

Wall or picket fence?

by [Oliver Thomas](#) in the [November 11, 1998](#) issue

*Edited by Stephen Monsma and J. Christopher Soper, Equal Treatment of Religion in a Pluralistic Society. (Eerdmans, 211 pp.)*

Modernity has had little impact on the breadth and depth of America's religious commitments. Church attendance is higher now than it was at the time of the nation's founding. To appreciate just how much America has deviated from the course some of the founding fathers predicted, consider Thomas Jefferson's 1822 letter to Thomas Cooper. Jefferson thought that within a generation trinitarian thinking would disappear altogether! Imagine how surprised he would be to find that, on the brink of a new millennium, the fastest-growing churches in America are Mormon, Pentecostal and evangelical.

Given religion's success over the past half century, one wonders why any person of faith would want to reconfigure the delicate arrangement between church and state. Yet that is precisely what editors Stephen Monsma and Christopher Soper propose. Monsma's numerous books and articles have made a strong case for reconsidering our current thinking about that portion of the First Amendment prohibiting laws "respecting an establishment of religion." His ideas are neither revolutionary nor new, but they do appear to be gaining popularity.

In both the academy and the media religion often has not been taken seriously. Several years ago I moved to a city where the major newspaper was reported to have a swarm of sportswriters and only one religion writer. But things have changed. Witness the advent of religion reporters at the *Wall Street Journal* and on the *ABC Evening News*. Consider the numerous cover stories in *Time*, *Newsweek* and *U.S. News & World Report* on Jesus, the church, new religions and spirituality in general. There is ample evidence that major media moguls have gotten the message that religion matters.

Still, Monsma and Soper have a point. In light of the modern administrative state's pervasive presence in our lives and of its decision to fund a variety of viewpoints and activities, should the government--in the name of neutrality--continue to deny

funding to religious viewpoints and activities? In short, the book addresses the central church-state question of the day. If neutrality is the proper posture of government toward religion, as most experts contend, what is meant by "neutral"?

The editors have enlisted some of the nation's foremost experts to assist them. Those who would replace Jefferson's famous "wall of separation" with what might be described as a picket fence include Robert Destro, former U.S. civil rights commissioner turned law professor; Michael McConnell of the University of Utah Law School; and Carl Esbeck, architect of the "charitable choice" provisions of the recently enacted welfare reform law.

Though the book is slanted against the traditional separationist position, its editors have invited respected voices from the separationist camp to present their views. Among them are Baptist stalwart Derek Davis of Baylor University and the prolific young Jewish scholar Gregg Ivers of George Washington University. Together they admirably defend Jefferson's wall.

The book opens with Esbeck's presentation of the constitutional basis for the equal-treatment theory. Though overstated, Esbeck's major point is indisputable. The Supreme Court is moving toward an "equal access" model under the establishment clause that, though confined primarily to issues of speech, may ultimately spill over into questions of funding. If present trends continue, writes Esbeck, the court may allow direct funding of social welfare programs run by churches and other religious organizations, as well as indirect funding of religious activities through vouchers and the like.

McConnell gives a trenchant critique of lower-court opinions in which judges have discriminated against religious speech and viewpoints. Although the evidence is spotty and anecdotal, tales of school districts that refuse to allow students to do research on religious topics or distribute Christian literature are bound to stoke the fires for a constitutional reordering. McConnell challenges even the Rehnquist court--a frequent target of separationists--and argues for a constitutional amendment guaranteeing equal funding as well as equal treatment for religion.

Destro's chapter on the implications for nonprofits may be the book's best. Destro describes the pressures on religious organizations to alter their religious character in order to qualify for government funding. This, coupled with a narrow interpretation of the Title VII exemption which allows religious organizations to hire like-minded

individuals, tends toward the secularization of many faith-based programs. Religious nonprofits may be left with the difficult choice of accepting government funding with its attendant regulation or refusing Caesar's coin altogether.

Particularly noxious is the attempt by some accrediting institutions to impose stringent principles of academic freedom on religiously affiliated colleges and universities. If church-affiliated colleges are unable to control the doctrines espoused in the classroom, the notion of a Christian academy will cease to exist. Destro's proposed solution might not solve this problem, since accrediting institutions tend to be nongovernmental and therefore not subject to the establishment clause.

The book's biggest weakness is its inability to explain why the framers of the Constitution included the establishment and free-exercise clauses if equal treatment is the proper government posture toward religion. Wouldn't the equal-protection clause standing alone have been sufficient? The addition of the religion clauses suggests that the framers intended religion to be treated differently from secular concerns. The free-exercise clause suggests that sincere claims of conscience should be accommodated, short of compromising such overriding social concerns as health, safety and the common defense. The establishment clause, on the other hand, suggests that although the government may establish many things, it may not establish religion. And, although the speech clause demands that we treat religious speech no worse than secular speech, *funding* religious speech may be problematic. Government taxing and spending is an inherently coercive activity. If money goes from one taxpayer's pocket to support another's religious speech and activities, have we not "established" religion?

Davis and Ivers, both critics of the equal-treatment model, show the negative impact that government support can have on religion generally, as well as on minority faiths. Rogers Smith offers the final word by attacking what appears to be an inconsistency in the editors' position. If we are going to treat religion as we do everything else for establishment purposes, shouldn't we also do so for free exercise? This would eliminate the many exemptions in the law that are designed to accommodate religion--from property tax exemptions to selective service provisions for conscientious objectors. Proponents of equal treatment, says Smith, want to have their cake and eat it, too.

One of the book's strengths is its high level of scholarship. The editors have avoided both rhetorical overstatement and ad hominem attacks, opting instead for a rigorous dissection of some of the best scholarly arguments. But this strength is also the

book's weakness. The sometimes formal and stilted style, with its heavy reliance on case citations and secondary works, makes the volume inaccessible to many readers. Some of the essays were originally published for a more specialized audience. Esbeck's chapter, for example, is reprinted from a law journal. McConnell's and Davis's work first appeared as congressional testimony. Despite this, the book is worthwhile reading for those who would move beyond the bumper-sticker arguments of radio talk shows to a deeper understanding of church-state relations.