ably into the '40s, '50s, and '60s, and there was not a single winner of the past decade or two that could not be described as anything but appalling. The culminating disgrace was the 1971 winner, something called "Shaft," from a black exploitation movie of the same name. In its original form it was a discordant series of electronic burps and screeches, punctuated by spoken street-wise argot and containing, literally, no discernible melody. What is the test of a good song? It was and remains a musical impossibility to sit at the piano and accompany oneself to "Shaft."

So, appropriately, this year's winner was a song entitled "Evergreen" from the recent reincarnation of *A Star Is Born*, lyrics by Barbra Streisand (!), music by someone called Paul Williams. Is it necessary to scientifically compare "Evergreen" with the winning entries of Cole Porter, the Gershwin brothers, Harry Warren, or Harold Arlen? Another tuneless, banal series of bars like "Evergreen" serves only to emphasize the sad fact that movies are no longer musical, and that it is practically felonious to give the same award to Paul Williams as to any of the songwriters mentioned above. What is particularly discouraging is that "Evergreen" won practically by default, there being such a dearth of suitable entries. If this process of decline is permitted to go much further the results could easily move from the realm of the sad to the comic.

Which, in fact, is where the awards ceremony resides today. In avoiding the artificial "glitter" of previous occasions, the director of this year's performance replaced it, in suitable style, with those elements of '70s glitter that, one can only hope, will be dismissed with a sneer in some comfortable future. Who ever supposed that Jane Fonda's schoolmarm sermonizing and Warren Beatty's middle-aged eroticism were in any sense an improvement over Bob Hope? And who, or what, is Richard Pryor, another master of ceremonies? Do a few parts in poorly received comedies qualify one to cavort about as a host to filmdom? Surely someone with less tenuous connections to Hollywood could have been found. But that would be too much to hope for, particularly when I am mindful of two of the presenters of awards. Norman Mailer, America's next nominee for the Nobel Prize for literature, handed the screenplay Oscar over after some introductory remarks about pederasty. And Lillian Hellman—well, what more is there to say? How many standing ovations can one woman endure in a lifetime? After a career of justified neglect as a playwright, Miss Hellman has gained solace in her old age by the constant and gratifying sight of people standing up and applauding when she enters a room. After advertising minks and sharing a stage with Richard Pryor, what triumphs remain for this Grand Old Woman who, as she has said, has no regrets? I like to think that she kicked herself backstage for having been bested in repartee by Jason Robards, who won an Oscar for his portrayal of the executive editor of the *Washington Post* in *All the President's Men*. He wished to thank, more than anyone else, Ben Bradlee himself, "for being alive"—making Robards surely the only person extant to think such a thing, much less say it. □

Special Correspondence / David Lowenthal

Connecting Religion and Government Constitutionally

A case for incomplete separation, with a response from Stephen Chapman.

In this year's February issue, Mr. Stephen J. Chapman argued that the First and Fourteenth Amendments require a complete separation of church and state at all levels of government.

Whatever the defects of his lucid essay, it has the supreme virtue of insisting that only the original meaning of the two amendments is authoritative, and that the Court's task is not to balance competing interests for and against an accommodation between church and state but to discover and apply this meaning. Mr. Chapman does not encourage judicial activism. He does not claim for the Supreme Court the role of supreme policymaker, or look to it for an expansion of liberty and equality beyond that intended by the Founders and the Framers of amendments. He seems to realize, as few do today, that a fixed constitution forms the backbone of the American Republic, providing, through its constancy as the supreme law of the land, a sense of security and unity to a free, diverse, and changing people.

Nevertheless, Mr. Chapman's essay contains some errors that are unfortunately common in discussions of church and state. He accepts the widespread but questionable view that the First Amendment represented a victory for Madisonian principles. He fails to examine what the Framers understood by the words "establishment" and "religion." He argues for an illogical incorporation of the First Amendment into the Fourteenth's guarantee of "liberty." And he concludes in favor of Justice Black's mistaken statement of principles in *Everson* calling for a "wall of separation between church and state." By examining the Constitution and the First Amendment, and by recalling what Madison and Jefferson did with public education in Virginia, we can see that the Founders intended no such absolute separation.

It is significant that Mr. Chapman attributes the "major impetus for toleration" to the Great Awakening of the eighteenth century—a wave of religious revivalism in the 1740s spawning many new sects and hence a "general acceptance of toleration." Yet the same "colonial mind" that favored widespread toleration admittedly favored state assistance to religion and even limiting the scope of toleration itself. The first effort completely to separate church and state came, it seems, from Madison and Jefferson in Virginia, but we learn nothing to dispel the possible inference that somehow these men and their eminent allies were also part of the Great Awakening and brought its tolerant tendencies to their completion. We are not told that most of them were, in fact, rationalists of the Enlightenment, nurtured on the writings of John Locke and Montesquieu, and hence not only suspicious of revealed religion as such but bent on freeing political life from the hostilities, follies, and degradation associated with it. Jefferson's study of Locke is demonstrated by his notes of 1776 closely paraphrasing the argument of Locke's revolutionary *Letter on Toleration*. There the separation of church and state was first set forth as a leading principle of political life, along

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with its necessary corollary—the supremacy of secular or civil interests over any ecclesiastical or religious interest whatsoever. In all probability, therefore, Madison, Jefferson, and their allies derived their novel position not from the religious tradition or experience in America but, like the Declaration of Independence itself, from modern liberal philosophy. This would explain why they could insist, counter to the "colonial mind," on disestablishment and on the elimination of religiously-grounded civil disabilities.

How did the original Constitution treat religion? First, Congress received no direct power to act on religious matters. Moreover, there was to be no religious test for national office, though it is hardly clear that this was motivated more by a desire to accommodate the irreligious than to prevent inter-religious disputes. In fact, a kind of implicit and minimal religious preliminary to taking office seemed to remain in the required oath or affirmation—the latter a substitute for the oath's swearing (by God) intended not for atheists but for Quakers and others whose religion forbade taking oaths. Yet, most surprisingly and most impressively, there is not a single mention of God in either the Preamble or body of the Constitution—a notable omission compared with four such references in the philosophical Declaration of Independence and at least one in the Articles of Confederation. Thus, the new union was made to look like an entirely man-made device or convention created in the name of the people and ratified by them for the improvement of their earthly well-being, even if among the "liberties" whose blessings were to be secured for themselves and their posterity was undoubtedly religious liberty itself.

How did the First Amendment affect this picture? Let us begin by reminding ourselves that the demand for a Bill of Rights as such came from those who feared the power a much-strengthened national government might exercise over the states and the people. Madison, who acquiesced in the demand, did not agree, and his original motions in the House of Representatives starting the amending process even attempted to place new limits on the states as well as on the national government. This seems to have generated considerable opposition from states-rights forces, for the final wording of the amendment (after a succession of changes in the House, the Senate, and the House-Senate conference committee) can hardly be interpreted as an overall Madisonian victory. A growing number of scholars, including Mr. Chapman, grant that the establishment section was directed not only at preventing a national establishment but at protecting existing state establishments from national interference. This may well account for the otherwise perplexing peculiarity of the language: "Congress shall make no law respecting an establishment of religion." If the conference committee had merely wanted to prevent a national religion from being established, simple wording to that effect, as in one of Madison's original motions, would have sufficed. By adopting the language it did, the committee made it impossible for Congress to make any law having to do with ("respecting") any establishment anywhere, whether on the national level or in the states. Madison had wanted to limit the states further by preventing them from violating the "equal rights of conscience," but this proposal was rejected by the Senate, even though Madison declared the restrictions to be placed on the states to be "the most valuable of the whole list." By contrast, the establishment section went much further than he wanted it to go because it gave the states protection against the national government. Both actions, however, share the same spirit, and together they constituted a spectacular defeat for Madison.

Madison's two other proposals would have prevented the national government from infringing anyone's civil rights "on account of religious belief or worship," or infringing "the full and equal rights of conscience in any manner, or on any pretext." The first of these simply vanished—perhaps because it was thought subsumable under the ban on establishment, or because of complications arising from the fact that the national electorate was, by the Constitution, left to be determined by the states, which in turn could impose religious disabilities. As for not infringing "the full and equal rights of conscience" in even the slightest manner, this Madisonian demand was dropped in favor of the First Amendment's second religious section, whereby Congress was prevented from making any law "prohibiting the free exercise thereof." How do these two expressions compare?

Mr. Chapman thinks "rights of conscience" clearly protected atheists and agnostics and was therefore replaced by religious freedom, meaning, apparently, freedom for religions and not for the irreligious. In those days, however, the term "conscience" still had a religious connotation—as shown even today by "conscientious objector." The insistence on non-infringement raises a clearer difficulty, for does "conscience" protect not only all beliefs but all actions dictated by it, and are both together not to be infringed? Moreover, how is a claim attributed to "conscience" to be tested? Perhaps it was to avoid these pitfalls that the Framers of the First Amendment settled on language by which Congress was enjoined from passing any law prohibiting (not infringing) the free exercise of religion (not conscience).

Despite Madison's later claim to the contrary, the word "prohibit" means something different from "infringe," or from the "abridge" (a word closer to "infringe") used directly afterward in connection with the remaining freedoms of the First Amendment. What the second religious section protects is the free exercise of religion—not of irreligion, or belief, or conscience—but only in such a way that Congress may not prohibit this exercise. It may be obliged, however, to abridge or infringe what it cannot prohibit. The reason is this: religion consists of a combination of beliefs and actions, and the actions may transgress secular or civil laws. Congress cannot flatly prohibit the exercise of a whole religion—it cannot outlaw a religion—but it may be obliged, in pursuance of its own legitimate ends, to prevent religious actions at variance with the law, and hence to infringe or abridge the free exercise of a particular religion to that extent. No other interpretation will account for the carefully varied verbs in the First Amendment, or for the final phases of its formulation in Congress before it passed to the state legislatures for ratification. Of the four Madisonian proposals, therefore, only one—the ban on establishing a national religion—directly became an element, if not an explicit part, of the First Amendment. The others were either contradicted, significantly modified, or dropped.

So far we have sought the general outlines of the two religious sections of the First Amendment without defining either "establishment," which figures in the first, or "religion," which figures in both. Let us start with religion. Here the Framers thought only of groups (an immediate advantage over "conscience") engaging in the public worship of God or gods, usually with the help of ministers and rituals, and involving actions of diverse kinds thought pleasing to the deity and necessary to salvation. Atheism and agnosticism were not religions: in fact, the philosophical deism or theism found in the Declaration of Independence was not a religion either. The word could not be diluted (as the modern Court has done) without ruinous consequences.

As Mr. Chapman seems to admit, religions, and only religions, are singled out for protection by the "free exercise" section, and it would be ludicrous to read that section as if it could be extended to include those who have no religion. There is no religious test for national office, and both atheists and religious believers alike are meant to enjoy the further freedoms of the First Amendment and of the Bill of Rights generally. But the "free exercise of

religion" means exactly that: only the kind of belief and conduct properly called "religious" is constitutionally placed beyond prohibition by Congress. In this one place, therefore, what looks like a clear preference for religion over irreligion was put in the Constitution at the behest of forces that were not happy with the original document. We may add that this section, by implication, allows Congress to assist or encourage the free exercise of religion, since only prohibiting such exercise is denied it.

What is the meaning of "an establishment of religion"? Evidently the Framers wanted to use a broader term than the more familiar "established church"—which was too narrow to cover the Protestantism or Christianity established in some of the states. As for "establishment" itself, it is a term that arose in England after the Reformation, and in connection with the state's choosing a particular church or religion as its own. The Encyclopedia Britannica (Thirteenth Edition) puts it this way:

> Perhaps the best definition which can be given, and which will cover all cases, is that establishment implies the existence of some definite and distinctive relation between the state and a religious society (or conceivably more than one) other than that which is shared in by other societies of the same general character....It denotes any special connection with the state, or privileges and responsibilities before the law, possessed by one religious society to the exclusion of others; in a word, establishment is of the nature of a monopoly.

Note that establishment involves an action by the state, not by a religion, and presumes the actual or possible existence of more than one religion, of which one is made in some sense official. For this reason, when only one religion is thinkable in a society (as in ancient Israel), or when its dominance in society exists independently of any choice made by the state (as in the Catholic Middle Ages), or when religion itself is not to some degree independent of the state (as in the ancient polis), the term "establishment" would not apply. Establishment, in fact, was the political means (coming with or after the Protestant Reformation) of preserving an unambiguous religious preference, an unambiguous source of consecration in a society marked by religious diversity.

The precise relationship created between the state and the religion it established could vary enormously, both in the amount of subordination to the state required, and in the areas where marks of preference were exhibited. There could be an enormous variation in the civil disabilities visited on the unestablished religions as well. Nevertheless, it was quite generally understood, in Europe and America, that a religious establishment entailed a religious preference not shared among all religions. This is what the establishment section of the First Amendment forbids Congress to do on the national level, just as it forbids Congress to interfere with such preferences on the state level. Notice also that all Madison wanted was a guarantee that Congress could not establish a national religion. For these reasons, assistance or encouragement to all religions would not have been considered an establishment of religion at that time: in fact, it would have been considered at best an unusual and peripheral possibility, raising none of the dangers feared from the mutual contesting of religions or churches for supremacy, and from the domination of some by others. Nor, as we have seen, is such aid barred by the free exercise section, though it must be admitted that the direct tendance of religion is not within Congress' just authority. As for aid or expressions of support that might be brought about in conjunction with a legitimate legislative purpose, either as a means or ancillary to it, the stipulations of the First Amendment demand only non-preference among religions, or their equal treatment, nothing more.

It is therefore misleading to conclude, as Mr. Chapman does, that the First Amendment allowed libertarians to take solace in "the complete break between religion and government at the federal level," however correct his acknowledgement that it allowed the states to "retain their authority over religious matters." When President Jefferson produced his famous metaphor of the "wall of separation between church and State" in response to an inquiry about the First Amendment from the Danbury Baptists (1802), he certainly was not talking about the states but about the national government, and he meant that there could be no establishment of religion at that level—i.e., no designation of one religion as the national religion, and no display of preferential treatment. It is true that both he and Madison, as presidents, sought to avoid all connections between the national government and religion, but this may have been because they wanted to set the strongest example not only of conformity to the First Amendment but of strict constitutional construction with reference to the delegated powers of the president and Congress. Evidently their own predecessors had a different view of constitutional requirements, for, as Mr. Chapman notes, Thanksgiving Proclamations had already become a presidential tradition before Jefferson refused to issue them. We shall shortly see, moreover, that both Jefferson and Madison were willing to make rather remarkable accommodations to religion, on a non-preferential basis, when they became active later on in bringing public education to Virginia.

Now how did the First Amendment get absorbed into the Fourteenth, passed after the Civil War? The modern Supreme Court, first for the non-religious parts of the First in *Gitlow* (1925) and then for the religious parts in *Cantwell* (1940), read the liberties originally guaranteed against Congressional interference into the "liberty" the Fourteenth guaranteed against state deprivation ("...nor shall any State deprive any person of life, liberty or property without due process of law"). These belated interpretations, starting almost sixty years after the Fourteenth was framed and ratified, and inconsistent with the standard interpretation of that period, are greeted by Mr. Chapman as a long overdue vindication of the Fourteenth's original meaning. But from his simple account of the opinions of Congressman John Bingham, one of the prominent framers of the amendment who regarded it as incorporating the entire Bill of Rights against the states, one would hardly become aware of the historical and scholarly complications of this much-controverted subject.

Without dilating on these issues, we can at least prove that in so absorbing the establishment section of the First, the Court performed a feat of illogic that not even its vast authority can justify. For if, as Mr. Chapman grants, this section was partly intended to *guarantee* the right of states to their own religious establishments, how can its incorporation into the Fourteenth *deny* the states this right? Assuredly it cannot, and so, notwithstanding everything the Court and its supporters have said to the contrary, this right still remains with the states (as far as the U.S. Constitution is concerned) to preserve or surrender as they wish—though all have, in fact, surrendered it through constitutional provisions of their own.

While Jefferson (together with Madison) is famous for championing religious freedom in Virginia, his work (and Madison's) as the father of American public education is much less known. His plans for dealing with religion in Virginia's schools and university are especially interesting for our purposes, and full of surprises. In his projected "Act for Establishing Elementary Schools" (1817), Jefferson did not permit ministers of the gospel to serve as visitors (overseers), fearing the sectarian jealousy that might be awakened if they did. He also provided that the teachers...

> ...shall, in all things relating to education and the government of their pupils, be under the direction and control of the visitors; but no religious reading, instruction, or exercise shall be prescribed or practiced inconsistent with the tenets of any religious sect or denomination. (Padover's *Jefferson*, p. 1076)

Far from forbidding these religious activities as such, the clear expectation here is that they will be undertaken and should therefore be so selected as not to offend any sect. This may have been the first effort to employ nonsectarian religious readings, prayers, and the like in public schools. Note also that Jefferson displays no concern for the non-religious parent or child, since to consider non-belief as

(*continued on page 30*)

John Nollson

Soul

We decided to drive out to Dorley's for a couple of drinks, a light supper, and some of the music. Dorley's was definitely becoming the place to go. In fact, Dorley's had been written up as the leader in bringing back the quiet jazz sound, the sound we had all heard in the background of the old movies on the TV late show.

Dorley's did not disappoint us. The jazz group was outstanding. The more I listened, the more I realized that it was the piano player who made the difference. His music had a clean sound, assertive but not overstated. His interpretations of some of the old standards, though clearly original, still struck one as definitive. What's more, he looked very familiar.

Suddenly I realized that it was Spiro Agnew.

I picked up my drink and walked over to the piano. It was Spiro Agnew, without any doubt. He was backed up by a bass, drums, and a very mellow electric guitar. Sitting on his piano was a large brandy snifter stuffed with five and ten dollar bills, obviously gratuities deposited by big spenders with special requests.

Spiro looked up and, without missing a note, invited me to sit down next to him. I had always been amazed by the ability of pianists in night spots to converse and play at the same time, even though I had seen it dozens of times on the late show. As I sat next to him on the piano bench, I was impressed once again with his effortless facility at the keyboard.

"Spiro," I said, "what have you been up to?"

"Oh," Spiro responded, "my group and I got tired of one-nighters, so we decided to play here on a regular basis." He shifted, effortlessly as usual, from *Deep Purple* to *I Can't Get Started with You*.

"You know," he continued, "I guess I first realized I could make a go of this back in '72. Nixon invited me to sit down and play something for the Shah during one of those White House dinners. Everyone there recognized that I played much better than Nixon. That really got Nixon furious, especially after the Shah said that nobody played my style of funky piano in Teheran. Do you know that the Shah invited me to play at his great blowout in Persepolis? That really drove Nixon up the wall, because he wasn't asked. I think all my problems with him started that night." And, without missing a note, he left *I Can't Get Started with You* and moved right into *I Wish You Love*.

I was impressed, because not even Georges Feyer or Peter Duchin could negotiate the transition between those two tunes with such grace.

The guitarist took a few bars as Spiro took two sips from a glass of ginger ale supplied by a waiter. Then Spiro sang: "Good-bye, no use leading with our chins, this is where our story ends, never lovers, ever friends. Good-bye, let's call it a day,

but before you go away, there's one thing I want to say...." And with that, he motioned to the crowd to join in; they responded with the first verse: "I wish you bluebirds in the spring, to give your heart a song to sing, and then a kiss, but more than this, I wish you love."*

The crowd continued to sing on its own, and Spiro said to me, "That's a terrific lyric!" He punctuated the lyric with a run of sevenths that was marvelously appropriate. Then Spiro took the solo: "My aching heart and I agree, that you and I could never be, so with my best, my very best, I set you free."*

And the crowd joined in: "I wish you shelter from the storm, a cozy fire to keep you warm, but most of all, when snowflakes fall, I wish you love."*

The applause had not yet died down, but Spiro had already shifted from *I Wish You Love* to *Candy Man*. "It's all a matter of knowing the basic chord structures," said Spiro. "Once you've got them down, you can play practically anything."

We were joined at the piano by a lanky fellow who spoke with a pronounced Oklahoma accent. "Spiro, old buddy," he drawled, "we met a few years back at the annual dinner of the American Petroleum Institute."

"Right," Spiro nodded.

"My wife and I were wonderin' if you would play something to remind us of the old days," continued the Oklahoman. "What about *Danny Boy*?" He slipped a twenty in Spiro's brandy snifter.

"You bet," winked Spiro, and he eased into *Danny Boy*, giving it country and western overtones that brought a smile to the face of the Oklahoman.

"Their eyes always light up when I play the old tunes," said Spiro. The waiter brought another glass of ginger ale and, by now, Spiro was into the first few bars of *I Left My Heart in San Francisco*.

"Spiro," I said, "you play with great expressiveness. You really feel the music."

"Well," said Spiro, "the fact is that I've suffered. I've been through it. Even the black musicians admire the way I play the blues." And with that, he went into *Sometimes I Feel Like a Motherless Child*. As soon as he had finished that great standard, he sang again, this time in a voice that convinced all of us that Louis Armstrong himself was in the room. It was that great favorite, *Nobody Knows You When You're Down and Out*. The crowd applauded.

"I really used to break them up when I'd do *I've Got a Right to Sing the Blues*," Spiro remarked, "but we don't play that tune any more. One of my old friends, Chuck Colson, told me it smacks of self-pity."

Then and there, I realized that Spiro had paid his dues.

My mind must have been wandering, because, when I next heard the music, Spiro was already in the middle of *Bridge Over Troubled Water*. As his hands moved gracefully over the keys, Spiro reminisced. "In the old days," he said, "I never related to the contemporary tunes. I guess it was Nixon's influence. He and Pat would get down in the dumps and they would ask me to play some Harold Arlen. Their favorite tune of his was *Come Rain or Come Shine*. It used to perk up their spirits. Sometimes Bob, and all those guys named John, the lawyers, the accoun-

* "I Wish You Love," written by Charles Trenet; MCA, Inc., publishers; Copyright 1955.