, on principle, that the provisions of the Constitution are parts of a coherent law and, therefore, that no clause in it can be regarded as conflicting with some other part of the document. Yet that is what the Court did in *Engel v. Vitale*: it used the establishment clause of the First Amendment to void the First Amendment's free exercise clause, as if these two provisions in the Constitution could be at odds with each other, instead of being, as they truly are, coordinate protections of the

right of the states to decide religious matters within their boundaries, free of federal intrusion.

That was certainly the understanding Thomas Jefferson had of the Bill of Rights. In his Second Inaugural Address as president of the United States, in 1805, Jefferson made his most emphatic, most public pronouncement on the subject of states' rights and federal authority with regard to religion. He declared then to his fellow citizens throughout the country, in his capacity as their principal elected magistrate (quote): "In matters of religion, I have considered its free exercise is placed by the Constitution independent of the powers of the General Government."

Jefferson's metaphor of a (quote) "wall of separation between church & State," which he used in 1802 in writing a letter to an association of Baptists, was wholly consistent with the statement he made in his Second Inaugural. Jefferson's wall metaphor refers to the wall the religious clauses of the First Amendment have constructed to keep the federal government from trespassing on the right of the states to regulate religion.

Besides its violation in *Engel v. Vitale* of the principle of constitutional consistency—that is, that one provision of the Constitution cannot be used to void another provision—the Supreme Court also transgressed the principle of equal protection under the law. The plaintiffs who brought suit in *Engel* claimed, through their lawyers, that their sensibilities were being offended by the recitation in the public schools of New York of a prayer approved by the state board of education. In ruling in favor of the plaintiffs' feelings, the Supreme Court was protecting the sensibilities of one group of citizens at the expense of another group, whose sensibilities were offended by the

decision to safeguard the feelings of the first group. In its verdict, the Supreme Court was declaring that the sensibilities of those who wanted to stop recitation of the prayer had more legitimacy and were of greater importance than the feelings of those who wanted the children in their care to continue to pray at the beginning of each school day: "Almighty God, we acknowledge our dependence on Thee, and we beg Thy blessings upon us, our parents, our teachers, and our Country."

When it comes to religious feelings, however, is equal protection ever possible? For in any large population, what gratifies the religious sensibilities of one person or group is bound to offend the religious sensibilities of some other person or group. And if we attempt to resolve the problem by banning expressions of religious belief that give offense, are we not in effect prohibiting all expression of religious belief, and banning religious expression as a constitutional right, since there are no universally inoffensive religious beliefs?

We would not apply that kind of reasoning to any other First Amendment right. Most certainly we would not ban public expression of secular beliefs because some of them would be offensive to someone. Indeed, we make a point of allowing, and take special pride in allowing, offensive secular speech. How, then, are we to prohibit public expressions of religious beliefs because someone finds them offensive?

And if we relegate religion to gatherings of like-minded persons in the privacy of homes, churches, and private schools, we emasculate freedom of religion by restricting it in a way that no other First Amendment freedom is restricted. Would we permit only private circulation of a petition for the redress of grievances? How about allowing only private publication and sale of books? Would we restrict free speech to private venues

only? Would we recognize only a right of private assembly? Indeed, we would not. To have meaningful rights in regard to freedom of religion, freedom of speech, freedom of the press, freedom of assembly, and freedom of petition, the equal protection of every citizen's feelings is, in the nature of things, impossible. When it comes to the exercise of the First Amendment freedoms, equal protection of every citizen's feelings is not something a government can undertake or hope to achieve, or truthfully claim to be able to provide.

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The Supreme Court's regulation in *Engel v. Vitale* in 1962 of religion in the state of New York has become a steady stream of federal regulation of religion, averaging more than one Supreme Court decision per year for the past forty-six years. This unprecedented flood of federal curtailments of religion has, with considerable regularity, been instigated, supported, and prosecuted by the American Civil Liberties Union, an organization whose actions make it appear that it is dedicated to the secularization of American society, and by societies and organizations like Americans United for the Separation of Church and State that have an equally strong affinity with the alleged right of atheists not to have their sensibilities offended by signs and expressions of belief in God. In the litigation that these groups have initiated, they always invoke their mistaken—but to them pleasing—understanding of the establishment clause in the First Amendment, as a weapon to be used to suppress the free exercise of religion. And the findings that federal courts have handed down in favor of such groups have given the establishment clause today an ascendancy over the First amendment's free exercise clause that is almost insurmountable. We may be sure the authors and ratifiers of the

First Amendment never dreamed that such a distorted view of the establishment clause would gain an ascendancy over the free exercise clause.

To ensure "separation of church and state," three criteria must be met: separation of government benefits from religious affiliations, or lack thereof; equal treatment under the law of religious organizations; and, protection of the free exercise of religion in both private and public venues. Where these conditions are enforced, church and state are in reality separate, and no establishment of religion exists.

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This is your host for "America's Fabric," John McElroy, saying thanks for listening. To hear today's program again, or to let someone else hear it, go to the website ambericasfabric.com and click on "Archives." Audios of all programs broadcast before today's can also be found at that website. The script of today's program will be posted on americasfabric.com by tomorrow.

Next Sunday's program will be an interview with four young Americans—two from the College Republicans and two from the Young Democrats organizations at the University of Arizona—on the subject of patriotism. Be sure to tune in to their discussion.

Until next Sunday, then, stay proud—and grateful—to be an American.

And remember, America is the land of the free because it is the home of the brave.