

# American Religious Liberties in the 21st Century: Maintaining the Wall in a Turbulent Age

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## **Acknowledgements**

I would be remiss to fail to bring attention to the reader the myriad support, inspiration, and counsel I have been granted in the process of writing this volume. First, I must acknowledge my dead but far from silent mentors, Thomas Jefferson and James Madison. The foundation of this work is merely one borrowed from those men and their ideological contemporaries and adapted for the changing times and relevant jurisprudence. However, those in the present deserve an equal amount of appreciation as those colonial scholars. My mentor and Independent Study advisor, Judge Raup, was invaluable in developing this work and practically solely responsible for fostering my interest in the law two years ago. Dr. Ross, my faculty advisor, was also instrumental in this endeavor. Without her support and guidance through the past three and a half years I doubt I would have been in a position to attempt a project such as this.

## **Introduction**

The premise of this work is to examine the status of church-state relations and religious liberties in the United States as our nation enters the 21<sup>st</sup> century, particularly in the volatile and precarious times following the September 11th terrorist attacks. Many domains of public life have been drastically affected since that fateful day, including the security of our religious liberties. The focus of this paper is to survey the realm of religious liberties in this burgeoning age of terrorism and national insecurity as well as other pertinent factors that affect the stability of the legal and political systems that have established those liberties. As in all pursuits of understanding, contemporary religious liberties must be put into historical context to extract the greatest depth of comprehension.

Overall, it will be argued that the surest way to preserve our religious liberties, even our democracy at large, is to steadfastly maintain the principle of separation between church and state. In fact, it will be illustrated that the greatest menace in the fight to maintain religious freedom comes from within our own borders. The struggle is exacerbated, sometimes knowingly and sometimes not, by Americans of all social, political, racial, economical, and legal positions from all points on the ideological spectrum. Ultimately it is the responsibility of the American public to catalyze a comprehensive movement to rectify the wrongs that have desecrated the religious freedoms our Founders enshrined in the First Amendment. It is one of the aspirations of this work to establish a reasonable middle ground that preserves the integrity and vitality of both religion as well as the fundamental law of our nation that guarantees our

cherished liberties. To do so, the issues will still be approached objectively and all prominent positions on the issues discussed in this work will be explored. Wherever this work exhibits tendentiousness it is only to lend support to the overriding theme of the value and importance of the wall of separation.

In order to extract a true understanding of the current situation a historical perspective must first be established so that things can be put into the proper context. An in-depth treatment of the roots of the “wall” metaphor will be followed by an analysis of the provisions in the Constitution which speak specifically to matters of religion. A perusal of the sentiments of the Founding era will be explored and contemporary scholastic reflections on that period will be offered.

The two proceeding chapters will then focus on current judicial and legislative activity in the realm of church-state relations. Since the catalogue of church-state legislation and litigation is too voluminous to examine exhaustively in this case, I will focus on several high-profile and other more critical matters, leaving peripheral concerns by the wayside. However, there are some rather important church-state matters that I will discuss that have remained below the radar of the American media, and therefore, the vast majority of Americans.

Finally, I will conclude this volume with an overview of the previously argued matters, hopefully illuminating the position advocating the importance of the separation of church and state in this modern era of increased religiously and politically motivated violence concerning U.S. interests home and abroad.

## **Historical Review**

As I have stated in the Introduction, a firm grasp of historical context will make any academic endeavor more complete, and rewarding. Without a proper grounding in the events that prefaced the current standing of issues ones search for truth is unfulfilled. Of course there are limitations to historical research and even the best interpretation of the past is bound to be biased or flawed in one manner or another; such is the pursuit of truth. The proceeding sections of this work outline some crucial history associated with religious liberty in the United States. None of which would be treated as the final authority on the subject, but still demand consideration as essential touchstones in the realm of church-state scholarship.

### **The Puritan Colonies**

When Americans think of the origins of their religious liberties the most common recollection is undoubtedly one derived from their first years in primary school: “The Pilgrims came to America to escape the religious oppression of the Church of England.” And to be fair, this statement is, on the whole, correct. However, that understandably simplistic and “cookie-cutter” response must be qualified to maintain its veracity. True, the pursuit of religious freedom was the prime motivation for the immigration of the first settlers to the North American continent. What is also true, as the Pilgrims experienced and as history has shown us is that “religious freedom” is a relative term.

When the Pilgrims founded the Plymouth Bay Colony in 1620, their intentions were to form an autonomous colony far from the shores of the British Isles that would

allow them the sovereignty to practice their religion as they saw fit. The Pilgrims, aptly named for their unending travels in search of freedom, had been fiercely persecuted and subjugated by the established Church of England. Perhaps finally they could guarantee their own salvation by severing themselves completely from the Anglican Church in England and starting anew in the New World. Their previous attempts at such freedom failed and the virgin soil of the Americas presented an extraordinary opportunity and promise of a better life.

Unfortunately for the Pilgrims, life was hard in the untamed wilderness of the New World and it became apparent that their continued survival was uncertain. Eventually, the Pilgrims were absorbed into the nearby Massachusetts Bay Colony, formed by the Puritans in 1630. Unlike the Pilgrims, the Puritans had never broken from the Church of England. Instead, the Puritans had simply established the Church of England anew in the Americas hoping to purify (hence the name) the Church and restore it to its rightful level of sanctity. Despite the rift between the two groups concerning their views on the Anglican Church they had roughly the same notion of religious liberty. To the bewilderment of most Americans, they had a diametrically different concept of religious freedom than the one held by the majority of Americans today. In the views of the Pilgrims and the Puritans, you either subscribed to their strict Christian theology or assented to be oppressed lest you be ostracized or killed. The Massachusetts Bay Colony was simply not, as a matter of fact, the fantastical image of perfect toleration between Puritan and non-Puritan alike.

Heavily influenced by the tenants of Calvinism, the Puritans secured a theocracy and established an obdurate rule of persecution against those who dissented from their



form of “freedom.” Only members of the Puritan church could vote or serve in the state assembly and the only landowners in the colony were Puritans. Clearly, if one was not a Puritan in the Massachusetts Bay Colony they were entitled to absolutely nothing and retained no rights or religious freedoms. So, the relativism of religious freedom becomes clear with both the implicit and explicit religious restrictions established in the government of Massachusetts Bay. As long as one was a Puritan they had complete religious freedom. If one was not a Puritan, they were subjected to the same degree of persecution that the Puritans had experienced in England. It would seem as though the Puritans had either failed to learn from their tribulations in England or that they had no interest in granting religious freedom to anyone did not belong to their sect. In light of the expanse of our historical resources it is now possible to conclude that they had no interest in granting religious liberty to others because they had learned from the tribulations they had experienced. In order to make sure that their religious beliefs were not infringed upon or marginalized the Puritans created a society that eliminated any contingency and guaranteed their religious liberty. The rights and liberties of members of other religious sects were simply not important and were not considered. After all, in the minds of the Puritans, any dissenters were wrong and did not deserve the rights that God had granted to the members of the pure and true Puritan Church of England.

### **Williams and the Dissent for Freedom**

While the intemperate climate of religious intolerance in the Massachusetts Bay Colony drove out many of the beleaguered dissenters, one iconoclastic preacher railed against the tyranny of the puritanical order of the Massachusetts Bay Colony. Roger

Williams, the most prominent of the early Enlightenment Age figures in the colonies, arrantly registered his demur at the Puritans' penchant for oppressing those of different faiths and sects. Because Williams believed that the complete freedom of conscience for every man was paramount for a truly free life and instrumental in the path to heavenly salvation, a concept he called "soul liberty," the Puritans were unjustly burdening religious dissenters. As Williams wrote: "I must profess, while Heaven and Earth lasts, no one Tenet that either London, England, or the World doth harbor, is so heretical, blasphemous, seditious, and dangerous to the corporal, to the spiritual, to the present, to the Eternal Good of Men, as the bloody Tenet... of persecution for the cause of Conscience."<sup>1</sup> For the Puritans, or anyone else, to prescribe by law the manner in which the conscience was to seek salvation was an intolerable offense to both God and man. Lest there be any confusion, Williams had his own firmly held theological postulates that he believed should prevail over any other, but he maintained that the only tenable method for evangelizing was open discourse as opposed to coerced uniformity.

A principal objection in Williams's opposition of the religious oppression in Massachusetts Bay was that the Puritans usurped the power of the civil authority to dictate theological doctrines. Not only were the colonial authorities treading on the "soul liberty" of the Massachusetts Bay colonists, but they were improperly using the power of the government to do so. To Williams it was clear that this impermissible union of the Church of England with the civil authority of the colony was the crux of the problem and had to be addressed. The Puritans were abridging the freedom of conscience of their fellow colonists in the same vile manner that the Anglicans had done in England.

By 1635, Williams had impugned the very foundations of the Puritan rule in the colony and was challenging every palpable aspect of the union between the civil authority and the Anglican Church. He argued that the church had no right to compel membership, or contributions, by force of law. He also contravened the magisterial practice of enforcing the first four of the Ten Commandments, arguing that the civil authorities had no such right. Furthermore, Williams believed that civil authorities could not make an oath of allegiance to the church part of an oath of citizenship in the colony. Williams dissented from the practice of religious coercion as well as the formation of a Christian state, declaring that "God requirth not an uniformity of religion to be enacted and enforced in any civil state."<sup>2</sup> He staunchly defended the rights of the area's original inhabitants, the various tribes of the area including the Massachusetts, Pennacooks, and Wampanoag Indians, as well as those of Europeans who did not wish to conform to Puritan doctrine.<sup>3</sup> "Natural men," as Williams called the native peoples, should not, and could not, be forced "to the exercise of those holy Ordinances of Prayers, Oathes, &c."<sup>4</sup> Likewise, settlers coming to the colony from European nations had a basic right to seek God by their own dictates, rather than by civil order.

Understandably, the Puritan leaders of the colony were growing weary of Roger Williams. His concepts engendered both fear and disgust among the orthodox religious and civil authorities as well as feelings of resentment of the current establishment from like-minded dissenters. The simple fact was that Roger Williams had to be either banished to the wilderness and face the harshness of life alone and the possibility of death, or sent back to England to be locked away in a London prison for the remainder of his life. The Magistrates opposed exiling Williams in the wilderness, fearing that he

would begin his own settlement, from which his "infections" would leak back into Puritania. Early in 1635, the General Court found him guilty of "disseminating new and dangerous opinions" and banished him from the colony with arrest orders mandating that he return to England.<sup>5</sup>

However, not all Puritans wanted Williams to be sent away so hastily. In fact, Governor Winthrop, for one, secretly aided plans by Williams and his confederates to establish a new colony south of the Massachusetts Bay settlement. Despite the superficially peculiar nature of such an act, Donald A. Grinde, Jr., Rupert Costo Professor of American Indian History at the University of California at Riverside infers that:

"Winthrop's reasons were many: to begin with, the colony needed accurate intelligence about and diplomatic liaison with the Indians, both of which Williams could provide. On a more theoretical level, Winthrop was among those Puritans who wished to find out whether a colony established on principles of soul liberty and political democracy could work, or whether it would dissolve into atheistic anarchy."<sup>6</sup>

While his supporters played out the ruse extending his stay in the colony before deportation back to England, Williams had secretly arranged a deal with Canonicus, the elderly leader of the Narragansetts, securing a tract of land large enough to support a colony. However, due to the Native Indians concept of ownership as well as his friendship with the open-minded white man, Canonicus would not accept money in payment for the land. "It was not price or money that could have purchased Rhode Island," Williams wrote later. "Rhode Island was purchased by love."<sup>7</sup>

It was not long before the civil magistrates learned that Williams was holding worship meetings in his house, a violation of the agreement reached between Williams and the General Court. Realizing that his arrest and banishment was imminent, Williams

fled the Massachusetts Bay Colony during a blinding blizzard, walking south by west to the lodge of Massasoit, a sachem among the Wampanoags, at Mount Hope. Walking eighty to ninety miles during the worst of a New England winter, Williams suffered immensely, and likely would have died without Indian aid.<sup>8</sup> Moving on to the land set aside by Canonicus, Williams began scouting for a suitable place to begin his settlement.

### **Providence Plantations and The Hedge of Separation**

Founding a colony in what is now the state of Rhode Island, Roger Williams established Providence Plantations in 1636. Slowly, supporters of Williams's idea of complete religious liberty began filtering down into the Plantations from Plymouth and Salem to join the new colony taking shape around the town of Providence. It was the law of the colony that settlers had unqualified religious and political freedom, a result of Williams's strong belief in the concept of "soul liberty." A corollary to that concept was his feeling that the temporal and the spiritual worlds should occupy two separate spheres, each restricted to their own respective domains. The difficulty lay in affecting this belief practically in the real world. In 1644, Williams declared in a tract published during a trip back to London to attain an official charter for the Providence Plantations colony that there be a "hedge of separation between the garden of the church and the wilderness of the world."<sup>9</sup>

Therein begins the raucous debate over the meaning, weight, and validity of the separation of church and state in the American legal and political systems. There are those who deny that the wall even exists and that it is a myth manufactured by a cabal of conspirators interested only in destroying religion. The Baptist minister who delivered

the benediction at the Republican National Convention in 1984, infamous for the Texas v. Johnson flag-burning case that arose from a protest outside of the Convention, declared that “there is no such thing as separation of church and state. It is merely a figment of the imagination of infidels.”<sup>10</sup> It has also been asserted that the principle of the separation between church and state is a communist plot originating from Article 53 of the Constitution of the Soviet Union. Such preposterous notions will not be dignified with direct refutation, but are rather submitted for levity and perspective concerning the extremity of those who seek to discredit the wall metaphor.

### **Thomas Jefferson and the Danbury Baptists**

As most Americans with even a shallow perception of the concept of church-state separation know, the modern understanding of the wall of separation is derived from one of the most well-known of the Founding Fathers, Thomas Jefferson. High school civics classes and non-scholarly works on religion in politics often identify Jefferson as the first to foster the idea of separation, and rightly so to a degree. Of course, as I have just mentioned and will explore specifically, Roger Williams voiced a very similar, and yet very different idea in 1644. More importantly, Thomas Jefferson penned the modern American understanding of church-state separation in a letter to the Danbury Baptist Association in January of 1802. Although a very extensive amount of intriguing scholarship surrounds the circumstances and events of Jefferson’s metaphor, I will only endeavor to illuminate the current discussion with an abstract of that broad historical realm while focusing on the more relevant parts.

The background to Jefferson's letter begins with the most vitriolic campaign for the presidency in American history. Running as the Republican candidate against his Federalist opponent, John Adams, Jefferson's religion, or alleged lack thereof, became the focus of the fierce contention. Seizing upon his authorship of the Statute of Virginia for Establishing Religious Freedom which advocated the disestablishment of revolutionary Virginia as well as his volume entitled Notes on the State of Virginia which contained the dangerously Enlightened sentiment that "It does me no injury for neighbor to say there are twenty gods or no god. It neither picks my pocket nor breaks my leg,"<sup>11</sup> as evidence of Jefferson's disdain for Christianity, Federalists rallied against Jefferson. He was labeled an atheist and an infidel by detractors throughout the campaign of 1800. So great was the fear generated by Federalist propaganda vilifying Jefferson as an opponent to religion that housewives in Federalist New England were seen burying the family Bible in their gardens or hiding them in wells because they fully expected the Holy Scriptures to be confiscated and burned by the new administration in Washington.<sup>12</sup>

As preposterous as we might dub these outrageous claims, they carried great weight during the bitter race for the presidency in the late 1790's. The exaggerated threat of a godless order of rule under Thomas Jefferson, characterized by Bible burnings and other outlandish persecutions of Christians, inflamed many voters throughout the nation. One particular area of electoral fervor was the strongly Federalist New England, also a bastion of state-established Congregationalism. While the overwhelming majority of voters in the New England area staunchly opposed Jefferson, a bantam minority of Baptists supported Jefferson precisely because of his unwavering commitment to religious liberty. One group of these ardent supporters was the Danbury Baptist

Association, an alliance of twenty-six churches in the Connecticut Valley organized in 1790 to represent approximately 1,484 members and as many as 6,000 other nominal adherents.<sup>13</sup>

With the support of Republican voters throughout the nation as well as those who resolutely stood for religious liberty Thomas Jefferson won the election and was inaugurated as the third President of the United States on March 4, 1801. Upon his installation into office, a committee of the Danbury Baptist Association wrote a congratulatory letter to Jefferson on his "appointment to the chief Magistracy in the United States."<sup>14</sup> At this time in American politics it was not uncommon for civic and religious associations to write messages of courtesy and appreciation to newly elected presidents. The Danbury Baptists eloquently expressed their unfaltering trust and support of Jefferson, entreating him to maintain his respect for the respective realms of religion and civil authority.

Jefferson's reply to the Danbury Baptists, cleverly written to both assuage his Baptist constituents as well as scorn his Federalist/Congregationalist opponents, clearly set out his opinions with regard to the government's role in religious affairs and vice versa. Composed on New Year's Day in 1802, the Danbury letter, as it has been come to known as, addressed the Association's hopes that under his administration, Jefferson would honor his commitment to religious liberty. In relevant part, Jefferson declared:

"Believing with you that religion is a matter which lies solely between Man & his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, & not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law



respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church & State."<sup>15</sup>

Despite the clarity of Jefferson's sentiments and the unmistakable separationist tone therein, the wall metaphor invoked in the missive to the Danbury Baptists still remains a hotbed of contention and disagreement. In fact, the phrase "wall of separation between Church & State" is the original source of a two hundred year-old American constitutional law debate over the involvement of religion in law and politics.

In order to find the true inspiration for Jefferson's metaphor, the search must be localized to Jefferson's era. Although Roger Williams was certainly an early Enlightenment figure, incredibly progressive relative to his peers in Massachusetts Bay, the most influential Enlightenment thinkers to weigh on Jefferson's political philosophies would have been more recent and prolific. Englishman John Locke and Scotsman James Burgh are two of the most prime inspirations on Jefferson's ideologies concerning the establishment of civil authority and the place of religion in that authority. Locke, perhaps the most influential thinker with respect to the structure, power, and duties of civil authority during the Enlightenment had, as we will see further on in this work, a most profound effect on Thomas Jefferson. For now, I will restrict this inquiry to the primary influence of James Burgh on Jefferson's wall metaphor.

Burgh, a radical Whig Commonwealthman, was "one of Britain's foremost spokesmen for political reform" whose writings influenced political thought in revolutionary America.<sup>16</sup> As a Real Whig, Burgh stood for the right of resistance, separation of powers, freedom of thought, religious toleration, the secularization of education, and the extension of the rights of Englishmen to all mankind, including the less privileged sections of British society.<sup>17</sup> This core set of values carried over into and

became an integral part of the Founder's ethos in setting out the values of the fledgling American nation. Like Roger Williams, Burgh's political motives lied with the preservation of religious liberty as well as religion as an institution. What makes the two different was their perspective on the conflation of religion and the civil government.

The reform-minded Scot deeply treasured religion, the wellspring of his politics as well as his moral code. However, like many Enlightenment scholars, Burgh was legitimately skeptical of established churches and warned that danger existed in "a church's getting too much power into her hands, and turning religion into a mere state-engine."<sup>18</sup> A proponent of the freedom of conscience, Burgh held a theological stance very similar to that of Roger Williams, being that religion and worship is a matter between the individual and God, not the individual and the state. As a logical extension of his position on religious liberty and the role of government, Burgh published his sentiments regarding the intersection of the two vital, yet contentious institutions in his work entitled *Crito*:

"Build an impenetrable wall of separation between things sacred and civil. Do not send a graceless officer, reeking from the arms of his bull, to the performance of a holy rite of religion, as a test for his holding the command of a regiment. To profane, in such a manner, a religion, which you pretend to reverence; is an impiety sufficient to bring down upon your heads, the roof of the sacred building you thus defile."<sup>19</sup>

Like Williams, Burgh ultimately held that entanglements between religion and the civil state lead to the very corruption that establishmentarians argued was countered by an ecclesiastical establishment. With arguments such as these it is clear that the early proponents of separation worried just as much about the well-being and integrity of religion as they did about the civil government.

This school of thought pertaining to the inclusion of religion in the government was almost certainly adopted by the Framers and other crucial figures who influenced the structuring of the new nation following the American Revolution. It has been documented that Thomas Jefferson, the author of the wall metaphor characterizing the First Amendment religion clauses, both admired and recommended the Scottish essayist's writings to fellow Founders as well as aspiring political and legal figures. No such support can be lent to the contention that Jefferson drew inspiration from Roger Williams's theologically-based hedge. In addition to the auspices of Jefferson, Burgh's writings were held out as essential reading by John Adams, Jefferson's opponent in the 1800 presidential election. Adams urged colleagues such as George Washington, Thomas Jefferson, Samuel Chase, John Dickinson, John Hancock, Robert Morris, Benjamin Rush, Roger Sherman, and James Wilson to undertake the study of Burgh's ideas, all of whom later "encouraged" the work of James Burgh.<sup>20</sup> With irrefutable evidence that the revolutionary generation, specifically the Framers, read Burgh with greater breadth it is certainly plausible that Jefferson drew his primary inspiration for his wall metaphor in the Danbury letter from the work of James Burgh, thus defining the argument in Separationist terms.

## **The Wall Debates**

More than any other concept in American constitutional law, the wall of separation is the most provocative and controversial by far. With or without historical or legal background in the debate, Americans certainly seem to have strong opinions on the separation of church and state, as evidenced by public opinion surveys which I will

explore later in this work. Opinions regarding church-state separation also have a tendency to transcend individual orientations on the political, religious, and ideological spectrum. Although certain political parties and other activist organizations have specific stances with regards to the issue, both support and opposition of the wall of separation can be quite diverse and motivated by a host of different rationale. Of course not every position in the debate is well developed, and in a way that is the very point on this work-to deepen understanding and illuminate inconsistencies. What this section endeavors to do is explore the three main areas of contention with regards to the wall of separation. These three areas will, for the benefit of clarity and brevity, be operationally defined as the directional, jurisdictional, and validity debates. The proceeding discussion will address them in that order.

### **The Directional Debate**

Essentially, the wide spectrum of opinions regarding the direction of the wall filters into two broad categories. Some argue that Williams's metaphor was the precursor of our modern separationist understanding of the wall of separation between church and state, while others like law professor Stephen L. Carter contend that it implies the opposite position. For Carter, the "hedge" described by Williams is a single-sided, or one-directional, wall retaining only the advances of the secular world into the sacred realm of the spiritual. Carter capsulizes his interpretation of the "hedge" metaphor fairly succinctly:

"For Williams, a Baptist, the garden was the domain of the church, the gentle, fragile region where the people of God would congregate and try to build lives around the Divine Word.

The wilderness was the world lying beyond the garden wall, uncivilized and potentially quite

threatening to the garden. The wall separated the two, and the reason for the wall was not that the wilderness needed protection from the garden- the wall was there to protect the garden from the wilderness.”<sup>21</sup>

Surely, Carter’s analysis of Williams is on point for the historical context of the time. Theologically, Williams felt that the garden of spirituality was of the highest importance, certainly more prominent than the concerns of the wilderness of civil society. The only concern those of the garden had with the wilderness was ensuring that the civil authority did not encroach upon the religious liberty of the inhabitants of the garden. As it was understood by Williams and his followers, if the state ever crossed the line of separation, the believer must choose to follow the commandments of God and ignore those of the state.<sup>22</sup> So, it would be entirely accurate to say that Williams had a greater interest in preserving religion than preserving the state. However, Williams was not entirely disinterested in civil authority. His founding of the new Providence Plantations and the civil government there, which was instrumental in the provision and protection of true religious liberty, demonstrated his acknowledgement of the proper role of civil government. Williams had learned from the discrimination of the Massachusetts Bay Colony’s civil government and constructed the government of Providence Plantations to guarantee the most basic of all rights in his view: the right to worship without governmental hindrance.

As the first several years of life in the colony would demonstrate, Williams’s radical ideas for the role of government produced a dubious balance between a plurality of competing religious sects that uncomfortably grated against one another. Eventually a peaceful co-existence emerged only after Williams brokered between the various feuding sects. History shows that Williams’s experiment in complete and unqualified religious

liberty was an idealistic and equally impracticable approach to governance of a pluralistic society. While all citizens enjoyed complete freedom of conscience, the lack of standards or norms to conciliate the diverse and, at times, irrational interests of the myriad sects resulted in social disorder. The fact that Williams, the colony's governor, and ultimate civil authority, was forced to intervene and restore order amongst the quarreling sects demonstrates the need for an arbiter between the claims of various groups of citizens while maintaining the overall order of the state. This arbitration is best achieved by way of a two-directional wall of separation, rather than the one-directional hedge proposed by Roger Williams and espoused by Stephen L. Carter. Without any overriding prescript that negotiates the equally compelling interests of both the religious citizenry who wish to practice without interference and the state which is bound to protect the rights of all the citizenry, a society will collapse upon itself in confusion and dissonance. In any society with a multiplicity of religious interests the principle of separation allows the various religious sects to live and worship as their doctrines prescribe without any abridgement, so long as the overall social order is not threatened and the rights of others are not tread upon. I will reserve further elucidation of this concept for the proceeding section of this volume.

Returning to Carter's interpretation of Williams's hedge of separation, it is important to note that his direct application of this concept to the Jeffersonian Age metaphor and the current legal understanding of the metaphor is irresponsible and misleading. Although the theologically-based hedge metaphor was appropriate for the Providence Plantations and the values incorporated by the settlers there, such a principle would not necessarily be valid when applied to a different governmental construct. In

other words, the people of Providence Plantations desired to live in a colony founded under the principle of complete religious liberty; after all, that is why they emigrated to the new colony from restrictive colonies like Massachusetts Bay. However, no such consensus existed at the founding of the United States as a new nation under the U.S. Constitution, thus making the Williams hedge metaphor an interesting historical footnote that is devoid of any legal force or rhetorical merit in the establishment of our fledgling nation.

Although Carter can, and has, argued that the “hedge” was the basis of the new nation’s First Amendment religion clauses and that the Framers adopted Williams’s theologically-inspired, one-directional separation between church and state, but he must do so from a position of lesser authority than he currently believes he occupies. This is not only because the hedge metaphor which was used in Providence, and in reality scrapped due to its impracticality, is inapplicable to a completely different government, but also because there is no clear evidence that any of the Founders, including Thomas Jefferson and James Madison, ever read the works of Roger Williams.<sup>23</sup> His works were primarily published in England<sup>24</sup> and did not see any substantial circulation in America until the 19th century.<sup>25</sup>

It is for these same reasons that legal historian Mark DeWolfe Howe has erroneously concluded that “if the First Amendment codified a figure of speech[,] it embraced the believing affirmations of Roger Williams and his heirs no less firmly than it did the questioning doubts of Thomas Jefferson and the Enlightenment.”<sup>26</sup> Howe further contends that the Jeffersonian language from the Danbury letter “could easily, perhaps even properly, be read as an ingratiating effort to echo a Baptist orthodoxy.”<sup>27</sup> While

Jefferson was likely to know of Roger Williams as both a religious and political figure, he was certainly not likely to have read or been influenced by his works. Many historians and legal scholars have asserted that Williams's views had a negligible impact on the prevailing concept of religious liberty during the framing of the Constitution. "As for any direct influence of his thought on the ultimate achievement of religious liberty in America," Perry Miller bluntly concluded, "he had none."<sup>28</sup> Regardless, both Carter's as well as Howe's commentaries elicit an intriguing debate on whether the constitutional church-state arrangement accords with the evangelical vision credited to Williams or the secular vision attributed to Thomas Jefferson.

### **The Jurisdictional Debate**

There is an equally stirring and contested discourse concerning the jurisdiction of the wall metaphor. Practically, this debate concerns itself with the proper application of the wall metaphor as a characterization of the First Amendment of the United States Constitution. Although there are various splinters and tangents that diverge from the two main positions in this debate, I will only concentrate on the two central arguments. The first camp submits that the First Amendment, understood correctly in its proper historical context, forbade only the establishment of a national church and held no authority over the states. On the other hand, the contrary position maintains that the First Amendment is meant to be interpreted as prohibiting any establishment, advancement, or support of religion irrespective of the level of government on which it occurs. The final position is a patchwork of the two aforementioned arguments, incorporating the historical perspective as well as the current understanding prohibiting a breach of the metaphorical wall. In



other words, even if the “original intent” of the Framers was to only restrict the establishment of a national church, prevailing judicial precedent makes that “original intent” doctrine a moot point.

The first position described in the jurisdictional debate is commonly referred to as accommodationism. As I hinted above, “original intent” doctrine is a perhaps the most prominent accommodationist argument, although not the only. While the accommodationist stance is multifaceted and contends many different points, original intent doctrine is the most relevant in this discussion. Popularized and ardently advocated by the Chief Justice of the Supreme Court, William H. Rehnquist, the doctrine has enjoyed wide currency among accommodationists as of late. This fact is made evident by original intent’s patronage of two other conservative and like-minded Justices in the high court, Antonin Scalia and Clarence Thomas. Those who subscribe to this particular interpretation the Constitution feel that the First Amendment should be read solely in the context of the time of its authorship. While declining to broadly interpret the Constitution, original intent scholars endeavor in placing themselves in the minds of the Framers in order to understand the original, and most relevant, intention of the words.

Approaching the religion clauses in this light is valuable for its appreciation of the history and search for greater understanding of the motives surrounding the First Amendment’s authorship. From this perspective, the wall of separation espoused by Jefferson was strictly a metaphoric construction of the relationship between organized churches and the national government. Despite the restrictions it placed on the central government, the First Amendment could not speak to the interchange between religion and state governments, nor was that the intention of the Framers. In fact, many legal

scholars and constitutional historians will point out that the First Amendment was ratified with the understanding that it would secure such an arrangement. It is argued that the religion clauses gathered a great deal of support from religious minorities out of fear that a majority of states with established Anglican churches would squelch the minority of states with established Congregational churches by imposing upon them a national Anglican church. Having learned from the mistakes in England and weary of more religious persecution, the First Amendment was endorsed by religious minorities as well as those suspicious of church establishment altogether.

An integral aspect of the “original intent” argument centers around the words used in the religion clauses of the First Amendment. In order to understand this crucial point we must examine the actual text of the religion clauses: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”<sup>29</sup> Original intent apologists point out that the initial word in the phrase denotes the Congress of the United States rather than a reference to all legislatures, both federal and state. Equally important is the remainder of the Establishment clause, which accommodationists believe should be read for its face value. Essentially, they approach the religion clauses with the most basic and simplistic reading, hoping to avoid the dangers of reading too deeply into a matter of fact proclamation.

Another intriguing examination of the importance of phraseology is Jefferson’s wording of the famous wall metaphor. Although it may only appear to be an argument of semantics, his use of the word “church” rather than “religion” presents another interesting facet of the original intent argument. As historian Jon Butler observed, Jefferson’s use of the word “church” rather than “religion” in his restatement of the First Amendment

emphasized that the constitutional separation was between ecclesiastical institutions and the civil state. His choice of language, no doubt, appealed to pious, evangelical Protestant dissenters who disapproved of established churches but believed religion played an indispensable role in public life.<sup>30</sup> Others feel that his choice of words denotes a prohibition of a national church only, while deferring to other matters of religion in politics such as school prayer, tuition vouchers, and religious displays on public property. In sum, advocates of original intent doctrine assert that the First Amendment must not be interpreted in contemporary modes; only a narrowly construed understanding of the religion clauses based in the circumstances and motives of the framing era can be supported.

The end result of accommodationist ideology is that religion is to be preferred over nonreligion. Although no specific religion or denomination is to be endorsed or established, it is believed that in all matters concerning the Establishment and Free Exercise, religion should be favored over secular concerns. This rationale is derived from both the religious liberty granted by the Free Exercise clause as well as the presupposition of a religious society. Because the Constitution grants the American people the right to practice their religion to their own dictates, surely religion must be considered of greater importance and priority over the absence of religion since those who do not practice religion forfeit their free exercise *de jure*. By defining religious exercise solely in terms of active exercise, the argument that religious liberty can also be exercised by non practice is explicitly rejected.

The diametrical argument to original intent and accommodationism is the strict separationist position. This argument fosters a broader reading of the First Amendment,

allowing for the most prohibitive interpretation of Jefferson's metaphor. Strict separationists refute the allegation that the Establishment clause was written only to prohibit the establishment of a national church, arguing instead that the broader reading not only instructs the government not to establish state-sponsored churches, but also to avoid the advancement of religion by the power of the government. Separationists also assert that the First Amendment can still be read broadly as well as in the context of the time, arguing that the "original intent" doctrine aforementioned as a central theme in accommodationist ideology is a misnomer. As they would have it, the First Amendment was authored with a flexibility that the Framers knew would have to be present in order for the provisions therein to survive the test of time. With that understanding, it is just as plausible that the original intent of the Framers was to foster a lasting separationist interpretation of the religion clauses.

Separationists decry claims that the First Amendment was understood as a prohibition on a federally established church only by declaring that such an approach is short-sighted and illogical. Not only would the Framers have been foolish to restrict the interpretation of the Constitution to their time only, but also make the federal constitution powerless with regards to the states. As discussed briefly above, couching essential freedoms, in this case religious liberty, in the strict historical context of their authorship severely limits their power. Likewise, the religious freedoms outlined in the First Amendment would be completely ineffective and moot if the federal constitution did not have any authority over state constitutions. In other words, why bother writing Bill of Rights and assuring religious liberty, free speech, protection against unlawful seizures, jury trials, and the host of other fundamental rights if they would not be recognized by

the states. Because this is not a study of federalism and the constitutional relationship between the federal government and the state governments, I will not enter into an in-depth analysis of that aspect of this argument. However, the main thrust of this line of thought remains valid. If the Framers had not meant for the First Amendment religion clauses to hold authority in the states as well as in the federal government they would not have even endeavored in writing and passing them.

With regards to the historical context aspect of this debate, strict separationism holds the contentions of original intent doctrine as anachronisms. Although the feelings, motivations, and bases of some of the First Amendment's composition may be grounded in the past, it is irresponsible to encase the Constitution's interpretation in a bygone era. Original intent inherently fosters an inequitable and arbitrary guide to interpreting the Constitution by restricting the reading of the religion clauses to the 18th century while allowing other sections of the Constitution to naturally mature and expand along with the nation in its journey through the past 200 years.

Take for example the Fourth Amendment prohibitions against illegal searches and seizures. Obviously the conditions of 1791, the year the Bill of Rights was ratified as a part of the Constitution, and 2002 are drastically different. It would be fair to say that we are worlds apart from our less technologically advanced and materially wealthy predecessors. As it stands now, our understanding of the Fourth Amendment as well as our reading of the Constitution as a whole has matured and evolved along with the changing times. Information technology, such as telephones, e-mail, the Internet, cell phones, and so forth, which did not exist at the time of the framing is currently protected by a broad reading of the Fourth Amendment, and rightfully so. Many other things have

changed since the Fourth Amendment was written and as a result many more things deserve the protections guaranteed by the Fourth Amendment. Now, instead of searching carriages and wagons, police must contend with myriad different types of vehicles and their accompanying compartments. Buildings of all types are radically different than their 18th century counterparts, thus identifying the necessity of adapted search and seizure rules for the police to operate by. Since the dawn of the Industrial Revolution there has been an incredible rise in the abundance of portable private property which also factors into Fourth Amendment search and seizure concerns. The list goes on and on, but it is suffice to say that as times have changed so have the understandings of our Constitution provisions. This is a natural process, for no governing document can be isolated in the past and remain a valid source of order for a society in constant progression. Fortunately for us, our Framers understood this eventuality and constructed a governing document dynamic enough to change as necessary even if they could not foresee the specific changes that lay in the future.

Another prevalent disparity between accommodationist and separationist philosophy is their approach to nonreligion as exercise of religious liberty. As previously stated, the accommodationist view on this subject is that religious exercise is characterized solely by active religious practice. This interpretation narrowly and shallowly perceives the Free Exercise Clause so as to look no further than actual worship, while dismissing the broader interpretation espoused by separationism that accounts for a “freedom of conscience” to choose religion or nonreligion. This notion of “freedom of conscience” is an intriguing development endorsed by several prominent Framers such as

Thomas Jefferson and James Madison. In fact, it has been traced to colonial statutes that predate the U.S. Constitution.

Unlike accommodationist ideology, the separationist stance does not defer to religion in any circumstance on church-state matters. Rather, separationist doctrine prescribes a firm restriction on governmental support, endorsement, or advancement of religion in any respect. Not only is religion not preferred over nonreligion, any attempts to further the ends of religion by the means of American politics or law are extirpated due to their offensiveness in the eyes of the First Amendment. As a general rule, separationism prefers secularism over religious intrusions on governmental affairs. To analogize this idea consider separationism as a gardener who walks about the borders of the metaphoric wall of separation snipping weeds and ivy of impermissible religious activity growing over the wall from the opposite side. However, it is important to point out that in fulfilling this role, the gardener does not indiscriminately hack apart healthy branches of religious activity that flourish freely on the other side of the wall. Separationism is too often associated with a plot to completely “sanitize” the public sphere of any trace of religion. It is true that some advocates of separationism become overly zealous in challenging religious expression and thus move beyond the realm of true separationism, just as some apologists of accommodationism venture beyond their stance in favor of theocracy. Separationism, in its purity, seeks only to eradicate inappropriate religious intrusions upon the government, better understood as the aggregate of the United States citizenry, while leaving the remainder of religious expression unfettered. In fact, not only does separationism restrain itself from impinging

upon appropriate religious expression, it endeavors to preserve and defend such religious practices.

The third position in this discourse is a composite of notions extracted from both accommodationist and separationist arguments. Due to its distinctiveness, this position is without a common title in the popular nomenclature associated with church-state issues. In the absence of this official title, I will assign this unique perspective “separationist reviewism” out of convenience. Many of the notions asserted under this position are simple compromises between the two prominent sides while others are derived solely from one particular position or originate from distinct and novel sources. The first of the compromises on the jurisdictional matters at hand relates to the original intent doctrine espoused by accommodationism and denounced by separationism.

While the historical veracity of original intent is unquestioned, the divergence from original intent in separationist reviewism is a matter of relevant, especially Supreme Court, jurisprudence. There is very little question that the Framers structured the First Amendment religion clauses so as to limit only Congress from the establishment of a national church, while leaving intact the states’ rights to establish religion. However, the principles of our Constitution also outline the essential function of the independent judiciary in interpreting our laws, most especially our most fundamental of laws. This concept, buttressed by the vindication of judicial review in *Marbury v. Madison*<sup>31</sup> as well as the inveterate principle of *stare decisis*, establishes the foundation of separationist reviewism. Building upon that foundation is the critical incorporation of free exercise and establishment provisions under *Cantwell*<sup>32</sup> and *Everson*<sup>33</sup> in the 1940’s. The concept of incorporation is undeniably the cornerstone of separationist reviewism. Not only did



incorporation bring assurances issued by the Bill of Rights under the power of the Due Process Clause of the Fourteenth Amendment, it allowed constitutional interpretation to escape from the past and advance into the present.

Essentially, reviewism holds that against the solid structure laid out by the judiciary, original intent cannot survive even the most casual scrutiny. Despite its obvious historical merit, the base concept of constraining a singular aspect of constitutional interpretation by two centuries is flatly ridiculous. In order to deem original intent the prevailing doctrine the fundamental concepts of judicial review, stare decisis, and incorporation would have to be disregarded on the whole. Furthermore, original intent simply collapses under the extensive jurisprudence that has mounted over the two centuries since the Bill of Rights was ratified. The Supreme Court and other federal courts have consistently handed down decisions that certify the validity of the separation of church between church and state, superceding any notion of original intent as submitted by Rehnquist and other like-minded jurists. Simply put, original intent is a moot point.

Despite the obvious incongruity between original intent and settled constitutional jurisprudence, the concept remains a threat to accurate First Amendment interpretation now more than ever for reasons already stated. With the Chief Justice of the nation's highest court supporting its implementation, original intent must still be taken seriously and confronted with a critical eye. As stated above, one of the most prominent exceptions to original intent is its isolation to antiquated 18th century context. The vast array of cultural, political, economic, and legal changes that have swept over the United States since 1791 have resulted in an ever evolving perspective on the Constitution.

Along with the abolitionist movement and the Civil War began the long struggle for equality amongst all races. Likewise, the women's suffrage movement and the Nineteenth Amendment initiated the steady march towards equality for both sexes. With continually developing understandings of our social climate and broadly enlightening insights on our democracy we have benefited from evolving constitutional erudition. No matter what the specific change or realm of life that it derives from, our constitution has always advanced in turn with the help of a conscientious judiciary.

One of the other glaring obstacles in practically implementing original intent lies in the demur of unequivocally establishing the original intent of the Framers. With tongue-in-cheek, I wonder if the Amazing Kreskin has advised Chief Justice Rehnquist on the finer points of clairvoyance so as to unmistakably determine the intentions of the long dead Framers. All joking aside, I must acknowledge that the scholarship surrounding the Framing has become so thorough and detailed that it is nearly possible to know what the Framers were thinking as they structured the First Amendment. We can certainly gain an appreciable insight into the proceedings and come to understand the intent of each delegate with more comprehensiveness, yet we can never actually know with exact certainty the original intent of those men in 1791. In fact, much can be said for the delegates like Madison and Pinckney who dissented from the original intent as posed by Rehnquist and others as the only intent voiced during the First Amendment's authorship. More on the construction of the First Amendment will follow in the proceeding section.

Ultimately, from the separation reviewist perspective, the plain fact is that despite the conjecture and postulations offered by historians and legal scholars as to the original

intent of the Framers of the Constitution, the controlling factor in law remains precedent. No matter what archaic letter or journal entry from a Founding generation figure that is unearthed voicing an opinion akin to Rehnquist's delusions, it will remain nothing more than a historical footnote. As long as the whole of the Bill of Rights applies to all fifty states and that the prevailing jurisprudence indicates that the religion clauses are broadly read, no thesis based on arcane historical particulars can be considered controlling.

As a consequence of the philosophies of separationist reviewism, both strict separationism and preference to religion over nonreligion are rejected. Rather, reviewism adopts the prominent stance of neutrality with respect to religion, demonstrating neither preference nor persecution. In other words, the government is restricted from taking into consideration the venerability of religion in society and likewise is prohibited from intentionally subverting religion. The aim of such a stance is that the predilection for either religion or secularism is removed from the scope of judicial scrutiny. Despite its obvious practical barriers, neutrality is the only equitable middle ground that does not tend to intentionally burden either of the extremes of belief. While neutrality may seem impassively ignorant to the importance of religion, it can also be argued that it is similarly cold to secular interests. The goal of neutrality is to ensure the rights of all parties, regardless of their religious interests, by using the precedent and existing rule of law to handle matters pertaining to religious liberty.

### **The Validity Debate**

The final arena of debate concerning the wall of separation metaphor is that of its validity. While most legal scholars and informed practitioners fully accept the validity of

the metaphor as an acceptable characterization of the First Amendment religion clauses as well as its current status as good law, there are those that question that legal force of a figure of speech. Again, this issue has gained notoriety by eliciting the support of several staunchly accommodationist jurists and also by publicity from conservative special interest groups. The purpose of the proceeding pages is to represent the challenge to the overall legality of the wall metaphor and refute the arguments therein. However, before I undertake this controversy, I will first review the basis of its current acceptance as valid constitutional law.

Whenever a church-state issue emerges in the media, the popular phrase employed by most writers or reporters goes something like this: "The court said the words 'under God' violate the establishment clause of the 1st Amendment, which requires the separation of church and state."<sup>34</sup> No matter what the issue in question happens to be, you can simply substitute the news story's phrase "the words 'under God'" with the matter at hand. Despite the rancor and protest from opponents of church-state separation that characteristically surfaces in that paper's next editorial section, this type of reporting is not necessarily lazy or incorrect. After all, it accurately reflects the current legal standing and informs those that are not familiar with that fact, regardless of their personal objections. Although I refrain from delving into public opinion polls at the present moment, the vast majority of Americans acknowledge the judicial reality of the separation of church and state. However, the portion of Americans that do not endorse the idea of separation do so with extreme vigor and determination.

As I have mentioned, it is with almost Swiss-watch exactitude that rabid anti-separation editorials appear in periodicals across the country after a major separationist

decision is handed down or religion is allegedly maligned by some new public policy. Not surprisingly, the uniformity of these enraged diatribes against separation are as reliable as the media stories reporting them. A common, and biting smarmy, excerpt from this brand of editorial responses invoking a straw man argument reads as follows:

“Let's look at what the Constitution says about religion. The First Amendment reads, ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ...’ Now, can anyone see anything in that quote even slightly resembling the words ‘wall of separation between church and state?’ They aren't there. They never have been. They were never intended to be.”<sup>35</sup>

For the benefit of the reader, I omitted the outrageously inflammatory comments that preceded the above quote that implicated “humanist proponents” and “liberal Democrats” for perpetrating the myth of separation on unwitting Americans. That kind of abusive ad hominem attacks of baseless smearing and conspiracy-baiting is a truly unfortunate, and an all too common occurrence in editorials addressing church-state issues. More importantly, the author fails to address the real question of the wall debates concerning the validity of a metaphor as law.

It is precisely the kind of sentiment displayed by the editorial author that underscores the need for a more informed debate, not just an exchange of snide remarks replete with inaccuracies and misrepresentations. Upon examination of this argument, the irony of this author's chosen title of “Separation of church and state is misunderstood” is striking. While the separation of church and state is greatly misunderstood, it is misunderstood by the countless individuals that invoke arguments similar to the one above, not by judges who cite the metaphor as standing case law.

While it is certainly true that the phrase “separation of church and state” is not in the First

Amendment, or in the Constitution as a whole for that matter, the point is not proven.

While nearly every legal scholar acknowledges the validity of the use of invented language or phrases that establish legal precedent, there is an extreme minority that either does not subscribe to this practice or are, in this editorial author's case, simply ignorant of the concept. After all, a plethora of "unoriginal," or non constitutionally established, legal terms have been implemented as rule of law by the courts.

A few illustrative examples may clarify this point. One prominent specimen of this practice of adopting language as rule of law that is not expressly written in the Constitution itself is the principle of the separation of powers. Although Americans fully accept this principle, which elementary school civics classes explain as a system of checks and balances, it is not to be found in the Constitution anywhere. Viewed as an essential keystone to democratic governance often associated with Article One, Section One of the U.S. Constitution, separation of powers has enjoyed status as rule of law since 1825.<sup>36</sup> And though it was addressed in colonial constitutions<sup>37</sup> it was conspicuously absent from the text of the Constitution. Following the logic asserted by the editorial writer above, separation of powers is a fraud without basis in our national founding document.

Several other examples of this practice of creating or adopting language not found in the Constitution that dictates constitutional interpretation can be seen with regards another important First Amendment liberty- the freedom of speech. Over the course of the 211 years since the First Amendment has been law, its assurance of freedom of speech has undergone a tortured history. Times of war, espionage, subversion, and unrest have tested the steel of this sacred freedom with varying outcomes and a host of different

interpretations beginning in 1919. Included in this catalogue of various interpretations is the clear and present danger test,<sup>38</sup> bad tendency doctrine,<sup>39</sup> preferred freedoms,<sup>40</sup> ad hoc balancing,<sup>41</sup> and the clear and probable danger standard.<sup>42</sup> All of these interpretations are conjured by the Supreme Court Justices that struggled with free speech issues brought before them, yet there is no record of these phrases in the Constitution.

However, this is of no consequence because the judiciary, especially appellate courts, is given latitude in interpreting the law and is within their rights to establish doctrines and metaphors in guiding lower courts and legislatures in the implementation of the law. This practice is clearly applied to religion clause interpretation by the Supreme Court in *Reynolds v. United States* where Justice Waite opined concerning Jefferson's wall metaphor created in the Danbury letter: "Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured."<sup>43</sup> Accordingly, the wall metaphor as vindicated in *Reynolds* and invoked in *Everson*<sup>44</sup> survives the superficial challenge to its validity. Simply because a constitutional principle is not expressly written in the 4,440 word founding document does not mean it cannot enjoy the force of law.

Keeping the above argument in mind, it is also important to consider the force and validity the wall metaphor as described by Jefferson was intended to wield. Of course it is difficult to assign the proper magnitude of the metaphor, just as it is difficult to ascertain the "true" original intent of the First Amendment. We are restricted to circumstantial speculations in these matters and as persuasive and plausible as they may

be, they are just speculations. With that said we shall examine critical perspectives on Jefferson and his wall metaphor.

What degree of significance did Jefferson attach to his "wall of separation" metaphor? Did he regard to metaphor as a definitive guide for lawmaker and jurist alike? As First Amendment scholar, Daniel L. Dreisbach responds:

“There is no evidence from the written record that he ever again used the "wall" metaphor. Its absence is particularly noteworthy in documents such as his second inaugural address and letter to the Reverend Samuel Miller that, like the Danbury letter, purportedly addressed Jefferson's views on the propriety of the executive appointment of days for religious observance. In short, there is little evidence that Jefferson considered the ‘wall’ the quintessential symbolic expression or theme of his church-state thought.”<sup>45</sup>

Essentially, Dreisbach posits that because Jefferson did not return to the wall metaphor in later writings it was not an important thesis in his personal ideology, and certainly not intended to be the transcendent authority on church-state issues for future generations.

However merited this argument is, it neglects to address the clear importance of the Danbury letter pro se. Rhetorically speaking, rejecting the wall of separation by citing its lack of appearance in other official documents written by Jefferson is an *ad ignorantiam* argument and, subsequently, an extraordinarily weak position. Simply because Jefferson failed to expound on his earlier metaphor in later public addresses and private missives does not invalidate the wall of separation metaphor as a viable interpretation of the First Amendment religion clauses. The unanimous court in *Reynolds* recognized this fact and the subsequent courts have adopted and sustained this approach towards Establishment and Free Exercise issues.



## The Constitution

The United States Constitution is as sacred a text in the history of democracy as any holy manuscript is for religion. Although it is not sacred in the religious sense, it embodies the spirit of governance by the people and stands as a paragon of democratic ideals. The Framers composed the Constitution in relatively short order, used very little verbiage, and still emerged with the most dynamic governing document in the history of world governments. Our Constitution is both timeless and peerless. The foresight of the drafters is evident in the Constitution's ability to accommodate both drastic and subtle social change. Yet, with all of the Constitution's flexibility and openness it remains unyielding with respect to the preservation of the fundamental rights and liberties of the people. The brilliance of the Framers' design of the Constitution can only be appreciated with a closer look at the structuring, drafting and ratification process, the subtleties of which will reveal a complex interplay of competing interests and common goals.

Americans venerate the Constitution for its embodiment of common virtues and aspirations held by the general citizenry. It is the legal and moral touchstone from which all public policy debate proceeds. This is especially true of debates involving a conflation of religion and politics. In such debates it is often asserted that the Founders advocated the incorporation of religion into the government as made evident by the Constitution. However, quite plainly, the U.S. Constitution is a secular document, outlining a secular government to preside over a religious people. There is as an extensive debate concerning this thesis now as there was at the time of the ratification. However, the positions of anti-separationists have curiously reversed over the passage of two hundred years. The proceeding section is comprised of a historical view of the

drafting and ratification process followed by an analysis of the “Christian nation” position and other arguments submitted against a secular Constitution.

### **Proceeding Towards a Secular Constitution**

Once free of British rule, the fledgling nation of former colonies struggled with the pressing debates facing the Founders in establishing a sovereign and durable nation. While Republicans, Federalists, Whigs and others vied for their preferred modes of governance, the Articles of Confederation were floundering. In the caucus of national leaders seeking to replace the failing Articles, anti-Federalists railed against the creation of a federal Constitution. Among their arguments inculpating the proposal was the charge that the Constitution was irreligious. The Declaration of Independence credited the “Creator”<sup>46</sup> in delineating human rights while the Articles of Confederation attributed freedom to the “Great Governor of the World.”<sup>47</sup> The proposed federal Constitution was conspicuously bereft of any allusions or tributes to the Christian deity, or any deity for that matter. The Framers had broken from eons of precedent by refusing to invoke the concepts of divine right or theistic sanction of rule. In fact, the only explicit reference to religion was a qualification that religious faith would not dictate governmental position.

This explicit reference to religion is found in Article Six of the Constitution and in relevant part reads as follows: “no religious test shall ever be required as a qualification to any office or public trust under the United States.”<sup>48</sup> Although this provision elicited a cacophony of objections from the public at large, the delegates attending the Philadelphia Constitutional Convention treated it as a non-issue. Charles Pinckney, the governor of South Carolina, who had emerged as a staunch protagonist for religious liberty during the

drafting of the Constitution, introduced the “no religious test” clause.<sup>49</sup> Submitted on the general convention floor on August 20, it was immediately referred to the Committee on Detail without debate. Ten days later the committee made its report without any mention to Pinckney’s “no religious test” provision. Feeling that his proposal was not given its due, Pinckney moved his proposal again from the convention floor. Issac Kramnick and R. Laurence Moore vividly reconstruct the resulting debate:

“Roger Sherman of Connecticut, the committee chairman, held that the prohibition was ‘unnecessary,’ the prevailing ‘liberality’ being sufficient security against such tests. Gouverneur Morris and General Charles Coatsworth Pinckney seconded Governor Pinckney’s motion, however. It was then voted on and according to the Maryland delegate Luther Martin, adopted by a very great majority by the convention, and without much debate. No records exist of the exact vote, but Madison’s personal notes of the convention report that North Carolina voted no and that Maryland was divided.”<sup>50</sup>

Despite the ease with which Pinckney’s “no religious test” clause was passed, there still remained a vexing disparity between the federal constitution to which it was added and the majority of the states’ constitutions.

While the delegates passed the “no religious test” clause for inclusion in the federal constitution, eleven of the thirteen states had religious tests for public office in their constitutions as of 1787. Kramnick and Moore capsule the states’ stances on religious tests:

“Even in Rhode Island, once the most religiously pluralistic and liberal state, where small numbers of Catholics and Jews freely worshiped, only Protestants could vote or hold office. New Hampshire, New Jersey, both Carolinas, Vermont, and Georgia also required officials to be Protestants. Massachusetts and Maryland insisted on belief in the Christian religion as a

qualification for office. Pennsylvania required its officials to be Protestants who believed in God and the divine inspiration of the Old and New Testaments; in Delaware all elected and appointed public officials were required to profess faith in God the Father, and in Jesus Christ His only son, and in the Holy Ghost, one God blessed forevermore.”<sup>51</sup>

At first blush, it seems paradoxical for the delegates of these eleven states, especially Pinckney, to vigorously petition for a national prohibition on religious qualifications for office while maintaining state religious tests. In fact, Catholic John Carroll of Maryland, brother of delegate Daniel Carroll, “acerbically noted in 1787 that even as many state constitutions had been drafted in 1776 reserving public office to Protestants, the American army swarmed with Roman Catholic soldiers.”<sup>52</sup> The apparent contradiction between the federal and state constitutions is troubling from our contemporary legal perspective where the states are beholden to support the federal constitution except in cases where the states wish to grant additional protection to the base freedoms guaranteed by the federal constitution. However, when analyzed through the same critical lens used to decipher the jurisdictional debate over the wall metaphor, the distinction is more clearly discernable.

It is most reasonably asserted that the supporters of a federal prohibition against religious tests for office did so with the same rationale that delegates later cited in support of the religious clauses of the First Amendment ratified in 1791. According to Madison’s notes, of those eleven states with their own constitutionally mandated religious tests, nine unanimously supported Pinckney’s measure to forbid federal religious tests. Ostensibly, the delegates of these nine states endorsed the federal measure in order to preserve the rights of the states in requiring the religious qualifications of their corresponding established religions. By forbidding the federal government from imposing religious

tests or criteria for office that may have superseded the state qualifications, the delegates ensured the perpetuation of the religious order and established churches of their respective states. The prevailing notion that the delegates of the Constitutional Convention perceived the federal constitution that they were framing concerned the organization of the centralized federal government only lends credence to this analysis of the religious test prohibition.

The two states among the thirteen represented at the Convention that did not have constitutionally mandated religious qualifications were Virginia and New York. In Virginia, the social climate for religious establishment was initially amenable before being overtaken by a wariness of religious establishment. Upon the proposal of Patrick Henry's "Bill Establishing a Provision for Teachers of the Christian Religion," Madison delayed the consideration of the bill and, with encouragement from George Mason, began working on a petition arguing against the legislation. In this petition, titled "Memorial and Remonstrance against Religious Assessments," Madison enumerated fifteen reasons to oppose Henry's bill, which would have assessed Virginians a moderate tax or contribution annually for the support of the Christian religion or of some Christian church, denomination or communion of Christians, or some form of Christian worship.<sup>53</sup> In the meantime, Virginia had flirted with the notion of establishing the Episcopal Church as the official state church, but the measure affecting that notion was repealed after only two years. This short-lived establishment can be explained as fallout from the Revolution. Like many colonies after the Revolutionary War, Virginia no longer wished to bear the mark of English tyranny (the official Anglican Church), and thus established a different church in order to unbind themselves completely from England. Shortly after

establishing the Episcopal Church in Virginia, citizens soon rallied against it and demanded its abolition.

Fresh from his victory over Henry's bill, Madison revived Jefferson's "Act for Establishing Religious Freedom" which had been laying dormant in the House of Delegates since it was drafted in 1777. Although Jefferson was in Europe serving as the U.S. foreign minister to France at the time, Madison believed that the conditions were right to reintroduce Jefferson's bill to the General Assembly. While keeping in close correspondence with Jefferson, Madison submitted "The Virginia Act for Establishing Religious Freedom" which was ultimately passed by a 60-27 vote in January 1786.<sup>54</sup> The landmark bill achieved many victories for religious liberty in Virginia by providing freedom of conscience for all citizens, abolishing any religious assessment tax, eradicating the conditional bestowal of civil rights based on religious beliefs, and chastising overzealous religionists in persecuting those of differing creeds. Moreover, the bill forbade religious tests of qualifications for public office:

"the proscribing any citizen as unworthy the public confidence by laying upon him an incapacity of being called to the offices of trust and emolument, unless he profess or enounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which in common with his fellow citizens he has a natural right..."<sup>55</sup>

Jefferson had combined the essential elements he saw necessary for complete religious toleration into one piece of legislation, making Virginia a pioneer in religious liberty. Not since Roger Williams and the Providence Plantation experiment, had a civil government taken such measures to promote religious freedom and equality.

Unlike Virginia, New York took a more cynical approach to religion and, in some respects, demonstrated a wariness of religion in general in its founding constitution. Not

to be misunderstood, New York provided a clear and indisputable endorsement of religious liberty in its Constitution by granting that “the free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind.”<sup>56</sup> However, in the same breath, the document declared that such freedoms are necessary to “guard against that spiritual oppression and intolerance wherewith the bigotry and ambition of weak and wicked priests and princes have scourged mankind.”<sup>57</sup> The New York Constitution also asserted a ban on established churches or religions by stating decisively that “all such parts of the said common law, and all such of the said statutes and acts aforesaid, or parts thereof, as may be construed to establish or maintain any particular denomination of Christians or their ministers... be, and they hereby are, abrogated and rejected.”<sup>58</sup> This section essentially disposed of or invalidated any remnants of the English common law that had been co-opted by the State of New York upon declaring sovereignty, which tended to establish religion by way of civil authority.

In another constitutional provision, New York forbade the clergy from holding any civil or military office. The constitution reasoned that “ministers of the gospel are, by their profession, dedicated to the service of God and the care of souls, and ought not to be diverted from the great duties of their function.”<sup>59</sup> Citing this reason, the New York State Constitution declared that “no minister of the gospel, or priest of any denomination whatsoever, shall, at any time hereafter, under any pretence or description whatever, be eligible to, or capable of holding, any civil or military office or place within this State.”<sup>60</sup>

Despite the good faith on the part of the General Assembly and supporters of the provision in keeping the clergy focused on saving souls, the prohibition is clearly a

violation of civil rights. Aside from the metaphysical duties of religious leaders, nothing distinguishes a priest, rabbi, or minister from any other tradesman or professional.

Nevertheless, the article was supported and approved as foundational element of the New York Constitution of 1777. In fact, at and around the drafting of the Declaration of Independence, a time period where the newly “freed” states were rewriting or establishing new constitutions, many states enacted similar provisions banning the clergy from eligibility as public officers. Among those states were Delaware,<sup>61</sup> Georgia,<sup>62</sup> Kentucky,<sup>63</sup> North Carolina,<sup>64</sup> South Carolina,<sup>65</sup> and Tennessee.<sup>66</sup>

Regardless of the rationale for doing so, the federal constitution adopted Pinckney’s “no religious test” clause with little debate. The resultant document is one of a secular nature. Not only did the delegates omit any reference to official religion or God in the Constitution produced in 1787 by the Constitutional Convention in Philadelphia, the one mention of religion was an exception to its use as criteria for public office. Despite the relative ease and accord with which this secular document was issued by the Convention, it provoked an outrage amongst the general public as the Constitution was brought before the ratification conventions in each of the states. State delegates throughout the thirteen states railed against the Constitution, specifically citing the lack of any requirement for public officials to be Christians. Amongst these vocal critics was Henry Abbot, a delegate to the North Carolina convention who warned that the exclusion of religious tests “was dangerous and impolitic and that pagans, deists, and Mahometans [sic] might obtain offices amongst us.”<sup>67</sup>

Of course, many citizens flatly rejected the Constitution based solely on the failure to invoke God or promote Christianity anywhere in the document. Above all,



some felt that acknowledgement of God's role in creating and supporting the United States was essential and the exclusion of God could not be abided. By manifestly displaying "cold indifference towards religion," an anonymous writer in the Virginia Independent Chronicle warned, the Framers might provoke the bitter wrath of the slighted deity and bring "pernicious effects down on the citizens of the new nation."<sup>68</sup>

This apocalyptic theme was frequently invoked during the ratification process and can be seen clearly in anti-Federalist, Charles Turner's politically partisan disapproval of the Constitution masquerading as a religious objection: "without the presence of Christian piety and morals the best Republican Constitution can never save us from slavery and ruin."<sup>69</sup> The prevalence of this type of political sabotage was frequent in that era, and as Jefferson's 1800 presidential campaign demonstrated, could often be more brutal and unremitting than our contemporary "mud-slinging."

Regardless of the basis for exception to the Constitution, its conspicuous lack of religious endorsement drew the ire of many religionists in the country. Catalyzed by this perceived injustice, advocates of the Christian commonwealth and rule by Christian standards as induced by many state constitutions sought to redress the grievous mistakes by the delegates in Philadelphia in their own ratification conventions. Surprisingly, Virginia was a source of tumult and controversy concerning the ratification of the secular Constitution. Both in April and May of 1788, measures were rejected that would have amended the words of Article Six to read: "[n]o other religious test shall ever be required than a belief in the one only true God..."<sup>70</sup> A letter to the delegates of Virginia's ratification convention in June 1788 entreated them to create a provision in one of the first two articles of the Constitution calling for the establishment of institutes of religious

indoctrination throughout the nation wherever feasible.<sup>71</sup> Meanwhile in Connecticut, William Williams unsuccessfully petitioned to include a long-winded theological accreditation to God in the brief Preamble as well as in Article Six.

However, the federal constitution and its accompanying treatment on religion was not without its supporters. James Madison, an accomplished champion of religious liberty, appealed to the delegates in the deliberating states in his Federalist No. 52: “the door of [the House of Representatives] of the federal government is open to merit of every description, whether native or adoptive, whether young or old, and without regard to poverty or wealth, or to any particular profession of religious faith.”<sup>72</sup> This sentiment was echoed in various general assembly chambers as well as from pulpits across the young nation. James Iredell, a future associate justice of the U.S. Supreme Court, amplified Madison’s argument by claiming that the “no religious test” clause was essential in assuring the fundamental guarantee of religious freedom. Democracy, he asserted, demanded that the voters of the nation be permitted to apply their own criteria in electing their officials, even if such a policy resulted in “representatives who have no religion at all, and pagans and Mahometans.”<sup>73</sup>

Many members of the clergy marshaled support for Article Six, especially Baptist leaders like John Leland. Leland, who would, in 1802, personally deliver a 1,235 pound mammoth Cheshire cheese to newly-elected President Thomas Jefferson in appreciation for his assurance of religious liberty, lauded the “no religious test” clause for its exclusion of governmental involvement in religion.<sup>74</sup> Another prominent Baptist leader, Reverend Isaac Backus, touted the righteousness of the test ban declaring that “nothing is more evident, both in reason and The Holy Scriptures, than that religion is ever a matter

between God and individuals; and, therefore, no man or men can impose any religious test without invading the essential prerogatives of our Lord Jesus Christ.”<sup>75</sup> Reverend Samuel Langdon of New Hampshire revered the clause for its separation of religious and temporal authority and remarked that it was “one of the great ornaments of the Constitution.”<sup>76</sup> Countless other clergy from a wide collection of sects praised the “no religious test” clause for its salutary effect not only on secular government, but more importantly, for the health and integrity of religion.

A broad base of support was arrayed in support of Article Six, for both political and religious reasons. In the most ecumenical argument in defense of the clause, Oliver Ellsworth described the provision as an egalitarian attempt to assure the furtherance of unadulterated democracy. Ellsworth, who originally published his argument under the nom de plume of “A Landholder” in the *Connecticut Courant* on December 17, 1787, spoke from a position of great familiarity and wisdom. He had recently served as a delegate to the federal Constitutional Convention in Philadelphia, would soon become a member of the first U.S. Congress, and would later sit for a brief time as the Chief Justice of the U.S. Supreme Court. In his opening paragraph, Ellsworth endeavored to assuage the fears of concerned religionists who worried that the clause would burden religion. Quite to the contrary, he argued, “my countrymen, the sole purpose and effect of it is to exclude persecution, and to secure to you the important right of religious liberty.”<sup>77</sup>

Ellsworth continued by surmising that:

“[a] test in favour of any one denomination of Christians would be to the last degree absurd in the United States. If it were in favour of either congregationalists, presbyterians, episcopalions, baptists, or quakers, it would incapacitate more than three-fourths of the American citizens for any publick office; and thus degrade them from the rank of freemen.”<sup>78</sup>

Rather than ensure the prosperity of religion in America, religious tests would ultimately run roughshod over religious freedom by oppressing those of the non-preferred sect or faith tradition.

He also pointedly argued that test acts would do nothing to certify the moral character of public officers and could, in fact, inspire greater unprincipled behavior in order to gain office as they did in the case of the English Test Acts. This misconduct ultimately affects not only the integrity of the civil government, but also the sanctity of religion. Ellsworth declares:

“how easy is it for [an unprincipled man] to make a public declaration of his belief in the creed which the law prescribes; and excuse himself by calling it a mere formality. This is the case with the test-laws and creeds in England. The most abandoned characters partake of the sacrament, in order to qualify themselves for public employments. The clergy are obliged by law to administer the ordinance unto them, and thus prostitute the most sacred office of religion...”<sup>79</sup>

Concluding his remarks on test acts, he professed that: “[i]f we mean to have those appointed to public offices, who are sincere friends to religion, we, the people who appoint them, must take care to choose such characters; and not rely upon such cob-web barriers as test-laws are...A test-law is the parent of hypocrisy, and the offspring of error and the spirit of persecution.”<sup>80</sup>

With the learned advocacy of individuals like Ellsworth, the federal constitution retained the “no religious test” ban of Article Six as well as its secular nature. Efforts to insert allusions to God, specifically Christianity, into the federal Constitution were repelled and deemed inappropriate or unnecessary. An antecedent to this secularization of the federal constitution can be observed in the failed attempts by Benjamin Franklin to

open sessions of the convention with prayer. On June 28, 1787, a month into the proceedings, the aged, yet highly esteemed delegate requested that the convention be opened with daily prayers and was subtly denied when the delegation voted to adjourn for the day rather than discuss the motion. To put the incident in context, it is important to recall that Shay's Rebellion and the financial plagues actuated by the weak Articles of Confederation were greatly vexing the delegates. Although Franklin's attempt to soothe the aching souls of his colleagues with a thoughtful entreaty to God was in good faith, it was markedly malapropos given the secular nature of the proceedings. It is more plausible to imagine that if the delegates did wish to implore God's guidance and support, that they would have undertaken that exercise in a house of worship. As some have indicated, with little surprise, groups of delegates could be seen attending services in local churches together on days that the convention was not in session. Despite the overstated charges that this implies a religiously inspired Constitution, it does, however, confirm that these men honored the power of religion. Perhaps it is for that very same reason that the convention members declined to carry on what was tantamount to a religious worship service in the same hall where they gathered to construct their governing document. Their reluctance in intertwining the establishment of the federal government by the Constitution with religion provides an insight on the importance the Framers weighed on both religion and secular civil authority.

Unlike the intractable provision banning religious tests in the federal constitution, the fates of the state religious tests were shorter lived. Although states were not legally forbidden from invoking religious tests for public servants until 1961, when the Supreme Court handed down its ruling in *Torasco v. Watkins*,<sup>81</sup> many of the provisions were

purged from state constitutions much before the Warren Court intervened. Isaac Kramnick and R. Laurence Moore recount the process of elimination for religious tests:

“The Pennsylvania constitution dropped its religious test in 1790, insisting only that officeholders be supporters of the Constitution. In 1792 Delaware added to its constitution a ‘no religious test’ clause. Georgia and South Carolina followed quickly. But Vermont and New Jersey retained their religious tests for officeholders until 1844, and New Hampshire its until 1877. [However,] new states entering the Union in the nineteenth century occasionally did include in their constitutions the requirement that officeholders believe in the Christian God.”<sup>82</sup>

Obviously not all of the states would subscribe to the view embodied in the federal Constitution, and in fact, the common perception was that such a system was most beneficial. While some states affirmed the provisions established in the Constitution and used it as a model or template from which to design their own, others ignored the federal document believing it had no bearing on them. Although this perception has been since invalidated by our modern understanding of vertical federalism, it is curious to note that two states still retain constitutional religious tests even though they are moot under the federal constitution.<sup>83</sup> Also worthy of note is the “no religious test” that was abandoned in South Carolina in favor of a clause requiring a belief in a “Supreme Being” to attain public office just after the conclusion of the Civil War. Under the Arkansas Constitution of 1868<sup>84</sup> those who did not profess a belief in a Supreme Being were disqualified from public office. The provision survived the years until 1997 when it was challenged and ruled to be an unconstitutional encroachment on free exercise and a violation of the federal constitution’s “no religious test” ban.<sup>85</sup>

Although not a religious test in the strictest sense, the presidential oath recited at the inauguration of each new president still bears a tangible link to the topic of Article Six. Despite the presence of the phrase “so help me God” commonly appended to the conclusion of the contemporary version of the oath, this addition is not derived from the U.S. Constitution. The original version, found in Article Two, reads as follows: “Before he enter on the execution of his office, he shall take the following oath or affirmation: ‘I do solemnly swear (or affirm) that I will faithfully execute the office of the President of the United States, and will to the best of my ability, preserve, protect and defend the Constitution of the United States.’”<sup>86</sup> Not only does the original Constitution ratified in 1789 fail to require a pledge to God, the deity still remains conspicuously absent from the Constitution, and for good reason. Not wishing to commingle religion with the secular state, and bound by Article Six, the reference to God is pointedly disallowed. As legal historian, Steven Epstein concludes:

“Although the oath of office specified in the Constitution does not include a reference to God, Presidents have appealed to the deity in their oaths since the inauguration of George Washington. When President Washington completed his constitutional oath of office, his hand placed on a Masonic Bible, he added, spontaneously, ‘I swear, so help me God’ and then kissed the Bible. It is most likely that Washington borrowed this practice from the English coronation ceremony, where the new King would kneel at the altar, place his hands on the Bible, swear the oath, and then kiss the Bible. Every President in modern times has sworn his oath ‘so help me God.’”<sup>87</sup>

Despite the obvious conflict between the popular practice and the constitutional “gag order” on this type of oath to God, there is no apparent violation of Article Six. Because the invocation of God is, by all appearances, extemporaneous and not required

by the oath set out in the Constitution, it ostensibly enjoys the protection of political and/or religious free speech. Despite the overwhelming acceptance of this traditional invocation on the part of the American public and their elected representatives, it does bear a certain unwarranted disregard for Americans who do not profess a Judeo-Christian faith, or are of nontheistical background. However, this concept will be reserved for greater exploration later in this work.

### **Congress shall make no law...**

As any student of the ratification process will attest, the debates concerning all manner of considerations were vociferous and heated. The extensive list of contentious items overwhelmed some delegates, but in the end the Constitution was approved by the thirteen states. During the debates, one of the central issues for the states was the assurance of civil liberties. Some statesmen, like the convention delegates of North Carolina and Rhode Island, feared that if the rights of the people were not expressly guaranteed in the Constitution then a tyrannical government would surely recant them. In fact, the delegates from the aforementioned states refused to ratify a Constitution without an enumeration of the express rights of the people. However, there was great distress being registered by those who feared that a list of rights would only tend to limit the freedoms enjoyed by the people. The rationale follows that if the Constitution did not include a few essential rights, being that an exhaustive list of sacred rights would be both impossible and impractical, a tyrannical administration could easily deny rights considered to be “given” that are omitted from the Constitution.



A great number of pundits weighed in their thoughts and despite the dissent from some wary Americans, the Herculean task of assembling the most integral civil rights and liberties was initiated in 1789. By no accident, James Madison, the brilliant and persuasive author of many polemics that impelled opponents to ratify the Constitution, was charged with the task of drafting what would later become what we know as the First Amendment. Although his first effort yielded a provision much different from the one ratified in 1791, the transformations that it underwent from draft to finished product lend a largely untapped insight into the motives and intentions of the Framers.

On June 28, 1789, James Madison submitted his first draft, which reads as follows: “The civil rights of none shall be abridged on account of religious belief, nor shall any national religion be established, nor shall the full and equal rights of conscience in any manner or on any pretext be infringed.”<sup>88</sup> This initial draft indicates that Madison subscribed to the popular Enlightenment view that religion and spirituality were more of a matter between man and God rather than civil authority and God. At minimum, Madison decreed three things in his draft. He forbade the establishment of any national church, conceivably by the same rationale as expressed in earlier portions of this paper. The remaining two provisions revolve around not only the vast array of civil rights, but also the specific rights of conscience. He endeavored to not only protect the general category of civil rights, but also to ensure that individual religious opinions would be respected and sheltered from actual abuse or theological persecution. Madison, by using the all-important phrase “rights of conscience,” signaled that all manner of religious as well as nonreligious beliefs would be honored. As we will see, although different in

wording from the final version accepted by conference committee, the ideas incumbent in both versions are not entirely dissimilar.

Soon after Madison had proposed his draft an eleven-member House committee, which included Madison, was convened to analyze the amendment and submit any changes to the full House. On July 28, the committee returned with an amendment stating: "No religion shall be established by law, nor shall the equal rights of conscience be infringed."<sup>89</sup> The committee had noticeably pared off the entire clause pertaining to civil rights and also dropped the qualifications of "national" from the establishment of religion clause as well as "full" from the rights of conscience clause. The new proposal maintained the spirit of Madison's original effort, but left more room for creative imaginations to plausibly infer that more restriction had been placed on government sponsorship of religion. The same committee also approved another proposal, which concisely declared that "No state shall infringe the equal rights of conscience."<sup>90</sup> This proposal, encouraging a vastly broader and religion-limiting reading, did not see progress on the House floor. Progressing on the separationist track laid by the earlier proposals, Samuel Livermore moved for the consideration of a substitute amendment on August 15. His amendment outlined a more exclusionary approach with regard to the government's role in religion. The proposal read: "Congress shall make no laws touching religion or infringing the rights of conscience." This provision endeavored to remove the government completely from the realm of religion, whether it entails the establishment of a national church or decrees concerning acceptable religious opinions.

Ultimately, however, the House approved an amendment on August 24 offered by Fisher Ames of Massachusetts declaring that "Congress shall make no law establishing

religion or prohibiting the free exercise thereof, nor shall the rights of Conscience be infringed."<sup>91</sup> Having passed the House, the Ames amendment was forwarded to the Senate for consideration. During the Senate debates three distinct alternatives were proposed and eventually rejected. These three versions were worded thus:

- Congress shall make no law establishing one religious sect or society in preference to others.
- Congress shall not make any law infringing the rights of conscience, or establishing any religious sect or society.
- Congress shall make no law establishing any particular denomination of religion in preference to another.<sup>92</sup>

Although these versions were defeated does not mean that they are devoid of enlightening insight. To the contrary, the very fact that these drafts were rejected sheds light on the aims of the Congress in composing the First Amendment while simultaneously casting genuine doubts on the popular accommodationist approach to the intent of the religion clauses. If the federal religion clauses were merely meant to relegate the choices of church establishment to the states, as accommodationists argue, why was the third proposal defeated? If senators were dually concerned about the establishment of national churches as well as freedom of conscience, why was the second proposal discarded? Granted that my suppositions are educated conjecture, but they are questions that demand to be confronted by those who refuse to acknowledge the broader reading of the First Amendment religion clauses.

What is certain is that the Senate emerged with an amendment on September 9 with the text: "Congress shall make no law establishing articles of faith, or a mode of

worship, or prohibiting the free exercise of religion."<sup>93</sup> With a conflict between the two versions issued by different houses and a stubborn House of Representatives unwilling to accept the Senate version, a joint conference committee was assembled to resolve the discrepancies and approve a final amendment. As a member of the committee, Madison orchestrated a monumental effort in preserving the elements of liberty and equality in during the debate over the language and intent of the First Amendment religion clauses. The committee emerged two weeks later, on September 24 with the final language for the religion clauses of the First Amendment.

In observing the course of this contentious and winding process, one prominent theme in the debate over the language of the clauses remains unequivocally consistent. Regardless of the individual drafting the language or the body politic in which it is proposed, all of the debated religious clauses dealt solely with forbidden activity or regulation on the part of the government. Rather than outlining measures to either support or hinder religion, the First Amendment proscribed the government from making any laws that would speak to religion. The Framers understood the personal nature of religion and were reluctant to entrust the any legislature, in this case Congress, with the power to dictate the lawful exercise of religion. That is not to say that this concept could not be expanded to include the states under this scope, which was ultimately the case with incorporation. Those, specifically accommodationists, who attempt to invoke original intent as a basis for excluding this broadened scope not only ignore fundamental legal principles, but also support a position that tends to subordinate religion to government ends. As will be discussed at various points in the coming pages, this danger is still lurking in the landscape of American constitutional law.

## **The Legislative Landscape: Deus Ex Machina Legislation**

The legislative environment of church-state issues is, and always has been, irrepressibly turbulent and dynamic. Even a brief perusal of the Congressional Record over the past forty years reveals an ongoing and ceaseless stream of measures directed specifically at modifying the legal and social understanding of church-state relations in the United States. Not only do these measures seek to fundamentally change the landscape of religious liberties, they quite often are promoted as moral solutions to social problems. The ubiquity with which sponsors of accommodationist bills cite the religious and moral benefits of their proposed legislation is only outmatched by the public's acceptance of their rationale. However, the notion that a law mandating school prayer or the posting of the Ten Commandments in public school classrooms will serve as a panacea for an array of social ills is mere demagoguery. Similarly, the proliferation of cant by feckless politicians and the deliberate misinformation of the public plagues the legislative activity in the realm of religious liberty. This kind of sophistry exploits the general ignorance of the citizenry regarding the true nature of religious liberties in America and invariably results in factious discord between opposing viewpoints. While there has been well-meaning and apposite church-state legislation, the bulk of which that has emerged since September 11<sup>th</sup> has been wholly perfidious.

### **School Prayer**

One of the perennial legislative movements is the undying effort to approve a school prayer amendment. Unremitting attempts to pass a school prayer amendment

have been perpetuated in one form or another since the 1962 landmark ruling in *Engel v. Vitale*.<sup>94</sup> In fact, just one month after the *Engel* decision was handed down, the United States Senate held hearings for two days and three constitutional amendments to allow unrestricted prayer in school were proposed. Given the typical sluggish and roundabout method of approaching issues in Congress, the expediency with which the Senate responded to the ruling demonstrates the political and social capital invested in church-state issues, particularly school prayer. Further shockwaves were produced by the ruling handed down in *Abington*<sup>95</sup> that struck down a Pennsylvania statute making required Bible readings and recitations of the Lord's Prayer at the beginning of the school day unconstitutional.

Although the Court had voted 8-1, the general public, especially in the South, was far from near unanimous approval of the decision. Opinion polls taken after *Abington* indicated that only 24 percent of the American public supported the court's decision.<sup>96</sup> The public uproar was intensified by misguided or misinformed political endeavors to register disapproval with the Supreme Court's second separationist ruling on school prayer in just two years. New York's famous Francis Joseph Cardinal Spellman proposed a constitutional amendment to "correct" the Supreme Court's "misreading of the no-establishment clause." In Alabama, Governor George Wallace implored school boards, school administrators, teachers, and students to disregard the Supreme Court's ruling altogether. The governor and the Alabama State Board of Education demonstrated their resolve at a meeting of the board on August 5, 1963, by reinforcing the curriculum with a resolution that prescribed daily Bible reading in Alabama classrooms. If the federal government challenged him, Wallace vowed, he would go to schools personally

and read the Bible. In addition to Cardinal Spellman's school prayer amendment, a rash of other amendments were proposed, including the popular Becker Amendment.

Introduced in 1963 by Rep. Frank J. Becker of New York, the amendment proposed permitting voluntary state-prescribed prayers in public schools. Wallace again provoked controversy while testifying before the House Judiciary Committee on the Becker amendment. He began his endorsement of the proposed amendment by attacking the federal government, socialism, and secularism and ended by advancing the accommodationist view of church-state relations and maintained that the Bill of Rights did not apply to state governments.

Since the Becker amendment failed, members of Congress have proposed similar amendments, a legislative practice repeated over two hundred times by the 1990's. Behind each one of these attempts to reinstate mandatory school prayer via constitutional amendment has been a campaign of inflammatory rhetoric and misrepresentation. Quite often legislators will propose a school prayer amendment to appeal to a broad constituency that feel prayer in school should be allowed by persuading that largely uninformed or misinformed group of voters that prayer is currently forbidden in public schools. The overwhelming acceptance of this rationale illustrates the widespread nescience of the American voters regarding their religious liberties. The reality is that school prayer is not wholly forbidden from public school, nor has it ever been. Although there exists a complex web of judicially settled bans on particular types of prayer with regards to the time, manner, and place of the prayer, voluntary silent prayer is certainly permitted in all of the nation's schools.

Despite the fact four of the five school prayer amendments offered under the 107<sup>th</sup> Congress<sup>97</sup> have come before September 11<sup>th</sup>, there has been legislative activity in the Congress that would have the potential and the express intention to affect school prayer. Specifically, a bill known as the First Amendment Restoration Act, has been proposed in the House and hence referred to the Subcommittee on the Constitution.<sup>98</sup> The “findings” portion of the bill includes a selective history of church-state cases that the bill is directed at reversing. Of these cases, the bill lists prominent separationist school prayer and Ten Commandment display decisions. In his introductory remarks on the House floor, the bill’s sponsor, Ron Paul of Texas, invoked all of the hallmark accommodationist arguments against the wall of separation. Rep. Paul’s sophistry also employed a hackneyed mimicry of Rehnquist’s original intent doctrine:

“The [Supreme] Court completely disregards the original meaning and intent of the First amendment. It has interpreted the establishment clause to preclude prayer and other religious speech in a public place, thereby violating the free exercise clause of the very same First amendment. Therefore, it is incumbent upon Congress to correct this error, and to perform its duty to support and defend the Constitution.”<sup>99</sup>

Paul also echoed the trite argument that the phrase “separation of church and state” was wrongfully derived “out of context” from Jefferson’s letter to the Danbury Baptists. Like Stephen L. Carter, Rep. Paul asserts that Jefferson’s wall, if valid, is one directional, thereby turning *its* original intent on its ear.

Of the twenty-two items listed in Rep. Paul’s findings, none posit new or especially interesting arguments concerning current First Amendment religion clause jurisprudence. In fact, Rep. Paul’s disappointingly facile argumentation seems to disregard the standing case law regarding religious liberties as well as fundamental legal



principles such as separation of powers and incorporation. The main thrust of his measure would, in his own words:

“restore First amendment protections of religion and speech by removing all religious freedom-related cases from federal district court jurisdiction, as well as from federal claims court jurisdiction. The federal government has no constitutional authority to reach its hands in the religious affairs of its citizens or of the several states.”<sup>100</sup>

This flawed concept of removing the jurisdiction of matters concerning religious freedom from the federal judiciary in order to “correct” injustices has been attempted many times over with no success. The deprivation of the federal courts’ jurisdiction over matters of religion based on an original intent argument is not only rhetorically weak, but also unconstitutional in and of itself. The Congress cannot effectively overrule or invalidate judicial decisions by removing that court’s jurisdiction, especially issues arising under the Constitution.<sup>101</sup> Nevertheless, Rep. Paul endeavors to skirt standing constitutional law by arguing that the Bill of Rights does not apply to the individual states, thus voiding the inconvenient Supreme Court rulings that stand as a barrier to mandating school prayer and other religious ceremonies in public or governmental realms. Although the obtuse legislative efforts to dodge constitutional restrictions on these types of religious activities consistently fail, vigilance must be maintained to ensure that religious liberties are not sacrificed on the alter of ignorance.

In addition to the renewed attempts at amending the Constitution with respect to school prayer, Congress’ various nonbinding measures on the matter provide invaluable insight into the legislative process of church-state issues. One of the most indicative of these post-September 11<sup>th</sup> measures is a concurrent resolution introduced to the House by Rep. Walter B. Jones, Jr. less than a month after the terrorist attacks.<sup>102</sup> On October 2,

2001, Rep. Jones submitted one of the most overtly religious resolutions to respond directly to the tragedies associated with international terrorism and the World Trade Center attacks. The measure was passed by the House in relatively short order, but was never acted upon since it was ostracized to committee by the Democratic majority in the Senate. Since the measure would have no legal impact on church-state issues and is merely a form of posturing, if not a method for testing the waters for a constitutional amendment. The resolution only bears mentioning to demonstrate the opportunistic tendencies of legislators like Rep. Jones, who has built a strong reputation as an ardent accommodationist.

The succinct resolution cites speeches endorsing the salutary effect of prayer from both President Eisenhower as well as President George W. Bush before proposing that the Congress should undertake legislative action concerning a school prayer amendment. Specifically, Jones' bill provided that "it is the sense of Congress that schools in the United States should set aside a sufficient period of time to allow children to pray for, or quietly reflect on behalf of, the Nation during this time of struggle against the forces of international terrorism."<sup>103</sup> Although Rep. Jones and the 196 other Representatives in the House who supported his resolution would assert that it represents a faith-inspired move to console and heal the nation, it also indicates a skillful manipulation of human tragedy to bolster legislatively troubled measures such as school prayer amendments. While earnest attempts to heal the wounds of a troubled nation with meaningful legislation are the express obligations of Congress, shameless promotions of sectarian interests that have consistently been rejected by the courts achieve nothing except divisiveness. Unfortunately, before the smoke had even cleared from lower Manhattan, some of our

elected representatives felt it necessary to “express their sense” that organized prayer should be smuggled back into public schools under the guise of national security and spiritual healing.

### **Religious Electioneering**

The 107<sup>th</sup> Congress, both before and after the terrorist attacks of September 11<sup>th</sup>, had seen action of several pieces of legislation that are designed to alter the federal tax law regarding the political speech of 501(c)(3) tax-exempt organizations. Since 1954, the Internal Revenue Code has restricted a specific category of nonprofit organizations, including churches and houses of worship, from expressly endorsing or opposing candidates for public office.<sup>104</sup> Although the law forbids that level of specificity in political speech, religious leaders are still free to preach on pressing social, cultural, and political issues from the pulpit. Religious leaders are, and always have been, permitted to address areas of concern that face their parishioners in the world outside of the church doors without fear of governmental regulation. In essence, the clergy and their churches still enjoy the full range of free speech as guaranteed to all citizens with the exception of specific endorsement or opposition of candidates.

However, as the case with all legislative issues concerning church and state, special interest groups and ambitious politicians often distort the truth of the matter and attempt to capitalize on voter ignorance. True to form, the pattern of misinformation and deception has been ratcheted up for the two bills proposing 501(c)(3) organization tax reform in the days since September 11<sup>th</sup>. The frontrunner of the two bills that has already been defeated in the House, was known as the “Houses of Worship Political Speech

Protection Act.”<sup>105</sup> Its clone in the Senate has not been acted on since it was referred to the Committee on Finance and is not likely to progress any further this term.<sup>106</sup> Although the “Jones Bill,” or “Houses of Worship,” measure has been already been defeated, it merits discussion here not only because the Senate version is still alive, but also because the likelihood of a renewed effort in the House next term is highly likely.

The “Houses of Worship Political Speech Protection Act,” introduced to the House by the aforementioned Rep. Walter B. Jones, threatens the separation of church and state in a most profound way. This threat is clear despite the misleading rhetoric that purports the bill to be a triumph for free speech over the tyranny of an oppressive tax bureaucracy. However, the public’s perception of the issue had become clouded with the amplified propaganda endorsing the bill degenerating into a shameless exploitation of the tragedy of September 11<sup>th</sup>. Rep. Jones himself exhorted the benefits of the bill in a post-September 11<sup>th</sup> America by making explicit references to the tragedy in his House floor speeches promoting the bill.<sup>107</sup> His exploitation of the terrorist attacks on New York and Washington, D.C. could be viewed in two different lights: one of admiration for his political savvy in catalyzing his once failed measure by invoking a *pathos* appeal to his colleagues and constituents, or stark condemnation for a heartlessly opportunistic attempt to capitalize on fear and confusion just 6 days after the terrorist attacks. With religious and spiritual emotions running high in the weeks following the attacks, Rep. Jones knew the possible salutary effects of his invocations of God and moral urgency. Either way his actions are viewed, the appeals failed where they counted the most: the roll call vote.

Rep. Jones’ appeals also failed to influence the sentiments of a wide array of religious groups, including the United Methodist Church, the National Council of

Churches, Unitarian Universalists and the American Jewish Congress. Special interest groups such as Americans United for Separation of Church and State, the ACLU, and People for the American Way also opposed the measure for its flouting of the principle of separation. These groups represented the overwhelming majority of Americans that expressly disapprove of churches endorsing or opposing political candidates. A Pew Forum public opinion survey conducted five months after September 11<sup>th</sup> and several months before Rep. Jones introduced his bill into the House concluded that seventy percent of Americans believed that churches should refrain from endorsing or opposing political candidates.<sup>108</sup>

While the “Houses of Worship” bill was rejected by a vast coalition of religious and civic groups, the measure was endorsed by far right groups such as the American Family Association, Christian Coalition, Concerned Women for America, and the Southern Baptist Convention. Not surprisingly, the primary supporters of Rep. Jones’ bill were prominent television evangelists such as D. James Kennedy, James Dobson, Jerry Falwell, and Pat Robertson, whose American Center for Law and Justice helped draft the bill. Clearly this conglomeration of advocates would have stood, quite literally, to profit the most from a revision of the tax code concerning 501(c)(3) nonprofit groups. By removing the obstructions that limit these politically active religious organizations, the “Jones Bill” would have allowed rampant abuse of good-faith federal tax shelters.

The host of reasons which demonstrate the imperative for opposing the “Jones Bill” all exhibit the measure’s dangerous combination of threats to religious liberty and baseless contravention of critical federal laws. Potentially, the bill could inevitably foster a religious regime using partisan politics to control the communities in which they enjoy

majority status. Conceivably, an electoral district that is demographically dominated by Evangelical Protestants could, in turn, become politically and religiously dominated by those Protestants in promoting only their sectarian interests. This type of political scheme would revert the United States back to a puritanical state in which religious minorities would be squelched and oppressed by the financial and political clout of larger sects. Rep. Jones' bill would also create a gaping loophole in the newly passed campaign finance legislation that would allow religious groups to act as unchecked political action committees capable of funneling unlimited funds into select candidates. Furthermore, the "Jones Bill" would make a special exemption for houses of worship only, while holding all of other 501(c)(3) nonprofit organizations to the more stringent limits on political candidate advocacy under the current law. All of these reasons demonstrate the unfair and unconstitutional advancement of religion and the potential for religious balkanization in American society.

### **Ten Commandments**

As I have already discussed, in the months since the September 11<sup>th</sup> terrorist attacks, the Congress has made efforts to create legislative balms for the deep emotional and spiritual woes of the American people. Amidst this flurry of religiously-based legislative endeavors, some measures have had at least tenuous connections to this questionable motive. However, two bills known as the "Ten Commandments Defense Act of 2002"<sup>109</sup> and the "Ten Commandments Public Display Resolution of 2002,"<sup>110</sup> respectively, are perhaps the most senseless pieces of religiously-inspired legislation in the 107<sup>th</sup> Congress. Despite transparent and flawed argumentation by both bills'

sponsors, these measures are clearly designed to contravene current constitutional law that forbids the display of the Ten Commandments on public or governmental property.<sup>111</sup>

The rationale for the passage of these provisions is specious at best and fraudulent at worst. The first of the bills, introduced into the House by Representative Robert B. Aderholt of Alabama, is a curious piece of legislation that declares that its purpose is “to defend the Ten Commandments.” Although the bill fails to mention its attackers, it is implicit in Rep. Aderholt’s “findings” that he fears the Decalogue will be forever shunned from public lands and forgotten by lawmakers altogether. Therefore, the bill constructed by Rep. Aderholt makes three distinct mandates regarding not only the Ten Commandments, but religious expression and judicial rulings on matters concerning the relationship between church and state.

The primary thrust of Rep. Aderholt’s bill is to relegate to the individual states the power to allow displays of the Ten Commandments on public lands owned by the state. This allowance is peculiar due to the wide latitude already allowed to citizens and groups to display the Decalogue in private areas. It is no coincidence that this measure which seeks to make public displays of the Commandments legal has originated from a Representative whose state is currently engaged in a legal battle over a public Ten Commandments display. The federal suit, known as *Glassroth v. Moore*, is a consolidation of a joint action by the ACLU and Americans United for Separation of Church and State along with another suit brought by the Southern Poverty Law Center. The appellee in the case, Chief Justice Roy Moore of the Chief Justice of the Alabama Supreme Court, is being sued for covertly arranging to have a four-foot-tall, granite

display of the Ten Commandments weighing 5,280 pounds installed in the rotunda of the Alabama Judicial Building in Montgomery. Although this case will be expanded on in greater detail in the proceeding chapter, at this juncture it is crucial to point out the obvious connection between the legislation Rep. Aderholt is proposing and its bearing on the court proceeding that had been initiated just a few months before. Of course it is only conjecture, but the timing and necessity of this legislation concurs with the theory that there is an organized accommodationist effort to defy federal law and impel Judeo-Christian doctrine on the general public.

The second provision is a furtive provision that is vaguely constructed to reinstate all manner of currently forbidden public religious expression as lawful acts of free speech. The language is ostensibly ambiguous with regards to the type of religious expression, but much more declarative in outlining the areas where this once forbidden religious expression would be permitted. Essentially, section 3(b)(1) of the bill assays to subvert the entire volume of religion clause jurisprudence by declaring that all religious expression on public property, including schools and courthouses, would be sanctioned by the government under the First Amendment.<sup>112</sup> Interpreted broadly, as Rep. Aderholt would anticipate, this surreptitious bill would turn nearly sixty years of constitutional law on its head and bypass a plethora of inconvenient religion clause rulings in one fell swoop. To ensure that this radical departure from understood and standing case law is preserved in the judiciary, the third measure in the bill directs all courts to “exercise the judicial power in a manner consistent with the foregoing declarations.” Although this and other articles of legislation that seek to alter the course of church-state jurisprudence mandate that the courts fall in line with any interpretation of the Constitution as



prescribed by Congress, they will always fail. The judiciary, particularly the United States Supreme Court, reserves the express right in interpreting all pieces of legislature whether constitutional or statutory.

The second Ten Commandments measure introduced during the 107<sup>th</sup> Congress, identified as “Ten Commandments Public Display Resolution of 2002,” is another overtly defiant response to judicial denunciation of public displays of the Decalogue. At present, the bill is buried in the House Committee on House Administration, where it was ostracized on the very day it was introduced. Although this resolution, like the Aderholt bill, stands little chance of being adopted, the constant threat being posed to the separation of church and state as well as diversity and pluralism of religious traditions in America is embodied even in futile measures like this one. The purpose and motivation of this resolution exhibits the very spirit of the accommodationist movement that seeks to contravene the law at every step even when thwarted by the courts in jurisdictions throughout the United States.

The resolution quite simply dictates that “[t]he Architect of the Capitol shall prominently display the text of the Ten Commandments in the chambers of the House of Representatives and the Senate.”<sup>113</sup> The measure’s sponsor, Indiana Representative Brian D. Kerns, is even more terse in the bill’s text with regards to the rationale for proposing such a measure. He cites the dwindling number of unchallenged Ten Commandment displays remaining in courthouses and other public buildings across the nation and then repeats an oft-heard, but reasonably negligible invocation of the Decalogue as an essential moral compass and legal model for western society. These superficial and trite arguments have largely been dismissed by the Supreme Court as in *Stone v. Graham*<sup>114</sup>

and buttressed by close study of the origins of common law. Contrary to the stock rhetoric employed by accommodationists who argue that Judeo-Christian doctrines, such as the Ten Commandments, are the sole foundations of common law, the antecedents of portions of the American legal system can also be found in the *Corpus Juris Civilis*, or the Roman law. Rep. Kerns' true motivation for this resolution can be discovered not in the hollow words of his bill, but in his emotionally-inspired words on the House floor.

Upon examination of Rep. Kerns' candidly expressive and emotionally charged words spoken not long ago during an open session of the House, it is apparent that his only aim is to defy standing case law regarding public displays of the Commandments. On September 26, 2002, Rep. Kerns rose to speak, hoping to revitalize his floundering resolution in the waning days of the 107<sup>th</sup> Congress. His peculiar remarks underscore the lack of lucidity in the standard arguments for legislation requiring the public display of Ten Commandment monuments. He first told a heart-warming tale of a 15-year-old girl who dreamed of erecting a Ten Commandments monument in memory of victims killed in the terror attacks of September 11<sup>th</sup> and the recent fruition of that girl's dream in Crawfordsville, Indiana. According to Kerns, the private land for the monument was donated by a local church and other local sponsors contributed to the cost of the monument depicting two tablets comprising the Ten Commandments with the words "Lest We Forget" inscribed between them.<sup>115</sup> This emotional appeal to his audience hopes to manipulate the tender sentiments reserved for the ambitions of young children and their expression of religious or spiritual convictions, but pales in comparison to his overt declarations regarding subversion of the law.

After the touching story of young local resident La'Shar Sharp's fulfilled dream, Rep. Kerns put aside any attempts to disguise his true intentions and affirmed that he wished to exhibit his disapproval of a legally settled matter concerning Ten Commandment displays in his own legislative district. The Congressional Record shows Rep. Kerns remarks verbatim: "As you may know Mr. Speaker, the Crawfordsville Courthouse was forced to take down its depiction of the Ten Commandments. For this reason, I introduced legislation, which would prominently display the Ten Commandments in both the House and Senate Chambers."<sup>116</sup> Rep. Kerns' unambiguous words demonstrate the spiteful and rebellious nature of his resolution. This sort of conduct is highly unprofessional and inappropriate for such a high-level elected official. However, this manner of behavior and the motivations that drive such misconduct are never observed by even vigilant citizens.

Comparable to the irrational nature of the stated goals and motivations of his resolution is the superfluosity of the provision. As Rep. Kerns so eloquently related in the story of La'Shar Sharp and her dream of erecting the Decalogue in remembrance of the victims of terrorism, private displays of the Commandments are beyond the scope of challenge under the First Amendment. The ease and alacrity with which the "Lest We Forget" monument was erected in a private park demonstrates the lack of necessity for displays on public lands and public buildings. There are many avenues of suitable private displays of the Ten Commandments without encroaching on the lands owned and maintained with the tax dollars of diverse religious and nonreligious interests. As for Rep. Kerns' entreaty that "[i]t is important in these times of uncertainty that we be steadfast in our beliefs and mindful of our roots,"<sup>117</sup> nothing could be more contradictory.

While some members of the community may draw their heritage lines back to Christian forebears, still many others profess religions as well as nontheistic beliefs that can be traced to the same founding of a nation which Rep. Kerns attempts to portray as solely ordained by his Christian brothers. Regardless of the predominant religion of centuries past or the present, our First Amendment guarantees that no one will be relegated to a lower class or have their religious beliefs openly suppressed. While being steadfast in his personal beliefs and mindful of his own roots, Rep. Kerns should also acknowledge the principle of respect for the beliefs and roots of others as his deistic counterparts, Jefferson and Madison fought so assiduously to embody in the Framing document of our nation.

As I have mentioned before, the events of September 11<sup>th</sup> shook the nation and presented a degree of emotional and spiritual trauma in the United States unrivaled since the bombing of Pearl Harbor. The reactions to the tragedy were as diverse as the citizenry that expressed them. For a great many, like Rep. Kerns, they found solace in the assurances and teachings of their religion, whether it be Christianity, Buddhism, Islam, Judaism, Hinduism, or any other the vast world religions. In this period of sensationally heightened spirituality, it is a deplorable act of hubris on the part of many to preclude the beliefs of the few. In the Congress of the United States, a symbolic manifestation of plurality in our great nation, it would be a travesty to establish a monument to the creed of the majority.

### **Faith-based Initiatives**

Of the myriad articles of legislation concerning the principle of separation of church and state that have been proposed in the 107<sup>th</sup> Congress, the most controversial,

yet cogent measures have been those in a series of bills relating to President George W. Bush's faith-based initiatives. Of these bills, two have risen to prominence: the Community Solutions Act of 2001,<sup>118</sup> and the CARE Act of 2002.<sup>119</sup> The two bills are directed primarily at making more government funding available to religious charities and social welfare programs with little to no regulation on religious proselytizing and substantial exemptions to current federal equal employment laws. Although the concept is genuinely admirable on parchment and noble in theory, it presents some very difficult practical problems upon application in reality. Unfortunately, those problems are not negligible matters of opinion or mere technicalities. Rather, these problems directly challenge the religious liberties and equality that are maintained by current federal equal opportunity employment laws and ensured by the Free Exercise clause. Moreover, the significant increase in federal tax dollars being directed solely to religious charities represents serious establishment clause issues. Overall, the implications of faith-based initiatives that tend to violate both the Establishment and Free Exercise clauses of the First Amendment cannot be tolerated.

The notion of making faith-based initiatives an integral part of the government's strategy for combating poverty and homelessness was both conceived and implemented by President George W. Bush. As a recurrent theme in his focused presidential campaign, Bush reiterated the importance of voluntary community service as well as the value of harnessing the infrastructure and mission of the faith community's social programs. On January 29, 2001, Bush followed through on his campaign promise by issuing two executive orders, the very first of his administration establishing a Center for Faith-Based and Community Initiatives (Center) within the five departments of the

Department of Justice, the Department of Education, the Department of Labor, the Department of Health and Human Services, and the Department of Housing and Urban Development.<sup>120</sup> The second order secured the creation the White House Office of Faith-Based and Community Initiatives (OFBCI) to work directly within the White House as the headquarters of the five Centers<sup>121</sup>. The stated purpose of the OFBCI is “to help the Federal Government coordinate a national effort to expand opportunities for faith-based and other community organizations and to strengthen their capacity to better meet social needs in America’s communities.”<sup>122</sup> As noble as the goal may be, the complications involved with making this scheme work present serious challenges to our established liberties.

In order to implement the policies that President Bush has urged Congress to pass, the OFBCI has acted as an additional lobbyist for the Executive Branch and the White House that needn’t be directly tied to the President. Instead, the Director of the OFBCI acts by proxy for the President and implements the policies that are included in the OFBCI’s mission as set forth by the President. The OFBCI had encountered significant setbacks since its inception almost two years as evidenced by its problems in securing stable leadership. Amid struggles with both Congress and Christian conservatives over the direction of the program, former Director John J. DiIulio, Jr. resigned after just six months with the OFBCI. However, the program has been reinvigorated by President Bush’s appointment of James Towey as Deputy Assistant to the President and Director of the Office of Faith Based and Community Initiatives on February 1<sup>st</sup> of this year. Under this new leadership, the legislative measures necessary to enact the initiatives proposed by the OFBCI have seen improved progress in both houses of Congress.

In August 2001, the OFBCI released a report entitled “Unlevel Playing Field” citing six specific “barriers” standing in the way of implementing the Office’s major proposals concerning the distribution of federal funds to faith-based organizations.<sup>123</sup> The report listed the barriers as: 1) a pervasive suspicion about faith-based organizations, 2) faith-based organizations excluded from funding, 3) excessive restrictions on religious activities, 4) inappropriate expansion of religious restrictions to new programs, 5) denial of faith-based organizations’ established right to take religion into account in employment decisions, and 6) thwarting charitable choice: Congress’ new provision for supporting faith-based organizations.<sup>124</sup> In order to clear these legal barriers, the OFBCI and the President have been rigorously pushing new legislation that would establish new rules governing the administration of federal funds for faith-based organizations. As mentioned earlier, this impetus for policy reform has produced two prominent bills in Congress.

The primary and most contended piece of legislation on the OFBCI’s agenda is the Community Solutions Act of 2001. Exactly two months after President Bush incorporated the OFBCI by executive order, Representative J.C. Watts, Jr. of Oklahoma introduced H. R. 7 to the House floor. Within four months the Community Solutions Act of 2001 was passed by a fairly narrow margin of 233-198 with just three representatives not voting.<sup>125</sup> Although the bill was reported to the Senate and referred to the Committee on Finance on the very same day, the Senate was unable to progress on the bill due to intense debate concerning the costs of applying its provisions. A year after the Senate received the House version of the bill it was marked for consideration and placed on the Senate Legislative Calender. However, the Senate has stalled again with the dwindling

days of the term being consumed with debates on homeland security, possible war with Iraq, and the newly passed defense budget.

The version of the Community Solutions Act of 2001 that was reported by the Senate Finance Committee was trimmed of some of the President's unprecedented tax benefits for those making charitable donations as well as those who do not itemize deductions on their federal tax returns. However, the major provisions of the bill remained intact and still intend to address the barriers identified by the OFBCI in their aforementioned report.

The first of those barriers as cited by the OFBCI is the suspicion on the part of federal agencies that the distribution of federal funds to faith-based organizations is legally questionable. Indeed, many federal departments and agencies are unsure of how federal funds can legally be administered to religious organizations, which conceivably creates situations in which faith-based organizations are not duly considered for federal funding. The report declares that:

“Federal officials, and State and local officials participating in Federal formula grant programs, often seem stuck in a ‘no-aid,’ strict separationist framework that permitted Federal funding only of religiously affiliated organizations offering secular services in a secularized setting, and deny equal treatment to organizations with an obvious religious character.”<sup>126</sup>

While it is admirable that the OFBCI and those who have supported the Community Solutions Act wish to clarify the rules of distributing federal grants, the proposal of legislation that would radically change those rules is unwarranted. Instead of legislating unnecessary changes to the statutory and standing case law the OFBCI should rather consider the distribution of an advisory publication or make available a source of



consultation when dealing with the complex issues of providing federal grants to religious organizations.

The second barrier discussed by the report is as equally miniscule as the first. The report claims that the lack of clarity in agency solicitations for grants tends to disqualify religious groups. Upon even a superficial analysis of this claim, it is obvious that the perceived barrier is nothing more than a *lack* of initiative and comprehension on the part of the faith-based groups seeking federal funds. While trying to establish culpability on the part of governmental agencies for “the absence of affirmative language in program rules and funding announcements,”<sup>127</sup> the report actually highlights the negligence of faith-based groups in not seeking elucidation of the qualifications for obtaining grants. The OFBCI decries the exclusion of faith-based groups in the funding process by stating that:

*“when restrictions on religious activities are listed without an equally strong affirmation of eligibility and equally emphatic positive guidance about how faith-based providers can legitimately collaborate to deliver assistance, correct information about restricted practices may have the effect of chilling participation by religious service groups.”*<sup>128</sup>

In other words, the OFBCI would have the soliciting agencies make a concerted effort to appear more welcoming and “affirming” for faith-based groups because their nature tends to exclude them from eligibility.

In reality, the only exclusion that is being perpetrated is on the part of the faith-based groups themselves. Although the announcements released by governmental agencies may not actively solicit applications from faith-based organizations, they certainly do not explicitly disqualify them. Rather, the agencies list forbidden practices, both religious and nonreligious, in order to ensure that the money provided by taxpayers

is not improperly distributed to groups who would engage in unfair and discriminatory practices. As suggested previously, a simple clarification in agency solicitations could resolve the exaggerated barrier that has only been created by the ignorance of faith-based groups. Moreover, the passage of legislation concerning this issue can similarly be avoided by an effort on the part of OFBCI in educating faith-based groups about their eligibility for grants.

While the OFBCI decries “the absence of affirmative language in program rules and funding announcements,” the lack of necessity for legislation on this matter is too greatly understated. Each year the government distributes untold amounts of tax money in the form of block grants and other funding that is awarded pursuant to persuasive applications for such monies. Although many deserving groups who do not apply and thus do not receive any of these funds it is not any fault of the government’s. Nor is there an imperative to create legislation that alters that method of distribution. While it is our hope that meaningful programs apply for grants, it is not the responsibility of the government to make them do so, or alter the guidelines so to encourage them more so than others.

The third and fourth barriers listed by the report echo this redundant theme of misunderstandings and unclear guidelines during the pursuit and distributional phases of the grant process. This theme is again clearly demonstrated in the stated barrier relating to the religious activity of faith-based organizations as candidates for federal assistance. Prefaced by an unsubstantiated anecdotal example of the censoring of religious displays in faith-based service provider’s facility, the report stated that vague language is another

culprit in the discrimination against religious organizations seeking federal money. The complaint reads as follows:

“HUD regulations for Community Development Block Grants, among other programs, expressly require religious organizations not only to agree to avoid giving ‘religious instruction or counseling’ but even to affirm that they will ‘exert no religious influence’ at all in providing the Federally funded assistance. Such exceedingly vague language chills the participation of many faith-based providers...”<sup>129</sup>

Once again, while it is unfortunate that some religious service providers are turned off by legal jargon that is occasionally difficult to decipher, the burden does not rest on the government agencies to serve as legal counsel for such confused groups. More importantly, these standards and tests that may involve somewhat impenetrable language for some tend to protect the religious liberties of others. It would be a gross, federally funded and supported violation of the client’s freedom of conscience to endure religious proselytizing while seeking shelter from the cold or filling their empty stomachs. It is shamelessly easy to dismiss these challenges to such “religious instruction” or “religious influence” by citing the desperation of the service seekers and their willingness to be subjected to proselytization as long as they are clothed and fed. This may be so for some, but imagine the unwelcome criticism and subjugation of service seekers at the hands of their religious opposites. However, this is not to say that all faith-based service providers would hope or plan to engage in such activity. The protection is in place to protect the rights of those who would be subjected to judgment by their service providers based on their professed faith.

The original version of the Charitable Choice Act of 2001 presented an opportunity for potential recipients of faith-based services to avoid such coercive

religious indoctrination. In its initial draft as submitted to the House, the bill provided that the presiding government agency locate a “nonreligious alternative” to administer the desired services if the recipient objected to the “religious character of the organization from which the individual receives, or would receive, assistance funded under any [faith-based] program.”<sup>130</sup> Unfortunately, that provision was deleted before passage in the House and has been replaced by a weaker provision which only allows a recipient to select the religious service provider that *least* offends them regarding the group’s religious tenants.<sup>131</sup> It is truly lamentable that any measure that would allow secular alternatives to be made available to recipients who genuinely care about the integrity of their religious beliefs. The removal of such measures implies that the poor and disadvantaged of this country do not deserve the full enjoyment and protection of their freedom of religion. No level of government in the United States can participate in any policy that disregards, or tends to disregard, a citizen’s religious liberties based upon their economic status without violating a host of guaranteed civil rights.

Additionally, the reluctance of faith-based groups certainly does not call for legislative action to change already equitable rules governing the activity of groups who receive tax dollars to support their missions. The issue of evidentiary standards is not to be flouted, specifically in the case of the alleged “Inappropriate Expansion of Religious Restrictions to New Programs” as argued by the report to be the fourth barrier.<sup>132</sup> It is particularly misleading for the report to imply that good law and accepted evidentiary standards and language have been overruled. While attempting to discredit the “pervasively sectarian” standard as adopted by the U.S. Supreme Court, the report improperly gave the impression that it had, in fact, been discarded when it had not.<sup>133</sup>

Of the most odious and expressly distorted claims made in the OFBCI's report is the perceived fifth barrier that alleges the denial of faith-based organizations' right to make employment decisions based on religious affiliation. To say that religious charities are not permitted to make religion-based employment decisions is an outright perversion of the salient facts. The truth of the matter is that under Section 702 of the Civil Rights Act of 1964, faith-based service providers have always been able to make employment decisions based on the applicant's religion.<sup>134</sup> That exemption is clear and undeniable. When conducting sectarian activities that pertain to the mission of the religious group, including the ministerial exception, these groups have the widest latitude afforded by Section 702 to seek those with a "shared religious vision." In 1972, Congress expanded this latitude even greater by including the non-ministerial staff under the Section 702 exemption with the passage of the Equal Employment Opportunity Act.

The origin of the distortion is what is not specified by the OFBCI report concerning the employment practices. As Edwin Chemerinsky, the Sydney M. Irmas Professor of Public Interest Law, Legal Ethics, and Political Science at the University of Southern California, writes:

"[I]t is important to recognize that faith-based programs already can receive government money and participate in social service programs. However, currently, they must create separate secular arms to do so. Organizations like Catholic Charities and Jewish Family and Social Services long have received government money and provided important services. Bush's proposal would change this by allowing the financial aid to go directly to the religious entity. It would be a major transfer of funds right from the federal treasury to religions."<sup>135</sup>

With Professor Chemerinsky's illumination of the report's hollow assertions it is clear that the OFBCI report attempts to capitalize on the "widespread confusion about

requirements on the part of officials and religious organizations” that it blames on government agencies for the “chilling” of faith-based social services.<sup>136</sup>

Contrary to the report’s false representation of the Court’s findings in *Corporation of the Presiding Bishop v. Amos*, the decision was based on a pivotal fact that is wholly ignored by the OFBCI’s report. As the lower district court noted, “[t]he case was brought by two former employees of businesses that had ‘no corporate or financial existence separate from’ the Mormon Church...”<sup>137</sup> Because the businesses were not secular arms of the larger church, they were permitted to consider the religious nature of their employees under Section 702. The contention of the report that a religious group’s ability to staff on the basis of a “shared religious vision” isn’t forfeited because it delivers government-funded social services is misdirected and requires qualification. As long as that discriminating entity is not the secular arm of the religious group, the variable of government funding is unimportant. Federal, state, and local courts have afforded faith-based service providers all due protection under the Free Exercise clause with the caveat that unwarranted discrimination on the part of the specific government-funded arm of the religious organization would not be allowed.

With the preceding discussion in mind, the relevant provisions of the Charitable Choice Act of 2001 concerning hiring on the basis of religion cannot be rectified with standing law. The provisions in question are subsections of the revised version of the Charitable Choice Act which was reported the Senate.<sup>138</sup> This particular act ensures that the government will treat religious and secular institutional applicants equally,<sup>139</sup> while simultaneously granting religious applicants a special benefit by funding them even if they engage in religious employment discrimination, conduct generally forbidden to all

other recipients.<sup>140</sup> Essentially, the Charitable Choice Act allows faith-based organizations to discriminate on the basis of all matters concerning religion with impunity. Under the bill, a publicly funded program could discriminate in employment against an applicant or employee if they are: unmarried and pregnant; divorced; gay or lesbian; or engage in any other activity that violates the “tenets and teachings” of the group’s religion. This type of unchecked discriminatory power imprudently handed over to sectarian groups utilizing federal and state tax money is constitutionally and morally unconscionable.

Overall, the provisions under the Charitable Choice Act tend to violate several important aspects of the Establishment Clause. In addition to the coercive nature of such religious programs as previously discussed, Charitable Choice invariably results in public tax money directly supporting the religious aims of faith-based groups. While the funds may not be directed to the most overt advancements of religion, tax dollars will indirectly support and further the sectarian interests of religion that lie beyond the secular aims of social service. As Edwin Chemerinsky asserts: “[t]he effect of charitable choice is forcing a Jewish person to subsidize a religion that teaches that belief in Christ is the way to stay off drugs; it is forcing an atheist to subsidize a soup kitchen that engages in group prayers.”<sup>141</sup> With the secular alternatives removed and the extended discriminatory employment practices endorsed under this legislation, the Charitable Choice Act will run roughshod over the Constitution.

Furthermore, the excessive governmental entanglement with religion that is assured under the provisions of Charitable Choice present constitutional quagmires that will threaten the sanctity and integrity of religion and elicit unrivaled dissent and

balkanization amongst the innumerable religious sects in the United States. First, the need for accountability under this faith-based initiative to offer social services creates the alarming prospect of governmental regulation of religious groups receiving funds directly from the U.S. Treasury. In fact, the Charitable Choice Act specifically outlines the accountability procedure which, it states, is no different than the procedure for regulating all nongovernmental entities.<sup>142</sup> Although the proceeding measure dictates that grants furnished by the government are to be placed into a separate account apart from the religious group's private funds, the government must still audit that religious group's accounting of public money.<sup>143</sup> Quite simply, that means that Internal Revenue Service auditors will be allowed to assess the faith-based group's use of that tax money and make recommendations concerning the performance of a religious group. In the interests of non-entanglement and the integrity of religion, it is best that the government not pronounce any sort of judgment concerning the effectiveness of religion in any context, let alone the power of faith in social services.

There are also critical matters pertaining to the advancement or hindrance of particular religious sects and faith traditions under Charitable Choice that must be considered. In one particularly significant section of the Act, a loophole exists that provides no means of redress if a minority religion is passed over for a grant of public funds in favor of a more dominant religious sect even though the smaller sect would be more apt to fulfill the desired social service. The provision in the Act that could conceivably create this conflict reads:

“Neither the Federal Government, nor a State or local government receiving funds under [Charitable Choice], shall discriminate against an organization that provides assistance under,



or applies to provide assistance under, such program on the basis that the organization *is religious or has a religious character.*”<sup>144</sup>

While the provision successfully forbids the government from excluding religious and faith-based organizations from Charitable Choice (the primary aim of the entire bill), it fails to provide equality between the various religious sects that may or have applied for federal funding. This lack of clarity will foster unhealthy competition between the various faiths in attempting to obtain government funding. An attempt was made to amend the germane subsection to apply to the *nature* of the organizations’ religious character and forbid discrimination based on that aspect, but it was defeated in the House. If this measure is not amended to prevent the unequal treatment of different religious faiths and traditions in the distribution of government money, the United States government would be entering a dangerous realm that it was never meant to engage.

While proponents of the bill claim that it avoids Establishment issues such as entanglement by pointing out that the bill itself declares that it presents no conflict with the First Amendment,<sup>145</sup> the reality is that it does not. Although the bill asserts that the distribution of public funds to faith-based groups is not endorsement of that group’s religious views, it does not take into consideration the manner in which the funds are distributed. No mention is made to the endorsement issues if the public funds are consistently awarded to the largest or most popular faith-based groups. If this legislation truly hopes to achieve the goals that it purports to crusade for, it must address the process of distributing the funds and how minority religions can still be equal partners with more dominant religions.

While the theoretical notion of harnessing America’s churches and faith-based groups to bolster social services and bring about meaningful progress in the war against

poverty and homelessness is admirable, the practical problems associated with faith-based initiatives provoke too many constitutional conflicts. Despite these inescapable problems, President Bush appears to pursue his dream with great sincerity and determination. His ideas have the potential to help a large number of needy Americans, but sadly, his ideas also have the potential to religiously disenfranchise vulnerable service recipients, discriminate against employees based on their religion of choice, and stifle smaller and less popular religious groups. Without remedying these and other observable constitutional problems, the Community Solutions Act of 2001 is an unforgivable slight to the Constitution and the court decisions that have attempted to preserve the ideals enshrined in our founding document.

### **The Judicial Landscape: Confusion and Conflict in the Courts**

History has demonstrated that constitutional issues, particularly matters concerning the relationship between church and state, have many faces. The Establishment and Free Exercise clauses have been applied to all manner of judicial matters concerning religion, yielding one of the most voluminous categories of constitutional jurisprudence in both federal and state courts. An exhaustive study of the myriad ways in which religion clause-based litigation is manifested in the courts is decidedly out of the scope of this work. What is at issue here is the rash of religious liberties cases which have come about proceeding the terrorist attacks of September 11<sup>th</sup> have changed the complexion of the religion clauses.

As the background provided in the legislative landscape indicated, issues concerning school prayer are extremely contentious. Although school prayer has not

specifically been addressed by the courts in a significant way since the September 11<sup>th</sup> tragedies, corollaries of the issue have manifested in many different forms that all center on public schools and the education system. The two most unequivocally notorious corollaries that have emerged from the judiciary in significant ways since September 11<sup>th</sup> are the Pledge of Allegiance and school vouchers. Curiously, the two decisions fall on completely opposite sides of the wall of separation. The Pledge decision, shocking the nation with its strict separationist interpretation of the Establishment clause, contrasts starkly with the equally controversial voucher decision that gave pause to those same separationists just one day later. Depending on the view taken of these contradictory rulings it may appear that there will never be any degree of stability in church-state cases. However, it is imperative to examine the distinct differences in the rulings and scrutinize the opinions of the respective courts. By this process, seemingly irresolvable contradictions can be properly understood and judicial errors, if any, can be illuminated.

### **One Nation under...**

Over the course of my politically aware life very seldom has there been a period when as many critical legal issues have been decided by our nation's courts than this past summer. As the fates would have it, I was as far out of touch from the news media as I have been in all of my life. The majority of my summer was consumed in much the same way that it was the previous year- hiking with probationary youth as part of a wilderness challenge program in the forests of North-central Pennsylvania. I can distinctly remember being informed about the Supreme Court's decision in *Ring v. Arizona*<sup>146</sup> by my close friend James McCafferty as I happily took my place at the campfire cooking the

night's dinner. Similarly, I can recall my elation upon being informed of the Court's decision prohibiting the execution of the mentally retarded in *Atkins v. Virginia*.<sup>147</sup> However, my recollection of being informed of the United States Court of Appeals for the Ninth Circuit's ruling in *Newdow v. U.S. Congress*<sup>148</sup> has remained clearer than any other event in recent memory. Likewise, the controversy that has followed the ruling has been indelibly branded into my memory as an inextricable companion. Unfortunately, much of this public outcry is a product of the general nescience that exists amongst the public with regards to their religious liberties and the rational limits to those liberties. Upon examination of the Ninth Circuit's opinion, it should be clearer to Americans that their disgust and ire is misplaced.

It was Friday afternoon, the last day on the trail for the particular excursion that I had been leading since the beginning of the week. My party was scheduled to meet our logistics staff at Sharp Top Vista overlooking the breath-taking Pine Creek Valley for a cookout and other pleasantries to wind down from an adventurous week exploring Pennsylvania's gorgeous Tiadaghton State Forest. The logistical staff arrived not long after our party had reached the vista and we exchanged glad salutations. Amongst the staff was, once again, my good friend and separation enthusiast Jim McCafferty who was about to share with me the most earth shattering legal news that I could ever conceive of in my wildest dreams. As I approached my friend he extended his hand, looked me in the eye and said, "I wanted to be the first. The Pledge of Allegiance has been declared unconstitutional." Of course after the initial shock I was enthralled to learn that what I had written about just a few months before as an exercise in rhetorical discourse for class was unfolding on the other side of the nation. Not surprisingly, my jubilation was met

with both resigned annoyance and muted contempt. I was eager to return to civilization in order to read the court's decision myself and understand the rationale expressed by the majority in San Francisco.

Upon my return to Williamsport, I promptly attained a copy of the Ninth Circuit's opinion and delved into the text with unrivaled enthusiasm. Despite my excitement, I almost expected to find some nagging detail or technicality that would inevitably invalidate the decision later on in the appeals process. However, there was no such mistake to be found. In fact, the opinion published by the court enlightened me to a greater extent than I had expected. I discovered not error, but instead thorough logic expressed with clarity and validity. If the general public that seemed to collectively denounce the decision as well as the Ninth Circuit Court of Appeals that issued it had actually read the opinion rather than relied on the vague and incomplete abstracts reported by the media, the controversy would have amounted to no more than the precedent set by the Supreme Court on which the decision was made. I submit that if this had been the case, there would have been far less condemnation of the court and the appellant, Dr. Michael A. Newdow, and a great deal more criticism of the Elk Grove Unified School District and the other appellees in the case.

In the suit brought by Newdow and the opinion that followed, expressing the holding of the court, many issues were brought to light and decided by the court. The discussion section of the opinion published by the Ninth Circuit has four subparts, only one of which will be considered here as germane to the present discourse. The court's discussion of the jurisdiction, validity of the State of California as a defendant, and the standing of the appellant will thus be omitted. This is not to say that they do not merit

analysis or commentary, however, they are decidedly out of the scope of the present inquiry. Other publications have widely disputed the standing of the appellant in this case, which may be reviewed at the reader's discretion.---sources on this

Perhaps the most glaring misconception with regards to *Newdow* of which I previously spoke is the scope of its reach and the actual effect that it would have if applied as decided. At present, the decision in *Newdow* has been stayed “pending the resolution of any petitions for rehearing, petitions for rehearing en banc, or sua sponte en banc consideration.”<sup>149</sup> Accordingly, nothing has legally changed with respect to the practice employed by the Elk Grove Unified School District in requiring the recitation of the Pledge of Allegiance as codified by the United States Congress in federal law.<sup>150</sup> Barring reversal of the Ninth Circuit’s decision upon en banc rehearing, the court’s mandate will solely affect the states within the court’s jurisdiction: Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington. The American public’s overarching unfamiliarity with the procedural and jurisdictional rules of the judicial system effectively renders this clarification a distinction with no apparent difference to the non-legal professional. While the court of appeals exercises a broad authority over the states in its jurisdiction, most Americans are unaware that other circuits in the court of appeals may issue conflicting decisions to stand as good law in their respective jurisdiction. The Seventh Circuit’s decision in *Sherman v. Community Consolidated School District Number 21*,<sup>151</sup> which upheld the reference to “under God” stands as case in point. While it is customary for the Supreme Court to be petitioned to resolve these apparent conflicts, they are legally permitted to stand by themselves as valid

case law in their own jurisdictions and be submitted as argumentation in other jurisdictions that have not yet ruled on the matter.

Moreover, the public consensus concerning the effect of the court's mandate is badly skewed. I posit that most Americans, like some of those from my anecdotal story, simply misunderstood the reach and effect of the Ninth Circuit's decision. The two judges forming the majority of the three-judge panel, Stephen Reinhardt and Alfred T. Goodwin, did not revoke the right of all Americans to recite the Pledge or make it illegal in any other way beyond the prohibition placed on public schools within the jurisdiction of the Ninth Circuit. Contrary to some wildly inaccurate reports published by disreputable news sources and inflammatory opinion/editorial articles appearing throughout the nation, young schoolchildren would not be arrested if they say the pledge in school. Nor would fantastical stories of ACLU lawyers coming into America's homes and having private citizens gagged upon reciting the Pledge come true.

The effect of the decision is far less expansive and restrictive than the vast majority of the general public is aware. The Ninth Circuit's decision in *Newdow* simply held that the 1954 addition of the words "under God" to the Pledge as well as the Elk Grove Unified School District policy and practice of teacher-led recitation of the Pledge, with the added words included, violates the Establishment clause.<sup>152</sup> In other words, the court only declared the phrase "under God" to be an unconstitutional addition to the Pledge as opposed to erroneous statements that indicate that the Ninth Circuit declared the entire Pledge unconstitutional. Rather than striking a blow against freedom of religion as many have argued, the decision ensured the prosperity of that principle while

simultaneously buttressing the High Court’s established respect for plurality and equality before the law.

The main legal thrust of the argument submitted by Newdow is one that is derived from the precedent formed by the Supreme Court over the past thirty years. The suit brought by Newdow objects to the Elk Grove Unified School District’s policy regarding the Pledge as well Congress’ 1954 adoption of the words “under God” to be amended to the Pledge. In the first objection raised by Newdow, the appellant challenged the constitutionality of a public school district policy requiring the recitation of the Pledge of Allegiance each morning before the commencement of the school day.<sup>153</sup> Although the California Education Code mandates “appropriate patriotic exercises,”<sup>154</sup> the Elk Grove school district implemented a policy that reached beyond the mandates of the State of California in *suggesting* the Pledge as an appropriate exercise by *requiring* the recitation of the Pledge in the classroom. Newdow does not allege that the school district is forcing his daughter enrolled in an Elk Grove district elementary school to participate in the recitation of the Pledge as forbidden by *West Virginia State Board of Education v. Barnette*,<sup>155</sup> rather he declares that the violation of her rights is inherent in her listening to the pledge. The injury to his daughter is a result of her being compelled to “watch and listen as her state-employed teacher in her state-run school leads her classmates in a ritual proclaiming that there is a God, and that ours is ‘one Nation under God.’”<sup>156</sup>

In approaching the challenge issued by Newdow, the Ninth Circuit employed three interrelated tests that have been born out of the Supreme Court’s struggle to analyze alleged violations of the Establishment clause in the realm of public education. The mainstay of these three tests is undoubtedly the three-pronged “*Lemon test*” which has



been applied by the Supreme Court in every Establishment clause matter between 1971 and 1984, with the exception of *Marsh v. Chambers*.<sup>157</sup> The second of these tests is the “endorsement” test, first articulated by Justice Sandra Day O’Connor in her concurring opinion in *Lynch v. Donnelly*<sup>158</sup> and later adopted by a majority of the Court in *County of Allegheny v. ACLU*.<sup>159</sup> The final test considered was the “coercion” test which was initially formulated by Justice Kennedy and used by the Court in *Lee v. Weisman*.<sup>160</sup> This array of Establishment clause tests represents the aggregate efforts of the Supreme Court in defining the proper height and strength of the wall of separation for over thirty years. Although the court volunteered that it was free to apply any one of the three tests, it reasoned that applying the *Lemon*, endorsement, and coercion tests collectively would foster a greater sense of “completeness.” Therefore the Ninth Circuit, with these three tests representing the entire catalogue of Establishment clause jurisprudence from 1971-2002, afforded the most thorough analysis of the arguments posed by the appellant Michael Newdow.

In the course of their analysis, the court first examined the 1954 addition of “under God” as well as the Elk Grove school district policy of teacher-led recitation of the Pledge under the lens of the endorsement test. In this context, the Ninth Circuit dismissed the all-encompassing invocation of ceremonial deism as an explanation of the reference to God in the Pledge. Rather, the court found that it reached beyond an acknowledgment of the vibrant religious culture in the United States or a benign manifestation of the historical significance of that culture. By analyzing the effect of reciting the Pledge, like any oath or affirmation codified in our laws, it was obvious that the phrase “one nation under God” had a normative effect. The Pledge is more than a

ceremonial incantation or a mere description of the United States; rather it is a swearing of allegiance to the values identified in the text of the Pledge. When one recites the Pledge, they affirm that our nation stands for the principles of unity, indivisibility, liberty, justice, and – since 1954 – monotheism. Given the outright rejection of such governmental endorsement of religion that has become an indelible standard in Establishment clause jurisprudence, it is clear to see the Ninth Circuit's rationale here. In an oft quoted section of Judge Goodwin's opinion, he identifies the implicit dangers of endorsing any type of religion in the Pledge:

A profession that we are a nation "under God" is identical, for Establishment Clause purposes, to a profession that we are a nation "under Jesus," a nation "under Vishnu," a nation "under Zeus," or a nation "under no god," because none of these professions can be neutral with respect to religion.<sup>161</sup>

Because the school district's policy is directed at inculcating a respect for the values enumerated in the Pledge it is understood that the state places its endorsement behind those legislatively composed words. Thus it follows that the state is endorsing a religious belief, namely the existence of God, when it requires public school teachers to lead recitations of the Pledge in its current form. Furthermore, the student needn't be compelled to participate in order to be made aware of the state's endorsement of monotheistic faiths by proxy of the Pledge. The actions of the state-funded teacher are sufficient to demonstrate the state's endorsement without a student's recitation of the words.

While Goodwin addresses the circumstances of the 1954 amendment to the pledge, he fails to make a thorough study of the pledge as it existed prior to the change. Instead, Goodwin simply notes that the Pledge was first codified by Congress in the

United States Code in June 1942.<sup>162</sup> For the benefit of deeper understanding and a more complete treatment of this issue, it is pertinent to consider the origins of the Pledge of Allegiance and its status hence. I will not endeavor to recount an exhaustive history of the Pledge, but rather highlight the most relevant information to provide a nuanced approach to the Ninth Circuit's rationale in *Newdow*. Coincidentally, the court's decision has sparked a renewed interest in the origins of the Pledge which had not existed beforehand. This revitalized interest has also produced a spattering of books specifically aimed at this newly intrigued audience of curious Americans.

The original Pledge of Allegiance, written by Baptist minister and Christian Socialist Francis Bellamy in 1892, read: "I pledge allegiance to my flag and to the Republic for which it stands – one nation indivisible – with liberty and justice for all."<sup>163</sup> Bellamy's Pledge was written for publication as a segment in "Youth's Companion," a popular national publication that was based in Boston and is akin to today's Reader's Digest. The pledge was, in essence, part of an elaborate advertising campaign engineered by Daniel Ford, James Upham and other liberal businessmen who, in 1888, had undertaken a campaign that they called the "School Flag Movement" to increase the presence of American flags outside of public school buildings and in their classrooms. Up until that time the American flag was rarely seen displayed on public school buildings, but through the efforts of those like Ford and Upham, American flags had been sold to approximately 26,000 schools by 1892.<sup>164</sup>

In 1891, Upham conceived of an innovative way to popularize the use of American flags in the schools. Upham planned to use the celebration connected with the 400<sup>th</sup> anniversary of Christopher Columbus' discovery of the "New World" to promote

the use of flags in public schools. Knowing that Francis Bellamy shared his distinct vision, James Upham recruited him to bolster the flag campaign. In February 1892, Bellamy and Upham lined up the National Education Association to support the “Youth's Companion” as a sponsor of the national public schools' observance of Columbus Day along with the use of the American flag. By June 29, Bellamy and Upham had arranged for Congress and President Benjamin Harrison to announce a national proclamation making the public school flag ceremony the center of the national Columbus Day celebrations for 1892.<sup>165</sup> In order to capitalize on this momentum, Bellamy composed the original Pledge of Allegiance to accompany the American flags that would be installed in the classrooms. The Pledge was published in the September 8, 1892 issue of “Youth's Companion”<sup>166</sup> and enjoyed thorough success with little alteration over the course of its more than two centuries of existence.

The first modification made to the Pledge was in 1923 and again in the following year when the National Flag Conference changed the Pledge's words “my flag” to “the Flag of the United States of America.” It is often argued that this change was a benign effort to avoid confusion among newly accepted immigrants who might mistake to which flag they were pledging allegiance. However, some have argued that the Conference's leadership composed of ethnocentric groups like the American Legion and the Daughters of the American Revolution had altered the Pledge solely to express disdain for the immigrants and propagate hegemony rather than alleviate confusion. Regardless of his reasoning, Bellamy protested the change to no avail; his entreaties were ignored and the Pledge was thus amended.

The second and most contentious alteration to the Pledge came in 1954 by act of Congress signed by President Eisenhower thus adding the words “under God” after the word “Nation.” This change was chiefly lobbied for by the Knights of Columbus and supported by fiercely patriotic sentiments intertwined with rabid religiosity. In the burgeoning of the Cold War the amendment to the Pledge was viewed as a critical measure in fighting the propaganda war that would dominate the background of the Cold War. The change allowed the United States to draw a line of distinction between itself and the atheistic government of communist Russia while simultaneously claiming the divine support of the Christian God. This concept will be more fully explored shortly, but it is necessary to note at present in order to understand the objection that would have resonated from the original creators of the Pledge.

James Upham, the man who conceived of the Pledge as an integral part of his promotion of the American flag and patriotism in public schools, would have never supported the addition of the phrase “under God.” As a Knight Templar in the Masonic “Converse Lodge” in Malden, Upham supported the traditional Masonic stance regarding the preservation of secular, state-run public education.<sup>167</sup> While the Masons respected the role of religion and morality in a successful democratic state, they strongly believed that the link between freedom and education required a free, non-sectarian school system.<sup>168</sup> Although condemned by some to be anti-Catholic, the Masons displayed an advocacy for equality of all religions and the triumph of overall morality rather than the prevalence of any one sect. Given this context, it is clear that Upham never would have permitted the reference to a particular deity to be ritually invoked by school children as part of a patriotic exercise. The critical values of patriotism and morality shared a high level of

significance for Upham and the Masons, but the commingling of the two would have amounted to heresy.

Returning to the Ninth Circuit's analysis of the Pledge's current codification, the court found that the phrase "under God" utterly fails the prime component of the endorsement test. Judge Goodwin reasoned that the phrase represented an impermissible government endorsement of religion as defined by Justice O'Connor in *Lynch*. The inclusion of the phrase tended to cultivate a sense of alienation of nonbelievers as expressed by Newdow in his arguments before the court. In the opinion, Judge Goodwin drew a direct connection between this logic and that expressed by Justice O'Connor by stating that the phrase "sends a message to unbelievers 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'"<sup>169</sup> This argument reiterates the grave importance of governmental neutrality concerning all matters of religion and makes clear the duty that is incumbent upon the court given the precedent set by the Supreme Court.

The lone dissenter on the three-judge panel, Judge Ferdinand Fernandez refutes the majority's assertion as to the enormous gravity of the phrase "under God" and its consequential endorsement of monotheism or religion in general. In order to do so, he posits that the effect of the words must be analyzed differently so as to examine only the immediately conceivable consequences of the phrase "under God." However, by putting "legal world abstractions and ruminations aside"<sup>170</sup> as Fernandez proposes, he simultaneously nullifies the entire catalogue of free speech and other First Amendment cases that have been based on that very philosophical type of abstraction. His assertion

that the words “under God” amount to nothing more than a *de minimis* suppression of minority religious beliefs is outright sophistry. The true *de minimis* affect is felt by the majority that enjoys the relevance and applicability of those words simply because they are not an affront to their values and moral prerogatives. In contrast, a *de maximus* affect is compounded onto the minority that does not subscribe to the religious incantation preferred by the majority. It is that wrongfully neglected and suppressed minority that concerns the court.

If equality and neutrality is to be assured, as Judge Fernandez purports to advocate,<sup>171</sup> the Pledge of Allegiance which is codified in the United States Code and the recitation of which is prescribed as a mandatory by the Elk Grove school district cannot offer *any* endorsement, no matter how slight, to *any* religion. Moreover, Judge Fernandez paradoxically posits that the religion clauses “were not designed to drive religious expression out of the public thought; they were written to avoid discrimination.”<sup>172</sup> Clearly he does not acknowledge the profound discriminatory effect that is fostered by a government approved and codified ritual that makes reference to a religious belief that is not shared by a significant portion of the American public. Furthermore, Judge Fernandez must recognize that the religion clauses were not designed to drive religious expression *into* the public thought, which the phrase “under God” invariably does. Simultaneously, the finding that “under God” is unconstitutional furthers the goal of neutrality in avoiding the discrimination of minority religions or nontheists who do not profess the existence of any God. It is for that reason that the majority ruled that the addition of the phrase “under God” in 1954 offends the primary thrust of neutrality.

Judge Fernandez furthered his lack of cogent reasoning in extending his argument to incorporate the antiquated and desperate principle of “ceremonial deism.” He opined that:

“such phrases as “In God We Trust,” or “under God” have no tendency to establish a religion in this country or to suppress anyone’s exercise, or non-exercise, of religion, except in the fevered eye of persons who fervently would like to drive all tincture of religion out of the public life of our polity.”<sup>173</sup>

Again, Judge Fernandez neglects the obvious logical flaws in his argument. He erroneously asserts that Newdow and other appellants like him aspire to drive “all tincture of religion out of the public life of our polity” while the suit brought before the court challenged the tincture of religion that had surfaced in the *legal* realm of our society. Judge Fernandez would have been justified in dissenting from a majority opinion that held unconstitutional the recitation of the Pledge in its current form among private citizens not acting under the support of the government. However, those are not the facts. Whenever a policy bears the seal of government endorsement, it is no longer just a matter of public life, but also of legal jurisdiction. Sadly, in 1954 the Congress chose to move a matter of religion into the realm of legal jurisdiction where it was forbidden and would inevitably have been rejected as an outright breach of constitutional law. Coincidentally, the intrusion of the phrase “under God” into a matter of purely public and legal policy represents an effort on the part of those with a fevered eye for religion to fervently drive any tincture of religion into the public life.

Following in the precedent of flawed logic set previously in his dissent, Judge Fernandez combined his retreat into ceremonial deism with a repulsively majoritarian assertion tantamount to “no harm, no foul.” To the contrary, this logic cannot be



accepted in the realm of civil liberties litigation. Any breach, no matter the direct effect, must be forbidden. Judge Fernandez further stated in his dissent that phrases such as “In God We Trust” and “under God” do not encroach on religious liberties asserting that “those expressions have not caused any real harm of that sort over the years since 1791, and are not likely to do so in the future.”<sup>174</sup> He argued that no signs of theocracy have developed since the Pledge was changed and such an event was not likely. What the judge misses is the crucial point that such encroachments on religious liberties cannot be perceived. They are by nature, suppressive, and do not lend themselves to exposure to the public or, for that matter, the judiciary. Rather than naïvely assume the use of inherently religious mottoes and incantations offends and suppresses no one, analyze the manifestly discriminatory practice as having the overwhelming propensity to unduly influence any other person. Instead of offending those who agreed with the religious addition to the Pledge as Judge Fernandez would advocate, the court decided that the omission of “under God” would reverse the offensive and suppressive tendency that was unconstitutionally added approximately fifty years ago.

In a concise review of the coercion test as defined by Justice Kennedy, the majority of the Ninth Circuit panel reasoned that the school district’s policy had a decidedly coercive effect on those present, even if they were not participating. Furthermore, the classroom environment provides an important contextual element to the discourse which makes clear the coercive effect of the school district’s policy concerning mandatory Pledge recitations every morning. If any pupil is to benefit from attending school, that student must hold up the conduct of their teacher as a shining example and heed the lessons provided them, both explicitly and implicitly. Given the youth and

impressionability of school students who are instructed to adhere to the norms set by their teacher, the coercive nature of religious invocations in a mandatory practice led by the teacher is overwhelming. Supposing that even if a student was as self-aware as to willfully dissent from such a practice, the court acknowledged the coercive effect that would be exerted upon that dissenting student by his fellow students and even his teachers.

Despite the rising clamor amongst constitutional law jurists as to the inefficacy of the *Lemon* test, its application in *Newdow* proved to be extraordinarily beneficial in adding both another layer of understanding to the suit as well as augmenting the appellee's claim. The first prong of the test, requiring a secular purpose for the 1954 addition to the Pledge not only demonstrated the obvious religious nature of the measure as opposed to a secular one, but emphasized the fact that even its religious purpose had become obsolete. As Judge Goodwin notes in his opinion: "[t]he federal defendants 'do not dispute that the words "under God" were intended' 'to recognize a Supreme Being,' at a time when the government was publicly inveighing against atheistic communism."<sup>175</sup> This rationale demonstrates the obvious advancement of religion that characterized the move to amend the Pledge, thus causing the amendment to utterly fail the first prong of the *Lemon* test.

However, the appellant argued that in applying the first prong of the test, the court must consider the document as a whole and not its individual subparts. The appellants argued that the overarching secular purpose of the Pledge lied in "solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society."<sup>176</sup> However, the court recognized this flawed

argument immediately as a fallacy of division. Although the Pledge “as a whole” contends to have a valid secular purpose, the subparts that comprise the entire Pledge do not necessarily have such a purpose. In fact, Judge Goodwin noted that the relevant subpart, the phrase “under God,” was the only section of the Pledge under scrutiny in the suit, not the Pledge “as a whole.” He also aptly observed that in *Wallace v. Jaffree*, the Supreme Court struck down Alabama’s statute mandating “meditation or voluntary prayer” not because the final version “as a whole” lacked a primary secular purpose, but because the state legislature had amended the statute specifically and solely to add the words “or voluntary prayer.”<sup>177</sup>

In a similar approach, the Ninth Circuit applied the purpose prong to the amendment that added “under God” to the Pledge as opposed to the Pledge in its current state. Again, the legislative history of the amendment revealed an unequivocal tendency to promote the advancement of religion, in order to differentiate the United States from communist nations. Judge Goodwin’s study of President Eisenhower’s speeches before Congress on the bill that amended the Pledge discloses the clear purpose of bolstering religion. Hypothetically, even if President Eisenhower’s language in those speeches referred to a God that honors all of the various religions in practice across the nation, the Court in *Wallace* that the First Amendment honors the “right to select any religious faith or none at all.”<sup>178</sup> Therefore, even the most egalitarian reference to God still impermissibly disregards the prerogatives of the nonbeliever as well as the uncertain.

In a measure that has been mimicked extensively in the legislative acts of today, such as the aforementioned Community Solutions Act of 2001, the bill that amended the Pledge in 1954 expressly disclaimed a religious purpose.<sup>179</sup> These attempts to prevent

future constitutional challenges are often ill-conceived and, in this case, irrelevant. The distinction that is purportedly made by the measure still acknowledges “a belief in the sovereignty of God” as well as “the guidance of God,” which amount to government endorsements of religious beliefs. As Judge Goodwin notes, the 1954 act to amend the Pledge failed the first two prongs and did not require further analysis under the *Lemon* test. However, there is no doubt that the court would have followed its current line of reasoning to renounce the government’s impermissible entanglement in religion by propagating a religious tenant that lay beyond the functions of civil authority.

The court’s consideration of the school district policy also failed its scrutiny under *Lemon*, where the Ninth Circuit decided to cease its analysis after the second prong as it did with respect to the 1954 amendment. The school district policy failed the second prong in the same manner as did the amendment to the Pledge. The impressionability of the schoolchildren coupled with the closed environment of the classroom confronted dissenting students with the unpleasant and unjust choice of either complicit acceptance or outright refusal that presented the possibility of reprisal or discrimination at the hands of his peers.

Before ending his opinion pronouncing the unconstitutionality of the 1954 amendment to the Pledge and the school district policy, Judge Goodwin made a profound statement in his footnotes regarding the contradictory decision made nearly ten years before. In his remarks, Goodwin criticized the Seventh Circuit’s decision in *Sherman* for lack of cogent reasoning and disregard for precedent as well as procedural errors that should effectively invalidate its ruling while placing his current ruling ahead of *Sherman* as better law. The Seventh Circuit asserts that because the First Amendment “[does] not

establish general rules about speech or schools; [it] call[s] for religion to be treated differently.”<sup>180</sup> With that statement, Judge Goodwin found it difficult to understand why “the Constitution prohibits compulsory patriotism as in *Barnette*, but permits compulsory religion as in this case.”<sup>181</sup> As a basic fundamental of constitutional law, it is clear that if there is to be any difference in treatment with regards to the Establishment clause, government-endorsed religion is to be treated less favorably than government-endorsed patriotism. Following that, the Ninth Circuit’s decision to strike down the 1954 amendment to the Pledge is perfectly tenable and follows the precedent set by the Supreme Court in 1943.

The procedural error made by the Seventh Circuit is perhaps the most glaring defect in its decision. Judge Goodwin harshly chastised the Seventh Circuit for ignoring not only the *Lemon* test (conceivably due to the Supreme Court’s criticism of it in *Lee*), but also for failing to apply the coercion and endorsement tests. Instead of applying Supreme Court precedent as it is their duty, the Seventh Circuit approached the issue simply by asking: “Must ceremonial references in civic life to a deity be understood as prayer, or support for all monotheistic religions, to the exclusion of atheists and those who worship multiple gods?”<sup>182</sup> In answering their question, the Seventh Circuit relied heavily on Supreme Court dicta regarding the Pledge to find no constitutional prohibition in the Pledge’s reference to God. Clearly, the Seventh Circuit erred greatly in failing to apply *any* established test as the Circuit courts are mandated to do. Furthermore, the Seventh Circuit incorrectly relied upon dicta which carries no legal weight, although helpful in bolstering inferior court decisions based upon established tests. In sum, it is clear that where the Seventh Circuit erred the Ninth Circuit excelled. Although

unpopular across the nation, the decision follows the judicial blueprint placed before the court with no radical departures from established law whatsoever.

### **The Voucher Dilemma**

The other earth-shattering church-state based within the realm of public education came just one day after the Pledge ruling in *Newdow* that shook the nation. Although the Supreme Court's decision in the present case, *Zelman v. Simmons-Harris*<sup>183</sup> came down in July 2002, the first legal action taken regarding the voucher scheme challenged in *Zelman* reaches back to as early as 1996. Initially, the program under litigation, entitled the Pilot Project Scholarship Program, was challenged in Ohio state level courts by two different groups of appellants who were consolidated together and have remained so throughout the entire legal process. As the record shows in the Ohio Supreme Court decision, one group of plaintiff-appellants, the "Gatton plaintiffs," filed a lawsuit against the State of Ohio and the state superintendent, John M. Goff, on January 10, 1996.<sup>184</sup> Three weeks later, the second suit was brought against Superintendent Goff by the "Simmons-Harris" plaintiff-appellant group in the Franklin County Court of Common Pleas. While the trial court rejected the plaintiffs' claim that the Pilot Program offended both the Ohio and U.S. Constitutions, the Tenth Appellate District of Ohio found in favor of the plaintiffs on grounds that the Program represented an establishment of religion.<sup>185</sup> Upon appeal to the Ohio Supreme Court, the Program was declared unconstitutional on procedural grounds, but survived the review of its Establishment clause implications.<sup>186</sup> Following the decision entered by the Ohio Supreme Court, the appellees with the State

of Ohio reasoned that if the procedural errors could be remedied the Pilot Program would pass constitutional muster in the federal courts.

Under review in a federal district court the Pilot Program was again declared to violate the Establishment clause under the *Lemon* test and was permanently enjoined from further administration.<sup>187</sup> Upon the subsequent appeal to the United States Court of Appeals for the Sixth Circuit, the three judge panel affirmed the decision by District Court Judge Solomon Oliver, Jr. in finding the Pilot Program violative of the First Amendment.<sup>188</sup> The case was finally appealed to the United States Supreme Court and oral arguments were initiated a little over a year after the appeals court decision was filed. In a very close decision, the five-member majority of the Court reversed the lower courts, deeming the Ohio Pilot Program constitutional amidst great controversy and sharp division between the Justices.

Being such a contentious issue with innumerable implications and far-reaching effects, nearly each Justice wrote their own opinion with only Justices Kennedy, Scalia, and Ginsburg declining to pen their own. For the Supreme Court, this issue was not isolated to the Ohio Pilot Program. Since 1983 and the ruling in *Mueller v. Allen*,<sup>189</sup> the Court had decided a flurry of voucher-related cases that involved varying methods of administering aid to religious schools that had gained a momentum unprecedented in past church-state relations history. Two of the most guiding cases, *Agostini v. Felton*<sup>190</sup> and *Mitchell v. Helms*,<sup>191</sup> both came within the past five years and under the reign of Chief Justice Rehnquist. However, with the recent decision invalidating a voucher program in Florida<sup>192</sup> raised questions about the overall constitutionality of such programs. Although

closely divided, the Court made a resounding ruling that upheld the Ohio Pilot Program, but set a high bar of constitutional standards for other voucher programs.

Although the Justices labored in an extensive study of the Pilot Project Scholarship Program implemented in Cleveland's school district and subsequently challenged by the plaintiffs in *Zelman*, the finer details are not the focus in this analysis. While I will be focusing primarily on the broader Establishment Clause conflicts at issue in the Court's decision before turning to a careful analysis of the non-legal implications of voucher schemes like the Pilot Program, a general overview of the program and its history is merited. As Chief Justice Rehnquist noted in his opinion, the impetus of the program stemmed from the deplorable conditions of public schools in the City of Cleveland. In 1995, the problems with the schools had become so endemic that a Federal District Court declared a "crisis of magnitude" and placed the entire Cleveland school district under state control.<sup>193</sup> Following shortly after that ruling, "a state auditor found that Cleveland's public schools were in the midst of a 'crisis that is perhaps unprecedented in the history of American education.'"<sup>194</sup> With test scores and dropout rates confirming what education experts and school officials had said about the school system in Cleveland, several measures were taken to address the dire nature of the failures within the Cleveland school system. Among those varied efforts was the Pilot Project Scholarship Program, which was codified into law in 1999.<sup>195</sup>

Generally, the Pilot Program provides financial assistance to families in any Ohio school district that is or has been federally turned over to state control. As it stood at the time of the law's enactment, Cleveland was the only Ohio school district to meet the standard established by the law. More specifically, the program provides two types of



financial assistance to the parents of children within the eligible district. The first type of relief provided by the Pilot Program involves tuition aid for students in kindergarten through third grade, expanding each year through eighth grade, to attend a participating public or private school of their parent's choosing. The other kind of tuition aid administered to parents is for those who had chosen to remain enrolled in the public school system that had been put under state control.<sup>196</sup> The tuition aid made available under the program is awarded to parents according to financial need, with the lowest-income families receiving priority in both the eligibility of aid as well as the portion of the award. Under the program, the aid is distributed to the parent, who in turn, decides where the money is to be directed. Where the parent chooses a private school, a check from the State of Ohio is made payable to the parent, who then endorses the check over to the chosen school.

The program is open to participation for all private schools, both religious and nonreligious, as well as all adjacent public schools. As a condition for participation under the program, private schools are required to: be located within the boundaries of the relevant school district, meet statewide educational standards, and agree not to discriminate on the basis of race, religion, or ethnic background, or to "advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion."<sup>197</sup>

As I mentioned before, the Justices delved into great detail and drew very fine lines of argumentation from the vast complexities of the facts in *Zelman*. With such a tremendous undertaking, the Court gathered a slew of figures and statistics to augment the clarity of their opinions and buttress their respective positions. Although I would

encourage those intrigued by the particulars in this case to avail themselves of the thorough study conducted by the Court, I would note that such a comprehensive analysis is far out of the scope of this work. Here, I would like to survey the Establishment Clause implications of the Pilot Program and ruminate on the non-legal aspects of its implementation. In going about this aim, my focus is primarily on what criteria of religion clause jurisprudence and which aspects of the program served as the foundation for the Court's decision. Along the way I will interject with my own analyses and those of the other Justices.

Writing for the five-member majority, Chief Justice Rehnquist outlined a very convincing argument concerning the consistent precedent recently reaffirmed by the Court in *Mitchell* as well as the validity of the "true private choice" doctrine established nearly twenty years ago in *Mueller*. Although Rehnquist authored a resounding affirmation of the Pilot Program, his opinion was marked by several curiosities. One of these oddities lies at the very beginning where he makes no hesitation in acknowledging the application of the Establishment Clause of the First Amendment through the Fourteenth Amendment. This application of federal law to state programs, typically begrudgingly done by the Chief Justice, is carried out unflinchingly. In fact, only Justice Thomas sounded the lone trumpet for the preservation of states' rights in his concurrence; cautioning the federal courts in treading on the grounds he feels should be reserved for the states alone. The second item of interest at the beginning of Rehnquist's opinion was the reaffirmation of the *Lemon* test. While Rehnquist maintains his position amongst the sharpest of the Court's critics of the *Lemon* test, he applied its prongs without reservation

or disclaimer. This fact may signal the prolonged survival of the test in the face of serious condemnations over the past decade.

Moving quickly through those initial remarks, Rehnquist declared that the most relevant question in the case before them was whether the Pilot Program had the “effect” of advancing or inhibiting religion. He had dispatched the concerns over the program’s valid secular purpose by citing the obvious purpose of providing invaluable assistance to the parents and children of a clearly failing public school system. The Court’s approach to the Pilot Program as articulated by Rehnquist was directed under two distinct categories concerning governmental pecuniary aid to religious schools. Precedent had established one category involving government programs that provide aid directly to religious schools, which tends more often than not to violate the Establishment Clause, and yet another category that involves programs that incorporate the element of true private choice. As the Court reviewed the precedent within both categories, the majority in the *Zelman* emphasized the principle of private choice that had been integral in the favorable accommodationist rulings of the past. Citing three past cases falling under the latter category of government aid programs combined with the broad availability of funds to all types of families, the majority asserted the neutrality of the Pilot Program as a direct result of the private choice that determined the administration of government funds. In Rehnquist’s opinion, he made this point clear:

“*Mueller, Witters, and Zobrest* thus make clear that where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause.”<sup>198</sup>

With that pretext, the majority pointed out that any funds that eventually went to religious schools was the direct result of a parental choice, not the government. Therefore, the argument that the government was impermissibly advancing religion by contributing to religious schools is refuted for lack of direct action on the part of the government. Rather, the majority asserts that the program is neutral in the dispersal of tuition aid with regards to religion, and allows the individual recipients to make their own choice as to where the tuition aid is spent. Relying on the plurality of the Court's rationale in *Mitchell*, Rehnquist cited this very notion from that case: "If numerous private choices, rather than the single choice of a government, determine the distribution of aid, pursuant to neutral eligibility criteria, then a government cannot, or at least cannot easily, grant special favors that might lead to a religious establishment."<sup>199</sup> Following that logic, the majority found the Ohio Pilot Program to be constitutional under the rubric of private choice tuition aid programs.

However, the lead dissent written by Justice Souter impugned the majority of distorting the principle of neutrality and inconsistently applying that illogical distortion in the present ruling. First, Souter notes that the Court recognized just two terms ago in *Mitchell* that "neutrality conceived of as evenhandedness toward aid recipients had never been treated as alone sufficient to satisfy the Establishment Clause."<sup>200</sup> Furthermore, the majority employs neutrality in such a fashion as to warrant it meaningless and illogical. While the majority's implementation of neutrality seems to maintain integrity on its face, Justice Souter's careful analysis of the principle as applied in *Zelman* reveals serious deficits in cogence.

Although “evenhandedness” remains an important element in a truly neutral voucher scheme, another critical aspect of neutrality that must be addressed involves the category of aid that may be directed to religious as well as secular schools and whether that aid scheme favors religion. Souter decries the majority’s rationale in affirming the constitutionality of a voucher program directed at all schools:

“If regular, public schools (which can get no voucher payments) “participate” in a voucher scheme with schools that can, and public expenditure is still predominantly on public schools, then the majority’s reasoning would find neutrality in a scheme of vouchers available for private tuition in districts with no secular private schools at all.”<sup>201</sup>

This is truly an important concern that the majority overlooks in preference for their version of neutrality that, as Souter demonstrates, tends to invalidate neutrality altogether.

Hypothetically, under the standard set by the majority in *Zelman*, a voucher scheme that provides no secular options outside of remaining enrolled in the troubled public school is neither truly neutral towards religion, nor is it evenhanded. While the majority rightfully maintains that the Pilot Program makes secular options available, regardless of their number or popularity, it is critical to acknowledge that future voucher programs similar to the one challenged in *Zelman* but without secular options would be upheld under the logic applied by the majority of the Court. This kind of program would undeniably tend to advance religion by making public funds available for religious schools without a diluting secular option. The only “choice” under that type of program would be the same one that is currently available to parents and their children without government involvement. Moreover, the pecuniary incentive to enroll in private religious schools would be an unmistakable advancement of religion over the secular public school

system in which they are already enrolled. Such a scheme does not present so much a choice as it encourages a defection from the lousy to the religious.

Turning to the majority's assessment of the distribution of the tuition aid, Souter again questioned the application of the criterion of private choice and the permissibility of such a scheme. He declares that "[t]he majority has confused choice in spending scholarships with choice from the entire menu of possible educational placements, most of them open to anyone willing to attend a public school."<sup>202</sup> Furthermore, Souter complained that:

"[t]he majority's view that all educational choices are comparable for purposes of choice thus ignores the whole point of the choice test: it is a criterion for deciding whether indirect aid to religious school is legitimate because it passes through private hands that can spend or use the aid in a secular school. The question is whether the private hand is genuinely free to send the money in either a secular direction or a religious one."<sup>203</sup>

To encapsulate Souter's argument, he finds it logically untenable to declare the presence of true private choice where the only choices outside of private religious schools are public schools that receive money not from private choosers, like parents, but rather from the state treasury. In the event that a parent selects one of the various forms of public schools (traditional, magnet or community schools), that money does not pass through private hands and would never have been available to a religious school in any event. Therefore, the majority's rationale in supporting the Pilot Program is most certainly blemished by this inescapable illogic.

In comparing the strong opinions authored by both Chief Justice Rehnquist and Justice Souter, I find myself falling to both sides of the discourse on varying points of contention. Although I can foresee grave constitutional conflicts in the near future

arising from the majority's oversights concerning their rationale, it seems as though the Ohio Pilot Project Scholarship Program just inches over the ambivalently-placed bar of the private choice standard. Although Souter made much of the statistic indicating that 96.6% of all voucher recipients attended religious schools between the years 1999-2000<sup>204</sup>, I must concur with Chief Justice Rehnquist in rejecting the attachment of constitutional significance to that figure, so long as at least one genuine secular private choice exists in the program. However, it would be loath to ignore the implications of a range of choices wildly skewed to favor the choice of a religious school over a secular one. This sort of disparity in educational choices would represent a form of educational anti-trust analogous to that of the business world. A government-sanctioned monopoly on the part of private religious schools participating in voucher schemes would ostensibly be the next legal challenge, invariably accompanied by Establishment Clause objections surrounding the government's institution of a program fostering a notably disproportionate group of religious schools.

Although I would generally accept the constitutionality of the Pilot Program, it would be on a much more cautious note and on drastically different grounds than those set forth by the majority. I fully share Justice Souter's skepticism regarding the feasibility of the majority's rationale for the same exact reasons that he posits in his comprehensive dissent. As a direct result of the majority's preference for form over substance, neutrality and the private choice doctrine have been wholly reduced to purposeless and hollow mockeries of objective standards. Following this ruling, neither neutrality nor private choice will have any screening function left within them because they have been reduced to such a low level that even the most cumbersome voucher

program could hurdle the bar the majority has now set. Most importantly, the principle of true private choice, which guided this decision through past precedent, is reduced to a mere formality. As Justice Souter remarked in his dissent regarding the principle of private choice in the Pilot Program, “a Hobson’s choice is not a choice, whatever the reason for being a Hobsonian.”<sup>205</sup>

The last constitutional matter in relation to the program that tends to create doubt concerning its constitutionality is the distribution of public funds to religious schools. Although the private parent is the receiver of the tax money distributed by the government, that money is almost certainly then directed to religious schools with religious missions. This fact is not disputed and as Souter notes, “the majority makes no pretense that substantial amounts of tax money are not systematically underwriting religious practice and indoctrination.”<sup>206</sup> It is precisely that type of indoctrination sponsored by public money that could produce cataclysmic social strife. Both Justice Souter and Justice Breyer illuminate this discourse by pointing out that religious teaching at taxpayer expense cannot be condoned given that the variance in religious doctrines would tend to provoke intense disruptions and upheaval.<sup>207</sup> Although I would ultimately permit the granting of tuition aid to parents seeking better educational opportunities and their transference of that public tax money to a religious school amongst a spectrum of secular options, I remain highly suspicious of this scheme. The tendency for abuses to corrupt the scheme and the likelihood of the extinction of secular options in the future should leave open the door to future challenge of the Pilot Program in the event of such problems.



Departing from the critical constitutional issues raised by Justice Souter, it is equally important to acknowledge the potency of the socially and religiously based conflicts that could spring from voucher schemes like the Pilot Program. In his dissent, Justice Breyer specifically addressed two pressing issues cast aside by the others, with the exception of Souter, that demand to be confronted. The first issue he took in hand was the social and religious divisiveness that voucher schemes invite, no matter what their intended neutrality, and secondly, the threat that voucher programs pose to the integrity of religion in America.

Justice Breyer, while concurring with the sentiments outlined by his fellow dissenter, Justice Souter, endeavored to focus his opinion almost entirely on the social implications of the voucher scheme challenged in *Zelman*. His first point of contention lie within the explosive potential for social conflict as a direct result of government involvement in religious education. Breyer emphasized that the religion clauses of the First Amendment had at least been constructed in part to reduce the likelihood of the bitter religious wars that were perennially waged in Europe throughout written history. He also acknowledged the extensive discrimination that went on in early America despite the assurances of the First Amendment that went unchallenged due in large part to the vast dominance held by the religious majority at that time. However, since the dramatic increase in immigration to America and the extensive array of religious, ethnic, and racial diversity that accompanied it, the 20<sup>th</sup> century Court took great pains to assure the new plurality of Americans their constitutional rights. It was from that point that the separation principle gained amplified importance and relevance to the Supreme Court and the rest of the judiciary.

With the backdrop of increased religious diversity in America and the evolving view of the religious clauses fostered by the Supreme Court, Justice Breyer then outlined the constitutional bramble that government funded religious education would inevitably find itself in. To him, even common sense demonstrated the problems with implementing an “equal opportunity” approach to religious exercise in public education due to the overwhelming task of providing an equal forum to each religious tradition that occupies a desk in the classroom. Even beyond the theoretical difficulties associated with “equal opportunity,” there remain the practical problems that would effectively paralyze the school day. Not only would students begin to resent one another in their competing religious practices within the classroom, but also the time it would take to honor each individual’s sacred practices would most certainly diminish the amount of instruction time to an unacceptably low level. The public schools would move further away from their stated purpose in educating the next generations on a wide array of academic pursuits and move closer to fulfilling the role of a Sunday School. As the Court has declared time and again, that type of instruction and overt concentration on religion belongs in the privately funded church or temple and not in the publicly funded public schools.

The aforementioned notion of conflict between religious sects is not simply a philosophical abstraction, but rather a truly real threat to the social harmony of our richly diverse nation. Under the type of voucher plan argued before the Court, it is easy to imagine the bitter antagonism that would rage between the sects while competing for chances to obtain government funding. While some religious leaders decry the state’s “corrosive secularization” of religion in America, these voucher schemes represent the

converse of that fear. Instead of the state willfully imposing secular culture upon religion through a voucher scheme, religious schools are clamoring to come under the secular umbrella of state funding. It is precisely when religion and the state find themselves under that umbrella, regardless of the reason, that the two entities become hopelessly entangled. At the very moment that the church and the state meet in voucher schemes similar to the Pilot Program, the state is inexorably compelled to fulfill its duty in assuring the proper observation of the law on the part of the religious schools. Justice Breyer found this idea articulated well in an *amicus* that argued “‘it is difficult to imagine a more divisive activity’ than the appointment of state officials as referees to determine whether a particular religious doctrine ‘teaches hatred or advocates lawlessness.’”<sup>208</sup> That kind of entanglement as forbidden in *Lemon* must not be ignored and could result in the upshot of other such voucher programs without valid secular options.

Earlier in Justice Souter’s dissent, he had concentrated briefly on the theme of the diminished integrity of religion by pointing out that the involvement of religious schools in publicly funded voucher schemes may lead to unwanted government oversight and interference. Following in the rationale as Justice Blackmun had simply warned in *Lee*, “government largesse brings government regulation.”<sup>209</sup> Therefore, Justice Souter concluded that the State’s religious antidiscrimination restrictions for the program might well impede on valued religious practices and sacred decisions. He noted that “a participating religious school may well be forbidden to choose a member of its own clergy to serve as teacher or principal over a layperson of a different religion claiming equal qualification for the job.”<sup>210</sup> Similarly, he observed that:

“a separate condition that ‘the school...not...teach hatred of any person or group on the basis of...religion’ could be understood (or subsequently broadened) to prohibit religions from

teaching traditionally legitimate articles of faith as to the error, sinfulness, or ignorance of others, if they want government money for their schools.”<sup>211</sup>

Obviously, this scenario threatens the integrity and well-being of religious groups more so than the state. In this case, while the interests of the state are fulfilled in the voucher program, the interests of religion are effectively ignored and cast aside as a direct result of dependence on government funding.

At this point, nearly all of the relevant constitutional issues have been at least adequately addressed if not overemphasized for effect. Although the Court deemed the Pilot Program to satisfy the valid secular purpose prong of the *Lemon* test, they were restricted from answering the second most important query concerning the program’s purpose. That question, one that has been extensively debated outside of the judiciary, is quite simply if voucher programs are effective in accomplishing their secular purpose. It is my gravest fear that vouchers tend to be counterproductive and damaging to the very educational system they are designed to salvage. I find it utterly impossible to escape the economics involved which make every indication that voucher programs will scuttle the public school systems they are instituted in.

Take for instance the argument from competition that many voucher apologists cite as a sure-fire way to reverse downtrend of public schools and simultaneously improve the education of the children in the troubled school districts. While this model as applied to the capitalistic environment of the corporate world finds merit, it finds no such currency here. A recent article in *The Atlantic Monthly* written by correspondent Jonathan Rauch typifies the illogic of the competition scheme.<sup>212</sup> Rauch argues that if vouchers can improve companies and public universities, then they can similarly improve the financial status of primary and secondary public schools. However, Rauch neglects

the obvious differences in the government's funding and the manner by which students pay tuition for these drastically different public institutions. While public universities are partially funded by the government, they are also funded in large part by the students who attend them. Those students who have obtained government loans pay them back, with interest, unlike the voucher schemes involved in primary and secondary education. The manner by which students apply and become eligible for those loans is also substantially different from a voucher scheme, which distributes public funds in a fashion unlike that of higher education loans.

More importantly, Rauch is foolish enough to believe that if you take money away from a public school, it will respond to that cut in funding with a renewed vigor lest they completely fail and be shut down. This ridiculous notion is completely unfounded in the environment of a voucher scheme that actively drains essential funds away from public schools and into the coffers of private ones. How can competition advocates like Rauch expect public schools to improve their performance when the money they need to operate, which is already scarce, is depleted even more by competing private schools that already enjoy the luxury of superior private funding? As Justice O'Connor noted in her concurring opinion supporting the voucher program, even nonreligious private schools are: smaller, have smaller class sizes, have more highly educated teachers, and have principles with longer job tenure than Catholic schools.<sup>213</sup> Justice Thomas similarly noted that "religious schools, like other private schools, achieve far better educational results than their public counterparts."<sup>214</sup> This consensus, shared not only by the Justices of the Supreme Court, but also the vast majority of the American public reaffirms the fact that private schools thrive on the surplus of their funding. It only follows that to divert

money from a failing public school system would only handicap that school district more than without the voucher system. After all, if money is the key to the success of both public and private schools, the transference of money from the disadvantaged to the advantaged achieves nothing but more imbalance and inequality.

In his concurrence, Justice Thomas spoke very eloquently and urgently of the tribulations that the urban schoolchild faces with the decaying public school systems they are left with. He emphasized the importance of education in each child's life and argued assiduously for the same educational opportunity available to more affluent communities to be available for the inner-city communities. I take this opportunity to echo Justice Thomas' remarks, for they strike at the heart of the matter that compelled the Ohio State Legislature to create a voucher program. At the conclusion of his concurring opinion, he remarked that "[t]he failure to provide education to poor urban children perpetuates a vicious cycle of poverty, dependence, criminality, and alienation that continues for the remainder of their lives."<sup>215</sup> Truly, this sentiment reflects the stark reality of the educational system in America. Once our elected leaders awake to this fact, perhaps the educational budgets across this country will then represent the inescapable reality that educational spending is directly correlated to the quality of life experienced by all Americans. However, I am hesitant to throw our constitutional rights and protections to the wind in the process of improving our schools. If our elected officials truly wish to revive the vitality of our nation's public schools, vouchers cannot be the foremost means to achieving that end.

## **Thou shalt not post the Ten Commandments**

The Ten Commandments are a powerful symbol in many respects. For those of faith who subscribe to the morals they mandate, it is a stark reminder of the “higher law” that they are called to obey. Others who do not necessarily profess a religious faith that holds the Commandments to be divinely ordered may still view them as a fairly respectable way to live one’s life. Of course there is a marked minority of individuals in American society who reject the Decalogue altogether, finding no more extraordinary value in them than David Letterman’s Top Ten List. No matter what perspective is taken on the theological importance of the Ten Commandments, as a symbol they certainly conjure an unmistakable cultural and social force in America that can, perhaps, only be rivaled by other symbols like the American flag. Like the American flag, any form of legal action that involves our cultural and nationalistic symbols tends to evoke powerful reactions that resonate widely throughout the populace. In the days following September 11<sup>th</sup>, these opinions became amplified to a much higher level of intensity that begged the attention of not only the national media, but also elected representatives in Congress as I noted earlier with Rep. Aderholt. It is remarkable to examine the degree of public concern and media coverage that was afforded to Decalogue displays as in all church-state issues since that fateful September day. However, the subject of Ten Commandment displays in public areas has always been a contentious and harshly embattled arena of church-state litigation.

One such legendary example of this bitter legal and social conflagration over the civic displays of the Ten Commandments can be found in the saga of then Alabama Governor Fob James and, then Etowah County Circuit Judge, Roy Moore. The story

begins as far back as 1995, when a suit was brought against Moore by the Alabama Freethought Association regarding the judge's display of the Ten Commandments above his bench as well as his "voluntary" prayers before court proceedings. The courtroom prayer was found to be unconstitutional by fellow county judge, Charles Price, but Moore defied the ruling. A legal quagmire ensued and two years later the nation's attention was fixed squarely on Moore and his propensity to inject his religious convictions in government affairs. In 1997, when the ACLU filed a lawsuit against Moore regarding the Ten Commandment display on behalf of local taxpayers, former Governor Fob James rallied behind Moore in defense of the display. In one of his many unfortunate lapses into the bigoted tactics of infamous former Alabama Governor George Wallace, James promised that he would "use all legal means at my disposal, including the National Guard and the state troopers, to prevent the removal of the Ten Commandments from Judge Moore's courtroom."<sup>216</sup> He further elaborated on that general threat by stating that "[t]he only way those Ten Commandments and prayer would be stripped from that Courtroom is with the force of arms."<sup>217</sup> Since then, Judge Roy Moore has continued bucking the rulings entered against him and sidestepped certain legal defeat when the Alabama Supreme Court remanded the ACLU's 1997 suit on the technicality of lack of standing.

With this legendary history of controversy and disobedience of legal orders it is hard to imagine how Moore has arrived at the prestigious position of chief justice on Alabama's highest court where he now sits. Even more shocking is the fact that he ran primarily on the platform of being the "Ten Commandments Judge,"<sup>218</sup> which enjoyed resounding currency among the vast majority of Alabamians who found no fault in Moore's religious antics in the courtroom. On January 16, 2001, Roy Moore was sworn



in as Chief Justice of the Alabama Supreme Court while pledging to "restore and preserve the moral foundation" of the law.<sup>219</sup> Approximately six months thereafter, Moore arranged to have the controversial 5,280-pound monument of the Ten Commandments installed after the courthouse had closed and his fellow justices had left for the day.

Very recently, U.S. District Judge Myron H. Thompson handed down his decision declaring the Ten Commandments display installed by Chief Justice Moore to be unconstitutional. Although Judge Thompson declined the plaintiffs' motion to immediately order the removal of the Ten Commandments display, he did order that Chief Justice Moore had 30 days to voluntarily remove the display. If Moore then failed to comply with the 30-day grace period, a permanent injunction with a 15-day limit would then be invoked. It is the genuine hope of all involved that Chief Justice Moore and those who collaborated in the placement of the Decalogue display in the rotunda of the Alabama Judiciary Building will abide by the District Court's ruling. Although it is only speculation, the possibility of Moore's defiance of the court's ruling in the same fashion as his flouting of Etowah County Judge Charles Price's earlier decision regarding his personal courtroom Ten Commandments display.

At the time this work was going into a final manuscript, oral arguments had just been concluded, but no decision had been handed down on the consolidated case known as *Glassroth v. Moore*. The proceedings closed with neither side able to claim a hunch on the decision, however, there was one crucial fact that hinted at Judge Thompson's ultimate ruling. That fact which worked in favor of the plaintiffs was the precedent already in place with the 11<sup>th</sup> Circuit forbidding such Ten Commandment displays. In

1993, U.S. District Judge Marvin H. Shoob ruled that a Ten Commandments plaque in the Cobb County State Court Building had to be removed unless accompanied by other secular or multi-denominational law codes that have influenced American law.<sup>220</sup> A year later, Judge Shoob's ruling was affirmed by the 11<sup>th</sup> Circuit, which includes in its jurisdiction the State of Alabama.<sup>221</sup> Given this precedent, it was impossible for Judge Thompson to ignore the primary controlling law of *Harvey v. Cobb* as well as the Supreme Court's ruling in *Stone*.

While this suit should be a relatively easily decided one, the action that brought about the suit is clearly a breach of ethics rules that bind judges, especially those sitting as the chief justice on the highest court in the state. Unfortunately, the Ethics Commission that voted 5-0 to send the investigation of Moore's involvement in unethical activities aimed to raise money for his defense in ongoing litigation on Alabama Attorney General Bill Pryor has been largely ignored.<sup>222</sup> Aside from the unethical behavior exhibited by Judge Moore, his largely puerile antics in bleeding his religious crusade into the courthouses of higher levels of government reflect on his antagonistic nature. Rather than conduct himself in accordance with the commonly accepted standards and ethical rules of distinguished jurists, Judge Roy Moore embodies all that is reprehensible on the bench. This concept will be more fully explored in the proceeding chapter.

The recent upsurge in public interest regarding these contentious Ten Commandment cases has not been limited to Alabama and neither have the lawsuits. While challenges to Ten Commandment displays are rather ubiquitous in the realm of church-state litigation, the public exposure now allotted to these cases reveals the intense emotional resistance on the part of religious groups and their adherents to departing from

public displays of the Decalogue. This heightened level of emotions could even be observed in nearby Chester County, Pennsylvania, where a federal court recently pondered the constitutionality of a Ten Commandments display in the 155-year-old historic West Chester Courthouse.

The bronze Ten Commandments monument, measuring 50 inches by 39 inches, has adorned the front façade of the courthouse since 1920 when the Council of Religious Education of the Federated Churches of West Chester donated the plaque to the county. As U.S. District Judge Stewart Dalzell noted in his thorough study of the monument's history as part of his decision in *Freethought Society v. Chester County*, the Chester County Commissioners authorized the county's acceptance of the plaque in March 1920.<sup>223</sup> In December of that same year, the County Commissioners authorized their Solicitor, Mr. MacElree, to be present at the unveiling of the tablet and accept it on the county's behalf. The Ten Commandments plaque was installed as a stand-alone display and has not been accompanied by any other monuments or plaques since its dedication over eighty years ago.

The Commandments display, though cherished by many in the West Chester community, has recently been declared to be unconstitutional under the legal rubric applied to all such cases since *Stone*. In a suit brought by a local nonprofit freethought society with assistance from the ACLU, the United States District Court for the Eastern District of Pennsylvania originally mandated that the plaque be removed from the building's façade. Subsequently, the court has stayed that ruling pending appeal to the United States Court of Appeals for the Third Circuit that has yet to be argued. In Judge Dalzell's opinion, he applied the *Lemon* test as mandated by Supreme Court precedent

and reiterated in the Seventh Circuit's standing decision in *Books* and determined that the display failed the first two prongs without consideration of the third.

Concerning the first prong, Judge Dalzell found that "Chester County's history of receiving of this plaque demonstrates that it was 'abandoning neutrality and acting with the intent of promoting a particular point of view in religious matters' when it accepted the gift in 1920."<sup>224</sup> Noting the overtly sectarian nature of the ceremony employed at the monument's unveiling, Dalzell concluded that the religious content of the program confirmed the marriage of Church and County that took place that day. He then summarized that "both on the face of the tablet and with reference to its history, we conclude that the purpose of the plaque is primarily religious and only incidentally secular."<sup>225</sup> With no valid secular purpose for the Ten Commandments display to rely upon, the court inevitably ruled that Chester County's Ten Commandments plaque utterly failed the first prong.

The court's analysis of the second prong determined that due to the sole presence of the tablet with no other secular or historical documents for a period of over eighty years weighed very heavily on its finding. In his opinion, Judge Dalzell emphasized this fact by stating that:

"The only plaque on the Courthouse facade with any substantive content is the Ten Commandments tablet. With neither (say) the Bill of Rights, the Declaration of Independence, the Mayflower Compact nor any other fundamental legal text flanking it, the tablet's necessary effect on those who see it is to endorse or advance the unique importance of this predominantly religious text for mainline Protestantism. Such 'denominational preference' runs afoul of settled Supreme Court Establishment Clause jurisprudence."<sup>226</sup>

Finding that the plaque tended to advance “mainline Protestantism” as opposed to other religions or nonreligion, the court was bound to reject the display based on the second prong of *Lemon*.

Approximately a month after the District Court announced its initial ruling on March 6, 2002, the defendants of Chester County filed a motion to put a stay on the permanent injunction issued by Judge Dalzell.<sup>227</sup> Forthwith, the court granted the county’s motion only for a period of two weeks to obtain an appropriate covering to be placed over the plaque. Upon the expiration of the grace period granted by the court the county was forced to place a cover over the tablet much to the dismay of various local residents who protested the removal. While the demonstration organized by local lawyer, Tricia Murnane was peaceful and lawfully assembled by a crowd estimated at 350 people, the sheriff’s deputies were forced to detain four unlawful protestors who blocked the county work crew sent to install the shroud over the Ten Commandments plaque.<sup>228</sup>

Although none of the four individuals who were detained were formally arrested for their civil disobedience, the incident evokes a curious contradiction in the logic of those who are incensed about the ruling. Many who gathered for the protest voiced concerns that their religious liberties were being violated by having the tablet covered and drew wild parallels between the covering of the Commandments in Chester County and the Nazis destroying Jewish artifacts during World War II.<sup>229</sup> Of course, these radical opinions do not represent the majority of those who would also dissent from the covering of the tablets, however, they do represent a powerful segment of the population that is politically and socially mobilized on these issues. While the rational dissenters feel that the Ten Commandments is part of their *personal* culture, the overzealous

radicals like those who went as far to illegally protest by blocking the county workers, feel that it is *everyone's* culture, like it or not.

Unfortunately, this type of hegemony has mercilessly gripped our nation in the wake of September 11<sup>th</sup> and resulted in innumerable acts of intolerance and bigotry across our nation. Those belonging to that highly-active hegemonic entity fail to see that they are the Nazis of this scenario, and not the victims. Their utter disregard for freedom of conscience and equality before the law has brought about a degree of arrogance in them that has, in effect, blinded them to the fact that they are the oppressors and not the oppressed. The rallying cries at the West Chester protest like that of one man who was carried away shouting, "This is God's law, and no man can remove it!" clearly demonstrate the audacity of that ideological persuasion. From an objective standpoint, it is ludicrous to imagine such an overwhelming religious majority crying foul when the norms and mores are adjusted to be applied equally to those of all religious traditions. In a sense this is human nature. Ask any anthropologist or historian and they will tell you that social change is achieved at a glacial rate, especially when that change is initiated at a time when confusion and fear cause the public to cling to the status quo for security. My inkling is that this would be the case in West Chester as it is in hundreds of communities like it across the nation. In time though, this grotesque reaction to change for equality will be but a distant, yet ugly memory.

Despite the extensive number of Decalogue display cases that have arisen since America's religious "awakening" in the days following September 11<sup>th</sup>, the Supreme Court recently turned down yet another opportunity to definitively rule on the constitutionality of Ten Commandment displays on public lands. The High Court once

again denied certiorari to hear an appeal regarding the embattled Ten Commandments display in front of the Elkhart Municipal Building in Elkhart, Indiana. The first of these cases involving the City of Elkhart emerged in May 2000, when the Seventh Circuit Court of Appeals' decision in *Books* found the 43-year old Ten Commandments monument outside of the city's municipal building to be an impermissible establishment of religion.<sup>230</sup> A year later, the United States Supreme Court denied certiorari, lacking one vote to hear the case.

Not surprisingly, Chief Justice William H. Rehnquist was the most vocal of the three voting to hear the case, which included associate Justices Scalia and Thomas. In his dissenting opinion on the denial of certiorari, Rehnquist telegraphed his intentions of upholding the monument had the case been granted oral arguments. His statements revealed obvious passion and intensive study in the matter; he cited extensive history of the monument in question and ultimately gave the impression that he would find nothing unconstitutional with the monument. At the end of his historical review, Rehnquist declared that, in context, "the monument does not express the city's preference for particular religions or religious belief in general. It simply reflects the Ten Commandments' role in the development of our legal system."<sup>231</sup> Such prognostication without hearing any argumentation on the issue is not unheard of, but is still widely discouraged and forbidden due to its interpretation as an advisory opinion.

Regardless of Rehnquist's dissent, the case stood as decided by the Seventh Circuit and the monument was expected to be removed as ordered. In an act of disobedience not so dissimilar from that of Judge Roy Moore, Elkhart city officials tested the law further by placing four similarly-sized religiously-themed monuments alongside

the Commandments monument just weeks after the Seventh Circuit had ruled. These monuments featured excerpts relating to God taken from the Declaration of Independence, the preamble of the U.S. Constitution, the Bill of Rights, and the Magna Carta. A U.S. District Court enjoined the erection of those monuments in July 2000<sup>232</sup> and was affirmed by the Seventh Circuit once again a year later.<sup>233</sup> Pursuant to that ruling, the appellant in these cases, Governor Frank O'Bannon sought an appeal to the United States Supreme Court which was subsequently denied with none of the Justices dissenting.<sup>234</sup> Although the facts of this case are significantly different than those in *Books*, the silence of Chief Justice Rehnquist on this matter is curious. Surely, in his dissent on the denial of cert in *Books*, one of the primary arguments centered on the presence of other secular monuments around those that are religious. In fact, he invoked the popular argument citing the presence of statues of "religious figures" within the premises of the Supreme Court Building itself:

"Indeed, a carving of Moses holding the Ten Commandments, surrounded by representations of other historical legal figures, adorns the frieze on the south wall of our courtroom, and we have said that the carving "signals respect not for great proselytizers but for great lawgivers." Similarly, the Ten Commandments monument and the surrounding structures convey that the monument is part of the city's celebration of its cultural and historical roots, not a promotion of religious faith."<sup>235</sup>

Perhaps the mystical and intangible behind-closed-doors activities of the Supreme Court are still too cryptic to be understood.



## **The Balancing Act**

The Great American Experiment has yielded some of the most admirable and inspiring principles of governance yet to be conceived in human history. By combining the principles of liberty and equality, the United States Constitution captured two of the most foundational values of social democracy. The historical recounting of the ratification process shows the great extent to which the Founders regarded the assurance of both religious liberty and equality to be inviolate elements of the Bill of Rights. As our democracy has evolved over the past 200 years since the Constitution was written, so too has our understanding of the religious liberties that are enshrined in the First Amendment. While some argue that the wall of separation between church and state has become hostile to religion, such a claim remains unproven in the decades that it has served as a guiding principle for our nation's highest court. In fact, it is my sincerest wish that the discourse that you have just surveyed indicates just how integral the wall of separation is in assuring all Americans their cherished religious liberties. While the vast array of information available to the average citizen about the "wall" is misleadingly rudimentary at best and utterly erroneous at worst, it is crucial to recognize the value of truly informed and balanced sources. I have labored extensively to produce just that type of accuracy and integrity while covering such a contentious issue.

If any final thought could be brought away from this work, it is my hope that the respect for religious diversity in America could be enhanced and maintained, even in times of great distress and fear. The true measure of our democracy and even ourselves is the manner in which we respond to threats to the stalwart freedoms that we have come to know as United States citizens. While the majority may enjoy an overwhelming sense

of security in the unchecked religious activities since September 11<sup>th</sup>, we must all remember the fragility of that security for the minority that does not share the religious faith of the majority. If there is anything that has made our country great in the 20<sup>th</sup> century, it is our respect for the diverse nature of our fellow citizens. That very respect for the plurality of America should be the primary guiding principle as we enter the 21<sup>st</sup> century.

## ENDNOTES

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- <sup>2</sup> Jack L. Davis, "Roger Williams Among the Narragansett Indians," *New England Quarterly* Vol. 43, 4 (December 1970), p. 603
- <sup>3</sup> Donald A. Grinde, Jr. and Bruce E. Johansen, *Exemplar of Liberty: Native America and the Evolution of Democracy* (University of Nebraska at Omaha Dept. of Communications, 1990), Chapter 5, Figure 9
- <sup>4</sup> James L. Giddings, *Roger Williams and the Indians* (Rhode Island Historical Society, 1957), p.21
- <sup>5</sup> Robert Boston, *Why the Religious Right is Wrong About Separation of Church & State* (Amherst: Prometheus Books) p.52
- <sup>6</sup> Grinde and Johansen, *Exemplar of Liberty*, Chapter 5
- <sup>7</sup> Elizabeth Ola Winslow, *Master Roger Williams* (New York: MacMillan, 1957), p. 133
- <sup>8</sup> Reuben Aldridge Guild, *Footprints of Roger Williams* (Providence: Tibbetts & Preston, 1886), p. 20
- <sup>9</sup> Roger Williams, *Mr. Cotton's Letter lately Printed, Examined and Answered* (London, 1644)
- <sup>10</sup> Isaac Kramnick and R. Laurence Moore, *The Godless Constitution: The Case Against Religious Correctness* (New York: W.W. Norton & Company, 1997) p.22
- <sup>11</sup> Thomas Jefferson, *Notes on the State of Virginia* (London, 1781) p.285
- <sup>12</sup> Daniel L. Dreisbach, "Mr. Jefferson, a mammoth cheese, and the wall of separation between church and state: A bicentennial commemoration." *Journal of Church and State* v43 i43 (2001): 729
- <sup>13</sup> William G. McLoughlin, *New England Dissent, 1630-1883: The Baptists and the Separation of Church and State*, Volume II (Cambridge, Mass: Harvard University Press, 1971) p.920, 986
- <sup>14</sup> Letter from a committee of the Danbury Baptist association to Thomas Jefferson, 7 October 1801, The Papers of Thomas Jefferson (Manuscript Division, Library of Congress), Series 1, Box 87, 30 August 1801-15 October 1801
- <sup>15</sup> Letter from Thomas Jefferson to Messrs. Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, a committee of the Danbury Baptist association in the state of Connecticut, 1 January 1802, The Papers of Thomas Jefferson (Manuscript Division, Library of Congress), Series 1, Box 89, 2 December 1801--1 January 1802
- <sup>16</sup> Carla H. Hay, *James Burgh, Spokesman for Reform in Hanoverian England* (Washington, D.C.: University Press of America, 1979), p.30, 41-44
- <sup>17</sup> David N. Mayer, "The English Radical Whig Origins of American Constitutionalism," *Washington University Law Quarterly* 70 (1992): 131-208
- <sup>18</sup> James Burgh, *Crito, or Essays on Various Subjects*, Volume I (London, 1766, 1767) p.7
- <sup>19</sup> *Ibid.*, Volume II: p.117-19
- <sup>20</sup> James Burgh, *Political Disquisitions: or, An Enquiry into Public Errors, Defects, and Abuses*, Volume III (Philadelphia, Pa., 1775), "Names of the Encouragers."
- <sup>21</sup> Stephen L. Carter, *God's Name in Vain: Wrongs and Rights of Religion in Politics* (New York: Basic Books, 2000) p.75
- <sup>22</sup> Timothy L. Hall, *Separating Church and State: Roger Williams and Religious Liberty* (Urbana: University of Illinois Press, 1998) p. 103-111
- <sup>23</sup> Garry Wills, *Under God: Religion and American Politics* (New York: Simon and Schuster, 1990), p.371
- <sup>24</sup> LeRoy Moore, "Roger Williams as an Enduring Symbol for Baptists," *Journal of Church and State* 7 (1965): 185
- <sup>25</sup> Daniel L. Dreisbach, "Sowing useful truths and principles: the Danbury Baptists, Thomas Jefferson, and the wall of separation" *Journal of Church and State* v39 n3 (1997): 462
- <sup>26</sup> Mark DeWolfe Howe, *The Garden and the Wilderness: Religion and Government in American Constitutional History* (Chicago, Ill.: University of Chicago Press, 1965), p.9
- <sup>27</sup> *Ibid.*, p.1-2

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<sup>28</sup> Perry Miller, "Roger Williams: An Essay in Interpretation," in *Complete Writings of Williams VII* (New York: Russell & Russell, 1963): 10

<sup>29</sup> United States Constitution: Amendment I

<sup>30</sup> Jon Butler, "Coercion, Miracle, Reason: Rethinking the American Religious Experience in the Revolutionary Age," in *Religion in a Revolutionary Age*, eds. Ronald Hoffman and Peter J. Albert (Charlottesville, Va.: University Press of Virginia; United States Capitol Historical Society, 1994), p.29-30

<sup>31</sup> see *Marbury v. Madison*, 1 CR (5 U.S.) 137 (1803)

<sup>32</sup> see *Cantwell v. Connecticut*, 310 U.S. 296 (1940)

<sup>33</sup> see *Everson v. Board of Education*, 330 U.S. 1 (1947)

<sup>34</sup> Maura Dolan, "Pledge of Allegiance Violates Constitution, Court Declares" *Los Angeles Times*, 27 June 2002, home edition.:1, 1

<sup>35</sup> John Mark Frazier, "Separation of church and state is misunderstood" *St. Petersburg Times*, 26 July 2001, *Hernando Times* ed.:2, Letters

<sup>36</sup> *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42 (1825)

<sup>37</sup> Constitution of Virginia of 1776, relevant part reading: "The legislative, executive, and judiciary department, shall be separate and distinct, so that neither exercise the powers properly belonging to the other: nor shall any person exercise the powers of more than one of them, at the same time"

<sup>38</sup> see *Schenck v. United States*, 249 U.S. 47 (1919)

<sup>39</sup> see *Abrams v. United States*, 250 U.S. 616 (1919)

<sup>40</sup> see *United States v. Carolene Products*, 304 U.S. 144 (1938)

<sup>41</sup> see *Kovacs v. Cooper*, 336 U.S. 77 (1949)

<sup>42</sup> see *Dennis v. United States*, 341 U.S. 494 (1951)

<sup>43</sup> *Reynolds v. United States*, 98 U.S. at 164 (1878)

<sup>44</sup> *Everson v. Board of Education* at 18 (1947) where Chief Justice Black states in relevant part: "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach."

<sup>45</sup> Dreisbach, "Sowing useful truths and principles", 462

<sup>46</sup> Declaration of Independence (1776)

<sup>47</sup> Articles of Confederation of 1776: Article 13

<sup>48</sup> United States Constitution: Article 6, Section 3

<sup>49</sup> Leo Pfeffer, *Church, State, and Freedom* (Boston: Beacon Press, 1953), p.67: Pfeffer highlights an attempt by Pinckney to insert a religious freedom article with the language: "The Legislature of the United States shall pass no law on the subject of religion. However, the delegates allegedly viewed the provision as unnecessary."

<sup>50</sup> Kramnick and Moore, *The Godless Constitution*, p.29

<sup>51</sup> *Ibid* at 30

<sup>52</sup> *Ibid* at 30

<sup>53</sup> Pfeffer, *Church, State, and Freedom*, p.98

<sup>54</sup> Boston, *Why the Religious Right is Wrong*, p.60

<sup>55</sup> The Virginia Act for Establishing Religious Freedom: Article I

<sup>56</sup> Constitution of the State of New York (1777): Article 38

<sup>57</sup> *Ibid.* at Article 38

<sup>58</sup> *Ibid.* at Article 35

<sup>59</sup> *Ibid.* at Article 39

<sup>60</sup> *Ibid.* at Article 39

<sup>61</sup> Constitution of the State of Delaware (1792): Article 8, section 9

<sup>62</sup> Constitution of the State of Georgia (1777): Article 62

<sup>63</sup> Constitution of the State of Kentucky (1777): Article 2, section 26

<sup>64</sup> Constitution of the State of North Carolina (1776): Article 31

<sup>65</sup> Constitution of the State of South Carolina (1778): Article 21

<sup>66</sup> Constitution of the State of Tennessee (1796): Article 8, section 1

<sup>67</sup> Kramnick and Moore, *The Godless Constitution*, p.32

<sup>68</sup> *Ibid.* at 33

<sup>69</sup> *Ibid.* at 36

<sup>70</sup> *Ibid.* at 37

- <sup>71</sup> Ibid. at 36. The letter insisted on a clause in the Constitution requiring the creation “at every proper place through the United States” of academies regulated by Congress where young people would learn “the principles of the Christian religion without regard to any sect, but pure and unadulterated as left by its divine author and his apostle.”
- <sup>72</sup> James Madison, *Federalist No.52*
- <sup>73</sup> Kramnick and Moore, *The Godless Constitution*, p.38
- <sup>74</sup> Dreisbach, “Mr. Jefferson, a mammoth cheese, and the wall of separation between church and state”, 725
- <sup>75</sup> Kramnick and Moore, *The Godless Constitution*, p.39
- <sup>76</sup> Ibid. at 39
- <sup>77</sup> Paul Leicester Ford, ed. *Essays on the Constitution of the United States, Published during Its Discussion by the People, 1787--1788*. (Brooklyn: Historical Printing Club, 1892): No. 7
- <sup>78</sup> Ibid. at No. 7
- <sup>79</sup> Ibid. at No. 7
- <sup>80</sup> Ibid. at No. 7
- <sup>81</sup> see *Torasco v. Watkins*, 367 U.S. 488 (1961)
- <sup>82</sup> Kramnick and Moore, *The Godless Constitution*, p.43
- <sup>83</sup> see Constitution of the State of Texas: Article I, Section 4, which reads: “No religious test shall ever be required as a qualification to any office, or public trust, in this State; nor shall any one be excluded from holding office on account of his religious sentiments, provided he acknowledge the existence of a Supreme Being” and Constitution of the State of Arkansas: Article 19, Section 1, which reads: “No person who denies the being of a God shall hold any office in the civil departments of this State, nor be competent to testify as a witness in any court.”
- <sup>84</sup> see Arkansas Constitution of 1868: Article 14, Section 6
- <sup>85</sup> *Silverman v. Campbell*, 326 S.C. 208 (1997)
- <sup>86</sup> United States Constitution: Article II, Section 1, Clause 8
- <sup>87</sup> Steven B. Epstein, “Rethinking the Constitutionality of Ceremonial Deism,” 96 *Columbia Law Review* 2083, 2110-12 (1996)
- <sup>88</sup> John M. Swomley, *Religious Liberty and the Secular State* (Buffalo: Prometheus Books, 1987) p.45
- <sup>89</sup> Ibid. at 47
- <sup>90</sup> Ibid. at 47
- <sup>91</sup> Ibid. at 46
- <sup>92</sup> Ibid. at 47
- <sup>93</sup> Ibid. at 48-49
- <sup>94</sup> see *Engel v. Vitale*, 370 U.S. 421 (1962)
- <sup>95</sup> see *School District of Abington Township v. Schempp*, 374 U.S. 203
- <sup>96</sup> Harold W. Stanley and Richard G. Niemi, *Vital Statistics on American Politics*, 6<sup>th</sup> ed. (Washington, D.C.: Congressional Quarterly, 1998)
- <sup>97</sup> Cong. Rec. 3 January 2001: H. J. RES. 69; Cong. Rec. 22 January 2001: S. J. RES. 1; Cong. Rec. 7 February 2001: H. J. RES. 12; Cong. Rec. 13 June 2001: H. J. RES. 52; Cong. Rec. 20 December 2001: H. J. RES. 81
- <sup>98</sup> Cong. Rec. 12 June 2002: H. R. 4922
- <sup>99</sup> U.S. House. Representative Paul speaking on legislation restoring First Amendment protections of religion and religious speech. *Congressional Record*. 107<sup>th</sup> Cong., 2<sup>nd</sup> Sess., 13 June 2002: E1037
- <sup>100</sup> Ibid. at E1037
- <sup>101</sup> United States Constitution: Article 3, Section 2, Clause 1, stating in relevant part: “The judicial power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.”
- <sup>102</sup> Cong. Rec. 2 October 2001: H. CON. RES. 239
- <sup>103</sup> Ibid. at H. CON. RES. 239
- <sup>104</sup> IRC Sec. 501 (2002): “Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious... purposes... no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.”
- <sup>105</sup> Cong. Rec. 28 June 2001: H. R. 2357

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<sup>106</sup> Cong. Rec. 1 August 2002: S. 2886

<sup>107</sup> U.S. House. Representative Jones speaking on ensuring freedom of speech in America. *Congressional Record*. 107<sup>th</sup> Cong., 2<sup>nd</sup> Sess., 17 September 2002: H6301, which reads in relevant part: "...I close this way, and I have ever since September 11. I first ask God to please bless our men and women in uniform, I ask God to please bless the families of our men and women in uniform, and I ask God to please bless the President of the United States as he leads this Nation. I ask God to please bless the men and women who serve in the House and Senate. I ask God, and I say it three times, please God, please God, please God, continue to bless America."

<sup>108</sup> Pew Research Center for the People & the Press in association with the Pew Forum on Religion and Public Life. Americans Struggle with Religion's Role at Home and Abroad, Part 3: Religion, Politics, and Policy. Washington, D.C.: The Pew Research Center, March 20, 2002.

<sup>109</sup> Cong. Rec. 7 March 2002: H. R. 3895

<sup>110</sup> Cong. Rec. 6 February 2002: H. CON. RES. 315

<sup>111</sup> see *Books v. City of Elkhart*, 235 F.3d 292 (2000)

<sup>112</sup> Cong. Rec. 7 March 2002: H. R. 3895, which reads in relevant part: "(b) The expression of religious faith by individual persons on or within property owned or administered by the several States or political subdivisions thereof is hereby--(1) declared to be among the rights secured against laws respecting an establishment of religion or prohibiting the free exercise of religion made or enforced by the United States Government or by any department or executive or judicial officer thereof..."

<sup>113</sup> Cong. Rec. 6 February 2002: H. CON. RES. 315

<sup>114</sup> *Stone v. Graham*, 449 U.S. at 41-42 (1980), which reads in relevant part: "The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact. The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness. (See Exodus 20: 12-17; Deuteronomy 5: 16-21). Rather, the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day. (See Exodus 20: 1-11; Deuteronomy 5: 6-15). This is not a case in which the Ten Commandments are integrated into the school curriculum, where the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like. (*Abington School District v. Schempp*, *supra*, at 225). Posting of religious texts on the wall serves no such educational function. If the posted copies of the Ten Commandments are to have any effect at all, it will be to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey, the Commandments. However desirable this might be as a matter of private devotion, it is not a permissible state objective under the Establishment Clause."

<sup>115</sup> U.S. House. Representative Kerns speaking on "Lest We Forget" the Ten Commandments.

*Congressional Record*. 107<sup>th</sup> Cong., 2<sup>nd</sup> Sess., 26 September 2002: E1693

<sup>116</sup> *Ibid.* at E1693

<sup>117</sup> *Ibid.* at E1693

<sup>118</sup> Cong. Rec. 29 March 2001: H. R. 7

<sup>119</sup> Cong. Rec. 8 February 2002: S. 1924

<sup>120</sup> "Executive Order 13198: Agency Responsibilities With Respect to Faith-Based and Community Initiatives," 66 *Federal Register* 21 (29 January 2001), pp. 8497-8498

<sup>121</sup> "Executive Order 13199: Establishment of White House Office of Faith-Based and Community Initiatives," 66 *Federal Register* 21 (29 January 2001), pp. 8499-8500

<sup>122</sup> *Ibid.* at 8499

<sup>123</sup> White House. Office of Faith-Based and Community Initiatives. *Unlevel Playing Field: Barriers to Participation by Faith-Based and Community Organizations in Federal Social Service Programs*. Washington: Government Printing Office. 2001

<sup>124</sup> *Ibid.* at 10-20

<sup>125</sup> Cong. Rec. 19 July 2001: Roll Call 254

<sup>126</sup> White House. Office of Faith-Based and Community Initiatives. *Unlevel Playing Field*, at 11

<sup>127</sup> *Ibid.* at 12

<sup>128</sup> *Ibid.* at 12 (emphasis in original)

<sup>129</sup> *Ibid.* at 14

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- <sup>130</sup> Cong. Rec. 29 March 2001: H. R. 7 at § 1994A(f)(1)(a)
- <sup>131</sup> Cong. Rec. 19 July 2001: H. R. 7 at § 1991(g)(1)(a)
- <sup>132</sup> *Ibid.* at 14
- <sup>133</sup> *Ibid.* at 15
- <sup>134</sup> 42 USCS § 2000e-1(a) (2002)
- <sup>135</sup> Edwin Chemerinsky, *Why the Rehnquist Court is Wrong About the Establishment Clause* 33 *Loy. U. Chi. L.J.* 221, 235 (2001)
- <sup>136</sup> White House. Office of Faith-Based and Community Initiatives. *Unlevel Playing Field*. at 16
- <sup>137</sup> *Amos v. Corp. of Presiding Bishop*, 594 F. Supp. 791, 800 (D. Utah 1984).
- <sup>138</sup> Cong. Rec. 19 July 2001: H. R. 7 at § 1991
- <sup>139</sup> *Ibid.* at § 1991(c)(1)(B), which reads in relevant part: “Neither the Federal Government, nor a State or local government receiving funds under a program described in paragraph (4), shall discriminate against an organization that provides assistance under, or applies to provide assistance under, such program on the basis that the organization is religious or has a religious character.”
- <sup>140</sup> *Ibid.* at § 1991(e), which reads in relevant part: “Nothing in this section alters the duty of a religious organization to comply with the nondiscrimination provisions of title VII of the Civil Rights Act of 1964 in the use of funds from programs described in subsection (c)(4).”
- <sup>141</sup> Edwin Chemerinsky, *Why the Rehnquist Court is Wrong* at 235
- <sup>142</sup> Cong. Rec. 19 July 2001: H. R. 7 at § 1991(i)(1), which states in relevant part: “a religious organization providing assistance under any program described in subsection (c)(4) shall be subject to the same regulations as other nongovernmental organizations”
- <sup>143</sup> Cong. Rec. 19 July 2001: H. R. 7 at § 1991(i)(2)(a), which states in relevant part: “Only the separate accounts consisting of funds from the government shall be subject to audit by the government.”
- <sup>144</sup> Cong. Rec. 19 July 2001: H. R. 7 at § 1991(c)(1)(B) (emphasis added)
- <sup>145</sup> Cong. Rec. 19 July 2001: H. R. 7 at § 1991(c)(3), which reads in relevant part: “The receipt by a religious organization of Federal, State, or local government funds or other assistance under this section is not an endorsement by the government of religion or of the organization's religious beliefs or practices.”
- <sup>146</sup> see *Ring v. Arizona*, 122 S. Ct. 2428 (2002)
- <sup>147</sup> see *Atkins v. Virginia*, 122 S. Ct. 2242 (2002)
- <sup>148</sup> see *Newdow v. United States Congress*, 292 F.3d 597 (2002)
- <sup>149</sup> see *Newdow v. United States Congress*, 2002 U.S. App. LEXIS 12826 at 1 (9th Cir. June 27, 2002)
- <sup>150</sup> 4 USCS § 4 (2002): “The Pledge of Allegiance to the Flag, ‘I pledge allegiance to the Flag of the United States of America, and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all...’”
- <sup>151</sup> see *Sherman v. Community Consolidated School District Number 21*, 980 F.2d 437 (1992)
- <sup>152</sup> *Newdow v. United States Congress*, at 612
- <sup>153</sup> *Ibid.* at 600, which states: “[T]he school district that Newdow's daughter attends has promulgated a policy that states, in pertinent part: ‘Each elementary school class [shall] recite the pledge of allegiance to the flag once each day.’”
- <sup>154</sup> Cal. Educ. Code § 52720 (1989)
- <sup>155</sup> see *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943)
- <sup>156</sup> *Newdow v. United States Congress*, at 601
- <sup>157</sup> see *Marsh v. Chambers*, 463 U.S. 783 (1983)
- <sup>158</sup> see *Lynch v. Donnelly*, 465 U.S. 668 (1984)
- <sup>159</sup> see *County of Allegheny v. ACLU*, 492 U.S. 573 (1989)
- <sup>160</sup> see *Lee v. Weisman*, 505 U.S. 577 (1992)
- <sup>161</sup> *Newdow v. United States Congress*, at 607-608
- <sup>162</sup> Codified under 36 U.S.C. § 172 and proposed as Pub. L. No. 623, Ch. 435, § 7, 56 Stat. 380 (1942)
- <sup>163</sup> Margarette S. Miller, *Twenty-three Words* (Portsmouth, VA: Printcraft Press, 1976) p.123
- <sup>164</sup> Louise Harris, *The Flag Over the Schoolhouse* (Providence, R.I.: C.A. Stephens Collection, Brown University, 1971) p. 69
- <sup>165</sup> Margarette S. Miller, *Twenty-three Words* at 105-111
- <sup>166</sup> *Ibid.* at 123
- <sup>167</sup> John Baer, *The Pledge of Allegiance: A Centennial History, 1892-1992* (Annapolis, MD: Free State Press, Inc., 1992) p.67

<sup>168</sup> Ibid. at 68  
<sup>169</sup> *Newdow v. United States Congress*, citing *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring)  
<sup>170</sup> Ibid. at 613  
<sup>171</sup> Ibid. at 613, which reads in relevant part: "We can run through the litany of tests and concepts which have floated to the surface from time to time. Were we to do so, the one that appeals most to me, the one I think to be correct, is the concept that what the religion clauses of the First Amendment require is neutrality."  
<sup>172</sup> Ibid. at 613  
<sup>173</sup> Ibid. at 614  
<sup>174</sup> Ibid. at 614  
<sup>175</sup> Ibid. at 609  
<sup>176</sup> Ibid. at 610, citing *Lynch*, 465 U.S. at 693  
<sup>177</sup> Ibid. at 610, citing *Wallace*, 472 U.S. at 59-60  
<sup>178</sup> Ibid. at 610, citing *Wallace*, 472 U.S. at 52-54  
<sup>179</sup> H. R. Rep. No. 83-1693, at 3 (1954), reprinted in 1954 U.S.C.C. A.N. 2339, 2341-2342, which states in relevant part: "This is not an act establishing a religion... a distinction must be made between the existence of a religion as an institution and a belief in the sovereignty of God. The phrase 'under God' recognizes only the guidance of God in our national affairs."  
<sup>180</sup> *Newdow v. United States Congress*, at 611, citing *Sherman*, 980 F.2d at 444  
<sup>181</sup> Ibid. at 611  
<sup>182</sup> *Sherman v. Community Consolidated School District Number 21*, 980 F.2d at 445  
<sup>183</sup> see *Zelman v. Simmons-Harris*, 122 S.Ct. 2460 (2002)  
<sup>184</sup> *Simmons-Harris v. Goff*, 86 Ohio St. 3d 1, 3 (1999)  
<sup>185</sup> see *Simmons-Harris v. Goff*, 1997 Ohio App. LEXIS 1766  
<sup>186</sup> see *Simmons-Harris v. Goff*, 86 Ohio St. 3d 1, 3 (1999)  
<sup>187</sup> see *Simmons-Harris v. Zelman*, 72 F. Supp. 2d 834 (1999)  
<sup>188</sup> see *Simmons-Harris v. Zelman*, 234 F.3d 945 (2000)  
<sup>189</sup> see *Mueller v. Allen*, 463 U.S. 388 (1983)  
<sup>190</sup> see *Agostini v. Felton*, 521 U.S. 203 (1997)  
<sup>191</sup> see *Mitchell v. Helms*, 530 U.S. 793 (2000)  
<sup>192</sup> see *Bush v. Holmes*, 767 So.2d. 668 (Fla. App. 2000), review denied, 790 So.2d. 1104 (2001), opinion on remand (Fla. Cir. Ct. Aug. 5, 2002)  
<sup>193</sup> see *Reed v. Rhodes*, 1 F. Supp.2d 705 (ND Ohio, March 3, 1995).  
<sup>194</sup> *Zelman v. Simmons-Harris*, 122 S.Ct. at 2463 (2002), citing Cleveland City School District Performance Audit 2-1 (March 1996)  
<sup>195</sup> see Ohio Rev. Code Ann. §§ 3313.974-3313.979 (Anderson 1999 and Supp. 2000)  
<sup>196</sup> *Zelman v. Simmons-Harris*, 122 S.Ct. at 2463 (2002)  
<sup>197</sup> see Ohio Rev. Code Ann. § 3313.976(A)(6)  
<sup>198</sup> *Zelman v. Simmons-Harris*, 122 S.Ct. at 2467 (2002)  
<sup>199</sup> Ibid. at 2467, citing *Mitchell*, 530 U.S. at 810  
<sup>200</sup> Ibid. at 2490 (Souter, J., dissenting), citing *Mitchell*, 530 U.S. at 838-839 (O'Connor, J., concurring in judgment); *id.*, at 884 (Souter, J., dissenting)  
<sup>201</sup> Ibid. at 2491 (Souter, J., dissenting)  
<sup>202</sup> Ibid. at 2492 (Souter, J., dissenting)  
<sup>203</sup> Ibid. at 2492 (Souter, J., dissenting)  
<sup>204</sup> Ibid. at 2496 (Souter, J., dissenting)  
<sup>205</sup> Ibid. at 2497 (Souter, J., dissenting)  
<sup>206</sup> Ibid. at 2498 (Souter, J., dissenting)  
<sup>207</sup> Ibid. at 2501 (Souter, J., dissenting), which reads in part: "Not all taxpaying Protestant citizens, for example, will be content to underwrite the teaching of the Roman Catholic Church condemning the death penalty. Nor will all of America's Muslims acquiesce in paying for the endorsement of the religious Zionism taught in many religious Jewish schools, which combines 'a nationalistic sentiment' in support of Israel with a 'deeply religious' element. Nor will every secular taxpayer be content to support Muslim views on differential treatment of the sexes, or, for that matter, to fund the espousal of a wife's obligation of obedience to her husband, presumably taught in any schools adopting articles of faith of the Southern



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Baptist Convention.” and *Ibid.* at 2506 (Breyer, J. dissenting), which reads in part: “How are state officials to adjudicate claims that one religion or another is advocating, for example, civil disobedience in response to unjust laws, the use of illegal drugs in a religious ceremony, or resort to force to call attention to what it views as an immoral social practice?”

<sup>208</sup> *Ibid.* at 2505 (Breyer, J., dissenting), citing Brief for National Committee For Public Education and Religious Liberty as *Amicus Curiae* 23.

<sup>209</sup> *Lee v. Weisman*, 505 U.S. 577, 608 (1992)

<sup>210</sup> *Zelman v. Simmons-Harris*, 122 S.Ct. at 2499 (Souter, J., dissenting)

<sup>211</sup> *Ibid.* at 2500 (Souter, J., dissenting)

<sup>212</sup> Jonathan Rauch, “Reversing White Flight” *The Atlantic Monthly*, October 2002, p. 32

<sup>213</sup> *Zelman v. Simmons-Harris*, 122 S.Ct. at 2477 (2002)

<sup>214</sup> *Ibid.* at 2482 (Thomas, J. concurring)

<sup>215</sup> *Ibid.* at 2483-2484 (Thomas, J. concurring)

<sup>216</sup> Rick Bragg, “Judge Allows God’s Law To Mix With Alabama’s” *The New York Times*, 13 February 1997, Late edition: National Desk, A14.

<sup>217</sup> John Bacon, “Alabama governor ready to defend prayer in court” *USA Today*, 6 February 1997, Final edition: News, 3A.

<sup>218</sup> Marlon Manuel, “Commandments crusade gives judge election edge” *The Atlanta Journal and Constitution*, 19 October 2000, Home edition: News, 12A.

<sup>219</sup> *Journal Sentinel Wire Reports*, “Ten Commandments judge’ sworn in” *Milwaukee Journal Sentinel*, 16 January 2001, Final edition: News, 4A.

<sup>220</sup> see *Harvey v. Cobb*, 811 F. Supp. 669 (1993)

<sup>221</sup> see *Harvey v. Cobb*, 15 F.3d 1097 (1994)

<sup>222</sup> Associated Press News Wire, “Thou Shalt Not...” *The Associated Press*, 3 June 2002.

<sup>223</sup> *Freethought Society v. Chester County*, 191 F. Supp. 2d 589, 590 (2002)

<sup>224</sup> *Ibid.* at 597 citing *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987)

<sup>225</sup> *Ibid.* at 598

<sup>226</sup> *Ibid.* at 599 citing in part *Larson v. Valente*, 456 U.S. 228 (1982)

<sup>227</sup> see *Freethought Society v. Chester County*, 194 F. Supp. 2d 437 (2002)

<sup>228</sup> Jonathon Gelb, “Hundreds protest shrouding of Commandments” *The Philadelphia Inquirer*, 23 April 2002, City Edition: City & Region, B1

<sup>229</sup> *Ibid.* at B1

<sup>230</sup> see *Books v. City of Elkhart*, 235 F.3d 292 (2000)

<sup>231</sup> *City of Elkhart v. Books*, 532 U.S. 1058, 1063 (2001)

<sup>232</sup> see *Indiana Civil Liberties Union v. O’Bannon*, 110 F. Supp. 2d 842 (2000)

<sup>233</sup> see *Indiana Civil Liberties Union v. O’Bannon*, 259 F.3d 766 (2001)

<sup>234</sup> see *O’Bannon v. Indian Civil Liberties Union*, 534 U.S. 1162 (2002)

<sup>235</sup> *City of Elkhart v. Books*, 532 U.S. at 1062 (Rehnquist, CJ., dissenting) citing *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 652-653 (Stevens, J., concurring in part and dissenting in part)