



IN SEARCH OF THE CONSTITUTION

God and the Constitution

May 21, 1987

Religious historians Martin E. Marty and Leonard Levy speak with Bill Moyers and offer their views on the separation of church and state in America.

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03:29

TRANSCRIPT

MARTIN MARTY: What the constitutional framers and the First Amendment framers did in those moments, by keeping God out of the constitution and keeping religion and the civil authorities at some distance from each other, was turn religion loose and free in America. It never had it so good.

LEONARD LEVY: There are people who are not theists who are in our public schools now, in big cities like Los Angeles and New York, by the thousands. There are people who are not Christians or Jews or even, for that matter, Muslims and they ought not be exposed to that cookie prayer which alludes to that divine being who allegedly created the world. You think so, I think so, but there are people who don't think so, and they shouldn't be made to feel like outsiders, as if they don't belong, as if this is not their country. It is their country, as much as it is ours.

BILL MOYERS: I'm Bill Moyers. The Puritans arriving in New England, the promised land in 1620, began the Mayflower Compact with these words: in the name of God, Amen. When the Founding Fathers of the American republic drafted a Constitution for the country 167 years later, in 1787, they began it with these words: we, the people of the united States. There's no mention of God in the Constitution. The word religion appears only twice. Once when the Constitution forbids any religious test for public office and again in the First Amendment, which says, congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. Those sixteen words of the First Amendment have become the charter of religious freedom in America and the cause, in our time, of great conflict and controversy. Did the Founders intend to create a wall of separation between church and state? Exactly what does the establishment clause mean? And why has it settled so little? Why do the controversies rage? We'll listen in this broadcast to two Americans who wrestle with those questions, who grapple with the demons and angels of church and state, between God and the Constitution.

BILL MOYERS: At the University of Chicago, Martin E. Marty, Professor of the History of Modern Christianity. Dr. Marty is president-elect of The American Academy of Religion, senior editor of The Christian Century magazine and the author of over 20 books, including one that received the National Book Award.

BILL MOYERS: In Claremont, California, Leonard W. Levy, professor of humanities and history at the Claremont Graduate School. The winner of the Pulitzer Prize in 1969, he is editor-in-chief of *The Encyclopedia Of The American Constitution*. The controversies of politics and religion we're experiencing today come dressed in modern costume. Can taxes be used to help parochial schools? Can religious symbols be displayed by a city government? Should preachers tell their flocks how to vote? But religion has always played a robust role in American life and in the affairs of state. Americans are religious people. The Pilgrims arrived here looking for religious liberty. What they wanted for themselves, however, they were quiet to deny others. Most of the colonies had laws establishing some form of official church

and you could wind up in prison for preaching the wrong gospel. Or fined for not attending church on Sunday. But conformity began to crumble as other immigrants arrived on the heels of the first Protestants. Tolerance was born of expediency and Americans began to agitate for some separation between church and state. By the time of the Constitutional Convention, most of the nation believed that an establishment of religion violated religious liberty. Many of the Founding Fathers acknowledged that religion promoted individual morality and civic virtue, but they didn't want the new national government to meddle in affairs of religion or conscience. Freedom, they argued, would be guarded by the tolerance of one for all. So many faiths claimed a piece of the American soil, their houses of worship as varied as the land itself, exalting the symbols that give meaning to the experience of believers, providing for the rituals and ceremonies that support convictions. And, at times, reminding us how fragile it all is, how this fair experiment, as Jefferson called it, is vulnerable to passion and bigotry. An experiment in irony, as well as tolerance. We Americans say to government, our faith is none of your business. But In God We Trust is engraved on our currency. Our presidents take their oath of office on the Holy Bible. And the clerk invokes the mercy of God on every session of the Supreme Court.

MALE VOICE: God save the United States and this honorable court.

BILL MOYERS: Tolerance and irony in the promised land between God and the Constitution. In his many books, Martin Marty has traced this tension in American religion and life. The first of his four volume work on modern American religion is entitled, *THE IRONY OF IT ALL*. Marty's no stranger to the contradictions of religion in this republic. An ordained Lutheran minister, he is past president of the American Catholic Historical Association.

BILL MOYERS: Let's start at the beginning. In 1620, the Puritans arrived here. They signed the Mayflower Compact, which began, In the name of God, Amen. One hundred and sixty-seven years later, the founding Fathers draft the Constitution and it begins, we, the people of the United States What happened to God?

MARTIN MARTY: Too many kinds of people were involved in signing the Constitution. God survived in the sense that virtually everyone who signed the Constitution was a firm believer in God, some sort of God or some way of believing in God. But there were too many different kinds of beliefs in Philadelphia. And it's a lot like 200 years later. When there are too many beliefs in a room, you tend to be quiet about something.

BILL MOYERS: Weren't there also many beliefs in the country by then? The Puritans had been joined by Baptists and Quakers and others from Europe who held a non-conformist view.

MARTIN MARTY: In New England, of course, they tried to keep it all of one sort, but they couldn't even do that. And they had to hang a Quaker or two there before they learned that you couldn't keep them out. And in the southern colonies you wanted everyone to be Anglican, or today Episcopalian, and you couldn't keep people out. But it was the middle colonies where the big difference came.

BILL MOYERS: Maryland

Oh in New Netherland, today's New York — by 1654, they had Jews. That meant they had to take in Catholics and Lutherans. The governor didn't like that at all. There went the neighborhood.

BILL MOYERS: Were many of them going to church by the time of the Constitutional Convention? Were we a church going people at that time?

MARTIN MARTY: We were not nearly the church going people then that we are now. And I know that most people today look back and think then everybody went and now nobody does. But in the 1780's, the preoccupation was politics, commerce, nation building. The best talent wasn't going into the clergy, it was going into law, et cetera. And most of the people in the room were members of a church, but they were rather casual church goers. They sort of did their round with it.

BILL MOYERS: What did the world look like to most of those men in that room? They were learned, they were men of vision, they were men steeped in the world and the affairs of politics. What did the world look like to them?

MARTIN MARTY: I think to most of them the world had two very interesting features in that, on one hand, they were people of the Enlightenment, which meant that they had considerable faith in what reason could do, what science could do. They believed in a measured kind of progress. They believed that what they were doing was worthwhile. They believed that there could be outcomes that were worthy of their investment. And, on the other hand, almost to a person they tempered this with a very realistic view of human nature. In Christian terms, they believed in original sin. In Enlightenment terms they believed in human limits. And so they present so much energy on investing hope in the people and then limited government and saying, "What are we going to do with interest and self-interest and faction and sect?" and their religion was the same thing. On the one hand, they

thought God was endowing this republic with special mission, special virtue, special calling. And the same God is holding them to account, whether they were clearly Christian or whether they were like Benjamin Franklin, who was, at best, barely Christian. He still did believe that God, whatever God was, would hold people responsible.

BILL MOYERS: Their eyes were not so much on heaven as they were on making life better, building order, building a government, building a society on earth.

MARTIN MARTY: Most of them spoke of religion in terms of its usefulness for society and in their private writings, not so much the record of the hearings of what went on there. You could tell, they are preoccupied by that. Religion is useful. And somebody has said they even treated religion like a utility. There's a water works and a gas works and a religion works. They wanted religion to thrive, though they were not passionate in the sense that today 's Jew or Christian would look for a God intoxication or a passion for being saved.

BILL MOYERS: Yeah, I read a passage from Madison talking about if wrong can be done, it shall be done and we have to take steps to guard against the wrong that can be done because it will be done. So they did have this understanding of the limitations, the imperfections, as you say, the original sin of human beings.

MARTIN MARTY: Your mention of Madison is just the perfect choice because the two things that I said they bad, he had especially programed in him. He was a child of the Enlightenment, and I mean child because at age 13, 14, 15, he's reading the Greek and Latin classics. To get into Princeton he had to translate the gospels from Greek into Latin. The other thing is he went to Princeton, he chose to go to that Presbyterian school under John Witherspoon. And, while Madison is very close to the vest about his personal, religious views, he had a pretty heavy dose of Calvinism and its views about human limits.

BILL MOYERS: He talks very little about his own beliefs, his own personal piety. Bible as a kind of a useful book for inculcating morals. But when he was in his eighties, the president of Yale tried to flush a creed out of Franklin. And he had to know a little bit about his wit and his sense of irony. "Oh yes, he said, "I believe there is a God. I believe that God will reward or punish us. But what the president of Yale was pushing him on was the deity of Christ. "Well, I've studied that," he said, too. And I've noticed that some people who believe it are good and some who don't believe it are good. And some who believe it are bad and some who don't believe it are bad. And, therefore, it can't be the deity of Christ that makes people good or

bad.” And he said, “Furthermore, as to the truth of that proposition, I’m an old man. I’ll soon die and I’ll have an easy way of finding out its truth or falsehood. “That’s typical of Franklin

MARTIN MARTY: Madison is not often visibly impassioned, but on religion he could get impassioned, not about his and Washington and others who speak of the deity of Christ. They did not believe that they took great pains not to. They respected the Bible. content of the nation’s faith, but about faith. This cool, cool, reserved sounding man could write about a diabolical, hell conceived principle by which ministers of the gospel were imprisoned in a county near him because they weren’t of the right faith. That’s passion. And, similarly, in The Federalist Papers, there’s real passion. Don’t try to remove the roots of interests and sects. That’s the deepest thing in people. Blunt their effects. See to it that they can’t act on their worst impulses by arranging it so that all the other people check each other out. And that’s really how he looked at the religions of America, too.

BILL MOYERS: Back to Franklin. You said that Franklin was barely a Christian, but didn’t he speak quite well of the Bible?

MARTIN MARTY: They all tended to speak quite well of the laws, though, could be drawn from the Bible or any other revelation. The laws had to spring out of nature and out of reason. What the constitutional framers and the First Amendment framers did in those moments, by keeping God out of the Constitution and keeping religion and the civil authorities at some distance from each other, was turn religion loose and free in America. It never had it so good. They had come from establishments. And I can say two hundred years later Europe still has leftover establishments. Church attendance will run four, six, eight percent in England or Sweden or Italy. And in America it runs forty and forty-five. I think that’s because their religion, as they all said in their experiment, would be on its own. And if you backed religion with governmental force, Madison said, you ‘d make either hypocrites out of people, they have to pretend they have the right faith, or knaves, they’re gonna misuse it, or fools because they’re setting up a strange circumstance.

BILL MOYERS: You cannot, he said, coerce opinion. You cannot force the conscience.

MARTIN MARTY: What they were really foreseeing, I think, is today’s Yellow Pages.

BILL MOYERS: The Yellow Pages?

MARTIN MARTY: Yeah, the Yellow Pages, with their advertisements for churches. Whenever I hear people say that, if we would just legislate the Judeo-Christian tradition and then we would all agree, I open it and I see Baha'i and I see Baptist, black Baptist, white Baptist, southern Baptist, northern Baptist. I think of the five Baptists that the Americans would know best and try picturing putting them in a room and saying, Now you come out with exactly the prescript for our society. How are you going to get Unity Church and Unitarian and Unite Church of Christ and the United Methodist to agree? All these people are passionate contributors to American life. I think that we would be in bad shape, worse shape than we are, if we didn't have them transmitting tradition and building a new generation. But never with governmental support.

BILL MOYERS: Why do so many Christians call Jefferson an infidel? They were passionately opposed to him, of all the Founding Fathers, it seems to me.

MARTIN MARTY: Jefferson is very far from anything like Christian orthodoxy, but he knows biblical language. He snips the gospels apart to get the teachings of Jesus without miracle and without divinity.

BILL MOYERS: You mean he took out all the references to anything Jesus did supernaturally?

MARTIN MARTY: Yes, and he did this by pasting it all together. He didn't want to be accused of distorting the words, so he took the New Testament in English, Latin, French and Greek, if originals still exist, pasted them together, took out all supernatural reference. He respected the morals of Jesus, but he didn't believe in the divinity of Jesus. To this day, people who would like to have government promote and favor and support religion, Jefferson is a problem. You either have to sort of baptize him retrospectively and clean him up, which is very difficult to do, or he remains the infidel. He was, by their terms, an infidel. He said Calvin 's God, the Trinity, that's mathematics, that's not religion, three in one, one in three. Well, that's deliberately offending. Normally very respectful of religion though. As I say, he respected Jesus —

BILL MOYERS: Baptists liked him.

MARTIN MARTY: The Baptists liked him and that's why nobody else did. But the Baptists had a very discriminating sense. Elder John Leland, who came to support Jefferson from up in Cheshire in New England, made a big Cheshire cheese and went along and made speeches for Jefferson and for Jesus. Well, he knew what

Jefferson didn't believe, but he knew that Jefferson was his best friend as far as what Baptists called soul liberty.

BILL MOYERS: Soul liberty?

MARTIN MARTY: Yes.

BILL MOYERS: Great term.

MARTIN MARTY: Yeah, you had to have — the mind and the spirit couldn't be trammled, couldn't be bound. Madison, Jefferson were the strongest two on that, but most of the Founders had that feeling. I should also say that those who were for an establishment —

BILL MOYERS: An established religion, an official religion.

MARTIN MARTY: Yea, a religion that was favored by the state and paid for, you might say, by taxes and privileged in every respect. The inside track religion. The people who supported that weren't bad guys. George Washington was for it. Patrick Henry was for it. Any number of these people were. They had not known a world for 100 years in which you didn't have religion supported by the state. They didn't picture it. But as far as the content of Washington's faith is concerned, I don't think people would be much happier with him than with Jefferson. The instances we have of Washington kneeling in prayer, the postage stamp and the window legendary kinds of things. Washington often attended church, but he didn't take communion. He never refers to the deity of Christ.

BILL MOYERS: What do you make of the fact that at his Inaugural he took the oath of office with his hand on is in tune with what they call the intuitive wisdom of the people, knows that he has a perfect right to celebrate that in public.

BILL MOYERS: But it means that the Bible is something more than the source book for revealed religions' faith. The Bible has become something other than a supernatural instrument. It's become a prop in the civil society.

MARTIN MARTY: I think all these Founders, again, in their respect for the Bible, took it with certain grains of salt. They were always separating the morals from the miracles and the stories from the ideas of good and virtue that they thought were there. And they had so much faith in reason that I think they thought they could all do what Franklin and Jefferson did, sit people down and take those things that are in the Bible that were offensive to them out. There are a lot of things in the Bible

that you couldn't build a civil society out of. The Sermon on the Mount, for example, you couldn't have an army on the Sermon on the Mount. If every man who ever lusted had had his eye out the next day, as Jesus said one must, we would have a nation of amputees. The New Testament doesn't exist to build a civil society.

BILL MOYERS: But if morals grow from beliefs, if conduct and behavior come from faith, aren't you undermining the structure of conduct and behavior when you demystify the faith? the Bible and then kissed the Bible?

MARTIN MARTY: Franklin and Others did an extremely delicate thing when they talked about public religion.

MARTIN MARTY: Washington's faith says, I will kiss the Bible. Just because he's the chief executive, he doesn't surrender that. The smart chief executive won't overplay it, but a chief executive who has a faith and for them, public religion didn't mean what it might have meant for Rousseau, civil religion that was from the top down, in which the state determines these are the truth. You have that in France in their decade and the last thing they wanted was French anti-religion and French Enlightenment. They start at the other end. Franklin, in effect, said, what are we gonna do with all these nice churches out here? Everyone has to have a separate "schtik". Catholics have to have the pope and the Lutherans have to have the Lord's Supper their way and the Baptists have to baptize people late and the Quakers have to be quiet. And they're all kind of strange in some way, but they all have a common morality. He oversimplified that common morality, but I think the Church has always accepted that bargain. And Franklin had respect for what they believed separately. When the greatest evangelist of his day, George Whitefield came to Philadelphia, Franklin heard that he could be heard by 30,000 people. Scientist Franklin didn't believe it. He measured it off on Walnut Street, Market Street, Eighth Street, said, Yeah, 30,000 people. He became Whitefield's printer, wanted to make a little money off him, but he also gave money for his tabernacle. Because he said, when he comes to town, I don't agree with all in his revival. But people talk the things of God, they get moral, et cetera. See, here again, it's the private, voluntary sector building community. That suited Franklin perfectly well. He just didn't dare have top down. You didn't 't dare have a state that says there shouldn't be religion or a state that says here are the approved religions.

BILL MOYERS: So this is why men skeptical of organized religion, determined to keep organized religion at bay, from the political throat of the country, could also say, as Jefferson did, that the liberties of a nation would be lost if people forgot that those liberties are the gift of God.

MARTIN MARTY: You won't find a Founder who 's going to knock God if we allow them to define God their way. Even Tom Paine, the most radical, of course he's not in the Constitutional Convention, but he is the patriot who is the radical. Theodore Roosevelt, a century and a half later, called him a filthy, little atheist, none of which he was. He believed in God, but it was this God of reason. They all gave great credence to the notion that push people far enough, they 're gonna act best when it's grounded in the depth of being or God or Great Architect or Great Author, they used words like that instead of the biblical terms.

BILL MOYERS: So they did find something down there that they could all stand on, even though they disavowed much that others believed.

MARTIN MARTY: Here again they were heirs of the Enlightenment, including the Scottish Enlightenment, which believed that one of the faculties in the human was a moral sense. And Washington could speak of conscience, that is, before anybody reaches you religiously, it's there. It could be obscured, it could be damaged, it could be that, but you have to count on that. And reasonable people are going to come to that. Now these people knew that reason wouldn't solve everything. They disagreed with each other viciously in that hall in Philadelphia.

BILL MOYERS: Often walked out, threatened to walk out.

MARTIN MARTY: Oh yea, the — and one of the reasons they were excited about religion is because they knew that if they'd ever bring it up, they'd have to walk out.

BILL MOYERS: That's why Ben Franklin suggested prayer at a critical moment. They were at each other's throats and Franklin coyly suggested that maybe if they paused and prayed, tempera would be enlightened by the grace of nature 's God.

MARTIN MARTY: But they didn't pray. And they didn't pray, I think, partly because they couldn't have gotten a quorum on how to go about saying the prayer.

BILL MOYERS: Also, they didn't have the money to pay the chaplain.

MARTIN MARTY: That's right. There's an old legend that Alexander Hamilton said that it was a domestic issue, they shouldn't call in foreign aid. But that is probably only a legend. But I think they all kept a little bit at a distance. Let's not bring up that kind of thing.

BILL MOYERS: What do you think the Founders would say if they could see their handiwork today?

MARTIN MARTY: I suppose they'd be overwhelmed by one feature of it and that is, I don't think they anticipated this wild a pluralism.

BILL MOYERS: It's a religious jungle out there.

MARTIN MARTY: It's a religious jungle out there. And not many years from now, an interesting moment will occur. There will be more Muslims than Jews in America. There are from two to five million Muslims now. Will we then be a Judeo-Christo-Muslim society? Will we be the people of the book, the children of Abraham? Meanwhile, there are 50,000 people seriously practicing the religions of India. There are new boat people coming all the time. California's had a Buddhist senate chaplain, et cetera, et cetera. The new Hispanic Catholicism differs greatly in style from the older Catholicism that Americans had known. And the Black religions are full of fervor and they help elect our mayors in so many cities. All that is going on out there.

BILL MOYERS: But all over the world there are counterforces at work. The rise of tribal fundamentalism and fratricide, Sikhs versus Muslims in India, Jews versus Arabs in the Middle East, Protestant versus Catholic in Northern Ireland, Beirut – Christians versus Muslims, Muslims versus Muslims, Christians versus Christians. One could look at that and feel apprehensive about the future.

MARTIN MARTY: I'm cursed with a face that makes me look optimistic when I'm not. I'm not optimistic. Around the world, I am grim about the prospects. I have a friend who says, we don't know enough about the future to be absolutely pessimistic, but I come close when I take the geographical tour you just did. Therefore, I start on a different base and I just say something has relatively worked here. In 500 years of American history, I know you could say there's a religious base to the removal of the Indians and there was a religious base to slavery. Let 's take those horrendously big, separate topics aside and say in 500 years there 've been fewer people killed in holy war on American soil than are accounted for in this week's, any week's news magazine around the world. But the stakes are so high that I would rather say, in the Madisonian spirit, I am a realistic hoper. Hope is not the same thing as optimism. I have no assurance that we won't go the way of a Lebanon someday. I think we have better resources to ward it off, but it's there.

BILL MOYERS: Lebanon is a good example of a society when the civil polity breaks down, there is no neutral force to restrain the passions on either side. And fundamentalist tribes war on each other.

MARTIN MARTY: Once in a while, you will hear celebrations of that impulse in America because a lot of people in the constitutional tradition are pretty limp about it. I have a little formula that says one of the problems in our society is that the highly committed people aren't 't very civil and the highly civil people aren't very committed.

BILL MOYERS: Can our Constitution keep the extremes at bay in this country? And, given the pluralism of American society, can we develop virtuous people without the Judeo-Christian tradition?

MARTIN MARTY: The Constitution can't give us anything. Only virtuous people who care about it could give us anything. It helped, through the people who drafted it and lived it, set up a polity which has to be thought over afresh in every generation. And if there are enough of them who care enough, we can make it. The Constitution gave us the ground rules and the lines on the court, so we know how to get the argument going. And from there on in, each generation has it to themselves.

BILL MOYERS: Leonard Levy has been In search of the Constitution throughout his adult life as scholar, teacher, editor and writer. For almost 20 years he taught constitutional history at Brandeis University in Massachusetts. Then, in 1970, he moved to the Claremont Graduate School in California, where he is professor of history and chairman of the department. He is widely recognized as one of the country 's most prolific students of the Constitution. In addition to his 26 books, the Pulitzer Prize winning historian has organized over 250 other scholars to produce, in this bicentennial season, the first Encyclopedia of the American Constitution. His latest book is on the establishment clause of the Bill of Rights – religion and the First Amendment.

BILL MOYERS: When I look at these amendments, I'm struck that the very first amendment and the very first clause in the very first amendment says congress shall make no law respecting an establishment of religion. That's the first one. Do you think that was deliberate?

LEONARD LEVY: It's wonderful that it is the very first amendment and the very first clause, but no, it wasn't 't deliberate. That was originally the third proposed

amendment to the Constitution. There were initially twelve that were being proposed. Two did not get adopted. And so what had been the third became the first. We like to believe that there is a special significance in the fact that it is the First Amendment. And, indeed, there is, symbolically, because these are our most treasured rights. And they're the very matrix of our system of freedom. It's a happy historical accident. What's the word? Serendipity?

BILL MOYERS: Serendipity. You write in *THE ESTABLISHMENT CLAUSE, RELIGION AND THE FIRST AMENDMENT*, you write that the Legislative history in the framing of the amendments, the Bill of Rights, prove that they, the Founding Fathers, wanted to make explicit a point on which the entire nation agreed. Quote: The United States government had no power to legislate on the subject of religion. First question. How do you know that?

BILL MOYERS: Despite the Constitution?

LEONARD LEVY: Those who feared the new national government argued that the constitution ought not be ratified because it might infringe freedom of religion or create an establishment of religion. Those who framed the Constitution said over and over again in unmistakable terms, No, you're wrong. This is not a government that has any authority whatsoever over the subject of religion. It can't pass laws touching the subject. So that, even in the absence of the First Amendment, there is no governmental authority to assist, aid, promote, endorse, sanction, financially aid, et cetera. The government can't get involved in the area of religion. It's supposed to keep out.

BILL MOYERS: Okay. Second question. Again, the United States government had no power to legislate on the subject of religion. They didn't say the states didn't have that power. They left the states free to legislate on religion, right?

LEONARD LEVY: Yes, that is correct.

BILL MOYERS: And the states did for a long time, right?

LEONARD LEVY: They did, indeed, for a long time continue to legislate on the subject of religion. Even after Massachusetts separated church and state in 1833, there was still state legislation which is discriminatory in character. For example, only theists or, for that matter, believers in the Bible may take an oath in court to offer testimony.

LEONARD LEVY: But the Constitution did not apply against the states. The Constitution included prohibitions upon the powers of the United States government to protect the citizens of the United States, but it did not in any way limit the powers of the states in these areas of civil liberties and civil rights.

BILL MOYERS: For a long time. Then it's 1947, you're a young man and I'm a young boy. Justice Black, for the majority of the Court, says finally, after all these years, the establishment clause of the First Amendment means at least this – neither a state nor the federal government can pass laws which aid one religion, aid all religions or prefer one religion over another. A hundred and fifty-three years later he decides the First Amendment means something you just said it didn't mean for so long.

LEONARD LEVY: What he said there was that it meant, with respect to the states, what it had always meant with respect to the United States. What he said was that the federal standard now applied against the states. So that what the United States government could not do and could never do from the time of the beginning of the Constitution, and especially after the addition of the First Amendment, what the United States government could not do nor could the states.

BILL MOYERS: And he did that, it seems to me, on a rather flimsy theft of the Fourteenth Amendment when he said that the Fourteenth Amendment, passed in 1868, really did incorporate the purposes of the First Amendment. Now isn't there a preponderance of evidence that the framers of the 1868 Fourteenth Amendment did not really intend to incorporate into the Fourteenth Amendment the First Amendment of the Bill of Rights?

LEONARD LEVY: The framers of the Fourteenth Amendment, who may not have intended incorporation of the Bill of Rights against the states, are abolishing slavery and laying down certain prohibitions upon the states. But they're playing to Jim Crow galleries, at least in the Senate. They control the District of Columbia, where there are Jim Crow cars. We don't want to be bound by their understandings as to the fact that the Fourteenth Amendment allowed the states to engage in Jim Crow legislation, as they were doing in the District of Columbia. Our values change, our standards change. The country changes. With respect to the First Amendment, this is a different nation. It's as if a different world had come into being after the adoption of the Fourteenth Amendment down to the time of our younger lives.

BILL MOYERS: It was still a white, Protestant America up until the early part of this century.

LEONARD LEVY: I think that World War II certainly changes everything. The country, sure It remained a white — it's still a white, Protestant nation, if you put it that way, in the sense that the overwhelming majority of our citizens are white and are Protestant. But the largest single denomination in the country today, about 55 million now, are Americans of Roman Catholic belief. There are 6 million American citizens who are Jewish. There are dozens, as a matter of fact there's something like 250 different sects and denominations in this country, including members of religions that were not even known at the time of the framing of the First Amendment. Those who framed the First Amendment never heard of Christian Scientists or Pentecostals or Mormons or Jehovah 's Witnesses. What I'm getting at is that, as the country changes, so too must the meaning of the Constitution. The Constitution's fixed. The words are still the same, words that were on the parchment then, they 're still the same today. But the meaning that we have to give to them should change as we change. Two hundred years of ever expanding democracy should have some constitutional impact and I think that was a monumentally wise step

BILL MOYERS: Which?

LEONARD LEVY: — which gave good constitutional content, a good constitutional basis for the position that the states should no more be able to recreate an Inquisition or establishments than the United States.

BILL MOYERS: There are so many people who say that the original intent of James Madison and George Washington and Benjamin Franklin, those other men, particularly Madison, that their intent is much more to be reckoned with than that of Hugo Black in 1947. And isn't it just as hard to take the word of Justice Black as it is to take the word of James Madison?

LEONARD LEVY: James Madison believed in an extreme separation of church and state. People today who say that we should go back to the original intent think, mistakenly, that James Madison's position bears them out. Because what those who advocate as a jurisprudence of original intent don't know, because they know very little about history, is that when James Madison used the term no national religion, he meant by it no laws at all touching the subject of religion. He meant that because he said that publicly paid chaplains in Congress constituted a national religion. He said that days of fast or of Thanksgiving were a national religion. If you look at what Madison, who framed the amendment initially, meant by no national religion, we know that it had a very broad meaning. However, that term no national religion is not in the Constitution. We can't take them too literally. Congress shall make no

law respecting an establishment of religion nor prohibiting the free exercise thereof. Are we to take them literally with respect to their use of the word prohibiting? Do you realize that government can regulate religion and abridge religion without prohibiting it? In the very next clause, the Congress shall make no law abridging the freedom of speech and press. Why, if you take them seriously, why did they distinguish in the religion clause the verbs? No prohibition thereof. Yet later they say no abridgment of free speech.

BILL MOYERS: So what are you saying?

LEONARD LEVY: I'm saying you can't take the text of the Constitution literally if you —

BILL MOYERS: What do you look for?

LEONARD LEVY: The historical intent in the kinds of evidence that I'm bringing to bear here. What did they understand by establishment? What kinds of establishments did they see around them in the seven states that existed? Aid to all religion, impartially. That was an establishment. That's what Congress cannot do. And that's what the states can't do, can't aid all religions impartially, after the Fourteenth Amendment is added. You look to the general understanding, to the historical evidence and to the meanings that men did put upon words, like what Madison meant by national religion.

BILL MOYERS: Isn't there a case for those people who argue that the Court has gone far beyond what can be clearly discerned in the record? People who claim that government aid to religion does not violate the First Amendment so long as no church or denomination receives preference over another. Attorney General Meese says the clause was designed to prevent Congress from establishing a national church, that as long as government does not designate a particular faith above all the rest, aid to religion is constitutional. And the chief justice of the United States, sitting on the same bench where Hugo Black sat, says much the same thing, that it's alright for Congress, the government, to help religion in general as long as it doesn't say, we'll help the Baptists more or the Protestants more or the Jews more or the Hindus more.

LEONARD LEVY: I suppose that Chief Justice Rehnquist also believes in black magic. Because only black magic can turn a limitation upon governmental power into an authorization for governmental power. There is no power on the part of the government expressly given to it by the Constitution to pass laws touching the

subject of religion. And, indeed, there is an express prohibition on that power. How you turn that express prohibition into an authorization I really don't know.

BILL MOYERS: But if they read history, if they read the record around the text of the Constitution, they find such things as the same Congress that passed the Bill of Rights immediately thereafter passing a resolution for a day of thanksgiving. Now that's an aid to religion. That proclamation for thanksgiving serves a religious purpose. And they read this—

LEONARD LEVY: You 're absolutely right. And they used that as a precedent for expanding the aid given by government to religion. Look. no principle expresses an absolute. There are exceptions to everything. I said this clause, the establishment clause, no government aid to religion. There are many exceptions to that, many. These people simply want to add to the exceptions. Among the exceptions, not the least of them is the fact that the Supreme Court. itself, opens its sessions with a cry, wood save the United States and this honorable Court.

BILL MOYERS: As you say though, right here on the dollar it says, win God We Trust. And children in school pledge allegiance to one nation, under God. I mean, that's promoting religion.

LEONARD LEVY: Boy, if there's any evidence, incidentally, that government aid to religion trivializes religion, deprives it of its content, can harm religion, just look at that — God on our money. commercializing God. It's proof that Caesar is profane, Caesar is not to be trusted, Caesar trivializes that which ought to be sacred. But I was saying there are many exceptions.

BILL MOYERS: You talk about exceptions and these people use them as examples. But let's take the most glaring exception of all, that government exempts churches and ministers —

LEONARD LEVY: And church properties.

BILL MOYERS: And church properties from paying taxes. Now I don't know what advances the cause of religion more than that government privilege.

LEONARD LEVY: You 're absolutely right. I agree with you that such tax exemption does advance the cause of religion. And this is a major exception, which the Court took into consideration in a case which it decided in 1970, the Walz Case. And it held that for the government to do otherwise would get it involved in all kinds of messy questions that the government shouldn't be entangled with. If the Court had

reached a different kind of conclusion in that Walz case in 1970, it would have created such a hostility amongst the public and in Congress and in the state legislatures that there might have been opposition to the principle itself, to the principle of separation. And the Court is attempting to preserve the integrity of that principle by yielding a little here and a little there. And the problem we have is not that it yields a little here and a little there, but rather that we can't tell what principle is governing its decisions when it does yield here but doesn't yield there. The Court's decisions are not very consistent. The Court taking the position that a creche, a nativity scene, at Christmas time on public property is a very sacred Christian symbol, in no way furthers or promotes a cause of religion merely because Christmas has become a sort of national holiday and there close to the baby Jesus is a figure of Santa Claus. It's ridiculous. So that the nativity scene is no more sacred than Rudolph the Red Nosed Reindeer? That scene is one which some Americans find offensive, in the sense that because it is a profound, Christian symbol, it makes others who don't share that belief feel as if they are outsiders, as I felt, by the way, when I was a kid in DeKalb, Illinois, and had to hear school prayers and had to be excused from them. And they all picked on me because I was Jewish, I was the outsider. I didn't feel it was my country, my school or my place. If I confront that nativity scene in a public place. with public money — Alright, there they find no violation of the establishment clause. I think they should have. By golly, my position is that they wouldn't know an establishment of religion if one toot life and bit them on the nose. There are many cases which show genuine inconsistency, inexplicable inconsistency in Supreme Court decisions. You mentioned Justice Black's opinion for the Court. It was a unanimous opinion for the Court, in which he held that any government aid could violate the establishment clause and quite properly so. But in that very case the Court divided five to four with respect to the particular question before the Court, shoving you it's pretty hard to apply the principle and you don't understand why they do or don't do something in any given case. Five men, a bare majority, thought that state subsidized bus rides of parochial school kids to their school did not constitute an establishment of religion. And for quite reasonable explanation, too, that the state was attempting to secure the safety of those kids. It paid for the bus rides of others — is it for the benefit of the children involved? That's the point. But there are subsequent cases in which the Court had held that a whole variety of aids, which seemed to be for the children, are indeed not for the children at all, but advance the religious mission of the school.

BILL MOYERS: Free textbooks for its children. For example, In parochial schools —

LEONARD LEVY: Well, free textbooks if they 're the same as the textbooks used in a public school are constitutional, that's for the benefit it of the children. But if there's a globe, an atlas, videotapes, all kinds of so-called instructional aids, these are regarded by the state as not for the benefit it of the child, but for the benefit of the school. How a textbook is for the aid of a child but the book of maps isn't is sort of hard to figure out.

BILL MOYERS: But aren't 't the Court's decisions erratic and confusing because there are nine men and women from different persuasions, appointed at different times by different presidents of different political philosophies, grappling with, as you said earlier, the most excruciatingly difficult human issues, of belief and faith and my relationship to God. And is there a principle that would apply uniformly over the course of these emotions and these beliefs?

LEONARD LEVY: I have to agree with your premises and — no, I can't come up with one quick principle for you which —

BILL MOYERS: We live with this, we live with this —

LEONARD LEVY: Yeah, we live with this dilemma as to what this means, but it's not just that the Court has so many cases over so large a period of time. Even members of the same Court sometimes change their minds. Even though individual members of the Court may change their minds over a period of time, that's not really the problem. Nor is the fact that the words of the Constitution, which they must construe, are inherently ambiguous That's substantially true. I think that part of the problem has to do with the fact that we have a Humpty Dumpty Supreme Court. By which I mean, there's a passage in which Humpty-Dumpty says, words mean what I choose them to mean. And Alice says, but could words have that many different sorts of meanings ? And Humpty says, "Of course, it all depends on who 's master. "

BILL MOYERS: What fascinates me is that you say it was wrong and you disagree with it, but you live with it. And all of us who find the Court from time to time or often offending us still live with it. The Court, interpreting this First Amendment, has become the arbiter of these issues and is the final umpire

LEONARD LEVY: It certainly is. That is the nature of our system. Whether it's the best system or not, it's one that certainly works, has been working well for us —

BILL MOYERS: But the game is never over.

LEONARD LEVY: — despite the fact that the controversy is so keen. But that's part of the system, you see. The controversy of the kind that we're engaging in or that's generated by decisions that people disagree with engulfs the country, results in conversations like this, forces people to think through the issues, to come to conclusions and to exert some kind of influence on the Supreme Court. It's not completely insulated. It listens to conversations like this and to what gets published about it's that we are in the process of helping make the Constitution mean what it means, even though it's the Court which, at least initially, has the final word. But only initially. It's a paradox, I know, but we can influence the Court. prayers. You grew up in DeKalb, Illinois, didn't you?

LEONARD LEVY: I did.

BILL MOYERS: Twenty years ago there was a case in DeKalb, when the Court said the cookie prayer was unconstitutional.

LEONARD LEVY: I forgot that it came out of DeKalb.

BILL MOYERS: The cookie prayer actually said, we thank you for the flowers so sweet. We thank you for the food we eat. We thank you for the birds that sing. We thank you, God, for everything. And the Court declared it unconstitutional, even though the teacher took the word "God" out of the prayer.

LEONARD LEVY: She did, but keep in mind that the court didn't quite declare it unconstitutional. If the Supreme Court won't issue certiorari, won't agree to review a case, all that they're saying is that we allow the lower court decision to stand. If that's the way you construe it, which is the reasonable way to construe it, yea, the Court, in effect, upheld that.

BILL MOYERS: Do you think the Founding Fathers would have thought that little verse an establishment of religion?

BILL MOYERS: What about school prayer?

LEONARD LEVY: think that the state should not promote or sponsor religion.

BILL MOYERS: But there are prayers and there are

LEONARD LEVY: I think not, but to begin with, that's a prayer that's being said in the public school, right? The Founding Fathers had no position with respect to prayers in public schools because public schools, as we know them, did not then exist. Prayers do not belong in the public school system even though they have

been sterilized, as in the cookie prayer, which is a non-denominational prayer and doesn't even refer to God. And I agree with you that the religious liberty would not be imperiled if children were able to say the cookie prayer in the public schools.

BILL MOYERS: The teacher said that she was only trying to instill a sense of wonder in the children, to make them appreciative of the world around them and of the divine being that made that world possible. She wasn't trying to persuade them or to indoctrinate them, only to instruct them.

LEONARD LEVY: These cases are very complex. That's why the Court divides so closely and so frequently and is so inconsistent. There are not clear answers. And when you say that that teacher really wanted to inspire children with a sense of wonderment and you referred to her saying, the creation by a supreme being, that is a religious statement. You may believe it and I may believe it, but there are a lot of people out there who don't believe it.

BILL MOYERS: You think this First Amendment protects atheists, areligionists?

LEONARD LEVY: Of course it does. The First Amendment protects religion and non-religion. There are people who are not theists who are in our public schools now in big cities like Los Angeles and New York by the thousands. There are people who are not Christians or Jews or even, for that matter, Muslims. And they ought not be exposed to that cookie prayer, which alludes to that divine being which allegedly created the world. You think so, I think so, but there are people who don't think so. And they shouldn't be made to feel like outsiders, as if they don't belong, as if this is not their country. It is their country, as much as it is ours.

BILL MOYERS: If I remember correctly, you refused to take part in prayers in DeKalb, Illinois, when you were a boy there, 1935, 1936. What happened when you said, I can't participate in that prayer. What happened?

LEONARD LEVY: I was ostracized and, well, more than that. I was persecuted. They beat me up regularly. As I would go home from school, kids would jump out, gangs of kids would jump out from behind bushes and beat the hell out of me and call me the Jew bastard and Christ killer and nasty kinds of names. And I used to love to play softball and I was kept off the team. No kikes on our team was the motto, which had, by the way, some sponsorship from members of the faculty. When religion is introduced directly into the public schools there is a price that may very well be paid by people who are different.

BILL MOYERS: There have often been times when persecution was visited upon children who wouldn't participate in the public school rituals of religion. In Philadelphia in 1862, when a Catholic bishop merely asked the Protestant officials in the school to let his children read a different version of the Bible, the Catholic version of the Bible, you remember what happened?

LEONARD LEVY: Yes, there were riots that went on for a couple years, as a matter of fact. There were two churches that were burned, there was a convent that was burned. There were twelve or thirteen people who were killed and there were forty or fifty people who were beaten up and severely hurt as a result of the bigotry that Protestants unleashed against Catholics in Philadelphia.

BILL MOYERS: That's clearly what the Founders intended to avoid, isn't it? That sort of passion engulfing society for religious reasons because people differ.

LEONARD LEVY: You're right. What happened in Philadelphia in 1842 is exactly the kind of thing that the Framers found most repugnant, abhorrent and that they wanted to avoid. And they tried to create a system in which religion and government were separate so that neither would be sovereign over the other, neither would be subject to the other. Each would be free of the other to avoid what happened then in Philadelphia.

BILL MOYERS: But that incident in Philadelphia is an example and what happened to you and it's repeated countless times.

LEONARD LEVY: Yes, it did. There's a good deal of prejudice, but — The system may work imperfectly, but it works on the whole quite well. There are regrettable instances, but they diminish in number over the years and I think the system is working better now than ever before. It ages well. It's got long legs. I think that as it ripens and matures, it's becoming more and more wonderful because of the greater diversity and the greater amount of freedom.

BILL MOYERS: Given the difficulty the Court always has in deciding these issues, if the Court, being human, has to err, on which side should it err?

LEONARD LEVY: I don't think it should have a choice in that regard. It has to err on the side of keeping religion and government as separate as possible. It has to err and make its mistakes when it votes in favor of the wall of separation between government and religion because it is the mandate of the Constitution that there shall be no law respecting an establishment of religion, no aid to religion. There are exceptions, but if they have to make a choice, they have to choose in accordance

with the policy that is quite, I find, explicit in the Constitution. Err on the side of separation for the good of religion, for the good of religious liberty and to keep the government clean.

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FROM THE SHOW

- God and the Constitution

TOPICS: Democracy & Government, Justice

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