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INTERVIEW SUBJECT: Robert Tuttle
FILM: Prayer In America
INTERVIEWER: Alison Rostankowski

The segments included in this interview excerpt were recorded in Fall 2006, as part of *PRAYER IN AMERICA*. The documentary is a production of the Duncan Group. Iowa Public Television is the presenter and flagship affiliate for the PBS system. Robert Tuttle is Professor of Law, at George Washington University Law School, and co-director, LegalTracking Project, Roundtable on Religion and Social Welfare Policy.

Q It would help me a lot in terms of setting a context for the interview if you could give us a historical overview of how the Constitutions views the separation of church and state.

TUTTLE Well, the first thing is, the Constitution doesn't talk about the separation of church and state. The Constitution Establishment Clause says, "Congress shall make no law respecting an establishment of religion." In that context, establishment may have meant only originally Congress can't set up a national church, because, at the time the Constitution was drafted and adopted, a lot of the states, particularly in New England, had established churches. So obviously the Constitution of that time didn't say, you know, separate church and state. The phrase comes from Jefferson, fifteen years after the adoption of the Constitution. It really only gets picked up later in the 19th Century, originally by folks who had a pretty strong anti-Catholic bias with this idea that you need to separate and separate for a particular purpose. You need to separate in order to keep the government from being taken over by Catholics.

Separation of church and state in our modern understanding of it, comes in a stronger fashion after the end of the Second World War. When the Supreme Court first applies the Establishment Clause to the states and then it becomes a national policy. But again, separation is probably not the best way to describe what goes on. It's a limit on the government's ability to promote, to adopt a religion rather than the kind of institutional wall that is usually portrayed.

Q Can you lay out for us what was really happening in the minds of the founders at the time they're conceptualizing this idea.

TUTTLE The answer is that there were lots of minds of founders because there were as many minds as there were founders. You have founders who were decidedly deist, that is they believed in a God but not the Christian personal God who involves himself in history. And on the other pole, there were those who were deeply devout Orthodox Christians in the sense of going to church regularly, participating in the Sacraments, deeply Evangelical men at that time. And so it's hard to say that the founders had a mind, because they reflected in their own religious habits and commitments, the full range of American experience at that time, which was very diverse.

Q Can you describe where we're at today and why this is so contentious.

TUTTLE There was certainly a kind of religious revival that followed the Second World War, and there are a lot of reasons that that may have happened. Changing patterns of family life, for example, we know now from church attendance patterns that people that have young children tend to find themselves coming back to church. Well, the baby boom had something to do with that growth. There's also a point of national definition. We are not communists, communists are atheist, we believe. And that was a very strong part of President Eisenhower's message. I mean if, President Eisenhower often said, it's important for people to be religious, I don't care what it is. But that's a part of that, religion is America, America is not communist and that changed a lot during the 1960's. The countercultural movements pushing in one direction, but also Protestant Evangelicalism pushing in the other direction against this kind of generic Ecumenical religious settlement where the Evangelicals were pushing for a far more, one might characterize as sectarian, but certainly denomination-specific or confessional religious experience rather than a kind of generic religion. And, at the other pole, those who were hostile to the religious establishment, pulling in the direction of a more secularist America. And those tensions really start to become sharpened in the 1960's, and then after the school prayer cases, and then certainly after Roe v. Wade, that divide gets much broader.

Q How do you see the divide today?

TUTTLE I mean I think that the argument from the side of religious traditionalists would be for most of our country's history, the people that have led have been religious, they've been religious in their own personal experience, they've been religious in their expression of that, and

they've allowed government to give some kinds of support to religion and departing from that is a bad thing. I mean they can give a variety of reasons for what makes it bad; it's bad as a matter of public policy, that we are a weaker country; it's bad as a matter of, of law, we don't have to depart; and it may be bad as a matter of the country's spiritual trajectory, we're a covenanted people and we shouldn't leave that behind is well it is an abandonment of our mission. So you can get all those reasons.

On the other side are folks that say, from the beginning the country has been intentionally as religiously plural as possible given people's imagination, they're, you didn't go much being deists, because that's, in fact, what the range was originally, but it was certainly inclusive. One of the important things in the U.S. Constitution that people often overlook is the requirement that the federal government not impose a religious test of any kind. So, the government wasn't gonna be a communion of the saints, the government is going to be made up of people who qualify for other reasons, but not for religious.

And then you see this religious breadth through the trajectory of the 19th Century in through the 20th. That's the other story and the other story ends up with a point where, to be inclusive, we must be secular, we must be neutral with respect to religion. So you have the traditionalist on the one side that says, you know, pay attention to this identity as a covenanted people, and the pluralists that say, our primary goal is inclusivity. Everybody needs to be felt that they are a full an equal participant, and not just legally but to be emotionally and spiritually in that sense to be able to be treated as a full and equal participant, so we're not going to use any language that excludes. That really is the, at least I see it, the religious dynamic right now

Q Can you, can you talk about it specifically in the context of school prayer?

TUTTLE Yeah. I mean the common schools movement in the 19th Century was heavily Protestant. It was not self-consciously in the sense that we want to go out and make people Protestants, but just as a matter of assumption, well everybody, or every right thinking person, is Protestant. Protestant in the sense of not Episcopal, not Baptist, but sort of inclusive for all those who use the King James version of the Bible as their basic reading primer. And that we're not going to make any specific concessions, everybody just generally agrees with the idea that there is a God, and this God is good, and this good looks after us.

The first real collision with that comes in, of course, with Catholics who were excluded and felt themselves excluded, and set up separate schools in order to, to deal with it. In the 1940's, when the Supreme Court says to government, you can't support Catholic schools, sorry. In the 1940's, when the Supreme Court says, as a matter of Federal Constitutional Law, government may not support religious schools, what the courts were essentially doing is saying, at that point, you can have schools that are generically Protestant and we can provide public support for them, but for no other schools. That was the Catholics perspective and the perspective of many folks who thought it was a little unusual, even if they weren't Catholic.

In a lot of ways the school prayer cases leveled the playing field. Because what they say is to Catholics and others who are not Protestant, you don't have to subject yourself to this Protestant experience when you come into the public schools, we're not going to allow the government to fund your schools, but we're also not going to allow the government to make its own schools a particular religious faith.

Defenders of school prayer tend to say that the prayers are not sectarian, that the prayers are very generic. If you look at the New York State Regents Prayer, which is, one might call it a deist prayer, or it's this idea that there is a general providence and this providence is someone that deserves to be worshipped, respected by us, and that's pretty much as far as it goes.

The problem is that for most confessionally religious people, to say a prayer has religious significance, and when you say a prayer that doesn't name God, specifically your God, well you're not really engaging in proper prayer. And so there were very strong religious objections to the breadth of this generic prayer; it wasn't specific enough. And so you got objections both from those that said we shouldn't have Protestant schools and those that said, if you make a prayer so generic you are essentially making us all do something that is religiously wrong.

Q Is there a distinction, or can you draw a distinction between the public schools and the teachers bringing prayer into the classroom versus a child in the classroom praying?

TUTTLE There's a huge difference between prayer for which the government is responsible and the private prayer life of individuals. And I think that's been what the courts have been wrestling with over the last 40-some years now.

The Establishment Clause, as interpreted by the Supreme Court says that the Clause is violated when the government is fairly held responsible for religious indoctrination, spiritual formation. So, the government can't do that, either with its direct funding money, and it can't do that through its own institutions.

So the question is when is the government responsible for religious formation that's going on in schools? And the court says it is clearly responsible when the government writes the prayer and delivers it. What about a teacher that decides on her own initiative to pray at the beginning of class? Well, the teacher is an agent of the government and, as such, it is very hard to say, that when the teacher is leading a class and the students are in class because of compulsory attendance laws, that the government should not be held responsible of the teacher's prayer.

From the other direction, a student who decides at the beginning of his lunch hour that he wants to pray, it's not something for which the government can reasonably be held responsible. Nor for student groups that decide that they want to gather, the schools allow some time for groups to come together, some students want to have their own religious group. If the government allows space for students to do that then the students should have a right to gather to pray. Again, because the government's not responsible for their prayer, even though the government furnishes the building, it's still the student's prayer. But that's been where the battle has been fought out over, particularly, the last 20 years.

Q

When you take that, from school prayer debates over into the prison isn't it similar in that, they're going to house these inmates anyway and pay for it with government dollars, so, if you have a building that's dedicated to prayer, and Faith-Based Initiatives, is there a problem with that?

TUTTLE

Well, the question is how well the analogy transfers from one setting to the other. Prisoners are different than school children, they're different in ways that make it more acceptable for the government to furnish religious services to them, because, of course, school children can go home and can go to the church of their choice or their parent's church whenever they want to. Prisoners, of course, cannot you know, pick up their bags and go to whatever religious congregation they want to, they are confined. And so the government does have some responsibility to try to help the prisoners engage in, as normal as possible, a religious life. That's something that the government does not owe school children. Indeed

we'd say the government cannot provide that kind of facilitation to school children.

But, on the other hand, we are more worried about voluntariness when it comes to prisoners, often, than we are with school children. We don't think twice about school children being allowed to opt out of things that their parents might find objectionable, but there are a variety of mechanisms for doing that, we don't feel that school children are under that same threat of coercion. School children may feel it, but we don't generally feel it.

Prisoners, on the other hand, are under 24-hour-a-day, 7-day-a-week control by the state, and so we are particularly concerned that when they are engaging in religious activity, or other kinds of activities, that they do so on their own initiative, they do so by their own choice. So we certainly would not allow the government to require someone to participate in religious activities, right. That everybody in this block must go to worship.

The question is whether that exhausts our concern with things being voluntary. Are there other kinds of situations that might equally seem non-voluntary or somewhat coercive. And that's really the issue with a number of these prison programs, at least one of the issues with these prison programs. Cases in which the only kind of therapeutic substance abuse treatment that the government offers to inmates is one that's done from a faith-based perspective. I mean, for the inmate, their choice is either engage in this religious life or don't receive the government-funded service. I mean if the service is important, especially if the service has implications for their ability to get paroled, then we should have some questions about the extent to which it is really voluntary for them to participate. So that's the first question.

And the second question is that the Establishment Clause assigns responsibility to government not just when it forces people to do things, but when it pay for certain things. The government's responsible if it decides to go out and fund a church to start. I mean, the fact that the government has paid for it doesn't force anybody to go there, but it still is a violation of the Establishment Clause. And so, if the government pays for a intensive religious treatment program in prison, then, under the Supreme Court's interpretation of the Establishment Clause, that's probably going to be a violation.

Q

Could you speak directly to the Iowa case?

TUTTLE

The Iowa case involves a legal challenge to a series of grants made by the State of Iowa to Prison Fellowship Ministries and its program Interchange. And the grants required or asked Interchange to provide 24-hour-a-day, 7-day-a-week, full immersion programs for inmates in Iowa and in Iowa State Prison. And they would provide a full range of both therapeutic, educational opportunities for inmates in the program. But they were virtually all done from a very religiously intensive perspective. This was the only contract that the State of Iowa let for those kinds of service certainly in this prison, and that range of services, there wasn't a secular immersion program. And indeed, Interchange was the only candidate for that contract, it wasn't done on a competitive basis, they came to, to Iowa. So that, for a variety of reasons, raises the questions about the Constitutionality of the grant.

But then the grant because it involved direct government payment for activities that are religious, drug treatment programs that are conducted with explicit religious language, that, in many cases expected, even if they didn't demand, but expected a religious commitment on the part of those who participated in them. Those are the sort of things that we'd say, if the government is paying for it, the government's responsible for it; and if the government's responsible for it, it violates the Establishment Clause.

So, In terms of the existing law, the Establishment Clause, I don't think it was a very hard case. That seemed the sort of activity that clearly falls within the Constitution's restriction. It would have been a more interesting, closer case, and, indeed, I think Interchange might have won, had the government given inmates a number of choices where they could have virtually the same services done from a secular perspective or from a perspective that is something other than Protestant Christianity. But, because they gave them, essentially only one choice if they wanted to receive this kind of intensive intervention and the intervention, at least allegedly, made some difference in their eligibility for certain kinds of benefits, both benefits when they're within prison, and then, perhaps benefits at the time of their release as well.

05:06:18 Q

In our interview with, ah, Mr. Colson, he talked about the Pennsylvania study which, essentially, in his mind, proves that the Ministries Fellowship, the Fellowship Ministries works and the Interchange works. Are you familiar with that study? And, if so, what do you think it proves or doesn't prove, and what might be the flaws of the study?

05:06:43 TUTTLE

Well, I'd rather not comment on the empirical part of the study although I do have some reservations about the quality of that study. The real question, at least legally, is, even if that is true, should that make a difference in terms of the Constitutional analysis? And, let's take a fairly extreme case. Suppose that the government decided that people make better citizens, they are more regular in paying their taxes, they raise better children, they make better financial decisions, if they are religious, and not just religious in general, but of a particular denomination. And so the government says, we're not gonna force anybody to do it, this is not coercion, people do this of their own choice. We're going to give everybody who signs up and attends this church regularly a hundred dollars a month because we think they are such better people that we're gonna get significant financial rewards. The question is, does that hundred dollars a month raise Constitutional problems?

The government is directly paying for people to be religious. The government defends by saying, we think it's better for all of us. And the answer, under any conceivable court challenge right now, would be that that is an unconstitutional program because the Establishment Clause does not have any provision under which the government can override the challenge by saying it's in the public good.

Unlike most of the parts of the Bill of Rights, where you can raise some kinds of public emergency, or public good exception to them, including the Free Exercise Clause, the Establishment Clause is not limited in that way, the government simply may not do the sorts of things for which it is reasonably held responsible for promoting religion.

Q

What is the Free Exercise of religion requirement?

TUTTLE

Well the other part of the religion clauses of the Constitution say Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. And over the last 15 years there's been a very hotly contested, area of Federal Constitutional and Statutory law. The question of whether the Free Exercise Clause keeps the government from doing something other than just restricting somebody specifically for religious reasons.

The most famous case in this period has been a challenge that came out of the land use dispute in Florida, where the town council of Highlea said, absolutely no animal sacrifice within our town borders. And the congregation that was the target of it, a

Santerian congregation said, wait a minute, you're allowing people to slaughter animals for virtually any reason, including reasons that are pretty bad, and you won't allow us to engage in our form of worship? Well that has to be religious discrimination. And although the 11th Circuit Court of Appeals sided with the town, the Supreme Court said, no, this is a poster child violation of the Free Exercise Clause, you've targeted somebody for special disfavor because of what they believe and what they do. And that's solid law, that's clear.

The question is the extent to which the Free Exercise Clause protects people from regulations that are not targeted at their religious belief. So, the requirement that all buggies that are horse drawn must have a placard on the back of them that is bright orange offended a number of older Amish, or others that said, we don't want adornments of that sort. Well the placard requirement is not targeted at this particular religious group, it applies to everybody generally. So, should they be protected? And, according to the U.S. Supreme Court they don't deserve that protection under the Free Exercise Clause, although a number of both federal and many state statues passed in the last 15 years have tried, at least in some circumstances, to restore protection for people in those circumstances.

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Can you talk about Faith-Based Initiatives in the past five or six years, what the origin is and in what ways you see them as dividing or uniting the country?

TUTTLE

Well the idea of Faith-Based Initiatives goes back really to a very old and very well accepted idea that religious groups help to provide social services, and the government sometimes funds those social services. So, the idea of government funding religious organizations that provide social services is not new at all, it goes back even before the New Deal Era. The question then is what's new? And what's new is the character of the religious organizations that can provide them. Prior to let's just say 1990 as a starting point, those who were providing government finance services were expected to be secular, they may have a religious name, but, apart from that, they are functionally and practically, similar to any secular organization that's providing those services. They don't engage in worship, they don't ask their clients to engage in worship activities, and they are institutionally distinct from any organization that engages in worship or other kinds of religious activity. And again if we're defining religious as a set of things that people ordinarily think of as religious, Bible studies, worship services, prayer, proselytizing.

Q

Can you talk about it specifically in prison? Charles Colson's programs obviously are the most well known but I'm sure there are others that might be more universal and include Islamic teaching, or Hindu teaching.

TUTTLE

There are a bunch of different kinds of prison programs. Those that are prison chaplaincy programs have a history as long as prisons themselves. We've had either volunteer or paid chaplains ministering the needs of prisoners. A lot of what goes on in prisons right now in terms of religious activity falls under this idea of chaplaincy. Indeed, the government has a affirmative responsibility to facilitate people's access to the religious services of their preference. So when we talk about Muslim programs in prison, or those of virtually any faith, that's most of what you run into.

The dividing line between those kinds of programs and what Mr. Colson's group is doing involve the extent to which they are, number one, engaged in therapeutic rather than ministerial activities. So that's the first distinction. They're not simply there to help meet the religious needs, they're there to help the state affect a kind of character change. And that's the state's intention in inviting them in, and that's the reason for their activities, they want to help make these folks better, to heal them spirituality but also to make them both better inmates and then also prepare them for a more successful shot at reentering. That's really what this is often about, how do you prepare people not to come back to prison again, not to get back involved in crime.

And there are not as many groups that are religious groups that are involved on that therapeutic level with the government. Most of them, appear to be primarily Evangelical Protestant. And really on the model of Mr. Colson's program, and they are the leaders in this sort of more intense activity. And the government in other contexts has not in the last five or six years, tried to generate the kinds of programs, therapeutic programs that will be available for prisoners of other faith. There are those that involve American Indians that go back a little bit longer in the federal and some of the state prison systems. But, the attempt to be inclusive in that kind of therapeutic model is relatively new. But, again, a lot of this does arise from Mr. Colson's initiatives over the last 20 years.

Q

Can you specifically describe, um, the way that, the way those initiatives work in prison because it sounds like part of the issue is that the government is providing some funding and the private sector is providing some

funding. So, what is it that an inmate would say is more attractive about 24 hours a day of therapy and Bible study versus watching reruns of the Flintstones in the main cellblock?

TUTTLE

There are a bunch of things going on with, with your questions, so I'll try to take them apart. The first is the distinction between private and public funding. If you really can segregate the two kinds of funding and say, this is what the government money is going for, this is what the private money is going for, and here's how the public money is used in programs that are available to essentially all inmates and things like that, in other words, in order to take advantage of the public money, you don't have to engage in the religious activity, then the programs would virtually all survive Constitutional challenge.

The problem is if the private and public money are intertwined, then, for Constitutional purposes, we essentially treat it as if it's all public money. So, it's very hard to say to someone who's a counselor, let's say that the money is going for payment of the counselor. Well, in this 40 minutes of our hour long conversation, I was being a secular counselor and so, therefore I get 40 minutes of government funding, and the extra 20 minutes of our session are religious counseling, and so I get 20 minutes of my time paid for by private money. From the outside it's impossible to tell where those 40 minutes end and the 20 minutes begin. We don't have somebody sitting there with a stopwatch that says at minute 38 you started using religious language. The idea is the government is not suppose to intrude in activities that have that kind of religious character and so, if we can't tell that the government secular part is segregated from the privately funded religious part, we'll treat it as if it's religious. So that's the money question about the two of them, and that's not just with individual counselors salaries, that would go with respect to an entire program of treatment. If you can't really segregate out the secular parts from the religious parts, then we treat it all as if it's religious.

What makes these more attractive to inmates there's probably as many different reasons as there are inmates that are at least potentially eligible to participate in them. Some of them, I am certain, because of their own existing deep faith and this really talks to them; some because of some emptiness that they recognize and they have been led to believe by the witness of others that may be filled, and so they really think that this is what they'll get; some of them because watching the Flintstones is boring, they feel like it's a waste of their

time, and this is essentially the only thing that is constructive that's offered; some of them because they think they'll get benefits out of it. And the alleged benefits in the Iowa case involved things like private toilets, or larger color TV sets, or other sort of the most basic amenities that were not offered on equal terms to those who were not participating in the program.

I don't think the Iowa program was intentionally designed to say, we want the government to provide extra benefits to inmates who participate in this. I think it happened because what they were given as the site was what had previously been the honor wing of the prison. And so they took over this honor wing, they displaced whoever was in there and didn't want to participate, who went back into the general population. And the facilities they then had were better than the ordinary facilities for inmates in the prison, because that had been the place where, you know, the best inmates were kept. So, it is a complicated story in that respect but, at least, as the trial judge accepted, this did provide, in the end, better material amenities to those who participated in the program than those who didn't, at least in most circumstances. And, that counted as an improper inducement.

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So essentially they're rewarded for participating?

TUTTLE

Right. And the alleged rewards were both those kind of material amenities and they were also allegedly, although I don't think it was as clearly proven, they were also allegedly given some, benefit in terms of their eligibilities for release, the treatment they would receive, you know once they finished their prison term. That was a more complicated story.

Q

But do these faith-based prison programs work? And, if so, why?

TUTTLE

The effectiveness of faith-based programs has been one of the greatest challenges, both academically and as a matter of policy, that we faced in this whole debate, because it's very hard to tell. It's very hard to tell because unlike a drug treatment study, we can't really do a double-blind, we can't sort of randomly assign people to one program or another, the government can't force anybody to accept religious faith, and so we're left with those who would be willing to choose it.

Now there are a couple of studies that are going on now where it starts with a pool of those who are willing to participate in religious programs and then some of them

get the religious programs and some of them don't, and that seems to me at least a better way of establishing it. But for many of these studies involving prisoners, they have to start with a pool that may already be significantly different than the entire pool of prisoners, they start with the pool of those who are willing to participate and they may not be representative on the whole. And that's part of the challenge that the Penn study faced, again, just on the question of the empirical basis of the study.

But it still runs up against the Constitutional problem, which is, effectiveness does not answer the Constitutional question and the Constitutional question turns not on whether it's a good thing the government's doing, but whether this is within the set of tools that the government may legitimately employ, whether it does good or not.

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When we interviewed Mr. Colson he talked about the enormous increase in the prison population. Do you have any insights into why the prison population is increasing?

TUTTLE

Cocaine and crack. I mean I think that the biggest change in our prison population has been either directly or indirectly related to illegal drugs. Whether you think it's good or bad is a matter of enforcement policy and whether it has made any difference in the general statistics on crime. The prison population that's based on drug or drug-related crimes is immense. And that' makes up for a huge proportion of those who have come into, to prisons.

TUTTLE

You know, I didn't really answer the Faith based question. The first big policy change that was reflected in legislation happened in the 1996 Welfare Reform, those were massive overhaul of Welfare. And one of the parts of that was called charitable choice, and the idea that, for the first time, at least at the federal level, the government was going to allow religious groups to participate, even if the groups had not set up these separate and secular affiliates. And that was the big shift with respect to some of the largest federal social welfare programs: Temporary Aid to Needy Families, eventually Welfare to Work. I mean these are the big, big dollar programs. And the idea was that a religious organization could retain its religious character, it didn't have to set up a group that promised not to pray or to worship. What the government did require is that the organizations not make religious participation a condition of receiving benefits and that they not engage in religious activities with those to whom they are providing services. They can offer those services at a different time or a different

place, but they couldn't package that with the government-funded activity.

And that was a change that passed with relatively little controversy in 1996, and was supported certainly by President Clinton who signed the bill, but then, in the 2000 campaign, it was supported also by candidate Al Gore and George Bush. There was unanimous praise for that variety of what later became the Faith-Based Initiatives.

The controversy has been surrounding George Bush. And the questions that have arisen all involve the extent to which the President can do this by Executive action rather than waiting for Congress to act, because, since the Welfare Reforms and they stretched out from '96 really through the year 2000, but since that time, Congress has not really enacted a program that promotes the Faith-Based Initiative. It's done a few relatively little things, but it's been all by Presidential initiative. And what the President has done is to say, it wasn't enough with legislation because we had a culture in the federal administrative bureaucracy that resisted this, that we had the statutory language but change wasn't happening.

And so we had to make the change at the regulatory level. And, in a very short period of time, two years, virtually all of the federal social welfare programs, by administrative rule change, had now adopted what were essentially the Charitable Choice Policy, no discrimination against groups that are explicitly religious, they can compete on equal terms. And then the restrictions are restrictions only on the extent to which they can use the funds to promote religion. The controversies have come in two different ways: The most public controversy has involved staffing, or who the organizations can hire. As a general rule, religious organizations can hire people of their own faith and not violate anti-discrimination laws, period. And there are some exceptions in a few states but, generally, the rule is you can hire people of your own faith. The question is, does that right change once you receive government funds? And the administration said, no it doesn't, and the administration's opponents, and especially the opponents on Capital Hill, said, yes it does. And that fight, more than anything, has kept there from being any additional federal legislation on Faith-Based Initiative.

The more complicated, but I think more interesting questions involve what groups can do with the money. And that's been the place where there's been, by far, the most litigation. And it really does encompass the Prison

Fellowship Ministry case. The Administration says that these religious grantees can use the money as long as they don't engage in inherently religious activities to prayer, worship, proselytizing. The problem is that the cases come up not with grantees using the money to engage in a prayer service, they all arise out of grantees using the money to engage in religiously intensive social welfare services. So, sexual abstinence education program, which is not inherently religious, but, when it's done with the use of bibles, and explicitly religious language and commitments, courts have held in two cases that that would violate, and it does violate, the Establishment Clause, because the government's responsible for the religious formation that's going on through those classes.

Same thing with substance abuse treatment programs that are conducted in a religiously intensive language. And the Administration has not, at least so far, acknowledged that important distinction, that it's not just those set of cases and problems that involve what they might call inherently religious activities, but it's any case in which the government might be thought responsible for religious formation.

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Do you think, the founders would have anticipated, a couple hundred years later, that people would still be fighting over these issues?

TUTTLE

I really have no idea what the founders themselves would have thought. I mean the world has changed, it's almost clichéd to say how much the world has changed in the last 230 years. We do know that they were aware of the explosive potential of religion, and explosive both in the bad sense: Wars, conflict, you know, great inhumanity; but explosive in the sense of powerful change for good, and the religious dynamism that was going on after the time of the first Great Awakening. And I think there have been some very good studies about how important that empowerment was for the whole cause of liberty. So, they saw its explosive potential. I don't think they would have been surprised that there is conflict going on because of religion 225 years from now.

I think, if you'd asked them, where's the source of conflict, they would have probably said, well, probably religion. At least most of them. Some of them had the enlightenment confidence that religion was going to wither away with all other superstitions, but most of them didn't. I think most of them understood.

Q

What is prayer?

TUTTLE

Well, I think there are lots of different kinds of prayer. I mean there is prayer that is petition, is offering up one's thoughts and concerns to God and asking God for very specific kinds of help. And that's certainly what sets off believers prayer from the prayer of deists or others who don't think that God intervenes, because petition prayer is, is a request for God to intervene.

There's prayer that's just simply praise that says, I worship you, that's what I'm supposed to do, what's what I wanna do, but I worship you. But it is first and foremost an acknowledgement that one sort of stands in one's life under God, not asking for anything in particular but, just saying, you know, you're God and I'm not. Which, I think for a lot of people is their life-defining event, is to understand that their center of being is some place other than themselves. And then there are any number of other kinds of prayers that other traditions than particularly the orthodox Christian might respect. But I sort of think of those two as intercession and praise as, as two of the most important forms of that.

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When you look at history it always informs the present and the future. Where do you see all of these issues going as it relates to prayer and religion in the future?

TUTTLE

I think that shift from the '50's to the present is very instructive. The idea of Protestant, Catholic, Jew, this is essentially the same confession that all of us have, and we can all be brothers and sisters together in that. And then this sort of confessional awakening that happens in a variety of different forms, but this idea that we are distinctive, we are not just like the others. And there are a ton of different reasons for that. But some of it, certainly, I think, has to do with people wanting a more secure identity than just one of the crowd, an identity they can say, I'm different, I am, if not unique, I am a member of a small group and we are closely defined by these sets of things. And in a variety of different parts of Christianity, certainly those that have become more traditional or more conservative, that confessional identity has become for them their paramount identity, and I don't see that changing, I don't see us going to a time where we have a kind of general ecumenical understanding of everybody essentially having the same faith just different words to use it. And I think that was largely a relic of a previous era. We will have certainly people respecting others and respecting others confessions, but I don't think that we'll see a time when the commonalities of religious experience and identity outweigh the differences.

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And the Constitution in that respect?

TUTTLE

The Constitution is at least with respect to the Establishment Clause, is perhaps more in flux at this point in time than it's been certainly in my lifetime. Because we now have cases that are almost invariably decided on a five to four basis and with the personnel changes in the court, even since the last big case was decided in, in 2005, I mean there are some significant questions about what happens with, with new cases that might come up. And this is especially true with the questions of government funding and also government displays under the Establishment Clause.

Had the cases involving the Ten Commandments, both of those five to four cases in which a change from one side to the other could mean either that virtually all public displays of religious artifacts are okay; or, the other direction, most religious displays are going to be unconstitutional. And to have it hanging by that relatively thin, thin thread, sometimes the thread was Justice O'Connor, sometimes the thread is Justice Breyer, but it's still a very thin thread. And that's also true, in some respects, with the cases involving funding, because there are a number of justices that believe that, as long as the government is giving money to a variety of organizations, and as long as the organizations are pursuing the government's ends, whether it's reducing recidivism, or promoting teen abstinence, it doesn't matter what language they use. We just have to make sure that the government is setting out a neutral playing field so that everybody that wants to participate can. That would certainly save a number of programs that are being challenged now. I don't think that such a rule would save the Iowa Prison Fellowship Program, because there weren't any other options, this was the only entity considered as part of the contracting basis.

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Do regular prison programs offer anything comparable for reentry, um, compared to say the Prison Fellowship Ministry?

TUTTLE

Well it's really hard to say because, by regular prison programs do you mean an ordinary chaplaincy program that may gather people for Bible study a couple times a week? And I think it probably doesn't, because the idea of Prison Fellowship Ministry is not just about immersion, although that's certainly it, it's about enculturating people into a particular form of life, and so it's all of their encounters with people are shaped by this.

The circle of contacts and support outside of the prison are encompassed by the program. So it is very different than something that somebody might come out of their environment into, ah, for a couple hours a week, it is

their environment, and that's the whole idea. The real question is whether you can do it in a way that is inclusive. And that's the challenge, and it's a challenge, not so much for Mr. Colson, because he doesn't have anything to complain about, it's not really his problem, it's the problem of the government. That the government can invite him to do their work, but as long as there are adequate opportunities for inmates to experience that kind of work, maybe not the same religious transformation, certainly from the perspective many folks, they can't get it outside of this one experience, but in a roughly comparable way does the government give people the opportunity to get the kind of treatment, to get the kind of education, and perhaps also to get the kind of support network, both within and outside, a prison, that something like that program would evolve

The real question as a policy matter is, why should we deny inmates the benefits of the program now that Mr. Colson offers while we wait for the government to get its act together and come up with comparable programs of other faiths or secular programs? That's, I think, really the most difficult question and the answer is, if we don't do that, I think, it allows the government not to do anything for the others. It'll, in a sense, takes the government off the hook. That if the government can say well we, we just don't wanna work at finding people other alternatives, that's an excuse they can use all over the place. I think it's a very tough question though.

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You used the word, ah, enculturate, and I, and I think the Iowa court case used the word coerce. Is that a word that you would apply?

TUTTLE

I mean I thought the Iowa court was intemperate in its language. That the core concerns are always coercion with people that are in jail, that are surrounded with people with guns, and barbed wire and all that. So we are definitely interested and concerned about coercion.

The question, though, is whether people are coerced into the program, whether people are coerced to participate in religious activities. And I don't think the facts of the case suggested the kind of coercion that, that the term might, you know provoke people to think, that nobody was forced at gunpoint to participate, nobody was forced at gunpoint to participate or on sort of pain of being thrown into some, you know, terrible situation. There were questions between better and not quite as good, but not inhumane, conditions. So it does raise questions about voluntariness.

The enculturation point, I think is different because enculturation is this idea that people's whole experience is going to be reshaped. They can chose to be in it or they can be forced into it, but the whole idea of reshaping their entire experience rather than some small segments, I take it to be a core part of what Mr. Colson's program was doing. And the court objected to that, at least in principle terms objected to that on a different ground. That ground was, if the whole thing is enculturation and it's all one seamless package, then you can't engage in the kind of segregation of religious, and thus private expenditures, and secular, and thus public expenditures, that the Constitution requires. And that, in my mind, was the chief defect of the program: One package, you can't split it apart. If you can't split it apart, it's not gonna pass muster under the Constitution now.

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I'd like to get your take on the inaugural prayer.

TUTTLE

Michael Newdow, the same man who challenged the constitutionality of the words Under God in the Pledge of Allegiance, also challenged the constitutionality of the inaugural prayer at President Bush's last inauguration. And the court, a lower federal court, essentially dismissed the case, said it wasn't interested in hearing it for a variety of reasons. But, if the Constitution prohibits having prayer at public school graduation or even baccalaureate service for public school graduation, then why is it that it's not also a problem at the inauguration? There are two different parts of the answer: The first is, we treat adults differently than we treat children, and so we allow legislative prayer at the opening of Congress, the opening of state legislature and, because we assume that adults can handle having to deal with somebody praying without having their consciences crushed or whatever. The other thing that inaugurations may be unique in the sense that the person is there praying, but praying on behalf of George Bush, he's somebody that's been invited by George Bush, it's not really the government speaking through the chaplain there, the person who's asked to pray, it's somebody who George Bush has requested to pray for George Bush and for the country. And I think people have an easier time saying, that's not the government's responsibility, that's the private prayer of George Bush, and we respect George Bush's own individual religiosity. We may not want that from the government, but he's a person as well as the representative of the government, and we'll respect it there.

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Does it carry over into Congress?

TUTTLE

Well it does, although there's a very interesting case that's going on in Indiana right now, challenging the practice of legislative prayer in Indiana. And the case challenges the explicit use of Jesus' name as a regular part of the Indiana legislative prayer. There, it's not just one chaplain, they're invited chaplains coming in, but the court said a disproportionate number of them pray in Jesus' name and there are very few that are not Christian, and so we think that stepped over the line. The line was set in a 1980's case called Marsh against Graham that involved legislative prayer in Nebraska. And there the chaplain for the legislator was conducting non-sectarian prayers. And the question is whether the non-sectarian quality of those prayers is what made them okay. Or was it okay because it's a relatively minimal intrusion into sort of an ordinary government activity of conducting the legislator. The lower court in Indiana said, the thing that made the legislative prayers okay was that they were non-sectarian. If that's true, and the lower court is right, then a lot of what goes on in the Congress is going to be susceptible to challenge, because prayers in the federal Congress are regularly, explicitly religious, they regularly involve someone's naming of their own God in the course of prayer. And, that's gonna be an interesting case to watch.

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The questions that we've discussed today are, in many ways more targeted to the Constitutional issues, but, the show will start with the Yankee Stadium service after 9/11. I'm wondering what your take on the 9/11 prayer service was?

TUTTLE

I think it was a quintessentially American moment too, but quintessentially American in a very interesting way. It does hearken back to this idea of a united, Ecumenical experience where, even though we may call God different names, we experience something of the power, however you wanted to express it, especially in times of grief or great tragedy. And this common, if hard to define, religious experience does unite us. And I think that was certainly true. But, of course, that wasn't the end of the story, at least for one of the participants. His involvement in the activity caused very serious concern in his denomination, to the extent that he was threatened with removal from his role of clergy. And, I think that, too, is a quintessentially American moment, where, people are trying, organizations are trying, to show that they are not just part of this sort of large Ecumenical body, that they do have distinctiveness and their distinctiveness makes religious difference.

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As far as prayer goes at that event, what were we praying to, and, and is it also distinctly American that we were praying to the notion of one God?

TUTTLE

I mean I think that people's experience of that was as diverse as you could imagine, and that just from talking to others about how they experienced that event and that time. There were certainly lots of folks who believed in a kind of union, that, despite our difference, we are all praying to the same God, we all have something of the same experience of being centered, or being grounded, supported, protected, loved, by this one God. Again, different experiences, we're happy to talk about our different experiences, but something unites us. And there were other folks for whom it was principally about community. We may not really be talking about the same God, we may not be talking about the same experience, but we have this experience of grief, this tragedy, and we experience this community of being together in this act that may look an awful lot alike and may feel alike to us, even if its object is a different God. I think, you know, you do capture both parts of prayer there, prayer as something that is unaddressed to a person, the personal God and that's principally about the conversation you have with this personal God; and you also have prayer as principally a personal experience, prayer that is something that I do, prayer is something that I experience.

A lot of people criticized the Yankee Stadium experience and lumped it in with a variety of other prayers that are essentially prayers, oh God, help us go kill somebody else. And there's certainly people that experienced it that way. It's hard for me to believe that that was the best description of what went on that time. I don't think it was a prayer to God for vengeance, I don't think it was a prayer to God that said, we America are somehow special, blessed, better than anybody else. I think it was a legitimate experience of grief and a prayer for hope. And people may have lots of different hopes, but, I would find it hard to believe that the hope of all was to go crush and kill somebody,