THE AMERICAN EXPERIMENT
RELIGIOUS FREEDOM

UNIVERSITY OF PORTLAND

GARAVENTA CENTER FOR
CATHOLIC INTELLECTUAL LIFE
AND AMERICAN CULTURE
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MARGARET MONAHAN HOGAN
LAURETTA CONKLIN FREDERKING
EDITORS

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Rev. E. William Beauchamp, C.S.C. (President of the University of Portland), Justice Antonin Scalia (Associate Justice of the United States Supreme Court), Dr. Margaret Monahan Hogan (Executive Director, Garaventa Center for Catholic Intellectual Life and American Culture), and Mrs. Mary Garaventa (benefactor) at the keynote address by Justice Scalia.

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INTRODUCTION

INTRODUCTION

Proclaim LIBERTY throughout all the Land unto all the inhabitants thereof. Lev. XXVX

This inscription appears on the Liberty Bell — one of the most famous symbols of the foundation of the American nation. This bell, engraved with the words found in *Leviticus* — the third book of the Old Testament, was rung in the proclamation of liberty. This appeared unproblematic at our nation's founding.

The founders of this nation and their forbears came to this land to escape the tyranny — some religious and some political. And on this new soil began an experiment — an experiment which intended liberty as ordered liberty and as ordered included religious liberty. The founding documents — the Bill of Rights — of this new nation attempted to set down the meaning of this liberty. This was a daunting task for never before 1791 had a nation enshrined religious liberty in its founding and directing documents. This provision for religious liberty was written by James Madison into the first amendment to the constitution in the two clauses which have become known as the establishment clause and the free exercise clause. In regard to religion the first amendment reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The demarcation between free exercise and establishment, as well as the tension inherent in the two gerundive phrases addressing religious liberty, has been present since their writing by James Madison. Madison himself struggled in writing them and this nation has struggled in its history to understand their meaning, to respect the limits of each, to recognize the power of both, and to keep their creative tension appropriate. The national aspiration for liberty has not been perfect in the history of its development. But errors, made evident in a free and open society, are susceptible to correction.

To celebrate that liberty the Garaventa Center for Catholic Intellectual Life and American Culture of the University of Portland hosted the conference *The American Experiment: Religious Freedom* on April 12-14, 2007. The purpose of the conference was to examine the role of religious freedom — in its original articulation and meaning, and in the ongoing history — in the American Experiment. The theme of the conference has its source in the identity of the University of Portland as a Catholic, Holy Cross, and American institution of higher learning. This triple identity claimed by *Oregon's Catholic University* calls the university to acknowledge that its flourishing has been made possible by the religious freedom provided by the nation; that its flourishing and the nation's flourishing are rooted in the recognition of the intrinsic dignity of all human life; and that the spirit of freedom and the spirit of religion, which together marked the founding of this Nation, can guide its future. This conference was fashioned to contribute to the work of the university in fulfilling its function as a Catholic University in America in the Twenty-first Century — marshalling and placing its intellectual resources in the service of the Church and the Nation.

Papers were submitted to the conferences not only from scholars in the United States but also from an international set of scholars, including those as far away as Malaysia, Turkey, Indonesia, and Rome, and as close as Canada. Papers were received from theologians, philosophers, political theorists, legal theorists, judges, attorneys, and historians. In addition, papers were submitted by established scholars, rising scholars, graduate students, and undergraduate students. Finally, sessions were planned in the conference to provide opportunities for the voices of many religious traditions to be heard and for a variety of perspectives on the myriad religious freedom issues and cases to be addressed. Topics presented in the conference included: the meaning of religious freedom for Jews, Christians, and Muslims as viewed from the perspective of the adherents of those faiths; the history of religious liberty and non-establishment through the lens of particular court cases; school prayer and school bible reading; the role of religious freedom in civic life and in political choices; conscientious objection in its history and in its role in an all volunteer military; the expansion and contraction of free exercise as well as the raising and sinking of the *wall of separation*; the separation and limits of canon and civil law as tested in the litigation of sexual abuse by clergy; comparative studies of religious freedom — its practice and protection — in various countries; and the presentation of emerging cases which will contribute to the continuation of the experiment.

As appropriate to a Catholic University prayer was an integral part of the conference. The conference opened with the celebration of the Eucharist on Thursday April 12th at the Chapel of Christ the Teacher. The celebrant and homilist for Mass was the Rev. E. William Beauchamp, C.S.C., president of the University of Portland, a member of the Congregation of Holy Cross, and an attorney. In his homily, set within the week of the great feast of Easter, the text of which opens these proceedings, Fr. Beauchamp recalled the transition from death to life that is the Easter celebration. He reminded that in religious belief rooted in the Resurrection we move from death to life and this faith provides hope to take up the tasks of redemption and reconciliation in the contemporary world. Fr. Beauchamp noted that the founders of this nation similarly acted out of their faith to establish a nation rooted in faith and in hope that this new order would serve as a beacon of hope and aspiration to the new nation and to the world.

Archbishop John G. Vlazny, ordinary of the Archdiocese of Portland in Oregon, closed the conference with the celebration of the Eucharist. His homily completes these proceedings. In his homily, rooted in the account of the faith of Thomas and the faith of the early disciples, Archbishop Vlazny reminded us that we — as individuals and as Church — are afraid but that just as the early disciples we must move beyond that fear to become effective Christian witnesses. This will require transformation in our lives. Because we are human, we — as individuals and as Church — will on occasion fail, but our faith in the promise of Jesus to be with us gives us the hope to rise out of sin and to journey to meet Christ.

Justice Antonin Scalia presented the opening address — the Garaventa Lecture — to an audience of 1800 people gathered in the Chiles Center at the University of Portland. In his

keynote address, *Realism and the Religion Clauses,* Justice Scalia indicated that there were thirty religion cases that had come before the court in his tenure on the court. Of those thirty cases, he dissented in only eight of the Court opinions. The examination of these particular dissents provided his text for a critique of techniques of constitutional construction, that is, those rulings by the majority that seemed to him untethered to the realism rooted in the accepted practices of the American people. The context for the address was supplied by the quotation — familiar to some as spoken in the presidential primaries of Robert Kennedy; but unfamiliar to most as to its origin — which says, "Some men see things as they are and say why; I dream things that never were and ask why not." Justice Scalia suggested that in its recent history the Court had fashioned abstractions and has applied these abstractions — such as the *Lemon* Test for the Establishment Clause cases and the *Sherbert* Test for the Free Exercise cases — and furthermore, he claimed, that when applied to some cases the resulting opinions have been occasions in which the court departed from the accepted practices and traditions of the American people. Justice Scalia suggested that the prudent jurist ought to derive rulings of the court in the raw material of society's traditions — the accepted constitutional practices of the American people. He concluded by adverting to the quotation that supplied the context within which his lecture had been set and reminded the audience of its origin in the work — *Back to Methuselah* — of George Bernard Shaw in which it is the Serpent who says to the woman Eve, "You see things as they are and say why, but I dream things that never were and I ask why not."

This volume of proceedings contains twenty-two out of approximately sixty papers accepted for presentation at the conference. The proceedings is divided into four sections. The papers in the first section examine major historical cases. The papers in the second section examine emerging issues. The focus of papers in the third section is on historical development. The work of the fourth section is theoretical analysis.

I. Major Historical Cases

In the first paper, *From Pierce to Smith: The Oregon Connection and the Supreme Court Religion Jurisprudence*, Judge Diarmuid O'Scannlain, of the Federal Court of Appeals in the Ninth Circuit, examines two landmark decisions — *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary* and *Employment Division, Department of Human Resources of Oregon v. Smith* — of the United States Supreme Court arising out of the state of Oregon. Judge O'Scannlain finds some curious connections between these two decisions and subsequent Supreme Court decisions as exemplified in the trajectory from *Pierce* to *Griswold, Roe v. Wade, and Lawrence v. Texas* and the evolution of the invocation of the "substantive" due process clause of the Fourteenth Amendment in support of the free exercise right of the First Amendment. He indicates some trends in Court decisions that require attention of the voices of the religious traditions in their communities and in their legislatures, if the exercise of their traditions is to continue to have standing in the law.

In *The Sinking Wall of Separation: the Supreme Court and the Establishment Clause 1947-2005,*

Edward F. Mannino examines leading Supreme Court decisions, stretching over a period of almost sixty years, which are related to aid to parochial schools and school prayer. He sees an evolution in the decisions and maintains that this development is a product of the particular concerns ascendant in a particular historical period and that the decisions manifest the particular value sets of the Justices, who, in their understanding of the establishment clause and the free exercise clause, decided them.

In *Too Brave to Fight: Conscientious Objection during World War I*, James McGowan presents a straightforward account of the history of conscientious objection in 20th century United States. The paper includes discussion of legislative intent, judicial decisions, and political consequences. It includes a rich discussion of the particular lives very negatively affected by the legislation, its judicial interpretation, and its military implementation. McGowan's paper describes the historical shift in exemption requirements from rigorous "well-recognized" religious groups to relying only upon a belief that "occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God."

In *Divine Inscriptions in Context: In God We Trust on U.S. Coins and Currency*, Biff Rocha focuses analysis on a critique of Jon Murray's written testimony before the Congressional subcommittee on Consumer Affairs and Coinage on Sept. 14, 1988 concerning the use of a religious motto on public currency. Rocha examines Murray's specific claims "that America was founded as a secular nation" and that "two fanatically religious individuals tricked the many" in order to include "In God We Trust" on the coins. Ultimately, the paper argues the complexity and diversity of views that dominated debate and decisions about the foundation of the nation. Regarding currency, Rocha offers the evidence that each stage of implementation passed through the legislative process and he concludes with anecdotal evidence that there is widespread support for the religious words on coinage today.

In *The Edgerton Bible Case*, Timothy C. Shiell provides an overview of the 1890 Wisconsin case. The Wisconsin Supreme Court set a national standard banning Bible reading for religious instruction in public schools. Shiell presents the arguments of the court in the decision and analyzes two issues that remain significant in current court decisions. In particular, legislative intent and the freedom of religious speech continue to pervade court decisions and Shiell traces some of the historical threads of these arguments. From his perspective, *Edgerton* was precedent setting in the questions that follow from the issue of legislative intent. "Is a court justified in overruling the religious intentions of the framers of a law? How exactly should we determine what the intentions of the framers were? How much weight ought future courts give to an earlier court's holding on the intentions of the framers?" Similarly, the freedom of religious speech issue continues to raise the question of protecting rights to religious expression within a public school, but within the boundaries set by the establishment clause. Shiell observes that the U.S. Supreme Court bans Bible reading when the context appears to be state-sanctioned proselytizing, but permits Bible reading when the context appears to be secular or private speech.

II. Framing Emerging Issues

In *Remarks from a Peculiar Lamp-Post: Observations of a Christian Trial Lawyer on Fifteen Years of Suing the Church*, Attorney Kelly Clark reflects on the vocation and profession of an attorney who is required by both his professional code and his moral duty to pursue justice for clients even when that pursuit causes serious problems for an institution — here the Catholic Church in the Archdiocese of Portland in Oregon — that has accomplished and continues to accomplish so much that is good in serving the flourishing of the community in Oregon

Just as the title of the paper suggests, in *Religion as Speech: The Growing Role of Free Speech Jurisprudence in Protecting Religious Liberty*, Mark Cordes examines the role of free speech in the protection of religious freedom. His study begins with early twentieth century decisions from the 1930s and continues analysis through the mid-1980s with the Rehnquist Court. The early cases set the precedent for including a wide range of religious speech activities, including distribution of religious tracts, open-air preaching and selling religious literature, under the protection of free speech. The second precedent from early decisions stated that when regulating speech government cannot discriminate because of its content. This content neutrality defined by the second precedent has been the basis for rejecting many Establishment Clause arguments. Whereas many public institutions and in particular public education institutions have excluded religious clubs and presentations with the ostensible support of the Establishment Clause, historically the Courts argue that content neutrality allows access to religious speech, just like other types of contents of speech protected by the Free Speech Clause, without violating the Establishment Clause. Cordes presents the cases where the Free Speech Clause and the Establishment Clause have created significant tension in reconciliation. However, the Courts' decisions consistently provide greater levels of protection to religious speech. Especially interesting is Cordes's analysis of the way in which the Supreme Court has deepened the protection to religious speech as part of content neutrality, at the same time that it has exposed religious groups to restrictions under laws of general applicability. As Cordes clearly states "[W]hereas before the focus was on the burden on religion, now the focus is on the nature of the regulation. Burdens on religious exercise that are incidental to general laws are not protected; only when religion is targeted is there a free exercise burden."

In *American Civil Religion in an Age of Religious Pluralism*, Ann Williams Duncan, beginning with the proposition that there is an American civil religion, examines the challenge that religious and cultural pluralism present both for the internal peace of the United States and for the global peace. She suggests that only with a new understanding of its own myths will the United States be able to fashion a new civil religion accessible and acceptable both at home and abroad.

In *Faith, Social Reform in the Inner City, and the Establishment Clause*, Judge Virginia M. Kendall examines how two separate groups — the Department of Justice and the Jesuits — worked to better the lives of the residents in the high crime areas of the near west and near southwest sides of Chicago. The two groups approached the problem from entirely different

motivations and perspectives. The Jesuits focused on Pilsen and Little Village in order to serve the poorest families in those immigrant Mexican neighborhoods. Historically, the Jesuits are educators, and in keeping with their tradition and mission, they chose to address the issue by opening a school, the Cristo Rey School. The Department of Justice, through the United States Attorney's Office in Chicago, chose to address the gun violence that plagued the streets with a law enforcement initiative aimed at reducing the murder rate. The Jesuits' program was entirely privately funded. The DOJ Program, dubbed "Project Safe Neighborhoods," was entirely publicly funded. The contributions of both groups to increased stability and lowering of the crime rates in their respective neighborhoods were augmented by the participation of the churches in their communities. Judge Kendall suggests that the success of these programs in service of the civic good might present some challenges to current establishment clause interpretation.

In *Our Freedom Depends on the Rule of Law*, Senator Patrick Leahy maintains that the commitment to the rule of law, especially by those is in power, is the best protection of freedom. He suggests that the current administration has assaulted the Constitution, undermined human rights, and eroded our privacy and freedoms. In his overview of recent legislation such as the Military Commissions Act and by federal treatment of detainees, he suggests that the United States has changed its political fabric in critical and unprecedented ways since 2002. Leahy extends this criticism to demand greater accountability at the national and international level. The United States needs to step forward and protect the victims of genocide throughout the world, and fight for global access to medicines essential for dealing with current health crises.

In *Restoring the Intrinsic Value of Human Life*, William Wagner advocates a federal legislative proposal to stop physician-assisted killing. Biblical references justify his position criticizing physician-assisted suicide and brief reference to problems following from the comparative case in the Netherlands. Wagner's legislative proposal relies on rights of Congress under the Commerce Clause to regulate interstate commerce. In the author's paper, this type of legislative strategy is the appropriate strategy for ending the practice in a way that will survive Supreme Court scrutiny.

III. Historical Development

In *The Establishment Clause and the Limits of* Pure *History*, Kyle Duncan argues that typically Justices invoke history to support particular understandings of the Establishment Clause. Duncan criticizes the strategic employment of history to validate diametrically opposed positions. Duncan maintains that Scalia, in contrast, retaliates against the interpretations that draw abstract lessons from history applied to the modern world. Instead, Scalia interprets the Establishment Clause through the filter of legal tradition for clarification and validation. Traditions reveal the policy making decisions and political norms that lie outside of the Constitution's areas of exclusion. *McCreary* demonstrates Scalia's approach where traditions narrow the uncertainties and define parameters of the Establishment Clause. Broad conceptu-

al distinctions between 'religious' and 'secular' appear to focus debate in the typical use of history. Government and religion as institutions become the more limited focus through Scalia's historical lens. However, Duncan argues, without a stronger textual meaning Scalia's approach slips from legal interpretation to theological determination. In response to the observed dilemma, Duncan concludes that Justices should focus on "establishment of religion" as a legal and not a cultural construct.

Zachary Foreman's paper, *Hemlock and the First Amendment: Tracing Religious Freedom from the Trial of Socrates to the U.S. Constitution* explores the balance of freedom and restraint as the essential foundation for viable, sustainable democracy. In this context, the execution of Socrates presents democracy's struggle to control those who may undermine it while potentially threatening the principle of freedom. Foreman traces the legacy of this dilemma from Athens to America presenting the arguments of many prominent intellectuals in support for non-democracies. The Founders relied on the virtue of the citizenry as the protection against unbridled relativism. Several thinkers put forward religion as the safety mechanism to protect those virtues. His conclusion closes the circle to question the challenge to religious freedom in the U.S. today as a parallel to the challenge of Socrates within fourth century democratic Athens.

In Jeffersonian Walls and Madisonian Lines: The Supreme Court's Use of History in Religion Clause Cases, Mark Hall studies all religion clause cases, and analyzes the extent to which Supreme Court Justices invoke history in their opinions. In particular he investigates the trends of the Court in its use of history and with respect to individual Justices in terms of whether they are "liberal" or "conservative." Hall concludes with a cautionary note about the way history has been invoked and the way it ought to be used to preserve its legitimacy as part of opinions of the Justices.

In *Jacques Maritain, Religion, and the American Experiment*, Thomas Albert Howard presents an assessment of America from the writings of philosopher Jacques Maritain. While often ignored because of his more apparent religious perspective, Maritain provides a fascinating understanding of America's freedom of religion. In contrast to Europe's secularist approach that historically pitted the state against religion, America fostered a more open set of possibilities that emphasized the compatibility of the state and religious participation. Howard provides the historical context for these diverging paths and analyzes the positive consequences following from America's incorporation of religious freedom into its political and civic institutions.

Constitutional Prophets: Ancient Paradigms and Modern Expectations by Chris Stadler presents an analysis of the central leadership role accorded to and claimed by American presidents. He roots this leadership role as representative of the nation and the voice of the people in the paradigm of leadership rooted in ancient Biblical sources. He describes the purpose of the paper as two-fold: first, and more narrowly, it is to provide a corrective emphasis on current explanations of the Bush presidency; second and more broadly, to illustrate, by reflecting

on how presidents lead as a social institution, the role and function of the American presidency from a particular cultural perspective.

IV. Theoretical Analyses

In *Conscience and Religious Liberty: Antidote to the Totalitarianism of the Positivist Mind*, Rev. Robert Araujo, S.J. avers that the dominant prejudices, including the canonization of pluralism and choice, operative in the contemporary liberal democracy and enshrined in positive law, can function as a form of totalitarianism unless the right to religious freedom is protected. He looks to history, in the lives of Saint Thomas More and Clemens Cardinal von Galen, to provide guidance for those who, in the presence of a properly formed conscience, choose to refuse to do or cooperate in what the positive law requires or permits.

In *How Protecting Religious Freedom Sustains Freedom Itself*, David C. Cochran analyzes the importance of religious freedom from the perspective of sustaining freedom more broadly. He presents the two understandings of negative liberty and then positive liberty. Under negative freedom, there is a wide range of views of religious liberty and he outlines several of these views including freedom of expression and consensus. For the perspective of positive liberty, Cochran develops Taylor's thesis of autonomy within the context of religious freedom. The free individual is an autonomous individual, but autonomy can be achieved only through developing identity. Because identity depends upon moral frameworks, religion remains a vital source for identity formation and autonomy, and therefore a vital part of freedom more broadly.

In *"Two There Are:" Understanding the Separation of Church and State*, Richard W. Garnett maintains that the proper understanding of the role of church and state is the protection of religion from government distortion so that religion and the state, neither of which is alien from the other, may flourish. Furthermore, he maintains that freedom of religion is a structural feature of social and political life which protects freedom of conscience, which develops and sustains constitutionally limited government, and which preserves the values and vision to guide the direction of this nation.

In *Respecting Respective Spheres: The Role of Religion in Public Life*, Steven Green delineates boundaries for religion and religious practice in the context of a secular state. There are three categories for appropriate thresholds defining spatial contexts for the maximum, constrained, and minimum religious expression. Within the private sphere religious content and advocacy is at its greatest. Green describes the private sphere as including the church or religious institution itself. For the author, within this sphere religious leadership should be permitted to comment on social and political issues currently restricted by the Internal Revenue Code. In the second category where government has created a forum for opinion and expression, religious expression should be permitted but more constrained than the level in the private sphere. Finally, where religious leaders or groups participate in government programs or functions, government should be permitted to issue the sharpest constraints to the point of excluding religious perspectives.

In *Neither Robber Barons nor Philosopher Kings: Political Prudence in the Just Polity*, John O'Callaghan pursues the question of what kind of leaders are appropriate to fashion the just society. His study begins with the examination of Plato's argument against Thrasymachus in the *Republic* to distinguish real justice from apparent justice and then moves to the Aristotelian distinction between prudence and cleverness to a similar distinction held by Thomas Aquinas. He develops Aquinas's notions of prudence as personal and political and as perfect and imperfect. He concludes that the prudence of imperfection is sufficient for just governance in the contemporary American polity.

The Garaventa Center for Catholic Intellectual Life and American Culture is deeply grateful to Mary Garaventa and her family for their continuous support of the center which bears their family name and for their support of the University of Portland which nourished many members of their family. We are also grateful to the Foundation — Our Sunday Visitor — for their grant in support of the conference.

The Garaventa Center and the editors of this proceedings are deeply indebted to Jamie Powell for her remarkable dedication to this conference and to the project of the proceedings. Her work on every detail of the conference — from the initial call for papers to the sending forth of participants — was remarkable. Her insightful comments, her ongoing work with the editors and with individual authors, and her sustaining encouragement were invaluable. We are grateful also to Rachel Barry-Arquit and Sue Säfve for their marvelous creativity, for their dedication to both projects — the conference and the proceedings — and for their painstaking care in bringing both projects to completion.

Margaret Monahan Hogan, Ph.D.
Lauretta Conklin Frederking, Ph.D.

OPENING HOMILY

HOMILY
MASS IN THE EASTER SEASON
THE AMERICAN EXPERIMENT:
RELIGIOUS FREEDOM

BY REV. E. WILLIAM BEAUCHAMP, C.S.C.
PRESIDENT OF THE UNIVERSITY OF PORTLAND

I have to admit upfront that I often feel very inadequate preaching during this special week of the year, as we continue our celebration of the great feast of Easter. I suppose one reason I feel this way could be because I am inadequate. But, I suspect the main reason for this apprehension is the nature of what we celebrate this week, this holiest of seasons. There are things about the life of Jesus that, as human beings, we find easier to comprehend than others — things to which we can easily relate, things we can internalize in our own lives and understand without too much difficulty because they are the types of things that we experience as human beings in our everyday existence. One of these things is death, and the unavoidability of it.

As we watch newscasts on television, or read the daily newspapers, we become aware of the fact that we seem to be enamored with bad news, with tragedies; and one gets the impression that very little good is happening in our world. Our world is rife with war, with violence and suffering, with hatred and terrorism. There is also so much news (and television and movie drama) about death — and death seems so final.

That is really the issue we are confronted with when we reflect upon and celebrate Jesus Christ's resurrection. We can more easily understand and accept Jesus as a human being, that as Son of God he took our flesh as his own from a teenage virgin; that he grew up much as you and I do, except for sin; that Jesus ate and drank, got tired and slept, laughed and wept; that his flesh was beaten and spat upon, and nailed to a tree; that he died and was buried in a tomb of rock. And death seems so final.

We can accept all of the above without much question because it is within the realm of our human understanding and experience. But during this Easter Week we celebrate the incomprehensible. After a lifetime of what many would call failures, leading to his death, Jesus rose from the dead in a split second. After we spend a somber Holy Week recalling passion and death of Jesus, we gather with joy and proclaim "Alleluia! He is risen!"

We pack the churches on Easter Sunday to celebrate this beautiful and joyful feast. In seems so natural, so simple — it is all so beautiful. But, is it that simple? Is Easter merely a day or two of celebration for us, a day on which the beautiful flowers and music, and the sense that spring has finally arrived, all come together to make us feel good, to feel as if we have done something good by going to church to celebrate? Or is it, most importantly, the celebration of something we have really incorporated into our lives — a celebration of our deepest belief, a recognition of the cornerstone of our Christian faith, and acknowledgement that all that we believe about the person of Jesus Christ only makes sense because of this incredi-

ble event of his resurrection?

The resurrection as an event is so simple, yet we often tend to make it so complex. Our human understanding tells us that it is impossible. Only our faith tells us it is so. But, our faith is weak. We come to celebrate the Easter season with our doubts and fears, with our shortcomings and failures, with our humanity. We come as people who want desperately to believe, but perhaps whose real life experiences and human weaknesses make us pause, make us reticent.

But, we are not alone. Mary Magdalene despaired when she believed the body of her Lord had been stolen, and when she saw him after the resurrection she at first thought it was the gardener. Thomas in very human fashion would insist that he put his hands into the wounds of Jesus before he could accept the fact that Jesus had risen. Jesus would appear to the disciples after the resurrection, and eat with them, and invite them to touch him assuring them he was not a ghost; he would remind them of all that Scripture had foretold of him and how he had fulfilled the prophecies of old. Yet they would still hide and barricade themselves in fear until the Holy Spirit came upon them and opened their minds and hearts and sent them forth.

Jesus passed through death. But even his earliest followers who walked with him, and who heard him tell of his death and resurrection, had to be urged to move from the empty tomb and from the past. This was, after all, a past in which they could leave everything for Jesus to do. They had chosen to follow him because they had dreams, they had hopes. Perhaps they believed Jesus would lead them to a life of power and prestige, of wealth and comfort. His death had presented them with a crisis, a call for commitment in a much deeper way, a call for their death to the old way of life in which they had expectations of Jesus that were rooted in their human understandings and limitations, their human experiences of sorrow and joy. They were called to move beyond what they could fully understand to what they believed in faith.

The message of our celebration in this and every Easter season is that we, as followers of Christ, must not cling to the tomb, but must find resurrection faith. We must move beyond our understanding to a faith that sends us forth with hope, to accept our task and responsibilities in this world, to be where Christ is. He beckons us forth into a mission with his disciples to our neighbor and to the whole world. He calls us to meet him in the ever-continuing task of redemption and reconciliation.

We gather the next few days for a seminar on religious freedom as established and protected in our country's Constitution. We are honored to have Justice Antonin Scalia present to be the keynote speaker for the conference. While the actual "freedom of religion" clause as contained in the Bill of Rights of our Constitution is short and very direct, the federal courts' interpretation of this clause over the decades has been varied and often controversial. What seems so simple on its face has often become very complex in its enforcement and in the living out of what it allows and restricts.

The settlers and founders of this country were committed to religious freedom; they recognized in their own way that they were sent by God to establish a nation both blessed by God

and called by God to be a beacon of hope and aspiration, a nation rooted in faith and belief in a God who was with them and guided them. They drafted a Constitution replete with freedoms, beginning with the freedom of religion. But, we recognize that with freedom comes responsibility. As we gather in this chapel at the opening Mass for this conference in which we will reflect upon the role of religious freedom in the American experience, as we reflect upon the freedom of religion clause of our Constitution in its simplicity and complexity, we profess that our lives are rooted in Christ. We profess that all of the blessings and freedoms we enjoy are gifts from God, and we reflect upon how we have, or have not, used these gifts to bring Christ's message of compassion, of peace, of forgiveness, of healing and sharing to our troubled world.

The resurrection of Jesus was the fulfillment of everything he came to do. His disciples were overwhelmed with the knowledge of this simple fact — Jesus lives! As they came to believe, they did not go back to living as they did before. And neither can we.

The disciples realized that they had to find a new way, a way that reflected the profound experience they had undergone. They did not do this perfectly, and they often did it with great struggle. But, they did it because they were driven to do so. Having cast their lives with Jesus, and then having realized that he had risen, they could not deny the power of his love which opens tombs, and locked rooms, and people's minds and hearts. They could not pretend that something earth-shattering and of infinite importance had not happened; they could not pretend that their lives would still be the same. And neither can we.

Today, more than ever, we need Resurrection. Too often we look on in fear and hopelessness at the secularism that is overtaking our society; or at the imprisonment of more-is-better consumerism; or at the darkness of evil, oppression, violence, hatred and misunderstanding. We become trapped in the conviction that we cannot feed the hungry, or shelter the homeless, or employ the jobless, or love the poor, or end the hatred and violence that consumes our world — because the problems seem too great.

We need Resurrection. We need to hear and know that Jesus, Son of God, has taken the first step and is with us. His power is at work, rolling back stones, lifting burdens — a power much stronger than the forces of evil that surround us — a power that gives life, not death. We need to realize more than ever that with the freedom to practice our religion that we enjoy comes the responsibility to make Jesus known and loved, and to not succumb to those who would try to silence us, often in the name of that same *Freedom of Religion* clause.

Our invitation as we gather in this chapel, and for this conference, is to know, even though we do not fully understand, but to know in the depths of our being that we can never be the same — because Christ is truly risen. We are called to experience the resurrection as real as the earliest disciples. Let us pray that this Easter season we will come to more fully comprehend that we are called to pass with Jesus through his resurrection, from death to the old ways into a new life — a life of hope, a life of love, a life of faith.

SECTION 1

Major Historical Cases

FROM *PIERCE* TO *SMITH*:
THE OREGON CONNECTION AND SUPREME COURT RELIGION JURISPRUDENCE

BY DIARMUID F. O'SCANNLAIN*

It is a distinct honor to be invited by the University of Portland, Oregon's Catholic University, to participate in such a distinguished conference on religious freedom that examines the history, the tension, and the power of the religious propositions of the First Amendment. I commend its Garaventa Center for assembling such diverse presenters in its colloquia, ranging in faith traditions from Christianity to Judaism to Islam, and in intellectual disciplines from history to political science to theology to medicine and, of course, to law.

As this conference takes place in Oregon, I thought it fitting to reflect on the role of two landmark religious decisions of the Supreme Court of the United States arising out of this state: *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*,[1] decided over eighty years ago, and *Employment Division, Department of Human Resources of Oregon v. Smith*,[2] decided within the last eighteen. While both of the cases were brought by religiously observant plaintiffs seeking relief from restrictive state measures, each carries its own significance for religious freedom. As an Oregonian, as well as a Ninth Circuit judge privileged to have chambers in the Pioneer Courthouse in the heart of downtown Portland, I became fascinated by the increasingly extensive scholarship on these very important cases having a common geographical origin in this state. Please join with me in exploring some curious connections between these two decisions which lead me to some counterintuitive conclusions about their impact on religious freedom, the subject of this conference. Of course I speak only for myself and not for my colleagues or the U.S. Court of Appeals for the Ninth Circuit.

On June 1, 1925, the Supreme Court issued its opinion in *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary*, which for ease of reference I will call "*Pierce*."[3] The decision responded to two appeals brought by Walter Pierce, the Governor of Oregon, with respect to the validity of the Oregon Compulsory Education Act of 1922, a voter-passed initiative requiring Oregon parents to send their children ages 8-16 to public school, and imposed fines and prison terms for non-compliance.

The Society of Sisters was (and still is) a religious order of Catholic nuns, which ran several boarding schools in Oregon, including St. Mary's Academy and St. Francis School in downtown Portland. Fearing that the new Oregon law would deprive its schools of revenue and Catholic parents of the ability to obtain religious training for their children, the Society of Sisters had challenged the Act in the United States District Court for the District of Oregon. There, the order sought to enjoin enforcement of the law by three defendants: Walter Pierce, Governor of Oregon; Isaac Van Winkle, Attorney General of Oregon; and Stanley Myers, District Attorney for Multnomah County. Arguing before a special three-judge panel, the religious order claimed that the law violated the Contracts Clause and the Due Process Clause of

the Fourteenth Amendment, and sought an injunction.[4] The three-judge court, consolidating the case with a challenge to the Act brought by the Salem, Oregon-based Hill Military Academy, a private non-religiously affiliated school, unanimously enjoined the Oregon statute on the grounds that it violated the Fourteenth Amendment. The Supreme Court affirmed, holding that the Act violated the "liberty of parents and guardians to direct the upbringing and education of children under their control."[5]

Public perceptions have cast the *Pierce* decision as a victory for religious liberty, and many academics encourage this view. Professor Stephen Carter of Yale Law School writes that "what *Pierce* ultimately represents is the judgment that in order to take religious freedom seriously, we must take the ability of parents to raise their children in their religion seriously."[6]

The Society of Sisters made an explicit argument for religious freedom in its bill of complaint, stating that "said pretended law attempts to control the free exercise and enjoyment of religious opinions and to interfere with the rights of conscience."[7] But, interestingly, the Society did not explicitly invoke the federal Free Exercise Clause, for that clause would not be incorporated against the states until 1940.[8] The Society instead claimed that the Oregon Compulsory Education Act deprived the religious order of liberty without due process of law as applied to the states under the Fourteenth Amendment.[9] This argument turned upon the freedom of parents to send their children to private schools, such as St. Mary's, which would offer religious training as well as general education.

The district court had enjoined the Act based upon the schools' rights to economic liberty and substantive due process. Citing *Lochner v. New York, Murphy v. California,* and *Meyer v. Nebraska*, District Judge Wolverton wrote for the three-judge district court:

> The right to contract in relation to one's business is a liberty that may not be inhibited without entrenchment upon rights guaranteed by the Fourteenth Amendment. … The right to engage in a useful, legitimate business, not harmful or vicious, is protected under the amendment, and cannot be abrogated. …
>
> It cannot be successfully combated that parochial and private schools have existed almost from time immemorial — so long, at least, that their privilege and right to teach the grammar grades must be regarded as natural and inherent, as much so as the privilege and right of a tutor to teach the German language with the grammar grades, as was held in *Meyer v. Nebraska*. … The absolute right of these schools to teach in the grammar grades … and the right of the parents to engage them to instruct their children, we think, is within the liberty of the Fourteenth Amendment.[10]

Although the district court styled this right as part of the "liberty" component, its decision was grounded essentially in the schools' property rights to patronage. Despite the strong interest in religious education at stake, the court did not discuss religious liberty at all. Instead, the court granted relief on the same grounds to both the Society of Sisters and Hill Military Academy, holding that the Oregon Compulsory Education Act deprived all such schools of property without due process of law, in violation of the Fourteenth Amendment to the Federal Constitution. The court expressly rejected the Society of Sisters' Privileges and

Immunities Clause argument, concluding that the clause did not protect businesses such as schools. As a footnote I should add that I feel some affinity with this panel because it included a late member of my own court, United States Circuit Judge William Ball Gilbert, sitting by designation, who was the first Oregonian to be appointed to the United States Court of Appeals for the Ninth Circuit.

The state defendants appealed directly to the Supreme Court of the United States. Governor Pierce emphasized in his Supreme Court brief that "after arguing the case mainly on the question of the deprivation of liberty without due process of law … [the judges] decide[d] the case solely on the question of the deprivation of property without due process of law."[11] Rather than defend the precise reasoning of the district court, however, the Society of Sisters responded that both a property right *and* a liberty interest were at stake. The Society carefully pointed out that there were strong religious interests at stake but that it expected the Court to "sit [ ] in impartial judgment … upon all faiths and creeds."[12] I mentioned that the Society did not ask the Court to rule based upon the Free Exercise Clause, which had not yet been incorporated against the states. Fascinatingly, it was the Oregon Attorney General, Isaac Van Winkle, in his separate appellate brief, who expressly raised the possibility that the Supreme Court might incorporate the clause so as to support the Society of Sisters' claims. Vehemently arguing that the federal Free Exercise Clause did not protect against state laws indirectly limiting religious liberty,[13] the Attorney General declared: "The books are full of cases in which the contention has been advanced that the religious convictions of a party have required him to break the law, and … that the laws in question are [therefore] unconstitutional. The courts have everywhere refused to uphold this contention."[14] The Attorney General pointed to the Court's decision in *Reynolds v. United States*,[15] which ruled that Mormon believers had no First Amendment right to constitutional exemption from anti-polygamy laws. The *Reynolds* Court had explained: "To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances." Attorney General Van Winkle argued that *Reynolds* and other precedent required the Supreme Court to uphold Oregon's law, which the state viewed as a legitimate requirement that "all immigrants admitted to all the advantages and opportunities of life in the United States … be taught by the state the English language, and the character of American institutions and government."[16]

The Society of Sisters thereupon seized the opportunity in its oral argument before the Supreme Court to make a not-so-subtle claim that the Oregon law was motivated by anti-Catholic animus. Pointing out that "the question of religious liberty [was] thrust into the case for the first time by the briefs filed on behalf of the Attorney General and the Governor of the State,"[17] the Society essentially argued that they constituted an admission regarding the purpose of the law. The Society asserted that the state's briefs revealed that the "underlying motive and the immediate intent and purpose of this measure were antireligious and to prevent religious instruction to children."[18] The law, the Society continued, was worse than

"any atheistic or sovietic measure ever adopted in Russia"[19] and sought to "destroy[ ] the right to religious liberty and freedom of education in the name, in the cant, on the pretence of Americanization."[20]

This claim was not surprising in light of the public perceptions of the law. Reports in the local *Oregonian* newspaper indeed commented that "[a]ccusations that the law was backed by the Ku Klux Klan and was aimed at the Roman Catholic Church have been heard from every side since the statute was put on Oregon's books."[21] And evidence demonstrates that the most active supporters of the ballot initiative indeed were members of the KKK, who placed a similar compulsory education measure on the ballot in Washington state in 1924 — after the Oregon district court's decision but before the Supreme Court rendered the final word on such laws. The anti-Catholic innuendos also came through in the Governor's and Attorney General's briefs, which were laced with complaints about the lack of proper immigrant assimilation, at a time when many immigrants were Catholic.

Yet the Supreme Court declined to rule on religious liberty grounds. Not only did the Supreme Court fail to read the Free Exercise Clause as offering protection against state laws, but the Supreme Court did not specify that the "liberty interest" of the Fourteenth Amendment was a religious one. Instead, the Supreme struck down the law based upon the personal "liberty of parents and guardians to direct the upbringing and education of children under their control."[22] Thus the Court shifted away from the economic basis of the district court's decision and did not even reference the religious liberty arguments presented by both parties in the case, choosing instead to articulate a form of parental liberty unconnected to economic or religious interests.

By grounding its decision in a *non*-religious-based parental right derived from the Fourteenth Amendment, the Court enabled the Hill Military Academy to emerge victorious in tandem with the Society of Sisters. And the holding meant victory to many more claimants than those at bar, for it heralded a substantive due process legacy that continues to unfold — with direct and indirect consequences for religious freedom.

In the decades to come, this substantive due process reasoning would spawn consequences that undermined many of the traditional values held dear by adherents of religion. While the immediate result of *Pierce* was to preserve the rights of parents to send their children to private religious schools, its decision soon was cited in support of the far less traditional rights of contraception, abortion, and sodomy. These three "rights" would not only be deeply confounding to the order of nuns who brought the case, but to many others who hold similar values and care about religious freedom.

In *Griswold v. Connecticut*, the Court articulated an expansive right to privacy based in the Fourteenth Amendment's due process clause and the emanations and penumbras of the Bill of Rights. It expressly invoked *Pierce* for precedential support, reading the case to stand for religious liberty under the First Amendment as well as due process rights under the Fourteenth. The *Griswold* Court did not limit the *Pierce* decision to parental rights, nor did it appear to no-

tice that the decision did not cite the First Amendment at all. The *Griswold* Court's citation to *Pierce* made clear that the latter would be used by the Court as an increasingly flexible tool to expand personal liberties beyond those defined by the constitutional text.

This point became all the more evident in *Roe v. Wade*,[23] when the Court widened the reasoning in *Pierce* to include a right to abortion. In discussing what it called "the roots" of "this guarantee of personal privacy," the Court noted that *Pierce* had established the right in the realm of "child rearing and education."[24] When the Court reaffirmed *Roe* fifteen years later in *Planned Parenthood v. Casey*, it invoked the case law supporting substantive due process and cited *Pierce* as one of the first decisions demonstrating "an aspect of liberty [to be] protected against state interference by the substantive component of the Due Process Clause."[25]

In *Lawrence v. Texas*,[26] the Court struck down a state ban on sodomy, concluding that the ban conflicted with the Court's "broad statements of the substantive reach of liberty under the Due Process Clause in earlier cases, including *Pierce v. Society of Sisters*."[27] Again, *Pierce* provided the Court with crucial support for a substantive due process decision that left many advocates of traditional religious values very much perplexed.

By providing an extra-textual ground for constitutional freedom in the context of private religious education, *Pierce* profoundly affected the methodology of the Court and the trajectory of the law. That seminal case has paved the way for new interpretations of the personal liberty guaranteed by the Fourteenth Amendment and the particular rights accorded to members of the human family vis-à-vis one another and vis-à-vis the state. These changes have affected a realm in which religion has long played a predominant role in inculcating values and practices. And, in time, these legal changes appear to have taken on a moral stature of their own: the frequent coincidence of moral and legal commands — such as those against murder, theft, and perjury — leads many to presume the law to carry both juridical and normative weight. Persons adhering to traditional faith-based teachings might have good reason to be less sanguine about that 1925 Oregon victory today.

In the decades following *Pierce*, the Court made jurisprudential changes that would alter the way it approached future religious liberty claims. In the 1940 decision *Cantwell v. Connecticut*, the Court, perhaps inevitably after *Gitlow*,[28] incorporated the Free Exercise Clause against the states. In the 1963 decision *Sherbert v. Verner*,[29] the Court articulated the now-familiar free exercise test that barred states from infringing on free exercise in the absence of a compelling state interest.[30] In *Sherbert*, the state had refused to provide unemployment compensation to a Seventh Day Adventist who had been fired for refusal to work on a Saturday, the Sabbath day of her faith. The Court held that the state was required to provide an exemption to the rule in order to avoid forcing a religious adherent to "abandon his religious convictions" in order to retain his livelihood.[31] "To deny an exemption … [would be] in effect to penalize'"[32] the exercise of religious liberty, the Court concluded. The *Sherbert* decision became the core basis for claims of religious exemption from neutral and generally applicable laws.

But by 1990, another Oregon case would once again determine the scope of religious liberty under the Free Exercise Clause, and in a most unanticipated way. In *Unemployment Division v. Smith*, which I will refer to as "*Smith*," two religious claimants sued the State of Oregon for denial of unemployment benefits. Alfred Smith and Galen Black had "ingested peyote for sacramental purposes at a ceremony of the Native American Church,"[33] and as a result, had been fired from their jobs at a private drug rehabilitation organization. Although the two men were not criminally prosecuted for their drug use, Oregon denied them unemployment benefits because they had been fired for "work-related misconduct." Citing *Sherbert*, Smith and Black argued that the Free Exercise Clause required an exemption from the general rule. They argued that the state's interest in "preserv[ing] the financial integrity of the [unemployment] compensation fund"[34] did not constitute a compelling reason to infringe on free exercise. They asserted that the relevant consideration could not be the state's much more important interest in enforcing its criminal laws, because they had not been prosecuted.

While successful in the Supreme Court of Oregon, they failed to persuade the Supreme Court of the United States, where then-Attorney General David Frohnmayer (now President of the University of Oregon) personally argued the state's case and prevailed. In a 5-4 opinion authored by Justice Scalia, the Court rejected Smith's and Black's free exercise claims. The opinion began with the text of the Free Exercise Clause. Although Justice Scalia conceded that "no case of ours has involved the point,"[35] he stated "it would doubtless be unconstitutional" for the government to ban "acts or abstentions only when they are engaged in for religious reasons."[36] On the other hand, Justice Scalia found the clause ambiguous as to whether "'prohibiting the free exercise [of religion] includes requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires)."[37] Without any reference to the history of the clause, Justice Scalia wrote that "it is a *permissible* reading of the text … to say that if prohibiting the exercise of religion … is not the object … but merely the incidental effect … the First Amendment has not been offended."[38] Characteristically, Justice Scalia went on to ensure that the reading was not only permissible but correct. Uncharacteristically, he looked solely to precedent — without considering the original meaning and history of the clause — to make this determination.

The *Smith* Court invoked *Reynolds v. United States* as the first occasion the Court had to assert the rule that "[c]onscientious scruples … [do not] relieve[ ] the individual from obedience to a general law not aimed at the promotion or restriction of religious beliefs." That, you may recall, was precisely the argument made, and the case cited, by the Attorney General of Oregon in *Pierce*, when he argued that religious liberty did not justify overturning the Compulsory Education Act. The Court had declined to discuss the matter in its *Pierce* opinion, but it met the argument head-on in *Smith.* Quoting *Reynolds*, Justice Scalia reiterated: "'Laws' … 'are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. … Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doc-

trines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself."[39] Justice Scalia made clear that the argument for non-exemption — ignored by the Court in *Pierce* — was dispositive in *Smith.* He stated: "There being no contention that Oregon's drug law represents an attempt to regulate religious beliefs, the communication of religious beliefs, or the raising of one's children in those beliefs, the rule to which we have adhered ever since *Reynolds* plainly controls."[40]

But the application of *Reynolds* was less likely in 1990 than it would have been in 1925, due to the interposition of *Sherbert*'s compelling interest test. Recognizing that *Sherbert* could be read to require religious exemptions based on free exercise, Justice Scalia meticulously distinguished the case. Although acknowledging that *Sherbert* addressed "the denial of unemployment benefits," he concluded that the case was different in crucial ways. Most importantly, Smith and Black had violated a criminal law, whereas "the conduct at issue in [*Sherbert*] was not prohibited by law."[41] And Justice Scalia pointed out that *Sherbert* had only limited significance for religious liberty even outside the realm of unemployment benefits, because "[a]lthough we have sometimes purported to apply the *Sherbert* test in contexts other than [the denial of unemployment benefits], we have always found the test satisfied."[42]

Justice Scalia's decision not to address the history of the Free Exercise Clause or its original meaning has been assailed by scholars, like my fellow United States Circuit Judge Michael McConnell of the Tenth Circuit, who believe that the clause envisioned legal exemptions in cases where religious liberty could not be reconciled with civil laws. Even though other scholars, such as Professors Michael Malbin and Ellis West, appear to offer different, and perhaps more persuasive, arguments to the contrary, Justice Scalia engaged none of them. I suggest that the *Smith* opinion's failure to enlist historical analysis to support its decision weakens it considerably. What is most surprising is that Justice Scalia did not offer any of the compelling arguments made by scholars like Malbin and West, and later built upon by Professor Philip Hamburger of Columbia Law School, despite the fact that they would have considerably strengthened that decision in the eyes of many jurists, who would be appalled by the impact of the decision on religious liberty. Attention to history and original meaning might at least have placated those who despaired over the dim prospects it left for claims of religious freedom. Some critics would view the decision as an anomaly for a Justice who was known to have decried other established precedents — such as *Roe v. Wade* — in favor of a more careful reading of the constitutional text. Many have wondered why the conservative justice, normally so attentive to tradition and original meaning, would author a decision cutting back on religious freedom.

The answer, and a reasonable one at that, appears to lie in Justice Scalia's conviction that the courts have limited competence and must remain above the religious fray. In addition to citing precedent, Justice Scalia's *Smith* opinion presents a pragmatic and structural argument for a narrow reading of the Free Exercise Clause. He argues that "courts must not presume to determine the place of a particular belief in a religion or the plausibility of a religious claim,"[43]

for evaluating such matters in objective terms would prove "utterly unworkable."[44] Requiring religious exemptions in some cases but not others would authorize judges to make impermissible value judgments and would raise "the prospect of constitutionally required religious exemptions from civil obligations of almost every conceivable kind."[45] Anarchy and arbitrariness, in short.

This was neither the first nor the last time Justice Scalia would argue that such matters could not be determined by the courts in a principled manner. Ten years after authoring *Smith*, Justice Scalia wrote in a case involving the parental right originally articulated in *Pierce.* In that case, *Troxel v. Granville*, the majority rejected a visitation-rights claim made by two grandparents. Citing *Pierce*, the Court stated that "the 'liberty of parents and guardians' includes the right 'to direct the upbringing and education of children under their control.'"[46] The mother, therefore, could deny the grandparents access to her child. Justice Scalia, in a powerful dissent, assailed the substantive due process reasoning of the majority and argued that the "theory of unenumerated parental rights … has small claim to *stare decisis* protection."[47] But he conceded his own belief that "a right of parents to direct the upbringing of their children is among the 'unalienable Rights' with which the Declaration of Independence proclaims 'all men … are endowed by their Creator,'" and suggested that this right was "among the 'othe[r] [rights] retained by the people' which the Ninth Amendment says the Constitution's enumeration of rights 'shall not be construed to deny or disparage.'"[48]

But of utmost importance, Justice Scalia finds the competence to define such right to rest in the legislative and not the judicial branch. While it would be "entirely compatible with the commitment to representative democracy set forth in the founding documents to argue, in legislative chambers or in electoral campaigns, that the State has no power to interfere with parents' authority over the rearing of their children,"[49] he had no power as a judge "to deny legal effect to laws that (in [his] view) infringe upon what is (in [his] view) that unenumerated right."[50] Justice Scalia's *Troxel* dissent may give context to his approach in *Smith*. If *Smith* is viewed as a part of Justice Scalia's larger efforts to rein in what he views as the lawlessness of substantive due process (particularly as defined in the abortion context), his *Smith* decision may appear more palatable to advocates of traditional religious values. This argument suggests that the *Smith* decision, like his *Troxel* dissent, can be read as a consistent approach to the Constitution after all.

But in a fascinating twist, the *Smith* decision appears to place increased emphasis on the role of substantive due process in vindicating religious freedom. For the *Smith* decision makes clear that an observant claimant will not win a free exercise exemption from a neutral and generally applicable law unless he or she can show an impermissible legislative intent to discriminate against religion or otherwise invoke substantive due process. Justice Scalia's *Smith* opinion acknowledges in a remarkable way the doctrinal stature of substantive due process, and seemed even to increase its importance for religious claims by stating:

> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have

> involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press[51] or the right of parents, acknowledged in *Pierce v. Society of Sisters*, to direct the education of their children.[52]

In other words, *Smith* makes clear that only substantive due process could support religious exemptions from the law that state legislatures did not choose to provide. This ruling leaves the *Cantwell* door open, but means that few religious claims for exemption can cross its threshold. And if the Roberts Court follows the admonitions of its conservative justices and continues its slow retreat from substantive due process, religious practitioners may have even narrower grounds on which to base their claims.

So where does that leave us? I suggest that as a result of its narrow reading of the Free Exercise Clause, *Smith* ensures, for better or worse, that religious liberty will depend largely on legislative action and not by judicial protection. Analysis of demographic trends adds interest to the jurisprudential shift, for the religious views of voting citizens, and their connections to established churches, have changed considerably since the time of the founding and even more so since *Pierce*. In 1925, religious liberty was attacked by a law passed on the initiative of a sectarian, anti-Catholic majority. Today, a growing percent of Americans associate with no organized religion at all. In recent decades, west-coast states have led a trend away from established churches, and Oregon has often appeared at the helm.[53]

What do trends toward secularization and religious individualism mean for religious liberty after *Smith?* I discern two primary concerns. First, restrictive laws may be passed with the purpose of inhibiting religion. Fortunately, the Supreme Court has made clear that even after *Smith* "[t]he Free Exercise Clause protects against governmental hostility which is masked, as well as overt," and "[o]fficial action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality."[54] Second, and perhaps more troubling, restrictive laws may be enacted — or simply enforced — out of sheer *insensitivity* to religion. The latter may be a special concern in a time of increasing secularism and preoccupation with self-centered and temporal pursuits. Third, even if the legislatures are willing to pass laws to protect religious practices, there is a significant risk that such statutes may be ruled unconstitutional by the courts. This third concern suggests that advocates of religious freedom may be caught between a rock and a hard place, as both courts and legislatures lose the ability to grant them shelter.

Restrictions on faith-based activities will not affect only members of the Catholic Church, as in *Pierce*, or the Native American Church, as in *Smith.* A look at current free exercise conundrums shows that practices of diverse faiths may be endangered. Will Muslims be forced to strip their heads of traditional garb required by their faiths? France has required as much, and while it has far outpaced even Oregon in its secularization, we may not be that far behind.

But we need not look abroad to see how law has already limited the practices of various religious persons and organizations. Recently, several pharmacists in Illinois were fired from their jobs for refusing on religious grounds to comply with state rules requiring them to dis-

tribute the morning-after pill. They filed suit in federal district court, citing the Free Exercise Clause. So far, the judge has denied the state's motion to dismiss and allowed the pharmacists to proceed on their claim that the state rules were motivated by anti-religious animus.[55] It will be interesting to watch the case unfold.

In Massachusetts, state anti-discrimination laws have been enforced without an exception that would allow Catholic adoption agencies to give children only to heterosexual couples. As a result, the Church has concluded that it could not reconcile the practice with its faith and withdrew from providing adoption services altogether. The Anglican, Catholic, and Lutheran churches may face other conflicts as well: will prosecutors begin to press charges for violations of underage drinking laws, when minors receive communion in both species at daily liturgies?

Anti-discrimination laws protecting women from employment harassment might also be applied to force churches with male clergies to hire female pastors or priests as well. And evidentiary rules might be enacted that would apply to all persons, without exemptions for priest-penitent communications.[56] While such laws might serve otherwise worthy purposes and be enacted without any intention of restricting religious freedom, they might be read in ways that would severely constrain faith-related practices.

As I have emphasized before — the concerns do not affect one church or a single faith. The anti-Catholic sentiments that prevailed in Oregon in 1925 have been subsumed by indifference and hostility toward other faiths as well. And while *Pierce* ensured that private schools, including religious ones, retained a right to exist, they may face new threats. For example, could anti-discrimination laws be invoked to require Jewish, Amish, Muslim, and other religious communities, to hire non-believers to teach in their schools?

Smith does not offer much hope for exemptions from such state anti-discrimination laws. It would be ironic — though certainly possible — for courts to find a discriminatory purpose behind such laws. But without proof of such purpose, or the aid of another constitutional right, religious claims for relief would fail. As these examples show, persons who care about freedom and faith must keep a watchful eye for animus. They must, however, turn their primary efforts to persuasion, so that their fellow citizens and their legislators can share their concerns and reach appropriate accommodations.

Unfortunately, a third impediment to religious freedom may arise in the context of legislative action: Statutes designed to protect faith-based practices may be deemed unconstitutional. For example, in *City of Boerne v. Flores*,[57] the Supreme Court struck down a provision of the Religious Freedom Restoration Act, in which Congress had sought to provide greater protection for free exercise. The Act rejected the limitations on free exercise allowed by the Court's opinion in *Smith*, and required federal courts to apply the more protective *Sherbert* test[58] when analyzing religious claims.[59] In *City of Boerne*, the Court rejected Congress's attempt to protect religious freedom, ruling that the Act exceeded the scope of congressional authority.[60] The Court emphasized that Congress may not "enact legislation that expands the rights [enumerated in the Constitution],"[61] or "define its own powers by altering the [Constitution's]

meaning."[62]

Thus, the Court's decision in *City of Boerne* undercut the assurance it had given in *Smith* that legislative action could protect free exercise. In *Smith* the Court had presented structural arguments emphasizing that legislatures could decide whether to expand religious freedom; in *City of Boerne* the Court applied structural arguments to cabin Congress's competence to do just that. While both decisions may be defended for their fidelity to the separation of powers, their interplay suggests yet a further hurdle for advocates of religious freedom.

The troubling interplay of the Court's free exercise decisions and its ruling in *City of Boerne* were noted in a dissent to that decision. There, Justice Souter expressed reluctance to limit Congress's power to protect religious freedom, and urged the Court to dismiss the writ of certiorari as improvidently granted. He argued that *Smith* should not be applied to strike down the Religious Freedom Restoration Act without closer analysis of the claims and "the historical arguments going to the *original understanding of the Free Exercise Clause* … which raise[ ] very substantial issues about the soundness of the *Smith* rule."[63] Justice Souter's concerns did not sway the majority, but his dissent underscored the problems for religious freedom that arise from the intersection of the Court's decisions.[64]

The future of religious freedom may now shift to the hands of voters and lawmakers. Although the courts can continue to protect religious practices against laws motivated by discriminatory purposes, or can grant relief when Free Exercise claims are made "in conjunction with other constitutional protections," most protective action must be legislative.

Believers must learn to attract the support of legislators — a task that may well become more difficult as secularism grows in the voting population. But at least the responsibility of pursuing religious liberty rests with those most committed to its preservation. If they raise their voices, I have no doubt that they will be heard and will eventually prevail in what is, deep down, a tolerant and respectful society, such that their faiths and freedoms will be protected in a nation built upon those values. For despite trends toward secularization, most Americans continue to profess religious faith, which, I suggest, enables them to understand the importance of faith-based practices and the value of accommodation. As American society and law remain grounded in moral norms and faith-based traditions, those asserting claims grounded in religious freedom may strike sympathetic chords. But to strike such chords, they first must speak. Only by the energy and perseverance of their voices can our nation retain in its fullest form the freedom for which it was designed.

* United States Circuit Judge, United States Court of Appeals for the Ninth Circuit; A.B., St John's University, 1957; J.D., Harvard Law School, 1963; LL.M., University of Virginia, 1992; LL.D. (Hon.), University of Notre Dame, 2002; LL.D. (Hon.), Lewis and Clark College, 2003. I would like to acknowledge, with thanks, the assistance of Marah Stith, my law clerk, in helping to prepare this paper.

[1] 268 U.S. 510 (1925) [hereinafter "*Pierce*"].

[2] 494 U.S. 872 (1990) [hereinafter "*Smith*"].

[3] 268 U.S. at 536 (emphasis added).

[4] *Society of the Sisters of the Holy Names of Jesus and Mary v. Pierce*, 296 F. 928, 930 (D. Oregon 1924).

[5] 268 U.S. at 534-35.

[6] Stephen Carter, *Parents, Religion, and Schools: Reflections on Pierce, 70 Years Later*, 27 Seton Hall L. Rev. 1194, 1205

(1997).
[7] Oregon School Cases (complete record) 25 (Belvedere Press 1925) [hereinafter "Oregon School Cases"].
[8] *Cantwell v. Connecticut*, 310 U.S. 296 (1940). The Society of Sisters did invoke a similar clause in Section 3 of Article I of the Oregon Constitution: "No law shall in any case whatever control the free exercise and enjoyment of religious opinions, or interfere with the rights of conscience."[9]Oregon School Cases, *supra* note 7, at 702.
[9] Oregon School Cases, *supra* note 7, at 25.
[10] *Society of the Sisters of the Holy Names of Jesus and Mary v. Pierce*, 296 F. 928, 936-37 (D. Oregon 1924).
[11] Oregon School Cases, *supra* note 7, at 107.
[12] *Id.* at 669.
[13] *Id.* at 168.
[14] *Id.*
[15] 98 U.S. 145 (1878).
[16] Oregon School Cases, *supra* note 7, at 99.
[17] *Id.* at 669.
[18] *Id.*
[19] *Id.*
[20] *Id.* at 671.
[21] Charles C. Hart, *U.S. Court Voids School Statute*, The Morning Oregonian, June 2, 1925, at 1, 8.
[22] 268 U.S. at 534-35.
[23] 410 U.S. 113 (1973).
[24] *Id.* at 152-53.
[25] 505 U.S. 833, 848 (1992).
[26] 539 U.S. 558 (2003).
[27] *Id.* at 564.
[28] In *Gitlow v. People of the State of New York*, 268 U.S. 652 (1925), the Court considered the validity of the statutory penalization of "criminal anarchy" under New York Penal Law §§ 160-161. Gitlow had been convicted of such crime and raised facial and as-applied challenges to the law based upon the Due Process Clause of the Fourteenth Amendment. Although ultimately affirming Gitlow's conviction, the Court stated: "For present purposes we may and do assume that freedom of speech and of the press — which are protected by the First Amendment from abridgment by Congress — are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." *Id.* at 666.
[29] 374 U.S. 398 (1963).
[30] *Sherbert*, 374 U.S. at 403.
[31] *Id.* at 410.
[32] *Id.* at 406.
[33] *Smith*, 494 U.S. at 873.
[34] *Id.* at 876.
[35] *Id.* at 878.
[36] *Id.*
[37] *Id.* at 879.
[38] *Id.* (emphasis added).
[39] *Smith* at 880 (citing *Reynolds*, XXX at 166-67).
[40] *Id.* at 883.
[41] *Id.* at 876.
[42] *Id.* at 884.
[43] *Id.* at 888.
[44] *Id.* at 888 n.4.
[45] *Id.* at 889.
[46] 530 U.S. 57, 65 (2000).
[47] *Id.* at 91.
[48] *Id.*
[49] *Id.* at 91-92.
[50] *Id.*
[51] Here the Court cited *Cantwell*, 310 U.S. 296, *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), and *Follett v. McCormick*, 321 U.S. 573 (1944). The suggestion that free exercise claims, which alone would fail, could succeed if framed "in conjunction with other constitutional protections," *Smith*, 494 U.S. at 881, has generated considerable debate. Eight years ago, I discussed the unusual character of such rights on behalf of a panel of my court. *See Thomas v. Anchorage Equal Rights Commission*, 165 F.3d 692 (9th Cir. 1999) (applying strict scrutiny to claims of violations of the "hybrid rights" of free exercise and free speech), *withdrawn and superseded by* 220 F.3d 1134 (9th Cir. 2000) (en banc) (deeming the

claims unripe for review). Academics have continued the analysis. *See, e.g.*, Kyle Still, Smith*'s Hybrid Rights Doctrine and the* Pierce *Right: An Unintelligent Design*, 85 N.C.L.R. 385 (2006) (citing the three-judge opinion in *Thomas*, 165 F.3d 692 at 703, and noting that "[p]erhaps not surprisingly in view of the Supreme Court's rather cryptic explanations, the courts of appeals have struggled to decipher Smith's hybrid-rights formula and have reached divergent conclusions as to exactly what constitutes a hybrid-rights claim.").

[52] *Smith*, 494 U.S. at 881.

[53] *See* Cathy Lynn Grossman, *Charting the Unchurched in America*, USA TODAY, March 7, 2002.

[54] *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993).

[55] *Menges v. Blagojevich*, 451 F.Supp.2d 992 (C.D. Ill. 2006).

[56] All 50 states provide such a privilege, though they differ as to which person can waive the protection. *See* McCormick on Evidence § 76.2 (5th ed. 1999). In *Mockaitus v. Harcleroad*, 104 F.3d 1522 (9th Cir. 1997), the Ninth Circuit ruled that the taping of a prison inmate's confession violated the inmate's rights under the Fourth Amendment and the Religious Freedom Restoration Act. Writing for the court, Judge Noonan noted that the inmate's expectation of privacy in his communications with his confessor, Father Mockaitus, was reasonable: "[T]he history of the nation has shown a uniform respect for the character of sacramental confession as inviolable by government agents interested in securing evidence of crime from the lips of [a] criminal." *Id.* at 1532. By taping the confession, the government violated the Fourth Amendment. Judge Noonan also concluded that taping the confession violated the provisions of the Religious Freedom Restoration Act that barred government from "'substantially burden[ing] a person's exercise of religion'" unless acting "'in furtherance of a compelling governmental interest'" and using "'the least restrictive means.'" *Id.* at 1528 (citing 42 U.S.C. §§ 2000bb et seq.). Judge Noonan's opinion rejected constitutional and statutory challenges to the Religious Freedom Restoration Act, concluding that Congress had full authority to enact such protective legislation. *Id.* at 1529-30. But less than half a year later, the Supreme Court disagreed, and struck down the statute. *See City of Boerne v. Flores*, 521 U.S. 527 (1997), *discussed infra* pages 26-28. It would appear that the priest-penitent privilege continues to enjoy Fourth Amendment protection, however.

[57] 521 U.S. 527 (1997).

[58] *Sherbert*, 374 U.S. at 403. *See supra* pages 13-14.

[59] *See* 42 U.S.C. §§ 2000bb et seq.

[60] *See City of Boerne*, 521 U.S. at 536.

[61] *Id.* at 527-28.

[62] *Id.* at 529.

[63] *City of Boerne*, 521 U.S. at 565 (Souter, J., dissenting).

[64] Justice Scalia concurred in the majority decision in *City of Boerne*, with the exception of Subsection III.A.1, in which the Court discussed the legislative history of the Fourteenth Amendment. 521 U.S. at 537. On the other hand, he had vehemently dissented in an earlier case in which the Court invalidated legislative protections of religious exercise. In *Texas Monthly v. Bullock*, 489 U.S. 1 (1989), the Supreme Court had struck down a statute exempting religious periodicals from sales tax. The Court ruled that the statute violated the Establishment Clause and was not mandated by Free Exercise. *Id.* at 26. Justice Scalia disagreed. He noted the long history of state statutes providing such tax exemptions, and added: "In practice, a similar exemption may well exist in even more States than that, since until today our case law has suggested that [the exemption] is *not only permissible but perhaps required*." *Id.* at 32 (Scalia, J., dissenting) (emphasis added). Of course, it is ironic that Justice Scalia, author of *Smith*, would suggest that exemptions from generally applicable tax laws were "perhaps required" by prior Supreme Court precedent, but the *Texas Monthly* dissent certainly accords with his view that legislatures can provide, and have traditionally provided, solicitude for free exercise.

THE SINKING WALL OF SEPARATION

THE SUPREME COURT AND THE ESTABLISHMENT CLAUSE 1947-2005

BY EDWARD F. MANNINO*

Religion and the First Amendment

The First Amendment deals with religion in two separate clauses. It prohibits Congress both from enacting any "law respecting an establishment of religion," or "prohibiting the free exercise thereof." This article analyzes the leading decisions of the Supreme Court of the United States under the first of these provisions, known as the Establishment Clause, insofar as they discuss aid to parochial schools and school prayer.

It is the thesis of this paper that these decisions are products of the concerns of the times in which they were decided, and were also impacted by the political and religious values of the Justices who decided them. Thus, they reflect the following realities. First, the early cases examining varied forms of aid to religious schools reflected Protestant fears about the growing influence of the Catholic school system, whose pupil population doubled from the end of World War II to 1965. Second, there was a parallel recognition by the Justices of the increasing pluralism of American society, which necessitated the transformation of the public school system from purveyors of a Protestant civic morality based upon the King James Bible to a more secular enterprise, which neither favored nor advanced organized religion. Third, the first two factors led the Supreme Court to adopt an increasingly strict separation of church and state in its opinions, erecting what Justice Hugo Black characterized as a "high and impregnable" wall between them. This early phase of strict separation lasted from 1947 to 1985, followed by a gradual transition period, characterized by the development of new tests, and eventuating in a more frankly neutral and accommodationist stance towards religion from the late 1990s through the present. Fourth, this neutrality can be attributed in part to the recognition that the Catholic school system posed less of a threat than previously feared, with that system declining from one that serviced twelve percent of American schoolchildren in 1965, to one that has a student population well under five percent of those children today. Fifth, this newer stance of accommodation can also be traced to appointment of Supreme Court justices by conservative Republican presidents from Ronald Reagan through George H. W. Bush.

The Establishment Clause: Erection of a "Wall of Separation"

The first major case in which the Supreme Court dealt with the Establishment Clause was *Everson v. Board of Education* (1947).[1] That case dealt with the controversial topic of reimbursing the parents of Catholic school students the costs of their bus transportation to school. The place of the Catholic schools in postwar America was a hot and divisive topic, and those schools provoked a strong voice of opposition in the work of Paul Blanshard. Blanshard wrote several books on what he called the "Catholic problem," beginning with *American Freedom and*

Catholic Power in 1949. That book was on the New York Times best-seller list for seven months. As Blanshard saw it, Catholicism was "antidemocratic," "separatist," and "un-American." He portrayed the religion as a threat to democracy on the same level as communism, devoting his second book, in 1951, to *Communism, Democracy and Catholic Power*. He argued that Catholics accounted for the majority of white criminals, and identified Catholic schools as "the most important and divisive instrument in the life of American children." One of Blanshard's principal points in his attack on Catholicism was the Catholic hierarchy's long-standing and philosophical opposition to the American principle of separation of church and state.[2]

The Catholic school system looked particularly ominous to those who shared Blanshard's views at the time, because it was in a great growth mode from the 1940s to 1965, with its attendance doubling during that period.

Predictably, in this context of public division and debate, the Supreme Court splintered in the *Everson* case. By a five-to-four majority, it upheld the New Jersey school district's reimbursement policy in an opinion by Justice Hugo Black. Black himself was an unlikely candidate to write an opinion upholding aid to the parents of Catholic schoolchildren. He had been, at one time, a member of the Alabama Ku Klux Klan and Alabama's Grand Dragon had said that "Hugo could make the best anti-Catholic speech you ever heard." Black's own son, himself a noted lawyer, wrote that Black "suspected the Catholic Church. He used to read all of Paul Blanshard's books exposing power abuse in the Catholic Church. He thought the Pope and bishops had too much power and property. He resented the fact that rental property owned by the church was not taxed; he felt they got most of their revenue from the poor and did not return enough of it."[3] Some historians have suggested that Black's vote in *Everson* was an attempt by him to dampen Catholic criticism, and that Black himself recognized that the general principles his opinion enunciated would be detrimental to the Catholic school system in future cases.

Black's opinion provided an overview from colonial times of how all religions had suffered where one had been established in any colony, and focused particularly upon the use of tax monies to support religious institutions. As Black saw it, "[t]he 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non- attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was

intended to erect 'a wall of separation between Church and State'."

Black wrote that the wall between Church and State "must be kept high and impregnable," but found that the New Jersey reimbursement of the costs of bus transportation for Catholic schoolchildren did not breach that wall. In what has become known as the "child benefit" theory, the majority ruled that it was permissible for New Jersey to extend "general State law benefits to all its citizens without regard to their religious belief." While he admitted that a non-reimbursement policy "would make it far more difficult for the schools to operate," Black wrote that "such is obviously not the purpose of the First Amendment. That Amendment requires the state to be a *neutral* in its relations with groups of religious believers and non-believers; it does not require the state to be their *adversary*. State power is no more to be used so as to handicap religions, than it is to favor them."[4]

The four dissenting justices provided two dissenting opinions, one by Justice Jackson, and the other by Justice Rutledge. In a slap against Catholicism, Justice Jackson's opinion commented that "[o]ur public school, if not a product of Protestantism, at least is more consistent with it than with the Catholic culture and scheme of values." In arguing against the constitutionality of the reimbursement of the costs of school bus transportation for Catholic school students, Jackson also observed that "Catholic education is the rock on which the whole structure rests."[5]

The *Everson* decision evoked strong protest among Protestants, inspiring, in January of 1948, the organization of Protestants and Other Americans United for the Separation of Church and State. That group, today rechristened as *Americans* and Others United, began a campaign against aid to parochial schools. Some religious groups joined this campaign under their own banners, with the Southern Baptists and Seventh-Day Adventists particularly prominent in opposing aid to parochial schools in various cases. They often were joined in such litigation by the American Civil Liberties Union and the American Jewish Congress. In an ironic twist, several Catholic groups, and many Catholic law journals, also opposed the *Everson* ruling, recognizing the need for separation of church and state in their writings and court filings.

The Wall Gets Higher: The School Prayer and Bible-Reading Cases

Fifteen years after the *Everson* decision, the Supreme Court had occasion to apply the Establishment Clause to the question of prayer in the public schools. *Engel v. Vitale* (1962) dealt with what Justice Brennan would later call a rather "bland" prayer composed by New York state authorities, which was to be said aloud by the class at the start of the school day. The prayer was not compulsory, and any student who wished not to say it would be excused. The prayer read "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."[6]

Prayers of this nature were becoming more common as a result of the Cold War. As part of the fight against what was then known as "godless communism," federal and state legislation of the 1950s took steps to identify the cause of democracy in the United States with that of the Almighty. In 1954, at the urging of the Knights of Columbus, a Catholic voluntary association,

the words "under God" were added to the Pledge of Allegiance. Two years later, "In God we trust," which had appeared on currency since 1865, became the national motto.

Once again, Justice Black spoke for the court in *Engel.* Writing for six members of the court, he announced that the prayer was unconstitutional because "the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government." Black pointed out that the Anglican Book of Common Prayer had been mandated as the official form of prayer and religious ceremony in England and in some of the colonies, and that the First Amendment was aimed at prohibiting such an establishment of religion. He also found that the voluntary nature of the prayer did not save it, explaining that "[t]he Establishment Clause, unlike the Free Exercise Clause, does not depend upon a showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not." Justice Black concluded his opinion by attributing to the founders "an awareness that governments of the past had shackled men's tongues to make them speak only the religious thoughts that government wanted them to speak and to pray only to the God that government wanted them to pray to. It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance."[7]

In a concurring opinion, Justice Douglas pointed to the fact that both the Supreme Court and Congress opened their sessions with prayers, and that the majority opinion dealt with only "an extremely narrow" point. As he saw it, the mere authorization of a prayer might not violate the Establishment Clause, but "once government finances a religious exercise it inserts a *divisive* influence into our communities." Douglas again repeated that the First Amendment mandates that the government be *neutral* in matters of religion. As he saw it, "[t]he First Amendment leaves the government in a position not of hostility to religion but of neutrality. The philosophy is that the atheist or agnostic — the nonbeliever — is entitled to go his own way. The philosophy is that if government interferes in matters spiritual, it will be a divisive force. The First Amendment teaches that a government neutral in the field of religion better serves all religious interests."[8]

Only Justice Potter Stewart dissented. Stewart's dissenting opinion explored the tension between the guarantee of "free exercise" and the prohibition against establishment, observing that "I cannot see how an 'official religion' is established by letting those who want to say a prayer say it. On the contrary, I think that to deny the wish of these schoolchildren to join in reciting this prayer is to deny them the opportunity of sharing in the spiritual heritage of our Nation." Stewart found that "the uncritical invocation of metaphors like the 'wall of separation,' a phrase nowhere to be found in the Constitution" was not helpful. Instead, "the history of the

religious traditions of our people, reflected in countless practices of the institutions and officials of our government," including the prayers opening Supreme Court and congressional sessions, the revised Pledge of Allegiance, and the use of "In God we trust" on coins since 1865, demonstrated that the New York prayer did not violate the Establishment Clause.[9]

The reaction to the *Engel* decision was fast and fierce. Former presidents Eisenhower and Hoover, as well as former Vice President Nixon, denounced it. They were joined by a large number of congressmen and religious leaders. Southern Democrats were particularly hostile, linking the *Engel* decision to *Brown v. Board of Education*, with one congressman indicating that the Supreme Court had "put the Negroes in the schools," and "driven God out." Others saw the decision as giving "aid and comfort to Moscow." The Roman Catholic Cardinal Francis Spellman of New York, and several Protestant leaders, also denounced the decision, while other Protestant leaders and most Jewish groups supported it. Legal commentary in law journals was almost evenly split, with a slight tilt against the *Engel* decision.

Notably, President John Fitzgerald Kennedy, the first Roman Catholic president, supported the decision, pointing out that the church and the home were the proper places for prayer. In the presidential election campaign of 1960, Kennedy had found great opposition to his candidacy among Protestant ministers, who questioned, along the lines of Paul Blanshard, whether a Catholic could faithfully execute the laws of the United States as President. In his speech to the Greater Houston Ministerial Association during the campaign, Kennedy proclaimed that he believed in the absolute separation of church and state, and opposed any public funding of churches and church schools.

Kennedy's support of *Engel* did not stem the tide of opposition. For over twenty years, proposed constitutional amendments were introduced to permit public school prayer. In 1984, a constitutional amendment proposed by President Ronald Reagan received the votes of 56 senators, a majority, but short of the two thirds required for constitutional amendment to be submitted to the people. That proposal provided that "[n]othing in this Constitution shall be construed to prohibit individual or group prayers in public schools or other public institutions," while "[n]o person shall be required by the United States or by any state to participate in prayer."[10]

One year after *Engel*, the Supreme Court reentered the controversy by striking down Bible reading in the public schools by a vote of eight to one in *Abington School District v. Schempp* (1963). The *Schempp* opinion was written by Justice Tom Clark, who concluded that the Establishment Clause prohibited more than the preference of one religion over another. He determined that a test had emerged from the prior opinions focusing upon "the purpose and primary effect" of the challenged practice. Under that test, "to withstand the strictures of the Establishment Clause there must be a *secular legislative purpose and a primary effect that neither advances nor inhibits religion.*" Since the Bible was "an instrument of religion," under this test it could be studied in the public school curriculum only "when presented objectively as part of a secular program of education."[11]

Concurring opinions were written by Justice Douglas, by the court's lone Catholic, Justice

William Brennan, and by the court's only Jewish member, Justice Arthur Goldberg. The most significant of these was that of Justice Brennan, who authored a lengthy opinion citing the experience in the United States from colonial times to the present and pointing out how particular religions had been the victims of discrimination. He noted that the early public schools used the King James Protestant Bible as a "textbook of morals," which was offensive to Catholic students who were taught from a different version of the Bible. Brennan also emphasized the importance of the changing composition of the American religious experience. He noted that "our religious composition makes us a vastly more diverse people that were our forefathers. They knew differences chiefly among Protestant sects. Today the nation is far more heterogeneous religiously, including as it does substantial minorities not only of Catholics and Jews but as well of those who worship according to no version of the Bible and those who worship no God at all."[12]

Once again, only Justice Stewart dissented. He attacked the "sterile metaphor" of the wall of separation, and reiterated his objection that "there are areas in which a doctrinaire reading of the Establishment Clause leads to irreconcilable conflict with the Free Exercise Clause." In the case of Bible reading in the public schools, "there is involved … a substantial free exercise claim on the part of those who affirmatively desire to have their children's school day open with the reading of passages from the Bible." Stewart noted that the voluntary nature of school children's participation in the Bible reading exercise made the state neutral, and that a blanket prohibition against Bible reading could be seen as "the establishment of a religion of secularism."[13]

The Highest Wall: From School Books to Teachers' Salaries

In 1968, the Supreme Court revisited the question of which boundaries were appropriate under the Establishment Clause in extending governmental aid to religious schools. In *Board of Education v. Allen* (1968), by a six to three vote, the court upheld a New York State program under which textbooks were lent to children in grades seven through twelve in all schools, including private and religious schools. In New York, this aid benefited principally schools operated by Catholic, Jewish, and Lutheran denominations.

In an opinion by Justice Byron White, a moderate who had been appointed to the court by President Kennedy, the majority upheld the program under the child benefit theory of *Everson*. Significantly, the majority emphasized that "this Court has long recognized that religious schools pursue two goals, religious instruction and secular education," and that "private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience."[14]

Three justices dissented, each writing their own opinion. That of Justice Black was one of outrage and apoplexy, characterizing the book-lending program as a "flat, flagrant, open violation of the First and Fourteenth Amendments." In a veiled reference to the Catholics whom he had denounced in his Alabama Klan days, Black wrote that "[t]he same powerful sectarian religious propagandists who have succeeded in securing passage of the present law to help religious schools carry on their sectarian religious purposes can and doubtless will continue

their *propaganda*, looking toward complete domination and supremacy of their particular brand of religion." Indicating that he opposed the use of tax dollars, "even to the extent of one penny," to support such sectarian schools, Black explained that "sectarian schools, which, although 'secular,' realistically will in some way inevitably tend to propagate the religious views of the favored sect."[15]

Justice Douglas aimed his dissent even more squarely against the Catholic schools, ignoring the aid that went to Lutheran and Jewish schools under the New York statute. Distinguishing *Everson*, he wryly commented that "there is nothing ideological about a bus." He pointed out that the Catholic schools were permitted to select the particular books to be used in teaching secular classes, and that they would, under the guidance of "priests and nuns," "select the book or books that best promote its sectarian creed." Douglas then went on to quote from various textbooks that promoted Christian views, and cited Catholic authors, including Monsignor John A. Ryan, for the Catholic Church's view that the teaching of religion and secular subjects could not be separated one from the other. He also quoted in full, as an appendix to his opinion, a message from New York's Cardinal Spellman which was read to all parishioners in New York who attended Mass the Sunday before the vote on a proposed state constitution which permitted aid to parochial schools.[16]

The narrow victory of the accommodationists in *Allen* was short-lived. Reacting to a much more controversial approach to aid to religious schools by the states of Pennsylvania and Rhode Island, the Supreme Court enunciated a new standard under the Establishment Clause in the often attacked, but still standing, decision in *Lemon v. Kurtzman* (1971). While that opinion dealt with several different aspects of aid to private schools, the most significant discussion was devoted to similar attempts by Pennsylvania and Rhode Island to subsidize the salaries of teachers of secular subjects in religious schools. Payments were made either to the teachers or to their schools on the condition that the subsidized teachers could not teach religion and could only use teaching materials then in use in the public schools, or approved by the state secretary of education. The states monitored compliance in various ways, including a post-audit program to assure that religion was not taught, and written pledges by teachers that they would not teach religion.

Chief Justice Warren Burger's majority opinion found that both teacher reimbursement schemes violated the Establishment Clause. Adding a third test to the criteria previously enunciated in the *Schempp* opinion, *Lemon* erected three obstacles to providing any aid to "sectarian" schools. These were "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion … finally, the statute must not foster 'an excessive government entanglement with religion'." Here, the Pennsylvania and Rhode Island statutes flunked the new, third, test by requiring monitoring of teacher compliance. As Burger put it, "[t]hese prophylactic contacts will involve excessive and enduring entanglement between state and church." Indeed, the statutes presented a "broader base of entanglement of yet a different character," because they necessarily

gave rise to "divisive political potential," with different groups warring with each other over state aid.[17]

As has been all too common in religion cases, separate opinions were written by most justices. In *Lemon*, Justice Douglas (joined by Justice Black), Justice Brennan, and Justice White each expressed their separate views. Douglas' opinion once again drew a bead on the Catholic schools. He proclaimed that a proper adjudication of the constitutional questions "must start with the admitted and obvious fact that the raison d'etre of parochial schools is the propagation of a religious faith." Again, as in *Allen*, Justice Douglas quoted from many Catholic sources to back up his view. He also focused upon the critical historical fact that "the major force in shaping the pattern of education in this country was the conflict between Protestants and Catholics. The Catholics logically argued the public school was sectarian when it taught the King James version of the Bible. They therefore wanted it removed from the public schools; and in time they tried to get public funds for their own parochial schools." Finally, he dismissed, with disgust, the argument that Catholic schools were saving the taxpayers $9 billion a year with the comment that "as if that were enough to justify violating the Establishment Clause."[18]

The lone Catholic on the court, Justice William Brennan, also invoked history in voting to strike down the Pennsylvania and Rhode Island statutes. He documented in detail the bleak history in which subsidies to one religious group or another had led to "bitter controversies" from the beginning of the nation. Such controversies over funding of particular religious schools led to some thirty-five states adopting constitutional prohibitions on the use of public school funds to aid sectarian schools between 1840 and 1900. By 1971, only a handful of states did not have such a constitutional prohibition.[19]

Justice White supported the decision of the court in the Pennsylvania case, but dissented on the Rhode Island statute. He concluded that the court was "surely quite wrong in overturning the Pennsylvania and Rhode Island statutes on the ground that they amount to an establishment of religion." Pointing out that there was no evidence that any teacher had actually been involved in inserting religion into his or her teaching of any class, White perceptively noted that the *Lemon* criteria created "an insoluble paradox for the State and parochial schools. The State cannot finance secular instruction if it permits religion to be taught in the same classroom; but if it exacts a promise that religion not be so taught — a promise the school and its teachers are quite willing and on this record able to give — and enforces it, it is then entangled in the 'no entanglement' aspect of the Court's Establishment Clause jurisprudence."[20]

Professor Noah Feldman has characterized *Lemon v. Kurtzman* as "the high point of legal secularism."[21] In the wake of its paradoxical approach, many legislative attempts to provide aid to religious schools failed for the next twenty-plus years. During that time, the Supreme Court struck down, among others, state statutes which would have permitted funding for repair and maintenance of buildings, for tuition reimbursement, for tests prepared by teachers, for other testing and guidance counseling services, and for the use of public school teachers

in parochial schools.[22] Attempts at accommodation were generally unsuccessful until the 1990s, when new justices and a strong evangelical political movement which united conservative Catholic and Protestant groups tilted the Supreme Court back to an approach which fostered accommodation in some areas.

The Beginnings of Change: New Justices and New Ways of Thinking

The decisions of the Supreme Court banning prayer from the public schools provoked a deep and spirited opposition from evangelical Protestant groups beginning in the 1960s. These groups, which traditionally had been apolitical, entered the public square through several new vehicles, including the Moral Majority, which was founded in 1979. Gradually, evangelical Protestants also joined forces with conservative Catholics in speaking out against the Supreme Court's decision in *Roe v. Wade* (1973), which found that states could not absolutely prohibit all abortions. Evangelical Protestants joined this fight most conspicuously through Operation Rescue, founded by Randall Terry in 1987.[23]

The issues of school prayer and opposition to abortion united conservative Protestants and Catholics. In the words of Francis Schaeffer, one of the intellectual leaders of this new conservative political opposition, "[s]ixty years ago could we have imagined that unborn children would be killed by the millions here in our own country? Or that we would have no *freedom of speech* when it comes to speaking of God and biblical truth in our public schools?... Sadly we must say that very few Christians have understood the battle that we are in. Very few have taken a strong and courageous stand against the world spirit of this age as it destroys our culture and the Christian ethos that once shaped our country."[24]

This coalition of evangelical Protestants with conservative Catholics was unprecedented, and some evangelicals opposed it. Bob Jones Jr., head of a fundamentalist Christian College named after his father, denounced cooperation with Catholics. Indeed, when Pope John Paul II was nearly assassinated in 1981, Jones remarked that "[t]his could be God's way of answering the prayers of his people."[25] Despite such opposition from the lunatic fringe, the new coalition attained some political success, and contributed to the election of Ronald Reagan to the presidency in both 1980 and 1984. Reagan, in turn, made four Supreme Court appointments which, over time, would form the basis for an eventual change to an accommodationist position in the court's Establishment Clause jurisprudence. Reagan appointed three new justices — Sandra Day O'Connor (the first woman appointed to the Supreme Court) in 1981; Antonin Scalia, in 1986; and Anthony Kennedy, in 1987. Reagan also elevated William Rehnquist to Chief Justice in 1986. Rehnquist originally had been appointed to the Supreme Court as an associate justice by Richard Nixon in 1971.

The impact of these appointments over time is illustrated through the consideration of opinions issued by the Supreme Court between 1985 and 1992, a time period over which two of these new justices and two others were seated.

In *Wallace v. Jaffree* (1985), the Supreme Court struck down as unconstitutional an Alabama statute which permitted a one minute period of silence in public schools "for meditation or

voluntary prayer." Speaking for a six person majority, Justice John Paul Stevens, an appointee of President Gerald Ford, found that the statute had "no other purpose" than return of prayer to the public schools. As such, the statute was unconstitutional under the first criterion of the *Lemon* test, which required a secular purpose for any legislation.[26]

Justice O'Connor, in a concurring opinion, noted that she had previously questioned the *Lemon* test, which she felt had "proved problematic." She had proposed instead a focus upon whether a particular statute "actually conveys a message of *endorsement* " of religion by the government. That approach, she concluded, would support the constitutionality of moment of silence statutes in the twenty-five other states which had passed them. O'Connor would become the major pivot in the next twenty years in the court's Establishment Clause decisions, seeking to create new standards in the area.[27]

While O'Connor agreed that the Alabama statute violated the Establishment Clause, three justices did not. Both Chief Justice Burger and Justice White wrote dissenting opinions. They were accompanied by Justice Rehnquist, who wrote the longest and most reasoned opinion in dissent. Rehnquist was perhaps the greatest historian ever to sit on the Supreme Court, and he went on to write several influential books on the Supreme Court and several of its major decisions in both politics and civil rights. In his opinion, Rehnquist referred to "hopelessly divided pluralities" in the previous opinions on the Establishment Clause, which were "neither principled nor unified." He stated that "*stare decisis* may bind courts as to matters of law, but it cannot bind them as to matters of history." With that premise, Rehnquist went on to criticize the line of decisions starting with the *Everson* case for their "wall of separation" philosophy, which he found reflected "a mistaken understanding of constitutional history." Reviewing the historical record, Justice Rehnquist concluded that the founders saw the First Amendment "as designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects." Based on the historical record, Rehnquist concluded that there was no constitutional basis for a wall of separation between church and state. He also found no basis for a requirement of "government neutrality between religion and irreligion nor did [the Establishment Clause] prohibit the Federal Government from providing nondiscriminatory aid to religion."[28]

The Supreme Court returned to the question of prayer in the public schools in *Lee v. Weisman* (1992). By then, four new justices had joined the court — Antonin Scalia in 1986; Anthony Kennedy in 1987; David Souter in 1990; and Clarence Thomas in 1991. Kennedy had been President Reagan's last appointment to the Supreme Court, and was Reagan's third nominee for the position. His first choice, Robert Bork, a highly visible conservative hero and scholar, was rejected by the United States Senate in a 58 to 42 negative vote, after an acrimonious and bitter debate. His second nominee, Circuit Justice Douglas Ginsburg, another well-known conservative, withdrew his nomination after it was revealed that he had smoked marijuana as a young man.

Justices Souter and Thomas were appointed by President George Bush, who had been

Ronald Reagan's Vice President. Souter was thought by liberals to be a "stealth candidate" for the conservative Republicans since he had written little as a judge on either the New Hampshire state courts or the Federal Court of Appeals for the First Circuit, and was not well known. He took the place of the liberal Justice William Brennan, and his appointment was thought to endanger the continued viability of *Roe v. Wade,* a decision which he paradoxically turned into a "super precedent" a few years later. Clarence Thomas, a Catholic African-American, who had served previously as the Chairman of the Equal Employment Opportunity Commission and then briefly on the Federal Court of Appeals for the District of Columbia Circuit, received even more venomous treatment than Robert Bork had, because of Thomas' extreme conservative views. He was confirmed by the narrow vote of 52 to 48, after unproved charges of sexual harassment had been aired in televised confirmation hearings, an experience which Thomas described as "a high-tech lynching."

Lee v. Weisman dealt with the constitutionality of a nondenominational prayer offered at a Rhode Island public middle school graduation on public school property. By a vote of five to four, the Supreme Court declared the Rhode Island prayer unconstitutional, with the majority opinion written by Justice Anthony Kennedy, one of the court's three Catholic members at the time. Kennedy had originally voted to uphold the prayer, and circulated a draft opinion doing so. Changing his mind because he felt that his draft opinion was "quite wrong," he changed the result as well.[29]

The prayer at issue in *Lee v. Weisman* had been composed by a Jewish rabbi, who had been supplied by school authorities with "Guidelines" composed by the National Conference of Christians and Jews. Those guidelines called for both "inclusiveness and sensitivity" and the rabbi's prayer was inoffensive to most, if not all, religious believers. Nevertheless, Kennedy found that the prayer was unconstitutional. For the majority, the "dominant facts" were that "[s]tate officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools." This was found to be "pervasive" governmental involvement with religion, and the majority specifically declined the request of the United States to reconsider the *Lemon* decision and its three criteria.[30]

A concurring opinion (originally written as a dissent before Justice Kennedy's change of mind) was written by Justice David Souter, who was joined by Justices O'Connor and Stevens. Souter, in his first year on the court, demonstrated how he would be a great disappointment to religious conservatives by writing an opinion which specifically rejected Chief Justice Rehnquist's view that the Establishment Clause was limited to establishing a religion or favoring one religious sect over another, even though Souter conceded that "a case has been made for this position." He went on also to reject the concept that *coercion* was a necessary element to find a violation of the Establishment Clause; instead, he favored Justice O'Connor's approach that governmental *endorsement* was sufficient. Based on these principles, and the Court's previous "settled" case law, he found the graduation prayer to be "flatly unconstitutional."[31]

Justice Souter's vote was critical, since four justices found the graduation prayer to be per-

missible. Writing for Chief Justice Rehnquist, and Justices White and Thomas, Justice Antonin Scalia, who was appointed to the court in 1986 by President Reagan, contended that the majority's reasoning was flawed. First, reviewing many examples of public prayers in governmental settings, Scalia accused the majority of "lay[ing] waste [to] a tradition that is as old as public school graduation ceremonies themselves, and that is a component of an even more long-standing American tradition of nonsectarian prayer to God at public celebrations generally." He accused the majority of using as "its instrument of destruction, the bulldozer of its social engineering," a test of "psychological coercion." This, in his view, was faulty, since an objecting student was free to sit in silence, and the state had not actively involved itself in composing the prayer in question.

Scalia also noted that the majority had not relied upon the *Lemon* test, and that "the internment of that case may be the one happy byproduct of the Court's otherwise lamentable decision."

Scalia ended by pointing out that the court majority had focused too narrowly on the interests of the objectors to the prayer ceremony, and not enough on the interests of the other graduates. He observed that "[c]hurch and state would not be such a difficult subject if religion were, as the court apparently thinks it to be, some purely personal avocation that can be indulged entirely in secret, like pornography, in the privacy of one's room. For most believers, it is not that, and has never been." By attempting "to banish" an expression of thanks to God from graduation activities, the majority ignored "the age-old practices of our people." Echoing the views of conservative Protestants and Catholics, Justice Scalia — himself a Catholic — concluded that "[t]he Baptist or Catholic who heard and joined in the simple and inspiring prayers of Rabbi Gutterman on this official and patriotic occasion was inoculated from religious bigotry and prejudice in a manner that cannot be replicated. To deprive our society of that important unifying mechanism in order to spare the non-believer what seems to me the minimal inconvenience of standing, or even sitting in respectful nonparticipation, is as senseless in policy as it is unsupported in law."[32]

By 1992, it had become apparent that the foundations of the Supreme Court's approach to questions raised by the Establishment Clause were being quickly eroded by the addition of the new justices appointed by Presidents Reagan and Bush. The new Chief Justice, William Rehnquist, Reagan appointee Antonin Scalia, and Bush appointee Clarence Thomas, were in favor of a bright line position of accommodation. Reagan appointee Sandra Day O'Connor and Bush appointee David Souter supported the prior case law, but called for a new test of endorsement to modify the trinitarian approach of *Lemon v. Kurtzman*. Even Reagan appointee Anthony Kennedy, author of two conflicting *Lee* opinions, would soon come to cast accommodationist votes in some Establishment Clause cases.

The Wall Comes Tumbling Down — A Bit

By the mid 1990s, the composition of the Supreme Court had been significantly changed as a result of the election of William Jefferson Clinton as President. Clinton was the only Democrat elected to the presidency in the twenty-eight years between 1980 and 2008. In his first term,

he appointed two new justices to the Supreme Court — Ruth Bader Ginsburg in 1993 and Stephen Breyer in 1994. Ginsburg replaced Justice Byron White, who had tended to vote to accommodate religion in Establishment Clause cases. By contrast, Breyer replaced Justice Harry Blackmun, the author of *Roe v. Wade*, who had taken a position of strict separation in controversies involving religion and the public schools.

Both Ginsburg and Breyer had been academics and federal circuit court judges before their elevation to the Supreme Court, and both came from a Jewish religious background. On the Supreme Court, Ginsburg, a former General Counsel of the ACLU, became a strict separationist in Establishment Clause cases; Breyer's approach was more nuanced, which resulted in his usually voting with the separationists, but sometimes voting to uphold aid to religious schools and public displays. The addition of Justices Ginsburg and Breyer led to the emergence of Justices O'Connor and Kennedy as the key swing votes in this area.

Both Justice O'Connor and Justice Kennedy tended to vote to accommodate aid to parochial school students and their parents, but against any type of public school prayer. Three cases decided between 1997 and 2002 illustrate the key role played by Justices O'Connor and Kennedy in cases involving aid to religious schools. The most dramatic of these cases was *Agostini v. Felton* (1997). There the Supreme Court dissolved an injunction it had upheld twelve years earlier in *Aguilar v. Felton* (1985) prohibiting the funding of a New York State program which permitted public school teachers to go into private schools to teach remedial education to disadvantaged students. The schoolteachers were assigned on a voluntary basis and were supplied by the state with a "detailed set of written and oral instructions" underlining the secular nature of the services they were to provide.

Writing for herself, and for Chief Justice Rehnquist, and Justices Scalia, Kennedy and Thomas, Justice O'Connor found that the *Aguilar* opinion was "not consistent with our subsequent Establishment Clause decisions," in two specific ways. "First, we have abandoned the presumption … that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state sponsored indoctrination or constitutes a symbolic union between government and religion." In addition, "[s]econd, we have departed from the rule … that all government aid that directly aids the educational function of religious schools is invalid." The majority opinion also folded the entanglement inquiry into the second *Lemon* criterion of secular effect, finding that it was simply "an aspect of the inquiry into a statute's effect." As such, "[s]ince we have abandoned the assumption that properly instructed public employees will fail to discharge their duties faithfully, we must also discard the assumption that pervasive monitoring of Title I teachers is required."

Reviewing the state program in question, Justice O'Connor summarized her conclusion that the state program "does not run afoul of any of three primary criteria we currently use to evaluate whether government aid has the effect of advancing religion: it does not result in governmental indoctrination; define recipients by reference to religion; or create an excessive entanglement. We therefore hold that a federally funded program providing supplemental,

remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees pursuant to a program containing safeguards such as those present here."[33]

In dissent, Justices Souter, Stevens, Ginsburg, and Breyer contended that the New York State program violated what they saw was a "flat ban on subsidization" of sectarian schools, and also constituted an impermissible "religious endorsement" by the state.[34]

Three years later the Supreme Court reviewed a federal program under which "secular, neutral, and non-ideological " educational materials and equipment were lent to public and private schools. This program was challenged in a Louisiana school district where private schools received about thirty percent of the dollars distributed, with the majority of those dollars going to Catholic schools. In *Mitchell v. Helms* (2000), writing for four justices, Justice Clarence Thomas found this federal program permissible under the Establishment Clause, based upon "[t]he principles of neutrality and private choice." In doing so, the plurality of Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas rejected contentions that direct aid to a religious school's educational mission was always impermissible, and that aid which was "divertible" to religious use was prohibited.

Justice Thomas' opinion is particularly notable for its attack upon the dissenters' views of the dangers of "pervasively sectarian" schools. As Justice Thomas saw it, "hostility to aid to pervasively sectarian schools has a *shameful pedigree that we do not hesitate to disavow* … Opposition to aid to 'sectarian' schools acquired prominence in the 1870s with Congress's consideration (and near passage) of the Blaine Amendment, which would have amended the Constitution to bar any aid to sectarian institutions. Consideration of the amendment arose at a time of pervasive hostility to the Catholic Church and to Catholics in general, and it was an open secret that 'sectarian' was code for 'Catholic.'" Thomas concluded that "nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs, and other doctrines of this court bar it. *This doctrine, born of bigotry, should be buried now.*"[35]

Justice Thomas' views did not command a majority, and the program was upheld by the votes of Justices O'Connor and Breyer, who joined a concurring opinion written by the former. O'Connor felt that the federal program was permissible because it offered aid on a neutral basis and was secular in content. She went on to note that she still adhered to the endorsement standard, but found that it did not apply where the aid was not directly given to sectarian schools. Here, the program consisted of a lending of materials, with no money distributed directly to the schools.

In dissent, speaking through Justice Souter, Justices Stevens and Ginsburg saw the federal program as violating the fundamental principle that there was to be "no aid to religious mission" under the strictures of the Establishment Clause. Justice Souter also contended that use of the "pervasively sectarian" school model was justified, since there were heightened con-

cerns under the Establishment Clause raised by the "religious indoctrination" practiced by those schools.[36]

The third — the most controversial — of the cases in which accomodation prevailed was *Zelman v. Simmons-Harris* (2002), which dealt with the political hot button issue of vouchers given to public school parents for use in paying for private schools for their children. *Zelman* reviewed an Ohio state program which provided aid for the Cleveland public school district, which was then one of the worst in the entire country. Under the program, tuition aid was provided to the parents of public school students in grades one through eight, with greater assistance being provided to the poorer families. Some ninety-six percent of the participating families chose religious schools, principally those affiliated with the Roman Catholic religion, even though two out of three of the participating families were not Catholic. Part of the attraction of the Catholic schools was their lower cost, which fit within the program's tuition cap.

This voucher program was defended publicly as designed to assist minority school children, who were being denied an adequate education. This argument resonated with Justice Thomas, the Supreme Court's only African-American justice. In a concurring opinion voting to uphold the Ohio program, Justice Thomas began and ended with quotations from the African-American Civil War antislavery spokesman, Frederick Douglas, who equated education for the emancipated slaves with emancipation itself. Thomas saw the voucher program as affording "greater educational opportunity for underprivileged minority students" and chided "the cognoscenti who oppose vouchers."[37]

The majority opinion of the court upholding the voucher program was written by Chief Justice Rehnquist, and joined by Justices O'Connor, Scalia, Kennedy, and Thomas. *Zelman* marked the triumph of Chief Justice Rehnquist in remaking the Supreme Court's jurisprudence under the Establishment Clause. Beginning as a lonely dissenter in this area in his first years on the Supreme Court as an associate justice, Rehnquist had reframed the concepts which were to be utilized in deciding these questions. In *Zelman*, he characterized the voucher program as one of government neutrality, with the allocation of moneys resulting from "true private choice," a phrase which appears repeatedly in the majority opinion. Since the secular purpose of the Ohio voucher program was stipulated, the only issue before the court was whether that program had the impermissible effect of advancing religion. Finding that the role of the government in the voucher program "ends with the disbursement of benefits," Chief Justice Rehnquist concluded that aid reached the sectarian schools "only by way of the deliberate choices of numerous individual recipients," whose choices could not be attributed to the government. As such, the voucher program was "entirely neutral with respect to religion."[38]

In separate dissenting opinions, Justices Stevens, Souter and Breyer focused on several factors which, in their respective views, rendered the voucher program unconstitutional under the Establishment Clause. Stevens saw the program as advancing "religious indoctrination at state expense" and as increasing the risk of "religious strife."[39] Souter saw the Establishment Clause as imposing a flat ban on any aid for "religious teaching," and predicted that the deci-

sion would lead to a "scramble for money" among "contending sectarians," which in turn would lead to "expectable friction." He explained that "[n]ot 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 the articles of faith of the Southern Baptist Convention."[40]

Finally, in the most thoughtful dissenting opinion, Justice Breyer raised the specter of "religiously based social conflict." Reviewing the same Protestant versus Catholic conflicts Justice Brennan had previously reviewed in his Establishment Clause opinions in the 1960s, Justice Breyer wrote that those conflicts demonstrated the need for separation, as opposed to what he termed "equal opportunity" for religions to contend one with the other to introduce their brand of religion into the public schools. In his view, the existence of some fifty-five religions in the United States of 2002 made such an approach "not workable." Moreover, Breyer saw the voucher program as particularly dangerous because it involved "direct financing of a core function of the church: the teaching of religious truths to young children."[41]

After *Zelman*, as Justice O'Connor pointed out in her concurring opinion, the question of whether the primary effect of a particular program which provided indirect aid to religious schools was or was not religious depended upon consideration of two factors — "first, whether the program administers aid in a neutral fashion, without differentiation based on the religious status of beneficiaries or providers of services; second, and more importantly, whether beneficiaries of indirect aid have a genuine choice among religious and nonreligious organizations when determining the organization to which they will direct that aid. If the answer to either query is 'no,' the program should be struck down under the Establishment Clause."[42]

Summary and Conclusion

Much of the confusion and backtracking which characterizes the Supreme Court's evolving Establishment Clause jurisprudence can be traced to societal pressures of the changing times, as well as to the political and social concerns of the shifting membership of the Supreme Court in the last sixty years.

The earliest cases, starting with Justice Black's opinion in *Everson*, manifest an underlying concern of the largely Protestant judiciary at that time regarding the emerging power of the Catholic school system in the United States. Justice Jackson, for example, in his *Everson* dissent, referred to the public schools as more consistent with Protestantism "than with the Catholic culture and scheme of values." Indeed, Justice Black, in his 1968 *Allen* dissent, was even clearer about his concerns, referring to "*powerful sectarian religious propagandists*," whom he viewed as "looking toward complete domination and supremacy of their particular brand of religion." Even Justice Clark referred to "powerful sects" in his in 1963 Opinion for the

Court in *Schempp*. And Justice Douglas repeatedly cited Catholic publications in purported support of his view that Catholic schools, under the influence of "priests and nuns," would select those state-financed textbooks "that best promote its sectarian creed." Indeed, Douglas hand wrote an undated note to Black stating that "*I think if the Catholics get public money to finance their religious schools, we better insist on getting some good prayers in public schools or we Protestants are out of business.*"[43]

Countering those views of Douglas, throughout the last sixty years, the Supreme Court's opinions have also manifested a recognition that the formerly largely Protestant public schools now are composed of a more diverse, and plural, student body, representing a host of Christian, Jewish, Muslim, and other religions, as well as atheists, agnostics, and those following no religion at all. Erecting what Justice Black referred to in *Everson* as a "high and impregnable" wall of separation between church and state, the Supreme Court sought to eliminate divisiveness among religions combating for public funding, as well as foreclosing the use of coercion to force public school children to participate in any religious activity at all, no matter how watered-down or general. Justice Brennan's concurring opinion in *Schempp* expressly identifies the growing diversity of religion and irreligion among public school students to justify the strict separation of church and state in all public school activities, observing that "[t]oday the nation is far more heterogeneous religiously, including as it does substantial minorities not only of Catholics and Jews but as well of those who worship according to no version of the Bible and those who worship no God at all." Similarly, the opinions of Justices Black and Frankfurter, in the earlier days, and those of Justices Stevens, Souter, and Breyer today, advance the need to avoid "religious strife" among competing sects as justifying a complete ban on "religious indoctrination at state expense."

The early torrent of fear about Catholic schools began to recede in the 1950s. A different, and more accepting, view of Catholics was fueled by Will Herberg's observations about a shared American Judeo-Christian religion in his influential *Protestant, Catholic, Jew* (1955), by the enormously popular Catholic televangelist Bishop Fulton J. Sheen, by the best-selling Catholic monk, Thomas Merton (whose autobiography, *The Seven Storey Mountain* (1949), shared the best-seller lists with the anti-Catholic works of Paul Blanshard), and by a societal embrace of Catholic anti-Communism in the years following World War II.

But it was not until the critical ten-year period between 1981 and 1991 that the doctrine of strict separation of church and state began to be watered down, and gradually replaced by a doctrine which sought more accommodation, particularly regarding the financing of religious schools. Under Presidents Ronald Reagan and George H. W. Bush, the more conservative Justices O'Connor, Scalia, Kennedy, and Thomas were appointed, and their equally conservative colleague, William Rehnquist, was elevated to Chief Justice in this period.

By the end of the 1990s, when the Catholic school population had diminished to less than five percent of American schoolchildren, the Supreme Court overturned some of its former precedent on aid to parochial schools. In its 1997 *Agostini* decision, for example, the Court

held that there was no longer a presumption of indoctrination when public employees were placed on the property of religious schools, nor an assumption that any aid that directly helped the educational function of such schools was thereby unconstitutional. Indeed, by 2000, a four-member plurality of the Supreme Court in *Mitchell* characterized the Court's prior treatment of "pervasively sectarian" schools as a doctrine "born of bigotry" which "should be buried now" because of its "shameful pedigree," tracing back to the anti-Catholicism of the Blaine Amendment in the nineteenth century. Finally, over the vigorous dissent of four justices, who contended that there should be "no aid to religious mission," Chief Justice Rehnquist and Justices O'Connor, Scalia, Kennedy, and Thomas held constitutional a state voucher program which targeted the underperforming Cleveland, Ohio public school system, even though the vast majority of aid went to parents, both Catholic and non-Catholic, who chose to use the voucher funding to send their children to Catholic schools.

By contrast, the Supreme Court maintained a strict separation between church and state when it came to any sort of religious instruction, speech or symbols on school grounds or in school activities. Protection of pluralism maintained a position of prominence in the Court's approach in this area.

*Edward F. Mannino is a partner at Akin Gump Strauss Hauer & Feld, LLP in Philadelphia.

[1] For the background of the *Everson* case, see Philip Hamburger, *Separation of Church and State* 454-472. Cambridge, Harvard University Press, 2002, and Roger K. Newman, *Hugo Black: A Biography*, supra, at 361-364.

[2] On Paul Blanshard and his works, see John T. McGreevy, *Catholicism and American Freedom: A History* 166-169. New York, W.W. Norton & Co., 2003, and Mark S. Massa, S. J., *Anti-Catholicism in America: The Last Acceptable Prejudice* 59-76. New York, Crossroad Publishing Co., 2003.

[3] On Justice Black's Klan career and views on Catholics and Blanshard, including the quotation from his son, see Hamburger, supra, at 422-434.

[4] The quotations from Justice Black's majority opinion in *Everson* appear at 330 U.S. 15, 16, and 18.

[5] The quotations from Justice Jackson's dissenting opinion appear at 330 U.S. 23 and 24.

[6] For the background of *Engel v. Vitale*, and the text of the New York school prayer, see Paul L. Murphy, "To Pray or Not to Pray: The Supreme Court Says No to Prayer in the Public Schools," II *Historic U.S. Court Cases* 965-971. New York, Routledge, 2001 (John W. Johnson, ed.).

[7] The quotations from Justice Black's majority opinion in *Engel v. Vitale* appear at 370 U.S. 422, 425, 430, and 435.

[8] The quotations from Justice Douglas' concurring opinion appear at 370 U.S. 440, 442, and 443.

[9] The quotations from Justice Stewart's dissenting opinion appear at 370 U.S. 445 and 446.

[10] The text of the proposed Reagan Constitutional Amendment on school prayer is quoted in Edwin Gaustad and Leigh Schmidt, *The Religious History of America: The Heart of the American Story from Colonial Times to Today, Revised Edition* 360. New York, HarperSanFrancisco, 2002.

[11] The quotations from Justice Clark's majority opinion in *Abington School District v. Schempp* appear at 374 U.S. 223, 224, and 225.

[12] The quotations from Justice Brennan's concurring opinion appear at 374 U.S. 240, 267, and 270.

[13] The quotations from Justice Stewart's dissenting opinion appear at 374 U.S. 309, 312, 313, and 316.

[14] The quotations from Justice White's majority opinion in *Board of Education v. Allen* appear at 392 U.S. 245 and 247.

[15] The quotations from Justice Black's dissenting opinion appear at 392 U.S. 250, 252, and 254.

[16] The quotations from Justice Douglas' dissenting opinion appear at 392 U.S. 256.

[17] The quotations from Chief Justice Burger's majority opinion in *Lemon v. Kurtzman* appear at 403 U.S. 612-613, 619, and 622.

[18] The quotations from Justice Douglas' concurring opinion appear at 403 U.S. 628, 629, and 630.

[19] The quotation from Justice Brennan's concurring opinion appears at 403 U.S. 645.

[20] The quotations from Justice White's separate opinion appear at 403 U.S. 662 and 668.

[21] For the view that *Lemon v. Kutzman* was "the high point of legal secularism," see Noah Feldman, *Divided by God: America's Church-State Problem — And What We Should Do About It* 223. New York, Farrar, Straus and Giroux, 2005.

[22] For a review of the many cases striking down aid to parochial schools from *Lemon* through the 1980s, see James Hitchcock, *The Supreme Court and Religion in American Life: Volume I — The Odyssey of the Religion Clauses* 128-139 .

Princeton, Princeton University Press, 2004.
[23] On the emergence of the conservative religious coalition of evangelical Protestants and conservative Catholics, see Patrick Allitt, *Religion in America Since 1945: A History* 150-169, 180-196. New York, Columbia University Press, 2003, and James T. Patterson, *Restless Giant: The United States From Watergate to Bush v. Gore* 133-145. New York, Oxford University Press, 2005.
[24] The quotation from Francis Schaeffer appears in Patrick Allitt, *Religion in America Since 1945*, supra at 156.
[25] The quotation from Bob Jones, Jr., appears in *id.* at 153.
[26] The quotation from Justice Stevens' majority opinion in *Wallace v. Jaffree* appears at 472 U.S. 43.
[27] The quotations from Justice O'Connor's concurring opinion appear at 472 U.S. 68 and 69.
[28] The quotations from Justice Rehnquist's dissenting opinion appear at 472 U.S. 92, 98, 99, 106, and 107.
[29] The "quite wrong" quotation comes from a March 30, 1992 note from Justice Kennedy to Justice Blackmun quoted in Tinsley E. Yarbrough, *David Hackett Souter: Traditional Republican on the Rehnquist Court* 171. New York, Oxford University Press, 2005.
[30] The quotations from Justice Kennedy's majority opinion in *Lee v. Weisman* appear at 505 U.S. 586 and 587.
[31] The quotations from Justice Souter's concurring opinion appear at 505 U.S. 612 and 631.
[32] The quotations from Justice Scalia's dissenting opinion appear at 505 U.S. 631-632, 633, 643, 644, 645, and 646. Justice Scalia explains his view of proper constitutional interpretation in Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 37-47. Princeton, Princeton University Press, 1997.
[33] The quotations from Justice O'Connor's majority opinion in *Agostini v. Felton* appear at 521 U.S. 209, 223, 225, 233, and 234-235.
[34] The quotations from Justice Souter's dissenting opinion appear at 521 U.S. 242 and 243.
[35] The quotations from Justice Thomas' plurality opinion in *Mitchell v. Helms* appear at 530 U.S. 802, 810, and 828-829.
[36] The quotations from Justice Souter's dissenting opinion appear at 530 U.S. 877 and 912-913.
[37] The quotations from Justice Thomas' concurring opinion in *Zelman v. Simmons-Harris* appear at 536 U.S. 677 and 682.
[38] The quotations from Chief Justice Rehnquist's majority opinion appear at 536 U.S. 650, 652, and 662.
[39] The quotations from Justice Stevens' dissenting opinion appear at 536 U.S. 684 and 686.
[40] The quotations from Justice Souter's dissenting opinion appear at 536 U.S. 715 and 716.
[41] The quotations from Justice Breyer's dissenting opinion appear at 536 U.S. 717, 721-722, and 736.
[42] The quotation from Justice O'Connor's concurring opinion appears at 536 U.S. 536.
[43] The quotation from Justice Douglas' undated note to Justice Black is found in Melvin I. Urofsky, *The Douglas Letters: Selected From The Private Papers of Justice William O. Douglas* 113. Bethesda, Adler & Adler, 1987.

TOO BRAVE TO FIGHT

CONSCIENTIOUS OBJECTION DURING WORLD WAR I

BY JAMES MCGOWAN*

In the midst of America's involvement in World War I, the Supreme Court unanimously upheld the constitutionality of the Selective Service Act of 1917, the first draft legislation since the Civil War. In doing so, the Court allowed to stand the Act's provision restricting exemption from combat duty only to members of "well-recognized" religious sects whose creeds forbade participation in war. This stipulation, designed with groups like the Quakers in mind, forced religious and secular conscientious objectors alike to take up arms or face harsh punishment. Because the governing bodies of most of the large churches in America supported the war, adherents to mainstream religious creeds were readily denied exemption, while unaffiliated religious and secular pacifists had little hope of any consideration.

In his brief to the court, civil liberties lawyer Walter Nelles argued that such a narrow exemption provision violated the First Amendment's protection of the free exercise of religion. Specifically, he took issue with the idea of measuring the sincerity of religious convictions strictly in terms of their adherence to doctrinal coherence. Such a restriction was no longer reasonable, he argued, since men's religious convictions could no longer be submitted as a matter of course to organized guidance. As he argued in 1917,

> There are wide differences among conscientious objectors. Some base their beliefs and conduct upon their duty toward God; others upon their duty toward man. Underlying the differences, however, is a unity which permits the treatment of the point of view of the conscientious objector as a single one. … The genuine intensity of belief is the one criterion of its religious character and that of the conduct it induces. Conscientious refusal to take part in the war is an exercise of religion.[1]

In arguing that it was not merely the content, but the intensity of a belief that generated its religious character, Nelles anticipated by some fifty-two years the virtually identical reasoning of the Supreme Court in *Welsh v. United States*, the final case concerning conscientious objection prior to the elimination of the draft in 1973. In that case, the court reversed the conviction of draftee Elliot Welsh for refusing to submit to induction. Finding that Welsh's admittedly agnostic but profoundly moral beliefs were held with the strength of more traditional religious convictions, the majority opined that "all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war" were entitled to conscientious objector status.[2]

When it came to determining the legitimacy of conscientious objection, how did government get from such a conservative and exclusive definition in 1917, to a rather liberal one that effectively accommodated completely secular individual beliefs? It began during World War I, when a relatively small group of objectors brought into sharp focus the intractable problem of conscientious objection in modern America, and who set the stage for the unfolding of consci-

entious objector accommodation in American politics and law. The World War I objectors revealed every problem addressed by major developments in draft policy from 1917 to 1970, but it took American government half a century to catch up.

Again, for World War I, Congress defined legitimate conscientious objection in such a way as to exclude from consideration all but traditional religious pacifists. Furthermore, it provided no alternative to service in the armed forces, instead obligating conscientious objectors to accept whatever service President Wilson might define as "noncombatant." This created some difficulty for hundreds of recognized religious pacifists, who were declared eligible for noncombatant service, but who nonetheless could not reconcile themselves to the idea of serving the wartime military apparatus.

Congress tried to remedy this situation in World War II, opening work of national importance under civilian direction to drafted conscientious objectors who were opposed to military service. During the war, some 12,000 men worked in the Civilian Public Service camps, run largely by the Historic Peace Churches. Furthermore, the 1940 draft law introduced the more open-ended and individualized phrase "religious training and belief" as the standard definition of valid conscientious objection, in contrast to restricting such to membership in a well-recognized peace church. Thus, it opened the way for individual religious pacifists whose beliefs were rooted in, for example, mainline Protestantism or Catholicism to benefit from conscientious objector protection. Roughly 50,000 draftees were classified as conscientious objectors during the war, with over 90% claiming a religious affiliation.[3]

The draft was revived in 1948 as part of the escalating Cold War. This version was similar to its predecessor, except that in terms of recognizing conscientious objection, it kept the phrase "religious training and belief," but expressly defined such as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation."[4] This was an attempt on the part of Congress to limit conscientious objector eligibility to the explicitly religious, while still allowing for some individual variation in the expression of faith. Through several renewals the draft remained in effect right into the Vietnam War, explicitly recognizing religious pacifists and authorizing civilian alternative service.

A few Vietnam-era Supreme Court decisions traverse from the definition of conscientious objection as it stood at the termination of the draft, and back in full circle back to Nelles's phrase "genuine intensity of belief." In 1965, the Court decided three cases, all of which concerned conscientious objectors whose claims were denied because draft boards found them to be grounded in some unorthodox conception of universal morality, and not explicitly based on a belief in God and the human obligations rooted in that belief. One objector derived his beliefs from a "Supreme Reality," another from a "universal power beyond that of man" and a third, Daniel Seeger, for whom the case is known, from a "cosmic order" which commanded an "intellectual and moral integrity" that did not allow for the willful destruction of human life. Ruling in favor of the objectors, the Court found unanimously that Congress's own definition of "religious belief" as that which originated from a "relation to a Supreme Being," meant

that the test of such a belief should be whether it "occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption." Justice Douglas asserted that any contrary construction would violate the "'free exercise' clause of the First Amendment by favoring one religion's conception of a Supreme Being over another's."[5]

Congress amended the section of the draft law relating to conscientious objection in 1967, deleting the reference to belief in a Supreme Being, and relying only on the exclusion of "essentially political, sociological, or philosophical views, or a merely personal moral code." Legal scholars disagree whether or not the change affirmed or overrode the court's decision in *Seeger*, but in any event the issue of a Supreme Being and conscientious objection was legally put to rest a few years later in the *Welsh* case. As Welsh wrote in his original application for conscientious objector status,

> I believe that human life is valuable in and of itself; in its living; therefore I will not injure or kill another human being. …[The] 'duty' to abstain from violence toward another person … is essential to every human relation. I cannot, therefore, conscientiously comply with the Government's insistence that I assume duties which I feel are immoral and totally repugnant.[6]

The court reversed Welsh's conviction, finding that his deeply held moral and ethical beliefs, like Seeger's, functioned as religion in his life, and therefore entitled him to conscientious objector classification. As one prominent historian of the draft has observed, with its decisions in *Seeger* and *Welsh* the Court "essentially rewrote part of the draft law to accept completely secular COs."[7]

Back in 1917, Nelles summarized his argument to the Court thus: "The Conscription Act, by constraining the violation of conscience, prohibits the free exercise of religion to all conscientious objectors, whether their objection rests upon their duty towards God or man."[8] Chief Justice White thought that proposal so unsound he dismissed it without comment. So the draft and its narrow exemption provision stood, and by the war's end hundreds of conscientious objectors languished in military prisons. Their ordeal remains the starting point for the gradual expansion of conscientious objector eligibility and the liberalization of military policies over the course of the twentieth century.

We don't know how many conscientious objectors there were during World War I. According to the War Department's official statement on the matter, published in 1919, only about 4,000 men in the Army camps claimed some form of exemption from military service because of their conscientious objections and only 19% of the total number of inducted draftees granted noncombatant status by their draft boards.[9] But we do know the names of 582 conscientious objectors tried by court-martial and imprisoned during the war, and their stories tell us much about the conscientious objector experiences.

The great difficulty for the Army in regard to conscientious objector issues in the early months of mobilization stemmed from three related developments. First, many men arrived in camp claiming conscientious objections of various sorts without any recognition from their

draft boards. Second, many objectors, including those duly recognized as noncombatants, once in camp, refused to accept duties assigned them beyond those relative to their own maintenance. Third, some objectors rejected any participation in military affairs whatsoever; refusing even basic chores relative to their upkeep, exercise under guard, or participation in formalities such as signing their name or submitting to inoculations.

The large majority of objectors arriving at camp in the fall of 1917 did so as members of their local dispatches of draftees. Once there, their treatment varied widely, ranging from courteous consideration to outright violence. Few objectors in those early months clearly understood their rights, and often found themselves at the mercy of newly-minted officers who had little information regarding their obligations and little patience for such an apparently unnecessary and decidedly unmilitary annoyance. Camp commanders had few if any orders from the War Department, which had intentionally avoided formulating specific measures and which had favored instead a policy of neglect and delay in the hope of attrition. Beyond ordering the segregation of conscientious objectors from the rest of the camp, the War Department remained silent on the matter.

Throughout the fall of 1917, sources from within the camps reported dozens of incidents of the coercion and abuse of conscientious objectors, and civilian conscientious objector advocates increasingly pressured the War Department to establish some sort of uniform policy. Finally, on December 19, 1917, the Secretary of War directed that, until further instruction, "personal scruples against war" would be considered as constituting 'conscientious objections,' and that such persons should be treated in the same manner as other conscientious objectors.

Secretary of War Baker's several biographers agree that the decision reflected his long-standing attitude that any American who objected on ethical grounds to killing his fellow man deserved consideration. The order of December 19 did not solve the problem of what to do with the objectors, but merely recognized and standardized a process already in place. It attempted to correct the inequities produced by Congress's inadequate resolution of the matter and the wide disparity in the actions of the draft boards. By the end of 1917, it was apparent that hundreds of men in the nation's military camps held deep conscientious convictions against war irrespective of any official recognition, and faced the possibility of coercion, violence, imprisonment, and even death at the hands of authorities for their beliefs. Furthermore, leaving aside the issue of secular conscientious objection, the draft act's reliance on local knowledge to determine which religious sects qualified for exemption resulted in significant inconsistencies, especially concerning marginal or socially derided religious groups, such as the International Bible Students Association. In some Pennsylvania districts, for example, members of the pacifist Fellowship of Reconciliation, a loose confederation of Quakers, secular pacifists, and social workers, were granted noncombatant eligibility based on their membership, while in other districts they were not.[10] Neither Congress nor the Selective Service ever delineated which religious sects qualified as "well-recognized," instead deferring the question to the judgment of local and district draft boards. Baker had a choice: allow the democratic

process to run its course and watch hundreds of otherwise blameless Americans suffer sometimes outrageous hardship at the hands of the military, or defy a Congressional mandate and assume sole authority over the question of conscience.

The liberalization and extension of conscientious objector protections removed many of those without noncombatant recognition from a difficult situation to the relative safety of segregation. Once segregated, though, they joined the hundreds of men already in a state of chafing idleness, some segregated now for many months, under a rotating staff of officers at best indifferent to their position, at worst, callous and abusive.

Not until March 20, 1918 did President Wilson issue an Executive Order defining noncombatant service and clarifying his policy regarding conscientious objectors. The order outlined those branches of the service the President deemed noncombatant, namely, and limited to, military support services such as those performed by the Medical Corps, the Quartermaster Corps and the engineers.

For those conscientious objectors unwilling to accept noncombatant service, the long-awaited order directing commanders to continue the policy of segregation and await further orders from the Secretary of War, only deferred resolution of the issue once again. Pending such directions, the order instructed that all such conscientious objectors should not be punished, but also not be allowed "any favor or consideration beyond exemption from actual military service." Finally, the order recommended courts-martial deal promptly with "persons who fail to comply with lawful orders" by reason of alleged conscientious objectors.[11]

The terms of the Executive Order satisfied most of the conscientious objectors. Many conscientious objectors who had previously declined to formally accept noncombatant service without a presidential definition reconciled their religious or personal scruples with the service officially offered to them. For these men, the long-awaited Executive Order cleared the way to the relative safety, security, and distance of unarmed support service, and hundreds, perhaps thousands, of conscientious objectors served in this capacity for the duration of the war.[12] The problem remaining for the Army entailed the disposal of those conscientious objectors who refused noncombatant service. The order appeared to maintain their status as a protected group, but failed to define the limits of that protection, while tacitly maintaining the authority of courts-martial to deal with cases of disobedience. Facing a novel situation without clear instructions, officers at some army camps embarked almost immediately on various disciplinary programs in irregular and unauthorized ways.

By April 1918, officers at Camp Zachary Taylor, were among the first to implement their interpretation of the Executive Order and they segregated as many as seventy-five conscientious objectors. [13] Camp Taylor, near Louisville, drew most of its troops not from Kentucky but from neighboring Indiana, and had among the eastern army camps one of the largest populations of Mennonite conscientious objectors, mostly young men from the farming communities of the northeastern part of the state.[14] The camp also had its share of Quakers, Dunkards, International Bible Students, and men from the Holiness sects of east Kentucky. Most of the

men had been in camp since late September or early October of the previous year, and had gradually found their way to the segregated conscientious objector detachments, where they awaited the final disposition of their cases. Many had, in the meantime, been working temporarily around the conscientious objector barracks and the base hospital. But all, their fates hinging on the government's next decision, had awaited, for several cold and idle months, the President's final definition of noncombatant service.

On April 13, 1918, the Civil Liberties Bureau received word of the arrest and confinement of about forty objectors at Camp Taylor.[15] Thus, they discovered the first systematic effort to discipline uncooperative conscientious objectors at a given camp under the authority and provisions of Wilson's Executive Order. A month later, when the disciplinary episode had run its course, forty-eight objectors awaited a trail by court-martial. Forty-eight brief and nearly identical trials were held at Camp Taylor between May 16 and June 11, 1918. At the conclusion of the trials, forty-six men, most of them recognized and certificated religious noncombatants, headed to Fort Leavenworth under sentences of at least ten but as many as twenty years. Two of the men, Walter Sprunger, a Mennonite from Berne, Indiana, and Charles W. Bolley, a Dunkard from Mongo, Indiana, would die there. The path leading from the conscientious objector barracks at Taylor to the disciplinary barracks at Ft. Leavenworth serves as a model of the railroading that became the customary procedure the Army used to discipline conscientious objectors throughout the war.

For fifteen days in April and May 1918, officers at Camp Taylor took details of, typically, ten men from the conscientious objector barracks, marched them to the base hospital, and ordered them to work. The work in question consisted mainly of raking grass seed into prepared ground, for the express and benign purpose (so officers stressed) of beautifying the area for the benefit of the patients. Occasionally, some details were ordered to cut sod, or rake a path, or level ground; in sum, all work relative to cultivating the area around the base hospital. The officers involved were determined to put the conscientious objectors to useful work, and the conscientious objectors, for their part, were determined to resist further military instruction, cost what it may. Both parties thought themselves justified by both the Executive Order and their conscientious convictions.

The passage in the Executive Order that engendered so much confusion lay buried in the third paragraph. It read,

> [All] persons not accepting assignment to noncombatant service, shall be segregated as far as practicable and placed under the command of a specially qualified officer of tact and judgment, who will be instructed to impose no punitive hardship of any kind upon them, but not to allow their objections to be made the basis of any favor or consideration beyond exemption from actual military service which is not extended to any other soldier in the service of the United States.[16]

This passage, when taken in conjunction with the part of the order recognizing the "discretion of courts-martial" in dealing with "persons who fail or refuse to comply with lawful orders," seemed to officers at Camp Taylor to authorize the discipline of conscientious objectors

who refused noncombatant service and who subsequently demanded, through their refusal of orders, exemption from more than "actual military service." Evidence suggests that officers deferred the question of whether or not work which amounted practically to light gardening constituted "actual military service" to future authorities, and decided to put those conscientious objectors who refused noncombatant service on such duty, at simple tasks that "any other soldier" might be required to do.

With the exceptions of the exact work in question and the individuals involved, each day's episode played out nearly identically to the previous, the series assuming as time went by the character of a farce. Each morning a corporal rounded up a group of men and marched them to the hospital. There a lieutenant led them to the rear of the hospital headquarters, near a porch filled with convalescing soldiers, where they found a number of tools, usually rakes, laid out for their use. Each time, the corporal gave the group a "general command" to take up the rakes and begin work. Typically a few of the men consented, but some, generally two or three but as many as six, remained where they stood. Upon instruction from the lieutenant, the corporal then proceeded to line the disobedient men up, and, presenting a rake to each one at a time, order them individually to take the tool and commence work. After each man refused the order, the superior officer took his turn and moved down the line, extending a rake to each man and ordering him to work. Those conscientious objectors who refused both officers were then arrested and confined in the guard house, while those who had consented to work returned to the conscientious objector barracks.

The first court-martial convened on May 16, 1918, hearing the trials of James Cook, a Methodist from Shawneetown, Illinois, William Goppert, a Dunkard from North Webster, Indiana, and James Murch, an International Bible Student from Indianapolis. Continuing through early summer 1918, as many as nine per day, the trials concluded on July 11. All forty-eight men were tried under the 64th and 65th Articles of War, which covered disobedience, and all were found guilty of all charges and specifications. Typically, the brief trials followed a uniform pattern. After a perfunctory reading of the charges and the Articles of War, three or four witnesses testified on behalf of the prosecution, after which the accused, who in all cases refused military counsel, were given the opportunity to take the stand under oath or to make an unsworn statement to the court. All but one of the men chose the latter. Afterwards, without the presence of counsel to argue, and in light of almost every conscientious objector's refusal to cross-examine the witnesses, there was very little left to do. The court simply closed and reopened a few minutes later to deliver its verdicts and sentence.

At each trial, the accused was given a chance to explain his position and offer evidence in his defense, sometimes with the court's assistance. Few had anything to say other than quote a few Bible verses to the court, and reiterate, apologetically, their virtual helplessness in the matter, the work in question being undoubtedly, in their minds, unconscionable military service. The conscientious objectors had waited for months, hoping for the President's imminent but delayed directive to release them from military custody into some sort of civilian

service. When the Executive Order failed to do so, the only acceptable alternative was to settle the matter finally by refusing further military direction and accept the consequences. Their faith had, after all, prepared them for such martyrdom.

Of the forty-eight conscientious objectors tried at Taylor in May and July of 1918, more than half belonged to various Mennonite denominations, united in 1918 by, among other things, their marginalization in American society and alienation from the workings of government. As inheritors of a long ethno-religious tradition of nonresistance and a "two-kingdom" theology that rendered the wishes of the state irrelevant to matters of religion and conscience, these Mennonite conscientious objectors justified their refusal in similar terms.[17] Before quoting several verses from the book of Matthew, Homer Curtis told the court,

> Our church, as is well known, is strongly opposed to all forms of military service, and as I consider that work over there at the Hospital noncombatant work — in the form of noncombatant work, although very simple in itself, I felt that I could not do it in view of my convictions and my creed. … I do not wish to be a shirker; I would be willing to do work of some kind that is useful and constructive, in some way that would not violate my convictions.[18]

Jesse Brenneman, another Mennonite, believed noncombatant service "inconsistent for a Christian to take, if he believes that combatant service is also wrong." Brenneman recounted for the court the story of the stoning of the martyr Stephen, from the book of *Acts*, and Paul's complicity therein, comparing the idea of noncombatant service to Paul's guilt for standing by and tending the clothes of those who were actually doing the work of stoning the martyr. Brenneman, like the other Mennonite conscientious objectors, stressed his willingness to work for the government "in any capacity that does not signify by the nature of the work that it is military service."[19]

Philip Pound, an International Bible Student from Leesburg, Indiana, echoed Brenneman's wariness of complicity, telling the court that, "in the sight of God … even beautifying the camp I consider would be giving my moral support, at least, to the war."[20] For Lawrence Williamson, a Quaker from Shirley, Indiana, kept in the Taylor Guard House for ninety-four days before being brought to trail on July 11, 1918, the simple fact that the work was under "direct supervision of military officers" was enough for him to deem it unacceptable military service.[21] Allen Christophel, a Mennonite from Goshen, told the court he considered the work part of the "military arm" of the government.[22]

Together, the conscientious objectors at Taylor determined that the "noncombatant" service formally offered to them in March 1918 was part and parcel of what many conscientious objectors would come to call the "military machine." Some regarded the work in question, as trivial or agreeable as it seemed, as necessary to the operation of the army as the fighting itself. Others reasoned that consenting to perform it amounted to direct participation in the machinery of combat. Still others simply could not formally submit to and cooperate with the military, an institution whose practical purpose was the destruction of human life. These conclusions put them in the difficult position of investing such a trivial affair as raking dirt with

powerful moral symbolism. As Lloyd Blickenstaff, a Dunkard from North Manchester, Indiana, told the court,

> Now, it may seem foolish to you men for me to stand here before you and say that I refused to cut sod because I am conscientiously opposed to war; but the reason I refused is not because I thought cutting a few shovels of sod would help the war, but by doing so, that is, taking part in what I thought to be noncombatant service, I would give my moral assent to the thing which I think is wrong, and give it my moral support."[23]

Like Blickenstaff, the other religious conscientious objectors at Taylor, most adherents to centuries-old creeds of nonviolence, could not give their "moral assent" to war by formally submitting to military direction, even though many of them had previously worked around camp on a voluntary basis. Long accustomed to separating civic from spiritual obligations, while awaiting the Executive Order they had justified their limited participation in the affairs of camp from several worldly perspectives. So long as the hope that they might be released from the military establishment into civilian custody remained, the Taylor conscientious objectors cooperated as best they could. When the Executive Order finally required their full compliance, in order to maintain their religious integrity they had little choice but to resist. Confronting the rigidity of the religious conscientious objectors' position, the military administration could only resort to specious rhetorical convolutions to undermine and dispose of it.

On June 13, 1918, reviewing jointly the records of eleven trials, including five Mennonites, three Dunkards, two Pentecostals and one Methodist, Acting Judge Advocate General James J. Mayes distilled the legal question, referring to the provisions of the Executive Order. "Did the accused," Mayes asked, "by declining to accept non-combatant service also acquire the right to refuse to perform any work which they might be ordered to do which, in their judgment, offended … their personal scruples against war? … It can not be seriously contended, that the Government ever contemplated acquiescence in a course of procedure on the part of conscientious objectors so subversive of military discipline." But what course of procedure *did* the Government contemplate in the terms of the Executive Order? The President therein instructed that all objectors "unwilling to accept" assignment to noncombatant service be segregated and protected from "punitive hardship." However, officers were explicitly advised "not to allow their objections to be made the basis of any favor or consideration beyond exemption from actual military service." This final provision was paramount in determining the legality of the proceedings. Accordingly, Mayes offered the following:

> An apparent misapprehension exists in the minds of the accused as to the meaning of the words 'actual military service.' They argue that any work which they may be ordered to do about the encampment is to their way of thinking 'military service.' It may be conceded without argument that this is true, and it may be admitted in addition, that any order given the accused by an officer or non-commissioned officer is perforce a military order. But this line of argument leads nowhere. The accused are soldiers. The [Executive] order upon which they rely is a military order, and it must therefore be interpreted in a military sense.

"The work which they were ordered to do was," Mayes concluded, "according to military interpretation, essentially non-military in character, though admittedly connected with the maintenance of the military establishment."[24] This remarkable interpretation, that work of an "essentially nonmilitary" character, although "military service," did not constitute "*actual* military service," was repeated throughout the war, in hundreds of cases, to sustain the findings and sentences of the courts trying conscientious objectors. Reviewing authorities consistently focused on the *form* of the work in question, and not, except in dismissal, on its *function*, the characteristic of supreme importance to the conscientious objectors.[25] Time and again, authorities determined that the trivial and non-martial nature of the work in question — work such as raking grass seed, planting flowers, shoveling garbage, or cleaning stables — did not constitute the "actual military service" from which conscientious objectors who declined to accept noncombatant service were exempted.

The Executive Order, intended to resolve the conscientious objector situation once and for all, failed to extend a nonmilitary alternative, in wartime, to hundreds of drafted religious pacifists whose creeds forbade participation in war. Although many would eventually accept agricultural furlough when offered it later in 1918, for those men unfortunate enough to find themselves at army camps where officers determined early on to discipline the conscientious objectors, disobedience was the only acceptable course of action. The government, for its part, had already gone to considerable lengths to accommodate conscience. Subverting the instructions of Congress, the War Department extended conscientious objector protections to all who applied, whether their objections rested on religious or personal scruples. With the Executive Order, it offered the safety and geniality of unarmed noncombatant service to all of them. However, its fatal mistake was in allowing the conscientious objectors to languish in camp for months on end, under the false impression that they would eventually be released into some form of civilian service.[26] Beginning at Camp Taylor, belated demands, that those conscientious objectors who had held out for long months formally accept the military service for which they were drafted, were met with stubborn refusal. Placed in this difficult and intolerable position, required by the Executive Order to assign conscientious objectors to noncombatant service, but prohibited from imposing "punitive hardship" on those who would not accept it, camp authorities generally acted as they saw fit.

On March 16, 1918, as part of a springtime reorganization of mobilization, and a specific response to the rising chorus of rural statesmen complaining of labor shortages, Congress enacted a law authorizing the Secretary of War to furlough enlisted men to engage in civil work in the national interest. Within a few weeks, when upon the publication of the Executive Order it became clear that a significant number of otherwise acquiescent conscientious objectors would indeed refuse noncombatant service and possibly subject themselves to disciplinary action, some saw in the furlough law a potential resolution to a decidedly difficulty problem. So by the beginning of summer 1918, with two drafts completed, a trained, equipped and independent quarter-million strong army ready to mobilize fully against the Germans, nearly a

year after the Americans landed in France and eight months since the first Americans dug their trenches, the machinery of state was finally ready to accommodate the few hundred conscientious objectors who would rather go to jail than shoulder a weapon or a tool for the war. Approximately 1500 conscientious objectors were eventually furloughed to agricultural service. Many of these, because they were literally farmed out as help to private citizens under little supervision, were subject to abuse and exploitation. Some even choose to return to camp to face a court-martial.

The Armistice of November 1918 did not bring an end to the conscientious objectors' ordeal. While many pacifist religious conscientious objectors were released in the weeks following the war, many more, especially Socialists and other political objectors, remained in prison well into 1920. Over a dozen conscientious objectors died in military custody. All of the conscientious objectors, the vast majority of whom were willing to serve their country in some way they could reconcile with their consciences, sacrificed months and years of their lives to maintain their religious or ethical integrity — sacrifices from which subsequent generations of drafted men reaped significant rewards.

* James McGowan is a graduate student in the Department of History at the University of California-Davis.

[1] "Nelles Brief," ACLU Papers, reel 5, vol. 43, p. 91.

[2] *Welsh v. United States*, 398 U.S. 333.

[3] John Whiteclay Chambers II, "Conscientious Objectors and the American State from Colonial Times to the Present," in *The New Conscientious Objection: From Sacred to Secular Resistance*, eds. John Whiteclay Chambers II and Charles C. Moskos (Oxford: Oxford University Press, 1993), 37.

[4] Ibid., 39.

[5] *United States v. Seeger*, 380 U.S. 163.

[6] *Welsh*.

[7] Chambers II, "Conscientious objector s and the American State from Colonial Times to the Present, 42.

[8] "Nelles Brief."

[9] United States War Department, *Statement Concerning the Treatment of Conscientious Objecto s* (Washington: Government Printing Office, 1919), 24.

[10] E. Evans to O.G. Villard, June 21, 1917, ACLU Papers, reel 3, vol. 18, p. 57, and E. Evans to Roger Nash Baldwin, December 11, 1917, ACLU Papers, reel 3, vol. 18, p. 62.

[11] *Statement*, 38-39.

[12] After some initial confusion, the War Department ruled further on April 18 that those Conscientious objectors who had accepted noncombatant service would not be required to bear arms. See *Statement*, 40.

[13] By April 30, 1918, the American Friends Service Committee thought the total group of Conscientious objector sat Taylor numbered about 85 men. See F.A. Evans to Roger Nash Baldwin, April 30, 1918, ACLU Papers, reel 3, vol. 18, p. 20.

[14] Gerlof D. Homan, *American Mennonites and the Great War, 1914-1918* (Scottdale: Herald Press, 1994), 101.

[15] F.A. Evans to Roger Nash Baldwin, April 13, 1918, ACLU Papers, reel 2, vol. 12, p. 115.

[16] *Statement*, 39.

[17] For a recent discussion of the Mennonites's relation to the modern American state, and a summary of their theology, see Perry Bush, *Two Kingdoms, Two Loyalties: Mennonite Pacifism in Modern America* (Baltimore: The Johns Hopkins University Press, 1998).

[18] GCM # 115068, Records of the Office of the Judge Advocate General (Army), RG 153, National Archives.

[19] GCM # 115067, Records of the Office of the Judge Advocate General (Army), RG 153, National Archives.

[20] GCM # 115729, Records of the Office of the Judge Advocate General (Army), RG 153, National Archives.

[21] GCM # 119479, Records of the Office of the Judge Advocate General (Army), RG 153, National Archives.

[22] GCM # 115379, Records of the Office of the Judge Advocate General (Army), RG 153, National Archives.

[23] GCM # 115066, Records of the Office of the Judge Advocate General (Army), RG 153, National Archives.

[24] GCM # 115202, Records of the Office of the Judge Advocate General (Army), RG 153, National Archives.

[25] A notable exception in the Taylor cases is the opinion of Major Scott Hendricks, the camp Judge Advocate and initial reviewing authority, rendered in the case of the Mennonite John Ramer on August 20, 1918. Hendricks wrote, "In

view of the fact that this office has failed to discover an adjudicated meaning of the word 'actual', as used in Paragraph 3, General Order No. 28, it takes the position that the only military services from which this accused was exempted, were those services which are generally recognized as peculiarly the function of some arm or branch of the military service. For example, carrying a rifle, under military orders, being a normal function of the infantry arm, would be *actual* military service, as would, perhaps, assisting a surgeon in an operation, under military orders, such being peculiarly a function of the medical department. But in the instant case we have no such service. We have agricultural service to be performed, it is true, under military orders, but nevertheless not peculiarly a function of any arm or branch of military service. It is an incident to, rather than an actual military service. It is no more 'actual' military service than is going to bed at taps and rising at reveille." Hendricks's unique exegesis notwithstanding, the tactic overwhelmingly favored by reviewing authorities was simply to render the work in question "essentially nonmilitary" by virtue of its ostensibly inoffensive form. GCM # 119478, Records of the Office of the Judge Advocate General (Army), RG 153, National Archives.

[26] Mennonite historian Gerlof Homan describes several meetings between various Mennonite delegations and Secretary Baker in the summer and fall of 1917, including one on September 1 which left a Mennonite War Problems Committee assured that conscientious objectors would be held in special detention units and not required to wear uniforms, drill, or accept noncombatant service, but rather be assigned "to other tasks not under the military arm of the government." Homan, 54.

DIVINE INSCRIPTIONS IN CONTEXT

IN GOD WE TRUST ON U.S. COINS AND CURRENCY

BY BIFF ROCHA*

Those opposed to religious words or symbols in public life, and especially on government property, frequently put forth the claim that the United States is a secular nation operating under an absolute separation of church and state. The account some have provided for how the national motto, "In God We Trust" came to appear on U.S. coins and currency, suggests the will of two religious people manipulated the system and injected religion into the secular design. This paper rejects such a claim and attempts to show how the religious inscriptions that have become part of our national symbols are the result of popular demand and general religious sentiment. By examining the history of how the motto "In God We Trust" came to reside on both U.S. coinage and currency, I suggest that the motto is an expression of the general popular desire for the country to recognize divine guidance and protection; in other words, the motto reflects the sentiments and the workings of American democracy.

This paper will focus on the testimony and *Written Statement: God On Our Coins* of Jon G. Murray before the Congressional subcommittee on Consumer Affairs and Coinage on Sept. 14, 1988. As Mr. Murray relates the history of the United States, he states his central claim near his conclusion. He writes, "two fanatically religious individuals separated by some ninety-two years of history were principally responsible for the events that culminated in the placing of an unconstitutional religious motto on the United States coins and currency." Yet as a representative of those citizens who object to the use of a religious motto on public currency, this battle is only one small scuffle in a larger cultural war. In a secular rendition of a Jeremiad this story tells a tale of how this nation has wandered from its original nonreligious moorings, and the explicit secular intention of the Founding Fathers. Over time, through small concessions and manipulation by radical fundamentalists, religion has crept into the sacred spheres of the public arena and government. Such infection of the civic and governmental spheres permits discrimination by the religious against minority religions and those of no religion. In Murray's view, while today the vast majority of Americans favor the secular government, they are inattentive, and need to be alerted by a prophetic voice, to the dangers of creeping religiosity. Left unchecked the few fundamentalists of society will willingly turn America into a theocracy. Ultimately, according to this story, this tolerance of the public expression of religion will lead to religious wars setting citizen against citizen in an all out holy war. This story may be a minority position in our present day, but let us take a moment to consider how stories grow.

So I ask you, what kind of tree did George Washington confess to chopping down? If you fit within the majority of Americans you will remember that when he was a little boy, George Washington was questioned about a certain hewed cherry tree. What is more, you might recall that when questioned, George could have equivocated, but rather it was a sign of his noble

character that the young boy responded with, "I cannot tell a lie. It was I who chopped down that cherry tree." While I do not have any statistical support I will, pardon the pun, go out on a limb and suggest that within the two hundred plus years that America has existed as a nation, there have been a number of cut trees. Why do we remember this one? Certainly there have been a number of boys caught in questionable circumstances, many of whom told the truth and many of whom squabbled over the precise definition of particular words such as "is" or "chopped down." How has this president become known for telling the truth? The power is in the story. When it comes to stories it makes a difference how the story is told, where the story is told and how often the story is told. Many modern cynics have commented that history is simply the tale told by the winner. Or worse yet, some say that a truth is just a lie that has been repeated often enough that a majority of people have come to believe it.

Tucked away in the bottom corner of Ohio lies the tiny college town of Oxford which serves as home to the red-brick wonder that is Miami University, America's Public Ivy. It was a faculty member of Miami University, William Holmes McGuffey, who situated the story of George and the cherry tree within the pages of *McGuffey's Eclectic Readers* which served as a sort of classroom catechism for Protestants of 19th century America. *McGuffey's Eclectic Readers* were among the first textbooks in America that were designed to become progressively more challenging with each volume. These graded readers told moral stories of virtue and character in line with the popular view of public schooling which was to instill patriotism while providing a moral education and spiritual formation. The *McGuffey's Eclectic Readers* became *the* American textbook and endowed William McGuffey with the title, schoolmaster to a nation. He attempted to give the public schools a curriculum that would instill in their graduates Christian beliefs and habits necessary for our emerging society. The tale of George Washington and the cherry tree has been read over and over again in schools across the nation by generations of students. The tale has become part of American history.

And now I must confess to a flaw. I am more of a fact checker than a story teller. As a teacher of religion I encounter a number of students who are often easily enticed by the newest movie or clip on YouTube. When Dan Brown's infamous *The Da Vinci Code* was published in 2003 I was hounded by a number of students to read the book which revealed dangerous secrets the Vatican would prefer to hide. It indeed became very popular, selling over 64 million copies, topping the New York Best Sellers list and now having been translated into forty-four different languages. After a year of trying to avoid conversations about *The Da Vinci Code* I finally succumbed to the pressure and read the notorious piece of pulp fiction. While I would not categorize it as great literature, my evaluation found it to be an entertaining and witty story. I felt, however, that I had somehow failed my students who had entertained the book as a serious interpretation of history. How could they know so little that they were unable to immediately recognize that this self-identified work of fiction was built upon historical inaccuracies, literary inventions and outrageous theological and historical claims that were taken for granted as fact? As a result I began to catalog some of the inaccuracies of the book. In class I would list

the errors in history, theology, science and art criticism. But after forty-five minutes of admittedly brilliant lecturing I would hear my students whispering to one another as they left the class, "But what if the story is true?" There is power in the story, in where it is told, in when it is told and in how often it is told.

My concern today is the story of the American people. Did the pioneers come to these shores to erect a massive wall separating society from the dangers of religion which needed to be penned up or held back? Or was it a spiritual pilgrimage which brought the pilgrims here, to settle colonies where religion and reality were seen as integrated and necessary?[1] Obviously I have chosen to represent the most contrary extremes of telling this tale, and a great deal of variation and nuance could be added. But from a distance the stories are basically rivals. Secular history emphasizes the aspects of America's heritage and the Founding Fathers which are not merely neutral but range from concerned to hostile towards religion. Meanwhile spiritual history highlights aspects of the American culture which allow or even encourage belief in the divine.

As stated at the outset, I wish to focus on the secular story as told by of Jon G. Murray in his *Written Statement: God On Our Coins* given before the Congressional subcommittee on Consumer Affairs and Coinage. I have selected Mr. Murray's presentation for several reasons: first, his comments are representative of many who oppose the use of the national motto, "In God We Trust" being applied to government monies; second, Mr. Murray is rather straightforward and honest in his claims; and third, Mr. Murray's congressional testimony is widely publicized and cited by numerous sources in this debate. By examining the history of how the motto, what Mr. Murray will elsewhere identify as "religious graffiti," came to reside on both U.S. coinage and currency, I will suggest the motto is an expression of the general popular desire for the country to recognize divine guidance and protection; in other words, the motto reflects the sentiments of the democracy.

Mr. Murray's story will be given here in summary form but it is easily available in its fuller version on the World Wide Web. Originally I discovered Mr. Murray's testimony at *www.Infidels.org*, but a quick search of the Internet revealed Mr. Murray's statement was posted on numerous atheist related websites such as *www.skepticfiles.org*, *www.atheists.org*, and *www.positiveatheism.org*. Clearly Mr. Murray's words resonate with organizations that are adhering to a secular worldview and thereby advocating a strict separation of church and state. But what many people may find disturbing is that Mr. Murray's version of the story has found its way into questionably neutral reference sites such as ReligiousTolerance.org and the online encyclopedia, Wikipedia.

The *Written Statement* opens with an outline suggesting Mr. Murray's main points. After a "Preface" and "Opening Statements" the paper discusses "E pluribus Unum," "The National Motto," "Post Civil War Religious Fanaticism," "An 1861 Letter of Correspondence," "Theodore Roosevelt Disapproved," and finally "Lyndon B. Johnson's 1955 Bill." The statement ends with a section entitled, "Conclusion," followed by the notes. The primary claim put forward in this

story establishes the United States as an intentionally secular nation. Early in the statement, Mr. Murray begins:

> Our Constitution was a pioneer document among the founding documents of nations in that it nowhere contained a single reference to a deity or divine inspiration. Instead it began by rooting its authority in "We the People," a direct and poignant departure from the divine right of kings from which so many of our forefathers fled to these shores. The importance of the doctrine of separation of state and church for all Americans cannot then be overstated. It was the marriage of church and state that compelled many of the settlers and immigrants to this country to flee their native lands and seek a country where religion was not integral part of the government.[2]

As Mr. Murray introduces his section on the Civil War, he supports his claim of American secularity as evidenced by its coinage: "The coinage, at that point in history, was totally secular; as clean from a mention of god as was the Constitution."[3] This transitional sentence should clarify and answer for the audience the obvious question. If the will of the Founding Fathers, and the majority of Americans, is for America to be a secular nation, how did mention of God find its way onto the national coinage?

Mr. Murray describes an attempt by some very influential people, after the Civil War to pass a constitutional amendment to acknowledge Jesus Christ as the source and authority of our civil government. While the amendment failed, one of the backers of the amendment, James Pollock, was selected by President Abraham Lincoln to become the Director of the U.S. Mint in 1861. Mint Director Pollock created the new motto "In God We Trust" and submitted it to Congress for approval. As Mr. Murray writes, "Mint Director Pollock had carte blanche and could, at his discretion, Christianize our coins."[4] Note the directionality included in Mr. Murray's developing metaphor. The coins and the Constitution were initially "clean" and only later were the coins soiled by "religious graffiti" and "Christianized." Mr. Murray's next sentence makes the implied theme of trickery explicit. "What could not be done through the will of the people was done through the scheming of several men." With the Civil War Murray described the impulse to put God on the national coinage as the work of "religious fanaticism."

Years later, with the rise of the Cold War, the desire for national expression of the spiritual is attributed by Mr. Murray to "the hysteria of McCarthyism." He describes the goal of the religious community to be the "capture [of] the symbols of the nation."[5] Drawing parallels to the earlier legislative act, Mr. Murray writes, "Just as in the case of Rev. Watkinson in 1861, one letter prompted the wheels of the executive branch into motion and on June 7, 1955, H.R. 619 *Providing for the Inscription of 'In God We Trust' on all Unites States Currency and Coins*, was introduced to the House."[6] President Johnson signs into law a bill that requires the motto on currency in addition to the coinage, as well as recognizing officially the motto "In God We Trust" as an American national motto.

As Mr. Murray comes to the end of his story he reaffirms his primary claim that America intends to be a secular nation, and expands his secondary claim that a few tricked the many to add religion to certain symbols of American society.

> We can see from the foregoing brief history that two fanatically religious individuals separated by some ninety-two years of history were principally responsible for the events that culminated in the placing of an unconstitutional religious motto on United States coins and currency. The issue of coin and currency mottoes was never submitted to the electorate for any type of vote. It was not by the overwhelming voice of the people that a religious motto was interjected into our coins, currency, national motto, and pledge. The events of 1954, 1955, and 1956 in regard to the establishment of religious mottos slipped through Congress almost unnoticed in the midst of the McCarthy reign of terror.[7]

Mr. Murray appeals to the committee as they consider redesigning the national coinage to select symbols that will not divide the country into "religionists and secularists."

Earlier in his testimony speaking for those against the divine inscriptions, Mr. Murray stated, "We would like to propose the substitution of the phrase 'E pluribus Unum' for the motto 'In God We Trust.'"[8] He accurately recounts that the Congress of 1776 appointed Benjamin Franklin, John Adams and Thomas Jefferson to draft a design of the Great Seal of the United States. The design ultimately displayed an eagle behind a heart-shaped shield holding an olive branch in one claw and arrows in the other, while in its beak flowed a scroll bearing the motto "E Pluribus Unum." Mr. Murray goes on to affirm, "it can be clearly seen that the motto 'E Pluribus Unum' meaning 'One Unity Composed of Many Parts' is a fitting motto to describe the Constitution of the United States as a document …"[9] Today one may view the Great Seal of the United States by examining the reverse side of any one dollar bill.

While there is much which could be said in response to Mr. Murray's *Written Statement* and testimony, I will select a few key points to dispute in each of his two main beliefs: 1) America was founded as a secular nation; 2) two fanatically religious individuals tricked the many. For the first claim I will target the words "founded" and "secular" while in the second claim I will explore the "two" vs. "many" issue, and examine the question of deception.

The founding of the Unites States and the will of the Founding Fathers are tightly intertwined in Mr. Murray's account. The way the author tells the story of the founding of the United States, and describes the will of the Founding Fathers, suffers from the same mistaken assumption of a unified position or plan. In his oral remarks Mr. Murray says, "The United States was the first experiment in the Western World to set up a secular government … having come from nations that were essentially theocracies, having seen theocracies develop among the colonies, and noticing the abuse therein, all references to God and religion were deliberately excluded from the Constitution."[10] I hope to deal with the absence of God from the Constitution in a later article, but for now I wish to focus the reader's attention to Mr. Murray's notion of progress and design. In his book, *American Catholicism*, historian John Tracy Ellis addresses the limited perspective of many histories of the United States which tend to be built onto a framework of purposeful progress.[11] Such accounts start with the English colonization of the Eastern shore, slowly and steadily progress westward developing the wilderness into cultivated farming land and then building up the urban centers. Mr. Murray has his own secular version of what, as Ellis points out, has been the dominant Protestant story.

In examining the settlement of North America the particulars of history illustrate that there was no such unified grand design. Before the English permitted merchants and pilgrims to visit the new world, Catholic Spain and France preceded Anglican England in establishing permanent settlements by nearly a century. The Spanish explored Central and South America while the French occupied most of what is Canada today. Within the borders of what is now the United States, Spanish explorers Ponce de Leon and Vasquez de Ayllon opened Florida in 1521 with the intent of converting the natives to Catholicism, while the French, motivated by similar concern, navigated the Mississippi and Great Lakes regions. By 1542 the plains of Kansas gave way to missionaries such as Juan de Padilla. The settlement of America was random and competitive, with settlements in the Florida, New Mexico and California moving northward, while others from Michigan and Ohio following the rivers moved in a southerly direction. Given the chaotic nature of America's settlement it is difficult to ascribe one method or perspective to the country. Likewise we should be wary when individuals state the "position" of the Founding Fathers in the singular.

The phrase "Founding Fathers" is generally applied to the governmental leadership that directed the colonies through the American Revolutionary War. As signers of the Declaration of Independence or delegates to the Constitutional Convention, these men set the political course for what would become the United States of America. In modern times a great deal has been written on the intellectual formation and political mindset of these men. Partly motivated as an attempt to draw out the original intent of the Founding Fathers for understanding the relationship of religion and politics envisioned in the American democratic experiment. Unfortunately the search for the historical founders suffers from a common plight of scholarship, where the founders described frequently mirror their author. Authors on the modern day political right sometimes describe the Founding Fathers as Born Again Evangelical Christians who based our government solely on the Bible. This reading of history calls for a return to America's Christian roots and some seek a preferential treatment of Judeo-Christian practices. Meanwhile, the Founding Founders of those on the modern day political left are deists, atheists or secularists who allow no room for religion in the operation of the State. This historical interpretation calls for the removal of any religious expression outside of the private sphere. For example Mr. Murray states, "In 1776, our fathers endeavored to retire the Gods from politics … to commemorate the intentions of the Founding Fathers [on the] new coinage, the Constitution alone, secular in origin, secular in intent, secular in content should be commemorated."[12]

Such scholarship on both sides suffers from a few problems which contribute to increased polarization. First, treating the Founding Fathers as a group forces upon them a unified worldview. As with any group there will be differences in education, philosophy and perspective. Each individual should be studied and appreciated on his own. Second, there is frequently a lack of balanced historical and literary contextualization. As political leaders many of these men wrote a great deal, some articles, books, notes, papers, and speeches. It is fairly simple to

select and list quotations for or against religion by the founders to give a predetermined impression. For example, John Adams, the second President of the United States, is often quoted as saying, "This would be the best of all possible worlds, if there were no religion in it!" which Adams did indeed write in a private letter to Thomas Jefferson on April 19, 1817. But reading the surrounding text changes the connotation of the quotation:

> Twenty times in the course of my late reading have I been on the point of breaking out, "This would be the best of all possible worlds, if there were no religion at all!!!" But in this exclamation I would have been as fanatical as Bryant or Cleverly. Without religion, this world would be something not fit to be mentioned in polite company, I mean hell.

Not only are more extensive excerpts necessary for a proper understanding of the person's intent, but background research needs to set the specific person within an historical context. Adams, for example, like many leaders of his day, viewed European Catholicism through both a political and theological lens. This then affected his distaste for Catholic involvement in governmental affairs. As such his comments on "religion" must be distinguished by the group to which Adams refers. A third habit which may alter the mental picture of these men is the tendency to focus on the famous few. The names Thomas Jefferson and Benjamin Franklin are easily recognized and these men have been the subject of numerous studies and biographies. Yet their religious opinion differs significantly from one another, and furthermore both differed from the numerous but less well known and similarly significant Founding Fathers such as Charles and Daniel Carroll, Jonathan Dayton or Oliver Ellsworth. The Founding Fathers were the cultural elite of colonial society. They were well educated and most engaged in multiple careers simultaneously. Of the fifty-five Convention delegates, thirty-five were trained lawyers. As such, many of these intellectuals were also trained theologically. Hugh Williamson earned an official license to preach in Connecticut and James Madison pursued a degree in Presbyterian theology. Abraham Baldwin was a minister and served as chaplain to the Continental Army and was offered a prestigious teaching position at Yale as a professor of divinity. Previously mentioned Oliver Ellswoth became the third Chief Justice of the U.S. and was the person to coin the phrase, "The United States of America." His degree in Theology was earned after studies at both Yale and Princeton on the subject. These are just a handful of examples showing that the label deist or secularist should not be used to describe the entire collection of men we call the Founding Fathers. Finally, regardless of how one finally characterizes their beliefs one cannot assume there to be corresponding beliefs within the general population of the colonies. Even those Founding Fathers who held a skeptical view of organized religion recognized the "common man" was inherently and overwhelmingly spiritual. To make this new nation work it had to be shaped not just for an oligarchy of Enlightenment elites, but rather it had to incorporate all of the many different people in the land into one national unity.

Continuing to question the position that America was founded as a secular nation I should now like to turn our attention to the definition of the term secular. Mr. Murray does not pro-

vide a dictionary definition for the term secular, but as we have seen earlier, he does provide his audience with an operational definition of the concept: "The coinage, at that point in history, was totally secular; as clean from a mention of god as was the Constitution."[13] This definition requires a thing to contain an explicit reference to God to be regarded as religious. It also assumes that anything not containing such an explicit reference to God is understood to be secular. The effect of defining the term in this way is to produce a very narrow category "religion" relative to an enormous category "secular." When applying this operational definition, many items typically associated with religion (Byzantine icons of Saints, a nun's habit, rosaries, and even the Buddhist religion) become "secular" since none of these items contain an explicit reference to God. Stepping back from my specific criticism of Mr. Murray's definition, I would like to suggest generally that any definition of "religious" or "secular" that relies on the pair operating as a dichotomy is going to be faulty.

The word secular developed within the Catholic Church. The term originates from the Latin *saecularis* meaning "of this present lifetime or generation." Contextually ecclesial authorities were distinguishing between elements overseen by God. Secular designated the temporal and earthly things, apart from the eternal and heavenly ones. The term secular was then applied to the religious clergy that ministered out among the people in the parishes. Today we could properly identify the diocesan priest as "secular clergy." Such individuals are distinguished from the men and women of monastic orders who live in religious communities. From the faith perspective everything is inherently religious and the secular is a subclass of religion (not an antonym) which refers to those things of the here and now which occur out among the people. Let us take the common dictionary definition of religion: "1. of, pertaining to, or concerned with faith or the divine; 2. beliefs and practices concerning the cause, nature or purpose of life the universe or existence." When distinguishing one item from another, the task is not to place the item in the category of religious or secular, but rather to ask to what degree does the item display characteristics of religion. How religious (to what degree) is it? Nature displays God's glory in an implicit fashion, while impressive basilicas explicitly illustrate the work of God through murals, music, statuary, architecture, symbols and divine inscriptions.

We have briefly examined Mr. Murray's belief that America was founded as a secular nation. I have observed the Founding Fathers were not a unified group with one cohesive anti-religious worldview. The United States was not settled and formed in accordance with a grand design or plan of the Founding Fathers. It is misguided to ask if America is secular or religious. Rather one needs to consider in what ways and to what degree does America recognize and acknowledge God/religion.

Momentarily adopting Mr. Murray's hypothesis that America was founded as a secular or religion-free society, consider his example of United States coinage. Incrementally over time religion was injected or forced onto these clean coins, until today when one finds religious graffiti on the penny, the nickel, the dime, the quarter, the half, the dollar and upon every de-

nomination of currency. Mr. Murray uses the appearance of religion on coins to demonstrate a hypothetical parallel encroachment of religion into the secular American society. If today, from this point of view, religion is expressed publicly everywhere in society, then the hypothesis would require the original historical situation to have been in Mr. Murray's words, "totally secular, as clean from a mention of god as was the Constitution." To test the hypothesis, let us return to the early period of United States history and observe if there are any signs of recognition of God or religion.

Before the Civil War, and even prior to the American Revolutionary War, evidence indicates a high degree of religious consciousness within the society. Let me elaborate on two religious symbols mentioned by Mr. Murray, the Great Seal and Liberty. Other examples of American religious symbols are too numerous such that present time and space do not permit me to review them in greater depth. As mentioned earlier, the Congress of 1776 appointed Benjamin Franklin, John Adams and Thomas Jefferson to draft a design of a Great Seal for the United States. These Founding Fathers employed three Latin phrases within the design: "*Annuit Coeptis*" (God[14] has favored our undertaking), "*Novus Ordo Seclorum*" (a new order of the ages), "*E Pluribus Unum*" (out of many, one). If we were to apply Mr. Murray's measurement of secularity, then one out of the three of the phrases contains a reference to God. This would be highly unusual if society was an anti-religious as Mr. Murray wishes us to believe. Further, Jefferson is the author of the phrase "separation of church and state" and is recognized by many scholars to be one of the least Christian or religious of the Founding Fathers. Yet it is Jefferson who creates and recommends to Congress this seal. On the other hand, if we reject Mr. Murray's definition of secular then we could instead ask: To what degree are these religious? What we observe is not a far removed separation of Church/religion from State/government, but instead we see phrases that contain both religious and governmental significance blended together.

All three Latin phrases retain both a religious and governmental connotation. A new order of the ages (*Novus Ordo Seclorum*) implies that the American experiment of democracy is a new way to approach government, but it also maintains the biblical notion that God works with humanity in different ways in different "ages" or dispensations (see, Rom 16:25; 1 Cor. 10:11). For example the apostle Paul in the third chapter of his letter to the Ephesians speaks of a mystery hidden to past generations (v. 5) but in this age of the Church is made known to all of humanity (v. 9). In fact, an entire branch of study, dispensational theology, has arisen from the biblical habit of dividing time into the age of the patriarchs, the age of the chosen, the age of the gentile and the millennial age to come. Contemporaries of Jefferson would have understood "a new order of the ages" to reference a partial fulfillment of biblical prophesies of peace and prosperity. This is further supported by the other motto, "God has favored our undertaking" (*Annuit Coeptis*). It is common among historians to acknowledge that many of the colonists saw America as a new Israel, and American as the new people chosen of God.[15] What is more, Jefferson himself suggested an image for the reverse of the Great Seal of

an Old Testament account of the Hebrew slaves fleeing the Egyptian Pharaoh. To make the parallel identity of America as God's chosen people more emphatic, Jefferson proposed adding an additional motto "rebellion to tyrants is obedience to God."[16]

Mr. Murray implies, but does not explicitly claim that the Founding Fathers drew the third phrase on the Great Seal, *E Pluribus Unum*, from a poem, *Moretum*, attributed to Virgil. While it is difficult to prove the derivation of the phrase, I wish to suggest two difficulties with his attribution. First, H. Rushton Fairclough in his Loeb Classics edition, says Virgil's *Moretum* "may be a rendering of a Greek poem by Parthenius;" the poem describes early morning in the life of an old farmer, Simylus, and his lone servant, Scybale. They get up before dawn, make some bread, and prepare a "moretum," which consists of garlic, parsley, coriander, rue, salt, and cheese, all mashed together, and formed into a ball, and then drizzled with oil and vinegar. In other words, this is basically an ancient salad or relish recipe. While many of the Founding Fathers had received a classical education, how likely is it they were taught or recalled the words of a salad recipe? The second difficulty is the actual phrase (at line 102 or 104 depending on which edition you use) is "color est e pluribus *unus*," not "unum."[17] Another candidate for the origin of the phrase, which Mr. Murray conveniently overlooks, is Saint Augustine.[18] The meaningful phrase, "out of many, one," is a classical Catholic ecclesialogical principle stressing the universal nature of the Catholic faith. It is used by Saint Augustine to describe the ties of brotherly love and friendship in book IV of his *Confessions* (397 AD). By just examining the three Latin phrases of the Great Seal, in both their likely sources and intended meanings, one finds a high degree of religious reference and intent. The case is made only stronger when one considers the multiple symbols employed in the design of the Great Seal (such as the Eye of God, cloud of God's glory or olive branch). While one might debate the literary source for the national motto, let us move to the symbolization of liberty where the origin is undisputed from which the Founding Fathers drew their inspiration.

The Founding Fathers spoke frequently of their love of liberty. Since no one can see liberty, a bell was used to symbolize the notion of liberty as an integral American characteristic and value. Most famously people remember July 8, 1776 when the Liberty Bell rang to announce the first public reading of the Declaration of Independence. Originally ordered from White Chapel foundry in England the bell cracked as soon as it arrived in Philadelphia. Local craftsmen John Pass and John Stow recast the bell in 1753, thus their names appear on the front of the bell, along with the city and the date. The bell hung in the tower of Independence Hall and rang to gather people for public assemblies and announcements. It was first created by order of the Pennsylvania Assembly in 1751 to commemorate William Penn's 1701 "Charter of Privileges" which was Pennsylvania's first constitution. The bell was to be set in the seat of the local government, the State House. While today there are many competing notions of liberty, one has only to examine the Liberty Bell to find the origin of the word and the intellectual worldview which contextualizes the meaning of true American liberty. The order for the bell required that a Bible verse be placed on the bell, Leviticus 25:10, "Proclaim liberty throughout

all the land unto all the inhabitants thereof." For many of the Founding Fathers there was a connection between liberty and the divine being; God was the author and source of Liberty. Humans could chose to exercise this natural right given to them by God, but it took effort and diligence. It should be self-evident that if our rights are derived from government, they can also be removed by government. It was in fact the wisdom of the Founding Fathers to stand in opposition to tyranny by acknowledging the source of human rights originated from God rather than from King George III, or for that matter any legislature. In 1791, Alexander Hamilton suggested the establishment of a national currency. Congress enacted this legislation following his recommendations the following year. The dollar was established as the basic monetary unit, and the act also allowed for the creation of a national mint. That act stipulated that United States coins should carry the word "liberty" or some symbol emblematic of liberty.[19] Along with bells, and the word liberty, female figures have frequently been used symbolize this concept. The French who donated in 1886 the statue of Lady Liberty (la Liberté éclairant le monde) were following this popular American tradition of representation. After testing Mr. Murray's hypothesis of an original religion-free society, we find there are signs of recognition of God and religion in the Great Seal and the symbolic representation of liberty.

Mr. Murray's *Written Statement* and testimony requires the acceptance of two main beliefs: 1) America was founded as a secular nation; 2) two fanatically religious individuals tricked the many. In responding to the first I have examined the danger of generalizing the character and beliefs of the Founding Fathers, and I have challenged a simple definition of the term secular[20]. Now to focus on the second belief, I will explore the "two" vs. "many" issue, and examine the accusation of deception. In 2007 the United States Mint began producing the coins for the new Presidential Series Golden Dollar Coins. With the success of the State Quarter program, the Mint envisioned a series of new dollar coins commemorating each of the presidents with a portrait on the obverse and the Statue of Liberty on the reverse. Numismatic journalist Dom Yanchunas recounts that fifty-five thousand error coins were released from the Mint which did not contain the legally mandated motto, "In God We Trust." The public reacted with outrage at the coins dubbed the "godless dollar." Newspapers, blogs and chatrooms buzzed with furor over the incident and the Mint's initial design decision to move the divine inscription to the rim of the coin. The error raised public attention to "God getting pushed to the edge" which many citizens believed to be symbolic of His treatment in modern American society. Yanchunas writes "The blunder was one of the worst manufacturing mistakes in the Mint's history."[21] A later news article in the same issue of *Coinage* magazine on page 83 notes that Congress was besieged by citizen complaints. Representative Virgil Groode of Virginia introduced H.R. 2510 in May of 2007 in response to the public outcry. He explains,

> I introduced this legislation in response to the many citizens complaining that 'In God We Trust' was on the side instead of being on the front or possible the back of the new presidential dollar coins. I am pleased that we have 88 original cosponsors on this measure. I hope the U.S. Mint will get the message.

Depending upon how "religiousness" is measured (church attendance, acceptance of doctrine,

practices, etc.) most scholars find a decrease in the overall religiousness of the American society over the past two hundred years. Still, there is enough interest and support to move numerous members of Congress to introduce legislation that will recognize the divine on American coinage.

Previous moments in history have experienced similar, if not greater, popular reaction to divine inscriptions. Mr. Murray recounts how in 1905 President Theodore Roosevelt asked sculptor Augustus Saint-Gaudens to redesign the coinage. Saint-Gaudens found the motto to be "inartistic" cluttering his design, so he removed it. Mr. Murray concedes in passing "the religious community fell upon Congress … with numerous petitions demanding the restoration of the motto."[22] Indeed both the House and the Senate introduced bills to restore "In God We Trust" which passed as public law 120. Due to the overwhelming number of letters of citizen protest the bill was signed by President Roosevelt on May 18, 1908.

Likewise it was a popular movement which added the words, "Under God" to the American Pledge of Allegiance and helped to introduce legislation to recognize "In God We Trust" as our national motto.[23] It began at the Board of Directors meeting in April of 1951 of the Catholic fraternal organization known as the Knights of Columbus. The resolution initially was to add the words "under God" after the words, "one nation" as the member knights recited the pledge. Soon, state councils were following suit; Florida, New York and South Dakota all adopted resolutions for their councils that the pledge be read as amended. The idea and practice increased in popularity so that by August of 1952 the Supreme Council of Knights sent copies of their resolution to Congress and the President.[24] At nearly the same time, in 1953, Matthew Rothert of Arkansas, presented the idea of extending the coinage motto "In God We Trust" to all paper money, to a meeting of the Arkansas Numismatic Society. The favorable reaction by his audience prompted him to send a written proposal for such a change to Treasury Secretary Humphrey; he also sent copies of the correspondence to Commerce Secretary and to President Eisenhower. Eisenhower enthusiastically supported the measures and signed the bill on the Pledge into law on Flag Day, June 14, 1954, reportedly stating, "From this day forward, the million of our school children will daily proclaim in every city and town, every village and rural school house, the dedication of our Nation and our people to the Almighty. The divine inscription "In God We Trust," was formally adopted as the U.S. National motto on July 30, 1956. Recall that far from being the result of two fanatical individuals, all the legislation bearing upon these divine inscriptions on American coinage and currency had to pass through the legislative process of the U.S. Congress. In addition, these measures in each case were instigated by citizens, writing letters, signing petitions and communicating with the House and Senate representatives.

There is power in the story, in where it is told, in when it is told and in how often it is told. Mr. Murray's tale has been told so often that it is moving from a few isolated websites for atheists to more mainstream reference sites accessed by the general public. The public schools of the United States, out of fear of upsetting groups advocating a strict separation of church and

state, have ceased to tell the religious side of American history. These combined factors have set the contemporary intellectual stage where the claim that America was founded as a secular and anti-religious nation, can receive a serious hearing and expect credence. The United States today is pluralistic and multicultural, but the latest *USA Today* poll finds that 92% of Americans express some form of belief in God.[25] So evidence suggests that both historically and presently a majority of U.S. citizens recognize the divine. The national motto "In God We Trust" expresses a popular general sentiment that combines the patriotic and religious natures of a majority of Americans. For those wishing to remove the motto there exist the same legal procedures by which the motto came to reside upon currency and coinage. But like young George Washington standing beneath the cherry tree, when challenged, we need to be able to give an honest history.

[*] Biff Rocha is Assistant Professor of Theology at Benedictine College in Atchison, Kansas.
[1] For a general overview of the role of religion in the new republic see, Library of Congress, "Religion and the founding of the American Republic," Online Exhibitions; accessed Oct. 4, 2007 at www.loc.gov/exhibits/religion/religion/html.
[2] It should be noted that there are textual variations between Murray's *Written Statement* as posted on the Internet and the official records of the U.S. Congress. Unless otherwise noted, I provide quotations from the Congressional record. *Hearing Before the Subcommittee on Consumer Affairs and Coinage of the Committee on Banking, Finance and Urban Affairs House of Representatives One Hundredth Congress, Second Session, on H.R. 3314 "A Bill to Modernize United States Circulating Coin Designs of Which One Reverse Will Have a Theme of the Bicentennial of the Constitution."* September 14, 1988. Serial No 100-90. (U.S. Government Printing Office: Washington D.C.) : 95.
[3] *Hearing,* 99.
[4] *Hearings*, 100.
[5] *Hearings*, 101.
[6] *Hearings*, 102.
[7] *Hearings*, 102.
[8] *Hearings*, 103, 96.
[9] *Hearings*, 97.
[10] Hearings, 34-35.
[11] John Tracy Ellis, American Catholicism (Chicago: University of Chicago Press) 1956.
[12] *Hearings,* 34-35.
[13] *Hearing,* 99.
[14] While the word "God" is not explicit in the text, it is implied by the phrase, and is intended by the context, and by its association with the symbol of the Eye of God. Comments to Congress give the interpretation of the motto as referencing God. See Richard Patterson, *The Eagle and the Shield* (Washington D.C.: Office of the Historian of the Department of State, 1976): 86.
[15] Paul Johnson, "God and the Americans," *Commentary*, January 1995, pp. 25-45.
[16] *Journals of the Continental Congress*, August 20, 1776. Posted at *http://memory.loc.gov/ll/lljc/005/0200/02760691.gif.* Accessed Oct. 24, 2007.
[17] Joseph Fitzgerald, *New York Times* (May 30, 1903): BR 10.
[18] Joel Mark Solliday, "E Pluribus Unum," *Campus CrossWalk* (Spring 2006): 1.
[19] Second Congress., "Coinage Act of 1792," *United States Statutes at Large*, Sess. I., (April 2, 1792): 246-251.
[20] For further advice on misunderstandings to avoid when studying U.S. history, see Robert Wuthnow's Heritage Lecture, "Myths About American Religion" (delivered October 4, 2007). Published by the Heritage Foundation and available online at Heritage.org.
[21] Dom Yanchunas, "Keeping Collectors on Edge," *Coinage* (September 2007): 10.
[22] *Hearing,* 101.
[23] "Pledge of Allegiance," *Columbia*, (October 2006): 34.
[24] Christopher Kauffman, *Faith & Fraternalism: The History of the Knights of Columbus 1882-1982*. (New York: Harper and Row) 1982: 385-387.
[25] USA Today Poll (Sept.11, 2006) Accessed at: *http://www.usatoday.com/news/religion/2006-09-11-religion-survey_x.htm*

BIBLE CASE

BY TIMOTHY C. SHIELL*

In May of 1890 the Wisconsin Supreme Court ruled in the Edgerton Bible case (as it was popularly called) that Bible reading in a public school for the purpose of religious instruction was unconstitutional.[1] Wisconsin thereby became the first state to ban Bible reading since prior decisions on this or a related issue in five other states had found the practice constitutional.[2] Given the jurisprudence of the day the decision was based on the state constitution rather than the federal constitution,[3] but the decision had national significance[4] and marked a twenty-year nationwide decline in school Bible reading.[5] Seventy-three years later the U.S. Supreme Court came to the same conclusion as the Wisconsin court in *Abington School District v. Schempp*.[6] Beyond this historical significance, the arguments involved in the case still figure prominently in contemporary debates concerning religion in public schools; more broadly, in debates about religion and government; and even more broadly, in debates concerning jurisprudence and constitutional interpretation.

I cannot fully explore the historical and contemporary significance of the case within the confines of this short paper; therefore I limit my remarks here to: (1) describing a few of the significant factors in the historic and argumentative setting of the case; (2) describing the major elements in the reasoning of the court; and (3) outlining two significant issues embedded in the case that remain at the forefront of our continuing experiment in freedom of religion.

I. The Historic and Argumentative Setting

Teachers in the Protestant-dominated common schools of the colonial era used the Protestant King James Bible in class, at least in part with the intention of converting Catholic pupils to a Protestant faith.[7] Even after the colonies became the United States with freedom of religion guaranteed in Constitution's Bill of Rights, Catholic and Jewish students were expelled from some public schools when they refused to read the Protestant Bible or participate in day opening scripture readings. This continued in some states into the 20th century.[8] In New York, only Protestant schools were eligible to receive state funds and public school textbooks contained anti-Catholic references.[9] When members of minority religions protested state endorsement of the majority religion, the majority reaction was sometimes violent: for example, in 1834 an angry Boston mob burned down a Catholic convent after Catholics protested Protestant Bible reading in public schools and in 1844 numerous people died during the Philadelphia Bible Riots.[10] Protestant bias received a legal stamp of approval when the Maine Supreme Court ruled in *Donahoe v. Richards*[11] that school authorities could lawfully compel Catholic students to read the King James Bible.

Protestant bias existed in Wisconsin too since Protestant Yankee immigrants dominated the state and tended to believe their Protestantism was nonsectarian.[12] Thus, their King James Bible — but not the Catholic Douay-Rheims Bible — continued to be a state approved textbook into the late 1880s even though the 1848 state constitution banned sectarian instruc-

tion and an 1883 state statute banned sectarian textbooks.[13] However, in 1888, six Catholic parents with children in the Edgerton school district filed suit in Rock County circuit court asking the court to force the school district to discontinue its practice of Bible reading during class.[14] Their argument was:[15]

P1: State law forbids sectarian instruction and textbooks. Article X, Section 3 of the Wisconsin State Constitution (1848) forbids sectarian instruction in public schools[16] and Sec. 3, Ch. 251, Laws of 1883 forbids sectarian textbooks.

P2: Reading from the King James Bible is sectarian instruction and the King James Bible is a sectarian textbook. These are sectarian because Catholics believe the King James Bible wrongly translates the word of God and omits books from Scripture; they also believe Scripture ought not to be read indiscriminately since they believe the Roman Catholic Church is the only infallible teacher and interpreter of the Bible.[17]

Thus, State law forbids reading from the King James Bible.

However, Judge Bennett of the circuit court, following common practice and the legal precedents in the five other states, rejected this argument.

The parents appealed to the Wisconsin Supreme Court and Humphrey Desmond, a widely known Catholic lawyer and editor, joined their legal team. Desmond had supported the initial petition by the parents in the *Catholic Citizen*, his Milwaukee-based, nationally influential newspaper. Desmond added rhetorical flair and a sense of moral destiny to the cause, arguing, for example,

> [I]f justice be our guide, we shall be as loyal to Christianity and the Bible as we are to the secular schools … not by making the texts of Scripture modern stocks into which the Catholic pupil is thrust …; but rather by believing and holding our Christianity in the mild spirit of its founder…. The law that will most honor the Bible and religion, is the law which most nearly follows the golden rule of each, "Do unto others as you would that others should do unto you." If you would not have Catholics force the Catholic Bible and beliefs and conscience upon you, then you should not force the Protestant Bible and beliefs and conscience upon them. That is the true meaning of non-sectarian schools. [18]

For its part, the Edgerton School Board offered at least seven reasons why Bible reading by its teachers was constitutional.[19] First, teachers cannot be banned from Bible reading without violating their constitutional right of conscience. Second, students are not required to remain in class during Bible reading and are not punished for leaving. Third, to enforce the Catholic parental demand would be sectarian since other sects do not believe the Roman Catholic Church is the only infallible teacher or interpreter of the Bible. Fourth, the Bible passages read during class are not sectarian since they appear in the Catholic Douay and Rheims Bible too,[20] and nothing in state law prohibits non-sectarian reading from the Bible. Fifth, the King James Bible is a state-approved textbook. From 1858 on, the Wisconsin state superintendent of public instruction has included it in his list of recommended school textbooks. Sixth, the decision to permit readings from the King James Bible was made in a lawful manner. The school board was formed by lawful process and its Board members lawfully elected. They

used lawful procedures in accordance with the will of the vast majority of children and parents in the school district in deciding to allow teachers to read from the Bible during school hours. And seventh, Bible reading is not sectarian instruction since instruction requires teacher elaboration or explanation, and the teachers read Bible passages without explanation or elaboration. Based on these reasons, the school board maintained that teacher Bible reading does not violate state law.

II. The Reasoning of the Court

The Wisconsin Supreme Court reversed the circuit court decision. Chief Justice William P. Lyons, writing the unanimous opinion of the five-member court, focused on the sectarian clause of the state constitution while Justice John B. Cassoday and Justice Harlow S. Orton added concurring opinions.[21] In this paper I present only the main points set forth in the Lyons opinion.

The court concluded that Bible reading violated the state constitution because it was both "sectarian" and "instruction." Why was it "sectarian?" Lyons wrote:

> Sectarian instruction as understood by our constitution refers exclusively to instruction in religious doctrines that are sectarian in the sense that the doctrine is believed by some religious sects and is rejected by others. Hence, to teach the existence of a Supreme Being, of infinite wisdom, power and goodness and that it is the highest duty of all mankind to love and obey Him is not sectarian because all religious sects so believe and teach. The instruction becomes sectarian when it goes further, and inculcates doctrine or dogma concerning which the religious sects are in conflict …. Reading from the New Testament of the King James Version of the Bible necessarily does go beyond this to become sectarian instruction at least because members of the Jewish sect reject the divine authority of the New Testament and members of the Church of Latter Day Saints sect use the Book of Mormon. Some of the portions read inculcate doctrines of the divinity of Jesus Christ and the punishment of the wicked after death, which doctrines are not accepted by some religious sects. A most forceful demonstration of the accuracy of this statement is to be found in certain reports of the American Bible Society of its work in Catholic countries … in which instances are given … [where] reading of the [King James Bible] converted Catholics to Protestants without the aid of comment or exposition. In those cases the reading of the Bible certainly was sectarian instruction. Therefore, it is sectarian also in Edgerton schools.[22]

What made it "instruction?" Lyons wrote: "[T]hat reading from the Bible in schools, although unaccompanied by comment from the teacher, is 'instruction,' seems to us too clear for argument. Some of the most valuable instruction a person can receive may be derived from reading alone, without any extrinsic aid by way of comment or exposition."[23]

In response to the school board's argument that Bible reading was permissible given the intent of the constitutional framers and state legislators, Lyons maintained that any such intent was outweighed by the fact that Wisconsin was founded by Catholics, Jews and adherents of many Protestant sects and that,

> These immigrants were cordially welcomed, and it is manifest the convention

> framed the constitution with reference to attracting them to Wisconsin. Many, perhaps most, of these immigrants came from countries in which a state religion was maintained and enforced, while some of them were non-conformists and had suffered … from their rejection of the established religion. What more tempting inducement to cast their lot with us could have been held out to them than the assurance that, in addition to the guaranties of the right of conscience and worship in their own way, the free district schools in which their children were to be [educated] were absolute common ground, where the pupils were equal, where the sectarian instruction [and intolerance] under which they had smarted in the old country could never enter? The state constitution thus provided that the child of the Jew, or Catholic, or Unitarian, or Universalist, or Quaker should not be compelled to listen to the stated reading of passages of scripture which are accepted by others …[24]

In response to the school board's argument that objecting pupils were excused from the Bible readings, Lyons stated,

> When, as in this case a small minority of the pupils in a public school are excluded, for any cause, from a stated school exercise, particularly when such cause is apparent hostility to the Bible which a majority of the pupils have been taught to revere, from that moment the excluded pupil loses caste with his fellows, and is liable to be regarded with aversion and subjected to reproach and insult …. [T]he practice in question tends to destroy the equality of the pupils which the constitution seeks to establish and protect, and puts a portion of them to serious disadvantage in many ways with respect to the others.[25]

Thus, Edgerton public school teachers were not to read from the Bible during school hours *for the purpose of religious instruction*; however, the court explicitly noted that Bible reading for non-religious purposes, including the teaching of history, literature and good morals, was permissible.[26] In conclusion, Chief Justice Lyons wrote,

> The priceless truths of the Bible are best taught to our youth in the church, the Sabbath and parochial schools, the social religious meetings, and above all by parents in the home circle. There, those truths may be explained and enforced, the spiritual welfare of the child guarded and protected, and his spiritual nature directed and cultivated, in accordance with the dictates of parental conscience.[27]

III. Two Significant Arguments

The Edgerton decision has played a role in numerous legal cases in Wisconsin, including a case upholding non-sectarian clergy-led prayer at public high school graduation ceremonies held in local churches;[28] a case striking down an ordinance banning organized religious speech in county parks;[29] a case striking down a state statute reimbursing Marquette University $3,500 per dental student to operate a dental school;[30] a case upholding a créche display on city property;[31] and a case upholding a school voucher program through which tax funds are dispersed to private religious schools.[32] However, rather than focus on specific cases in this section, I shall introduce two broader issues and arguments, namely, the Legislative Intent Argument and the Freedom of Religious Speech Argument.[33]

1. The Legislative Intent Argument. The Edgerton School Board and its supporters[34] argued that Bible reading should be permitted since the founding fathers and legislators of Wisconsin were acting from Christian purposes. Put more formally:

P1: Laws should be interpreted according to legislative and/or framers' intent.

P2: The legislative and/or framers' intent in Wisconsin was to permit Bible reading in public schools because (a) the Northwest Ordinance of 1787 explicitly provided for the establishment of free, public schools based in the Christian religion, including Bible reading; (b) the preamble to the Wisconsin state constitution explicitly invokes God as its ultimate foundation;[35] (c) the Committee on Education during the 1846 Wisconsin Constitutional Convention unanimously rejected a ban on religious and sectarian books;[36] (d) the 1848 Convention, aware of the 1846 decision, proposed only the prohibition on sectarian instruction, and this clause was accepted by the voters in Wisconsin; and (e) the state legislature adopted the same language in creating the state university, and the state university Board of Regents and faculty adopted the practice of Bible reading.

Thus, Wisconsin Law permits Bible reading in public schools.

However, the *Weiss* court rejected this conclusion. Justice Lyons emphasized a competing and, in his opinion, a more compelling original intent, namely, to guarantee state neutrality on religion in order to attract immigrants to the new and developing state[37] whereas Justices Cassoday and Orton argued that any original religious intent had been superceded by later laws emphasizing the secular nature of state government.

This kind of debate over original intentions arises in many cases involving freedom of religion as well as many cases beyond freedom of religion. Perhaps the most significant issue concerning freedom of religion that involves original intent is whether the Establishment Clause in the U.S. Constitution: (a) permits government to promote religion in general though not any particular religion (a.k.a. "accomodationism"), or (b) requires the government to remain strictly neutral on religion in general and in particular (a.k.a. "separationism"). The U.S. Supreme Court first explicitly announced (b) — strict government neutrality — in *Everson v. Board of Education*.[38] Writing for the majority, Justice Hugo Black stated,

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."[39]

Despite this strong "separationist" wording, the court voted 5-4 to uphold a New Jersey law reimbursing parents for transportation costs incurred in sending their children to public schools and private Catholic schools on the ground that the law had the secular purpose "to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools."[40] The two written dissents did not dispute (b) — complete government neutrality. Rather, they argued that the court failed to apply this standard correctly to the facts of the case. They maintained that the transportation reimbursement program was a tax used to support religious instruction.[41] This "strict government neutrality" doctrine, said to be drawn from earlier decisions,[42] was supported in both the majority and dissenting opinions through a review of the intentions of founding fathers Thomas Jefferson and James Madison.

There are numerous criticisms of the *Everson* doctrine of complete government neutrality, including dissents by former Justice William Rehnquist in *Wallace v. Jaffree*[43] and by Justice Antonin Scalia in *Lee v. Weisman*.[44] These dissents appear to have prompted Justice David Souter to restate the *Everson* argument in his concurring opinion in *Lee v. Weisman*.[45] However, the debate over the original intentions behind the Establishment Clause is further complicated by the fact that many scholars oppose originalist jurisprudence in general,[46] and others challenge the assumption that the right time period to look for Establishment Clause meaning is the Founding era.[47]

Through the Legislative Intent Argument, then, we can see one clear way in which Edgerton Bible case remains relevant. Is a court justified in overruling the religious intentions of the framers of a law? How exactly should we determine what the intentions of the framers were? How much weight ought future courts give to an earlier court's holding on the intentions of the framers?

2. The Freedom of Religious Speech Argument. The Edgerton school board and its supporters also argued that the board ought not to violate the teachers' right of conscience in expressing their religious views.[48] That is:

P1: The Constitution guarantees the right of religious conscience.

P2: Teachers are exercising their right of religious conscience when reading from the Bible during class.

Thus, The Constitution protects teacher Bible reading.

Although the board and its supporters used the language of the right of conscience, their argument is focused on a speech act (oral Bible reading); hence, my referring to it as the Freedom of Religious Speech Argument.

The Wisconsin Supreme Court did not respond to this argument in its decision. Their silence will come as no surprise to those knowledgeable of the history of freedom of speech since at that time freedom of speech was not protected by the extensive body of law that shields it today. Here I will pass by the issue of whether or not the Wisconsin court should have addressed the Freedom of Religious Speech Argument or what they should have decided if they had addressed it in order to emphasize that given current legal precedents on religious

speech courts today cannot remain silent on the legal weight afforded freedom of religious speech where it may conflict with the Establishment Clause. Issues regarding freedom of religious speech have become increasingly common and prominent insofar as protecting religious expression has become an explicit part of the agenda of influential private organizations like the American Civil Liberties Union, the American Center for Law and Justice, and Foundation for Individual Rights in Education as well as the Bush administration.[49] Today it is an unavoidable and vital question how a teacher's or a student's right to religious expression should be protected or accommodated in a public school or university.

Consider the example of school prayer. I suggest that courts tend to view this issue as the Edgerton court viewed Bible reading: it is invalid when it appears to be state-sanctioned proselytizing but permissible when it has a secular justification or is private speech. Thus, the U.S. Supreme Court banned all clergy-led prayer at graduation ceremonies in *Lee v. Weisman*[50] and banned student-led prayer at high school football games in *Santa Fe Independent School Dist. v. Doe* [51] where the school retained control over the location, schedule, and content of the student's message. The court reasoned that under those conditions, the religious message carries the imprimatur of the school and, thus, is an establishment of religion. This reasoning also was employed in *Cole v. Oroville Union High School District*,[52] in which the school retained the right to review and modify a student's comments. On the other hand, student prayer was upheld in *Adler v. Duval County School Board*[53] because the school used neutral criteria in selecting a student speaker and provided a truly open forum for the student to express whatever he or she wished. Under these conditions, the court reasoned that the school is merely accommodating the student's free speech rights. Courts have also upheld the student's right to pray during a private baccalaureate ceremony[54] and school's decision to delete "proselytizing and sectarian" references from a student's graduation speech while allowing references "to God" as they related to the student's personal beliefs and allowing the student to announce that his speech had been involuntarily changed and that copies of his unaltered speech would be available at the conclusion of the graduation ceremony.[55]

Of course the boundaries of school prayer in particular and state-neutrality in general will continue to be tested; thus, the Freedom of Religious Speech Argument provides a second example of a way in which the Edgerton case remains relevant. Under what conditions should the state regard religious expression in public places or using public resources as a violation of the Establishment Clause?

Conclusion

Shortly after the Edgerton decision in 1890, the preacher William McAtee made this appeal to the Protestant devout in the hope of stirring them to action against the decision protecting Catholics from protestanized public education: "Courage, patriotism and religion are now appealed to as never before in our state's history. Have we the virtue to save what has been so dearly won and so carefully transmitted to us? The virtue to hand it on, untarnished and unimpaired, to those who shall come after?" [56] Although the debate today is not so much be-

tween Protestants and Catholics but rather between those who desire forms of state endorsement of religion and those who resist it, there remain people — like William McAtee — who ignore or strive to overturn legal precedents like *Weiss*, *Engel* and *Schempp*, in some cases harassing those who complain about the imposition of religious practices in public schools.[57] To be sure, there also are people who would (erroneously) stamp out all religious expression in public schools if they could. Thus, I suggest that anyone who hopes to better understand what courts have decided about freedom of religion, why they decided it, and what deeper legal issues are involved would do well to study the issues and arguments arising in and developing out of the Edgerton Bible case.

* Professor Timothy Shiell is Associate Professor of Philosophy at the University of Wisconsin-Stout.

[1] *State ex rel. Weiss v. District Board of Edgerton*, 76 Wis. 177; 44 N.W. 967; 1890 LEXIS 74 (1890).

[2] *Donahoe v. Richards* 38 Maine 376 (1854) ruled that Bible reading can be required. *Spiller v. Inhabitants of Woburn* 94 Mass. 127 (1866) ruled that the reading of the Bible in public schools did not hurt or molest a student's right of conscience or interfere in any way with his religious professions or sentiments. *Board of Education v. Minor* 23 Ohio 211 (1872) ruled that Bible reading and the singing of hymns is constitutional so long as it is optional. *McCormick v. Burt* 95 Ill. 263 (1880) upheld the suspension of a student for refusing to discontinue his studies during reading of the Bible. *Moore v. Monroe* 64 Iowa 367 (1884) rejected the argument that reading from the Bible made the public school into a place of worship.

[3] The Bill of Rights (and the First Amendment's guarantee of freedom of speech in particular) was first applied to state governments through the Due Process Clause of the Fourteenth Amendment in *Gitlow v. New York* 268 U.S. 652 (1925).

[4] State supreme courts in Nebraska, Illinois, Louisiana and Washington soon followed Wisconsin: *Nebraska ex. Rel. Freeman v. Scheve* 65 Neb 876 (1903); *People ex. Rel. Ring v. Board of Education* 245 Ill 334 (1910); *Herold et. al. v. Parish School Board* 136 La 1034 (1915); and *Washington ex. rel. Dearle, et. al. v. Frazier* 102 Wash 369 (1918).

[5] Michael deHaven Newsom, "Common School Religion: Judicial Narratives in a Protestant Empire," 11 *S. Cal. Interdisc. L.J. 219* (Spring, 2002).

[6] 374 U.S. 203 (1963).

[7] Neil G. McCluskey, *Catholic Viewpoint on Education* (Garden City, N.Y.: Image Books, 1962).

[8] *State ex. rel. Finger v. Weedman, et. al*. 55 S.D. 343 (1929) (striking down a school board rule expelling Catholic students who refused to participate in day opening Bible readings).

[9] Newsom, *supra* note 5, pp. 238-239.

[10] Newsom, *supra* note 5, p. 242.

[11] 38 Me. 379 (1854).

[12] See, e.g., R. Laurence Moore, "Bible Reading and Nonsectarian Schooling: The Failure of Religious Instruction in Nineteenth Century Public Education," *The Journal of American History,* Vol. 86, No 4. (Mar.2000), pp. 1581-1599 and Joseph A. Ranney, "Absolute Common Ground: The Four Eras of Assimilation in Wisconsin Education Law," 1998 *Wis. L. Rev*. 791, 797 (1998).

[13] Ranney, *supra* note 12, pp. 798-799. "The early assimilationists were largely Protestant in their outlook and they transmitted this view to the public schools. They took the Wisconsin constitution's injunction against sectarian education seriously but they simply did not see their faith as sectarian. Bible instruction in the public schools was commonplace — indeed, the framers of the constitution had rejected a clause prohibiting the use of "books of religious doctrine or belief" in the schools because they believed the Bible had universal value and it was usually the King James version favored by many Protestant denominations that was read in the schools. In 1883, the Legislature prohibited the use of textbooks which had a tendency to inculcate sectarian ideas, but the law did little to reduce either the public schools' Protestant orientation or Catholic resentment."

[14] Frederick Weiss, W.H. Morrissey, Thomas Mooney, James McBride, J.C. Burns and John Corbett.

[15] This statement of the argument is based on the parents' petition to the circuit court, reprinted in *State ex rel. Weiss v. District Board* 1890 Wisc. LEXIS 74, Prior History, pp. 1-5.

[16] Article X, Section 3. "The legislature shall provide by law for the establishment of district schools, which shall be as nearly uniform as practicable; and such schools shall be free and without charge for tuition to all children between the ages of 4 and 40 years; and no sectarian instruction shall be allowed therein; but the legislature by law may, for the purpose of religious instruction outside the district schools, authorize the release of students during regular school hours."

[17] In 1840, American Catholic bishops called on parishioners to reject "private interpretation" for two reasons: (1) it is

inconsistent with the commission Jesus gave to the Church to teach, and (2) it asserts that the individual rather than the Church has final interpretive authority. See Newsom, *supra* note 5, p. 240.

[18] Edited final two paragraphs of "The Bible in the Public Schools, Argument of H.J. Desmond, Esq., of Milwaukee, Before the Supreme Court of Wisconsin, in the Edgerton Bible Case," *Donahoe's Magazine* (July, 1890).

[19] This statement of the argument is based on the Board's petition and statements in *State ex rel Weiss.*

[20] The Board identified these passages as the ones read in class: Psalms 1, 15, 19, 23, 24, 27, 37, 46, 100, 121, 125; Proverbs 15: 1, 3, 13, 16, 20; Proverbs Chapters 16, 20 and 22; Matthew Chapter 2; Matthew 5: 1-13; Matthew 6: 1-16; Matthew 13; Matthew 25: 1-28; Luke 11: 1-14; Luke 19: 1-28; Luke 21: 1-5; Romans 14: 4-8; and Corinthians Chapter 13.

[21] Justice Cassoday rebutted the School Board's argument from religious and legal tradition and distinguished the Wisconsin case from *Donahoe v. Richards*, 38 Me. 379; *Ferriter v. Tyler*, 48 Vt. 444; *Moore v. Monroe*, 64 Iowa 367; and *Millard v. Board*, 121 Ill. 297. Justice Harlow S. Orton presented further examples of Wisconsin laws showing "how completely this state, as a civil government, and its civil institutions, are divorced from all possible connection or alliance with any and all religions, religious worship, religious establishments, or modes of worship, and with everything of a religious character or pertaining to religion …" including Article I, Section 18, "The right of every man to worship God Almighty according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect, or support any place of worship; … nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishments or modes of worship."

[22] *Weiss*, abridged excerpts from pp. 192-195.

[23] *Weiss* at p. 194.

[24] *Weiss* at p. 198.

[25] *Weiss* at pp. 199-200.

[26] *Weiss* at p. 195. The U.S. Supreme Court ruled similarly in *Stone v. Graham* 449 U.S. 39, 42 (1980).

[27] *Weiss* at p. 202.

[28] *State ex rel. Conway v. District Board*, 162 Wis. 482 (1916).

[29] *Milwaukee County v. Carter*, 258 Wis. 139 (1950).

[30] *State ex rel. Warren v. Nusbaum*, 55 Wis. 2d 316 (1972).

[31] *King v. Village of Waunakee*, 185 Wis 2d 25 (1994).

[32] *Jackson v. Benson*, 218 Wis. 2d 835 (1998).

[33] Further significant arguments arising in the Edgerton case include arguments concerning the role and weight of precedent, the competing rights of the majority and minority, and the logical and social implications of judicial decisions.

[34] See, e.g., McAtee, W.A., "Must the Bible Go?: A Review of the Decision of the Supreme Court of Wisconsin in the Edgerton Bible Case," (Madison: Tracy, Gibbs & Co., pamphlet, 1890) and Blaisdell, J.J., "The Edgerton Bible Case: The Decision of the Supreme Court of Wisconsin, concerning the Bible and our Public Schools," (Janesville: Madison Presbytery, pamphlet, 1890).

[35] The preamble says, "We, the people of Wisconsin, grateful to Almighty God for our freedom, in order to secure its blessings, form a more perfect government, insure domestic tranquility, and promote the general welfare, do establish this constitution."

[36] The rejected clause stipulated, "No book of religious doctrine or belief, and no sectarian instruction shall be used or permitted in any public school."

[37] Lyons did not reject, but did question, the school board's claim that Bible reading was a general and accepted practice at the time the state constitution was adopted, and he did explicitly claim that Bible reading was no longer common practice. *Weiss* at p. 197. See also Henry Crooker, "The Bible in the Public Schools, or Dr. Bascom and the Supreme Court," (Madison: State Journal Printing Co., pamphlet, 1890), pp. 13-15. "That a majority of Wisconsin citizens use Ivory soap does not make the State of Wisconsin a soap manufacturer; that a majority of our citizens believe in Christianity does not make the State a religious institution," p. 14. Crooker also wrote a second pamphlet, "The Public School and the Catholics," (Madison: H.A. Taylor, 1890). But see R. Laurence Moore , *supra* note 9, for evidence disputing the assumption that Bible reading was a general practice in the United States until the Engel and Schemmp decisions.

[38] 330 U.S. 1 (1947).

[39] *Everson* at 15.

[40] *Everson* at 18.

[41] Justice Robert Jackson (joined by Justice Felix Frankfurter) and Justice Wiley Rutledge (joined by Justices Frankfurter, Jackson, and Harold Burton) wrote dissenting opinions.

[42] See, e.g., *Reynolds v. United States*, 98 U.S. 145, 164 (1879) (upheld Utah law banning polygamy).

[43] 472 U.S. 38, 91 (1985) (invalidated Alabama law permitting daily school "moment of silence" for prayer or meditation).

[44] 112 S. Ct. 2649, 2678, 2683-84 (1992).

[45] 507 U.S. 577 (1992).

[46] See, e.g., Paul Brest, "The Misconceived Quest for the Original Understanding," 60 Boston U..L.Rev. 204 (1980); Ronald Dworkin, "The Forum of Principle," 56 New York Univ. L.R. 469 (1981) and "Bork's Jurisprudence," 57 U. Chicago L.Rev. 657 (1990); Richard Posner, *Overcoming Law* (Cambridge and London: Harvard University Press, 1990), Chapter 9; and Mark Tushnet, ""Religion and Theories of Constitutional Interpretation," 33 Loyola L. Rev. 221 (1987).

[47] Kurt T Lash, "The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle," 27 Ariz. St. L.J. 1085 (Wtr, 1995). Lash argues that since the Establishment Clause only applies to states via its incorporation in the Fourteenth Amendment, the correct place to look for original intent is not the writings of Jefferson or Madison or the Constitutional Congress but rather the Thirty-ninth Congress (just after the Civil War) when "incorporation" is said to have occurred through the Due Process Clause of the Fourteenth Amendment..

[48] LEXIS, Prior History, pp. 10-11. See also McAtee, *supra* note 34, p. 21 quoting Judge Bennett of the circuit court, "The plaintiffs and their children must not forget that other people have consciences, and are protected in their rights of conscience as well as themselves ….Whose conscientious scruple must give way?"

[49] Charles Haynes describes the Bush administration (Department of Justice) activities in Haynes, "Fighting Religious Discrimination: Bush Administration's Quiet Campaign," The First Amendment Center, 3/4/2007, *http://www.fac.org/commentary.aspx?id=18229*. While acknowledging controversies in the Bush agenda, Haynes notes that, "If you face religious discrimination in America, it helps to have the DOJ on your side. Just ask the Muslim student in Oklahoma who won the right to wear her head scarf to school. Or the Christian student in New Jersey who won the right to sing a religious song at the school talent show. Or the Jewish congregation in Florida that won the right to rent worship space in its city's commercial district. Or the Sikh family in California who won the right to live free of harassment by their neighbors."

[50] 505 U.S. 577 (1992).

[51] 530 U.S. 290 (2000).

[52] 228 F.3d 1092 (9th Cir. 2000).

[53] 250 F.3d 1330 (11th Cir., 2001), *cert. denied*, 534 U.S. 1065 (2001).

[54] *Jones v. Clear Creek Independent School District* 977 F.2d 963, 972 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993):"there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."

[55] *Lassonde v. Pleasanton Unified School District,* 167 F. Supp. 2d 1108 (2001), *affirmed*, 320 F.3d 979 (2003), *cert. denied*, 540 U.S. 817 (2003).

[56] McAtee, *supra* note 34, p. 72.

[57] See, e.g., Lynda Beck Fenwick, *Should the Children Pray?: A Historical, Judicial and Political Examination of Public School Prayer* (1989), pp. 142-171; Robert S. Alley, *School Prayer: The Court, the Congress and the First Amendment* (1994), pp. 107-219, and Edward Keynes, with Randall K. Miller, *The Court v. Congress: Prayer, Busing and Abortion* (1989), pp. 187-205. Newsom notes that the Catholic and Mormon plaintiffs in Santa Fe had to hide their identities to avoid harassment from school officials and others, to the point the District Court had to threaten the school board with contempt of court. See *Santa Fe*, *supra* note 51 at 294, note 1. For harassment in a recent Bible reading case, see *Doe v. Porter*, 370 F.3d 558 (2004).

SECTION 2

Framing Emerging Issues

REMARKS FROM A PECULIAR LAMP-POST

OBSERVATIONS OF A CHRISTIAN TRIAL LAWYER ON FIFTEEN YEARS OF SUING THE CHURCH

BY KELLY CLARK*

Justice Scalia's joke last night about the old Irish drunk saying in response to his wife's question "What do you have to say for yourself?" after he had stumbled home and fallen flat on his face, "I have no prepared remarks, but am happy to take questions from the floor," reminds us that the best comments always occur in context.[1] So I am keenly aware that my comments today occur in a particular context: here we are at a prestigious Catholic university, in the midst of a conference on religious liberty, in a city whose Archdiocese in the next forty-eight hours is likely to emerge from a lengthy bankruptcy, at least the most immediate cause of which was a torrent of childhood sexual abuse lawsuits filed by me and a handful of other trial lawyers. Indeed, it was only three days ago that I testified as a central witness in the confirmation proceeding of that bankruptcy pursuant to a subpoena served on me by Mr. Levine, attorney for the Archdiocese of Portland, and here I am on a panel with him.[2] So this irony of appearances is not lost on me. It is only one of many ironies I have lived with for nearly fifteen years now, since I had an interview with the first of what has come to be over one hundred people I have represented for the abuse they experienced as children by Catholic clerics.

It will be my purpose today to offer you some observations on several of those ironies, some of which are quite personal, but all of which, I hope, will feed into, if not directly address, the topic of civil law and canon law. For I am myself at a peculiar lamp-post at the intersection of canon and civil law, or more generally, of religious belief and civil law. This intersection of faith and law is my vocation — *vocare*, calling — and has been my calling ever since as a young man in college, a convinced Christian, if a very flawed one then as now, reading C.S. Lewis and Dietrich Bonhoeffer, G.K. Chesterton and Thomas Merton, Mother Teresa and later a young, vibrant Pope called John Paul II. Ever since, I understood that my *vocare* was to try to serve Christ and His Church in the world, the only question for me being whether to answer that call as a lawyer or Episcopal priest.

Perhaps, then, you can already see some of the ironies that a person like me might face as I have spent over a decade suing an institution for which I have great regard — indeed have twice in my life very nearly joined. And, perhaps also, then, you will excuse me if some of these remarks sound like John Henry Newman's *Apologia Pro Vita Sua* — a defense of myself and my actions in suing the Church. But I believe my best chance to offer some light on the topic of this session and this conference is to reflect on some of these ironies, offered from the peculiar lamp-post against which I lean and watch the world go by at the intersection of religious faith and civil law.

I. How I Got Here

Suing a church is not something that any person of Christian faith does lightly. The very idea of Christians taking one another before secular authorities is something that Jesus himself, as reported in the Gospel of Matthew, frowns upon.[3] St. Paul also teaches the unity of the faithful in such a way that makes it apparent that he would be troubled by believers asking the secular courts to solve problems of the Church.[4] In this culture, this culture of narcissism and materialism — yes, in the phrase of John Paul the Great, this culture of death[5] — bringing serious and sustained legal action against one of the only powerful institutions, secular or faithful, that regularly stands against the excesses of the era, is a sobering endeavor for any person of goodwill, let alone a Christian — in my case, a high church, theologically conservative Episcopalian who often looks with admiration and yearning from Canterbury toward Rome.

Nor are the stakes lowered simply because I am a trial attorney, and so in some sense lawsuits are what I do. For I have known always and tried to practice consistently, the idea that lawsuits are serious things; that such an event has significant consequences for the parties involved, and almost always, directly or indirectly, for society as well. So I try to use this severe weapon put in my hand by my profession not just as a hired gun, but to do justice as best I can see it, and perhaps in some small way to bring the *City of Man* more in line with the *City of God*. Usually this finds me fighting on behalf of some David, trying to slingshot courtroom stones at some Goliath.

So it was that when fourteen years ago a young man, about my age, came to see me to tell the story of what his priest had done to him twenty years earlier in his early teens, and when I found myself searching his countenance and believing him — that was the only proof I needed then, though my instincts were later validated when the priest admitted it — I knew that I had to make a heavy decision. Apart from the fact that as a then-sole practitioner I knew I was facing a long fight with a large, well-funded institution with the best insurance lawyers around, more importantly I had to decide how I felt about suing the Church. It would not be easy — not easy work or easy justice or easy sleep — not easy at any level.

When all was said and done, it came down to this: the man needed my help. The criminal statute of limitations had passed, the priest was still in ministry at a large suburban church with a school, my client desperately needed mental health counseling and alcohol treatment, and the Church was balking at doing much about any of this. Finally, this quietly tough man wanted some measure of restitution and justice for what had happened to him. It was pretty clear to me that the only way to accomplish all these things was civil litigation. So it came down to this: he needed my help and I felt I could help him.

Besides, helping people with legal problems was my job! As I thought about the case, why would I not take the case? Why, apart from cowardice? Sure this was THE Church — even this Episcopalian understood that — but I believed then and believe now, even as a Christian, that while the Church of Christ exists within a secular and not always friendly order, yet, as St. Paul, St. Augustine, Bonhoffer, Lewis, and John Paul the Great had all in their different ways taught

me, God could use even secular powers for His Good Will. Is that not one of the lessons of Our Lord's Passion — that God can use even a hostile regime to accomplish His purposes? Surely we can with sure confidence seek secular justice, political or legal, even in difficult times or circumstances, trusting God in the outcomes. Indeed, as a lawyer I had staked my vocation on that principle. Now when the spiritual and emotional stakes were high was no time to abandon it.

So I took the case. True to my guess, it was a hard fight. Seven years later, after a trip through the appellate courts to the Oregon Supreme Court, on the morning the trial was to begin, we settled the case. In truth my client would have taken a fraction of the amount he was offered that morning at nearly any time during the litigation, but the Church never offered. They were apparently sure the law was on their side. I was deeply disappointed and have never forgotten that the night before the Supreme Court argument, when no one was looking and the Church had a chance to do the right thing and offer a fair settlement for serious and admitted abuse — which they could have done with the one small insurance policy they had — they offered him the princely sum of $5,000.00.

Now, since the day that man first walked into my office in 1994, I have heard the stories and the sobs, the anger and the addictions, and the faith and the futility of nearly 100 other men and women who were abused as children by priests, nuns, and lay leaders they trusted from a Church they loved. Franciscans, Paulists, Redemptorists, Jesuits, Benedictines, Holy Cross Fathers, and priests of nearly a dozen dioceses around the country. Most of the people who came to me had already decided to seek civil justice in the only form our system provides: monetary restitution. Some I discouraged. Several I had to turn away, not because I did not believe them, but because they were so mentally or emotionally ill that I could not be sure of the truth, or because they would not commit to my strict and uncompromising rule that they work hard and consistently in mental health counseling and, even more importantly, that, if addicted, they must start and stay in recovery.

Often I have tried to offer them the reassurance that it was not the Lord Jesus Christ who abused them. Indeed, I tell those who will listen that He suffers with them. Some I gently ask if they would like me to seek a process and dialogue for them to be in reconciliation with the Church. Most do not. All I tell is that they are still beloved in the eyes of God no matter how guilty or unlovely they may feel. Many cannot even hear that. So I just try to love them as best an advocate and counselor at law can do, and quietly offer my own feeble and inconsistent prayers.

II. The Ironies

So that is how I got here. Now let me just mention in overview some of the most difficult ironies I have encountered in these cases. There are several I could talk about, and while time today will only allow me to touch upon one or two, perhaps the full list is itself instructive.

1. The irony of me as a person of faith and a very great sinner asking a secular jury to "judge" the mistakes of others.

2. The irony of an advocate for religious liberty like me suing a church.
3. The irony of asking a secular jury to evaluate faith-based decisions under that vague civil law concept of "negligence."
4. The irony of asking a secular jury to punish a church that by its very nature is, and must be, self-repentant.
5. The irony of asking a civil judge to decide issues of religious property ownership.

I will start with the first one that occurred to me.

1. Asking a Secular Jury to Judge Faith-based Decisions under Standards of "Negligence"

The problem that I saw occurred in the following context. Let's say you have a superior or a bishop, evaluating the likelihood that a troubled priest or an employee was rehabilitated. I have seen situations where that is precisely the case.[6] Let us assume a priest, making sincere confession, has repented and promised that he will not offend again. Perhaps he has even obtained some counseling. A bishop, let us say, sincerely believes that the priest's *metanoia* — conversion and then repentance, "about faith" — is complete. So the bishop reassigns the priest. Later, the priest re-offends. The bishop's decision was objectively a mistake. At a deeper theological level, could I as a Christian "blame him" for his thinking? How did I feel about asking a secular jury to evaluate this decision? Am I not asking a jury to pass secular judgment on religiously based decisions, to call as negligence that very theological concept at the heart of Christianity, the idea of grace that is at the very core of my own life and salvation?

My first considered response has to do with the limits of religious liberty in a civil society. Neither concepts of canon law nor grace can be applied infinitely as a social matter. This is why we have stoplights. Civil libertarians, especially, such as the Oregon Supreme Court in its jurisprudence, have forgotten this, pretending that civil rights are absolute. However, as Justice Scalia says, that is *braggadocio* — a lofty but somewhat naive myth that does not reflect the reality of our society or traditions.[7]

Last year, I was asked to debate the ACLU's Charlie Hinkle before the Portland City Club on the question: *Do We Have Too Much Free Speech in Oregon*. I took the position that we do, and used as examples the issues of money in politics, billboards along our freeways, and Oregon's ubiquitous adult entertainment industry; all to show that the citizenry want to regulate freedom of expression in response to a problem that they perceive to be significant.[8] We simply do not have "absolute free speech" in Oregon, nor should we. We do not allow free speech as we are walking through security at airports, or for fraud in real estate deals, or the classic example of yelling fire in a crowded theater. There are simply limits to all civil liberties. In the religious context, consider the prohibition of polygamy for members of the Mormon community — the Church of Jesus Christ of the Latter-day Saints (LDS);[9] consider fundamentalists who will not treat their children with medicine;[10] or consider a hypothetical religion that might insists on sacrificing virgins. Our society has always understood that when your religious beliefs hurt me — or hurt my child — you should be held accountable. I would submit that this "societal insight" is itself a product of natural law. I am quite sure that Augustine and Aquinas

would say so.

Now as it has turned out in my cases, I most often have had an easier time of it than I thought. The reality I found, more often than not, was that the decisions to transfer or reassign a priest, far from being pure, prayer-soaked, considered opportunities for redemption, were usually driven by prudential or even ignoble concerns for avoiding scandal or hiding problems. Most bad decisions I have seen were not because a bishop or superior thought a man redeemed, but rather because he thought the man not redeemed, and so the question was how to hide his problem or limit the Church's exposure. So much of my worry on this point has been a false alarm — but I do acknowledge and imagine situations where the reality is as I feared. The LDS Church, for instance, believe that repented sin must be forgiven altogether, that the person becomes "white as snow," and that old sins cannot be held against him in any way — including assignments in and around the church. So you see the issue and the irony.

2. Asking a Secular Jury to Punish the Church

The second sticky irony I want to mention is this one about asking a secular jury to punish a Church that is by its nature self-reforming.

The theory of punitive damages is of course that a jury is asked to make a separate determination and a separate award of money sufficient to punish the institution, quite apart from how much money it will take to compensate the victim. Although one hears a great deal of talk about punitive damages, the truth is they are rarely awarded, and even more rarely upheld by the higher courts. But the fact is, they are an important part of our legal system, because punitive damages are the most powerful tool civil justice has for reforming wayward or irresponsible institutions.

Yet, the irony I faced was this: the Church is the Body of Christ, supposedly inspired and led by the still small voice of the Holy Spirit. Can we really force it to self-examination by the blunt instrument of civil punishment?

The next question I had to ask myself was this — how do I as a trial lawyer decide how much "punishment" to ask from a jury? One of the lawyers going into the Archdiocese of Portland bankruptcy had been ready to ask a jury to award $125 million in punitive damages. Was that too much? How much is enough? How much is too much? More fundamentally, how ironic is it that the changes in the Church over the last ten or fifteen years have been driven, I would suggest, not by the prayerful introspection of theologians and bishops, but by the practical and unlovely demands of insurers and risk managers and public relations consultants. Is that what we want?

Well, here as elsewhere, I have taken some solace in the idea that we are not actually punishing a church for its religious beliefs; rather, we are punishing a church for failing to live up to them — temporal punishment, I would submit, being the natural consequences of temporal sin. In that sense we are asking a secular jury to hold the Church accountable to its own principles. After all, the Church has always told its families, "your children belong here, they are safe here. You can leave them with us. You can turn to us in times of trouble; you, single

mothers; you, broken families. We will provide leadership and role models and good men for your boys and good women for your girls. Trust us." If the Church wants to say that to the world — not just the membership, for let us not forget that every Church of Jesus Christ is a church of outreach — if the Church advertises itself to society as a safe place for kids, while its leadership knows that this is not so, why should the Church be exempt from the civil law of punitive damages?

This brings me to the question of religious exemption from general laws. As Justice Scalia pointed out last night, as a matter of constitutional law, as religious people, do not come to a civil judge or Justice and ask for a judicially created exemption from the general laws; rather, convince your fellow citizens through the legislative process that you deserve one![11] I would say the same thing in the context of punitive damages: convince your fellow citizens on the jury that you have been redeemed, and no longer need punishment.

For I eventually came to realize that the full wisdom of our system in a punitive damages case is that both sides get to appeal to the jury. The very fine Church lawyers will get to stand up and make the case that monetary punishment is not just, not necessary, that given all the good the Church does for society, or all the changes that have been made, "ladies and gentlemen of the jury, fellow citizens, you should not impose this harsh penalty." At that point, the Church is in the dock, pleading for mercy like so many other individuals or institutions that have broken society's laws. Again, do we believe that all truth is God's truth? That all justice is God's justice? Aquinas did. Do we?

But, there is one more difficulty and it is quite profound. I have not fully worked this one out yet. What if we are in such a cynical society, so hostile to religion in general and the Church in specific, that the Church could never get a fair hearing? Several years ago I tried a case in Marion County involving the Jehovah Witnesses. It took us two days to finally get a fair jury selection because so many people were so outspokenly — almost proudly — prejudiced against the Jehovah Witnesses.[12]

Ah well, that is a problem. One that scares me, not just for the Catholic Church, but for all churches, indeed for all institutions of religious faith. For it is certainly true that — as has been noted by thinkers Catholic and Protestant, Jewish and evangelical, Richard John Neuhaus and Martin Marty, Rabbi Heschel and C.S. Lewis — when society no longer values the institutions of religion as social institutions, when society believes that all religion must be not only personal but private, with no public presence desired or permitted, then outright persecution is not far behind. While I do not have this worked out in its entirety, I am of the hunch that the answer lies somewhere in the mysterious idea uttered by the French novelist François Mauriac. When asked in the 19th Century about the Church's increasingly active role in French politics, he said, "The Church gets involved in politics when she ceases to produce enough saints."[13]

I suggest an analogous thought: the Church fears juries and seeks protection in the bankruptcy courts, when she ceases to bear enough fruit and produce enough saints to convince

her fellow citizens of her value to society. The remedy for society's distrust of the Church in the 21st Century, I suspect, is not that different from what it was in the 1st Century. Go spread the Gospel and shine the light, and convince the society around you of what you are truly about. And, never, ever, ever again, allow such a cancer in your midst as the child abuse scandal.

III. Conclusion: All Right, Then, I'll Go to Hell

This is not a conference on the child abuse cases, but one on religious liberty; and so my focus has not been on the realities of the child abuse cases. However, my duty to the men and women to whom I promised to be their advocate requires me to simply remind you of the child abuse scandal: how bad it was; how easy to forget, or minimize, or deny. Every person of goodwill is outraged when they hear of the manipulations and betrayals foisted upon my clients. Court reporters — women and men who have heard it all and are as a rule pretty immune to the emotions of depositions — time and again in my cases would come to me afterwards in tears and anger. So do not let my remarks today suggest that I am any less outraged, or angry, or determined to obtain some measure of secular justice for my clients than I was the first day my first client told me his story.

That I have grappled with what it means to be a person of Christian faith suing the Church, an advocate for religious liberty going after an institution that does immense good for society, that I have agonized about it along the way — none of that means that I would do it differently, or not do it. Indeed, if I had to choose between fighting for justice for these horribly damaged men and women, or succumbing to the scruples I often have about suing the Catholic Church, I would tell the scruples to go to hell, even if it meant that I went along with them.

I am reminded of the scene in Huckleberry Finn,[14] when Mark Twain gives us perhaps the most poignant insight into Huck's character, and indeed Twain's own. Huck is trying to decide whether to follow his own instincts, which tell him he must free the Negro slave Jim, or to bend to the scruples of convention, which would mean to turn him in. In his confusion over the source of his conscience, and of his scruples, he decides to follow his conscience and free Jim, even if that ends up being the wrong choice. "All right, then, I'll go to hell,"[15] he says, in what surely must be the high point of all American literature. I guess I would say the same thing. If it is a sin to sue the Church for the crimes committed against children in its name, all right then, I'll go to hell. But if that is so, then as I plead my case before St. Peter, I will remind him that Our Lord was heard to say: "Suffer the little children to come unto me, and forbid them not: for of such is the Kingdom of God"[16] and "whoever causes one of these little ones who believe in me to stumble, it would be better for him to have a great millstone fastened around his neck and to be drowned in the depth of the sea."[17]

[*] Attorney Kelly Clark is a partner at O'Donnell & Clark L.L.P. in Portland Oregon.

[1] Antonin Scalia, Justice, U.S., Keynote Address at the University of Portland Garaventa Center Conference — *The American Experiment: Religious Freedom* (April 12, 2007).

[2] Howard M. Levine, Partner, Sussman Shank, L.L.P., Speaker at the University of Portland Garaventa Center Conference — *The American Experiment: Religious Freedom* (April 13, 2007).

[3] *Matthew,* 5:20-26 (English Standard).

[4] *See, e.g.,* 1 *Corinthians* 3:1-17 (English Standard).
[5] Pope John Paul II, *Evangelium Vitae (The Gospel of Life)*, Encyclical Letter Addressed at St. Peter's, Rome, Italy (March 25, 1995).
[6] *See, e.g.,* Kelly W.G. Clark, Kristian Spencer Roggendorf, & Peter B. Janci, *Of Compelling Interest: The Intersection of Religious Freedom and Civil Liability in the Portland Priest Sex Abuse Cases*, 85 Or. L. Rev. 481, 490-494 (2006) (a classic case of re-assignment after the priest has repented).
[7] Scalia, supra.
[8] Kelly Clark, Address to the Portland City Club (Jun. 16, 2006), available at http://www.oandc.com/20060616_clark_oregonfreespeech.php.
[9] *Reynolds v. United States*, 98 U.S. 145 (1878).
[10] *See, e.g., Jehovah's Witnesses in State of Wash. V. King County Hosp. Unit No. 1*, 278 F.Supp. 488 (D.C. Wash. 1967) (parents objected to blood transfusion for infant based on religious belief).
[11] Scalia, *supra*.
[12] *Checkley v. Boyd*, 170 Or. App. 721, 14 P3d 81 (2000), *rev. denied*, 332 Or. 239, 28 P.3d 1174 (2001), *and appeal after remand*, 198 Or. App. 110, 107 P.3d 651 (2005), *and rev. denied*, 338 Or. 583, 114 P.3d 505 (2005).
[13] A.W. Richard Sipe, *The Crisis of Sexual Abuse and the Celibate/Sexual Agenda of the Church*, in Sin Against the Innocents: Sexual abuse by priests and the role of the Catholic Church, 61 (Thomas G. Plante ed., Praeger Publishing, 2004).
[14] Mark Twain, *The Adventures of Huckleberry Finn*, in Tom Sawyer and Huckleberry Finn, p. 237 (Alfred A. Knopf 1991) (1884).
[15] *Id.* at 473.
[16] *Luke* 18:16 (King James).
[17] *Matthew* 18:6-7 (English Standard).

RELIGION AS SPEECH
THE GROWING ROLE OF FREE SPEECH JURISPRUDENCE IN PROTECTING RELIGIOUS LIBERTY

BY MARK W. CORDES*

Introduction

Most discussion of religious liberty, at least from a constitutional perspective, primarily focuses on the two religion clauses of the First Amendment — the guarantee of free exercise of religion and the prohibition against establishment of religion.[1] Focusing on these two clauses is not surprising, since they make specific reference to religion — that is their only concern — and they address two common threats to religious liberty, government interference with religion, protected by the Free Exercise Clause, and government promotion of religion, protected by the Establishment Clause. And, indeed, the religion clauses have played and will continue to play an important role in protecting religious liberty in the United States.

Less appreciated, however, is the critical role of the First Amendment's Free Speech Clause in protecting religious liberty. Although free speech, unlike the free exercise and establishment clauses, is not intentionally designed to protect religious liberty, as a practical matter it has done so often. In fact, when it comes to protecting a person's or group's right to exercise religion, the Free Speech Clause has been used much more frequently than the Free Exercise Clause. And this paper maintains that will be even more true in the future.

This paper explores the role of free speech jurisprudence in protecting religious liberty. It is the thesis of the paper that not only has free speech jurisprudence played a critical role in protecting religious liberty, but it will play an increasingly important one in the twenty-first century. This is partly due to the changing jurisprudence of the Supreme Court, which has increasingly focused on free speech protections and less on free exercise to protect religion, and partly due to the changing nature of American society and culture. This latter factor, the changing nature of American culture, refers to the growing dichotomy between a highly religious people and a highly secular culture. This has resulted in growing pressure to privatize religious belief, which in turn often results in excluding religion from a variety of forums on public issues. And it is exactly that type of discrimination against religion and religious views that the Court's free speech jurisprudence addresses.

The paper begins by briefly examining the historic role free speech doctrine has played in protecting religious liberty through the mid-1980s — the start of the Rehnquist Court. Part two will then discuss how during the Rehnquist Court era free speech became perhaps the primary vehicle to protect religious liberty. Although the Rehnquist Court, for the most part, followed earlier holdings regarding religious speech, it changed the analysis in two significant ways: first, by characterizing the exclusion of religious speech from public forums as viewpoint, rather than subject-matter discrimination, and second, by making neutral treatment of

religion the defining feature of the Court's Establishment Clause jurisprudence. Finally, part three briefly discusses what this increasing focus on free speech as the primary basis to protect religion signifies what role it might play in the twenty-first century.

I. The Historic Role of Free Speech in Protecting Religious Liberty

Free speech doctrine has long played a central role in protecting religious liberty. In fact, religion and free speech have long had a strong, even symbiotic relationship. On the one hand, free speech doctrine has long protected religious liberty, providing a doctrinal basis to protect various religious activities. On the other hand, religion provided building materials for the construction of free speech doctrine, especially in the early years of its development, the 1930s, 40s and 50s. It is not an exaggeration to claim that religious speech contributed, during those critical decades, as much as political speech to the emergence of modern free speech protection.

This symbiotic relationship was largely attributable to the zeal of one particular sect, the Jehovah's Witnesses, which was a frequent party to early Supreme Court decisions. Pursuant to the dictates of their religion, the Jehovah's Witnesses aggressively took to the streets, often rubbing against both the sensibilities of their listeners and the boundaries of local laws. As a result, the Witnesses often ended up in court, and had remarkable ability to argue their cases all the way up to the Supreme Court, being a party in about twenty Supreme Court decisions from the late 1930s to the early 1950s.[2] More often than not they won, and in doing so the Jehovah's Witnesses helped to build the foundation of modern free speech jurisprudence.

Two cases are illustrative of the Jehovah's Witnesses' early role in advancing free speech jurisprudence. In *Lovell v. Griffin*,[3] a 1938 decision, a city ordinance in Griffin, Georgia, required that before anyone could distribute circulars, handbooks, advertising or literature the person had to get written permission from the city manager. Alma Lovell, a devout Jehovah's Witness, violated the ordinance by distributing pamphlets and magazines without first getting permission. She did not deny she violated the ordinance, but said that she was "sent by Jehovah to do this work" and that to even apply for permission would have been "an act of disobedience to His command."

The United States Supreme Court agreed with Ms. Lovell that she did not need permission to distribute the literature, but not because it violated her religion. Rather, the Court observed that the permit requirement constituted a prior restraint on Ms. Lovell's right of free speech, and was, therefore, unconstitutional.[4] This was one of the early decisions solidifying the Court's commitment to scrutinize prior restraints, and reflected that protections against prior restraints went not only to the institutional press, but also to individuals distributing literature.

A second case was *West Virginia State Board of Education v. Barnette*,[5] which involved a state law that required students to recite the Pledge of Allegiance. Barnette was a Jehovah's Witness whose religion said that it was wrong to pledge allegiance to anything or anyone but Jehovah, and so refused to participate. The Supreme Court, in a 1943 decision, agreed with Barnette, but grounded its reasoning not so much on religion as on free speech principles, stating:

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith within."[6] With this case, the Court established what is now known as the compelled speech doctrine, which provides that the right to free speech includes the right not to speak, and therefore a person cannot be forced to espouse beliefs against his or her wishes.

These are just two examples from a large number of cases illustrating how these early free speech cases involving the Jehovah's Witnesses helped to protect religious exercise on the one hand, but how they helped provide the materials to build a strong free speech jurisprudence on the other. In doing so, these early free speech cases established two important principles regarding religious speech. First, the decisions left no doubt that the protections of free speech, only then beginning to be recognized by the Court in a meaningful fashion, extended in full to a variety of religious speech activities, most of which involved proselytizing in some manner. Thus, the distribution of religious tracts, open-air preaching, and selling of religious literature were all protected forms of speech.[7] To the Court, trying to convert someone to one's religious beliefs was no different from converting someone to a political position. In fact, the Court appeared not even to think twice about the religious content of the speech, automatically giving it the same protection as political or other speech.

The second principle to emerge from these early decisions that has proved to be very significant for religious speech was the idea that when regulating speech government cannot discriminate against speech because of its content. Although the Court indicated that government can impose reasonable time, place and manner restrictions on speech to further important government interests, it was quick to strike down regulations that created the potential for content discrimination. The Court was especially sensitive in these early cases to discretionary licensing schemes which required that a speaker get a government permit before engaging in various forms of expressive activities. This, of course, constituted a prior restraint, which is problematic to begin with, but the Court was also concerned that if the process for receiving a permit lacked appropriate standards, permits would be granted or denied based upon whether the person issuing permits favored or disfavored the particular speech in question. The Court's decisions made it clear that the First Amendment would not tolerate the potential for such content discrimination.[8]

The second of these two concerns, that government cannot discriminate when it regulates speech, emerged over the next several decades as probably the central principle governing free speech jurisprudence. On the one hand, the Court continued to recognize that government can impose reasonable time, place and manner restrictions on speech to serve substantial government interests, as long as the restrictions did not overly suppress speech and did not regulate speech based on its content.[9] On the other hand, almost all restrictions based on content, with only a few exceptions, were held invalid. This was famously reflected in a 1972 decision, *Police Department of Chicago v. Mosley*, where the Court stated, "government has no

power to restrict expression because of its message, its ideas, its subject matter or its content."[10] Using this mandate of content-neutrality, the Court struck down a large number of restrictions on speech that turned on the content of the speech.[11] This was true even where the restriction was relatively modest and left plenty of alternative ways to communicate the message. The restriction was still invalid if it treated some speech contents different from other speech contents. Conversely, the Court upheld most restrictions on speech that did not turn on content, as long as the restrictions served important government interests and left ample alternatives for communication.

This growing emphasis on content-neutrality in regulating speech can be seen in two 1981 decisions involving religious speech, *Heffron v. International Society for Krishna Consciousness*[12] and *Widmar v. Vincent*.[13] In *Heffron* the Court reviewed a Minnesota state fair regulation which prohibited the sale or distribution of literature within the fairgrounds except from a designated booth. The International Society for Krishna Consciousness challenged the regulation, arguing that the restriction interfered with its ability to practice its religion by distributing literature. The Court rejected the argument, finding that the restriction constituted a valid time, place and manner restriction. Emphasizing that the restriction applied equally to all speech, no matter what its content, the Court applied an intermediate standard of review, finding that the restriction served a significant government interest in controlling crowds at the fair and was narrowly tailored to serve that interest. Further, the restriction left adequate alternatives for speech, since the regulation allowed the Krishnas to distribute literature and solicit funds from a booth within the fairgrounds, and the Krishnas were free to pursue those same activities unrestricted outside the fairgrounds.[14]

Therefore, although the Court declined to protect the religious speech in question, its holding was based on the substantiality of the state's interest, the minimal impact it had on the Krishnas' ability to spread its message, and, most importantly, the fact the same restriction applied to all other speech, no matter what its content. This was a standard analysis that had emerged for analyzing restrictions on speech in public areas, and the religious speech was simply treated the same as other speech, no better and no worse. Indeed, the Court went out of its way to stress that religious groups do not enjoy any greater rights "to communicate, distribute, or solicit on the fairgrounds" than any other group with "social, political, or other ideological messages to proselytize."[15] Since the Krishnas were not being discriminated against, and since the state had a substantial interest in regulating speech activity within the fairgrounds, the regulation was upheld.

In contrast, in *Widmar v. Vincent*, the second of the 1981 decisions involving religious speech, the Court held that a public university could not prohibit a religious group from using campus facilities when the use of such facilities was extended to non-religious groups. In that case the University of Missouri had permitted over a hundred different student groups, reflecting a wide-range of interests and opinions, to have access to campus buildings to meet. However, university policy prohibited the use of campus buildings "for purposes of religious

worship or religious teachings," believing such a prohibition was required by the Establishment Clause. For that reason the university refused to grant similar rights to Cornerstone, an evangelical student group whose meetings consisted of prayer, singing, and Bible study.

The Supreme Court, in an 8-1 decision, held for the students, saying that exclusion of a student group based on its religious speech violated the Free Speech Clause, while inclusion of a religious group on the same terms as other groups did not violate the Establishment Clause. The Court began its analysis by noting that the university was not obligated to open up its facilities to student groups, but once it did so it had to make them available on a content-neutral basis. Unlike *Heffron*, where the state had regulated speech on a content-neutral basis, in *Widmar* the university violated that principle by treating religious speech less favorably than other speech, which violated Cornerstone's free speech rights.[16] The Court also rejected the university's Establishment Clause argument, saying that providing equal access to religious speech did not violate the Establishment Clause, since it treated religion neutrally and as such did not place the state's imprimatur on religion.[17]

In one way, *Widmar* was not a particularly surprising or eventful decision, since it was a logical extension of previously recognized principles concerning religious speech. As noted above, the Court had long included religious speech within the protections of the free speech clause. Similarly, concerns about content discrimination had informed free speech doctrine since the 1930s and 40s, and had emerged in the 1970s as perhaps the Court's foremost concern. Thus, to find that a university's discrimination against a group because of the religious content of its speech was unconstitutional was quite predicable and consistent with precedent.

Nonetheless, *Widmar* was significant for three reasons. First, *Widmar* clarified that the protections of free speech went not only to religious proselytizing and preaching, activities designed to engage others in dialogue and thus similar to other types of speech, but also included such core religious practices as prayer and worship. Justice White's lone dissent in *Widmar* had argued that prayer and worship do not constitute speech in its normal meaning, but the majority specifically rejected that position, stating that, "UMKC has discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion. These are forms of speech and association protected by the First Amendment." The majority elaborated on this in a lengthy footnote, saying that "[t]here is no indication when 'singing hymns, reading scripture, and teaching Biblical principles' cease to be 'singing, teaching, and reading' — all apparently forms of 'speech,' despite their religious subject matter - and become unprotected 'worship.'"[18]

Second, the Court reaffirmed the content-neutrality requirement, but did so in what is now known as a designated or limited public forum context. In previous cases the Court had invalidated government procedures that required a permit before engaging in speech activity, such as a parade, if permits might be granted or denied based on speech content, and had also struck down content restrictions in traditional public forums like streets and sidewalks. But in *Widmar* the Court held that even if government is not required to open its facilities to speech,

once it voluntarily chooses to create a speech forum, it cannot discriminate against speech because of its content. This is significant, since the role of traditional public fora, such as streets and parks, is declining as centers of speech activity, while in the future limited public forums, voluntarily created by the state, are likely to play the greater role as facilitators of speech.

Finally, and perhaps most importantly, the Court held that providing equal access to religious speech, as mandated by the Free Speech Clause, did not violate the Establishment Clause, even when it resulted in religious worship on public property. Although the Supreme Court had long protected religious speech, *Widmar* was the first case where extending protection to religious speech began to rub up against the Establishment Clause. In finding that granting equal access to a religious group would not violate the Establishment Clause, the Court applied the three-part *Lemon* test, quickly noting that the first and third prongs were easily met, since an equal access policy has a secular purpose of non-discrimination and would avoid excessive entanglement with religion. Thus, the only issue was whether providing equal access to religious groups would have a primary effect of advancing religion. The Court concluded it would not, for two reasons. First, an equal access policy would not confer the state's imprimatur on religion since it would simply be treating Cornerstone the same as any other student group. Second, since over 100 student groups participated in the university's open forum, the forum's primary effect was not to advance religion, absent a showing that religious groups would dominate the forum.[19]

Taken as a whole, *Widmar* reflected a strong emphasis on the need to treat religion neutrally, with a certain symmetry between the Free Speech and Establishment Clauses. On the one hand, content-neutrality is mandated by the Free Speech Clause, and therefore excluding a religious group from a state-created speech forum violates free speech. On the other hand, to treat a religious group neutrally, giving it the same access as other student groups to a speech forum, mitigated any Establishment Clause concerns that might exist when religious speech occurs on public property. In particular, neutral treatment dissipates any perception of endorsement and minimizes any primary effect of advancing religion when part of a larger forum. Yet the Court did not apply a neutrality test per se in analyzing whether an equal access policy would violate the Establishment Clause, and its analysis suggested that even a neutral treatment of religion might be unconstitutional if religious groups dominated a forum. This emphasis on neutrality, though only partial in *Widmar*, became central over the next quarter century, particularly in the religion jurisprudence of the Rehnquist Court.

II. The Rehnquist Court, Neutrality and Religious Speech

By the 1981 decisions in *Heffron* and *Widmar*, content-neutrality had become a central focus in analyzing free speech rights, including religious speech, and played a significant, though not dispositive role in Establishment Clause analysis. During the Rehnquist Court this emphasis on neutrality became even more pronounced, with the Court largely taking a view of religion as a co-equal participant in our nation's public life, to be neither favored nor disfavored. This resulted in an even more pronounced shift to free speech, and away from free ex-

ercise, as the dominant protection of religious liberty.

The Court's increasing protection for religion as speech is reflected in four primary cases: *Westside Board of Education v. Mergens*, *Lamb's Chapel v. Center Moriches Union Free School District*, *Rosenburger v. Rector and Visitors of the University of Virginia*, and *Good News Club v. Milford Central School*. All four cases had generally the same fact pattern. Each involved a public school, ranging from elementary to a four-year university, and in each case the school decided to create what could be viewed as a forum for speech purposes, in two cases only for students themselves and in two others for community groups and organizations. In each case, however, the school denied access to religious speech because of perceived Establishment Clause problems. And in all four cases the Court said, as it had earlier said in *Widmar*, that to deny access to a group because of the religious content of its speech violated the Free Speech Clause, and to grant equal access to religious speech eliminated any Establishment Clause concerns that might otherwise exist. Although *Widmar* was certainly strong precedent for each of the cases, the Court in fact extended the level of protection previously recognized in *Widmar*.

The first case in which the Rehnquist Court employed this analysis was *Westside Board of Education v. Mergens*,[20] in which a high school permitted about thirty student clubs to meet on campus, but denied permission to a Bible study club because school officials believed recognizing a student religious group would violate the Establishment Clause. The students sued under the "Equal Access Act," a federal statue that in effect extended the protections of *Widmar* to high school campuses. In essence, the Act said that once a school opened up a forum for student clubs, it could not exclude a group based on its content, specifically mentioning religious clubs as one example. The Supreme Court held for the students, finding that exclusion of the Bible study club violated the Equal Access Act, and that permitting the group to meet as part of a broader forum of student groups did not violate the Establishment Clause.

Because the Court analyzed the students' speech rights under the Equal Access Act,[21] the majority did not directly address constitutional free speech rights as such. As a practical matter, however, the case had strong constitutional overtones, in part because the Act itself was largely based on the Court's own analysis in *Widmar*. There was little doubt that the Congressional purpose in passing the Act was to extend to high school students the same rights the Court had recognized for college students in *Widmar*. This point was made clear by a concurring opinion by Justice Marshall, joined by Justice Brennan, that said the Equal Access Act simply codified what was already constitutionally required under the Free Speech Clause — prohibiting discrimination against religious clubs on the basis of content.[22] Justice O'Connor's plurality opinion also strongly hinted at the Free Speech overtones of the opinion.[23]

In regard to the second issue, whether granting equal access to the Bible study club violated the Establishment Clause, the Court made clear what was suggested in *Widmar*: that neutral treatment of religion in a public forum does not violate the Establishment Clause. No single opinion commanded a majority of the Court on that issue, but a focus on neutral treatment of

religion meeting the Establishment Clause ran through various opinions. Justice O'Connor's plurality opinion for four members of the Court stressed that the basic message of the Act was "one of neutrality, not endorsement; if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion."[24] Justices Scalia and Kennedy, although not agreeing with the endorsement analysis used by Justice O'Connor, nevertheless agreed that the neutral treatment of religion, in which religious speech was treated the same as other speech, met the dictates of the Establishment Clause.[25] Taken as a whole, *Mergens* clarified the premises implicit in *Widmar*: religious speech must be provided equal access to speech fora, and such neutral treatment of religion does not violate the Establishment Clause.

This same analysis was seen three years later in *Lamb's Chapel v. Center Moriches Union Free School District*,[26] when the Court again held that excluding religious speech from a designated forum violated the Free Speech Clause. In that case a school district policy permitted use of school facilities for various community groups, but specifically excluded religious uses on the grounds that it would violate the Establishment Clause. A church requested to use a school building to show a film series on child-rearing, which would clearly have been a permitted use of the building except for the religious content involved. For that reason the request was denied, and the church sued. As it had in *Widmar*, the Court held that excluding the church from a state-created speech forum violated the Free Speech Clause, and permitting the church on equal terms as other community groups did not violate the Establishment Clause.

The Court began it analysis with the free speech issue, assuming, without deciding, that the school's policy only created a limited public forum. Even under that narrow understanding of the school district policy, the Court said the church's speech rights had been violated, since denying access to the church constituted not just subject-matter discrimination, but also viewpoint discrimination, considered the worst form of speech restriction and almost always invalid. The Court rejected the idea the restriction was viewpoint neutral, even though it treated all religious views on child-rearing the same. Instead, the Court noted that the subject of child rearing was clearly permissible under school regulations, so the Church's request was denied solely because it planned to address the topic form a religious viewpoint.[27]

The Court further held, as it had in *Widmar* and *Mergens*, that permitting the church to use the facility on the same terms as other community groups did not violate the Establishment Clause. As it had in *Widmar*, the Court stressed that under the circumstances of the case there was "no realistic danger that the community would think the District was endorsing religion or any particular creed, and any benefit to religion or to the church would have been no more than incidental."[28] In a very cursory fashion it also noted the *Lemon* test was met.

Two years later, in *Rosenberger v. Rector and Visitors of the University of Virginia*,[29] the Court again addressed exclusion of religious speech from a state-created forum. In that case the University of Virginia provided funding for certain student publications, but specifically prohibited religious publications from receiving any funding, stating that direct financial support

for religion violated the Establishment Clause. In finding the policy excluding religious speech unconstitutional, the Court began its analysis by noting that the university in effect had created a public forum, which required that any restrictions be content-neutral, which the policy violated. Moreover, relying on its analysis in *Lamb's Chapel*, the Court viewed the prohibition on funding religion as not just content-based, but viewpoint based, stating:

> By the very terms of the SAF prohibition, the University does not exclude religion as a subject matter but selects for treatment those journalistic efforts with religious editorial viewpoints. Religion may be a vast area of inquiry, but it also provides, as it did here, a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered.[30]

Earlier in the opinion the Court had labeled viewpoint discrimination as a "blatant" and "egregious" form of content discrimination, and thus it was clear the student rights had been violated.[31]

The Court also found that providing equal funding to religious publications would not violate the Establishment Clause, since it treated religion neutrally under such a scheme. The Court began its Establishment Clause discussion by stating, "[a] central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion."[32] The Court noted this principle also applied to free speech equal access cases, stating that it had "more than once" rejected the idea that the Establishment Clause prohibited "extend[ing] free speech rights to religious speakers who participate in broad-based government programs neutral in design." On that basis the Court held that including a religious publication in the funding program would not violate the Establishment Clause, since it would simply be treating religion neutrally, rather than preferentially. This was true even though it meant that government monies would go to an explicitly religious activity, a traditionally sensitive area of Establishment Clause jurisprudence.[33]

A final and very recent case (2001) illustrating how content-neutrality protects religious speech and at the same time avoids Establishment Clause concerns is *Good News Club v. Milford Central School*.[34] In that case a school district adopted regulations identifying several purposes for which local schools could be open to public use, including "instruction in any branch of education, learning or the arts," and for "social, civic, and recreational meetings and entertainment events." Pursuant to that policy, a local "Good News Club," a Christian organization for young children, sought permission to use the building after school. A typical meeting would include learning and reciting Bible verses, singing songs (presumably Christian), hearing a Bible story, and closing with a prayer. Although school policy permitted other groups, such as the Boy Scouts, to use the building, the school refused permission for the Good News Club to meet because of the religious nature of the meetings.[35]

As in the previous cases, the Supreme Court held that excluding the religious group from a state-created public forum violated the Free Speech Clause, and permitting the group to use the building on the same terms as other groups did not violate the Establishment Clause. The Court began its free speech analysis by recognizing that at a minimum the school had created a limited public forum, which required that speech restrictions not discriminate on the basis

of viewpoint and be reasonable. Relying upon its previous analysis in *Lamb's Chapel* and *Rosenberger*, the Court held that excluding religious groups from the forum constituted viewpoint discrimination and was thus unconstitutional. The Court stated that it was clear, under the school's guidelines, that any group that "promotes the moral and character development of children," such as the Boy Scouts, is permitted to meet. Therefore, the Good News Club was seeking to address a subject otherwise permitted under the guidelines, moral and character development, from a religious perspective. The effect of the policy was to exclude a particular viewpoint (religious) on moral and character development, and, therefore, violated the group's free speech rights.[36]

The Court then addressed the Establishment Clause issue, concluding, as it had in previous cases, that permitting the Good News Club to meet on the same terms as other groups would not violate the Establishment Clause. The Court began by noting that the Establishment Clause issue was essentially the same one addressed in *Lamb's Chapel* and *Widmar*, both of which clearly established that granting religious speech equal access to a school-created forum did not violate the Establishment Clause. The Court also noted, as it did in *Rosenberger*, that a significant factor in Establishment Clause analysis is neutrality toward religion, and "because allowing the Club to speak on school grounds would ensure neutrality, not threaten it," the school "face[d] an uphill battle in arguing that the Establishment Clause compels it to exclude the Good News Club."[37] Finally, the Court said there was no coercive pressure to participate in club activities, since the decision to participate was up to parents, not children.

The Court's decision in *Good News Club*, its most recent decision regarding religious speech, largely reinforces the previous holdings of the Rehnquist Court: that excluding religious speech from state-created fora violates the Free Speech Clause, and giving religious speech equal access to such fora does not violate the Establishment Clause. Indeed, as noted earlier, the genesis of the free speech rights analysis can be traced back to the public forum cases of the 1930s, 40s, and 50s, and the Court's 1981 decision in *Widmar,* which essentially set out the basic Free Speech and Establishment Clause analysis that was later affirmed in *Mergens*, *Lamb's Chapel*, *Rosenberger*, and *Good News Club*. These Rehnquist Court cases, therefore, did not so much take the Court in a new direction as affirm and solidify earlier doctrine and analysis.

In two important respects, however, the Rehnquist Court took religious speech rights a step further and strengthened the protection given to religious speech. First, whereas *Widmar* had treated the exclusion of religious speech as content-discrimination, the Court in *Lamb's Chapel*, *Rosenberger*, and *Good News Club* characterized it as viewpoint discrimination, a much more problematic form of speech discrimination, and one that is almost inevitably unconstitutional. It is important to emphasize how significant this characterization is. Although any type of content discrimination is problematic, the Court has often stressed that viewpoint discrimination is a particularly troublesome type of discrimination. Professor Rodney Smolla, a leading First Amendment scholar, puts it this way in his treatise: "The doctrinal difference between

content-based discrimination and viewpoint discrimination is certainly significant. Content-based discrimination normally triggers strict scrutiny (or some other form of heightened scrutiny), often resulting in the law being held unconstitutional. But laws that engage in viewpoint discrimination have even tougher going."[38] The Court in *Rosenberger* made this same point, stating that "[W]hen the government targets not subject matter, but particular views taken by speakers on a subject the violation of the First Amendment is all the more blatant," and labeling viewpoint discrimination "an egregious form of content discrimination."[39]

Thus, it is no small matter that the Court in these cases began characterizing the exclusion of religious speech as not just exclusion of religion as a category of speech, but rather as exclusion of religious viewpoints on a variety of broader social issues. The Rehnquist Court made that change by viewing each of the fora in question as addressing particular social issues, but excluding the religious viewpoint in each. In *Lamb's Chapel* it was discussion of child-rearing, in *Rosenberger* it was a variety of political and social issues, and in *Good News Club* it was character and moral development. Thus, what might be superficially seen as merely excluding a particular speech content — religion — is reconceptualized as exclusion of particular viewpoints — religious — on a broad set of issues addressing society. The consequence is to provide an even greater level of protection to religious speech than had previously existed.

The second way in which the Rehnquist Court solidified the use of free speech to protect religion was in how it handled the Establishment Clause issue — an issue that is inevitably presented in these types of cases. What was implicit in *Widmar*, that the neutral treatment of religion would not violate the Establishment Clause, became more overt in the Rehnquist Court years. This was particularly true in *Rosenberger* and *Good News Club*, where the Court made neutrality the central factor in its analysis and which almost, but not quite, guarantees the Establishment Clause is not violated if religion is treated the same as other speech, no better and no worse.

Perhaps even more significant, however, were the fact-pattern in those two cases, which involved areas in which the Court had often closely scrutinized government involvement with religion. In *Rosenberger* this involved use of government monies to fund an overt, even blatant religious message. In *Good News Club* it was overtly religious activity, such as prayer and Bible study, in the context of an elementary school, where students are the most impressionable. Both of these are highly sensitive Establishment Clause areas, in which both historical understandings and the Court's own jurisprudence suggest any government association with religious activity should be closely scrutinized. Yet in both of these contexts the Court essentially said the neutral treatment of religion, as required by the Free Speech Clause, would trump any Establishment Clause concerns.[40]

Finally, in order to appreciate fully the ascendancy of free speech protection for religious liberty, a brief word should be said about what was happening to Free Exercise jurisprudence during this period. As previously stated, religious liberty has long been protected more under the Free Speech Clause than under Free Exercise. Yet there was about a three decade period,

beginning with Court's opinion in *Sherbert v. Verner* in1963, in which the Court provided significant protection under the Free Exercise Clause, reflected at first in *Sherbert* and later in cases such as *Yoder v. Wisconsin*[41] and *Thomas v. Review Board*.[42] Under these cases, once a religious adherent showed that a government law or regulation resulted in a substantial burden on religion, even if only incidental, then the government had to show a compelling interest in not granting an exemption to the affected believer.

This analysis, which accommodated religious beliefs that would be uniquely burdened by general rules, was rejected by the Rehnquist Court's 1990 decision in *Employment Division v. Smith.*[43] In that case the Court held that an Oregon statute that made use of peyote a crime could be applied against a Native-American even when used as part of a religious ritual. In finding that the Free Exercise Clause was not even implicated under the facts of the case, the Court reshaped its Free Exercise analysis by stating that neutral laws of general applicability do not even trigger free exercise protection, even if the law imposes a substantial burden on religion. Rather, the Free Exercise Clause is triggered only when government targets religion as such.[44]

Although the Court characterized its analysis as consistent with prior cases, the reality was that *Smith* dramatically changed the way the Court went about deciding free exercise cases. Whereas, before the focus was on the burden on religion, now the focus is on the nature of the regulation. Burdens on religious exercise that are incidental to general laws are not protected; only when religion is targeted is it the case that there is a free exercise burden. For all practical purposes, this parallels the Court's neutrality analysis in the free speech cases. As such, religion has no special constitutional claim to special treatment.

Although seen by most as a setback for religious liberty, the *Smith* decision arguably affirms the Court's view of religion set out in the free speech cases, one in which religion is a co-participant in America's public life. The free speech cases say that as a co-participant, religion cannot be excluded from public life, but the *Smith* decision says religion, as a co-participant, is not entitled to special constitutional protection. Read together, they suggest that religion must take the bitter with the sweet that neutrality brings; being a co-participant in America's public life means religion cannot be disfavored, but, after *Smith*, it also suggests it is not *constitutionally* given preferential treatment.

III. Reflections on What This Might Mean

Let me conclude by offering a few thoughts on what the Court's increasing use of free speech doctrine to protect religious liberty might mean, briefly touching on two issues: (1) what these cases say about how the Court views the role of religion in American life; and (2) how the Court's increasing focus on free speech, rather than free exercise, fits with the challenges religion will face in the twenty-first century.

A. How the Court Views Religion

In his keynote speech at this conference on Saturday, noted constitutional scholar Douglas Kmiec concluded his remarks by imagining that a visitor from another galaxy is given Supreme Court cases on religion and, based on what those cases say, asked to describe religion. Kmiec suggested that this visitor would likely conclude, based upon those cases, that religion is divisive, coercive, irrational and empty. And indeed, there is language and ideas in various Supreme Court opinions that would lend support to each of those views.

But let's assume that our visitor from another galaxy is instead given the Rehnquist Court cases regarding religious speech, and in particular *Mergens, Lamb's Chapel, Rosenberger* and *Good News Club*, and asked how the Court views religion. The answer would be very different from the description given by Kmiec. Rather than seeing religion as a threat to American values, the visitor would likely conclude that religion should be a full co-participant in America's public life, to be received on the same terms as any other world view or value system. This general view of religion, which clearly flows from the Rehnquist Court's religious speech cases, would include the three following corollaries:
(1) religion is not intended to be merely a private affair, but has a public dimension to it;
(2) religious views have the same right to influence society as any other view; and
(3) as long as government treats religion equally and neutrally, religion is not a danger or threat to society.

This, of course, differs dramatically from Kmiec's description of how the Court views religion, but I believe is more in line with the Court's actual view of religion's role in American society. Although the Court remains skeptical about government involvement in and promotion of religion, it is much more positive about religion per se and its role in American life. Religion is a valued co-participant in America's public life, and has the same right to influence the direction of the nation as any other belief or value system.

This view of religion as co-participant in America's public life is reflected in two aspects of the Rehnquist Court jurisprudence. First, by characterizing the exclusion of religious speech as viewpoint discrimination, the Court not only increased the level of protection given to religious speech, but sees that speech through a slightly different lens. Rather than viewing the cases as merely excluding religion as a subject, the Court has consistently seen the exclusion as excluding religious views on various societal concerns: child-rearing, character and moral development, and social issues. From this perspective, government is creating speech fora for the purpose of discussing various issues, and the impact of denying access to religious speech is to exclude the religious viewpoint on those issues. The Rehnquist Court made clear, however, that religion has an equal right to participate in those debates.

The second way the Rehnquist Court strongly reinforced religion's right to be a co-participant was by not allowing the Establishment Clause to shut the door to religion's participation in such debates. Many people, including some scholars, latch on to the concept of separation of church and state as in fact shutting the door to religion's participation in broader societal dis-

cussions, at least to the extent such discussion is taking place under the rubric of government sponsorship, as in public schools. But the Court, by emphasizing a neutrality analysis, eliminated the idea of the Establishment Clause as a barrier, saying the Constitution's basic concerns are addressed by treating religion the same as everyone else — in other words, allowing it to participate on the same terms. As mentioned before, there is a nice symmetry here — the neutrality that is mandated by free speech is sufficient to mitigate Establishment Clause concerns.

Finally, the Rehnquist Court's view of religion as a full co-participant in America's public life came with a cost, which is some sacrifice of protection under the Free Exercise Clause. As noted earlier, the *Smith* case essentially applied the same neutrality analysis to Free Exercise as was being applied in the Free Speech and Establishment Clause contexts. But here the effect was to provide less, not more protection for religious liberty. Still, *Smith* was arguably consistent with viewing religion as a co-participant in America's public life, simply recognizing that religion must take the bitter with the sweet.

B. Religion's Challenges in the Twenty-First Century

Finally, I want to discuss how the Court's emerging use of free speech doctrine to protect religious liberty fits in with the challenges religion faces in the twenty-first century. For a substantial part of our nation's history, religious liberty faced two primary threats — government attempts to interfere with religion and government attempts to establish or promote religion. Although both concerns remain to some extent today, neither one poses the substantial threat that it did in the past. This is largely a result of our nation's increased sensitivity to religious diversity and tolerance on the one hand, and the extent to which the ideal of separation of church and state has been engrained in the American consciousness on the other.

For example, although government interference with religion still occurs, it is attenuated compared to previous periods in our history. There are few instances today where government intentionally interferes with religion;[45] our societal emphasis on toleration and diversity precludes that for the most part. The more likely type of interference occurs from general laws which have incidental, yet substantial burdens on religion, such as occurred in *Smith*. Even here, however, our societal emphasis on tolerance and respect for religious diversity make it likely that legislation itself will accommodate unique religions, an option that the *Smith* Court said was permissible and consistent with the Establishment Clause. Indeed, after *Smith* the state of Oregon itself passed an exemption for the religious use of peyote.

Similarly, concerns about government promotion of religion, though certainly very real today, are but a shadow of what they were in earlier periods of American history. There are no serious efforts to establish official state churches, as existed at our founding and for several decades thereafter and there are no efforts to recognize Christianity as our official religion, as periodically occurred throughout the nineteenth century. Even efforts to pass a serious constitutional prayer amendment have largely run out of gas, and the type of civil religion that government identifies with is so void of meaningful substance as to not make it a threat to anyone. Even the religion in public school issues that continue to plague the courts, and will

undoubtedly do so for years to come, today tend to be quite nuanced and at the margins, a far cry from the earlier cases of children reciting state-composed prayers.

What is likely to be the real challenge for religion in the twenty-first century is government and societal efforts to privatize religion. As suggested above, American society has certainly reached the point where it respects, or at least tolerates, a variety of religious faiths, and is not inclined to deliberately interfere with any of them. At the same time, however, there is a growing sense on the part of many people that religion is and should remain a private matter, and in particular kept away from influencing America's public life. This is in part a result of the growing dichotomy in the twentieth century between a highly religious people and an increasingly secular culture, with American cultural values being less and less influenced by the religious values of its people. As a consequence, many people believe that religion, though important, should be a private matter. This perception finds reinforcement in misunderstandings of the Establishment Clause and the related idea of separation of church and state.

This growing movement to privatize religion has been well-documented by others, with perhaps the leading voices being Richard John Neuhaus and Stephen Carter. Neuhaus's 1983 book, *The Naked Public Square*,[46] detailed and discussed the growing tendency to privatize faith in this country, to make the public square devoid of religious influence. A decade later Carter repeated this theme in *The Culture of Disbelief*,[47] using the phrase "God as a hobby" to describe societal attitudes toward religion: religion is fine as long as it is kept to yourself. Central to both writers is the idea that society sees religion as irrelevant to broader societal concerns and is increasingly excluding religion from the public square.

Even if Neuhaus's and Carter's claims are a bit overstated, I think their basic point has validity: there is a growing sense in this country that religion should be a private matter. It is perhaps displayed most prominently in the current debate over the role of religion in politics, with many suggesting it is inappropriate for people of faith to bring their religious values into the political arena. But it is also seen in the types of cases the Rehnquist Court reviewed, in which government created a forum for speech but excluded religious speech.

In this context, I believe that the Court's growing emphasis on free speech jurisprudence is particularly appropriate for this new century, because it addresses what might well be the primary threat to religious liberty: efforts to privatize religion, resulting in discrimination against religion in public life. Not only is free speech doctrine well-designed to protect against the specific types of discrimination that might take place, as seen in the school forum cases, but it also sets a tone and communicates a broader message to society, that religion should be viewed as a full co-participant in America's public life. It serves as a reminder of who we are as a people and the constitutional commitments that we embrace, which include a commitment to treat all value systems, including religious ones, with equal respect and dignity.

Conclusion

Protection of religious liberty and the development of free speech doctrine have long been intertwined, dating back to the 1930s and 1940s when modern free speech jurisprudence began

to emerge. The central role of free speech jurisprudence in protecting religious liberty came to full fruition in the Rehnquist Court years, however, when the Court adopted a strong neutrality analysis for religion issues. While this resulted in diminished protection under the Free Exercise Clause, it solidified the protection given religion under free speech. In particular, in a series of cases the Court consistently characterized exclusion of religious speech from public speech fora as viewpoint discrimination, thereby providing religious speech the highest protection possible. At the same time, the Court consistently held that the neutral treatment of religious speech avoided any Establishment Clause concerns, even in contexts which the Court has traditionally considered highly sensitive.

This emphasis on neutrality is well positioned to address many of the challenges religion faces in the twenty-first century. While America is now increasingly tolerant of different religious faiths, there is also a perception by many that religion remain private and out of public life. The Court's free speech jurisprudence makes clear, however, that religion is a co-participant in America's public life, and attempts to exclude religious views from public discussion and debate are unconstitutional.

*Mark W. Cordes is a law professor at Northern Illinois University College of Law.

[1]The First Amendment to the Constitution reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

[2]See Michael W. McConnell, et. al., *Religion and the Constitution* 596 (2nd ed. 2006).

[3]303 U.S. 444 (1938).

[4]*Id.* at 451-52.

[5]319 U.S. 624 (1943).

[6]*Id.* at 642.

[7]See e.g., Saia v. New York, 334 U.S. 558 (1948); Martin v. City of Struthers, 319 U.S. 141 (1943); Lovell v. City of Griffin, 303 U.S. 444 (1938).

[8]See, e.g., *Saia,* 334 U.S. at 561; *Lovell*, 303 U.S. at 450.

[9]See, e.g., City Council v. Taxpayers for Vincent, 466 U.S. 789 (1984); Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984); Grayned v. Rockford, 408 U.S. 104 (1972); *see generally*, Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. Chi. L. Rev. 46, 51 (1987).

[10]408 U.S. 92, 95 (1972).

[11]See, e.g., Boos v. Barry, 485 U.S. 312, 321 (1988); Carey v. Brown, 447 U.S. 455, 462 (1980); *Mosley*, 408 U.S. at 95.

[12]452 U.S. 640 (1981).

[13]454 U.S. 263 (1981).

[14]*Heffron*, 452 U.S. at 647-55.

[15]*Id*. at 652-653.

[16]*Widmar*, 454 U.S. at 269.

[17]*Id.* at 274-75.

[18]*Id.* at 269 and 269 n.6.

[19]*Id.* at 270-77.

[20]496 U.S. 226 (1990).

[21]See *id.* at 235.

[22]See *id.* at 262 (Marshall, J., concurring).

[23]See *id.* at 250 (O'Connor, J.J., Plurality opinion) ("there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect") (emphasis in original).

[24]See *id.* at 248-52 (O'Connor, J.J., concurring).

[25]See *id.* at 260 (Kennedy, J., concurring).

[26]508 U.S. 386 (1993).

[27]See *id.* at 391-94.

[28]See *id.* at 394-95.

[29]515 U.S. 819 (1995).
[30]*Id.* at 831.
[31]See *id.* at 829.
[32]See *id.* at 839.
[33]See *id.* at 839-45.
[34]533 U.S. 98 (2001).
[35]*Id.* at 102-105.
[36]See *id.* at 108-10.
[37]See *id.* at 114.
[38]Rodney A. Smolla, SMOLLA AND NIMMER ON FREEDOM OF SPEECH: A TREATISE ON THE FIRST AMENDMENT § 3.26 (1994).
[39]*Rosenberger*, 515 U.S. at 829.
[40]See *Edwards v. Aguillard*, 482 U.S. 578 (1987) (the "Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools").
[41]406 U.S. 205 (1972).
[42]450 U.S. 707 (1981).
[43]494 U.S. 872 (1990).
[44]*Id.* at 878-80.
[45]Exceptions to that principle occasionally occur. For an example of a rare instance where a local government intentionally interfered with religion, see Church of the Lukumi Babalu Aye v. City of Itialeah, 508 U.S. 520 (1993).
[46]Richard John Neuhaus, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA (William B. Eerdmans Publishing, 1984).
[47]Steven L. Carter, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION (Harper & Row, 1993).

AMERICAN CIVIL RELIGION IN AN AGE OF RELIGIOUS PLURALISM

BY ANN W. DUNCAN*

I. Introduction

Few would deny that September 11, 2001 changed the United States of America in fundamental ways. Countless books in fields such as religious studies, sociology, political science and history have been written in the past five years in an attempt to help the American public, and perhaps the authors themselves, understand the reasons for this attack and how to prevent similar attacks in the future. For scholars of religion, this has brought into clear focus the vital importance of recognizing and reckoning with the growing religious diversity within our country and the increasing globalization which brings America into conversation with other cultures, and, therefore, other religions throughout the world. This type of interaction requires not only knowledge and understanding of these other religions but also understanding of the aspects of American culture, and even Judeo-Christian religion, which are seen as an affront to many of the cultures with which we seek to cooperate. September 11th was an attack on America in a real and a figurative sense. Though Osama bin Laden and his cohorts form only a small fraction and an extreme minority of the Islamic faith and Arab world, their criticism of American politics and ideology must be taken seriously. The ability of the United States to overcome the ideological and cultural conflicts that led to September 11th and to play a role in international and inter-religious cooperation towards a peaceful world depends first on its ability to find such harmony within American borders.

Numerous scholars of religion have addressed the growing religious diversity and pluralism within the United States, even before 2001. Arguing for various ways in which this diversity can be welcomed and integrated it into our national ethos, these scholars present rather optimistic views of the future and a clear belief in the possibility of cooperation. Yet, one must also consider the effect of this growing diversity and 9/11 on the national creeds and mythologies that shape our view of our own country and the world. This paper attempts to examine these effects and put various theories of pluralism and civil religion into conversation with each other in the context of our present circumstances. Beginning with the proposition that there exists an "American civil religion," I will detail Robert Bellah's articulation of this idea in his work from the 1960s. I will then survey scholarship on the subject of pluralism and civil religion since Bellah and discuss the state of pluralism and the American civil religion in the post-9/11 world. In a country increasingly aware of its unprecedented religious diversity and a country changed by the events of September 11, 2001, which was perceived to be a religious attack by the perpetrators, the America civil religion described by Bellah in 1967 is inevitably shifting and must fundamentally change in order to continue to give the United States a sense of identity and purpose in the modern world. Only with a new understanding of the myths of

America can the United States put forward an identity accessible to all its citizens and not fatally objectionable to its enemies. With such a change, new questions inevitably arise about the continuing relevance or possibility of a unified civil religion.

II. The Theory of American Civil Religion

A. Bellah Revisited

Though scholars and religious individuals have articulated similar theories in the past and since, perhaps the clearest and most enduring articulation of the concept of the American civil religion comes from Robert Bellah.[1] In his 1961 book, *The Broken Covenant: American Civil Religion in a Time of Trial*, Bellah defines civil religion as "that religious dimension, found I think in the life of every people, through which it interprets its historical experience in the light of transcendent reality."[2] The American civil religion is thus the means by which Americans understand, in light of the transcendent, American history, purpose and action. According to Bellah, the founders clearly understood the United States to be a country chosen by God but in a conditional manner that required faith and virtue and responsible use of power.[3] Finding examples of this rhetoric throughout American history, Bellah quotes Herman Melville who writes, "we Americans are the peculiar, chosen people — the Israel of our time; we bear the ark of the liberties of the world" and points to Lincoln's second inaugural address as the single greatest expression of this understanding of covenant and judgment in American history.[4]

In 1967, Bellah elaborated on this concept of the American civil religion in an article entitled "Civil Religion in America" published in the journal *Daedalus*. This civil religion, he writes, "exists alongside of and rather clearly differentiated from the churches" and thus should be studied in much the same way as more traditional religions.[5] As a religion, the civil religion contains rituals and symbols, which combine religious language with American political ideals and principles. Bellah points to Rousseau's understanding of the social contract as one of the first articulations of civil religion and he cites political documents such as the *Declaration of Independence* and presidential speeches for evidence of civil religious language. Bellah argues that the president acts as the primary figurehead for the religion and thus has a duty to both his people and to God. Beyond the president, all Americans have "the obligation, both collective and individual, to carry out God's will on earth."[6]

Bellah anticipates and addresses concerns that this civil religion constitutes a violation of the separation of church and state. Though this separation makes more specific religious reference unconstitutional, Bellah writes, "The separation of church and state has not denied the political realm a religious dimension."[7] This religious dimension necessarily manifests in a rather generic and nonspecific language, consistent with the understanding that more specific articulations of faith are appropriate in the private realm. Bellah describes the God of the civil religion as fitting this general model. The word God does not refer to a particular religion but becomes "a word that almost all Americans can accept but that means so many different things to so many different people that it is almost an empty sign."[8] Bellah describes this God

as "not only rather "Unitarian," he is also on the austere side, much more related to order, law and right than to salvation and love … He is actively interested and involved in history, with a special concern for America."[9] Thus, the non-specificity of this God does not diminish belief in His real presence within and care for the lives of Americans. Moreover, this special concern translates into a sense of "chosenness" and responsibility for the American government and its citizens.

In *The Broken Covenant*, Bellah moves beyond simple description of this theory and addresses the status of this civil religion in the 1960s. Addressing demographic changes in the country, Bellah argues, "if we are to survive our third time of trial, encouragement of a broad range of experiments with cultural symbols and styles of community may be essential."[10] "Yet," he continues, "we have broken our covenant with God by allowing our greed to drive us and by denying freedom to portions of our citizenry."[11] This failing has become increasingly clear to Americans, leading Bellah to conclude, "The illusion that our power allows us to be the world's policeman is now gone and there is the growing realization that our relative power in the world is in decline."[12] Though Bellah argues that the civil religion "is still very much alive," he cautions against dangerous trends that may lead to the end or perversion of this system.[13] In his later *Daedalus* article, Bellah describes the 1960s as the third time of trial since the nation's founding. The first trial was the struggle for independence, the second, the debate over slavery and the present conflict being to determine America's role in the world. Bellah cautions, "Gradually, but unmistakenly, America is succumbing to that arrogance of power which has afflicted, weakened and in some cases destroyed great nations in the past."[14] He calls for a greater sense of humility and awareness of "higher judgment" to keep the power of the civil religion in check.[15]

Despite these potential abuses of the power and moral righteousness possible through civil religion, Bellah remains optimistic and finds hope for America in the very diversity that challenges its sense of identity. He argues that to emerge from this time of trial, America requires a "new set of symbolic forms" which would draw inspiration from traditions other than exclusively Judeo-Christian religions. Since the civil religion appeals to a transcendent reality rather than the America government, changes in American reality do not necessarily mean a disruption or end of the civil religion. Thus, Bellah advocates "a world civil religion," which "has been the eschatological hope of American civil religion from the beginning."[16]

B. Post-Bellah Perspectives

Writing in the 1960s, Bellah naturally drew from his perception of the America of his time — an America facing the civil unrest of the 1960s and a new awareness of and interest in non-Western religious and cultural traditions. As America has continued to change politically, demographically and otherwise, perceptions of civil religion naturally have changed as well. In 1994, the American Academy of Religion gathered a forum of four historians of American religion to respond to a series of questions regarding the applicability of Bellah's thesis for the modern day. Their responses were published in the journal, *Religion and American Culture*

and provide a telling array of perspectives and critiques of Bellah's ideas. Phillip E. Hammond, who played a large role in the initial conceptualization of civil religion, argues for the existence of "legitimizing myths" rather than "civil religion" because the former "invites the question 'How do you understand it?' rather than 'Does it exist?'"[17] Amanda Porterfield argues that Bellah was more effective in influencing a generation of religious studies scholars than in describing reality.[18] Suggesting that Bellah's theory has lost its utility, James Moseley argues that events such as the Vietnam War, the Watergate scandal, the end of the Cold War and growing economic and environmental concerns have increased public distrust of the government and weariness about any sense of divine destiny or providence.[19] Finally, Jonathan Sarna argues that despite the deserved and enduring influence of Bellah's work on religious studies, many of his claims were overstated. He sees Bellah's essay as more expressive than analytic, manifesting a desire for unity in a fractured America. Though Sarna concedes that Bellah's principles continue to have relevance, he feels they do not take into account the large-scale social clashes more aptly described in Robert Wuthnow's *The Restructuring of American Religion*.[20]

While these scholars portray Bellah's ideas as a relic of the 1960s and more idealistic than practical, other scholars find his theory to be as applicable today as when it was first articulated. Perhaps the most systematic and substantial post-Bellah treatment of the American civil religion comes in Richard T. Hughes's 2003 book, *Myths America Lives By*. In this book, Hughes, integrating the experiences of minorities such as African Americans, looks at the evolution of American myths over time.[21] Currently, Hughes argues, Americans are faced with the challenge of understanding the events of 9/11 in a way that makes sense within the framework of civil religion. For Hughes, the answer lies in understanding our past. In what he construes to be the most recent phase in an evolution of understandings of American myth, post-World War I America has been characterized by a belief in its own blamelessness. Hughes writes,

> Americans are committed to creating for themselves a perfect world in a golden age that has little to do with the messy contents of human history with which so many people in so many other parts of the world must deal every day, especially the realities of tragedy, suffering, and death.[22]

He points to the examples of Mormonism and the Disciples of Christ, as case studies of those who when challenged by catastrophes of the last two centuries, attempted to restore a golden age and innocence. Hughes finds political manifestations of this idea in President Wilson's characterization of the United States as the pinnacle of civilization and a force against evil and in President Roosevelt's similar rhetoric in World War II. Furthermore, movements such as the Civil Rights Movement represent attempts to expand the American creed to include a greater segment of the population.

Though he recognizes the potential pitfalls of such an ideology, Hughes argues that these myths "hold great potential for good."[23] Particularly during times of war and national stress and catastrophe, Americans naturally and necessarily "absolutize" those myths that give meaning to the national identity.[24] Thus, while America certainly needs to reevaluate national myths to reconcile them with failures in the past and changes in the nature of the nation, the

civil religion can be salvaged and used for good. Hughes writes, "A true revolution of American values will not call on Americans to scuttle their national myths. Rather, a true revolution of values might well ask Americans to embrace the myths in their highest and noblest form."[25]

Hughes's portrait of myth making throughout American history provides a tidy and optimistic counterpart to Bellah's account of the 1960s. In fact, Bellah wrote the forward to Hughes's book. Yet, neither Bellah nor Hughes fully addresses the dramatic increase in religious pluralism and globalization that have characterized the past century generally and the past decade in particular. While American failings, such as denying African-Americans access to the American creed, have been addressed and overcome through internal social movements such as the Civil Rights Movement, current challenges to the creed are more global and widespread than before and, in some ways, beyond the grasp of American citizens' efforts at grassroots, political and social revolution.

Moreover, such a smooth transition from Bellah to Hughes fails to account for real changes in the nature of civil religious language. While Hughes refers to turning points in understandings of the civil religion, he fails to adequately account for the fact that fewer and fewer Americans now ascribe to the somewhat puritanical understanding of a God who stands in judgment over His people. Greater religious diversity combined with political disruptions such as Vietnam and Watergate complicated this understanding of covenant. Even the Civil Rights Movement appealed to a God different from that of the founding fathers. This God was more loving and inclusive rather than judgmental and this led to a very different type of relationship than that suggested by Bellah.

III. Theories of Religious Pluralism and Globalization

A. Early Theories

While diversity has certainly been a constant throughout American history, public perceptions of this diversity have changed dramatically. Whatever the limitations on modern tolerance and pluralism might be, the general public of the modern United States allows for great diversity of belief, appearance and culture than even fifty years ago. As illustrated in Josiah Strong's 1885 book, *Our Country: Its Possible Future and Its Present Crisis*, nativist sentiment has pervaded American history, particularly during times of increased immigration and diversification. Fearing the negative moral, economic and demographic effects of immigration, Strong advocated for a reassertion of Anglo-Protestant values and hegemony throughout the nation. After outlining the "perils" of immigration, "romanism," and Mormonism, among others, Strong discussed the role of the Anglo-Saxon race in bringing to the world the twin values of liberty and "pure *spiritual* Christianity [italics original]."[26] By combining civic and religious language in this way and pointing to American Anglo-Saxon Protestants as the caretakers of the world's future, Strong tied his calls for homogeneity to civil religious ideas. He used his text to demonstrate "that such dependence of the world's future on this generation in America is not only credible, but in the highest degree probable.[27]

By the mid-20th Century, it was clear to most Americans that the United States was no

longer an exclusively Protestant or even Christian nation. The world wars played a sizable role in moving the country past the polarizing tensions between nativists and immigrants. As American troops, aid agencies and religious congregations mobilized for the war efforts, previously isolationist or foreign-labeled groups proved their loyalty to America in words and actions and the country united against a common enemy. In the context of the Cold War and growing concern over "atheistic communism" a greater toleration of religion-in-general emerged. Will Herberg's *Protestant-Catholic-Jew* aptly exemplified this change in perceptions of diversity. Cited by virtually every recent account of religious diversity in America, this book has served as a counterpoint to broader, more inclusive studies in the late 20th and early 21st centuries.

Herberg centered his thesis on the premise that "both the religiousness and the secularism of the American people derive from very much the same sources," namely a biblical, Abrahamic tradition with a similar vision of God and morality.[28] Responding to early theories of America as a "melting pot," he pointed to a melting along three separate veins, thus creating three melting pots — Protestant, Catholic and Jewish.[29] As more and more non-Protestants are American-born, these individuals have clung to their religious identity as a mark of distinctiveness.[30] As a result, Herberg argued, America has developed a unique type of pluralism: "While the unity of American life is indeed a unity in multiplicity, the pluralism this implies is a very special kind. America recognizes no permanent nation or cultural minorities."[31] The three faiths hang in balance, held together by a common belief in the "American Way of Life," which Herberg defines as "a spiritual structure, a structure of ideas and ideals, of aspirations and values, of beliefs and standards [which] synthesizes all that commends itself to the American as the right, the good, and the true in actual life."[32]

Herberg speaks indirectly of a structure or ideology analogous to Bellah's civil religion. He writes, "Insofar as any reference is made to the God in whom all Americans 'believe' and of whom the 'official' religions speak, it is primarily as sanction and underpinning for the supreme values of the faith embodied in the American Way of Life."[33] In this way, regardless of specific religious affiliation (though within the boundaries of his three categories), the central and overriding "religious affirmation" of Americans remains the belief that "religion is a 'good thing,' a supremely 'good thing,' for the individual and the community."[34] For Herberg, this "faith in faith" becomes as important or even more important for Americans than any specific creed. This common belief allows disparate groups to coexist and find unity in spite of religious difference.

Herberg goes further to argue that because religious belief is vital to being an American, it is unsurprising that religion plays a larger part in any construction of national purpose.[35] This pattern of decrease in foreignness with affirmation of religion and interfaith cooperation based on the act of faith alone paints a rather harmonious picture of inter-religious relations. However, Herberg discusses the concerns and disruptions within Protestantism as it moves from being the single dominant faith to one of three. Herberg ultimately has faith that

Protestants will be able to overcome the uneasiness in support of the national cause. Largely as a function of the demographic particularities of his time, Herberg does not seem concerned in including "God-centered" as an inoffensive and inclusive marker for this generic faith.[36] Certainly, this is a reflection of the emphasis on theistic religion as opposed to "godless" communism during the 1950s. As non-theistic religions become more visible and popular, such an assumption becomes problematic.

B. Pre-9/11 Theories

Several sociologists and historians of American religion responded to the greater scope of religions differing in conceptions of God as well as practice and ethnicity in the years between *Protestant-Catholic-Jew* and 9/11. Robert Wuthnow's *The Restructuring of American Religion* exemplifies this literature on religious pluralism that seeks to address the effects of these demographic changes in the pre-9/11 world. During this time, the conflicts that arose between religious groups were often local or of small scale and thus seemed more able to be overcome. In his study, Wuthnow argues that religion remolds and reshapes itself to respond to the world rather than being a stable force shaken by changes around it. From this understanding, Wuthnow defines religion as a social institution, motivated by theological and philosophical beliefs, which maintains a mutually influential relationship with the world in which it functions. He denies that religion is either secularized or stagnant but argues that it is a dynamic force, which changes in response to immigration, war, growing diversity and social and political debates. The primary catalyst in religious change is the emergence of cross-denominational groups with specific goals and purposes that bring religious individuals together to cooperate in ideologically charged liberal and conservative organizations.

Wuthnow indicates that this "restructuring" within American religion and politics will naturally have an effect on American myths. He writes,

> The tenets of America's legitimating creed naturally bear some relation to the religious opinions and practices of the American people. If religion is deeply valued in the private sentiments of its people, the nation's public culture is also likely to reflect the value attached to these sentiments. And if organized religion undergoes a series of restructuring events — if it becomes polarized — then the legitimating myths of the nation at large my also be subjected to certain tensions and modifications.[37]

Wuthnow suggests that greater changes in demographics have led to changes in the American civil religion. Rather than a force of unity, "It has instead become a confusion of tongues speaking from different traditions and offering different versions of what America can and should be."[38] The primary competing civil religions are first, a liberal mythology based upon common beliefs about humanity and, second, a conservative mythology based upon reference to the Bible or God. What continuity Wuthnow sees in the civil religion lies in principles such as freedom — a theme that is hard to affirm or disaffirm.[39] However, descriptions of the undeniability of the principle of freedom combined with Wuthnow's suggestions of a more international civil religion fail to anticipate problems that arose in the post-9/11 world. It has be-

come clear that America's international enemies find this type of internationalizing identity and mission and as well as claiming of values such as freedom to be imperialistic and hypocritical.

Discussing similar demographic changes but focusing on the concept of pluralism, Diana Eck has contributed substantially to this conversation. As director of the Pluralism Project at Harvard University, Eck remains one of the most vocal and well-known advocates of greater awareness of American religious pluralism and a more rigorous and active embodiment of pluralistic ideology throughout the country. In the Pluralism Project literature as well as her 2001 book, *A New Religious America*, Eck begins with a description of the very diversity upon which she bases her prescriptions for America. Rather than focusing on Judeo-Christian faith communities, she presents stories of weekly worship in Buddhist meditation centers and Hindu temples throughout the American heartland and describes the freedoms and challenges that these groups have faced in living as religious minorities. Eck also profiles the neighbors of these religious communities, thus attempting to show the greater awareness of Asian religions, in particular, throughout the country.

The result of numerous surveys, sociological and demographic studies and field work within these religious communities, Eck's conclusions about the existence and depth of religious diversity in the United States lays the groundwork for her real argument in this project. Her main concern is how Americans should and, in reality, do react to this diversity. Though she does not dwell on negative reactions to diversity (as this would get in the way of her otherwise optimistic perspective), Eck does outline some of the difficulties in integrating these new faiths and perspective into American society. In particular, she notes the difficulty with Muslims who, for Christian and Jewish Americans are "cousins and neighbors" — tied together by a common Abrahamic heritage but also differing on the most fundamental of beliefs.[40] She points to "visible difference" as the key problem for Americans who are hesitant to accept these new communities though whether this problem is anything new in America is up for debate.[41] Yet, Eck believes the nation can overcome any hesitancies or prejudices that might exist.

As Eck rightly notes, to truly become a harmoniously diverse nation, toleration is not enough. Moving beyond toleration, true pluralism means, "Great diversity is not simply tolerated but becomes the very source of our strength."[42] Regardless of how our nation has been perceived in the past, Eck suggests,

> The twin principles of religious freedom and non-establishment provide the guidelines for something far more valuable than a Christian or Judeo-Christian nation. They provide the guidelines for a multi-religious nation, the likes of which the world has rarely seen. The presence of new neighbors of other faiths in America has made crystal clear both the strength of these twin principles and the need to reaffirm them again and again.[43]

While Eck appropriately recognizes that religious freedom, as defined in the Constitution, allows for a wide variety of religious expressions beyond Judeo-Christian faiths, the reality of

the application of this principle in the past is also important to recognize. The visible difference Eck cites as the source of much intolerance has been a continual problem in America and one that the public has heretofore not been able to overcome. Whether or not theorists or even governmental officials choose to adopt a broader and more inclusive application, public opinion determines the ways in which these principles are understood within the very American cities and towns profiled in the Pluralism project. Moreover, recent studies such as Phillip Jenkins's *The Next Christendom* have show that most new immigrants to the United States are conservative Christians.

C. Post-9/11 Theories and the Challenges of Pluralism

Certainly, Eck's work has become all the more relevant in the years following September 11, 2001. While Eck finished this book prior to the attacks, her book includes a preface written after the attacks, which essentially reaffirms the vital importance of pluralism. Joining the conversation, numerous other historians and sociologists have described the changing landscape of American religion and what this means for our national identity. William Hutchinson's *Religious Pluralism in America* mirrors Eck's position in some ways as he addresses the need for an appropriate response to the fact of greater diversity. Presenting a more complex situation than Eck's however, Hutchinson distinguishes between pluralism and toleration, and openly recognizes the difference between the existence of diversity and how we deal with this diversity. Surveying American history, he notes three steps to pluralism: "pluralism as toleration," "pluralism as inclusion" and "pluralism as participation."[44]

Hutchinson suggests that Americans will have to offer the same toleration they require for themselves, let go of ideas of "chosenness" in a narrow Judeo-Christian sense and allow for a broader definition of what it is to be an American and what behaviors and beliefs are acceptable within that definition. Yet, Hutchinson also recognizes that such a change can be "deeply traumatic."[45] To make the transition less traumatic we must not only accept these changes but also ingrain pluralistic ideas within our national identity. Though we have evolved as a nation from the extreme nativism of Josiah Strong, nativist fears and resistance to new religious trends and communities will always constrain our acceptance of pluralism. Noting this reluctance, Hutchinson writes, "Americans today are being dragged — sometimes kicking and screaming, sometimes in a state of calm and genuine persuasion — into the realities not just of today, but of the early nineteenth century. We are playing catch-up."[46]

In this way, despite his realism concerning the lack of pluralistic perspectives in the country's past, Hutchinson does seem to follow Eck in finding a basis for pluralism and toleration within the religious ideals that have been used to limit toleration. He argues that pluralism must become not "a practical necessity" but "an allowable, perhaps a necessary, element in theistic religion."[47] He directly references Bellah's description of the American civil religion and writes, "a renewed civil religion cannot be constructed without a frank and strong affirmation of pluralism as a major principle, even if it is not the only principle involved."[48]

Also calling for a renewal of civil religion, Barbara McGraw's 2003 book *Rediscovering*

America's Sacred Ground: Public Religion and Pursuit of the Good in a Pluralistic America recognizes that America has moved from a melting pot of assimilation to a society which embraces multiculturalism and tends toward moral relativism in an effort to be inclusive. In the face of these trends, McGraw advocates a return to John Locke's idea of social contract as "America's Sacred Ground." Thus, McGraw finds the sacred not only in the transcendent or otherworldly but also in the basic rights, values and principles that bind our society together. The danger today is a failure to recognize these values and abide by them. She writes, "Our political framework is a fragile one; its survival depends wholly on a people who recognize that our enemy is not so much a force from outside our boundaries, but our own ignorance about what grounds the American system."[49] Thus, McGraw sees a real possibility of a renewed American myth accessible to Americans in all their diversity and as powerful as its more explicitly religious manifestations.

Focusing more on the problem than possible solutions, sociologist Robert Wuthnow's recent book *America and the Challenges of Religious Diversity* surveys American responses to diversity. Like William Hutchinson, Wuthnow argues that the recent change in America has not been an increase in diversity but rather a change in American's perceptions of diversity. A greater awareness of difference is due to "mass communications, immigration, and our nation's role in the global economy."[50] In pointing out this awareness, Wuthnow admits he is not attempting to resolve this tension but to show that it is a "*significant cultural challenge*" that cannot and, perhaps, should not be overcome.[51] However, he does find many elements of the current situation troubling. Through extensive surveys of public perceptions of diversity, Wuthnow finds that, in the wake of 9/11, "many Americans regard religions other than their own as fanatical, conducive to violence, close-minded, backward, and strange."[52]

Acknowledging the challenges of diversity and the continued reluctance of others to truly engage with and accept varying belief systems, Wuthnow makes prescriptions for future improvements. He argues that the current problem is not the existence of difference but the failure of our population to really confront and deal with these differences. Thus, he argues America needs to adopt a "reflective pluralism" which moves beyond "shallow" statements about belief in toleration or a desire to see religious leaders work together. Instead, "for a society truly to make informed decisions about how pluralistic it wants to be, its leaders and citizens must devote time and energy to thinking about the question."[53]

While the key figures in discussions of civil religion and pluralism in the pre-9/11 years have not written extensively after this attack to fit this event into their arguments, Robert Bellah and Diana Eck have offered comments in prefaces or forwards to more recent works by other authors. Neither, however, suggests real changes to their previous articulations of the problems and possibilities of civil religion or pluralism in the wake of September 11. As Robert Bellah articulates in his forward to Hughes's *Myths America Lives By*, "America is the center of a new kind of empire and responsible for the whole world. Our reaction to September 11 suggests we are far from ready for that responsibility."[54] Thus, in the present sit-

uation, we must ask "To what extent can we help America become a responsible empire and to what extent must we stand against empire altogether?"[55] In many ways, the present conflict is, for Bellah, a continuation of the third time of trial he first described in the 1960s.

Also showing remarkable continuity in response to an event some might see as proof of the overly optimistic nature of her theory, Diana Eck weighed in on the issue of pluralism after 9/11. Eck provided the preface to Barbara McGraw's and Jo Renee Formicola's 2005 *Taking Religious Pluralism Seriously: Spiritual Politics on America's Sacred Ground*, a collection of essays framed around the ideas articulated in McGraw's 2003 book. For Eck, the primary effect of September 11 on American pluralism was that it brought "a new consciousness of the transformation of American society."[56] She sees this event as an opportunity to learn more about other religions, particularly Islam, which would then lead to greater cooperation between Muslims and other Americans. She also sees this event as a rallying point, a unifying event that encourages Americans to work together to disavow "indiscriminate violence against neighbors of any faith or culture."[57]

In stark contrast to Eck's continuously optimistic tone, which continues to allow for a positive role for religion and religious cooperation in the future, Sam Harris's controversial book, *The End of Faith*, finds such a positive role impossible. Directly responding to the violent segments of Islam which dominate the modern news and were responsible for the 9/11 attacks, Harris argues that religious toleration in the modern age is not only unwise but harmful. He begins his argument with the simple suggestion that the primary problem with faith in general is its inability to be proven. While, in theory, peacefully, uninvolved faithful individuals are not a problem for society, the fact that religions can be so destructive means that they are not acceptable in the modern world and must be justified through appeal to fact. Harris writes,

> I take it to be self-evident that ordinary people cannot be moved to burn genial old scholars alive for blaspheming the Koran, or celebrate the violent deaths of their children, unless they believe some improbable things about the nature of the universe. Because most religions offer no valid mechanism by which their core beliefs can be tested and revised, each new generation of believers is condemned to inherit the superstitions and tribal hatreds of its predecessors.[58]

In contrast to scholars such as Eck who advocate the freedom to worship in private and a duty of all Americans to tolerate, learn about, respect and cooperate with those of other faiths, Harris argues that faith is no longer a private concern. These violent manifestations mean that society has a duty to challenge rather than accommodate.[59] This accommodation is especially problematic in relations between the Abrahamic faiths. Instead of recognizing common heritage and seeking to learn about the Muslim extremists who act against America, Harris writes, "It is time we acknowledged that no real foundation exists within the canons of Christianity, Islam, Judaism, or any of our other faiths for religious tolerance and religious diversity."[60] This rather extreme perspective contrasts sharply with the vast majority of scholarship on these issues but points to the important problem of negative manifestations of religion in the modern world and the question of whether religious motivations, no matter how

generic or inclusive, can be, for political action, inherently and fundamentally dangerous.

IV. American Civil Religion in an Age of Pluralism and Globalization

Scholars writing in the period between Bellah's essays and the modern day interpretations have created innumerable shades of gray in addressing the relevance of civil religion in a pluralistic society. However, putting these different theories into conversation with one another and with the current political and international situation illuminates certain holes in these arguments and further complexities in finding an answer. On a basic level, many elements of Bellah's civil religion remain in our political reality today. For example, Bellah points to inaugurations as prime examples of civil religious language and "an important ceremonial event in this religion [that] reaffirms, among other things, the religious legitimation of the highest political authority."[61] Demonstrating the prevalence of religious language found throughout his public speeches, President George W. Bush, ended his second inaugural address by remarking

> America, in this young century, proclaims liberty throughout all the world, and to all the inhabitants thereof. Renewed in our strength — tested, but not weary, — we are ready for the greatest achievements in the history of freedom. May God bless you and may He watch over the United States of America.[62]

Beyond basic reference to God, Bush frequently refers to the sense of divine providence and responsibility for the world, particularly in reference to the "War on Terror." In his 2006 state of the union address, Bush juxtaposed this vision of America with the competing vision of terrorism and concluded, "The only alternative to American leadership is a dramatically more dangerous and anxious world."[63]

While the language of providence carries over from the early years of America, the nature of this providence has changed. In *The American Jeremiad* (1978), Sacvan Bercovitch describes the understanding of providence prevalent in early articulations of civil religion. He defines the American Jeremiad as a system of thought prominent in both political speeches and sermons in early America, which focused on the humility and fallibility of the people, the power of God and the covenantal relationship between the country and its God. From the first immigrants and continuing into the nineteenth century, political sermons and public speeches decried the woes of a backsliding people and the sure punishment they would face. This promise of castigation for wrongdoing was combined with an intense and "unshakable optimism" of the promise of the country.[64] Combining Hebrew Bible understandings of God's judgment and covenantal promise for a chosen nation, these jeremiads provoked both humility and a sense of duty. While modern articulations of American providence certainly carry on this idea of divine mission and duty, the element of humility and human fallibility has been lost. This central feature has ramifications, not only for a nation to self-monitor its religious and political actions but also for a nation to promote a positive international image.

In addition to changes in the meaning of providence, the use of the term "God" has changed as well. While the same word is used, it is important to ask the nature of this God and the generic character of this language. Several scholars note the tendency toward non-specificity

but few have truly noted the problems that arise when non-theistic religions and increasing numbers of those with an interest in "spirituality" over organized religion become a viable presence in America. No matter how generic this God may be, those who do not subscribe to a single deity or any deity at all will not find value in such a myth. Perhaps, in a more pluralistic world, Phillip Hammond is right in suggesting that it is now more appropriate to talk about a "legitimating myth" rather than a "civil religion." This change in language would allow for non-religious myths and remove the rather sticky and uncomfortable problem of creating a religious language acceptable to all Americans. In many ways, this is what Barbara McGraw is suggesting as well in finding the basis for a renewed, modern civil religion in political and moral values, which do not have specific religious content.

While this seems an attractive answer in light of the current problems of pluralism and international relations with the Islamic world, it seems unlikely that such a set of values would be enough to mobilize and inspire individuals and create a sense of national identity in the same way as religious language. Bellah emphasizes the importance of a deity for the system of civil religion through his reference to Abraham Lincoln's second inaugural address as the most poignant and lasting articulation of the civil religion. Bellah points to Lincoln's description of "covenant and judgment" as two central aspects of the civil religion — two aspects unexplainable without a deity with which the country has made a binding agreement and to which the nation must answer for its misdeeds.[65]

It is this lack of awareness of judgment and fallibility that Bellah recognizes as the central problem in the "third time of trail." While this continues to be a substantial problem in modern America, Bellah's view towards the future falls apart with his assertion that belief in American hegemony is fading rapidly. He writes, "the illusion that our power allows us to be the world's policeman is now gone and there is the growing realization that our relative power in the world is in decline."[66] While the United States has lost much of the sense of divine judgment vital to a constrained and responsible civil religion, this space has been filled by an overemphasis on the idea of divine providence. As Bush's statement in his second inaugural address illustrates, America's political leaders often describe America, in political rhetoric, as the good, the fair and the just while the enemy is described as the antithesis — evil, depraved and barbaric. Just five days after the 9/11, Bush outlined his plan to catch and punish the perpetrators of the attacks and terrorists in general by appealing to their opposition to American values. He remarked, "they can't stand freedom; they hate what America stands for."[67]

Similarly, other theorists have failed to anticipate the current political climate in America. In 1994, James Mosely argued, "the end of the Cold War removed any sense of a common enemy — without the jubilation of an earned victory — leaving only unfocused remnants of belief in American destiny."[68] Clearly, this statement is no longer relevant in the wake of 9/11. Bush frequently talks explicitly of the enemies of America and transparently seeks to rally Americans against this enemy. In his September 16, 2001 speech, Bush ended by saying that "we've never seen this type of evil before."[69] He clearly sets up a dualism between the

United States and evil, thus elevating the United States and turning the "War on Terror" into a battle between good and evil.

Forgiving Bellah for not being able to see forty years into the future, his cautionary remarks remain important both in demarcating the appropriate limits of modern civil religion and in the way some of his concerns have been realized. The dualistic rhetoric outlined by Bellah further reinforces the question of appropriate exercise of power and responsibility. Anticipating the problem's inherent in irresponsibility and arrogance, Bellah writes,

> The civil religion has not always been invoked in favor of worthy causes … With respect to America's role in the world, the dangers of distortion are greater and the built-in safeguards of the tradition weaker … The issue is not so much one of imperial expansions, of which we are accused, as of the tendency to assimilate all governments or parties in the world that support our immediate policies or call upon our help by invoking the notion of free institutions and democratic values.[70]

This description will likely be eerily familiar to modern Americans who witness American involvement throughout the country and an aggressive agenda to spread democracy and other American ideals to other countries.

While scholars such as Robert Wuthnow argue that the civil religion needs to have a more international focus, it is this internationalism that many see as a problem. Perceiving this involvement as undesirable, increasing numbers of individuals throughout the world, particularly in extreme segments of Islam, are reacting against America's actions motivated by the American civil religion. For individuals such as Osama bin Laden, the religious elements of American identity, perceived or real, combined with this evangelization of democracy are inherently offensive and imperialistic. Speaking even as early as March 1997, bin Laden articulated his criticisms of the United States. He argued that the collapse of the Soviet Union, "made the U.S. more haughty and arrogant, and it started to see itself as a Master of this world and established what it calls the new world order." He goes to say, "wherever we look, we see the U.S. as the leader of terrorism and crime in the world."[71] While bin Laden certainly does not hold a majority opinion in the Islamic world, recent history testifies that his influence is substantial and his ability to affect American lives and security remains unquestionable. Moreover, his is not the only voice against America. The existence of such a sentiment in even a minority of the world's population raises questions as to the positive use or perhaps perversion of civil religion in modern America.

If such a perversion is, in fact, the current reality, what then is the solution? Robert Wuthnow has suggested a "reflective pluralism" which involves an emphasis on respect and "a principled willingness to compromise."[72] While this certainly seems a reasonable goal for American individuals and small communities dealing with the growth of new religious communities as detailed in Eck's book, the global application becomes more troublesome. In the current example of the "War on Terror," the language of good and evil has limited the possible outcomes of the conflict and limited the possible actions of the government. A fundamental and dramatic change in the way civil religion manifests in political language and international relations

would be needed in order for this level of respect and compromise to be realized.

If such a change were possible, what would American civil religion look like? On a national and international level, Americans would need to embrace a "cultural pluralism" such as Jewish-American philosopher Horace Kallen articulated in the 1950s. According to Kallen, diversity must be recognized and valued to avoid cultural conflict. "Cultural pluralism," then, "designates the orchestration of the cultures of mankind which alone can be worked and fought for with least injustice, and with least suppression or frustration of any culture, local, occupational, national or international, by any other."[73] Thus, both recognizing and respecting difference in religion and culture becomes the cornerstone for a national and international identity for America.

Yet, successful recognition of diversity is not enough. In his description of the challenges to civil religion, Robert Bellah called for a new "Great Awakening" which he characterized as "The inward reform of conversion, the renewal of an inward covenant among the remnant that remains faithful to the hope for rebirth."[74] Perhaps, this focus on "inward" belief and conviction must form the center of a renewed civil religion. The non-religious values posited by McGraw could form the basis for a new type of civil religion inasmuch as these values, established at the founding and articulated in our central political documents, are firmly rooted in America's history. Yet, Americans would need to ascribe to these principles in a real, personal and inward way and, to do this, would likely need to tie these values to their specific religious beliefs and moral frameworks. Doing so on an individual level would mean that innumerable civil religions could exist within a larger unified whole. However, in order for widespread individual commitment to these values to occur, the American public must believe that its government is also living by these principles and seeking to apply them to the larger world. If the American public were able to see this, perhaps the rest of the world would as well. For, at the center of this system would be respect for and protection of the rights of all manner of people, faiths and cultures, and would thus be an ethos both completely American and universal and thus an ethos Americans could seek to spread throughout the world without worries of imperialism or irresponsible use of the resources, power and influence. In this way, if Sam Harris is wrong and all religions, at their core and in their pure forms, seek a world of peace, Bellah's hope for "a world civil religion" may, in fact, be a possibility and "the eschatological hope of American civil religion" could be finally realized.[75]

*Ann W. Duncan is a graduate student in the Department of Religious Studies at the University of Virginia.

[1] Other studies of civil religion include Thomas Luckmann's *The Invisible Religion* (1967), Conrad Cherry's *God's New Israel: Religious Interpretations of American Destiny* (1971), Donald Jones and Russell Richey's *American Civil Religion* (1974), Leroy Rouner's *Civil Religion and Political Theology* (1986) and Richard Pierard and Robert Linder's *Civil Religion and the Presidency* (1988).

[2] Robert N. Bellah, *The Broken Covenant: American Civil Religion in a Time of Trial* (New York: The Seabury Press, 1961), 3.

[3] Ibid. 41.

[4] Ibid. 38, 54.

[5] Robert N. Bellah, "Civil Religion in America," *Daedalus, Journal of the American Academy of Arts and Sciences* 96.1 (Winter 1967), 1.

[6] Ibid. 5.

[7] Ibid. 3.
[8] Ibid.
[9] Ibid. 7.
[10] Bellah, *The Broken Covenant*, 110.
[11] Ibid. 149.
[12] Ibid.
[13] Bellah, *Daedalus*, 13.
[14] Ibid. 17.
[15] Ibid.
[16] Ibid. 18.
[17] Phillip E. Hammond, Amanda Porterfield, James G. Moseley, Jonathan D. Sarna, "Forum: American Civil Religion Revisited," *Religion and American Culture* 4:1 (Winter 1994), 2.
[18] Ibid. 9.
[19] Ibid. 17.
[20] Ibid. 21-3.
[21] Hughes labels each phase of the civil religion to correspond to different time periods of American history. His stages are: Chosen Nation, Nature's Nation, Christian Nation, Millennial Nation, Mythic Dimensions of American Capitalism and Myth of the Innocent Nation.
[22] Richard T. Hughes, *Myths America Lives By* (Urbana: University of Illinois Press, 2003), 157.
[23] Ibid. 191.
[24] Ibid. 193.
[25] Ibid. 195.
[26] Josiah Strong, *Our Country: Its Possible Future and Its Present Crisis* (New York: The Baker &Taylor Co., 1885), 159-160.
[27] Ibid. 1.
[28] Will Herberg, *Protestant-Catholic-Jew: An Essay in American Religious Sociology* (Chicago: The University of Chicago Press, 1955 [1893]), 3.
[29] Ibid. 20.
[30] Ibid.
[31] Ibid. 37.
[32] Ibid. 75.
[33] Ibid. 81-82.
[34] Ibid. 84.
[35] Ibid. 264.
[36] Ibid. 254.
[37] Robert Wuthnow, *The Restructuring of American Religion* (Princeton: Princeton University Press, 1988) 241.
[38] Ibid. 244.
[39] Ibid. 262.
[40] Diana Eck, *A New Religious America: How a 'Christian Country' Has Become the World's Most Religiously Diverse Nation* (San Francisco: Harper, 2001), 232.
[41] Ibid. 296-7.
[42] Ibid. 6.
[43] Ibid. 384.
[44] William R. Hutchinson, *Religious Pluralism in America: the Contentious History of a Founding Idea*l (New Haven: Yale University Press, 2003), 6.
[45] Ibid. 237.
[46] Ibid. 10.
[47] Ibid. 236.
[48] Ibid. 234.
[49] Barbara McGraw, *Rediscovering America's Sacred Ground: Public Religion and Pursuit of the Good in a Pluralistic America* (Albany: State University of New York Press, 2003), 183.
[50] Robert Wuthnow, *America and the Challenges of Religious Diversity* (Princeton: Princeton University Press, 2005), xiv.
[51] Ibid. xv.
[52] Ibid. 228.
[53] Ibid. 289.
[54] Hughes, xi.
[55] Ibid. xii.
[56] Barbara McGraw and Jo Renee Formicola, *Taking Religious Pluralism Seriously: Spiritual Politics on America's Sacred Ground* (Waco, TX: Baylor University Press, 2005), xiii.

[57] Ibid. xv.
[58] Sam Harris, *The End of Faith: Religion, Terror, and the Future of Reason* (New York: W.W. Norton & Company, 2004), 31.
[59] Ibid. 44.
[60] Ibid. 225.
[61] Bellah, *Daedalus*, 4.
[62] George W. Bush, "Second Inaugural Address," January 20, 2005, Steps of the United States Capital, Washington, D.C.
[63] George W. Bush, "State of the Union Address by the President," January 31, 2006, United States Capital.
[64] Bercovitch, Sacvan, *The American Jeremiad* (Madison: The University of Wisconsin Press, 1978), 7.
[65] Bellah, *Broken Covenant*, 54.
[66] Ibid. 149.
[67] George W. Bush, "Remarks by the President Upon Arrival," September 16, 2001, The South Lawn of the White House, Washington, D.C.
[68] Hammond, 17.
[69] Bush, September 16, 2001.
[70] Bellah, *Daedalus*, 14-5.
[71] "From Somalia to Afghanistan, March 1997," *Messages to the World: the Statements of Osama bin Laden*, Bruce Lawrence, Ed. (New York: Verso, 2005), 50-51.
[72] Wuthnow, *America and the Challenges of Religious Diversity*, 291.
[73] Horace M. Kallen, *Cultural Pluralism and the American Idea: An Essay in Social Philosophy*, (Philadelphia: University of Pennsylvania Press, 1956), 100.
[74] Bellah, *The Broken Covenant*, 162-3.
[75] Bellah, *Daedalus*, 18.

ARE YOU THERE GOD? IT'S ME, THE CONSTITUTION

SEARCHING FOR THE FREE EXERCISE CLAUSE

BY SABY GHOSHRAY*

Lord please forgive me, I have committed sins for our freedom.
-Sergeant Mathew Gonzalez[1]

Insofar as a member of Congress taking an oath to serve America and uphold its values is concerned, America is interested in only one book, the Bible. If you are incapable of taking an oath on that book, don't serve in Congress.
-Radio and TV host Dennis Prager[2]

They say they want more religion in the public square, but it's clear they mean only their religion.
-Reverend Barry Lynn[3]

I. Introduction

When a religious minority accuses a governmental agency of having ignored her constitutionally protected freedom of religious exercise, is her sincere prayer of religious liberty[4] a hypocritical opportunism or a simmering disconnection within the body of the First Amendment?[5] Answers to questions like this reside within the very essence of the Establishment Clause and the Free Exercise Clause. Confusion, complexity and lack of clarity in understanding these clauses, however, have added to the fog of misapplication in various cases involving religious rights. Despite a litany of cases developed both at the Supreme Court and lower courts level, obstacles remain in developing a coherent analysis of the freedom of religious exercise in the U.S., as diverging interpretations have been provided by the scholars on two fundamental issues. The first emanates from not having a solid demarcation between the freedom to believe and the freedom to act within the Free Exercise Clause of the First Amendment.[6] The second comes from the inability of both the judiciary and legislative policy making bodies from fully grasping the connotations of religion within a multi-cultural cosmopolitan fabric. I intend to illuminate both issues in this article.

Constitutional interpretation of the Free Exercise Clause indicates that the freedom to believe is absolute with no curtailment of its reach prescribed by the Supreme Court. On the other hand, the freedom to act has historically gone through diverging interpretations, where the trajectories of freedom have either been expanded or shrunk. This is where the protection regarding Free Exercise Clause for religious conduct has become complicated as some religious activities have been accepted while some others rejected. Along the way, no absolute protection mechanism has been developed. The pertinent question is, therefore, why is it important to revisit the Free Exercise Clause of religion? Let us consider a few incidents that re-

quire us to consider the dynamic nature of religion and the sincerely held beliefs by those of different faiths.

A. Ground Realities

1. The Soldier

A former military soldier in Bakersfield, California placed a decal on his truck which begs, "Lord, please forgive me, I have committed sins for our freedom." The Iraqi vet said he proudly served "to protect my children" and he would do it again, but had to reconcile what he did in Iraq with his Catholic faith. Sgt. Mathew Gonzalez was one of the first Army Rangers in Iraq and served over 13 months in country. He said if necessary he would return to Iraq. He began speaking out about the decal after some people called into a radio show and complained about the sticker His decal is a statement to acknowledge that as a Catholic he believes he did sin by killing in Iraq. Other veterans disagreed with Gonzalez's beliefs by saying that killing on the battlefield is not a sin. Gonzalez said the message is in no way meant to dishonor the military or other soldiers. It only serves as a reminder of the killings and death he and all soldiers partake in. The decal sparked controversy as people expressed their shock, disbelief, and a sense of betrayal by a fellow soldier asking for forgiveness for killing on the battlefield.[7]

2. The Muslim Clerics

Six Muslim Clerics returning home from a Islamic Religious conference in Minnesota were handcuffed and removed off an US Airways Flight 300 based on accusations by fellow passengers and flight personnel that the men were acting suspicious. The six Islamic religious leaders have filed suit against US Airways for having them removed from a flight in November 2006. The clerics believe they were guilty of nothing more than "flying while Muslim," according to a national Muslim advocacy group. Police escorted the U.S. residents off the plane in Minneapolis, Minnesota. The men were questioned, released and never charged. Further the men alleged when they tried to book another flight on US Airways, the airline declined to sell them new tickets. The men said the arrest was degrading and a violation of their civil rights. The executive director of the Council on American-Islamic Relations Nihad Awad said, "We cannot allow prejudice and fear to determine our actions as a nation. If the civil rights of one American are violated, the civil rights of all Americans are threatened." In a statement regarding the incident, US Airways defended the flight crew. "Our position on this matter has not changed," it said. "We continue to back the actions of our crew and ground employees. This was not about prayer, but rather about behavior on the airplane that led to a decision by our crew members — backed by local law enforcement — to remove these customers from the airplane for further questioning." The Clerics are also suing the Minneapolis Metropolitan Airports Commission.[8]

3. The Courtroom Oaths

In early 2007, the Senate filed a bill that would give people a choice over how they make their courtroom oaths. The bill will allow the choice of sacred text, if any, that could be used when in court. In a similar situation, Congressman Keith Ellison made history by being the first

member of Congress to choose a Quran at his swearing in ceremony. The issue of courtroom oaths also made its way into the North Carolina courtroom in 2003 when Sydiah Mateen, asked to offer her oath by placing her hand on the Quran instead of the Bible. She was denied her request. In 2005 a lawsuit followed that argued favoring Christianity over other religions is unconstitutional. The lawsuit was dismissed in part because the presiding judge felt Sydiah Mateen had other options including not using the Bible and just making an affirmative statement such as "so help me God," especially when the law only requires that the Bible be used if a holy book is used. However, in January of 2007 the Court of Appeals ruled that the lawsuit should go forward. The new bill, if passed, would allow the person taking the oath by placing their hand "upon the Bible or any text sacred to the party's religious faith." The bill also noted that the sacred books would not be supplied by the court, but would be accepted by donations.[9]

4. TSA and the Hindu Ornaments

Most passengers know the drill once they stand in the security line in preparation to board the airplane. In robotic rhythm, rows of people begin the undressing procedure. Remove all belts, shoes, watches, phones, wallets, laptops and jewelry. But then the line halts, the stream of compliant passengers is slowed. A passenger won't remove the objects from her wrists as demanded by Transportation Security Administration (TSA) personnel. The passenger details, "These are not bracelets you buy in the store and wear for show and tell. But are very intimate Hindu religious ornaments that have never been removed from my wrists." The passenger continues,

> You are first ordered to remove the bracelets, then you try to inform TSA agent that they are not simple bracelets, but they are not removed for religious reasons. Then you are pressed about your religious identity and why you refuse to remove 'jewelry' from your wrists. Then they usually compare you with other Hindus who don't wear such things on their wrists or who agree to remove them. Then, I am compelled in just a few minutes time, to educate them on the philosophy, of Hinduism, in efforts to make my screening process fairer. I usually tell them, these ornaments represent an important component to a Hindu woman's life, in particular Hindu marriage. Since having them placed on my wrists I have never removed them. To remove them, is an insult to my religion and my family. I simply can't remove them, but feel free to wand me, pat me down, and even visually inspect me.

The passenger has never been denied to board or fly, but she has had to face extraordinary long delays and various quips from the different agents frustrated by her refusal to comply with their demands including the threat to be arrested and denied boarding privileges.[10]

B. Examination of the Realities

No doubt these stories provide a snapshot of the expansive plurality of religious identity in America. America has evolved from a country, whose national identity was originally based on Judeo-Christian fundamental philosophy, to a rich mosaic of ethnicities, whose national identity is currently being shaped through a kaleidoscope of crisscrossing multi-ethnic religious practices.[11] To solidify this multi-national identity, it is therefore time to look into the Free Exercise Clause of religion from an emerging viewpoint. This viewpoint must include

not only the Judeo-Christian principles, but also the faiths and beliefs of the many divergent religious sentiments now commonplace in the United States. In this article, I will examine the evolution of the Free Exercise Clause of the First Amendment,[12] while weighing the conflicts of interests of the state on one hand, and the religious minority on the other. I shall also embark on charting the trajectory upon which the Supreme Court has changed course while deciding the landmark case of *Employment Decision v. Smith.*[13] Further, I will explore the post-*Smith* constitutional landscape and how it has given rise to the environment in which the interests of diverging religious entities are crisscrossing against greater national interests. With this objective in mind, my paper is segmented as follows. Part II delves into the historical backdrop to examine how the frontiers of free exercise clause of religion have evolved while tracing the historical contours of religious pluralism against constitutional interpretation by the Supreme Court. In Part III, I examine some of the significant constitutional developments surrounding religious liberties in the pre-*Smith* era in an attempt to identify the Court's rationale in making a retreat from providing expansive protection to religious freedom. In Part IV, I analyze the legacy of *Smith* in deciding the cases in the post- *Smith* era. This leads to my discussion in Part V where I, while tracing the contours of the shrinking Free Exercise Clause of the religion, explain why *Smith* was erroneously decided. In Part VI, I extend my discussions on the expansive meaning of religion, which without fully comprehending the meaning of religion, any discussion on free exercise in the current era is simply unattainable. Finally, I conclude in Part VII, with the assertion that we must protect the religious freedom of every American if we want to live up to the promise of religious freedom and protection enshrined in the Constitution.

II. The Free Exercise Clause against a Historical Backdrop

The history of religious persecution in both Europe and the colonies led to the creation of the religion clauses of the First Amendment to ensure guarantees of religious freedom within a constitutional framework.[14] In this context, the early colonial history in carving out religious freedom for all believers can provide a necessary backdrop upon which the doctrinal development of the religious clauses of the First Amendment took place.

Let me briefly recapture the history of struggle for religious freedom in America as revealed through the prism of separation.[15] On one side of this dividing wall, is the conception of unbridled religious liberty, borne out of a broader conception of human rights, which allowed the conscience of the Free Exercise Clause to emerge. On the other side of the separation, is the bounded rationality of established religion, which cringed at the audacity of religious pluralism and preferred to remain confined within its dogmatic constriction. Conflict between the fidelity to religious conservatism and the yearnings for religious divergence fostered the development of Free Exercise Clause of the First Amendment. Since the early days of the Constitution, its texts have been debated and interpreted based on how the scholars and Justices saw it fit within the realm of their personal viewpoints and political ideologies. The central theme of the Clause remained unperturbed, while keeping Congress at bay from

making any laws prohibiting the free exercise of religion. The difficulty in developing a consistent doctrinal analysis of the religious clauses of the First Amendment comes from the absent demarcation between the Establishment Clause and the Free Exercise Clause. Invocation of Free Exercise Clause inevitably brings the test of whether state regulation imposes any undue burden[16] on the religion. On the other hand, an Establishment Clause analysis revolves around whether the state gets excessively entangled[17] in the exercise of religion. The difficulty in correctly adjudicating cases based on the religion clause surfaces due to frequent failures in properly distinguishing between burden and entanglement. These issues of burden and entanglement caused confusion in decision making in religion cases, which the Court sought to rectify by formulating a three part test for identifying the unconstitutional establishment as developed in *Lemon v. Kurtzman*.[18] For the first time, the Supreme Court's decision established this three-pronged Lemon Test[19] to determine under what conditions the state's action is deemed unconstitutional. If the test results prove that the Establishment Clause of the First Amendment has been violated, then the action is deemed unconstitutional, as the Court noted: "First the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally the statute must not foster an excessive entanglement with religion."[20] Scholars have noted that the concept of entanglement[21] and its lack of clarity is the root cause of this confusing conundrum surrounding the Free Exercise Clause. Additionally, an expansive reading of the phrase, "neither advance nor inhibit religion,"[22] could mean that any measure that inhibits religion in any way raises an issue regarding Establishment Clause of religion. This then points to a weakness in the Free Exercise Clause, as it cannot stand on its own, as a free standing separate but equally viable clause of the religion clause. Rather, in the constitutional scholarship on First Amendment, there seems to be a tendency for the Establishment Clause to be subsumed by the Free Exercise Clause. While in the year 2000, the Court applied the *Lemon* Test in deciding *Santa Fe Independent School District v. Doe*,[23] the issues of inconsistency and lack of clarity have rendered the future of *Lemon* rather uncertain, especially given the conservative bent exhibited by the current Supreme Court. Let us examine the constitutional trajectory of the Free Exercise Clause in a bit more detail.

Most Free Exercise Clause cases involve laws that prohibit an individual from engaging in conduct required by religious beliefs or required conduct prohibited by religious beliefs. In most cases, these laws are not directed at any specific religion, but are designed to deal with some secular problem that incidentally affects individual religious practices. The controlling enquiry in this context is to determine whether an individual's legitimate invocation of the Free Exercise of religion requires the law to give the individual an exemption from the stipulated governmental requirement, or state mandated action. Therefore, it is central to determine whether the state's interest in uniformity and universal compliance holds sway over individual's religious interests, which is a driver for the determination of a Free Exercise Clause exemption for an individual.

The above discussion indicates that the Free Exercise Clause has become a contentious issue within our First Amendment jurisprudence, for various reasons. First, there is a tension between the Establishment and the Free Exercise of religion. The Supreme Court, over the years, has handed down several benchmark decisions in an attempt to define the frontiers of religious liberty. The narrow decision-making by the Supreme Court has continually kept us guessing as the frontiers kept vacillating under the weight of inherent complexity in the text. Second, the tension between the Establishment Clause and the Free Exercise Clause of the constitution has left wide latitude in the interpretation and circumstances for which religious practices are to be given constitutional protection.

The Establishment Clause of the First Amendment requires the federal government to observe careful neutrality towards all places of religious practice or worship. The state or the governmental agencies therefore, must avoid aligning toward any individual Church or similar place of worship, or system of belief or non-belief. In other words, no governmental agency should favor one religious entity over any other. Religious activity is therefore, to be kept free from governmental aid or promotion, as the government can neither promote nor inhibit.

On the other hand, the Free Exercise Clause of the First Amendment prohibits the federal government from interfering in the rights of individuals or groups to practice publicly the religion of their choice or to practice no religion at all. As the case laws evolved, the list of allowable activities under the protected activities of religion has expanded to include preaching, teaching, gathering for public worship, and printing and disseminating religious publication. The only caveat is that these activities not interfere with the government's rights to maintain civil order and to maintain peace. One of the structural difficulties however, is the difficulty at times for the Clauses to exist distinctly without the Establishment Clause subsuming the Free Exercise Clause.

The ground realities described in the introduction section of this article exposes the struggles affecting persons of faith and presents a snapshot of the deep schisms that surfaced over the last several years for varying religions. Thus, we are compelled to take a deeper look into the limits of the Free Exercise Clause, as it is the most enduring constitutional protection against restriction of religious liberty. Reflecting back on the Muslim Imams, the Iraqi veteran, or the Hindu airline passenger, many poignant questions arise. How far can a religious minority go to exercise his religious belief against the strong tides of public sentiments surrounding him? How far can a minority woman go, even when her religious beliefs are at odds with the authority's comfort level while she poses no threat? I would trace these difficulties in the post-*Smith* legal landscape, which has narrowed the expansive ambience of religious pluralism evidenced in the pre-*Smith* era.

Ironically, the issue of religious freedom that most Americans take for granted has received little attention from the press and virtually no outcry from the public, despite the gradual religious restrictions since 1990. In my view, the Court's departure in *Smith* from its liberal rule-making is the result of its inability to deal with the proliferation of numerous beliefs, each of

which supports multiple social conducts. The Court's own apprehension in dealing with the constitutionally sanitized religious behaviors with some other fundamental rights, prompted the Court to depart from its compelling state's interest test, which I shall examine in Section IV. During the period before *Smith*, the Court's interpretation of the Free Exercise Clause opened up a wide range of religious activities, which resulted in a plethora of possibilities. However, the corrective course the Supreme Court took in *Smith* by erasing long standing protections for religious pluralism is definitely not in tune with the spirit of the free exercise of religion in America. Through its 2005 Ohio ruling of *Cutter v. Wilkinson,*[24] the Court may have attempted to shift course away from its trajectory of shrinking limits of the Free Exercise Clause. The last two years have been a mixed journey of convoluted legal arguments over the meaning of free exercise. Ignored by a media which has little patience on arduous complexities, and submerged in public apathy, findings in the most recent cases like *Van Orden v. Carey*[25] have been muted and rendered insignificant in public forum. But, before I delve into the development in *Smith*, let me take a step back and understand the pre-*Smith* expansion of religious freedom.

III. Understanding the Legal Landscape before *Smith*

My rationale in the previous section that the *Smith* decision is borne out of the Court's desire for a corrective maneuver can be better understood by recognizing its efforts in the earlier cases in which the Court had constructed constitutional trajectories encapsulating allowable religious conducts. One of the earliest cases was *Reynolds v. U.S.*,[26] where the Court upheld a federal law prohibiting polygamy as applied to a Mormon in which his religion required him to engage in that practice. The Court distinguished between belief and conduct and concluded that the government had broad authority to prohibit religious conduct. The Court's opinion is important because it delineated the boundary between belief and conduct. For example, we can believe in a multitude of things with no limits whatsoever. But, whether that can translate into acceptable behavior or conduct within the boundaries of civilized society is something of a different nature. This is an important area to probe further. The enquiry revolves around determining whether belief can be translated into acts and whether the umbrella of protection offered from the Free Exercise Clause can be extended automatically to religious acts developed because of religious beliefs. The difficulty in reconciling with the Court's logic can be understood better in a simple construct. Consider the following.

Suppose that individual A harbors a sincerely held belief in religion X. This belief compels him to follow actions *a, b, c* and *d*, all which forms part of his religious observance. Now, further suppose actions *b* and *c* comport to the life style or sociological practices of the majority religion, or prevailing order of the society. But actions *a* and *d* do not. According to the *Reynold*s Court, individual A could be prohibited from observing actions *a* and *d*, as the government has broad authority over such conduct. If the government officials making determination on the allowable conduct for individual A, have only a nonage understanding of religion X, could they still be allowed to make that determination? The situation described here has uncanny

resemblance to the scenario with the Hindu airline passenger depicted earlier. It demonstrates the dangerous minefield the Court must traverse if broad authority is provided over the allowable religious conduct. This slippery slope of restricted actions only descends into restricting the freedom of religious expressions for minority religions.

The history of religious practice or the evolution of human civilization tells us that doctrinal development in religion owes its framework to the continuous chain of conduct and action. When a governmental authority prohibits some conduct, it begins the process of chipping away at the core of certain beliefs, culminating in eventually alteration of the core value of a religion. This is especially so when religious practices belonging to the minority religions are concerned. I would argue, instead of giving governmental authority wide latitude as prescribed in *Reynolds v. United States,*[27] the test should center on fundamental values of ethics and morality. In *Reynolds* the Court held:

> Laws are made for the government of actions. And while they can not interfere with religious beliefs or opinions, they may with practices … Can a man excuse his practices to the contrary because of his religious belief. To permit this, would be to make the professed doctrines of religious beliefs superior to the law of the land. And in effect, permit every citizen to become a law unto himself. Government could exist only in name under such circumstances.[28]

The Court affirmed the development of *Reynolds* in *Davis v. Beason*.[29] It stated that, "it was never intended or supposed that the First Amendment could be invoked as a protection against legislation for the punishment of acts amicable to the peace, good order and morals of the society."[30] While continuing on the journey to solidify the limits and frontiers of the Free Exercise Clause of the religion, the Court, in *Cantwell v. Connecticut,*[31]somewhat rejected the belief-conduct construct by trying perhaps to expand the belief construct. There the Court held:

> The 1st Amendment embraces two concepts freedom to believe and freedom to act, the first is absolute but in the nature of things, the second can not be. Conduct remains subject to regulation for the protection of society in every case the power to regulate must be so exercised as not in attaining a permissible end unduly to infringe the protected freedom.[32]

A state may not by statute wholly deny the right to preach or to disseminate religious views. It is equally clear that, the state may by general and non-discriminatory legislation, regulate the time, the places, and the manner of soliciting upon its streets, and holding meetings thereon and the state may, in other respects, safeguard the peace, good order and comfort of the community without unconstitutionally invading the liberties protected by the Fourteenth Amendment.[33]

The period between 1960s till the later part of 1980s saw revisionism as the Court began to strike down laws infringing on divergence in religious beliefs. In those early cases, the Supreme Court seemed to balance the religious interests with the governmental interests in deciding whether to grant an exemption on a case by case basis. Not only did this result in incremental infusion of clarifying dimensions, but also posed lack of definitional consistency in few cases.

For example, in *Sherbert v. Verner*,[34] the Court applied strict scrutiny for laws burdening religion. An important aspect of the *Sherbert* opinion was the Court's decisions to apply heightened scrutiny while finding that the standard of heightened scrutiny was not met. The Court asserted that fraudulent claims by unscrupulous claimants invoking religious objections to Saturday work was insufficient, while prescribing those alternative forms of regulations should combat such abuses. Despite providing a threshold as to how far claims of allowable religious conduct can be entertained, *Sherbert* addressed a newly opened Pandora's Box of definitional complexity. This complexity questioned whether granting a religious exemption to a law that is applicable to everyone else fosters an establishment of religion. The majority in *Sherbert* found no Establishment Clause problem because the exemption involved neutrality in issues of religious difference. In this case, it was not unanimous, as the Justices approached the question from diverging perspective. For example, Justice Harlan joined by Justice White, dissented. While arguing that the Court's holding requires the state to provide benefits to those who refuse to work for religious reasons but deny benefits to those who are not religiously motivated. Concerned with the possibility that this treatment is a special treatment, Justice Harlan, however, kept open the possibility by opining on whether this is indeed a violation of the Establishment Clause.[35] This vacillation within the Supreme Court jurisprudence on the free exercise of religion kept open a wider array of possibilities when it came to determining allowable conducts within some broad-based ground-rules.

IV. What Does *Smith* Mean for Religious Liberty?

The most enduring legacy of the 1990 *Employment Division v. Smith*[36] is the Court's attempt to provide perhaps a more definitive guidance on the boundary in law. This legacy includes defining where the free exercise protection of religion ends, while greatly reducing that protection. In *Smith*, two Native Americans were denied unemployment benefits by the State of Oregon. The Court denied those benefits because they were fired for using peyote[37] in their worship. Under a test used by the Supreme Court decades before *Smith*, Oregon would have been required to show a compelling state interest for denying Native Americans a religious exemption from the anti-drug laws. But in deciding the Oregon case, the Court changed the test. No longer would the government have to show a compelling state interest before denying the request for accommodation for a law the applied to everyone. Again a caveat: that the law did not target religion, is appropriate. Thus, as long as Oregon bans peyote use by everyone, not just Native Americans, the state does not have to grant or consider an exemption for religious use.

In Justice Scalia's opinion, the Court marked out the parameters of the free exercise. The Court held:

> But the "exercise of religion" often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation. It would be true,

> we think (though no case of ours has involved the point), that a State would be "prohibiting the free exercise [of religion]" if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display. It would doubtless be unconstitutional, for example, to ban the casting of "statues that are to be used for worship purposes," or to prohibit bowing down before a golden calf.[38]

Here we witness sharp distinction in the standards of tests while comparing *Smith*'s standard with those used by the Court in earlier cases. The respondent in *Smith* sought to extend the meaning of Free Exercise Clause by seeking justification to use peyote. The respondents invoked the allowable religious conduct doctrine, despite the criminal law banning the practice. The Court perhaps was apprehensive of the proliferation of allowable religious conducts that are contrary to various criminal and civil laws. Thus, a new test was devised. The Court's justification in disallowing the use of peyote emanated from the recognition that the practice was not specially directed at their religious practice, and was within allowable rights for those who use the drug for other purposes, like medical marijuana usage. In deciding the *Smith* case, the Court specifically refused to apply *Sherbert's* compelling government interest test. The Court viewed *Sherbert* to be applicable only in unemployment compensation issues and thereby prohibiting *Sherbert*'s expanded meaning to be applicable in criminal law. This was driven by Court's lack of recognition towards the compelling government interest standard which may be too restrictive for promoting equality in areas involving speech, race and religion.

The central argument of *Smith* produces a constitutional anomaly if taken in isolation to prove consistency in applying the free exercise segment of the First Amendment. The sudden restriction of religious freedom in *Smith* obviously did not prove popular with the legislatures, evident by Congress's attempt to invalidate the decision by passing the Religious Freedom Restoration Act (RFRA).[39] The Court, however, struck down the Act in the case of City *of Boerne v. Flores.*[40] There the Court held that the broad power of Congress is under the enforcement clause of the Fourteenth Amendment and therefore, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.[41]

Further complicating the *Smith* aftermath, the lower courts jumped on the bandwagon by suddenly shifting towards a more restrictive view of the Free Exercise Clause. In *Cooke v. Tramburg*[42] the Court took a more restrictive view of the Free Exercise Clause. As the *Cooke* case reveals that the respondent members of the Islamic faith at the New Jersey prison sought to challenge prison policy by alleging that due to the restrictive prison policy they are unable to attend the weekly Muslim congregational services regularly held in the prison facility. Thus, Muslim prisoners were being denied their right to religious worship. They sued seeking an accommodation. The Court summarily rejected on the Free Exercise claim. Noting that imprisonment necessarily brings with it a restriction of privileges and also recognizing that prison officials were entitled to exercise discretion. However, Justice Brennan, joined by three others Justices, dissented, and noted the importance of prayer and the government's failure to show that alternatives were not workable.

The restriction of religious freedom continued untrammeled as seen in the landmark decision in *Ling v. Northwest Indian Cemetery Protective Association*.[43] By denying the claim of Native Indian respondents, the Court in *Ling* held that the accommodation of Native Indian practices was not required. In denying the claim of the Native Indian tribes against the United States Department of the Interior's forest Service's destruction of sacred ancient sites, the Court invariably signaled the onset of an alarming trend of the lack of religious protection in federal land. The Court categorically stated that the Free Exercise Clause affords an individual protection from certain forms of governmental compulsion, but does not afford individual rights to dictate the conduct of the government's internal procedures. Justice Brennan, joined by Blackman and Marshall, dissented and noted the respondents were required to show centrality before the government was required to show a compelling justification for the proposed action. Why didn't the Court recognize the respondents' beliefs to be sincere? Would the government's proposed action have severely affected the religions practices of the minority religion? While there have been other discrimination against religion cases that involved tension amongst the Establishment and Free Exercise Clauses, I will however, fast forward to 2005 and the *Cutter v. Wilkinson*[44] aftermath.

V. Unanswered Questions of *Smith* in an Era of Shrinking Religious Liberty

Having reviewed the evolution of religious rights granted by the Free Exercise Clause of the First Amendment I want to focus on the how the concept of the shrinking Free Exercise Clause has evolved since the landmark case of *Employment Division v. Smith*.[45] The first issue to analyze is whether the legal approach taken by the government is based on a special neutral statutory requirement that is in a direct collision course with the Free Exercise Clause. The second issue is to determine if that special neutral requirement bypasses the individual's religious protection granted under the Free Exercise Clause. With thirty years of lower courts decisions and several landmark Supreme Court cases as precedent, it is crucial to develop a standardized procedure to detect how much the Free Exercise Clause is shrinking in favor of governmental interest. The Supreme Court, in findings as in *Smith*, has reversed course from their previous findings that, whenever an individual claim for relief from procedural burden based on Free Exercise Clause comes. There a substantive determination of the individual entitlement has to be made. Two distinguishing factors make this determination. In the first place there is an analysis of whether the individual claim is based on a facially neutral requirement and as such, is not interfering with the legislative purposes. In the second place, it has to be determined whether a sincerely held religious objection to the requirement and that the fulfillment of that requirement serves a compelling governmental interest. If it is determined that the fulfillment of that requirement does serve a compelling governmental interest, the process must find a less restrictive alternative. This alternative must not burden the administrative process nor can it be against the facially neutrally law of general applicability. If the determination further finds that the individual religious accommodation is against the compelling governmental interests, then the Court might rule that the Free Exercise Clause

provides substantial protection for lawful conduct grounded in religious belief. However, the state may justify curtailing that religious liberty if it can show that curtailment is essential to accomplish a compelling or overriding governmental interest.

My exigencies analysis is put forth to resolve the conflict between compelling government interests and sincerely held religious beliefs. The test has to be whether sincerely held religious beliefs can be accommodated without disturbing or shrinking the governmental interests. If, the individual religious accommodation comes in direct conflict with the fulfillment of governmental interests, the procedures should be to find a less restrictive means to accommodate that individual religious belief. If no less restrictive means exists, that compelling governmental interests prevails under the test. I characterize this as the tipping point. How can it be determined that the tipping point has been exceeded? The enquiry should consider whether accommodating that sincerely held religious belief will severely and unduly interfere with the fulfillment of the governmental interests. If there comes a point at which granting that individual religious accommodation radically restricts the operating latitude of the legislature, then it can be concluded that the tipping point has arrived and the individual religious interests must give way to the governmental procedure.

But, where does the legislative determination comes into play? Legislative determination of individual exemption would undermine the purpose of the general applicability of law, because the impropriety of ignoring such legislative determination would undermine the state's goal of providing a facially neutral law of universal applicability. Therefore, one of the key prerequisites of advancing the compelling governmental interests of a facially neutral application resides in developing a determined and specific procedure to detect whether legislative determination is in conformity with granting individual exemption. Where does the shrinking of the Free Exercise Clause come into focus? I would argue that the right to free exercise of religious beliefs shrinks as the number of individuals requiring accommodation for their sincerely held belief increases. However, there are limits to the accommodation that the government can oblige. Viewing each case in isolation would unduly burden the government. If the state is bound to accommodate the demands, it could do so in a handful of instances but not if the number of such cases dramatically increases. But, again, where is the threshold? How to develop a test for a threshold? Could there be a good cause test for individualized accommodation that can be incorporated in the analysis? Is there a substantive determination that could be based on precedent cases? Let us consider the responses to these questions.

The response could be advanced in two steps. In the first, I recognize that imposition of purely procedural requirements can restrict religious freedom, which could embolden the case for a shrinking Free Exercise Clause. In the second, applying an open-ended frame of reference could bring in uncertainties as the numbers of individuals seeking exemptions on the basis of religion could creep, and the government could be hard pressed to determine how and under what basis to grant exemption. Therefore, how does this analysis differ from the Court's findings in *Smith* that a compelling state interest test can be abandoned? This is a very

perplexing scenario, and requires a great deal of analysis to present a coherent and workable solution.

By delving into the framework of the constitution's rule making, particularly within the context of the Madisonian[46] doctrine of separation, we can trace the origins of the First Amendment where we find the constitutional thought process based on non-preferentiality. The doctrine of non-preferentiality contends that the framers had no intention of prohibiting government aid to all denomination or religions on a non-preferential basis. This is a plausible but fundamentally defective interpretation of the establishment clause. Therefore, we could not develop a framework to understand *Smith* as it does not produce a workable solution.

While the seminal case of *Sherbert v. Verner*[47] significantly opened the scope of free exercise protections for individuals, the post-*Smith* legal landscape involved various Supreme Court as well as lower court decisions, where the central tenet of the *Smith* Court's holdings have been solidified. This therefore, invites enquiry as to whether the constitutional trajectory is showing signs of shrinking the Free Exercise Clause of religion. Although many commentators hail the Supreme Court decision in *Smith* as the most relevant guidance towards situations when individual exemptions towards universal laws cease to apply, I would present several flaws in the *Smith* analysis.

The central theme of *Smith* is that individuals are no longer entitled to special exemptions on account of neutral laws burdening individual religious practices. The Court held that Free Exercise Clause, "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability."[48] Clearly, the Court intended *Smith* to be the guidepost for religious rights of individuals under the dual doctrines of neutrality and general applicability. However, my reading of *Smith* reveals that adherence to "neutral laws of general applicability"[49] is narrowly tailored to only protecting free exercise rights of individuals belonging to the majority religions, and thus, was erroneously decided.

Further examining the guiding principles of *Smith*, several questions remain unanswered. The answers to these questions will form the central core of understanding the post-*Smith* era and its impact on the shrinking constraints witnessed in individual religious exercise freedom. While *Smith* permits government regulation of individual religious practices, there remains a fuzziness surrounding what is neutral law, or, whether the concept of neutrality could be universally applicable to all religious sects. Obvious questions arise. Could law ever lose its neutrality? Is an individual's search to define sincerely held religious belief, mutually exclusive with the governmental definition of neutral laws of universal application? The Supreme Court has been clear in its qualified proclamation in *Smith.* The Court presented an authoritative declaration that compelling state interest is no longer the test to determine the viability of free exercise claim. The new test is based on satisfying both the dual issues of neutrality and universal applicability. In my view, the free exercise right of religion rises and falls with a determination of both these components and, therefore, requires a thoughtful analysis. The legitimacy of adjudicating free exercise right is best pursued by determining whether the

neutrality and universal applicability principles are valid by themselves.

First, let us consider, what is neutrality? Again, could law ever cease to be neutral or stop becoming applicable universally? The government's characterization of neutral laws of universal applicability could be construed as upholding the majority religious, or a law that can support or sustain the interests of the majority religious beliefs. If this is the case, then the law purports to be deemed universally applicable. Herein lies a problem. The constitution was written more than two hundred years ago when a single predominate religious thread was the governing religion of the land. Therefore, all the possible scenarios that the framers of the constitution could have envisioned revolved around various implications of one single religious doctrine. Even if we take for granted the possible doctrinal changes or doctrinal evolutions and its implications of individual beliefs, we cannot grasp their ability to encapsulate the protection of diverging religious practices witnessed in the 21st century.

For example, various religious practices, as was described earlier in our ground realities sections, require the sincere believer of that religion to decorate external objects. The TSA intrusion into a religious practice comes into conflict with religious exercise due to specific federal regulations related to security and to travel restrictions. Therefore, we must address whether or not that federal law's universal application applies to those religious practices which are in conflict with the religious practices of the majority religion. The answer is unequivocally no. Therefore, our enquiry should center on the issue of whether neutral laws of universal applicability are mutually exclusive of an individual's search for her Free Exercise Clause guarantee in regard to her religion. This is where I would argue that the justification or the test proposed in *Smith* was erroneously constructed. Furthermore, the *Smith* opinion did not take into consideration when law could eventually cease to be neutral or stop becoming universally applicable. The recognition of the full scope of this possibility requires us to have a good understanding of what religion means, particularly within the broader context of dynamic constitutionalism, an area of research I have detailed elsewhere.[50]

VI. Religion: Where Art Thou?

Understanding the realm of protections, that the constitution's religious clauses might be called upon to provide to U.S. citizens, is incomplete without fully recognizing the expansive reach of the word religion in today's context. From a nation built on strictly Judeo-Christian religious principles, America has evolved into a nation containing multiple religious strands. This prompts us to examine and expand on the Framers' views on the meaning of religion. Historical records of the constitution reveal the founders' theistic view of the religion. This is evident in the commentaries of George Mason and James Madison, who in their characterization of religious obligation, state, "the duty which we owe to our creator, and the manner of discharging it."[51] This abiding belief in a creator was further revealed by Benjamin Franklin as, "… the essentials of every religion [to be] the Deity; [and] that he made the world, govern'd it by his Providence …"[52] Do these early writings necessarily provide a broader recognition to all existing religions, something perhaps the framers did not anticipate to be part and parcel

of the American social fabric?

Thomas Jefferson perhaps provides the clearest answer to this question. He indicates the Framers' intention to include all religions, even the faith of Muslims and Hindus and to provide them all the protective umbrella of the First Amendment's Free Exercise Clause, as reflected in Jefferson's comments in the Virginia Bill for Establishing Religious Freedom. There Jefferson said, "The bill [was] meant to comprehend, within the mantel of its protection, the Jew and the Gentile, the Christian and Mahometan, the Hindoo, and infidel of every denomination."[53] This is probably the closest the framers have come in opining whose religious rights ought to be protected, despite being mute on what protection should be accorded to other non-orthodox, and atheistic religious practices. I will argue that this explicit recognition of all available orthodox religions of their time gives us a definitive indication of the framers' intention on inclusion and religious neutrality.

The Framers' objective was to insert a neutral definition of "religion" that includes believers of all kinds. The detail in Jefferson's writing on the passage of the Virginia Bill provides ample evidence of the inclusive mindset with which the Framers of the constitution intended not to discriminate against any religion. In light of what the Framers conceived more than two centuries back, it is remarkable and, in my view, it provides broad protection to believers of all kind. The same sentiment has been echoed by Justice Harlan who averred that the Free Exercise Clause of religion protects the non-believer, by affording equal protection to both the believer and the non-believer. As he held:

> [T]he State cannot constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can (it) aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.[54]

Therefore, the dual rationality ensconced in neutrality and inclusion provides us with the meaning of religion. The definition must protect the right of the Hindu to wear religious articles on her person in public places, as well as protect the right of Native Americans to perform religious rituals on sacred grounds. As James Madison observed more than two centuries back, that right is encapsulated within the explicit recognition that,

> This right in its nature is an unalienable right. It is unalienable; because the opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men: It is unalienable also, because what is here a right towards men, is a duty towards the Creator.[55]

His words eloquently remind us that in spite of our differences on religious views of religion, we would be remiss to forget that:

> That Religion or the duty which we owe to our Creator and the Manner of discharging it, can be directed only by reason and conviction, not by force or violence. The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate.[56]

VII. Conclusion

The Framers of the American Constitution envisioned a multi-cultural and multi-ethnic societal fabric, sustenance of which depends on the spiritual vibrancy of religious pluralism. This spiritual vibrancy is at stake today. It is dogged by the dogmatic constrictions of the majority religion, gradually eroding the exuberance of free exercise of minority religions. Despite the explicit guarantee of religious liberty by the First Amendment's Religion Clause, we are suddenly confronted by the profound realization that the proliferation of religious pluralism might not go very far after all. The central enquiry here, is whether the highest court of the nation drifted away from its earlier promise of guaranteeing religious liberty for all? If this is indeed the case, then we are indeed experiencing a gradual shrinking of the Free Exercise Clause of Religion. My article has established that the shrinking of the Free Exercise Clause is predicated in validating the fundamental argument of *Employment Division v. Smith*.[57]

The *Smith* Court was decided by invoking the constitutionality of universal application of neutral laws. My arguments questioned that framework by showing that it is not sustainable legal reasoning and therefore, the *Smith* Court's rational must be invalidated. Instead of invoking other legal doctrines, such as, equal protection, or resorting to social rights based arguments, this article examines the inherent inconsistency in the two basic premises.

The *Smith* Court's rational was developed under the twin premises that, it is possible to bring in neutrality in legal paradigm, and this can be applied universally on issues dealing with religious pluralism. My assertion here is that achieving both true neutrality and universal applicability is untenable within the existing framework. Therefore, the constitutional development based on *Smith* indeed opens up the possibility of the shrinking Free Exercise Clause. This is due to its inability to insulate the religious minorities from being swallowed by the overpowering social current of the established religion.

Finally, the kaleidoscope of America's multiple religions must be enmeshed within the protective umbrella of the constitution's First Amendment, and insulated from the zealous imposition of administrative burdens on harmless religious practices. If the constitutions cannot guarantee the Hindu woman's religious ritual of wearing religious ornaments while flying, if the Constitution cannot allow the Muslim defendant to place his hand on the Quran while taking an oath in a court of law, and if a Catholic soldier cannot freely express his religious antipathy against state sanctioned killings in the battlefield, then America is not living up to the promise delivered by James Madison more than two hundred years back. He proclaimed:

> It is a duty of every man to render to the Creator such homage, and such only, as he believes to be acceptable to him. This duty is precedent both in order of time and degree of obligation, to the claims of Civil Society. Because if religion be exempt from the authority of the Society at large, still less can it be subject to that of the Legislative Body. The dictation is both derivative and limited: it is limited with regard to the co-ordinate departments, more necessarily it is limited with regard to the constituents.[58]

Burdened by legal reasoning and prompted by providential prudence, I am therefore compelled to issue a clarion call. Let us deliver on the promise of James Madison. Let us exorcise the exclusionary spirit of *Smith*. Then and only then, can we confidently embrace the meaning of the constitutional guarantee of religious freedom — a freedom represented in the mosaic of beliefs, non-beliefs and traditions we call religion. All are most certainly worthy of protection under a never shrinking Free Exercise Clause.

[*] Dr. Saby Ghoshray is Vice President for Development and Compliance at World Compliance Co.

[1] *See* discussion *infra* note 8.

[2] *See* All Headlines News, Talk *Show Host Under Fire For "Anti-Islamic" Comments* (District of Columbia), December 8, 2006 available at http://www.allheadlinenews.com/articles/7005798707. The popular columnist and radio talk show host Dennis Prager found himself in a center of controversy after spewing out anti-religious remarks. He was complaining about Congressman Keith Ellison who chose to use the Quran instead of the Bible in his swearing him ceremony. Prager said, "I have never bashed Islam in my life. I have written 1,000 columns, many on the Islamic world. I have been in broadcasting for 25 years. I've studied Arabic and Islam. I was a fellow in the Middle East Institute of Columbia University, where I did my graduate work." However, Prager continued on, "Insofar as a member of Congress taking an oath to serve America and uphold its values is concerned, America is interested in only one book, the Bible. If you are incapable of taking an oath on that book, don't serve in Congress."

[3] *See* The Raw Story, Religious Protests Disrupt US Senate's Hindu prayer, July 12, 2007, available at http://rawstory.com/news/afp/Religious_protests_disrupt_US_Senat_07122007.html. Hindu Priest, Rajan Zed was invited to offer the opening prayer before a session of the Senate in July of 2007. Just as Priest Zed offered the prayer, he was interrupted with protest and heckles from three Christian conservative protesters. The shouts heard included, "This is an abomination." The activists were arrested, cited and ordered to court. The group Americans United for Separation of Church and State condemned the outburst. "This shows the intolerance of many Religious Right activists." "They say they want more religion in the public square, but it's clear they mean only their religion," said the group's executive director, Reverend Barry Lynn. These protest come on the heels of the conservative American Family Association email and letter campaign to ban Hindu prayer in the chamber.

[4] In this way, I attempt to establish that an individual's right to believe or not believe is central to the understanding of religious liberty. Over the course of the two centuries of American government, the Supreme Court rulings on religious liberty have gone through a confusing array of mixed signals, through a litany of cases like, the military prohibition of skullcaps for Jews, the school prayer issue, Native Indian religious use of peyote, and statutory exemptions for religious organization. In almost all of these cases, the claim of religious rights is determined through vigorous analysis via two lines of reasoning. In the first, the determination is made as to whether the case involves legitimate issue of religious liberty, while the second, balances the claim of legitimate religious liberty against the "compelling state interests," and area examined later in this paper. In my view, the concept of religious liberty must be examined by taking into account meaning of two components, the "religion" and the "liberty". While the terms "rights" and "liberty" may be used interchangeable in this work, I will provide a much broader interpretation of "religious" than can be gleaned perhaps from the writings of the framers of the constitution.

[5] *See* generally, Donald E. Lively, Dorothy E. Roberts, & Russell L. Weaver, First Amendment Anthology, Anderson Publishing Company, 1994.

[6] *See supra* note 6. The Free Exercise Clause states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The Free Exercise Clause of the First Amendment along with the Establishment Clause of the First Amendment makeup the Religion Clauses. The Free Exercise Clause has often been interpreted to include two freedoms: the freedom to believe, and the freedom to act. The freedom to believe is considered absolute, while the freedom to act faces state restriction.

[7] *See* Turnto23.com, *Soldier under Fire for Controversial Decal*, March 5, 2007 available at http://www.turnto23.com/news/11177861/detail.html.

[8] *See* CNN.com, *Airline checks claim of 'Muslim while flying' discrimination*, November 21, 2006 available at http://www.cnn.com/2006/US/11/21/passengers.removed/index.html or http://www.cnn.com/2007/US/03/13/imam.suit/index.html?iref=newssearch.

[9] *See* Lee A. Henderson, *New Bill to Allow Texts Other Than the Bible for Courtroom Oaths*, February 11, 2007, available at http://www.associatedcontent.com/article/147822/new_bill_to_allow_texts_other_than.html.

[10] This story reflects real experiences airline passenger Jennifer Schulke has faced as a frequent international airline traveler. She has detailed her experiences to me. Also, I have accompanied her on multiple trips and witnessed firsthand the experience as described in this short story. I affirm the authenticity. Further information can be obtained by e-mailing her at Jennifer-Schulke@sbcglobal.net.

[11] *See generally* W. McKinney & W.C. Roof, American Mainline Religion: its Changing Shape and Future. New

Brunswick, Rutgers University Press, 1987. *See also* Barry A. Kosmin, Egon Mayer and Ariela Keysar, AMERICAN RELIGIOUS IDENTIFICATION SURVEY, 2001, THE GRADUATE CENTER OF THE CITY UNIVERSITY OF NEW YORK, available at http://www.gc.cuny.edu/faculty/research_studies/aris.pdf.(Findings include significant statistical data which highlights the change within mainstream religious adherence, to the changes seen in non-christian traditions like, Islam, Buddhism and Hinduism.)

[12] As part of the Bill of rights, the First Amendment prohibits the federal legislature from making laws that establish religion, this is deemed the Establishment Clause. Also, prohibited is the prevention of free exercise of religion, this is deemed the Free Exercise Clause. Both clauses important because any laws enacted that limit freedom of speech, also limit freedom of the press, limit peaceful assembly, and limit the right to seek redress from the government for grievances. *See generally See* Paul Marcus, *The Forum of Conscience: Applying Standards Under the Free Exercise Clause*, Duke *Law Journal*, Vol. 1973, No. 6 (Jan., 1974), pp. 1217-1272; *See* Dorothy Roberts, Dorothy, Donald E. Lively and Russell L. Weaver, eds. *A FIRST AMENDMENT ANTHOLOGY* (Anderson Publishing Company, 1994).

[13] Employment Division v. Smith, 494 U.S. 872 (1990).

[14] Despite divergence of their interpretation, constitutional historians agree that the protection mechanisms of the First Amendment are borne out of historical needs, not merely for logical, moral or ethical reasons. Religious persecution in medieval England was real, which brought out humanity's innate barbarism in the severest form or religious intolerance. *See generally* Sydney E. Ahlstrom, A Religious History of the American People, Doubleday Publishing (1972); *see also*, Robert S. Alley, James Madison on Religious Liberty, Prometheus Books (1989).

[15] Although the constitution does not have explicit provision of "separation," the concept grew out of perceived need for the separation of Church and State as a protection of the Church from the State, so that the Church can work unhampered. Understanding the separation between the two religion clauses is important here, as even the Supreme Court has historically found it difficult to find effective zone of neutrality where the two clauses can operate without entangling each other. This sentiment is echoed by Justice Douglas in *Zorach v. Clauson*, 343 U.S. 306 (1952):
The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma.

[16] The issue of burden is best explained against the backdrop of *Smith*. As any governmental burden on a religious belief or practice has a low threshold of justification, if it is determined to be generally applicable and not targeting a specific. For example, in 1993 the Court applied the burden principle in the Church of the *Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520 (1993). The Court held the law burdened a specific religious practice (e.g. animal sacrifice ritual of the Santeria religion), and thus the government would have to demonstrate that it had a compelling interest at stake. Ultimately, the government could not meet this burden and the law was stuck down.

[17] The issue of entanglement relate to the establishment clause and the concern over a state church, and more importantly, assuring no government support for any particular religion, or excessive government entanglement with religion.

[18] Lemon v. Kurtzman, 403 U.S. 602 (1971).

[19] The three prongs of the Lemon Test are determining that the government's action must have a legitimate secular purpose; that the government's action must not have the primary effect of either advancing or inhibiting religion; that the government's action must not result in an "excessive government entanglement" with religion. *Id.*

[20] *See supra* note 19.

[21] *See supra* note 18.

[22] The Free Exercise Clause of the First Amendment provides that government will neither advance nor inhibit religious expression.

[23] Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000).

[24] Cutter v. Wilkinson, 544 U.S. 709 (2005).

[25] Van Orden v. Perry, 125 S. Ct. 2854, 2859 (2005).

[26] Reynolds v. United States, 98 U.S. 145 (1879).

[27] Reynolds v. United States, 98 U.S. 145 (1879). This Supreme Court case opined that religious duty was not a suitable defense to a criminal indictment. A Mormon, George Reynolds was charged with bigamy. Reynolds contended that the bigamy conviction should be overturned in part because it was his religious right to practice bigamy.

[28] *Id.*

[29] Davis v. Beason, 133 US 333 (1890).

[30] *Id.*

[31] Cantwell v. Connecticut, 310 U.S. 296 (1940).

[32] *Id.*

[33] The 14th Amendment to the Constitution was ratified on July 28, 1868, and granted citizenship to "all persons born or naturalized in the United States," including former slaves. It also states from denying any person "life, liberty or property, without due process of law" or to "deny to any person within its jurisdiction the equal protection of its laws." The 14th Amendment is cited for its far reaching protection of civil rights to all Americans. *See generally* James

W. Hilliard, *To Accomplish Fairness and Justice: Substantive Due Process,* 30 J. Marshall L. Rev. 95, 102, 104, 110 (1996). (Noting the principle of constitutional due process is aimed at protecting rights of individuals and providing legal safeguards to them. It affirms that an individual cannot be deprived of life, liberty, or property without being afforded legal protection available to him under the law. The Bill of Rights and the Fourteen Amendment to the U.S. Constitution ensures due process rights of individuals. Procedural and substantive due process are two types of laws. While procedural law seeks to enforce the due process rights of individuals, substantive law creates, defines, and regulates the rights.) For a cursory review of the Bill of Rights, see http://usinfo.state.gov/usa/infousa/facts/funddocs/billeng.htm (last visited Dec 28, 2007) (outlining the first ten amendments to the Bill of Rights). Additionally, to gain a detailed understanding of the Fourteenth Amendment, visit http://www.nps.gov/malu/documents/amend14.htm; *See* also Saby Ghoshray, *Charting the Future of Online Dispute Resolution: An Analysis of the Constitutional and Jurisdictional Quandary,* 38 U. TOL. L. REV.336-338 (2006) (explaining application of the Fourteenth Amendment for protection of constitutional rights of individuals). *See also,* A Century of Lawmaking for a New Nation: U.S. Congressional Documents and Debates, 1774 — 1875, Statutes at Large, 39th Congress, 1st Session, available at http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=014/llsl014.db&recNum=389.

[34] Sherbert v. Verner, 374 U.S. 398 (1963). The Sherbert Test consists of whether the person has a claim involving a sincere religious belief, and whether the government action is a substantial burden on the person's ability to act on that belief. Also, the government must prove that it is acting in furtherance of a "compelling state interest," and that it has pursued that interest in the manner least restrictive, or least burdensome, to religion.

[35] *Id.*

[36] *See supra* note 14.

[37] The common pseudonym peyote refers to the flower cactus that grows above ground along the Texas and Mexico border. Peyote has been used throughout history by the Native Indian people. Peyote is used to experience the psychedelic effects and the accompanying inner insight that is sought in the Native Indian religious rituals. In May 23, 1993, the Senate Bill 1023 was introduced in the 103rd Congress, as Native American Free Exercise Act of 1993. Under Title II- Traditional Use of Peyote, the Congress found the following:

1. for many Indian people have used the peyote cactus in religious ceremonies for sacramental and healing purposes for many generations, and such uses have been significant in perpetuating Indian tribes and cultures by promoting and strengthening the unique cultural cohesiveness of Indian tribes;
2. since 1965, this religious ceremonial use of peyote by Indians has been protected by Federal regulation, which exempts such use from Federal laws governing controlled substances, and the Drug Enforcement Administration has manifested its continuing support of this Federal regulatory system;
3. the State of Texas encompasses virtually the sole area in the United States in which peyote grows, and for many years has administered an effective regulatory system which limits the distribution of peyote to Indians for ceremonial purposes;
4. while numerous States have enacted a variety of laws which protect the ceremonial use of peyote by Indians, many others have not, and this lack of uniformity has created hardships for Indian people who participate in such ceremonies;
5. the traditional ceremonial use by Indians of the peyote cactus is integral to a way of life that plays a significant role in combating the scourge of alcohol and drug abuse among some Indian people;
6. the United States has a unique and special historic trust responsibility for the protection and preservation of Indian tribes and cultures, and the duty to protect the continuing cultural cohesiveness and integrity of Indian tribes and cultures;
7. it is the duty of the United States to protect and preserve tribal values and standards through its special historic trust responsibility to Indian tribes and cultures;
8. existing Federal and State laws, regulations and judicial decisions are inadequate to fully protect the ongoing traditional uses of the peyote cactus in Indian ceremonies;
9. general prohibitions against the abusive use of peyote, without an exception for the bona fide religious use of peyote by Indians, lead to discrimination against Indians by reason of their religious beliefs and practices; and
10. as applied to the traditional use of peyote for religious purposes by Indians, otherwise neutral laws and regulations may serve to stigmatize and marginalize Indian tribes and cultures and increase the risk that they will be exposed to discriminatory treatment.

This bill eventually passed as the American Indians Religious Freedom Acts Amendments of 1994 and is available at http://mojo.calyx.net/~olsen/RELIGION/airfaa.html (accessed on Jan. 03, 2008).

[38] *See supra* note 35.

[39] The Religious Freedom Restoration Act or RFRA (42 U.S.C. § 2000bb) is a 1993 federal law designed to prevent laws which overly burden a person's free exercise of his or her religion.

[40] City of Boerne v. Flores, 521 U.S. 507 (1997).

[41] *Id.*

[42] Cooke v. Tramburg, 43 N.J. 514, 205 A.2d 890 (1964).

[43] Ling v. Northwest Indian Cemetery Protective Association, 485 U.S. 439, 472 (1988).
[44] *See supra* note 25.
[45] *See supra* note 14.
[46] The separation of church and state is a legal and political principle derived from the First Amendment and which states, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof …" These famous words and the philosophy behind the words are from Thomas Jefferson. His words were part of a lecture on the impact of the Establishment Clause and the Free Exercise Clause of the First Amendment.
[47] *See supra* note 34.
[48] *See supra* note 14.
[49] *See supra* note 14.
[50] *See* Saby Ghoshray *To Understand Foreign Court Citation: Dissecting Originalism, Dynamism, Romanticism, and Consequentialism*, 3 Albany Law Review vol. 69, 709-743. By referring to a dynamic constitution, attention is drawn to the process by which the constitution adapts to the changing conditions in the society. As the frontiers of the freedom of speech, the freedom of religion, the rights to privacy and sexual practices among consenting adults continue to expand within the meaning of our constitution, we are confronted with its dynamic aspect. In most parlances, the phrase "dynamic constitution" and "living constitution" are used synonymously. *See generally* Richard H. Fallon, Jr., Implementing the Constitution 3-4 (2001).
[51] *See* George C. Freeman, III, *The Misguided Search for the Constitutional Definition of "Religion"*, 71 Georgetown Law Review 1519 (1983). *See generally* Robert, S. Alley, *James Madison on Religious Liberty*, 1985; Sydney E. Ahlstrom, *A Religious History of the American People*, 1972.
[52] *Id.*
[53] *Id.*
[54] *See, e.g,* the opinion of Justice Harlan, *Waltz v. Tax Commission of City of New York*, 397 U.S. 664 (1970).
[55] *See* Robert S. Alley, James Madison's Memorial and Remonstrance against Religious Assessments, The Supreme Court on Church and State, Oxford University Press, 1988.
[56] *Id.*
[57] *See supra* note 56.
[58] *See supra* note 56.

FAITH, SOCIAL REFORM IN THE INNER CITY, AND THE ESTABLISHMENT CLAUSE

BY HON. VIRGINIA M. KENDALL*

A City in Crisis

In 2001, the City of Chicago was facing a crisis. For the seventh year in a row, it had been ranked as having one of the highest murder rates in the country compared to other cities of its size.[1] In 2001 alone, there were 665 murders committed on the streets of Chicago. In the six years prior to 2001, the Chicago Police Department had recovered between 10,000 and 14,000 firearms each year from the city's streets.[2] The State's Attorney's Office for Cook County, the county within which the city sits, had secured approximately 40,000 felony convictions in one year, a significant portion of which were related to the possession and use of firearms. A closer look at the statistics revealed that the murder rate in certain neighborhoods located on the near west side of the city was three times that of the city average; those neighborhoods also accounted for the highest concentration of homicide and gun recoveries in the city.[3] The Chicago Crime Commission identified eighteen independent street gangs operating within the borders of two police districts within that ten-mile square area.[4]

This paper will address how two separate groups worked to better the lives of the residents in the high crime areas of the near west and near southwest sides of Chicago — "hot zones" of violence, gang activity, and poverty. The two groups approached the problem from entirely different motivations and perspectives: one group, the Society of Jesus, or the Jesuits as they are commonly called, focused on Pilsen and Little Village in order to serve the poorest families in those immigrant Mexican neighborhoods. Historically, the Jesuits are educators, and in keeping with their tradition and mission, they chose to address the issue by opening a school, the Cristo Rey School. The other group, the Department of Justice, through the United States Attorney's Office in Chicago, chose to address the gun violence that plagued the streets with a law enforcement initiative aimed at reducing the murder rate. The Jesuits' program was entirely privately funded. The DOJ Program, dubbed "Project Safe Neighborhoods," was entirely publicly funded.

Both groups were successful due, in significant part, to their progress in changing expectations in the community and in changing behavior in the community. Both programs were non-traditional. The Jesuits' Cristo Rey model recognized the inadequacy of relying solely on Catholic donations to keep its school solvent and reached out to the larger corporate community to aid its mission. The Project Safe Neighborhood (PSN) model recognized the inadequacy of traditional law enforcement techniques such as increased arrests and increased penalties for crimes and expanded to include community education, awareness and rehabilitation programs. As such, both programs involved both religious and secular components, embraced their secular and religious counterparts in the struggle, and by bridging the gap between

church and state, improved the lives of the people they sought to aid.

Of course, when we talk about bridging the gap between church and state, we know that the Establishment Clause comes into play. And in spite of the effectiveness of these programs, the Establishment Clause could be invoked to challenge aspects of either program. I will conclude by saying that cumbersome legal tests such as the *Lemon* test are ill-suited to address the practical and real issues of inner city reform. I will encourage any future discussion of the Establishment Clause as it pertains to the inner city to include a basic understanding that social reform is generally most effective when the church and state cooperatively address society's problems.[5] I will also add, as at least one other commentator has proposed, that current Establishment Clause jurisprudence can be used to support such programs in certain contexts.

A Tale of Two Communities

In 2001, 84% of all inmates released from Illinois prisons were released to Cook County, and within that County, 34% of all inmates were released to six neighborhoods on the near west side of the City, including the neighborhoods of Austin, Englewood, and North Lawndale.[6] These three neighborhoods are home to some of the most socio-economically disadvantaged groups in the city. Englewood, for example, was, in 2001, nearly 98% African-American and the average annual income of a household within the community was less than $20,000.[7] 54% of the community lived below the poverty level and 25% of the community was unemployed.[8] In Englewood in the year 2003, the crime rate exceeded the city average by 115%.[9] And in 2001, 1,681 inmates were released into the small west side community of Austin.[10]

A few miles to the south and east of Austin, Englewood and North Lawndale, lie two more Chicago neighborhoods, Pilsen and Little Village. These communities were also gang-ridden with no less than 20 street gangs actively operating in the community.[11] Pilsen and Little Village were primarily Mexican-American and the average income of a household within those communities was $28,000 per year.[12] In Pilsen, 49% of the community members are foreign born and 75% are not citizens.[13]

Although only three miles apart, these two distinct geographic communities were in many ways polar opposites culturally — Pilsen comprised primarily first and second generation immigrant Mexican families who settled into a community where their native Spanish language was spoken freely and where their Catholic faith was practiced regularly; and Austin comprised primarily African American families and a variety of pastor-based Christian churches.[14] Both communities were plagued with crime. Gang activity and gang crimes characterized their daily lives and random shootings rocked the communities on a steady basis. Both communities were also dotted with churches: primarily Catholic in Pilsen and Little Village and a variety of Protestant and Baptist churches on the near west side. The children in these neighborhoods shared some common characteristics with children living in poverty across the country: 48% knew someone who was shot with a gun; 17% heard gun shots in their neighborhood at least once a week; and 39% worried about being shot some day.[15]

Against this bleak backdrop, the Jesuits and the Project Safe Neighborhoods Task Force decided to change the course of this inner city devastation. Notably, the privately-funded initiative benefited significantly from its unique partnership with the public community; and the publicly-funded initiative benefited significantly from its partnership with community organizations including churches and faith-based social service groups. The results of both programs have been and continue to be impressive, suggesting that programs seeking to address the significant social ills of the inner city must inherently take into account the specific and unique characteristics of the community within which the initiative is implemented. Understanding and embracing the role that churches and faith-based groups play within inner city communities enables certain reform programs to prosper. Any analysis of inner city reform programs under current Establishment Clause jurisprudence should also take into account the unique relationships between faith-based groups and the state unless we are to doom such effective programs to failure.

Cristo Rey Jesuit High School — A Private Catholic High School

In Pilsen in 1996, the Jesuits opened the first new Catholic high school in Chicago in 40 years in the middle of this poverty-stricken community and named it, "Cristo Rey Jesuit High School." Pronouncing that it would be a "new passion in Pilsen," Cristo Rey chose to serve the residents of Pilsen by offering an alternative to inadequate public schooling in the area. Recognizing that the local public school program was substantially over-crowded and that the closest local high school, Benito Juarez High School, suffered from an abysmal drop-out rate of over 65%, the Jesuits chose to establish a program committed to graduating Latinos from high school and preparing them for college. This new program would require students and parents to apply for admission to the school; but rather than relying on traditional academic testing to place students, the school focused instead on an assessment of a student's economic need (no student would be accepted unless his family's income was at or below poverty level) and the expressed commitment of the student and family. Each prospective student must express a desire to participate in the program and all students would be required to affirmatively accept the school's mission statement. In addition, the student's family was required to express a commitment to the program. Furthermore, all students and parents would be required to sign a contract espousing the mission and rules of the school. The school's rules included random drug testing and zero gang tolerance — no gang affiliation, no gang colors, symbols or attire.

The goal of the school was simple: to give hope and support to the Mexican American community in Pilsen by providing opportunities for its youth. The school would accomplish its goal by giving young Latinos and Latinas access to a working community they had traditionally not entered for reasons both personal and external and it would do so in a Catholic setting — more specifically, a Jesuit Catholic setting. The school provided an environment that invoked Jesuit principles such as "men and women for others" and "*cura personalis*." These traditional Jesuit ideals focused on seeing each student as an individual in order to develop her talents and to encourage her to use those talents to give back to the community.

The unique characteristic of Cristo Rey, however, was not necessarily in its Jesuit mission (there were, for example, more than forty-four Jesuit high schools in existence at the time that Cristo Rey was opened in 1996), but rather the means by which the Jesuits sought to reach their goal of educating the very poor. The Jesuits chose to fund their mission in a novel way: through employee salaries paid to the students for their work in private companies and public entities throughout the City. Cristo Rey's work/study program sent students to work one day per week in law firms, hospitals, banks, consulting firms, advertising agencies, and government agencies. The employers, in turn, paid the students a salary, but made the salary payment directly to the school, to pay for the student's education. Rather than hire a full-time clerical employee, for example, many law firms in the city agreed to hire Cristo Rey students. The firm paid $22,000 per year for a full-time job; four Cristo Rey students who alternated days at the firm filled each job. The program exposed each student to one day each week at a law firm and introduced her to firm life in "The Loop" — a professional environment not normally accessible to young Latinas growing up in Pilsen. This exposure included on-the-job training by professional human resources officers, job and skills training, mentoring from supportive employers and co-workers, and, again, the general exposure to a work environment that she would not normally be able to access.

Cristo Rey was entirely supported by private dollars. In 2002 alone, the school raised more than $1 million from private donations to aid the school. Beyond these private donations, the school required an additional $2.5 million to remain open and to educate its students. That money came from one source only — the school's innovative work/study program.

Project Safe Neighborhoods

A Federally Funded Program through the Department of Justice

Meanwhile, a few miles to the west, another organization attempted to change the climate of gun violence on the west side. The local United States Attorney's Office, through a federally funded program called Project Safe Neighborhoods, sat down at a table with researchers from Columbia University, local police, federal law enforcement, the local and federal prosecutors' offices, the Chicago Crime Commission, the Chicago Alternative Policing Strategy (commonly referred to as "CAPS"), the Illinois Department of Corrections and twelve community based organizations ("the Task Force") and discussed how to spend federal funds in the most effective way to combat gun violence on Chicago's streets.[16] The task was daunting: in the previous year, 74 murders had been committed in the 11th and 15th police districts alone — an area merely nine miles square.

Traditionally, federal gun programs had focused on reducing gun crime by increasing the number of federal prosecutions and focusing on repeat offenders who would receive increased sentences due to the strict federal recidivist statutes passed by Congress.[17] For the first time, the federal program did not dictate the precise manner in which funds could be spent, but instead encouraged communities to design the most effective programs for their unique issues, problems and resources.[18] This seemingly minor alteration in traditional federal programs

aimed at reducing crime provided the Task Force with the necessary level of autonomy to craft initiatives that would take into account all aspects of the problem, including the type of crimes being committed, the kinds of offenders, the law enforcement tools currently employed, the resources being used other than law enforcement, and the effectiveness of previous programs.

In Chicago, this autonomy led the PSN Task Force to the conclusion that the problem could not be analyzed by law enforcement alone; instead, it required input from community groups; religious groups operating in the "hot zones," including churches and schools; and grass roots organizations. As a result, the Task Force that was established comprised both local and federal law enforcement officers and reached out to members of the affected communities who were in touch with the issues and concerns of their neighborhoods. Three unique initiatives emerged from this collaboration: parolee forums, an integrated juvenile program, and a public awareness campaign.

Before reviewing these components of the program, it is important to note that the program included some traditional prosecution efforts for repeat offenders. Each month, for example, a federal prosecutor, a local prosecutor, an agent from the Bureau of Alcohol, Tobacco, and Firearms, and a representative from the City of Chicago's Drug and Gang House Enforcement Unit met to review every gun case in the city from the previous month. Repeat offenders with a history of drug, gang and/or gun violence were culled from the local prosecutors office to be prosecuted in federal court by the United States Attorney's Office for the Northern District of Illinois, where they would face stiff federal sentences.[19] Also, gun teams were formed to seek out the source of illegal weapons entering the city. These teams included local and federal law enforcement officers who developed information gained in part from community informants and used that information to perform undercover operations and "sting operations" to arrest offenders who transported weapons into the city.[20]

These traditional prosecution efforts were supplemented by the three community program components that relied on less conventional methods to reduce gun crime: parolee forums, a public awareness campaign, and an integrated juvenile program. The offender notification forums began in January of 2003 and were held twice a month in the city's "hot zones" — the targeted areas selected by the Task Force as having the greatest need for intervention. Offenders who had been recently released into the community after serving a sentence for a crime that involved either gun violence or gang participation were selected to participate in a forum held at a public place within their neighborhoods. These forums were designed to provide two strong and equally significant messages: first, that an ex-offender arrested in the future for a gun crime would face federal prosecution and its corresponding harsh sentence; and second, that a number of social service organizations existed in the community to help aid the offenders with re-entry into the community. The first part of each forum began with the harsh message delivered from local and federal law enforcement officers. The second part of each forum consisted of a string of social service providers who offered their aid in resume

writing, job interviewing, vocational training, drug rehabilitation efforts, faith counseling, and skills training. Sandwiched between the carrot and the stick approach was the presentation of an ex-offender who spoke of his own personal experience of overcoming the challenges facing a recently released offender and excelling in spite of those challenges. Each forum ended with opportunities for the ex-offenders to approach both sides of the forum's panel — law enforcement personnel and community members — to ask questions, gather printed information, and sign up for services. Many times, these forums lasted long after their scheduled stop-times as prosecutors, ex-offenders and social organizers worked together, discussed issues and gathered information.

The second unique component of the program designed for Chicago was a public awareness campaign. This campaign was a traditional media campaign consisting of billboards, bus placards, and public service announcements letting the community know that PSN existed and that it was targeting ex-offenders with guns. This traditional campaign was supplemented by the CAPS program which distributed fliers to the community with the photo of an offender who had been culled for federal prosecution, was convicted and was sentenced to hard federal time. "Don't Let this Happen to You," announced each flier. CAPS posted the fliers in the neighborhoods where the offender lived prior to his arrest. The flier included the offender's street name and photo so that neighbors knew exactly who had been arrested and under what circumstances. The flier concluded with a pronouncement of the harsh sentence imposed. These fliers were also posted at area police stations on walls and bulletin boards and in processing areas.

Finally, the Task Force used federal funds specifically set aside for juveniles to create a juvenile awareness program called "Hands without Guns." This program was designed to move beyond previous federal initiatives with a single message, such as the "Just Say No" anti-drug campaign. Instead, the program was designed to build self-esteem and to help students identify social situations where healthy choices could be made and independent thought could be exercised rather than reverting to the social pressures of gang involvement. The course, which spanned a full eight weeks of education, was designed in conjunction with a private social service organization, Uhlich Children's Advantage Network, an organization started by St. Paul's Evangelical Lutheran Church — now the United Church of Christ. The program was integrated into literally all of the high schools and junior high schools in the targeted PSN areas. The program included developing student leaders in each of the schools to continue the program beyond the initial eight-week plan. Individual student leaders then opted to initiate other activities to expand on this self-esteem/non-violence program such as rallies, marches, vigils and school support groups.

As the Task Force moved into its fourth year in 2006, plans were laid to expand the juvenile program to reach juvenile offenders. Juvenile ex-offender forums much like the adult model were being designed; a juvenile probationary program with both student support and parental contracts was also drafted in conjunction with the Chicago Police Department and CAPS. This

comprehensive juvenile program would then span the course of a juvenile's potential life to crime: a student would hear the message within school not to become involved in violence or gangs; if the student engaged in some conduct that did not result in a serious criminal conviction, he could then participate in the probationary period, and finally, if the student became a convicted juvenile, prior to being released, he would attend a community forum. The community involvement and awareness programs would theoretically span his entire formative years from preteen through adulthood.

The Common Theme — Community Involvement and Support

Soon both the Jesuits and the PSN Executive Board began to address the realities of effectuating their plans. The Jesuits recognized the need to coordinate with the employers who hired their students. Many of the employers were governed by a variety of state and federal regulations regarding employment including the laws set forth by the IRS, OSHA, Title VII and the Department of Labor. Before long, the coordinator of the work/study program began to address the needs and concerns of the employers (the ones providing the tuition for the school's students) regarding everything from inappropriate student/employee conduct to inappropriate employer conduct. In doing that work the coordinator necessarily became versed in the state and federal laws and regulations applicable to the work place, which regulations required the work environments into which Cristo Rey students had been placed to remain devoid of all Catholic elements of education. This is not to say that the work/study program was sterile of any faith-based educational focus. To the contrary, numerous courses at the school during the remainder of a student's week addressed both ethical and faith scenarios in addition to practical learning moments. Yet when the students were in the workplace, they were treated as all other employees and the Catholic elements of the program were de-emphasized to the extent required by applicable laws and regulations. That is to say, with respect to those laws and regulations, no exceptions were made for the Cristo Rey student/employees: the same demands made of all other employees were placed upon them and the same benefits and respectful treatment provided to all other employees was provided, in turn, to them.

Parents of the students were also required to understand that the workplace required a different treatment for their students. It was not as easy to take a day off for a school assembly for the Feast of Our Lady of Guadalupe — a traditional feast involving an early morning mass and breakfast holding a place of prominence in the Mexican/Catholic's faith — instead, the students who worked on the feast day were still required to leave the festivities and attend their jobs. Following proper dress, demeanor and behavior in the workplace was demanded of all students in the workplace regardless of the student's age or level within the high school. Students who did not successfully complete their work days were held to the same standards as students who skipped too many school days.

A remarkable development occurred during this process: the community of supporters expanded. The network of role models and caregivers now included supervisors in the workplace and colleagues in the office. No longer did the school need to rely entirely upon the

parents — or even fellow students or teachers — to keep their children on track; instead, suddenly, Cristo Rey students were exposed to a new realm of social influence: role models of professionalism in the form of co-workers in the workplace. Pulling these students further from their milieu of poverty, gang affiliation, and street violence into a world of hard work, respectful treatment of peers, and the complete absence of violence had a social impact on the students that could not be provided to them even within the walls of the Catholic high school where respect for others was taught and monitored. Here, in this new world of the workplace, governed by rules of the state, professionals operated side by side with students from the inner city and the students learned firsthand that this state and federally protected world prohibited certain social behaviors of their neighborhood. And they were rewarded for adopting the social conventions of the professional environments in which they found themselves — they were paid for their positive behavior.

Soon, Cristo Rey students began to receive job offers in the summers after their school years had ended from employers who deemed it difficult to give them up for the short break. Employers served as mentors and numerous one-on-one relationships began between the Mexican immigrant students and their professional counterparts. Before long, meeting a Cristo Rey student on the streets of Chicago and discussing college prospects as he or she maneuvered the streets with confidence became the norm rather than the aberration.

Similarly, Project Safe Neighborhoods began to seek out partners to appear at ex-offender forums and to gain insights into the social programs serving the communities. Within a short period of time, the Task Force repeatedly was directed to churches and faith-based organizations as the groups that were established in the community, respected by its residents, and knowledgeable about what previous efforts had failed. These groups offered insights to the Task Force regarding potential projects and in some instances provided the information that either spawned or aborted various initiatives.

One anecdotal example occurred in spring of 2005 as the Task Force expanded its initiative into the 10th police district of Chicago. The 10th district was geographically divided between the Hispanic community and the African American community along a single street. Two members of the Task Force met with some community outreach organizers in Pilsen just weeks before the first ex-offender forums were scheduled to begin. When the Pilsen community leaders learned that the forum was to be held at Garfield Park in the predominantly black neighborhood of the district, they candidly informed the Task Force that no Latino would cross that street to reach the forum. It was simply too dangerous for a Hispanic to enter the black community where African American gangs governed the streets. Nor would any African American cross that same street to come to a forum in the predominantly Hispanic side of the district for the same reasons. You can hold the forums there if you like, the members stated, but no Latinos will come.

As a result of this insight, an elaborate program of shifting ex-offender forum sites was developed where forums were held in alternating locations — one at Garfield Park, the other at

the West Side Technical Institute — and offenders were selected to attend based on their proximity to the location, in an effort to accommodate their cultural and safety concerns. This piece of critical information would not have been provided to law enforcement prior to this non-traditional approach of seeking out religious and social leaders in the community for insight; instead, the forums would have been held at the sites selected by law enforcement personnel, the offenders would not have come, and the forums would have failed leaving the law enforcement officers scratching their heads as to the cause.

The PSN Task Force met regularly with religious groups, local grass roots groups, and social organizations who were tied into the fabric of the communities in order to address potential issues in the programs before they were initiated and to spread the word to the community through their unique network of communication afforded only to those linked through the church.

Determining What Works

The Project Safe Neighborhoods Task Force was guided through its mission by Professor Tracey Meares of Yale Law School. Prof. Meares, who had been studying the behaviors that lead individuals to commit crime and the manner in which communities attempt to combat crime, shared her expertise with the traditional law enforcement-minded group of professionals. This research component was another unique feature of the program that was made possible by the absence of specific spending requirements tied to the federal funds that were allocated to various cities through the PSN initiative.

Identifying certain normative behaviors and social influences that can impact a community had proven to be successful in strategies for fighting street gangs in Chicago in the past.[21] Meares provided the Task Force with insights from prior research in the field that showed that when social organizations are present in a community, such as small community support groups centered around social programs or churches, the community is better able to resist crime and delinquency.[22] This concept of social influence suggests that individuals tend to imitate those around them and, as such, individuals in high-crime areas create a self-perpetuating local norm.[23] In order to reduce crime, these social organizations need to reinforce norms of order.[24] As Prof. Meares has written: "Taking social norms into account increases not only the power to explain inner-city crime but also the power to control it." [25]

An interesting social norm identified as critical by the Task Force was the community perception of criminal activity and the perception of those offenders with high status within the community. Social influence theory, as described to the Task Force, revealed that individuals were more likely to commit crimes when they perceived that others were engaged in crime that was tolerated within the community.[26]

Armed with this knowledge, the Task Force began to influence the community's perception of itself by showing that crime would not be tolerated and that proper behavior would be rewarded. The Task Force emphasized a visible presence of law enforcement within the neighborhoods. Gun teams wore jackets emblazoned with PSN GUN TEAM when they effec-

tuated warrants; posters with arrested offenders flooded the fences and lamp posts in the areas of arrests; and billboards could be seen every few blocks within the hot zones. The Task Force partnered with the U.S. Marshals to conduct fugitive sweeps on entire city blocks within the neighborhood at once in order to send a strong message to the community that all offenders would be weeded out from the community. A common theme at PSN Task Force Meetings was to remind the partners that the Task Force was not working in the hot zones to make a splash and leave, but to remain as a steady presence within the community.

Church leaders responded by holding vigils and prayer services when a shooting took place on the streets. Community leaders spoke out at informal press conferences to denounce the violence within their neighborhoods and then sat down at the Task Force table to inform the police where the gang activity was occurring.

Meanwhile, without having the benefit of a research partner, the Jesuits continued to grow Cristo Rey. Starting from a one-room former roller rink, the Jesuits changed Pilsen's public perception by erecting a new state of the art facility at a corner where just months earlier gang members had congregated. The Cristo Rey students proudly walked to buses in their professional attire (dress pants, white shirt and tie) to head to their jobs for the morning. Walking past both young and old members of the community, they visibly sent the message to the community that the community was safe, that they were professionals, and that they did not participate in street crime.

Far from the classrooms in Pilsen, students from Cristo Rey worked side by side with professionals in office buildings in the city's white-collar district, discussing plans for their futures. This social organization of the workplace may have been the single most effective tool used by the Jesuits in changing the perception of residents of Pilsen. By changing the normative behavior through social support of young working college-bound professionals working in a safe space, the perception that Pilsen had become a safer neighborhood that produced professionals who did not participate in street crime became the reality. [27]

The Results

PSN-targeted areas experienced a 37% drop in murder rate during the time that the researchers were observing the program.[28] Research showed that the strongest PSN dimension associated with a decline in the homicide rate was the percent of offenders who attended an ex-offender forum.[29] For example, increasing the percentage of ex-offenders who attended a forum by only 1% was associated with an approximate 13% decrease in the murder rate in that area.[30]

Cristo Rey now graduates over 100 students each year and is in its tenth year. The average percentage of student graduates from Cristo Rey who attend college is 98% compared to a drop out rate at the local public high school down the street of 67% annually. The success of the work-study program has been so impressive that in 2004, the Cristo Rey Network was formed in order to aid other communities in starting schools within the inner city using the Cristo Rey model. Currently, there are twelve new Cristo Rey schools operating across the country in twelve urban communities all serving the poor, and seven more schools are ex-

pected to open within the year.

Community Involvement in Changing Inner City Violence

Meares posits that in order to realize the full potential of a norm-based vision of law enforcement, law enforcement must look beyond traditional institutions designed to merely control crime; it must embrace other non-traditional institutions in the inner city — including the church.[31] Because the African-American community on the west side of Chicago relies heavily upon the social structure of its churches for social support and to affirm positive behaviors, any law enforcement strategy that eliminates the church from its analysis is bound to be less effective at best and, at worst, may be destined to fail. If communities are able to bridge the gap between the church and police, social organization theory suggests, and one researcher asserts, that considerable crime reduction benefits should follow.[32] As an example of this success, Meares describes a prayer vigil — organized by the police — that took place on the streets of the west side of Chicago. The police commander in one of the police districts discussed in this paper organized the vigil by inviting pastors of the community's churches to attend a planning meeting. While on neutral police property, as opposed to the church of any one pastor, the religious groups and police were able to organize a thousand-member vigil that included groups of ten standing on known drug corners singing and praying for an end to violence.

This concept is, of course, inherent in the philosophy of the Jesuits, who would state that it is only through the grace of God that their school has excelled. An outsider with some research training, however, might add that the school is excelling because it has incorporated one particular social community — the Catholic Church (of which the majority of Pilsen's residence are members) — with another positive social community — the professional working world of Chicago. Regardless of whether one credits the grace of God or the influence flowing from the partnership of positive social communities, one thing is clear: the link between the church community and the secular community in these impoverished, crime-ridden Chicago neighborhoods has produced a less violent, more prosperous and more hope-filled community.

Establishment Clause

Recognizing that both of these programs have been very effective in addressing one of society's moral obligations: breaking the insidious cycle of poverty, crime, and lack of hope within the inner city, we must consider whether they can each exist comfortably within the First Amendment's Establishment Clause. The "softball question," pertains to Cristo Rey Schools and the simplest answer is, "of course" because they are entirely funded by private dollars. The harder question is whether a Cristo Rey school can receive government funding for its work/study program? The other question is whether the PSN initiative can partner with church and faith-based organizations to continue its work in reducing crime?

The answer, I believe, to both questions, is yes. Current Establishment Clause jurisprudence provides for a framework to address both programs. The *Lemon* test[33] set forth by the Supreme Court for determining whether a violation of the Establishment clause exists requires

that a statute must have a secular purpose; it must not have as its primary purpose the advancement or inhibition of religion; and it must not have excessive government entanglement with religion. However, this cumbersome test does not take into account any competing societal needs. Can there be a time when society's needs are so great that the entanglement is acceptable? What level of entanglement is permissible when our society is so troubled that a young man of color actually believes that his life ends automatically in his 20s?

When I was working on the PSN Task Force, there seemed to be a general reluctance to mix any faith-based organizations into the PSN strategy for fear of violating a generalized and nebulous belief that church and state must be separate in all manners. In a somewhat knee-jerk reaction at times, plausible solutions to some of the issues presented were rejected because of this common misunderstanding of Establishment Clause jurisprudence.

Yet, the Supreme Court has repeatedly upheld government aid programs that are neutral with respect to religion and which provide assistance directly to a broad class of citizens who then direct such aid to religious schools as a result of their own genuine and independent private choice. The Court held in *Zelman v. Simmons-Harris* that a previous trilogy of cases, *Mueller, Witters, and Zobrest* supports the proposition that the incidental advancement of a religious message that is not attributable to the government is permissible when aid is distributed due to the deliberate choices of numerous individual recipients. *Zelman* was the case that upheld the City of Cleveland's voucher program for students in the inner-city who were significantly harmed by an inadequate public school system. As then Chief Justice Rehnquist stated in the opinion: "Any objective observer familiar with the full history of and context of the Ohio program would reasonably view it as one of a broader undertaking to assist poor children in failed schools, not as an endorsement of religious schooling in general."[34]

Similarly, any objective observer familiar with the full history of Chicago's hot zones would know that PSN and similar programs are working to stop the violence and bring peace to the streets and hope to the next generation as opposed to endorsing any faith program.

When inner city communities face crisis as Chicago did in 2001, all effective initiatives must be considered — including providing the inhabitants of impoverished communities with a realistic choice for education. Voucher programs like the one upheld in *Zelman* provide such an opportunity. Although some commentators have argued that the *Zelman* opinion will have less impact over time due to federal initiatives such as the No Child Left Behind initiative;[35] that position does not take into account the effectiveness of the particular program. The two models discussed today — the Cristo Rey model and the PSN model in Chicago — are effective. As long as effective initiatives exist, individuals within these communities will have the power of choice provided that governments recognize that these programs can change the lives in these targeted zones.

The concept of providing choice to the impoverished by enabling the underprivileged in that community to choose to spend a small allotment of money on tuition in a private school is a concept that takes into account the unique factors of the community. Those factors in-

clude race, poverty, lack of adequate programs, and churches that are operating within these communities to break that continued pattern of poverty and crime.

But what about a program that is entirely separate from a Catholic school — a program like the Cristo Rey work/study program? Can government aid be provided to support such programs in private schools? Granted, the Cristo Rey work/study program is affiliated with a Jesuit school. But once in the workplace, the student is an employee governed by all of the same laws and obligations of his co-workers. He is being monitored in the work place by a supervisor from the business, not by a teacher from the school, and no religion is being taught, discussed, or supported. If the success of a school like Cristo Rey depends upon the success of the work/study program, can the government support such an initiative in order to alter the pattern of poverty in Pilsen? One commentator suggests that is exactly what the Court should be doing in these cases — balancing the competing state interests.[36] Since the Court has repeatedly accepted the role of interest weighing with respect to other constitutional rights (freedom of speech, substantive due process, equal protection, to name a few), she argues, why not balance the interests in establishment clause cases?

If a balancing test were to be used in these cases, judges would have an opportunity to hear the factors that I set forth at the beginning of this paper and could assess whether the partnership with certain faith-based groups outweighs the interest in avoiding entanglement between church from state.

Conclusion

Regardless of the test to be applied to Establishment Clause cases, it is becoming increasingly more apparent that if educators, social activists, and law enforcement want to change the lives of the inner city community, they need to do so by partnering the church and state to coexist as pro-social community support. The unique nature of the Catholic church to the near southwest side Mexicans in Pilsen demands that their deep-seated faith be taken into account when seeking to reform social behavior. Similarly, the unique deeply-rooted faith of the near west side African American communities demands that law enforcement in that neighborhood must acknowledge the unique tool for change that the church can provide.

The Cristo Rey School and the PSN initiative in Chicago were successful and continue to be so because they were not afraid to embrace faith as a component for successful change. Any analysis of future inner city Establishment Clause cases will need to do the same.

* The Honorable Virginia M. Kendall is a federal district judge in the Northern District of Illinois.

[1]Chicago ranked third among United States cities in 2000 with a population of 2,896,016. United States Census Bureau, Census 2000. In 2001, the city's murder rate of 22.9 murders per 100,000 residents ranked it as the highest murder rate among cities of comparable size. Morgan Quitno Press, Murder Rate in 2001.

[2] Andrew Papachristos et al., *Attention Felons: Evaluating Project Safe Neighborhoods in Chicago* 23 n. 29 (September 2006) Institute for Social and Economic Research and Policy.

[3] Papachristos et al., *supra* note 2, at 8.

[4] Kate Curran Kirby et. al., *The Chicago Crime Commission Gang Book* 61 (James W. Wagner & Kate Curran Kirby eds., Chicago Crime Commission 2006).

[5] *See Lemon v. Kurtzman*, 403 U.S. 602 (1971).

[6] Nancy G. LaVigne et al., *A Portrait of Prisoner Reentry in Illinois,* 51-52 (Urban Institute Justice Policy Center 2003);

City of Chicago ex offender statistics show that of 29,167 prisoners released in Illinois in 2001, 61.7% were released into Cook County. *Id.* at 47.
[7] United States Census Bureau, Census 2000, *accessible at http://www.census.gov*.
[8] *Id.*
[9] La Vigne et al., *supra* note 6, at 59.
[10] *Id.* at 65.
[11] Kirby et. al., *supra* note 4, at 61.
[12] % hispanic/latino; 92% Mexican. United States Census Bureau, Census 2000, *accessible at http://www.census.gov*.
[13] *Id.*
[14] La Vigne et al., *supra* note 6.
[15] Uhlich Children's Advantage Network, TRU Proprietary Question Results (Teenage Research Unlimited 2006).
[16] Papachristos et al., *supra* note 2, at 7.
[17] Richmond's Project Exile and Boston's Operation Ceasefire were two policy precursors to the PSN program that used such tactics. Papachristos et al., *supra* note 3, at 3.
[18] "Chicago created a hybrid program" that combined Exile-type focus on lengthy prison sentences ….with focus on high-risk population in a targeted area. *Id.* at 1.
[19] See 18 U.S.C. §924(c).
[20] Papachristos et al., *supra* note 3, at 2.
[21] *See* Tracy Meares & Dan M. Kahan, *Law and (Norms of) Order in the Inner City*, 32 Law & Soc'y Rev. 805, 822 (1998).
[22] *Id.*
[23] Meares and Kahan, *supra* note 21, at 814.
[24] *Id.*
[25] *Id.* at 816.
[26] *Id.* at 823.
[27] Clifford Shaw and Henry McKay, *Juvenile Delinquency and Urban Areas* (University of Chicago Press, 1969).
[28] Papachristos et al., *supra* note 3, at 20.
[29] *Id.* at 23.
[30] t*Id.*
[31] Meares & Kahan, *supra* note 21, at 827.
[32] *Id.* at 828.
[33] *Lemon v. Kurtzman*, 403 U.S. 602 (1971).
[34] 536 U.S. 639, 655 (2002).
[35] James Forman, Jr. The Rise and Fall of School Vouchers: A Story of Religion, Race, and Politics, 54 UCLA L. Rev. 547, 553 (2007).
[36] Tracy L. Meares & Kelsi Brown Corkran, *When 2 or 3 Come Together*, 48 Wm. & Mary L. Rev. 1315, 1379 (2007).

OUR FREEDOM DEPENDS ON THE RULE OF LAW

BY SENATOR PATRICK LEAHY*

It is wonderful to be here today in beautiful Portland with so many accomplished theologians, scholars and jurists. Over the past several days you have been discussing the great American Experiment and the many freedoms that are encompassed by our national endeavor. Certainly our freedoms — including religious freedom — are affected by things such as our immigration laws, our healthcare priorities, and our anti-terrorism efforts. These are issues that test our commitment to the rule of law.

When we restrict the rights of those least among us, we not only diminish our role on the global stage but we threaten the very *Blessings of Liberty* that our Founders tried to secure in our Constitution. In the end, freedom as we know it depends on the protections that come from a consistent and healthy rule of law.

Defense of the Rule of Law

In times like these, I'm reminded of Sir Thomas More's line from *A Man for All Seasons*. When Saint Thomas's family implored him to arrest a dangerous man, he responded that even the devil should have the benefit of the law. When his son-in-law suggested that he would "cut down every law" "to get the devil," Saint Thomas warned, "when the last law was down and the devil turned round on you, where would you hide … the laws all being flat … do you really think you could stand upright in the winds that would blow then?" (*A Man for All Seasons*, Act 1, scene 7, Robert Bolt, 1954).

As the patron saint of statesmen and politicians, Saint Thomas's defense of the rule of law as a fundamental protection against evil reminds us that when politicians change the legal landscape for partisan advantage or narrow ideological benefit — or when we let fierce but fleeting political winds uproot us, however briefly, from our nation's enduring principles — it threatens all of us. Whether it is limiting the Great Writ of *Habeas Corpus* or denying immigrants full due process rights, cutting down these protections weakens the rule of law that is fundamental to whom we are as Americans.

As the only elected official speaking at this conference, I thought it appropriate to share with you my perspective, as Chairman of the Senate Judiciary Committee, on some recent examples of attempts to cut a path through the law to fight what some have termed evil doers.

The Judiciary Committee handles much more than its share of the most sensitive and controversial issues that come before the Senate — from countering terrorism and fighting crime, to protecting the civil rights of all Americans, and everything in between. The Committee has a special stewardship role over our national charter and over our most cherished rights as Americans. We consider nominations, legislation and constitutional amendments that bear directly on our liberties and freedom.

I came to the Senate during the political ebb tide of Watergate and Vietnam, but in my thirty-

two years in the Senate, I had never seen Congress so willfully derelict in its duties as it was from 2002 through 2006. During this unfortunate chapter in the history of Congress, our Constitution was under assault, our legal and human rights were weakened, our privacy and other freedoms were eroded. The recent election sent a strong message. The American people rose up to take away Congress's rubber stamp, and to demand a new direction with more accountability and, I believe, a renewed respect for the rule of law.

Habeas Corpus: A Keystone of American Liberty

In the wake of September 11th, our government rightly reexamined threats to our national security. However, just as we cannot allow ourselves to be lulled into a sense of false comfort when it comes to our national security, we cannot allow ourselves to be frightened into hiding our liberty in a blind trust. Our freedom is the foundation that makes us strong as a nation. We must remain vigilant on all fronts or we stand to lose all that is precious — our liberty, along with our security.

A lesson in how not to legislate was the adoption of the *Military Commissions Act* in the run-up to the last election. Congress was wrong to suspend the Great Writ of *Habeas Corpus* — a keystone of American liberty. That law needlessly undercut our freedoms and values, and allowed the terrorists to achieve something they could never win on the battlefield. It was acting from fear rather than strength to undercut our Constitution. Congress squandered an opportunity to write a good law, to set enforceable guidelines for fighting and winning the war on terror, without sacrificing American values and leadership on human rights.

Justice Scalia emphasized in the *Hamdi* case that "[t]he very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive" (*Hamdi v. Rumsfeld* (03-6696) 542 U.S. 507, 2004, Scalia, J., dissenting). But the bill written by the White House and passed by the last Congress was designed to ensure that this Administration is never again embarrassed by a United States Supreme Court decision reviewing its unlawful abuses of power.

I look forward to restoring these fundamental protections and the checks and balances on which the Constitution and our freedoms rest.

Torture: A Tragic Change In American Conduct

Another example of legal protection being eroded in the fight against so-called evil-doers involves our treatment of detainees. This Administration ignored the rule of law on the issue of torture. Unfortunately, Congress failed to respond properly to this landmark departure.

This tragic change in American conduct, permitting tactics that shock the conscience, no doubt led to the nation's embarrassing involvement in Abu Ghraib and the continuing problem in Guantanamo Bay. Despite the objections of military veterans who fear for the future treatment of American detainees, we were told that in the age of terrorism and in the course of war, a change in the traditions and laws of detention was necessary.

Not only did the President redefine "torture;" his policies effectively allowed for the out-

sourcing of torture through a process known as "extraordinary rendition." Through this policy, our nation delivers individuals to other countries with terrible human rights records.

The Department of Justice has also been using a "material witness" law as a sort of general preventive detention tactic to hold people — including U.S. citizens — whom there is insufficient evidence to charge with a crime. One individual snared under this tactic was local Portland attorney Brandon Mayfield, who was wrongly identified by the FBI as involved in the Madrid train bombing.

Immigration: Our Country Is A Nation of Immigrants

The rights of migrants are a matter of fundamental human rights. In our current system, however, many immigrants living within the United States are living outside the boundaries and also outside the protection of our legal system. How America treats its undocumented workers is a reflection of our respect for the rule of law.

We all must recognize that our country is a nation of immigrants. I hope that we can advance American interests and American values by making further progress on comprehensive immigration reform. We made some bipartisan progress in the Senate last year only to be stymied by those who sought partisan political advantage by adopting a fence along our Southern Border as a reflection of their values.

Comprehensive immigration reform means much more than making our land borders more secure and enforcing immigration violations in our interior. It includes addressing the millions of people who are here in an undocumented status, and finding a mechanism to match willing foreign workers with employers who need them. We can and must work together to bring individuals out of the shadows, to treat hardworking people with dignity and respect rather than disdain and discrimination.

International Human Rights: A Responsibility to Fulfill

Our common humanity requires us to look at how American laws affect freedom beyond our borders. I also serve as Chairman of the State and Foreign Operations Subcommittee of the Appropriation Committee. In this role, I am familiar with the power America has to help developing nations and encourage democracies. Unfortunately, I am also familiar with the ongoing atrocities that plague the world and threaten human rights on an epic scale.

Despite promises of "never again," we are witnesses to acts of genocide in the Congo, Rwanda and now Darfur. The lawlessness in these countries cries out for a renewed international movement to respond to blatant violations of human rights.

One of the first things I did as Judiciary Chairman was create a new subcommittee dedicated to human rights to elevate these issues in the context of American laws. Within months of the formation of our new Subcommittee on Human Rights and the Law, the Senate passed the *Genocide Accountability Act*, which closes a loophole that allowed those who commit or incite genocide to seek refuge in our country without fear of prosecution for their actions. This bill is an important next step in working to do all we can to combat genocide throughout the world.

Too often, we in this country, the richest and most powerful nation on Earth, have done too little to stop human rights atrocities in Sudan and elsewhere around the world. Many more lives could have been saved if we and other nations had shown stronger leadership.

Global Health: An Opportunity To Make A Global Difference

American laws that can dramatically affect individuals in the global community involve health care. We live in a wealthy country with unmatched medical professionals and facilities, and we should not ignore the obvious suffering beyond our borders.

The Judiciary Committee has jurisdiction over patents, which include many life-saving medicines. As Chairman I intend to amplify efforts to reexamine our patent laws in the hope that by making thoughtful and practical changes we can greatly increase access to essential medicines throughout the world. We can help struggling families in developing nations, while improving U.S. relations with large segments of the world's population.

The current global health crisis is one of the great callings of our time. Whether it is the Avian Flu, AIDS, SARS, West Nile Virus, or the approaching menace of multi-drug resistant bacteria, we need to recognize that the health of those half-way around the world is not only morally compelling but affects our security here in the United States. Through Judiciary Committee actions, we hope to make life-saving medicines more readily available around the world.

Conclusion

The American Experiment can be a bright, inspiring light to other nations or a starkly different perception — a dark, foreboding threat. The ability of America to serve as an example to civilizations across the world is compromised when we fall short of our own values. I think we can all agree that our freedoms are better protected when we are admired and respected by other nations than when we are merely feared.

Catholics are all called to work for the common good, and to live in solidarity with the least among us. Catholic teaching relating to the common good is broad in scope. The common good is not limited by political boundaries. It has universal application. The purpose of all laws is to advance the common good of the entire human family.

Curtailment of rights through rash, defensive actions threaten the greater human family and the stability of the rule of law. Laws that are selectively ignored or cut down to eradicate so-called evil-doers will make us all more, rather than less, vulnerable.

I hope that American values regarding the common good will again be reflected in our laws. The rule of law allows us to transcend self-interest and momentary fears to achieve a stable, lasting peace in which human dignity can flourish. The American Experiment is designed to create a society in which all people can flourish and express the truths they hold most dear.

Upholding the rule of law — whether it be for the devil or someone who disagrees with our beliefs — is the best way to protect ourselves, our freedoms and our values. It is our responsibility to one another, and to the generations that follow, to do so.

*Patrick Leahy is a member of the United States Senate. A Democrat, he is the senior senator from the state of Vermont. At the time of this lecture he was chair of the Senate Judiciary Committee. This talk was presented at lunch on the final day of the conference.

RESTORING THE INTRINSIC VALUE OF HUMAN LIFE

A FEDERAL LEGISLATIVE PROPOSAL TO EUTHANIZE PHYSICIAN-ASSISTED KILLING

BY WILLIAM WAGNER*

Thou Shalt Not Kill
(Exodus 20:13; Deuteronomy 5:17 KJV)

Oregon law authorizes physicians to prescribe and dispense a lethal dose of drugs, for the purpose of assisting in the killing of a human being. The Oregon law expressly provides a physician cannot "be subject to civil or criminal liability or professional disciplinary action" for engaging in the conduct authorized by the law.[1]

The United States Supreme Court recently struck down a federal drug-control strategy designed to neutralize the Oregon law authorizing physician-assisted suicide.[2] The Court's decision, in *Gonzales v. Oregon*, prohibits enforcement of the nation's drug laws against Oregon doctors who dispense drugs to assist in the killing of a human being.[3] To reach this result, the Court invalidated an official federal Executive Branch interpretation of the Controlled Substances Act (CSA)[4] authorizing such enforcement.[5] Predictably, after the Court's decision, state legislators in other states started introducing legislation similar to the Oregon law.[6]

The purpose of this paper is to suggest a federal legal strategy that is constitutionally sound, likely to survive scrutiny by the United States Supreme Court, and, moreover, capable of contributing to the restoration of the protection of human life rooted in the claim that human life, including the vulnerable, has intrinsic value. The paper begins with the presentation of God's standard in the protection of human life. Then the paper discusses how laws authorizing physician assisted-suicide reject God's inviolable moral standard and create grave implications for society. The second part of the paper recalls that "righteousness exalts a nation"[7] and presents a federal legislative proposal designed to restore the intrinsic value of human life. This part of the paper explains why the proposal will, unlike the federal strategy in the *Gonzales* case, survive scrutiny by a majority of the United States Supreme Court. The final section of the paper presents a challenge: if this proposal is to become public policy, citizens must put their fundamental rights to free expression and religious conscience into action.

I. Introduction: God's Inviolable Standard: You Must Not Kill.

God created man in his own image, in the image of God he created him; male and female he created them. [8]

God saw all that he had made, and it was very good. [9]

For I know the plans I have for you, declares the LORD. [10]

For we are God's workmanship, created in Christ Jesus to do good works, which God prepared in advance for us to do. [11]

These are the very words of God. In these words, he tells us that the life he creates has worth, value, and significance. He declares his creation of human life good and intimately communicates that he has a plan and purpose for each life he creates. Since God creates human life, only He can authorize the taking of it. Nowhere in His Word does he authorize suicide or assisting someone to commit suicide. God's inviolable standard expressed in his command, "*You must not kill*," thus applies.

The Lord's command not to kill is entitled to the reverent respect by those he created.[12] The Hippocratic Oath written during the fifth to fourth centuries B.C. begins as a prayer and declares the dedication of the cult of physicians including the proscription, "I will neither give a deadly drug to anybody if asked for it, nor will I make a suggestion to this effect."[13] Such a standard is consistent with God's inviolable standard and proceeds from a premise that human life has intrinsic value and purpose at all stages. It is also consistent with the positive law of forty-nine of the fifty states — leaving Oregon standing alone in its radical departure from accepted medical practice. Indeed, numerous states, by law, prohibit physician-assisted suicide.[14] Conversely, Oregon's law (and currently pending legislation in other states) rejects God's inviolable standard present in the natural law, divine law, and most positive law. In its place, proponents of physician assisted suicide favor the approach of moral relativism embedded in a radical and inherently contradictory notion of autonomy — an approach where each individual chooses, as a matter of personal preference, when and whether a human life has positive value or purpose and who shall be made to serve that choice.

II. Rejecting God's Inviolable Standard: the Implications

The prescribing and dispensing of federally controlled drugs for assisting suicide proceeds from the fundamentally erroneous premise that human life in certain conditions no longer has positive value or purpose. That premise has incalculably grave implications for all of us. When we abandon God's moral absolutes today, it becomes easy tomorrow to choose death in other ways, for other people, in other situations, since the positive value of life has become a relative individual choice in particular circumstances. In a book edited by Kathleen Foley, and Herbert Hendin, *The Case Against Assisted Suicide, For the Right to End-of-Life Care*[15] numerous scholars document that while Oregon's law may be the next step toward the precipice it certainly was not the first step taken down the slippery slope. Prior to the enactment of the Federal CSA, euthanasia societies grew during the late 19th and early 20th century as part of the eugenics movements in the United States and Europe.[16] Thirty states passed sterilization laws embraced by both Presidents Theodore Roosevelt and Woodrow Wilson.[17] The Nazis first legalized non-voluntary euthanasia of the elderly, then proceeded to kill hundreds of thousands of the mentally ill — all prior to the unspeakable tragedy of the holocaust.[18] Both euthanasia and sterilization were viewed as appropriate instruments of eugenics. As late as the 1940s, this country's leading euthanasia proponent, Dr. Foster Kennedy, advocated compulsory euthanasia for retarded children on eugenics grounds.[19] By the 1970s, the euthanasia movement's focus shifted to easing the "burden" of caring for the elderly, and then to easing suffer-

ing.[20]

The Dutch experiment in physician assisted suicide — as noted by the United States Supreme Court in its 1997 decisions — has failed frighteningly. Doctors consistently violated unenforceable Dutch legal requirements.[21] Sixty percent of Dutch assisted suicide cases go unreported.[22] Most non-reporting involves cases in which physicians failed to follow established guidelines for voluntariness or consultation.[23] Worse, in several thousand cases, each year physicians ended patient's life without the patient's consent.[24] Twenty-five percent of physicians terminated one or more patient's life without request.[25] In the 1995 study year, the Remmelink Report indicated almost one thousand cases in which physicians actively intervened to cause death without an explicit request from the patient.[26] Each major Dutch measure enacted to control and regulate physician-assisted suicide (including informed consent, consultation, and reporting) largely failed or was modified or was violated.[27]

The Supreme Court in *Washington v. Glucksberg* recognized that "what is couched as a limited right to 'physician-assisted suicide' is likely, in effect, a much broader license, which could prove extremely difficult to police and contain."[28] Indeed, what we sowed yesterday, we are reaping today. A Dutch health care facility now concedes it euthanized newborn infants and a physician who killed the disabled babies unapologetically asserted that his conduct is proper.[29] So society continues, as Judge Robert Bork observes, to slouch toward Gomorrah — and at an increasingly faster pace as it replaces God's inviolable moral standard with an a relative individual standard of personal convenience.[30]

The American Medical Association, and more than forty other national and state medical and health care organizations, affirms that "the ethical prohibition against physician-assisted suicide is a cornerstone of medical ethics."[31] According to the AMA, physician assisted suicide is "fundamentally incompatible with the physician's role as healer."[32] State legislation such as the Oregon Statute rejects this position and the underlying inviolable standard which serves as the foundation of the practice of medicine. The grave implications for our nation that accompany such a choice are clear.

Foundations do matter. Oregon's assisted suicide law (and similar legislation pending in other states) grieves millions who know God made us in His image, and that therefore life is sacred. It is time to remind ourselves of the ancient Biblical truth that "righteousness exalts a nation."[33] We must not be deterred by those who, as they strive to secularize this country, seek to exclude only the religious from participating in the democratic promulgation of public policy. We are, by His grace, a nation where everyone, including the religious, may freely contribute to the marketplace of ideas and to the development of public policy. What follows therefore, is a federal legislative proposal to restore the intrinsic value of human life — a proposal that is both constitutionally sound and, unlike the Executive Branch strategy in the *Gonzales* case, one that will survive scrutiny by a majority of the United States Supreme Court.

III. A Federal Legislative Proposal to Euthanize Physician-Assisted Suicide

A. Background

The Controlled Substances Act (CSA) currently regulates the manufacture, distribution, dispensing, and possession of controlled substances.[34] Enacted by Congress in 1970, the CSA consolidated previous drug laws into a comprehensive statute, thereby strengthening law enforcement tools against international and interstate drug trafficking.[35] The conventionally understood purposes of the act were to combat drug abuse and to prevent diversion of controlled substances into illegal channels.[36] The current CSA makes it a federal crime for physicians and pharmacists to prescribe and fill prescriptions inconsistent with these purposes.[37] Under the CSA it is a crime for a physician to "dispense" a controlled substance without a legitimate medical purpose in the usual course of medical treatment.[38]

Preliminarily, it is worth noting that current federal policy on physician-assisted suicide is inconsistent because of the failure of the CSA to expressly proscribe the dispensing of controlled substances for assisting suicide. On the one hand, Congress expressed disapproval of physician-assisted suicide in its Assisted Suicide Funding Restriction Act of 1997.[39] There, Congress expressly stated the principal purpose of the Act was "to continue current Federal policy by explicitly providing that Federal funds may not be used to pay for items and services (including assistance) the purpose of which is to cause (or assist in causing) the suicide, euthanasia, or mercy killing of any individual."[40] On the other hand, the current state of the CSA operates in a way that endorses physician-assisted suicide. Because physicians register with the federal government under the CSA, and because they must write prescriptions only for a legitimate medical purpose to be valid under the CSA,[41] physicians writing prescriptions for lethal doses of controlled substances results in a federal policy that endorses physician-assisted suicide as a "legitimate medical purpose."[42]

Attorney General Ashcroft believed the CSA authorized him to establish, through an interpretive rule, that dispensing controlled substances to assist suicide violates the federal drug law.[43] The Attorney General, therefore, promulgated an interpretative rule to officially clarify that assisting suicide is not a legitimate medical purpose under the federal drug law.[44] The interpretive rule reconciled the inconsistency in current federal policy by providing a federal enforcement strategy capable of neutralizing a state law like Oregon's authorizing physician-assisted suicide. Unfortunately, in *Gonzales v. Oregon*, a majority of the Supreme Court rejected the Attorney General's argument and struck down the Executive Branch's interpretive rule.[45]

In striking down the interpretive rule authorizing federal enforcement of the CSA to protect life, the Court quashed the only existing federal strategy capable of stopping doctors from dispensing drugs with the intent to take life. The Court did not, however, uphold physician-assisted suicide — it only held that the Attorney General lacked legal authority to promulgate the official interpretation. Nor did the Court address the issue whether Congress, under the Constitution, may regulate federally controlled drugs in a way that prohibits the dispensing of such drugs to kill a human being. It is the thesis of this paper that Congress can — and must.

B. Remedy: A Legislative Proposal

As part of a constitutionally authorized federal regulatory scheme, Congress should amend the CSA to expressly prohibit the dispensing of federally controlled drugs to assist in the killing of a human being.[46] A proposed amendment appears at the end of this paper as an Appendix.

Congress may act to regulate the dispensing of drugs to assist in the killing of human life if: 1) empowered to do so under some provision of the United States Constitution; and 2) no other part of the Constitution limits such regulation.[47] If authority exists under the Constitution for Congress to regulate, and no other part of the Constitution limits such regulation, then the Supreme Court should uphold the law when it is rationally related to any legitimate governmental interest. Most importantly, under the Supremacy Clause, such a federal law pre-empts any conflicting state law (like Oregon's) that cannot consistently stand together with the federal regulation.[48]

1. The Constitutional Power of Congress to Regulate Controlled Substances

Article I of the United States Constitution vests in Congress the power "[t]o regulate Commerce ... among the several States,"[49] Additionally, the "Necessary and Proper" Clause empowers Congress to enact laws reasonably necessary to carry out its power under the Commerce Clause.[50] Supreme Court precedent interprets these provisions as empowering Congress to regulate *inter alia* "things in interstate commerce" and activities that "substantially affect" interstate commerce.[51] Article I empowers Congress, therefore, to regulate dispensing of controlled substances with the intent to assist suicide if either: 1) the drugs are things in interstate commerce or 2) the activity substantially affects interstate commerce.

a. Regulating as a Thing in Interstate Commerce

Drugs dispensed "for assisting suicide have likely traveled in interstate commerce."[52] Such drugs are, therefore, 'things' in interstate commerce. Because the controlled substances are 'things' in interstate commerce, Congress, has the power under the Commerce Clause, to regulate by amending the CSA as proposed.

b. Regulating as an Activity Substantially Affecting Interstate Commerce

Congress may also regulate activity concerning controlled substances if the activity substantially affects interstate commerce.[53] In determining whether a substantial effect on interstate commerce exists, a court can aggregate the regulated activity if it is economic activity.[54] "[A]ctivities regulated by the CSA are quintessentially economic" since they involve "the production, distribution, and consumption of commodities."[55]

Doctors dispensing federally controlled drugs actively participate in the interstate controlled substances market.[56] Since this economic activity concerning controlled substances substantially affects interstate commerce, Congress may regulate it.[57] When Congress enacts comprehensive legislation to regulate the interstate market in a fungible commodity, it acts "well within its authority to 'make all Laws which shall be necessary and proper' to 'regulate Commerce among the several States.'"[58] For example, in *Raich*, the Court held Congress pos-

sessed the power to regulate even the intrastate manufacture and possession of marijuana for personal use, since such economic activity substantially affected interstate commerce.[59] Justice Stevens, writing for the Court stated, "When Congress decides the total incidence of a practice poses a threat to the national market, it may regulate the entire class."[60]

c. The Current Scope of the CSA's Comprehensive Regulatory Regime

In *Raich* the Court expressly held that "the CSA is a comprehensive regulatory regime specifically designed to regulate which controlled substances can be utilized for medicinal purposes, and in what manner."[61] Seven months later, however, the *Gonzales v. Oregon* Court characterized the CSA's comprehensive regulatory regime more restrictively (i.e., limiting "doctors from using their prescription-writing powers as a means to engage in illicit drug dealing and trafficking as conventionally understood").[62] The majority stated Congress should use "explicit language in the statute" if it desires to prohibit physicians from dispensing drugs to assist suicide.[63] In view of the Court's language, Congress must expressly amend the CSA to do so. Since Article I of the Constitution provides an appropriate power source for Congress to enact the proposed amendment — either because the drugs are *things* in interstate commerce or because the *activity* substantially affects interstate commerce — the next issue is whether any other part of the Constitution limits Congress from exercising its Article I powers.

2. Nothing in the Constitution Limits Congress from Using its Article I Powers to Regulate the Dispensing of Federally Controlled Drugs that Assist in the Killing of a Human Being

No constitutional provision limits Congress from exercising its Article I power as proposed in this paper. Some may, however, attempt to misconstrue the proposed amendment to the CSA by suggesting that it concerns a state's right to regulate the practice of medicine — and that it therefore alters the usual constitutional balance between the states and federal government. The problem with such a federalism analysis is that the proposed amendment here is not about the regulation of medical practice; it is about the right of the federal government to regulate controlled substances in a uniform manner. That is, the proposed amendment, as part of a constitutionally authorized federal regulatory scheme, prohibits the dispensing of federally controlled drugs to assist in the killing of a human being. In any case, no constitutional provision limits Congress from using its powers under Article I to regulate commerce in connection with medical matters; no question exists that Congress can establish uniform national standards in the areas of health and safety.[64]

In the past, some also contended that a fundamental right to assisted-suicide exists under the Due Process Clauses, and that laws proscribing assisted suicide violate the Equal Protection Clause. The United States Supreme Court soundly rejected such contentions.[65]

Since no fundamental right limiting Congress's power exists, Congress may regulate federal drugs as long as its legislation is rationally related to a legitimate government purpose.[66] The government has a legitimate interest in preserving human life, stopping suicide, and preventing a moral slide toward euthanasia.[67] A statute prohibiting the dispensing of federally controlled drugs to assist suicide is rationally related to these legitimate state interests. In

amending the CSA, therefore, Congress should clearly articulate that its intent to comprehensively regulate the market of controlled substances includes regulation of such substances used to assist suicide.

Moreover, Congress properly can conclude that regulation of drugs, and drug-dispensing activity assisting suicide, is a reasonably necessary way to achieve its purpose of comprehensively regulating the interstate market in controlled substances as amended.[68] As noted, drugs dispensed for committing suicide are "things" in interstate commerce Congress may regulate under the Commerce Clause.[69] If a primary purpose of the CSA is to control the controlled substances market,[70] then regulating such a commodity in interstate commerce is rationally related to the government's legitimate purpose. Likewise, since doctors dispensing drugs for suicide actively participate in the interstate controlled substances market, Congress can rationally conclude that, in the aggregate, leaving suicide drugs outside the regulatory scheme substantially influences price and market conditions. Such is the case even if the manufacture and dispensing of controlled substances for assisting suicide is purely intrastate, since such economic activity, in the aggregate, substantially affects the larger interstate drug market. Congress should provide clear legislative history establishing this fact.[71]

Congress properly, therefore, can conclude that regulation of drug-dispensing activity is a reasonably necessary way to achieve its purpose of comprehensively regulating the interstate market in controlled substances — especially as amended. Including improper drug-dispensing activity for lethal purposes within the CSA's coverage furthers its legitimate objective. Indeed, leaving such activity excepted from regulation will undermine a clear legislative intent to regulate the drug market comprehensively in a manner which protects public health and safety.[72]

Under a "rational basis" standard, broad deference is due to congressional judgments concerning whether drug dispensing economic activity by physicians substantially affects interstate commerce.[73] Likewise, such broad deference applies to whether Congress's regulation of drugs is reasonably necessary to carry out its amended legislative purpose under the Commerce Clause.[74]

C. Effects of the Proposed Legislation

As amended, the Federal Controlled Substances Act will preempt Oregon-type laws authorizing doctors to dispense drugs to assist killing human beings. The relevant Oregon law in this case authorizes physicians, in certain circumstances, to prescribe and dispense a lethal amount of drugs for the purpose of assisting in the killing of a human being.[75] The Oregon law expressly provides that a physician cannot "be subject to civil or criminal liability or professional disciplinary action" for engaging in the conduct authorized by the Oregon law.[76] The drugs dispensed in the lethal conduct authorized by the Oregon law are controlled substances regulated under the federal CSA.[77] Generally, such substances are among those listed in Schedule II of the CSA.[78] The conduct now authorized as legitimate and immune from prosecution under Oregon law will become a prosecutable crime carrying serious penalties under

the amended provisions of the CSA.

Currently under the CSA, it is a federal crime for a physician to "dispense" a controlled substance without a legitimate medical purpose in the usual course of medical treatment.[79] If amended as proposed here, the CSA will specifically proscribe the dispensing of drugs to assist in the killing of a human being. Moreover, as under the current provisions of the CSA, when "death … results from the use of such substance" dispensed, the dispensing physician will face significant penalties under the CSA.[80] Where federal and state provisions conflict, Article VI of the United States Constitution controls:

> This Constitution, and *the Laws of the United States* which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the … laws of any State to the Contrary notwithstanding.[81]

And in its *Raich* decision, the Supreme Court recently reiterated:

> The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail. It is beyond peradventure that federal power over commerce is superior to that of the States to provide for the … necessities of their inhabitants …. No form of state activity can constitutionally thwart the regulatory power granted by the commerce clause to Congress.[82]

As amended, the CSA will expressly preempt any state laws to the extent "there is a positive conflict between [a provision of the CSA] and that state law so that the two cannot consistently stand together."[83] Under conventional conflict preemption principles, therefore, the CSA as amended will clearly preempt Oregon's statute authorizing *the dispensing of controlled substances* to assist suicide. The CSA as amended will proscribe the dispensing of controlled substances by physicians to assist in the killing of a human being — and provide severe penalties when "death … results from the use of such substance …."[84] Oregon's law, on the other hand, expressly authorizes — and immunizes against prosecution — the lethal dispensing proscribed and severely penalized by the CSA. Thus, the two statutes here will conflict to such an extent that they cannot consistently stand together.

Moreover, even if a court could some how construe the CSA as amended to not expressly preempt the Oregon statute, implied preemption exists where "compliance with both federal and state regulations is a physical impossibility."[85] The mutually exclusive provisions of an amended CSA and Oregon law governing the dispensing of controlled substances make it impossible for a dispensing physician to comply with both. In such situations, the Supreme Court has deemed the state law preempted — even where a distinctive state interest is at stake.[86]

The proposed amendment to the CSA will end the dispensing of federally controlled drugs to assist in the commission of suicide. Because the proposal is constitutionally sound it will, when challenged, survive scrutiny by a majority of the United States Supreme Court. While the proposal holds the potential to restore the intrinsic value of human life, its promulgation into public policy depends on the will of a morally motivated citizenry. It is with this final point that I conclude, and present the reader with a challenge.

IV. Conclusion: A Challenge to Those Who Seek to be an Instrument of His Peace

Legitimizing the killing of human beings merely creates an illusion of a nation willing to protect fundamental freedoms. Such a course inevitably erodes essential foundations of a country. Those who came before us built our constitutional democratic republic upon a fundamental foundation of decency. That foundation is under attack by those who seek to transform our pluralistic nation (where everyone may freely participate in public policy development) into a secular nation (where everyone except the religious may do so). Although structural institutions of free government may stand for a time, the essence for which they stand can eventually cease to exist.

Under our watch, proponents of doctor-assisted killing attacked a sacred standard — and we lost important ground. Worse, these same proponents continue to seize upon the *Gonzales v. Oregon* case to justify expanding the practice to other states. God's inviolable standard that life has positive value at all stages is a fundamental standard — not morally relative. For the legislative proposal discussed in this paper to become public policy, citizens must put their fundamental rights of free expression and religious conscience into action. This requires participating in the policy-making process. If we do so, we can retake lost ground and halt advances against the inherent value of life. Urge Congress to use its constitutional power to amend the CSA — and permanently euthanize assisted-suicide.

Appendix — Proposed Legislation

A BILL

To amend title 21, United State Code, to prohibit the dispensing of controlled substances for assisting in the commission of suicide.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the 'Controlled Substances Regulation to Preserve Life Act of 2007'.

SEC 2. PROHIBITION ON THE DISPENSING OF CONTROLLED SUBSTANCES FOR ASSISTING IN THE COMMISSION OF SUICIDE.

(a) Title 21, United States Code, section 841(a) is amended by inserting the following new subsection (3):

Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally —

(3) to dispense a controlled substance to assist an individual in killing himself or herself.

* Professor Wagner is President of the International Center for Ethics & Responsibility and teaches Constitutional Law and Ethics at the Cooley Law School.

[1] Oregon Death With Dignity Act, OR. REV. STAT. ANN. §§ 127.800-897 (West 2003).

[2] Gonzales v. Oregon, 546 U.S. 243 (2006).

[3] *Id.* It is important to note that the Court: 1) did not uphold physician-assisted suicide; 2) did not uphold Oregon's law; and 3) did not resolve the question whether the Constitution allows the federal government to regulate federally

controlled substances in a way that prohibits the dispensing of such drugs to kill a human being.

[4] Controlled Substances Act, 21 U.S.C.A. §§ 801-02, 811-14, 821-30, 841-44a, 846-56, 858-65, 871-87, 889-90, 901-04, 951-71 (2006).

[5] Incorrectly assuming he was acting within statutory authority allowing him to do so, the Attorney General attempted to confirm, through an interpretive rule, that dispensing controlled substances to assist suicide violates the federal drug law. The Attorney General's rule further attempted to officially clarify that assisting suicide is not a legitimate medical purpose under the federal drug law (The federal drug law already expressly provided that it was a federal crime for a physician to "dispense" a controlled substance without a legitimate medical purpose).

[6] For example, in 2006, legislators introduced bills to legalized assisted suicide in the state legislatures of Arizona, H.B. 2313, 47th Leg., 2d Reg. Sess. (Ariz. 2006); H.B. 2314, 47th Leg., 2d Reg. Sess. (Ariz. 2006); Washington, S.B. 6843, 59th Leg., 2006 Reg. Sess. (Wash. 2006); and Rhode Island, H.B. 7428, 2006 Leg. Sess. (R.I. 2006).

More recently, California legislators, on February 15, 2007, introduced the California Compassionate Choices Act, AB 374 (Cal. 2007). A month earlier in Vermont, legislators introduced the Patient-Directed Dying Act, H.44 (Vt. 2007), and the Patient Control at the End of Life Act, S.63 (Vt. 2007); *see also* Compassion in Choices, Improving Laws: In Legislatures, http://www.compassionandchoices.org/improvinglaws/statehouses.php (last visited May 10, 2007).

[7] *Proverbs* 14:34 (NIV).

[8] *Genesis* 1:27 (NIV); *see also Genesis* 1:26 (NIV).

[9] *Genesis* 1:31 (NIV).

[10] *Jeremiah* 29:11 (NIV).

[11] *Ephesians* 2:10 (NIV). As David confirms in the Psalms, "For you created my inmost being; you knit me together in my mother's womb.... [Y]our eyes saw my unformed body. All the days ordained for me were written in your book before one of them came to be." *Psalm* 139:13, 16 (NIV); and *see, e.g.*, in Paul's letter to the Colossians: "For by him all things were created: things in heaven and on earth, visible and invisible, whether thrones or powers or rulers or authorities; all things were created by him and for him." *Colossians* 1:16 (NIV); and in Isaiah's divine prophesy concerning Israel's deliverance and restoration: "Bring all who claim me as their God, for I have made them for my glory. It was I who created them." *Isaiah* 43:7 (NIV); and in Acts: "The God who made the world and everything in it is the Lord of heaven and earth .... From one man he made every nation of men, that they should inhabit the whole earth; and he determined the times set for them...." *Acts* 17:24, 26 (NIV); and Paul's statement, just prior to facing humanly unbearable adversity: "[I]f only I may finish the race and complete the task the Lord Jesus has given me — the task of testifying to the gospel of God's grace." *Acts* 20:24 (NIV).

[12] Although the duty of those created to respect the commands of the Creator is self-evident, it becomes especially clear when one reads the commandment not to kill *in pari material* with the First (I am the Lord your God.... You shall have no other gods before me. *Exodus* 20:2-3; *Deut.* 5:6-7), and the Greatest commandment ("Love the Lord your God with all your heart and with all your soul and with all your mind." *Matthew* 22:37-40).

[13] Ludwig Edelstein, The Hippocratic Oath: Text, Translation, and Interpretation 3 (1943).

[14] *See, e.g.*, Wash. Rev. Code § 9A.36.060 (2000).

[15] The Case Against Assisted Suicide: For the Right to End-of-Life Care 6-7 (Kathleen Foley & Herbert Hendin eds., 2002).

[16] *Id.*

[17] *Id.*

[18] *Id.* at 7.

[19] *Id.*

[20] *Id.* at 8. Remarkably, no suffering requirement exists in the Oregon law, which purports instead to be based on personal choice. *See* Oregon Death With Dignity Act, Or. Rev. Stat. Ann. §§ 127.800-897 (West 2003). The Oregon law requires the physician to advise the patient of palliative care and hospice, but does not require that the physician have any training in either and requires no palliative care consultation. *Id.*

[21] The Case Against Assisted Suicide, *supra* note 15, at 10.

[22] *Id.*

[23] The Oregon law similarly fails to provide an enforcement mechanism for physician non-compliance. Moreover, the law's data collection requirements are so meager — the form used requires no disclosure of the reason for the patient's request — that study of the Oregon experiment is limited. *Id.* at 8.

[24] *Id.*

[25] *Id.*

[26] Herbert Hendin, *The Dutch Experience*, *in* The Case Against Assisted Suicide, *supra* note 15, at 105; *see also* Zbigniew Zylicz, M.D., *Palliative Care and Euthanasia in the Netherlands: Observations of a Dutch Physician*, *in* The Case Against Assisted Suicide, *supra* note 15, at 123.

[27] Herbert Hendin, *The Dutch Experience*, *in* The Case Against Assisted Suicide, *supra* note 15, at 103 (citing Carlos F. Gomez, Regulating Death: Euthanasia and the Case of the Netherlands (1991)).

[28] 521 U.S. 702, 733 (1997).

[29] Steven Ertelt, *Dutch Doctor Who Engages in Euthanasia of Newborns Unapologetic*, Dec. 27, 2004, http://www.lifenews.com/bio623.html.
[30] *See* Robert H. Bork, Slouching Toward Gomorrah 173-92 (1996).
[31] Brief of the Am. Medical Ass'n, Am. Nurses Ass'n, Am. Psychiatric Ass'n, et al., as Amicus Curiae Supporting Petitioners at 5, Washington v. Glucksberg, 521 U.S. 702, No. 96-110 (1997).
[32] *Id.*
[33] *Proverbs* 14:34.
[34] Controlled Substances Act, 21 U.S.C.A. §§ 801-02, 811-14, 821-30, 841-44a, 846-56, 858-65, 871-87, 889-90, 901-04, 951-71 (2006).
[35] Gonzales v. Raich, 545 U.S. 1, 10 (2005).
[36] H.R. Rep. No. 91-1444, at 1 (1970); *Raich*, 545 U.S. at 12-13; *see also* Oregon v. Ashcroft, 368 F.3d 1118, 1125 n.7 (9th Cir. 2004) ("The record is voluminous and replete with statements of congressional intent to combat drug abuse and addiction, and particularly the problem of doctors who illicitly funnel prescription drugs into the hands of dealers and addicts.")
[37] 21 U.S.C.A. § 801(1).
[38] Controlled Substances Act, 21 U.S.C.A. § 841
(a) Unlawful acts

… it shall be unlawful for any person knowingly or intentionally —
(1) to … dispense a controlled substance ….
(b) Penalties
(1)(C)In the case of a controlled substance in schedule I or II … such person shall be sentenced to a term of imprisonment of not more than 20 years and if death … results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual ….
Id.
[39] Pub. L. No. 105-12, (1997), 111 Stat. 23 (codified at 42 U.S.C. § 14401 et seq.).
[40] 42 U.S.C. § 14401(b).
[41] 21 U.S.C.A. § 830(b)(3)(A)(ii) (2006).
[42] 145 Cong. Rec. H10880 (1999). As one United States Congressman put it, the issue is "whether we are going to have a consistent Federal policy that does not support assisted suicide or whether we are going to allow a Federal regulatory scheme to be used to support physician-assisted suicide." *See id.* at H10878 (statement of Rep. Canady).
[43] Gonzales v. Oregon, 546 U.S. 243, 249 (2006).
[44] *Id.*
[45] *Id.* at 254-75.
[46] Prior attempts by Congress to prohibit assisted suicide were unsuccessful. *See, e.g.*, Lethal Drug Abuse Prevention Act of 1998, H.R. 4006, 105th Cong. (1998); The Pain Relief Promotion Act of 1999, H.R. 2260; S. 1272, 106th Cong. (1999); The Pain Relief Promotion Act of 2000, H.R. 5544, S. 2607, 106th Cong. (2000). Some reasons given for not amending the CSA included concerns raised by physicians that drugs dispensed with proper intent (*e.g.*, relieving pain) could be prosecuted if the patient died. In this regard, opponents expressed concern over too much discretionary authority being given to the Attorney General and the DEA to review decisions made by physicians. Proper exercise of prosecutorial discretion, combined with a requirement that a Grand Jury return an indictment, make such concerns unlikely. Such concerns can, nonetheless, be adequately addressed by an affirmative defense (as in other situations where physicians are prosecuted for dispensing drugs outside professional limits). *See, e.g.*, 21 U.S.C. § 885(a)(1); United States v. Steele, 147 F.3d 1316, 1318-20 (11th Cir. 1998) (en banc) (and cases cited therein), *cert. denied*, Steele v. United States, 528 U.S. 933 (1999) (upholding a conviction of a physician under the CSA for dispensing drugs outside professional limits). Opponents to amending the CSA (to prohibit the dispensing of drugs to assist suicide) also expressed concerns that Congress lacked power to regulate. As demonstrated in this paper, such concerns lack merit. The bottom line is that previous attempts by Congress to address the problem failed largely because not enough political support for amending the CSA existed. I address this issue in the concluding section of this paper.
[47] U.S. Const. art. I.
[48] U.S. Const. art. VI; *see also* 21 U.S.C. § 903; Gonzales v. Raich, 545 U.S. 1, 29 (2005).
[49] U.S. Const. art. I, § 8, cl. 3.
[50] § 8, cl. 18.
[51] *See* United States v. Morrison, 529 U.S. 598, 608-09 (2000); United States v. Lopez, 514 U.S. 549, 558-59 (1995); *see also* United States v. Darby, 312 U.S. 100, 118 (1941).
[52] *See* Gonzales v. Oregon, 546 U.S. 243, 302 n.2 (2006) (Thomas, J., dissenting).
[53] *Raich*, 545 U.S. at 9, 15. "[A]ctivities regulated by the CSA are quintessentially economic" since they involve "the production, distribution, and consumption of commodities." *Id.* at 25-26.
[54] *Id.* (aggregating economic activity); *Morrison*, 529 U.S. at 617-18 (holding that court may not aggregate non-econom-

ic activity based on its "aggregated effect on interstate commerce").
[55] *Raich*, 545 U.S. at 25-26. Moreover, "[i]n assessing the scope of Congress' authority under the Commerce Clause, ... [a court] need not determine whether [the] activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding." *Id.* at 22 (citing *Lopez*, 514 U.S. at 557).
[56] *See Oregon*, 546 U.S. at 302 n.2 (Thomas, J., dissenting).
[57] *Raich*, 545 U.S. at 25-26.
[58] *Id.* at 22 (citing U.S. CONST. art. I, § 8).
[59] Congress may regulate even "purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce." *Id.* at 17.
[60] *Id.* (citations omitted).
[61] *Id.* at 27; *see also id.* at 24.
[62] Gonzales v. Oregon, 546 U.S. 243, 270 (2006) (*E.g.*, diversion of drugs into illegal channels).
[63] *Id.* at 271-72.
[64] *Raich*, 545 U.S. at 9; *Oregon*, 546 U.S. at 302 n.2 (Thomas, J., dissenting); *see also* United States v. Darby, 312 U.S. 100, 115-17 (1941) (renouncing earlier doctrines holding that Congress could not utilize the commerce power to achieve legitimate objectives relating to the health and welfare of the nation).
[65] In *Washington v. Glucksberg*, the Court held that no fundamental right to assisted suicide exists under the liberty interests protected by the Due Process Clause of the Fourteenth Amendment. 521 U.S. 702, 723-28 (1997). Likewise, in *Vacco v. Quill*, the Court held that laws proscribing assisted suicide do not violate the Equal Protection Clause — distinguishing between laws permitting the refusal of unwanted life-saving measures (where the patient dies naturally from the underlying pathology) and assisting suicide (where the person dies from poison intentionally administered to kill). 521 U.S. 793, 800-09 (1997).
[66] *See, e.g.*, Hodel v. Indiana, 452 U.S. 314, 323-24 (1981) ("A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends.").
[67] *See, e.g.*, *Glucksberg*, 521 U.S. at 728 (recognizing a number of legitimate state interests including "preserving life," "preventing suicide," and preventing a moral slide "toward euthanasia"); *Quill*, 521 U.S. at 808-09 (same); *see also* Planned Parenthood v. Casey, 505 U.S. 833, 846, 878 (1992) (recognizing protection of human life as a legitimate state interest).
[68] Congress's original purpose in enacting the Controlled Substances Act was to comprehensively regulate the market of such substances. *See Raich*, 545 U.S. at 27. A House Report expressly stated that Congress promulgated the law in order "to deal in a comprehensive fashion with the growing menace of drug abuse in the United States … through providing more effective means for law enforcement aspects of drug abuse prevention and control." H.R. Rep. No. 91-1444, Pt. 1, at 1 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 4567. Moreover, when it enacted the Federal Controlled Substances Act, Congress made extensive findings and statements, including that:
(1) Many of the drugs included within this subchapter have a useful and legitimate medical purpose and are necessary to maintain the health and general welfare of the American people.
(2) The illegal . . . distribution, and possession *and improper use* of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people.
(3) A major portion of the traffic in controlled substances flows through interstate and foreign commerce. Incidents of the traffic which are not an integral part of the interstate or foreign flow, such as manufacture, local distribution, and possession, nonetheless have a substantial and direct effect upon interstate commerce ….
21 U.S.C. § 801(emphasis added).
[69] *See Oregon*, 546 U.S. at 302 n.2 (Thomas, J., dissenting).
[70] *Raich*, 545 U.S. at 19.
[71] Although not required, a specific finding to this effect by Congress will be helpful when courts inevitably review the statutory scheme. *See Raich*, 545 U.S. at 20-22.
[72] This is why, for example, the dispensing of controlled substances is regulated under the CSA by "provid[ing] for control … through registration of manufacturers, wholesalers, retailers, and all others [including physicians] in the legitimate distribution chain …." H.R. Rep. No. 91-1444, Pt. 1, at 3, 6 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 4569.
[73] *See Raich*, 545 U.S. at 22, 25-26; United States v. Lopez, 514 U.S. 549, 557 (1995).
[74] *Lopez*, 514 U.S. at 557-58.
[75] Oregon Death With Dignity Act, OR. REV. STAT. ANN. §§ 127.800-897 (West 2003).
[76] *Id.* § 127.885(1).
[77] Gonzales v. Oregon Pet. App. 114a (Memorandum for the Attorney General, June 27, 2001).
[78] *Id.*; *see also* Pet. App. 65a (opinion of the district court).
[79] *See* 21 U.S.C. §§ 841(a)(1); 802(21); 829; 21 C.F.R. § 306.04(a) (1973) (re-designated as 21 C.F.R. § 1306.04(a) (1975); *see also* United States v. Moore, 423 U.S. 122, 124, 139 (1975) (holding that a physician can be convicted under the CSA

when acting outside professional limits). Whether the physician acted outside authorized professional limits is not an element of the offense that the government needs to negate; rather, it is an affirmative defense available to the practitioner who carries the burden of going forward with the evidence concerning the exception. 21 U.S.C. § 885(a)(1); United States v. Steele, 147 F.3d 1316, 1318-20 (11th Cir. 1998) (en banc) (and cases cited therein). The proposed amendment will firmly establish that Congress did not intend an exception for non-medical use of controlled substances for terminating human life. Permitting states to alter the CSA by injecting such an exception holds the potential to gut the full intent of the federal law. For example, if such an exception is allowed, a state could pass a law permitting physicians to prescribe and dispense controlled substances to assist patients to get "high" in order to deal with stress.

[80] *See* 21 U.S.C. § 841 (b)(1)(C) (prescribing up to life in prison for dispensing Schedule II controlled substances in violation of § 841(a) where death results from the use of the drug); *see also Moore*, 423 U.S. at 132 (recognizing that Congress geared the CSA's penalties "to the nature of the violation, including the character of the drug involved").

[81] U.S. CONST. art. VI (emphasis added).

[82] Gonzales v. Raich, 545 U.S. 1, 29 (2005) (Internal quotations and citations omitted).

[83] 21 U.S.C. § 903. To be sure, nothing in the CSA prevents a state from enacting its own stricter drug legislation, or prosecuting drug offenses at the state level. *Id.* And nothing in the Federal CSA preempts a state from regulating within the field of physician-assisted suicide (i.e., nothing in the CSA preempts a state law authorizing physician-assisted suicide *per se*).

[84] *See generally* §§ 841(a)(1), 802(21), 829; 21 C.F.R. § 1306.04(a) (1975); *Moore*, 423 U.S. at 124; 21 U.S.C. § 841 (b)(1)(C).

[85] Boggs v. Boggs, 520 U.S. 833, 844 (1997) (internal quotation marks omitted) (citing Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992)).

[86] *See, e.g.*, Hisquierdo v. Hisquierdo, 439 U.S. 572, 581, 590 (1979) (finding state community property law preempted by federal military pay law).

SECTION 3

Historical Development

THE ESTABLISHMENT CLAUSE AND THE LIMITS OF *PURE* HISTORY

BY KYLE DUNCAN*

Introduction

For the Supreme Court, history has always been the key to understanding the Constitution's command that "Congress shall make no law … respecting an establishment of Religion." Proponents both of mainstream and revisionist histories of the Clause would together affirm with former Chief Justice Rehnquist that the "true meaning of the Establishment Clause can only be seen in its history."[1] History also continues to be a major preoccupation of Establishment Clause scholarship.[2] This paper does not contest the premise that historical study should be a major ingredient in any compelling account of the Clause's meaning. Rather it asks whether another ingredient has been neglected, and whose refinement would help discipline how justices and scholars employ history to interpret the Clause. Ironically, as this paper argues, the missing ingredient is a coherent account of the how the words of the Establishment Clause themselves work to clarify the Clause's meaning and its function within the overall constitutional structure.

Wide disagreements about the historical meaning of the Clause are nothing new, but my attention to the subject was renewed by the testy exchanges among Justices Souter, Stevens and Scalia in the 2005 Ten Commandments cases, *McCreary County* and *Van Orden*.[3] In particular, Scalia's *McCreary County* dissent has drawn overheated criticism that misses what Scalia is attempting to do out of an understanding of history.[4] My own view is that Scalia wants to refine the typical originalist use of Establishment Clause history by treating a public tradition of religious practices as an amplification of original meaning across time.[5] Scalia, that is, seeks to use history in a more concrete and disciplined way than the Court has in past anti-establishment cases.

But Scalia's historical experiment cannot deliver fully on its promise, primarily for the same reason that the Court itself has never been able to draw consistent lessons from history. Neither approach has developed an account of what tangible *legal* limits are set by the text of the Establishment Clause. Thus even Scalia's more disciplined approach likely will not reliably channel the use of historical materials in future cases.

The basic problem seems to be this: the circle of government actions forbidden by the Clause has been drawn too vaguely and too broadly — around something perhaps described as "bad relationships between religion and government." The circle needs to be far tighter — drawn in terms of "establishment" as a legal construct and less as a cultural, sociological or theological construct; drawn in terms that restrain distinct institutional relationships between the state and actual "churches," instead of policing the vague boundaries between the "religious" and the "secular."

This paper will use the disagreement among the Justices in the Ten Commandments opin-

ions to discuss the limits of *pure* history in Establishment Clause jurisprudence. It will then sketch what is needed to discipline the use of historical materials — a better textual account of what legal limits the Establishment Clause places on government.

I. Historical Januses

The Establishment Clause's text should be understood as placing a specific kind of "frame" within which to process the bewildering mass of historical materials that vie for an interpreter's attention.[6] First, to understand why *any* frame is inevitably necessary, it will be useful to review a few iconic pieces of historical evidence and show how they could easily stand for diametrically opposed meanings of the Establishment Clause. These bits of history are "Janus-faced," that is, depending on one's frame of reference, they look in two directions — either toward an expansive, aggressive Clause or a narrow, modest Clause.[7] What is missing is a well-defined frame within which to interpret such evidence.

The central conceit of modern anti-establishment jurisprudence is a good example. *Everson* unanimously read the Clause as an act of collective repentance, wrung from the "consciences" of "freedom-loving colonials" that had been "shock[ed]" into a "feeling of abhorrence" by their own oppressive religious establishments.[8] *Everson* takes this evidence — the persistence of religious establishments in the colonies and early States — and creates a frame for interpreting the Clause. The Clause becomes an instrument designed to purge certain unpalatable church-state relationships from our civic memory. It is an agent of aggressive, secularizing change. But, with a minor viewpoint adjustment, the very same evidence cuts the opposite way. The state establishments, after all, survived the ratification of the Constitution and in some cases persisted well into the Nineteenth Century.[9] The Establishment Clause did *nothing* to alter that situation, but instead maintained the political conditions under which state establishments could flourish or wither of their own accord. Thus, Gerard Bradley describes ratification of the Religion Clauses as "deeply conservative in its celebration of the present and immediate past and in its insistence that the prevailing regime need be preserved inviolate."[10] Now, the same historical fact means that the Establishment Clause is an agent of conservation and stability, promoting the church-state status quo, and sublimely agnostic about the value of establishments.

Much the same can be said for another historical pillar of Clause meaning: the Virginia Assessment Controversy. *Everson* deemed it an interpretative watershed and, consequently, canonized Madison's and Jefferson's views of the Controversy for interpreting the later Establishment Clause.[11] On this view, the Establishment Clause is a transformative provision, hardwired to propel us out of the thickets of state-fostered religion and to salve taxpayer consciences from even "three pence" of clergy taxes.[12] And yet, at the time of *Everson*, a commentator as astute as Father John Courtney Murray jeered at the historiography of Justices Black and Rutledge. "The tricks," Murray wrote in a famous article, "that they play on the dead are astonishing."[13]

For Murray (and other scholars since), the context of the Assessment Controversy showed

Madison's and Jefferson's views of the Virginia tax were *foreign* to the content of the Establishment Clause. As a Virginia legislator, Madison had championed *avant garde* church-state views, but things changed when he became a federal congressman. Madison explicitly set aside his personal church-state views when he shepherded the Religion Clauses through the First Congress, precisely because the object was to make them non-controversial and politically palatable.[14] The text of the Clauses hints at this — it is nothing remotely like Madison's *Memorial and Remonstrance* or Jefferson's *Bill for Establishing Religious Freedom*. On this view, the Madison of the federal Religion Clauses simply sought non-controversial measures that would not forestall ratification of the new Constitution — a far cry from the Madison championing progressive church-state views in Virginia.[15] And, as a final irony, Murray indicates that "the First Amendment met sharp and serious objection in the Virginia senate, on grounds of its inadequacy in comparison to the Virginia statute."[16] In sum, on this view of the evidence, the inference to be drawn from the Virginia Controversy is that, whatever the Establishment Clause was designed to do, it was something *deliberately different* from what Madison and Jefferson had sought to accomplish in Virginia.

Examples could be multiplied, but I will close with two pieces of evidence that are typically cited for one view of the Clause, but that, on closer inspection could well stand for the opposite view. They are Janus-faced *par excellence*. The first is James Madison's 1822 letter to Edward Livingston.[17] It is often cited as evidence that the Establishment Clause, properly understood, creates a strictly secular government and would rule out legislative chaplains or executive proclamations of thanksgiving and fasts. After all, in the letter Madison reaffirms his commitment to "[t]he immunity of Religion from civil jurisdiction," distances himself from paid legislative chaplains, and laments his own (albeit toned-down) proclamations while President. Surely this is evidence of what the Establishment Clause means? Yes, but only if one's frame for Clause meaning is something like "The Establishment Clause rules out the kinds of religion-and-government interactions that James Madison privately condemned."[18] It is a very different story if one's frame is: "The Clause does not reach those religion-and-government interactions that were commonly thought at the time to be a matter of politics, or at least were not commonly thought to present any *constitutional* question." It is important to see that, under this frame of reference, Madison's letter is strong evidence that the practices at issue *were perfectly constitutional*. After all, in the 1822 letter Madison *affirms* that he "found it necessary on more than one occasion to follow the example of predecessors" with regard to proclamations. The inference is that such practices were commonly thought to be unproblematic for purposes of the Establishment Clause. Indeed, Madison's own scruples shrank before the political realities created by such a common understanding. His own reservations, whether felt at the time or expressed decades later, are at best evidence that his own philosophy of church-state relationships was out-of-step with the times.

Finally, passages from Justice Story's *Commentaries on the Constitution* are often cited as evidence of an original understanding that the Religion Clauses were meant to protect

Christianity only.[19] After all, goes the argument, didn't Story write that "[t]he real object" of the Religion Clauses "was, not to countenance, much less to advance Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects ...."?[20] This quote not only appears to buttress a pro-Christian original understanding of the First Amendment, but also makes Story a prototypical Judge Roy Moore and the antithesis of such forward-thinking figures like Madison or John Locke. This, then, is evidence for what the Clauses "meant" to the founders, if, again, one's reference point is their personal religious predilections or perhaps their predictions about the effect of the Clauses.

But some further reading in the *Commentaries* reveals Story's point is exactly the opposite: the Clauses denied federal power to patronize *any* religion, including Christianity. Story recognized that the "general, if not universal sentiment, in America" at the founding was "that Christianity ought to receive encouragement from the state," but he immediately went on to write that confiding such a power to the nascent federal government would have been courting disaster. Given the "dangers from ecclesiastical ambition, the bigotry of spiritual pride, and the intolerance of the sects," Story explained that in the Religion Clauses "it was deemed advisable to exclude from the national government all power to act upon the subject."[21] Thus, if we change the frame of reference from Story's assessment of the founding generation's *personal religious predilections* to their *legal methods* in crafting the Religion Clauses, the *Commentaries* reveal a starkly different view about the substantive content of the Clauses. One evolves from the unjustifiable caricature of Story the "Christian nationalist," to the Story who wrote — again, in the same *Commentaries* held up to buttress a pro-Christian original understanding — that the Religion Clauses meant that "the Catholic and the Protestant, the Calvinist and the Arminian (sic), the Jew and the Infidel, may sit down at the common table of national councils, without any inquisition into their faith, or mode of worship."[22] And whom did Story cite to support his view of universal religious freedom and anti-coercion, which he thought was enshrined in the Religion Clauses? None other than the progressive political philosopher, John Locke.[23]

But someone will say, "So what? It isn't news that historical 'facts' can be made to stand for contradictory propositions." Quite so, but the point here is that one's understanding of what the Establishment Clause is supposed to *do* (what I have been calling the "frame") strongly influences the inferences one pulls out of historical facts. One who sees the Clause as repenting for illiberal establishments, and another who sees it as stubbornly clinging to those establishments, will infer very different Clause meanings from the persistence and contours of state establishments after the framing. One who sees the Clause as embodying collective notions about what church-state relationships were beyond the pale, and another who sees it as embodying James Madison's experimental church-state philosophy, will read the Assessment Controversy very differently as regards Clause meaning. The fundamental point is that historical materials cry out for a frame of reference within which to assess them. We will now turn to a recent controversy over the use of history and see if the Justices have made any progress

toward such a goal.

II. The Clause's Historical Meaning: Typical Treatments and Scalia's Experiment

In the Justices' sharp debates in the Ten Commandments opinions, one can see two strikingly different approaches to the derivation of Establishment Clause meaning from historical materials. In Justice Souter's *McCreary County* majority opinion, and in Justice Stevens's *Van Orden* dissent, what one might call the typical or mainstream approach is on display.[24] But Justice Scalia's *McCreary County* dissent appears to be attempting something new — a refinement of how historical data should be deployed to illuminate Clause meaning.

The Court's mainstream approach to history — going back to *Everson* — involves drawing abstract lessons from key historical events and applying those lessons to a modern world the Justices perceive, in crucial aspects, to have moved on from the religious worldviews of the 18th century. Souter's statement in *McCreary* that the command of "neutrality" emerges from a "sense of the past" captures this perfectly.[25] Historical data are either too inconclusive or too rooted in uncongenial religious outlooks to furnish precise answers to today's religious controversies, and therefore must be treated only as signposts. From the mists of the past, they point in broad directions toward a religious future unknown to the founding generation. This is a form of highly abstracted originalism, from which the Court has derived principles such as "neutrality," "non-endorsement," "non-coercion," and (increasingly making a comeback) "non-divisiveness."

Take "non-endorsement," for instance. Drawing on a congeries of historical religious acknowledgments and symbolism — and perhaps *despite* such a history — the Court has divined the principle that the Establishment Clause forbids the government from thereby making "religious outsiders" of some of its citizens.[26] While any strictly original version of this "outsider" principle would operate only in concrete civil and political terms — such as in a denial of voting rights or access to public services — today's non-endorsement principle functions in the realm of a "reasonable observer's" perception of his place in civil society. This approach obviously creates a broad arena for judicial discretion and creativity in "updating" the operation of the Clause for (what at least the Justices perceive as) a religiously-altered modern society.

In his *McCreary* dissent, Justice Scalia launches his most forceful rejoinder yet to this typical treatment of history. Scalia's project is "new" in the sense that he is applying to the Establishment Clause his approach to legal traditionalism in other areas. But, at bottom, Scalia's approach to the Clause is a refinement of the usual "accomodationist" historical answer to a "separationist" Clause — of the kind seen, for instance, in the legislative chaplain case, *Marsh v. Chambers*.[27] More importantly, however, Scalia is attempting to invert the usual relationship between history and general principle in the Court's Establishment Clause jurisprudence.

Scalia's use of historical materials to interpret the Clause must be understood in light of his constitutionalism. Scalia sees the Establishment Clause as a time-bound limit on governmental power and majoritarian change. Like other guarantees in the Bill of Rights, the Clause "prevents the law from reflecting certain changes in original values" and is "designed to restrain

transient majorities from impairing long-recognized personal liberties." Historical materials, in the form of a persistent tradition of official actions, projects the contours of those constitutional limitations across time. An "open, widespread, and unchallenged" legal tradition serves to "validate" or "clarify" the common, public understanding of what limits the Clause was supposed to place on government and ensuing majorities.[28] History thus becomes a kind of running commentary on original understanding.

On this view, historical materials in the form of legal traditions are more likely to say what governmental actions the Establishment Clause was *not* intended to restrain. Why? Tradition, for Scalia, concretely reflects society's on-going resolution of "the basic policy decisions governing society," revealing the "accepted political norms" that lie *outside* the Constitution's areas of exclusion. Consequently, persistent legal traditions will sketch areas of policy-making freedom, untouched by the prohibitions of the Clause. By the same token, tradition tends to cabin judicial power. Scalia says that long-standing traditions "are themselves the stuff out of which the Court's principles are to be formed," and "the very points of reference by which the legitimacy or illegitimacy of other practices is to be figured out."[29]

What hermeneutic of history emerges from Scalia's traditionalism? First, history helps Scalia sketch the central purpose of the Establishment Clause. The Clause is, at its most basic, intended to identify two mutually-exclusive forms of government "religious" actions. The constitutionally off-limits area contains actions that history instructs us were commonly understood at the framing to be beyond governmental power. These are the easy cases: if the United States founded an entity called the "Church of the United States" or if it made the *1928 Book of Common Prayer* normative in all Episcopalian Churches, history would clearly teach that such actions were placed beyond the pale by the Establishment Clause. In *McCreary*, Scalia himself affirmed that if the government promulgated an "official" version of the Ten Commandments, such an action would easily fall within the anti-establishment prohibition.[30] But the flip-side of the "constitutionally off-limits" area is the area of political prudence. Government religious action is plainly constitutional where historical materials show unambiguously that "government conduct that is claimed to violate the [Establishment Clause] … [was] engaged in without objection at the very time the [Clause] … was adopted."[31] In these easy cases, a public consensus on founding-era practices is virtually conclusive evidence for Scalia on the common, public understanding of the reach of the Clause — either placing a practice firmly in the forbidden area or in the political prudence area.

Scalia, of course, recognizes that hard cases will often arise where historical materials do not speak to a contested practice — either because the record is thin or inconclusive, or because the practice itself was unheard of. There would consequently be a zone of uncertainty between the areas of clear prohibition and clear political prudence. For Scalia, a post-adoption tradition of laws or other official actions may clarify the parameters of the Clause by helping to narrow that zone of uncertainty. As to particular governmental religious practices, the reach of the Establishment Clause may be uncertain, because of shortcomings in the original

historical materials, but post-enactment traditions may help develop the contours of the original reach of the Clause. That this is no easy task is revealed by the question Scalia would then pose about the disputed governmental action: is that action "consonant with [the original] concept of the protected freedom?"[32] As discussed later, here is where cracks begin to appear in Scalia's method, even taken on its own terms.

At this point, however, we can draw some broad comparisons between the Court's typical approach to history and Scalia's approach. Most generally, for the Court, the Establishment Clause itself is a source of general abstract norms that superintend historical traditions. Even longstanding public traditions fall under the sway of such norms, which give the Court a broad revisionary authority when scrutinizing the present manifestations of those traditions. Scalia's approach is diametrically opposed. For Scalia, it is persistent, public traditions themselves that clarify the contours of the Establishment Clause. Provided those traditions are sufficiently indicative of a relatively uncontested public understanding of a particular practice's permissibility, those traditions amplify across time what the Clause originally permits and prohibits to majorities.

On a more specific level, the Court tends to draw abstract norms from historical materials, norms that are relatively detached from the historical circumstances from which they emerge. The paradigm example is "neutrality." Having drawn that norm from controversies such as the Virginia Assessment Act, the Court has not limited the contours of "neutrality" to the historical dynamics surrounding the controversy. In other words, the Court's "neutrality" is not necessarily Madison's or Jefferson's, nor is it a public understanding of "neutrality" circa 1787. Instead, "neutrality" becomes a relatively free-floating principle to be elaborated by the Justices themselves according to their own notions of how the concept ought to apply in modern situations. Much the same could be said for the Court's notion of what counts as "secular."

Scalia's derivation of norms from historical materials appears to be less abstract and more wedded to the particular milieu out of which the norm arose. The overarching point of Scalia's *McCreary* dissent, for example, was to contest the one-size-fits-all application of a "neutrality" principle to an issue on which historical traditions appeared to paint a starkly different picture. As Scalia controversially argued, neutrality may well be a sensible principle in the area of funding religious institutions, but that does not necessarily mean it works for government religious symbolism. Scalia does not explain the basis for that distinction, but as I have argued elsewhere, the basis that immediately comes to mind is the idea that historical traditions outline different contours for the Establishment Clause when it comes to funding, as opposed to symbolism.[33] Much the same can be said for Scalia's treatment of a broad norm like "secular purpose." The kind and degree of secularity that the Establishment Clause imposes on the government depends for Scalia on the particular practice at issue — and the matrix of legal traditions underpinning it — rather than on what *a priori* definition of "secular" or "religious" should be derived from the Clause.

Finally, it should be said that the Court's typical use of history has led it to make rather

broad conceptual distinctions in its Establishment Clause jurisprudence, for example, "religious" purpose versus "secular purpose"; "endorsement" of religion versus "acknowledgment" or "accommodation" of religion. On this basis, the Court has crafted a Clause that often forces Justices to theorize about the possible motivations or effects of a law and how those fall on a conceptual spectrum with "religious" at one end and "secular" on the other. By contrast, the Clause Scalia discerns from historical materials, appears more concerned with the relationships between government and religion as institutions. Thus, Scalia is not interested in asking to what degree the Ten Commandments displays are motivated by "secular" or "religious" purposes, or whether they send messages of "endorsement." On the other hand, he admits that if the government legally promulgated an "official" numbering or interpretation of the Commandments themselves, then the anti-establishment prohibition would be triggered.

Scalia's use of history would produce an Establishment Clause strikingly different from the mainstream Clause — both in overall purpose and particular results — and so it is worth asking what would be the pros and cons of Scalia's approach to Clause history. One benefit of Scalia's approach is that it rejects a one-size-fits-all Clause. The subject of "religion and public life" in this country assumes so bewildering an array of forms that it seems sensible to posit a Clause that adapts to different situations. "Neutrality," as Scalia points out, may work in some areas and fail in others. Yet, on the other hand, would Scalia's flexible Clause produce an even messier jurisprudence than the Court's already convoluted one? Would it be intolerably unpredictable and, more importantly, inherently malleable? For instance, in the Ten Commandments cases, Scalia and Souter adopted starkly different understandings of what symbolic content the displays had. Were the displays generalized affirmations of the importance of religion to American legal traditions or rather were they official state encouragement to follow the Commandments (or to become a Christian or a Jew?)? Such diverging perceptions will surely influence how one uses history to determine what the Establishment Clause says about such a display. If Scalia's historical method is susceptible to that kind of manipulation, it may be no better than the "non-endorsement" test, or Justice Breyer's "no test-related substitute for legal judgment" test.

Another plus to Scalia's approach is that it would explicitly avoid the "founder intention" problem that has plagued so much Establishment Clause jurisprudence. Too often, disputes in the case law have seemed to turn *whose* intention or church-state philosophy served the deeper policy goals of a particular opinion. Thus, James Madison (or at least Madison the 1785 Virginia Legislator) is recruited to underwrite a separationist ideology that, if openly pressed in 1791 at the federal level, would have torpedoed the Establishment Clause itself. In *McCreary,* Scalia disclaims any reliance on private opinions or private writings, but would instead mine historical materials only for commonly-held public understandings of the Clause's content. This presumably meets the objection raised by Souter and Stevens that over-reliance on history raises the problem of "what religion?" or "which God?" was secretly privileged by the founding generation. Scalia's method is not interested in the problem, because it is not in-

terested in secret intentions.

But by restricting his historical palette to public understandings, has Scalia thinned the historical record too much? If it is difficult to come up with *the* Madisonian intention about the constitutionality of legislative chaplains, imagine how daunting it would be to piece together a compelling account of the overall public understanding of that issue. Such an understanding, if it existed, may not be discernible from any existing public record of the time. At best, the process might lead to all manner of tenuous inferences, particularly in borderline cases. So, again, does Scalia's method actually promise to relieve us from the kinds of flighty extrapolations the endorsement test forces upon the Justices?

Whatever the balance of costs and benefits, there is a deeper problem with Scalia's historical method. Scalia's key move is to say that post-adoption tradition provides an extended gloss on the Clause's original meaning. But, as Scalia would recognize, tradition cannot simply construct a free-floating "meaning" for the Establishment Clause, building up gradually like a pearl in an oyster shell. Tradition, even as Scalia understands it, is too unwieldy: it must be channeled by some legal standard laid down by the terms of the constitutional provision. The Establishment Clause cannot plausibly function as an empty vessel for tradition as, for instance, "due process" does in Scalia's jurisprudence, in which longstanding public legal traditions are *by definition* the baseline for "due process of law." The Establishment Clause must have a more concrete referent than simply the "law of the land regarding religious matters." While the Clause is not likely to have as much "counter-traditional" content as Scalia's Equal Protection Clause, it must have some degree of concrete, textual specificity.

For Scalia, constitutional provisions are super-majoritarian instruments for placing something beyond the reach of ensuing "transient majorities." But *what* does the Establishment Clause place beyond majoritarian reach: certain kinds of "long-recognized personal liberties"; a particular historical class of church-state relationships; certain prohibited intersections between government and "religion"? On its own terms, Scalia's method requires an answer to these questions, because otherwise tradition has nothing solid with which to interact. So, what is really missing from Scalia's use of history to interpret the Establishment Clause? Perhaps it is an adequate account of the textual meaning of the Clause itself. This comes as no small irony for Scalia the arch-textualist.

An example will show this more clearly. Suppose the State of Mississippi decides to adopt as a motto, "In Jesus We Trust"? Would Scalia's historical method avoid the problems of other approaches? Would it give us a firmer ground on which to say Mississippi is *constitutionally* forbidden from adopting this motto? Presumably a majority of the Court today would apply some form of the endorsement test and conclude, unsurprisingly, that the motto impermissibly endorsed Christianity and alienated non-Christians. Of course, in doing so the majority would have to face the usual pitfalls of the non-endorsement analysis. It would, for instance, have to explain[34] why our national motto, "In God We Trust," does not just as unequivocally endorse monotheism and alienate atheists, Buddhists, and Hindus. It would have to explain why a

motto, which people could blithely ignore, was more of a religious alienation of non-believers than prayers said by paid legislative chaplains before every legislative session. It might also offer to explain how a secular Court can make such distinctions without essentially deciding theological questions and violating the Court's own doctrine forbidding governmental entities from making religious decisions. Would Scalia's legal traditionalism promise a cleaner solution to this problem?

The answer depends on the very thing that Scalia has not sufficiently elaborated: that is, what is the textual referent of the Establishment Clause prohibition? If the Establishment Clause merely forbids a certain kind or degree of "government religiosity," then Scalia would have to deploy historical traditions to figure out *what* kind and *what* degree. In other words, Scalia would have to ask whether "In Jesus We Trust" was in the same sort of symbolic ballpark as other religious manifestations our governments have typically made. This could easily lead to the sort of outcome that Scalia's critics have vociferously accused him of *wanting* to reach — namely, a constitutional privileging of a sort of generalized "monotheism." Or perhaps Scalia's parsing of historical traditions would only set a baseline of permissible government symbolism, theoretically permitting "In Jesus We Trust" or "In Zeus We Trust." As I have argued elsewhere, I think that is a far more plausible reading of how Scalia is deploying tradition in these cases.

But that would still not answer the question of the constitutionality of the motto. According to Scalia's own method, he would then have to ask whether Mississippi's use of the disputed motto were "consonant with the [original] concept" of the "freedom" protected by the Establishment Clause. Not an easy question, to say the least, and particularly if you have not decided ahead-of-time what manner of "freedom" is supposed to be protected by the Clause. This is to say, simply, that Scalia's method needs an adequate account of what the *text* of the Establishment Clause is doing. Without it, he will likely end up having to say why "In Jesus We Trust" *is* or *is not* constitutionally similar to "In God We Trust" or "God save this honorable Court." In other words, without a textual anchor, Scalia's method may well force him to make *theological* determinations that no judge ought to make, that he himself would say judges have no competence to make, and that the Establishment Clause itself probably forbids judges from making.

In the next section, we will return to the "In Jesus We Trust" problem and see if Scalia's method, supplemented with some textual help, might after all reach a reliable constitutional outcome. But for the time being, it is worth noticing that Scalia has apparently been unwilling to embrace another possible solution to Establishment Clause meaning that would solve the motto problem. That is the jurisdictional/federalism understanding of the Clause, elaborated by scholars such as Steven D. Smith and adopted in some form by Justice Thomas.[35] This view *does* confront the problem of textual Clause meaning and gives a controversial answer: what the Clause originally placed beyond the reach of "transient *federal* majorities" was the entire subject-matter of *state* religious establishments. That would cleanly solve our motto

problem. The Establishment Clause is agnostic about the motto: if you like it, Mississippi, go with it! Something tells me, however, that many people would feel unsatisfied with this solution. Not to mention the fact that the jurisdictional thesis needs to explain in what way the Establishment Clause *also* restrains the actions of the federal government itself. And then there's the delicate problem of incorporating such a provision against the States. But that goes well beyond the scope of this paper. It is enough to note here that Scalia has thus far shown no enthusiasm about embracing a purely jurisdictional account of the Clause's textual meaning.

So, does Scalia's historical method simply fail to deliver on its promise, or can it be helped? Is there a way of specifying the textual range of the Establishment Clause so that Scalia's use of legal traditions can be more reliable and less manipulable? More broadly, can we find an Establishment Clause that, together with the disciplined use of historical materials, will allow judges to reach reliable, predictable legal outcomes based on objective non-theological principles? Or are we stuck with a Clause, smack at the head of the Bill of Rights, that inevitably leads to a jurisprudential Babel, constructed from the clashing of individual Justices' hunches, guesses, predictions, and religious worldviews?

III. Tightening the Circle

The Babel just alluded to rises on the following questionable, but almost never questioned, foundation: that the Establishment Clause is a source of judicial solutions to all "religion and government problems." Imagine a vast sphere, representing the length and breadth and height of all those problems in our dizzyingly pluralistic American society. Then comes the Clause, dividing light from darkness in that sphere, creating the firmament, segregating land from sea. "It shall be secular." "It shall be neutral." This must be the intuitive view of the Clause taken by Justices when they warn that departing from the Court's jurisprudence will transform middle America into Northern Ireland, Mississippi into Beirut.[36]

But surely this is not the only view one can take. Can we instead read the Clause as operating within our vast void, not to catalogue and categorize every problem, but rather to specify a narrower field of "religion and government" problems? Call them "religious establishment problems," and understand the word "establishment" as so many other well-chosen words in our famously reticent Constitution — as a legal term of art, clothed with all the historical and conceptual finery of such terms.[37] The field of religion-and-government problems specified by the Clause would begin from those history teaches were present to the minds of the framing generation as being susceptible of legal resolution.

The power the Clause denies to government would thus be akin to a clause forbidding government from entering into an definable legal arena (such as coining money or issuing "Letters of Marque and Reprisal"), or to one inviting government to occupy an arena (such as the power to construct a uniform rule of bankruptcy, or to rule on admiralty and maritime matters).[38] If we could understand the "anti-establishment" prohibition of the First Amendment as withdrawing governments from such matters, then perhaps that one gesture might strip the Establishment Clause of its most unappealing adornment — its tendency to invite

flights of cultural, sociological, and theological fancy. Instead, Justices could concentrate on the idea of an establishment of religion as a legal and not a cultural construct — as a demarcation of institutional human relationships, and not as a *Maginot Line* between clashing concepts or theologies or states of mind. This would tighten the circle of the Clause's prohibitions from cultural, sociological, and theological matters to *legal* matters. If possible, perhaps the most immediate benefit of doing this would be to discipline the way historical materials are used to interpret the Clause. Restricting the target, the "object,"[39] of the Clause to concretely identifiable relationships between institutional government and institutional religion would give interpreters a matrix within which to process history.

For instance, in trying to solve the modern riddle of government religious symbolism, no longer would we be forced to speculate endlessly and pointlessly about the kind and degree of theological content, or lack thereof, in George Washington's Farewell Address or in the motto "In God We Trust." Instead, we would ask whether the use of such religious language presented to the generation that framed the First Amendment a species of relationship between state and church — between the *real* institutions of government and religion — that they sought to outlaw by ratifying the Amendment. Such evidence in American history appears to be sparse, which is why even separationist scholars commonly observe that government religious language or symbolism would have been thought by the founding generation to present no constitutional issues, as opposed to issues of political prudence. This historical datum ought to have significance about the reach of the Establishment Clause. It ought to mean that the Clause simply does not speak to the issue of government religious speech and symbolism — not because of some particular kind of theological content or message in the symbols, but because the symbols typically do not betray the presence of any form of historically prohibited institutional relationship between church and state.

Consider how this simplifies the "In Jesus We Trust" problem from the previous section. For both the Court majority and for Scalia, the solution to that problem comes down to analyzing the theological-symbolical content of the motto in light of some broader principle — for the majority, the motto's "endorsement" value, and for Scalia, its theological fit with our legal traditions. Thus, in a way, Scalia and the majority are both analyzing, inappropriately, the theological content of the motto, albeit at different levels of abstraction. But if the Establishment Clause is not concerned about semiotics or theology, but instead about concrete, legally-discernible institutional relationships, the problem becomes soluble by conventional legal standards. Now we can ask whether the motto betrays some kind of forbidden institutional relationship between the state and an actual religious institution. There are historical antecedents for such an inquiry. For instance, during the Elizabethan phase of the English Reformation, the government legally mandated certain changes in public religious symbolism — for instance, replacing images of the Blessed Virgin Mary with images of Elizabeth — in order to cement the increasingly stringent Anglican establishment. Or, again, in the late Fourth Century A.D. the Roman emperor Gratian very publicly renounced his traditional title

"Pontifex Maximus" and transferred it to the Pope, demonstrating a withdrawal of the Roman state from religious governance.[40] In these cases, the government's deployment of religious symbolism was in the service of strengthening (or dismantling) a concrete legal relationship between state and church. Such examples at least furnish a starting point for thinking about how "In Jesus We Trust" might function in a genuine religious establishment, and would therefore be prohibited by the Establishment Clause. Of course, this also means that if the motto is pure window-dressing then its deployment might be insensitive or blasphemous, but not constitutionally forbidden. More importantly, however, the analysis of the constitutionality of the motto does not turn on spurious distinctions between the "sectarian" motto and the "monotheistic" motto, or between the "endorsing" motto and the merely "solemnizing" one. It cannot be said too many times that, even were inquiries of that nature coherent (which is doubtful), judges are not equipped to make them.

But at this point, it will be objected, what we have is mere intuition. Granted, the prohibitory circle of the Establishment Clause must be tightened from cultural-theological constructs to institutional-legal constructs. Granted, this would have the likely effect of disciplining Justices' use of history in solving anti-establishment problems by channeling historical materials into a concrete legal matrix. Granted, the resulting anti-establishment jurisprudence would probably be more consistent and coherent because it would now be keyed to concrete institutional relationships — and judges are better equipped to analyze such things as opposed to semiotics and theology. But, even granted all that, how can the proposed "legal-institutional" recasting of the Establishment Clause be justified or defended? Is it a pure preference, foisted on the Clause by those (like me) who are dissatisfied with the Court's jurisprudence and who want to find a way to discipline and regularize it?

The obvious place to begin is with the text of the Clause. Any account of the Clause as keyed to institutional legal relationships — and not to cultural-theological concepts — ought to tie itself to the words. Both Court and scholars have appeared to shy away from the words of the Clause, particularly the key phrase "establishment" of religion.[41] Indeed, it is possible that in the Court's jurisprudence the word "respecting" functionally determines the reach of the Clause more than what must obviously be the central focus of the Clause — "an establishment of religion." That is, by interpreting "respecting" to mean something like "leading up to" or "tending towards" establishing religion, it is as if interpreters have absolved themselves from doing the hard work of defining what the term of art "establishment of religion" actually means as a legal concept. After all, if the phrase "respecting an establishment of religion" simply means, at the end of the day, "somewhere within shouting distance of a religious establishment," then we are excused from having to be too precise about what the Clause actually prohibits. A convincing jurisprudence of the Establishment Clause cannot rest on such verbal laziness.

Looking at the words of the Clause with fresh eyes, isn't it plain, isn't it *obvious*, that the term "establishment of religion" is a legal term of art, just as much phrases in other parts of

the Constitution such as "Letter of Marque and Reprisal" or "Bill of Attainder" or "Corruption of Blood"? This certainly doesn't make "establishment of religion" easy to define, but it would discernibly change the whole approach to specification of what is prohibited. It would change it from a mystical to a legal inquiry. It would dispense with the historically implausible assumption that "establishment of religion" *really* just means "bad religious characteristics in a secular government"? Nor would this approach mean that the concept of "establishment of religion" is somehow frozen in time. Leading scholars have asked whether the concept of "establishment" or "separation of church and state" could somehow evolve over time, or indeed be transformed by the Fourteenth Amendment.[42] But the premise of such scholarship is that the original concept of an "establishment of religion" must have a fairly concrete, definable legal architecture. Otherwise, how could anyone — not to mention a judge — even begin to chart how the concept would change over time, or be transformed from what into what. It would be as if the evolutionist were trying to account for the development of *homo sapiens* with no fossil record at all.

Conclusion

Thus the re-imagination of the anti-establishment prohibition does not promise easy answers, but it does furnish a starting point in relatively definite legal categories. Foundational assumptions for a jurisprudence as volatile as the Establishment Clause are — to say something utterly banal — critical. We should not be content to start building on generalities such as "neutrality" and "non-endorsement," because we will keep circling the problem, endlessly restating it in terms of vague principles that do not promise objective solutions. "Does the religious symbol unconstitutionally endorse religion to the reasonable observer by sending the message that he is a second-class citizen and political outsider, or does the religious symbol merely acknowledge citizens' religious convictions?" Who knows? Merely posing such questions fatigues the mind and heart.

Are there scholarly foundations already being laid for such a re-thinking of the Establishment Clause? I think so. Michael McConnell's magisterial taxonomy of founding-era establishments in the first part of his *Establishment and Disestablishment at the Founding* is a good example.[43] McConnell tackles the problem of religious establishments as if they were composed of a discernible, definable matrix of legal characteristics such as the following: government control over church doctrine and structure; mandatory church attendance and prohibitions on non-official forms of worship; certain forms of public financial support, and so on. McConnell's stated intention in that article is not to revolutionize the jurisprudence, but instead to call it back to a kind of historical realism.[44] In my view, this is only way forward in Establishment Clause jurisprudence. Our three-part tests have become untethered from the historical milieu in which the anti-establishment prohibition was generated, and are flailing in mid-air. It is no response to say, "That is as it should be. The constitutional guarantees are supposed to evolve." It is no response because, if the jurisprudence lacks roots in historical reality to begin with, the evolution of the jurisprudence is unreliable and directionless, virtu-

ally by definition. We need to revolutionize Establishment Clause jurisprudence by reading the Clause in a revolutionary way — as a legal prohibition, and not as a theological manifesto. Otherwise, interpreting the Clause will continue to lead us toward such sentiments as the Psalmist felt when pondering the omniscience of God: *Such knowledge is too wonderful for me; It is high, I cannot attain to it.*[45]

* Kyle Duncan is Assistant Professor of Law at the University of Mississippi School of Law.

[1] *Wallace v. Jaffree*, 472 U.S. 38, 113 (1985) (Rehnquist, C.J., dissenting).

[2] *See, e.g., Symposium: The (Re)Turn to History in Religion Clause Law and Scholarship*, 81 Notre Dame L. Rev. 1697-1843 (2006) (featuring articles by Steven K. Green, Marci A. Hamilton & Rachel Steamer, Douglas Laycock, and Steven D. Smith).

[3] *McCreary County v. ACLU*, 545 U.S. 844 (2005); *Van Orden v. Perry*, 545 U.S. 677 (2005).

[4] *See, e.g.*, Thomas B. Colby, *A Constitutional Hierarchy of Religions? Justice Scalia, the Ten Commandments, and the Future of the Establishment Clause*, 100 Nw. U. L. Rev. 1097 (2006).

[5] *See* Kyle Duncan, *Bringing Scalia's Decalogue Dissent Down From the Mountain*, 2007 Utah L. Rev. 287 (2007).

[6] I will sketch out what sort of frame I believe is suggested by the text of the Clause in Part III, *infra*.

[7] *See, e.g., Van Orden*, 545 U.S. at 683 (observing that the Court's "cases, Janus like, point in two directions in applying the Establishment Clause").

[8] *Everson v. Board of Educ.*, 330 U.S. 1, 11(1947); *see also Engel v. Vitale*, 370 U.S. 421, 428-29 (1962) (reading same historical motivations for Establishment Clause).

[9] *See, e.g., Everson*, 330 U.S. at 14 (observing that, after ratification of the First Amendment, "some states persisted for about half a century in imposing restraints upon the free exercise of religion and in discriminating against particular religious groups"); *see also* Anson Phelps Stokes & Leo Pfeffer, Church and State in the United States 64-82 (1964) (discussing establishments in states before and after First Amendment).

[10] Gerard Bradley, Church-State Relationships in America 80 (1987).

[11] *See*, *Everson*, 330 U.S. at 11-13.

[12] *See, e.g., Flast v. Cohen*, 392 U.S. 83, 103-04 (1968) (constructing unique taxpayer standing doctrine for Establishment Clause cases based on Madison's "three pence" argument in his *Memorial and Remonstrance*); *see also Hein v. Freedom From Religion Foundation, Inc.*, 127 S. Ct. 2553, 2583 (2007) (Scalia, J., concurring) (disputing reliance on Madison's *Memorial* for Establishment Clause interpretation).

[13] *See*, John Courtney Murray, *Law or Prepossessions?*, in Essays in Constitutional Law (Robert G. McCloskey ed., 1957).

[14] *See, e.g.,* Bradley Church-State Relationships, *supra*, at 87-88 (arguing that "Madison's personal philosophy ... has nothing to do with the meaning of the Establishment Clause").

[15] *See*, *id* at 88 (asserting that "'[n]oncontroversial' understates the banality of the liberties championed by Madison").

[16] Murray, *Law or Prepossessions*, supra.

[17] *See*, 5 Founders' Constitution 105-06 (Philip B. Kurland & Ralph Lerner, eds. 1987).

[18] *See, e.g., Van Orden*, 545 U.S. at 724-25 (Stevens, J., dissenting) (citing Madison's 1822 letter).

[19] *See, e.g., McCreary County*, 545 U.S. at 880 (citing Story's *Commentaries* as primary support for proposition that "the religion of concern to the Framers was not that of the monotheistic faiths generally, but Christianity in particular, a fact that no Member of this Court takes as a premise for construing the Religion Clauses"); *Wallace*, 472 U.S. at 52 (citing Story's *Commentaries* to support proposition that the Religion Clauses "merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism").

[20] Joseph Story, Commentaries on the Constitution of the United States §991 (Ronald D. Rotunda & John E. Nowak, eds. 1987).

[21] Story Commentaries §992.

[22] *Id.*

[23] *Id.* at §990.

[24] Former Chief Justice Rehnquist's *Van Orden* plurality presents the usual counterpoint to the mainstream approach to history. That approach is not new, but I will discuss it insofar as Justice Scalia's approach attempts to refine it.

[25] *See, e.g., McCreary County*, 125 S. Ct. at 2742-43.

[26] *See, e.g., County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter,* 492 U.S. 573 (1989).

[27] 463 U.S. 783 (1983).

[28] *See* generally Antonin Scalia, A Matter of Interpretation 38-40 (1997); *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 95-96 (Scalia, J., dissenting).

[29] *See Rutan*, 497 U.S. at 95-96 (Scalia, J., dissenting).

[30] *See McCreary County*, 545 U.S. at 894 n.4 (Scalia, J., dissenting).
[31] *Id.*
[32] *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 375 (1995) (Scalia, J., dissenting).
[33] *See* Duncan, *supra* note 5, at 322-23.
[34] Or better yet, it *should* have to explain such things. What it would actually do, of course, is ignore the problem altogether or fall back on empty explanations such as "the motto has become a ceremonial deism."
[35] *See, e.g.,* Steven D. Smith, Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom 17-34 (1995); *Zelman v. Simmons-Harris*, 536 U.S. 639, 677-680 (2002) (Thomas, J., concurring).
[36] *See, e.g., McCreary County*, 545 U.S. at 882 (O'Connor, J., concurring) (observing that "[a]t a time when we see around the world the violent consequences of the assumption of religious authority by government, Americans may count themselves fortunate: Our regard for constitutional boundaries has protected us from similar travails, while allowing private religious exercise to flourish"); *Zelman*, 536 U.S. at 685-86 (Stevens, J., dissenting) (admitting that his views regarding the constitutionality of school voucher programs "have been influenced by my understanding of the impact of religious strife on the decisions of our forbears to migrate to this continent, and on the decisions of neighbors in the Balkans, Northern Ireland, and the Middle East to mistrust one another").
[37] *See, e.g., Calder v. Bull*, 3 U.S. 386, 390 (1798) (op. of Chase, J.) (explaining the technical legal meaning of the constitutional term "*ex post facto* law").
[38] See*, e.g.,* U.S. Constitution arts. I §9 (denying States power to "grant Letters of Marque and Reprisal" and "coin Money"); I §8 (granting Congress power to "establish … uniform Laws on the subject of Bankruptcy throughout the United States"); III §2 (granting federal jurisdiction over "all Cases of admiralty and maritime Jurisdiction").
[39] *See, e.g., M'Culloch v. Maryland*, 17 U.S. 316, 423 (1819) (recognizing power to invalidate congressional laws "should congress, under the pretext of executing its powers, pass laws for the accomplishment of *objects* not intrusted to the government") (emphasis added).
[40] *See* Hugo Rahner, Church and State in Early Christianity 70 (1961).
[41] *See, e.g., McCreary County*, 545 U.S. at 874-75 ("The First Amendment contains no textual definition of 'establishment,' and the term is certainly not self-defining. No one contends that the prohibition of establishment stops at a designation of a national (or with Fourteenth Amendment incorporation […] a state) church, but nothing in the text says just how much more it covers.").
[42] *See, e.g.,* Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 Ariz. St. L. J. 1085 (1995); Kent Greenawalt, *History As Ideology: Philip Hamburger's* Separation of Church and State*,* 93 Cal. L. Rev. 367 (2005).
[43] Michael W. McConnell, *Establishment & Disestablishment at the Founding, Part I: Establishment of Religion*, 44 Wm. & Mary L. Rev. 2105 (2003).
[44] *Id.* at 2205-08.
[45] Psalm 139:6 (RSV).

HEMLOCK AND THE FIRST AMENDMENT

TRACING RELIGIOUS FREEDOM FROM THE TRIAL OF SOCRATES TO THE U.S. CONSTITUTION

BY ZACHARY FOREMAN*

Socrates was tried and executed by the democratic citizens of Athens on charges of impiety and corruption of youth in 399 B.C. Why has this trial captured the imagination of so many for so many centuries? What lessons were learned, and can be learned, about religious freedom from the story of the first democracy's executing the first philosopher?

First, I shall summarize the trial of Socrates, highlighting its religious aspect. Then, I shall briefly trace the legacy of democracy to the founding of America and discuss how the Framers learned from the mistakes of Athens. I will also focus on the important place they had for religion in their plans for a new nation. Finally, I will contrast the situation at present with the intentions of the Founders, and examine what implications both the trial at Athens and the convention in Philadelphia have on the debate on religious freedom today, focusing a great deal of attention on the scourge of relativism and the loss of a sense of the necessity for public virtue.

The trial and death of Socrates highlights the inevitable tension between the "one and the many," the one as truth and the many opinions of the *demos*. How can truth have the same weight as falsehood? Benedict, when he was still Cardinal Ratzinger, rhetorically asked whether truth is determined by majority vote. What happens when the authority of the majority is contradicted by a true *philosoph*?

The Trial of Socrates

Athens was the world's first democracy, a democracy in the purest sense, not representative but direct. Athenian democrats treasured two things above all: *isegoria*, equal opportunity to speak, and *parrhesia*, freedom of speech. Athenians were fiercely proud of their unique tradition of liberty and equality. It is in this context that we must consider the trial of Socrates.

Socrates was the first person in recorded Athenian history to be executed for impiety and corrupting the youth. To the citizens of Athens, he threatened the health of the state because he was impious and he was impious because he threatened the health of the state. Athenian leaders, as did all Greeks of the time, believed that not recognizing the gods of the city could imperil the city. Among the possible dangers was leading others to question the acts of the gods; this threatened the authority of the city.

In fourth century Athens, there was a resolution in the form of a particular democratic construct. A private citizen would bring a charge against another and a public official (in the case of Socrates, the King Archon, because it was a religious matter) would decide if it was a true breach of law. Then the accuser and defendant would appear before a jury of citizens, chosen by lot. This number, usually between 200 and 1000, was so large that it would be difficult to bribe them. Little is known about his primary accuser, Meletus, who charged Socrates with

impiety. His position as accuser is recorded in the following: "This indictment and affidavit is sworn by Meletus … against Socrates: Socrates is guilty of refusing to recognize the gods recognized by the state, and of introducing other new deities. He is also guilty of corrupting the youth. The penalty demanded is death."[1]

Socrates himself, in responding to the charges, summed them up in his defense, "Socrates does wrong because he corrupts the youth and doesn't believe in the gods that the city believes in, but believes in other new divinities."[2] The charge did not specify particular youths Socrates is alleged to have corrupted or any specific event or subject matter. This was likely because no one could be charged for crimes committed before 403 B.C., when a general amnesty was proclaimed, in order to end the cycle of civic strife between democrats and oligarchs in Athens.[3] Since specific acts could not be addressed, the only attack (and defense) could be the overall character and behavior of Socrates himself. It was not his deeds, but his disposition that was on trial.

> Although politics undoubtedly played a role in the indictment of Socrates, the prosecution may have determined that because, under the terms of the amnesty, Socrates could only be charged with crimes allegedly committed during the period from 403-399 B.C., they had a better chance of succeeding with the more vague charge of impiety, expecting that the prejudiced and superstitious minds of many jurors would supply the precision that the written indictment lacked.[4]

To further complicate matters, sophists were suspected of corrupting the youth who later were involved in the oligarchic rebellion of 411 B.C. and the rule of the Thirty. As alluded to in *The Clouds* of Aristophanes, Socrates had to defend himself against charges that he himself was a sophist. In addition, he was linked to some key figures involved in the oligarchic coup against the democrats during the war.

There was no separation of church and state, of the religious and secular spheres, in Athens, or, in fact, anywhere in the ancient world. Thus the relationship between religious freedom and political freedom was quite different from what it is today.

> A distinction between gods and state would have been inconceivable in either Athens or Rome in the classical period …. Whereas in modern times religious toleration is a necessary precondition for political liberty, S.L. Guterman suggests that in the ancient world political freedom was the parent of religious liberty. When the Romans persecuted or repressed a religious group, it was for essentially political reasons, whereas medieval opposition to dissenting groups was explicitly religious.[5]

Denying the authority or existence of the gods, meant defying the authority of the polis. However, while the accusers may have had political reasons for indicting Socrates, the religious reasons were no mere pretext. The jurors, as well as Socrates and Plato, took the impiety charge itself quite seriously. "The ancient Greeks understood piety (*eusebeia*) principally as reverence or respect for the gods and the religious rituals of the polis … Piety encompassed all virtuous action, and impiety (*asebeia*) was regarded as a threat to the foundations of civic life…. The legal penalty for impiety was usually death or exile"[6]

Greek religion was more one of orthopraxis than orthodoxy, that is, it placed more emphasis on ritual observances than belief. "Nevertheless, while it is no doubt true that impiety was primarily a matter of behavior, an offense against established religious customs or rituals, it also included unorthodox beliefs about the gods and atheism … the impiety charge in Socrates' indictment probably referred not to some failure to conform to religious ritual but rather to unorthodox beliefs."[7] More precisely, Socrates was indicted for his words rather than his deeds.

The trial defense was in three parts: the first a defense against the charges; the second was a proposal of a just penalty; and finally concluding remarks after Socrates was sentenced to death. Socrates was factually guilty of the charges and didn't try to deny them, however, his defense became an attack on the authority of the city to try him. These are his words: "I shall obey God rather than you, and while I have life and strength I shall never cease from the practice and teaching of philosophy."[8] Socrates, in that proclamation, saying that he had no choice but to follow his conscience (or *daimonion*), placed himself firmly against the state.

Most outrageously, Socrates says that Athens is the one really on trial; Socrates is hoping to save the city from sinning by killing him. He forced the jurors to choose between Socrates and Athens. Socrates himself was surprised that the vote (280-220) was so close. Moreover, as just penalty, he asked for one of the city's highest honors, to receive free meals for life at the *Prytaneum*, usually given to Olympic athletes or war heroes. Socrates would rather die than give up philosophy.

> The trial of Socrates was a trial of philosophy. He died as a result of a tragic conflict between himself and Athens, each committed to antithetical principles. While the Athenians permitted him to conduct his philosophic life for years, in 399 B.C. Socrates compelled them to choose between philosophy, with its radical questioning and uncompromising ethical principles, and the prevailing politics of the city. Essentially, the conflict was between the good man and the good citizen…. For Socrates to be a "good citizen" he would have had to surrender his moral autonomy to popular notions of justice and goodness. [9]

Socrates, in a sense, forced them to execute him. He refused to play the political game of rhetoric and compromise. Although he was a famous citizen, a war hero and husband and father of three, he refused to defend himself by using these facts to gain sympathy. Every attempt at compromise was met with counter-proposals bordering on the absurd. Rather than admit impiety, he said that he was following a divine command. Rather than admit that he was a corruptor of youth, he admitted that he was the only educator of youth in Athens. Rather than offering to pay a fine, he offered to be supported by the state as a hero. Finally, he even said that if he were fined, he would continue his work, and if exiled, he would simply continue his work in another city. Socrates presents Athens with a dilemma:

> To kill Socrates meant that the Athenians, who prided themselves on their value of free speech, could not bear criticism. They could not tolerate the idea that all beliefs should be open to question. To acquit Socrates would bestow legal sanction upon his mission, permitting the gadfly to persist in his critical activities.[10]

Still, Socrates cannot be seen as an advocate of religious freedom in the modern sense

(though one could argue that he was the first practitioner of civil disobedience). Paul Rahe underscores the difference between the Athenian constitution of the fourth century B.C. and the American constitution of the twenty-first century.

> No one — not even Socrates — ever dared to suggest that a man's religious beliefs and behavior were of no concern to the body politic, and no one argued that the city should concede full sexual freedom to all consenting adults. Not even in an emanation from its penumbra can one discern in the constitution of Athens a fundamental right to privacy. In that city, there were no effective institutional constraints on the exercise of popular will against those whose private demeanor had inspired public distrust; and to the best of our knowledge, none were ever even contemplated.[11]

Democracy on Trial

The question, however, remains: was Athens right to condemn Socrates? Was Socrates bound to obey his *daimonion*? Could both have been right? Clearly, Athens had the right and duty in principle to defend itself against its enemies. The two most influential Catholic political philosophers of the twentieth century, Jacques Maritain and John Courtney Murray, both have written about the potential necessity of the state's defending itself against a gadfly such as Socrates, against a political heretic, an enemy of democracy.

In an essay on censorship, Murray begins with the theoretical principle: "Every government has always claimed what is called police power, as an attribute of government. This power in itself is simply the principle of self-preservation and self-protection transferred to the body politic."[12] In fact, Murray sees the case of the self-defense of the polis as impinging on the central problem of social science: balancing freedom and restraint. He says,

> The issue that is central in the whole problem is the issue of social freedom. More exactly, it is the issue of striking a right balance between freedom and restraint in society. This is the most difficult problem of social science, to such an extent that all other difficulties are reducible to this one.... First, in society constraint must be for the sake of freedom.[13]

This seems paradoxical but constraining freedom in one way can and should enable freedom in another. Murray uses the example of traffic regulations, which restrain behavior because one cannot, for example, drive on the wrong side of the road. However, it enables citizens the freedom to drive to the grocery store without a high probability of being maimed. But, Murray points out, there are always unforeseen, unintended consequences, in addition to the more obvious trade-offs.

America, in comparison with most other societies in history and in the world, has decided to err on the side of freedom, rather than order, as indicated by the freedoms enshrined in the Bill of Rights. However, not all that is legal is moral; and Murray emphasizes the distinction between the two and the importance of the distinction in discussing censorship. "The law, mindful of its nature, is required to be tolerant of many evils that morality condemns."[14] Ignoring this difference can cause grave harm to society. A common observation is that as the

general level of morality in a society falls, the laws of that society multiply (and one might add, so do the lawyers, legislators, law enforcement officials, prisons, private security companies and other various personnel as well as detecting and protective technologies like CCTV, DNA analysis, etc). Since we citizens can no longer restrain ourselves by our interior virtues, we must be restrained by the state and its latest investigative and penal technologies.

Maritain, in *Man and the State*, in a section entitled, "The Political Heretics" also discusses the problem of how a free society deals with its internal enemies. "In a lay society of free men the heretic is the breaker of the 'common democratic beliefs and practices,' the one who takes a stand against freedom, or against the basic equality of men, or the dignity and rights of the human person or the moral power of law."[15]

Maritain sees flaws in the common debate on the subject. He neither absolutizes the right to free expression, but also, though he recognizes the right of a state to protect itself, is skeptical of the probability that it will succeed, since censorship and repression are likely to backfire.

> The question of freedom of expression is not a simple one…. On the one hand, it is not true that every thought as such, because of the mere fact that it was born in a human intellect, has the right to spread about the body politic. On the other hand, not only censorship and police methods, but any direct restriction of freedom of expression, though unavoidable in certain cases of necessity, are the worst ways to ensure the rights of the body politic to defend freedom and the common charter and common morality.[16]

Thus, though Maritain recognizes the rights of states to defend themselves against heretics, he sees many practical considerations against it. Primarily, that it is virtually impossible to stamp out ideas with laws and prisons (as totalitarian regimes can attest). He, therefore, sees education as the best practical means of protecting society, a similar conclusion that the Greeks came to, which is why corruption of the youth was such a serious charge (and why Plato's *Republic* devotes so much space to discussing the system of education). For Maritain, the aim of education is unity, but unity in pluralism. The democratic faith must be fostered, but in a variety of ways, tailored for each situation and community.

Even though it seems obvious that even a democracy must place its own survival as its first priority, enemies of democracy (or of Athens, and there were many of both) pointed to the execution of Socrates as the worst of hypocrisies. They sought to show that democracy either would fall into anarchy because it couldn't control those who would undermine it (even if not deliberately) or it would betray its founding principles of freedom and thus its claim to a higher morality. Democracy was accused of priding itself on freedom but not being able to tolerate criticism of democracy itself, or even allow anyone to question its principles.

The Long Legacy of Socrates

In general, the West inherited an anti-democratic view of Athens, spurred, perhaps most of all by the execution of Socrates. Thucydides, sympathetic to the broad oligarchic model, is very critical of democracy in his *History of the Peloponnesian War,* highlighting the irrational decisions of the citizens and the problems of keeping secrets or having a consistent foreign policy

during time of war. The fact that oligarchic Sparta defeated democratic Athens also served to dim the attraction to democracy (as well as the fact that Athens saw no moral problem with conquering fellow Greeks and demanding tribute).

Plato's *Republic* can be interpreted as an extended defense of Socrates, or rather, of the place of philosophy in the polis. Like Socrates, who countered the charge that philosophers were enemies of the state with the idea that in fact they were the most virtuous in the state, Plato said that only when kings were philosophers or philosophers were kings would a truly good republic exist. His republic deliberately bears little resemblance to Athens and he offers a scathing and influential examination of democracy and democratic man in book XIII of the *Republic*.

Aristotle — believing that society was best ruled by the virtuous and only those with sufficient leisure to cultivate it, that is, those who owned property should rule — was also an opponent of democracy. Plutarch, though he lived 500 years after Socrates, was the most widely consulted source concerning ancient Athens until the nineteenth century. He favored the conservative factions and was therefore not often sympathetic towards the democrats.

The next serious treatment of Athenian democracy had to wait until Machiavelli, nearly a millennia and a half later. He considered Rome and Sparta to have been far more successful than Athens, which only lasted a short time as a democracy under Solon and then again less than 100 years during the fifth century, B.C. Virtually all other Italian Renaissance thinkers, drawing on the majority opinion of the classical sources available to them, also favored the mixed governments of Sparta and Venice over the democratic regimes of Athens and Florence. Oligarchies were seen as stable and peaceful; and democracies were seen as highly unstable. Not surprisingly, the majority of French and English political thinkers of the sixteenth and seventeenth centuries were most favorable toward monarchy and least toward democracy.

Democracy in Athens; Democracy in America

Americans of the revolutionary generation, on the other hand, needed to show that their struggle was not an act of treason or radical revolution, but one of fidelity to the great western tradition and, fundamentally, of conservation. They did this by invoking the great names of the past, especially those great republicans.

> For Americans the mid-eighteenth century was truly a neo-classical age — the high point of their classical period. At one time or another almost every Whig patriot took or was given the name of an ancient republican hero, and classical references and allusions run through much of the colonists' writings, both public and private.... Such classicism was not only a scholarly ornament of educated Americans; it helped to shape their values and their ideals of behavior.[17]

But most of these early Americans learned about the classical world through translation and popularizations in the Whig tradition, most especially those Latin authors writing about the earlier age of Republicanism in longing tones. They learned that Republics are not conquered from without but decay from within, weakened by love of luxury and other vices.

The first half of the eighteenth century saw a great burst in interest in both Greece and Rome in England and France. It was dominated by an anti-democratic tone, drawing extensively on Plutarch (second only to the Bible in popularity in colonial America). The writings concentrated mostly on the decline of Athens — its imperialism, its corruption and vices, and its descent from manly virtue to effeminate vice. In contrast, Sparta was held up as an example of stability and virtue.

> What Americans heard about classical Athens would inevitably carry a special valence, for unlike eighteenth-century Europeans concerned about the possible decadence of their large nation-states, Americans shared with the inhabitants of Renaissance Italy a real opportunity to resurrect the classical polis. They decided against it … Under scrutiny, however, the eventual collapse of all the ancient states was alleged against them, most particularly in Greece, and still more particularly in Athens.[18]

The founding fathers, too, most citing its lack of checks on the potential of the tyranny of the majority, wrote about Athens in the lowest of terms. In the *Federalist Papers*, Madison wrote, "In all very numerous assemblies, of whatever characters composed, passion never fails to wrest the scepter from reason. Had every Athenian citizen been a Socrates, every Athenian assembly would still have been a mob."[19]

But they believed that they could avoid the fate of Athens, by avoiding the most obvious pitfalls of democracy. In fact, contrary to popular opinion, the founders never intended a democracy at all. It only seems so because the successful American example literally redefined democracy to all generations to come.

> The American foundation would radically alter the connotations of democracy. Three very different men — Hamilton, Adams, and Madison — recoiled with force from the Athenian example and from the notion of direct democracy with which it was inextricably associated. By co-opting republican principles for liberal ends, Madison sought to detach the democratic impulses from republicanism; but he also engineered in his writings a deliberate redefinition of terms whereby an aristocratic theory of politics was couched in sufficiently democratic language that the founders would soon be claimed as the authors of American democracy by men whose beliefs were very different.[20]

Even the more democratic aspects of the Constitution, such as the House of Representatives, were not easy to put through, so strong was the anti-democratic example of Athens. It seems clear that many of the democratic elements contained in the Constitution that we so admire were included in spite of the fact that they are democratic, not because they were democratic. Historian Susan Ford Wiltshire observed this resistance to democracy:

> At first, some delegates such as Roger Sherman of Connecticut, resisted the idea that the people should have any part in electing the national legislature, because they 'want information and are constantly misled.' Others, including Elbridge Gerry of Massachusetts, wished to preserve republicanism while avoiding the 'excess of democracy' and the 'danger of the leveling spirit.' George Mason and James Madison expressed the prevailing view, which recognized the necessity of a democratic branch in the legislature to represent 'the different parts of the whole

> republic,' like the English House of Commons. America 'had been too democratic' but should not 'incautiously run into the opposite extreme.'[21]

But other than the negative example of Athens, what practical influence did the classical world have on the founders? Carl Richard, in his book *The Founders and Democracy,* neatly sums up the importance of the classical world upon the founders:

> Classical ideas provided the basis for their theories of government form, social responsibility, human nature, and virtue. The authors of the classical canon offered the founders companionship, solace, and the models and anti-models which gave them a sense of identity and purpose. The classics facilitated communication by furnishing a common set of symbols, knowledge, and ideas, a literature select enough to provide common ground, yet rich enough to address a wide range of human problems from a variety of perspectives.... The American Revolution was a paradox: a revolution fueled by tradition.[22]

Even more than simply being models and moral support, however, "the ancients were invoked at every level of debate — at the Constitutional Convention and at state ratifying conventions, concerning general political theories and regarding specific clauses of the Constitution — by Federalists and by Anti-federalists."[23] Richard points out that this reliance on classical authors heavily favored the Federalists, as there were many more authors who supported mixed government than simple democracy. In fact, "Direct democracies, like Athens, bore the stigma of instability, violence, corruption, and injustice which the ancient historians and political theorists had so brilliantly fastened upon them. Many friends of democracy avoided using the word, preferring to use the term 'republic.'"[24]

Virtue and Democracy

Nevertheless, the founders knew that no matter how many fine institutions they founded or how many checks and balances they included, their experiment would fail if the virtue of the citizenry failed. "Such an order [worthy of free persons] seeks the public good through building institutions and forming communities both to nourish the requisite habits of the heart [virtues] and to check the excesses to which the human heart is prey."[25]

Unfortunately, the fears of the Founders have come true, at least in part. The virtues required to make sure our institutions continue, that buttress our liberties, have eroded. Nihilism, which swept Europe earlier, has crept into the sphere of the elites in America.[26] The difference between the Athenians and the Founders is in the institutions, especially the checks and balances they constructed, and in the influence of religion in supporting the morality and civic virtues of society. We are threatened with the loss of both unless we recognize their critical importance to our society.

Some disagree that democracy depends on morality. In fact, they say, democracy is most compatible with relativism, not truth and therefore democracy is essentially amoral. Pope John Paul II describes this point of view in the encyclical *Centisimus annus*:

> Nowadays there is a tendency to claim that agnosticism and skeptical relativism are the philosophy and the basic attitude which correspond to democratic forms of

> political life. Those who are convinced that they know the truth and firmly adhere to it are considered unreliable from a democratic point of view, since they do not accept that truth is determined by the majority, or that it is subject to variation according to different political trends. It must be observed in this regard that if there is no ultimate truth to guide and direct political activity, then ideas and convictions can easily be manipulated for reasons of power. As history demonstrates, a democracy without values easily turns into open or thinly disguised totalitarianism.[27]

Pope Benedict, of course, has become famous for his phrase "Dictatorship of Relativism," in a homily just before he was elected pope. However, years before he became Benedict, Cardinal Ratzinger gave a speech titled, "Relativism: The Central Problem for Faith Today." In it he spoke primarily of relativism in theology, but he did briefly discuss political relativism, surprisingly in mostly positive terms:

> Relativism has thus become the central problem for the faith at the present time.... In turn, relativism appears to be the philosophical foundation of democracy. Democracy in fact is supposedly built on the basis that no one can presume to know the true way, and it is enriched by the fact that all roads are mutually recognized as fragments of the effort toward that which is better. Therefore, all roads seek something common in dialogue, and they also compete regarding knowledge that cannot be compatible in one common form. A system of freedom ought to be essentially a system of positions that are connected with one another because they are relative as well as being dependent on historical situations open to new developments. Therefore, a liberal society would be a relativist society: Only with that condition could it continue to be free and open to the future.
>
> In the area of politics, this concept is considerably right. There is no one correct political opinion. What is relative — the building up of liberally ordained coexistence between people — cannot be something absolute. Thinking in this way was precisely the error of Marxism and the political theologies.
>
> However, with total relativism, everything in the political area cannot be achieved either. There are injustices that will never turn into just things (such as, for example, killing an innocent person, denying an individual or groups the right to their dignity or to life corresponding to that dignity) while, on the other hand, there are just things that can never be unjust. Therefore, although a certain right to relativism in the social and political area should not be denied, the problem is raised at the moment of setting its limits.[28]

Benedict is a very careful thinker. His use of the term "dictatorship of relativism" is akin to "tyranny of the majority" (the founders weren't afraid of majorities but tyrannical majorities). He is not condemning relativism *in toto*. Rather he is condemning relativism when it becomes tyrannical, when it becomes "total relativism." He is clearly not opposed to limited political relativism.

If all were relative, then it would be useless to say that democracy is any better than oligarchy or that liberty is better than slavery. Far from reinforcing one another, relativism ultimately undermines liberty as it does everything else. Even more fundamentally, without morality, all liberty is empty because our choices are empty. We can only choose between one meaningless thing and another meaningless thing. All meaning is sucked out of our lives.

In contrast, liberty and truth are mutually reinforcing. "The rationale for defending liberty — especially 'the free marketplace of ideas' — is to come closer to the truth. The rational for defending truth is that it makes us free."[29] But truth and liberty are not sufficient. They are dependent on virtuous citizenry, and virtue is incompatible with relativism (and exists in tension with democracy and liberty).

> From the *Declaration of Independence* through *The Federalist*, and in every wise document of our realist revolutionary tradition, it is confidently asserted that the possibility of self-government rests upon the virtue of its citizens. Were the citizens of a republic to seek to remain teenagers forever, "one of the kids," such virtue could never come to maturity, and self-government would fall.... The flight into illusions about their own virtue would trap them in insatiable hypocrisies, by which they would endlessly boast of their superior morality, liberation, and sensitivity, while manifesting in their lives a noteworthy self-absorption. For such citizens, virtue would less and less entail personal suffering, self-discipline, and hard personal choice, (that is, self-denial), and would more and more consist in identifying themselves with enlightened opinion.[30]

Although, theoretically, religion (at least as more narrowly defined in the contemporary world) is not necessary to acquire and maintain a body of virtuous citizens (after all, virtue ethics originated in a pagan world), practically speaking, virtue is strongly supported by the Judeo-Christian heritage. This was a missing ingredient in the ancient world. The Judeo-Christian tradition is a far better school for virtue than the Homeric gods or even Stoicism.

Alexis de Tocqueville in his travels through America saw the importance of religion (he considered it the first political institution of American democracy) and voluntary associations in the civic life of America. He also foresaw the danger of America falling into tyranny, when the lust of democrats for equality led them to demand such an extensive governmental network of services to remove the insecurities, edges, and hardships from life that they would fall into the honeyed grip of a new "soft despotism." [31]

But Tocqueville was not alone in his judgment of the important influence religion had on American civic life. George Washington, considered by his contemporaries to be the paragon of virtue, said, in his *Farewell Address* to the nation that popular government depends on virtue and virtue depends on religion.

> Where is the security for property, for reputation, for life, if the sense of religious obligation desert the oaths which are the instruments of investigation in courts of justice? And let us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.... It is substantially true that virtue or morality is a necessary spring of popular government. The rule, indeed, extends with more or less force to every species of free government.[32]

Tocqueville speaks similarly when he says that the spirit of freedom and the spirit of religion "work in harmony and seem to lend mutual support.... Religion is considered as the

guardian of mores, and mores are regard as the guarantee of the laws and pledge for the maintenance of freedom itself."[33]

If religion is so important to the existence of democracy should it be protected and encouraged? George Weigel in his essay "Religious Freedom: the First Human Right" posits freedom of religion, or freedom of conscience, as the "one absolutely fundamental human right." This is because human persons are fundamentally truth-seekers; indeed, the right to freedom of conscience entails the obligation to seek the truth. Freedom of conscience recognizes limits to the power of the state, establishing a fundamental barrier between the person and the state. It is no coincidence then, that the first ethicist, the first philosopher, to consider the effect of actions upon the soul would also be the first to consider the realm of conscience sacrosanct.

Weigel states that democracy protects religious freedom and religious freedom protects democracy. (The founders would have used the term "republic.") First, the fundamental freedom of conscience prevents the tyranny of the majority, that is, it protects minority rights, thus preventing democracy from turning into mob rule or anarchy. Moreover, this freedom fosters an environment in which public virtues, which are necessary for the functioning of democracy can thrive. This environmental protection is more than simply procedural.[34] As was true of ancient Athens, the founders shared the belief that religion supported the public virtues necessary for the flourishing of the society.

Religion and Democracy Today

If this is the case, we twenty-first century Americans have cause to worry. First, a foundational element for a thriving republic, a limited political system, is being undermined by the intrusion of politics into both the cultural and economic spheres. Second, the suppression of the energies of civil society is accelerating because of reduced incentives to work and create and a loss of the sense of excellence. Third, the separation of powers is in danger of crumbling; threatened by legislation by the judiciary (exemplified in *Roe v. Wade*), separate foreign policies by the legislative branch and other things. Finally, the carefully constructed checks on the tyranny of the majority have been discarded, such as indirect election of senators, lowering of the voting age, enlargement of the franchise to women and to blacks, and the erosion of states' rights.[35] There even is a movement to abolish the Electoral College in presidential elections. Our educational institutions have replaced teaching virtue with teaching relativism and the elites in the free press are becoming increasingly alienated from the populace. At the same time demagogues on TV, the radio and the Internet seek to manipulate the masses through emotional appeals and taking advantage of the ignorance of their audiences. Finally, in some instances we seem to have a direct democracy because of the importance placed by politicians on opinion polls, so that 1000 people chosen at random powerfully influence the decisions of a nation.

Conclusion

There was never a "golden age" of liberty. Every age had to fight for liberty. That is the example

that the Founders give us. It is certainly not inevitable that the democracy decay or that relativism triumph or that religion be banished from public life. These difficulties, however, do show why it is important to be aware of the history of liberty, from its roots in Athens and Jerusalem, through Rome and Christianity and to the age of the Founders of the United States of America.

But then why is it important to understand the trial of Socrates? It is important because it strips the debate of all essentials in two ways. First, the Athens of Socrates is a foreign place and time to 21st century Americans. In discussing religious freedom, we can get bogged down in the details: specific cases, people, events and words. Religious freedom is a larger issue than *Locke v. Davies* or Jefferson's letter to the Danbury Baptists or even the First Amendment. Looking at liberty versus the interests of society in a very different context compels us to examine the essence of the issue. Second, contemporary hot button issues, such as prayer in schools, intolerance, abortion, are difficult to talk about unemotionally. Since no one has a personal stake in the fate of Socrates (who after all has been dead for two-and-a-half millennia), perhaps it is possible to discuss the elements in his trial more dispassionately than we can discuss what is currently on the docket of the Supreme Court.

The final valuable element of discussing the trial of Socrates comes from Socrates himself, who doesn't allow us to avoid the essence of the issue. He constantly brought the jury back to what was at stake: the good citizen vs. the good man. He forced Athens to follow through on its principles to the bitter end: forcing him to drink hemlock, rather than brokering some compromise that might let them avoid seeing the full implications of their democratic stance toward the philosophical life.

* Zachary Foreman is a graduate student in the School of Philosophy at The Catholic University of America in Washington, D.C.

[1] James Colaiaco*, Socrates Against Athens: Philosophy on Trial* (New York: Routledge, 2001), 15, quoting Diogenes Laertius, writing 700 years later. I have not the space to go into the controversy over sources. Suffice to say, I relied almost exclusively on the early Platonic accounts of Socrates: the *Euthrypo*, *Crito* and most especially the *Apology* but also Xenophon's *Apology*. For our purposes, the actual details of Socrates trial are not as important as the ideas and the legacy.

[2] Plato, *Apology of Socrates* 24a. All quotations from the Apology are from *The Trial and Execution of Socrates: Sources and Controversies*. Edited by Thomas Brickhouse and Nicholas Smith (New York, NY: Oxford University Press, 2002). Note that this is an inversion of the original charge. Some speculate that this is because Socrates saw the most important aspect of the charge as corrupting the youth, thereby, endangering the future of the polis.

[3] For example, Socrates could not have been indicted on the grounds that two of his students had been members of the Thirty Tyrants, who failed to overthrow the democracy of Athens. Nor could he be indicted on charges that another student, Alcibiades betrayed Athens and was involved in the oligarchic revolution of 411 BC. See Colaiaco, 110-111.

[4] Colaiaco*,* 112.

[5] Susan Ford Wiltshire, *Greece, Rome and the Bill of Rights* (Norman, OK: University of Oklahoma Press, 1992), 104.

[6] Colaiaco, 118-119.

[7] Ibid., 119.

[8] Plato, *Apology,* 29.

[9] Colaiaco, 215.

[10] Ibid., 220.

[11] Paul Rahe, *Republics, Ancient and Modern: Classical Republicanism and The American Revolution* (Chapel Hill, NC: University of North Carolina Press, 1992), 196.

[12] John Courtney Murray, *We Hold These Truths: Catholic Reflections on the American Proposition.* New York: Sheed and Ward, 1960, 159.

[13] Ibid., 163.

[14] Ibid., 166.
[15] Jacques Maritain, *Man and the State*, Chicago, IL: University of Chicago Press, 1951, 114.
[16] Ibid., 116-117.
[17] Gordon Wood, *The Creation of the American Republic, 1776- 1787* (Chapel Hill, NC: University of North Carolina Press, 1998 [1969]), 49.
[18] Jennifer Tolbert Roberts, *Athens on Trial: The Antidemocratic Tradition in Western Thought*. (Princeton, NJ: Princeton University Press, 1994),179.
[19] *The Federalist Papers*, quoted in Roberts, 181.
[20] Roberts, 186.
[21] Wiltshire, 105.
[22] Carl Richard, *The Founders and the Classics: Greece, Rome, and the American Enlightenment*. Cambridge, MA: Harvard University Press, 1994.233-234.
[23] Ibid., 234.
[24] Ibid.
[25] Michael Novak, *Free Persons and the Common Good* (Latham, MD: Madison Books, 1989), 55.
[26] Michael Novak. On Cultivating Liberty, 9-10. See also his prior work, *The Experience of Nothingness*, (Rev. & exp. ed. New Brunswick, NJ: Transaction, 1998, [1970]).
[27] *Centesimus Annus,* 46, Encyclical Letter, May 1, 1991. http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_01051991_centesimus-annus_en.html.
[28] Joseph Cardinal Ratzinger, "Relativism: The Central Problem for Faith Today," Address to CDF, May 1996, *http://www.ewtn.com/library/CURIA/RATZRELA.HTM*.
[29] Michael Novak, *On Cultivating Liberty: Reflections on Moral Ecology*. (Latham, MD: Rowman & Littlefield, 1999), 28.
[30] Ibid. 133-134.
[31] Michael Novak. *The Universal Hunger for Liberty: Why the Clash of Civilizations is Not Inevitable* (New York: Basic Books, 2004), 138-139. The idea that a return to virtue is required in order for modern democracies to survive is, of course, not a novel one. Novak introduces his book with that exact notion. He suggests that the twentieth first century will see a departure from modern political philosophy — and a return to older philosophy — to a philosophy that "sees statecraft as a kind of soulcraft" (p. 13).
[32] Washington's Farewell Address, 1796. *http://www.yale.edu/lawweb/avalon/washing.htm*. Most observers believed that without the virtues of Washington the war would not have been won, the Constitution might not have been written and the country might not have survived its first decade of existence.
[33] Alexis de Tocqueville, *Democracy in America*, translated by George Lawrence and edited by J.P. Mayer (New York: Anchor Books, 1969), 46-47.
[34] George Weigel, "Religious Freedom: The First Human Right." In *The Structure of Freedom: Correlations, Causes, and Causations*. Edited by Richard John Neuhaus (Grand Rapids, MI: Eerdmans Publishing, 1991), 42-43.
[35] Obviously the end of slavery and women's suffrage were good things. Nevertheless, the movement to widen franchise as far as possible is clear. It could potentially include felons and immigrants, legal or illegal, or even residents of the District of Columbia.

JEFFERSONIAN WALLS AND MADISONIAN LINES

THE SUPREME COURT'S USE OF HISTORY IN RELIGION CLAUSE CASES

BY MARK HALL*

In *Everson v. Board of Education*,[1] Justice Wiley Rutledge observed that "[n]o provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment. It is at once the refined product and the terse summation of that history."[2] Scholars and activists argue about the relevance or irrelevance of the Supreme Court's use of history in general and the extent to which Justices are good historians.[3] These debates have been particularly furious with respect to the Court's use of history in Religion Clause cases.[4] Although broad claims are often made about the Court's use of history in these cases, they are either unsupported generalities or extrapolations from a careful reading of only a handful of the Court's many Free Exercise and Establishment Clause cases.[5]

In this essay, I offer a systematic analysis of every Religion Clause case decided by the Supreme Court. In Part A, I provide original data drawn from the Court's Religion Clause cases that clearly and succinctly address how Justices have used history in their Religion Clause opinions. I show the extent to which Justices have appealed to history and, when they do so, to whom or what they appeal. In Part B, I look at the distribution of Religion Clause cases over time and consider whether there are patterns with respect to the Court's use of history. In Part C, I consider individual Justices, particularly the extent to which they tend to write opinions in Religion Clause cases and how often they use history. In this discussion, I define what it means to be "liberal" or "conservative" in Religion Clause cases and place Justices on an ideological continuum based upon every vote cast between 1940 and 2005. I follow this with an examination of the extent to which jurisprudential liberals and conservatives differ in their use of history. In Part D, I offer a narrative account of the Court's use of history in Religion Clause cases with an emphasis on opinions where Justices consciously reflect on the relevance or irrelevance of history.

The primary purpose of this essay is to provide a systematic account of how Justices have used history to help them interpret the Religion Clause. I do not attempt to evaluate every aspect of the Court's use of history nor do I address the question of whether Justices should use history. In the concluding section, I do contend that if Justices are going to make historical arguments, they should make good ones. I also suggest ways in which their historical arguments in Religion Clause opinions could be significantly improved.

A Few Comments on Methodology

The United States Supreme Court has decided 115 cases in which at least four Justices considered the Free Exercise or Establishment Clause (or both) to raise substantial issues.[6] This count does *not* include cases where religion played a significant role but that were decided

upon other constitutional or statutory grounds.[7] Nor does it include cases where a Religion Clause claim is dismissed without serious consideration.[8] Of these 115 cases, 60 primarily involve the Establishment Clause, 44 primarily involve the Free Exercise Clause, and 11 concern both clauses (and, of course, some of these cases contain other constitutional or statutory issues).[9] Altogether, these cases generated 365 separate opinions.[10]

Having determined the relevant pool of cases, I carefully read each opinion and quantified distinct appeals to different Founders, documents, and events. In most instances the number of appeals was clear, but in cases rich with historical discussions the number can be difficult to determine. For instance, Justice Black, in his opinion in *Everson*, wrote:

> The movement toward this end reached its dramatic climax in Virginia in 1785-86 when the Virginia legislative body was about to renew Virginia's tax levy for the support of the established church. Thomas Jefferson and James Madison led the fight against this tax. Madison wrote his great Memorial and Remonstrance against the law. In it, he eloquently argued that a true religion did not need the support of law; that no person, either believer or non-believer, should be taxed to support a religious institution of any kind; that the best interest of a society required that the minds of men always be wholly free; and that cruel persecutions were the inevitable result of government-established religions. Madison's Remonstrance received strong support throughout Virginia….[11]

Although Madison's name is mentioned three times in this passage, two pronouns refer to him, and *The Writings of James Madison* is referenced in a footnote, I consider Black to have appealed to Madison only one time in the passage. However, when Black proceeds on the next page of his opinion to refer to Madison's role in drafting and authoring the First Amendment, I count this as an additional appeal to Madison.[12] Altogether I conclude that Black made five separate appeals to Madison in *Everson*, even though Madison's name appears twelve times in his opinion.

My decision to separate distinct appeals to particular Founders and events introduces more ambiguity into this study than if I had simply counted references to them, but I believe it more accurately reflects the extent of these appeals. As well, it avoids counting references in which something or someone is criticized or that have nothing to do with the Religion Clause. As a point of comparison, a simple LexisNexis search of Religion Clause opinions reveals 419 references to Madison, 303 to Jefferson, 63 to George Washington, and 17 to George Mason. In contrast, by my count, Justices appealed to Madison 189 times, Jefferson 112 times, Washington 21 times, and Mason 6 times.

A. Overview of Appeals to History

From the Supreme Court's first Religion Clause case, *Reynolds v. United States*,[13] to the most recent one considered in this study, *Cutter v. Wilkinson*,[14] Justices have appealed to the history surrounding the writing of the First Amendment, the Founders generally, and specific Founders to shine light upon the meaning of the Establishment and Free Exercise Clauses. An appeal to the "Founders" includes any general reference to "the Founders," "the Framers," or "the First

Congress." An appeal to "context" includes references to the "Founding era," the political culture of the time, or laws, constitutions, and similar documents from the era that purport to illustrate general concerns of the time.[15] Finally, appeals to specific Founders include combined references to Founders and documents that they authored (e.g., "Jefferson's Letter to the Danbury Baptists" or "Letter from George Washington to the Religious Society Called Quakers").[16] The following table provides a broad overview of the basic trends:

Table 1 Overview of Appeals to History in Religion Clause Cases

Reference	Establishment Cases	Free Exercise Cases	Combined Establishment and Free Exercise Cases	Total
Founders	177	35	3	215
Context	120	68	2	190
Madison	173	16	0	189
Jefferson	94	18	0	112
Washington	19	2	0	21
J. Adams	6	1	0	7
G. Mason	4	2	0	6
R. Williams [a]	5	1	0	6
Sherman	3	0	0	3
Ellsworth	1	2	0	3
Gerry	3	0	0	3
D. Carroll	3	0	0	3
Franklin	1	1	0	2
Iredell	2	0	0	2
Huntington	2	0	0	2
Livermore	2	0	0	2
J. Allen	1	0	0	1
S. Adams	1	0	0	1
F. Ames	1	0	0	1
I. Backus	0	1	0	1
Benson	0	1	0	1
Boudinot	1	0	0	1
Hamilton	1	0	0	1
P. Henry	1	0	0	1
R.H. Lee	1	0	0	1
J. Jay	1	0	0	1
Pendleton	1	0	0	1
Spence	1	0	0	1
Wythe	1	0	0	1
Witherspoon	0	1	0	1
Sylvester	1	0	0	1
J. Marshall	1	0	0	1
Rutledge	1	0	0	1
Sullivan	1	0	0	1
Vining	1	0	0	1
Total	631	149	5	785

[a] It is a stretch to count Roger Williams as a Founder, and I otherwise avoid including individuals who fall outside the Founding era — even figures far closer to it such as Joseph Story. However, I include Williams because of the significant role some Justices believed he played in forming the American conception of religious liberty and church-state relations.

Table 1 shows that Justices have been far more likely to appeal to history to inform their interpretation of the Establishment Clause than the Free Exercise Clause (although, intriguing-

ly, not when both clauses are at issue). They clearly prefer general appeals to the Founders or the general historical context, although, as we shall see, they often flesh out these general appeals with quotations from or references to documents by specific Founders. When doing so, in the aggregate they favor appeals to Jefferson and Madison over the other thirty-one Founders who appear in Religion Clause opinions by a ratio of almost four-to-one. As discussed below, appeals to history are not evenly distributed among Justices, but it is worth noting that in Religion Clause cases there are an average of 6.8 appeals to history per case and more than 2.2 per opinion.

B. Historical Trends

The Supreme Court heard few Religion Clause cases until the Free Exercise and Establishment Clauses were applied to the states in 1940 and 1947, respectively.[17] As indicated by the following tables, the Court decided only five Establishment Clause cases prior to 1961, and virtually all references to history from these cases are contained in one opinion, *Everson*.[18] Since 1961, however, the Court has faced a constant stream of Establishment Clause cases and has been fairly consistent in its appeals to history.

By contrast, the Court resolved sixteen cases involving the Free Exercise Clause in the 1940s, but since then the Court has addressed an average of five cases per decade. As noted above, Justices seldom appeal to history to shine light on this clause. This fact was noted by Justice Souter in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[19] and led to historically rich responses by Justices O'Connor and Scalia in *City of Boerne v. Flores*.[20] These two opinions account for fifty-nine of the seventy historical references in Free Exercise Clause cases from the 1990s — and more than forty percent of the historical references made in all Free Exercise cases combined. The following tables illustrate historical references by decade.

Table 2 Establishment Clause Cases

Decade	No. of Cases	Context	Founders	Jefferson	Madison	Other Founders
Pre-1940	2	0	0	0	0	0
1940s	2	20	8	24	37	7
1950s	1	1	0	1	0	0
1960s	8	18	27	21	25	11
1970s	12	15	16	9	28	1
1980s	20	23	56	9	25	26
1990s	8	29	37	16	36	8
2000-2005	7	14	33	14	22	14
Total	60	120	177	94	173	67

Table 3 Free Exercise Clause Cases

Decade	No. of Cases	Context	Founders	Jefferson	Madison	Other Founders
Pre-1940	2	2	0	2	2	0
1940s	16	16	12	9	4	4
1950s	4	0	0	0	0	0
1960s	3	2	0	1	0	1
1970s	6	7	2	3	4	2
1980s	8	1	4	0	1	0
1990s	3	40	17	3	5	5
2000-2005	2	0	0	0	0	0
Total	44	68	35	18	16	12

Table 4 Establishment and Free Exercise Clause Cases

Decade	No. of Cases	Context	Founders	Jefferson	Madison	Other Founders
Pre-1940	1	1	1	0	0	0
1960s	1	0	0	0	0	0
1970s	2	1	0	0	0	0
1980s	6	0	2	0	0	0
1990s	1	0	0	0	0	0
Total	11	2	3	0	0	0

C. Individual Justices

Tables 1 through 4 show Court trends with respect to Religion Clause cases in general, but it could merely reflect the proclivity of a few Justices to write Religion Clause cases and appeal to history. Table 5 lists Justices in order of the number of opinions they have written in Religion Clause cases. Because some Justices serve longer than others or in eras when more Religion Clause cases came before the Court, the third column lists the number of Religion Clause cases in which written opinions were issued during each Justice's tenure. I also delineate exactly to what or whom these Justices appeal. The final column lists the average number of historical references per opinion for each Justice.

Table 5. Use of History by Individual Justices

Justice	No. of Opinions[a]	No of Religion Cases During Tenure[b]	Reference					Total	Average No. of Reference Per Opinion
			Context	Founding Fathers	Thomas Jefferson	James Madison	Other Founders		
Brennan	30 (44)	68	13	36	10	14	7	80	2.7
Burger	27 (61)	44	18	29	3	6	8	64	2.4
O'Connor	26 (52)	50	24	13	2	5	3	47	1.8
Rehnquist	26 (39)	67	4	16	1	10	16	47	1.8
Stevens	25 (42)	60	5	5	10	5	2	27	1.1
White	23 (34)	67	1	1	0	0	0	2	0.1
Douglas	22 (44)	50	2	3	1	23	0	29	1.3
Blackmun	19 (32)	60	2	5	3	3	2	15	0.7
Scalia	14 (45)	31	23	23	5	5	15	71	5.1
Black	13 (34)	38	13	6	13	11	5	48	3.7
Stewart	13 (35)	37	1	1	0	0	0	2	0.2
Powell	13 (31)	42	7	3	5	8	3	26	2
Souter	12 (67)	18	11	33	15	41	4	104	8.7
Frankfurter	12 (43)	28	9	3	10	8	3	33	2.8
Jackson	9 (53)	17	1	2	0	0	0	3	0.3
Kennedy	9 (43)	21	8	5	0	2	1	16	1.8
Reed	8 (36)	22	10	8	4	3	1	26	3.3
Marshall	8 (12)	65	0	0	1	0	0	1	0.1
Thomas	8 (53)	15	8	10	1	4	0	23	2.9
Murphy	6 (30)	20	1	0	5	1	0	7	1.2
Harlan II	6 (38)	16	1	0	0	0	0	1	0.2
Warren	5 (42)	12	6	1	5	7	2	21	4.2
Breyer	5 (38)	13	4	3	0	0	0	7	1.4

Stone	4 (27)	15	1	1	0	0	0	2	0.5
Rutledge	3 (25)	12	13	4	11	28	6	62	20.7
Fortas	3 (75)	4	1	1	1	0	0	3	1
Ginsburg	3 (21)	14	0	0	0	0	0	0	0
Roberts	2 (18)	11	0	0	0	0	0	0	0
Per Curiam	2 (...)	NA	0	0	0	0	0	0	0
Goldberg	1 (50)	2	0	0	0	0	0	0	0
Vinson	1 (13)	8	0	0	0	0	0	0	0
Clark	1 (8)	12	0	2	4	3	1	10	10
Hughes	1 (33)	3	0	0	0	0	0	0	0
Bradley	1 (25)	4	0	0	0	0	0	0	0
Field	1 (33)	3	1	1	0	0	0	2	2
Fuller	1 (33)	3	0	0	0	0	0	0	0
Peckham	1 (50)	2	0	0	0	0	0	0	0
Waite	1 (50)	2	2	0	2	2	0	6	6
Total	365	956	190	215	112	189	79	785	...

[a] The percentage of Religious Clause cases in which each Justice wrote an opinion is included in parenthesis.
[b] This figure includes all cases in which a Justice cast a vote. If a Justice missed a case or recused himself or herself from it, the case is not counted.

Data in column two of Table 5 suggests that Justices are drawn to write opinions in Religion Clause cases. Overall, since 1946 Justices have penned opinions in 25% of the cases in which written opinions were issued.[21] In roughly the same period, Justices wrote opinions for 38% of the Religion Clause cases that came before them.[22] With some Justices this may simply reflect judicial productivity.[23] With others it seems to be a result of a Justice's innovative or unique approach to the Free Exercise or Establishment Clause cases, which may lead the Justice to write a greater percentage of concurring or dissenting opinions advocating his or her position.[24]

Most Justices who write Religion Clause opinions have appealed to history to shine light on the meaning of the Clause. Specifically, 76% of the Justices who have written at least one Religion Clause opinion have appealed to history, and every one of the twenty-three Justices who authored more than four Religion Clause opinions have done so. Of course even among these Justices, some have utilized history significantly more often than others. Of the twenty-three Justices who authored more than four Religion Clause opinions, six made an average of

less than one historical reference per opinion as opposed to nine who average more than two historical references per opinion.

Why are some Justices more likely to appeal to history than others? One possibility is that conservative Justices (who are presumably concerned with original intent) are more likely to appeal to history than are liberals. To test this hypothesis, however, it is necessary to define what it means to be a judicial "conservative" and a judicial "liberal."

For the purposes of this essay, I consider a liberal vote in a Free Exercise Clause case to be one that favors an individual or group over the state. In Establishment Clause cases, a liberal vote is one that prohibits the government from supporting religious activities or groups. When both clauses are at issue, a liberal vote is one that favors the individual or group against the state *unless* the question involves government support of a religious individual or organization. In that case, a liberal vote is one that favors separation.[25] Table 6 considers all votes on Religion Clause cases cast in and after *Cantwell v. Connecticut*.[26] Labeling votes in complicated cases over a span of decades as liberal or conservative obviously does not reflect the nuanced opinions of many Justices, but it has the virtue of providing a clear and objective measure for liberalness or conservativeness with respect to the Religion Clause.[27]

Table 6. Use of History by Judicial Liberals and Conservatives

		Total No. of Religion Clause Votes			% of Liberal		% of Liberal Votes in	%of Liberal Votes in
Justice	Party of Nominating President	Free Exercise	Establishment	Combined Free Exercise and Establishment	Votes in Free Exercise Cases	& of Liberal Votes in Establishment Cases	Combined Free Exercise and Establishment Cases	All Religion Clause Cases
Fortas	D	1	3	…	100	100	…	100
Goldberg	D	1	1	…	100	100	…	100
Douglas	D	26	21	3	81	86	100	84
Brennan	R	18	41	9	78	83	56	78
Ginsburg	D	3	11	…	33	91	…	79
Stevens	R	16	38	6	44	92	67	77
Rutledge	D	9	3	…	78	67	…	75
Minton	D	4	…	…	75	…	…	75
Black	D	23	14	1	74	71	0	74
Marshall	D	21	35	9	57	86	56	72
Souter	R	4	14	…	75	71	…	72
Murphy	D	17	3	…	76	33	…	70
Clark	D	6	5	1	67	60	0	67
Blackmun	R	15	36	9	73	64	56	65
Breyer	D	3	10	…	67	50	…	61
Stewart	R	10	23	4	80	43	75	57
Stone	R	15	…	…	53	…	…	53
Harlan II	R	4	11	1	50	45	0	53
Warren	R	3	8	1	67	50	0	50
Hughes	R	2	…	…	50	…	…	50
Vinson	D	5	3	…	60	33	…	50
Burton	D	7	3	…	43	67	…	50
Frankfurter	D	21	6	1	38	67	0	46

Powell	R	10	26	6	40	46	50	45
Reed	D	20	2	…	40	0	…	45
White	D	18	40	9	67	23	78	42
Jackson	D	14	3	…	29	100	…	41
Whittaker	R	1	3	1	100	33	0	40
O'Connor	R	12	32	6	50	38	17	38
McReynolds	D	3	…	…	33	…	…	33
Burger	R	10	27	7	50	15	43	27
Thomas	R	3	12	…	67	17	…	27
O. Roberts	R	11	…	…	27	…	…	27
Kennedy	R	6	14	1	50	21	100	24
Scalia	R	9	20	2	56	5	50	23
Rehnquist	R	18	41	8	17	2	38	10
Byrnes	D	2	…	…	0	…	…	0

Having ranked Justices on a spectrum of liberal to conservative, it remains to be seen to what extent their votes correlate with their use or neglect of history. Justices who wrote opinions in Religion Clause cases in or after *Cantwell* (i.e., all of the Justices in Table 6 except Minton, Burton, Whittaker, McReynolds, and Byrnes) appealed to history to shine light on the meaning of the Free Exercise or Establishment Clause an average of 2.2 times per opinion. Among these Justices, those with a liberal voting record of 66.6% or higher made an average of 2.9 historical references per opinion. By contrast, the six Justices with a conservative voting record of 66.6% or higher made 2.6 historical references per opinion. The fourteen Justices who fell in the middle made significantly fewer appeals to history — just 1.3 per opinion. Somewhat counterintuitively, jurisprudential conservatives are actually slightly less likely to appeal to history than liberals, although both conservatives and liberals do so more than moderates.

Although Justices on both the right and the left routinely appeal to history to support their opinions, they do not necessarily appeal to the *same* history. As shown by Tables 7 and 8, when comparing Justices listed as jurisprudential liberals or conservatives as defined in the previous paragraph to the types of references these Justices make, the most striking element is the liberal block's overwhelming number of appeals to Thomas Jefferson and James Madison. Indeed, Table 7 shows that 54% of all of their appeals are to these two men — more than their appeals to the historical context, the Founders in general, and all other Founders *combined*.

Table 7 Liberal Justices and Appeals to History

	Context	Founding Fathers	Thomas Jefferson	James Madison	Other Founding Fathers	Total
Fortas	1	1	1	0	0	3
Goldberg	0	0	0	0	0	0
Douglas	2	3	1	23	0	29
Brennan	13	36	10	14	7	80
Ginsburg	0	0	0	0	0	0
Stevens	5	5	10	5	2	27
Rutledge	13	4	11	28	6	62
Black	13	6	13	11	5	48
Marshall	0	0	1	0	0	1
Souter	11	33	15	41	4	104
Murphy	1	0	5	1	0	7
Clark	0	2	4	3	1	10
Total	59	90	71	126	25	371
% of Appeals Made to Each Reference[a]	16%	24%	19%	35%	7%	…

[a] Percentages do not add up to 100% due to rounding.

By contrast, Table 8 shows that conservative Justices are significantly more likely to appeal to a wide range of historical sources. Only 17% of these Justices' historical references are to Thomas Jefferson and James Madison — a full 37% fewer references than those made by the liberal block. As well, conservative Justices are more than twice as likely as liberals to refer to other Founding Fathers.

Table 8 Conservative Justices and Appeals to History

	Context	Founding Fathers	Thomas Jefferson	James Madison	Other Founding Fathers	Total
Rehnquist	4	16	1	10	16	47
Scalia	23	23	5	5	15	71
Kennedy	8	5	0	2	1	16
O. Roberts	0	0	0	0	0	0
Thomas	8	10	1	4	0	23
Burger	18	29	3	6	8	64
Total	61	83	10	27	40	221
% of Appeals Made to Each Reference[a]	28%	38%	5%	12%	18%	…

[a] Percentages do not add up to 100% due to rounding.

D. Religion Clause Cases and the Use of History

The above data show that the vast majority of Justices who have written Religion Clause opinions have used history to shine light upon the Clause's meaning. This has been particularly true with respect to the Establishment Clause, in which appeals to history have been steady throughout the Court's cases. Justices have been far less likely to appeal to history to illumi-

nate the Free Exercise Clause, but recent opinions suggest that history may become increasingly important for understanding this clause as well. Moreover, the data show that liberal Justices are slightly more likely to appeal to history than conservatives, although they do not necessarily appeal to the same history.

Quantitative data are useful for supporting generalizations about the Court's use of history, but qualitative analysis helps answer questions such as how, why, and when Justices appeal to history. The following discussion provides a narrative overview of the Court's use of history in Religion Clause cases with a particular focus on cases where Justices consciously reflect upon their use of history. I assume a general familiarity with these cases and make no effort to summarize every important Religion Clause case or even to describe the development of Free Exercise or Establishment Clause jurisprudence.

1. Reynolds to *Everson*

The Court inaugurated its use of history in its first Religion Clause case, *Reynolds v. United States*.[28] Asked to decide whether the First Amendment protects the right of a member of the Church of Jesus Christ of Latter-day Saints to commit polygamy, the Court responded with a resounding no. In his opinion, Justice Waite noted that:

> "[R]eligion" is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted. The precise point of the inquiry is, what is the religious freedom which has been guaranteed.[29]

Waite began his discussion of history by exploring early colonial attempts to regulate religious practice and belief.[30] He then considered reactions against these regulations, particularly those in Virginia.[31] Specifically, he reasoned that the First Amendment must be understood in light of James Madison's and Thomas Jefferson's opposition to Patrick Henry's general assessment bill.[32] To explain these Founders' views on church–state relations, he relied heavily on Madison's *Memorial and Remonstrance*, Jefferson's *Bill for Establishing Religious Freedom*, and Jefferson's 1802 letter to the Danbury Baptists.[33] Waite concluded that the Founders intended the Free Exercise Clause to deprive Congress "of all legislative power over mere opinion" but left Congress free "to reach actions which were in violation of social duties or subversive of good order."[34]

The four church–state cases decided between *Reynolds* and *Cantwell v. Connecticut*[35] contain no judicial innovations and virtually no discussion of history. This changed rapidly after the Supreme Court applied the Free Exercise Clause to the states in 1940.[36] Between 1940 and 1946, the Court decided sixteen cases involving the free exercise of religion (usually in cases involving freedom of speech as well), often overturning local ordinances. This aggressive expansion of the Court's power to promote liberty was seldom defended by appeals to the Founders' intent. In fact, the opposite was true. Of the forty-five historical references in these cases, thirty-one of them are from three opinions favoring restrictions on religious speech or action (or inaction, in the case of *West Virginia State Board of Education v. Barnette*[37]).[38] Thus, with respect to the Free Exercise Clause, most Justices were not particularly interested in the

Founders' views, and the few who cited them did so to support a restrictive conception of religious liberty.

Everson v. Board of Education marks a critical turning point in the Court's Religion Clause jurisprudence. The case applied the Establishment Clause to the states and offered an interpretive approach to the First Amendment that has exercised enormous influence. Justice Black, in his majority opinion, accepted Waite's claim that the Religion Clause must be understood in light of "the background and environment of the period in which that constitutional language was fashioned and adopted."[39] Like Waite, Black argued that the Founders' views are summarized well in Madison's *Memorial and Remonstrance*, the then-recently discovered *Detached Memoranda*, Thomas Jefferson's *Virginia Bill for Religious Liberty*, and his 1802 letter to the Danbury Baptist Association.[40] In his opinion, Black made several general historical claims, but he fleshed them out with specific examples involving Jefferson and Madison. Indeed, he made five distinct references each to Jefferson and Madison but appealed to only one other founder, Patrick Henry, in his capacity as an attorney in the famous "Parson's Case."[41]

Despite Black's strong separationist language, the majority affirmed the constitutionality of a New Jersey program that reimbursed parents for the cost of transporting their children to private religious schools.[42] In his dissenting opinion, Justice Jackson famously quipped that Black reminded him of "Julia who, according to Byron's reports, 'whispering "I will ne'er consent," — consented.'"[43] More significant for our purposes, however, is Justice Rutledge's dissenting opinion, which was joined by Justices Frankfurter, Jackson, and Burton. In a record unbeaten to this day, Rutledge made sixty-two distinct historical appeals to support his conclusion that the Founders intended to erect a high wall of separation between church and state.

Rutledge began his opinion by quoting the Religion Clause and several sentences from Jefferson's "A Bill for Establishing Religious Freedom."[44] The bulk of his opinion rests on the proposition that:

> [N]o provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment. It is at once the refined product and the terse summation of that history. This history includes not only Madison's authorship and the proceedings before the First Congress, but also the long and intensive struggle for religious freedom in America, more especially in Virginia, of which the Amendment was the direct culmination. In the documents of the times, particularly of Madison, who was [the] leader in the Virginia struggle before he became the Amendment's sponsor, but also in the writings of Jefferson and others and in the issues which engendered them is to be found irrefutable confirmation of the Amendment's sweeping content.[45]

Rutledge followed this passage with an extensive discussion of church–state struggles in Virginia and a short examination of the framing of the First Amendment.[46] Altogether he made sixty-two distinct historical references — including eleven to Thomas Jefferson and twenty-eight to James Madison. Lest anyone miss Madison's significance, Rutledge attached a copy of his *Memorial and Remonstrance* as an appendix to his opinion.[47]

In *Everson*, Black and Rutledge presented an argument that has had a tremendous influence on the Court's Religion Clause jurisprudence. Although not formally a syllogism, it has the appearance of one, and I will refer to it throughout this essay as "*Everson*'s syllogism." It goes as follows:

> The Establishment Clause must be interpreted in light of the Founders' intent.
>
> Thomas Jefferson and James Madison represent the Founders.
>
> Jefferson and Madison favored the strict separation of church and state.
>
> Therefore, the Establishment Clause requires the strict separation of church and state.[48]

Of course Justices do not always agree on what the strict separation of church and state requires, and occasionally a Justice would challenge or attempt to qualify a premise or the conclusion of this syllogism. But for forty years this syllogism reigned supreme in Establishment Clause cases, and it often impacted Free Exercise Clause cases as well. As noted above, numerous scholars have criticized the accuracy of *Everson's* history,[49] but for many Justices and students of church–state relations it remains the definitive account of the origins of the Religion Clause.

2. McCollum* to *McGowan

Illinois ex rel. *McCollum v. Board of Education*,[50] the next Religion Clause case decided by the Court, illustrates well the impact of *Everson* on future church–state cases. Although in *McCollum* Black and Frankfurter made four and five historical references respectively, their arguments primarily rely upon the historical account of the origins of the First Amendment offered by Black and Rutledge in *Everson*. These two opinions cite *Everson* eleven times, and *Everson* is cited as the source for many of the historical quotations in *McCollum*.[51] It is, of course, not surprising that the Court would rely on an earlier account of history as Justices can hardly make extensive historical arguments in every Religion Clause opinion. Yet it is important to recognize the proclivity of Justices to rely upon *Everson's* history if one is to grasp its full impact on the Court's Religion Clause jurisprudence.

Justice Reed, dissenting by himself in *McCollum*, offered the first response by a Supreme Court Justice to *Everson*'s history. Reed began his historical discussion with the suggestion that "[t]he phrase 'an establishment of religion' may have been intended by Congress to be aimed only at a state church."[52] He conceded that the Clause's meaning may have expanded over time; however, he contended that nothing in the Founding era suggests that it should be interpreted so broadly as to prevent Illinois from allowing school children to receive voluntary religious training from ministers in public schools during school hours.[53] Indeed, he attempted to turn the tables on Black and Rutledge by showing that Jefferson and Madison supported religious education at the University of Virginia.[54] As well, he argued that texts such as Madison's *Memorial and Remonstrance* do not require *McCollum*'s outcome.[55]

Reed's dissent is notable for offering the first sustained effort by a Justice to make a historical

argument to support what later became known as the accomodationist or nonpreferentialist interpretation of the Establishment Clause. It is significant as well insofar as he did not challenge the Court's reliance on history but only its interpretation thereof.

Of the ten church–state cases decided between *McCollum* and *Engel v. Vitale*,[56] only *McGowan v. Maryland*[57] contains an extensive discussion of history. Chief Justice Warren, in his majority opinion, and Justice Frankfurter, in his concurring opinion, apparently felt compelled to explain how state recognition and protection of the Christian Sabbath (and discrimination against those who worship on other days) could be squared with the high wall of separation between church and state described in *Everson*.[58] Each Justice showed that states had historically banned unnecessary labor on Sunday, but a critical part of their historical argument is that these laws are constitutional because Jefferson and Madison did not oppose similar legislation.[59] Specifically, both Warren and Frankfurter emphasized that Jefferson authored and Madison supported in the Virginia General Assembly "A Bill for Punishing Disturbers of Religious Worship and Sabbath Breakers," which, among other things, fined individuals who worked on Sunday.[60]

3. Engel to *Marsh*

Engel remains one of the most controversial church–state cases ever decided. Justice Black, in his majority opinion declaring teacher-led devotional exercises in public schools to be unconstitutional, deviated little from *Everson*'s syllogism. As in *Everson*, he argued that Virginia's experience is particularly relevant:

> In 1785-1786, those opposed to the established Church, led by James Madison and Thomas Jefferson, who, though themselves not members of any of these dissenting religious groups, opposed all religious establishments by law on grounds of principle, obtained the enactment of the famous "Virginia Bill for Religious Liberty" by which all religious groups were placed on an equal footing so far as the State was concerned. Similar though less far-reaching legislation was being considered and passed in other States.[61]

Black never explained why legislation in other states is less relevant than that of Virginia, but he made it clear that he considered Jefferson and Madison to be the key Founders.[62] He also introduced readers for the first time to a new "Founder" — Roger Williams of Rhode Island.[63] Williams, of course, appealed to Black as "one of the earliest exponents of the doctrine of separation of church and state."[64] Other than Madison, Jefferson, and Williams, Black mentioned no other Founder.

The most intriguing element of *Engel* from the perspective of the Justices' use of history is Justice Douglas's admission in his concurring opinion that "I cannot say that to authorize this prayer is to establish a religion in the strictly historic meaning of those words."[65] Douglas even conceded that "[r]eligion was once deemed to be a function of the public school system."[66] Few separationists on the Court have been willing to concede that the Founders wanted anything other than the strict separation of church and state. Despite this departure from *Everson*'s argument, Douglas had no doubt that school prayer was unconstitutional, at least in part be-

cause "once government finances a religious exercise it inserts a divisive influence into our communities."[67]

The Court's holding in *Abington School District v. Schempp*,[68] is a logical extension of *Engel*. For the purposes of this essay, it is notable for two reasons. First, Justice Clark's opinion contains the most concise (albeit slightly expanded) statement of *Everson*'s premise that Jefferson's and Madison's views define the Establishment Clause: "[T]he views of Madison and Jefferson, preceded by Roger Williams, came to be incorporated not only in the Federal Constitution but likewise in those of most of our States."[69]

More significantly, Justice Brennan's concurring opinion contains the first sustained argument against relying on "[a] too literal quest for the advice of the founding fathers" to interpret the Establishment Clause.[70] In several much-quoted passages, he contended that such a quest is misdirected for the following reasons:

> [T]he historical record is at best ambiguous, and statements can readily be found to support either side of the proposition.
>
> … [T]he structure of American education has greatly changed since the First Amendment was adopted.
>
> … [O]ur religious composition makes us a vastly more diverse people than were our forefathers.
>
> … [T]he American experiment in free public education available to all children has been guided in large measure by the dramatic evolution of the religious diversity among the population which our public schools serve.[71]

Brennan's concerns are often referred to, quoted, or excerpted in such a way so as to suggest that he believed the Court should abandon altogether the use of history in Religion Clause cases.[72] However, the core of his argument is that Justices should avoid focusing on specific practices that the Founders did or did not favor and instead explore the principles they embraced. These principles, rather than specific policies, appropriately guide the Court's jurisprudence. After a sweeping discussion of a wide range of historical documents and church–state cases, Brennan concluded,

> Specifically, I believe that the line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers. It is a line which the Court has consistently sought to mark in its decisions expounding the religious guarantees of the First Amendment. What the Framers meant to foreclose, and what our decisions under the Establishment Clause have forbidden, are those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice. When the secular and religious institutions become involved in such a manner, there inhere in the relationship precisely those dangers — as much to church as to state — which the Framers feared would subvert religious liberty and the strength of a system of secular government.[73]

Brennan also noted that there are "myriad forms of involvements of government with religion" that do not violate the Establishment Clause.[74] Details about his views are not important here, but his qualifications as to how the Court should use history are. It is critical to emphasize that Brennan did not abandon *Everson*'s commitment to history — indeed, he appealed to "the Founders" as a group in this opinion more than any other Justice in any other Religion Clause opinion.

Between *Schempp* and *Walz v. Tax Commission of New York City*,[75] Justices primarily relied upon precedents in Religion Clause cases, and, to the extent to which they appealed to history, they grounded these appeals in previous historical discussions.[76] In *Walz*, Brennan issued a concurring opinion in which he agreed with the majority that it is constitutionally permissible to exempt churches from certain taxes.[77] In explaining this relatively rare accomodationist vote, Brennan seemed to abandon *Everson*'s tenet that the only Founders who matter are Jefferson and Madison. Of his ten references to history, only two are to these men.[78] Douglas, dissenting in *Walz*, would have none of this — of Douglas's eleven appeals to history, all are to James Madison.[79] And to make sure no one missed Madison's significance he, like Rutledge in *Everson*, included as an appendix to his opinion a copy of *Memorial and Remonstrance*.[80]

During the 1960s and 1970s, no Justice offered an extensive or detailed rejection of *Everson*'s history, but it was occasionally challenged. For instance, Justice Harlan, in his solo dissent in *Flast v. Cohen*,[81] noted "that the First Amendment was not intended simply to enact the terms of Madison's Memorial and Remonstrance."[82] More fundamentally, in *Nyquist*, Justice White contended that "one cannot seriously believe that the history of the First Amendment furnishes unequivocal answers to many of the fundamental issues of church–state relations."[83] Few Justices have accepted White's proposition, although he religiously followed it himself, appealing to history only one time in his twenty-three Religion Clause case opinions.

In the richest historical opinion since Brennan's concurrence in *Schempp*, Chief Justice Burger made a sweeping argument to uphold the constitutionality of legislative chaplains and prayer in *Marsh v. Chambers*.[84] Drawing from a range of documents, actions, and Founders, Burger contended that legislative chaplains and prayer were widespread in the Founding era.[85] Moreover, he emphasized that the very men who drafted and approved the First Amendment also agreed to hire legislative chaplains and approved of legislative prayer.[86] Even in the case of Virginia, he noted that the state continued the "practice of opening legislative sessions with prayer."[87]

Altogether Burger made twenty-five distinct appeals to history in *Marsh*, although only one of these appeals was to Madison and he did not mention Jefferson at all. By virtually ignoring Madison and Jefferson, he implicitly challenged *Everson*'s premise that these two men represent all of the Founders. Significantly, Burger did not attack the Court's Establishment Clause jurisprudence in general but merely focused on the constitutionality of the law in question. A broad challenge to the reign of *Everson* would have to wait for another two years.

Brennan, dissenting in *Marsh*, seemed to acknowledge that *Everson*'s account of history

was in jeopardy. After criticizing Burger for not relying on the legislative history of the Establishment Clause (even though few Justices have discussed its legislative history), he dismissed his reliance on the actions of the First Congress, arguing that they may not have reflected the Founders' views on church and state.[88] Instead, he suggested that "the passions and exigencies of the moment, the pressure of constituents and colleagues, and the press of business" may have led them to pass legislation that violated principles enshrined in the Establishment Clause.[89] As evidence he pointed to Madison, who "voted for the bill authorizing the payment of the first congressional chaplains" but "later expressed the view that the practice was unconstitutional."[90] Brennan did not explain why Madison's unpublished reflections written at least twenty-four years after his vote should be preferred to Congress's overwhelming support of the practice, but the conclusion makes some sense in light of *Everson*'s premise that Madison and Jefferson speak for the Founders. Brennan's commitment to this premise is suggested as well by the fact that four of his seven appeals to history are to these men and that he appealed to no other Founder.

Brennan's opinion did not completely reject the use of history for Establishment Clause jurisprudence, but it significantly downplayed its relevance. Critically for our purposes, Brennan contended:

> [T]he argument tendered by the Court is misguided because the Constitution is not a static document whose meaning on every detail is fixed for all time by the life experience of the Framers. We have recognized in a wide variety of constitutional contexts that the practices that were in place at the time any particular guarantee was enacted into the Constitution do not necessarily fix forever the meaning of that guarantee. To be truly faithful to the Framers, "our use of the history of their time must limit itself to broad purposes, not specific practices." Our primary task must be to translate "the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century…."[91]

In this passage, Brennan moved significantly beyond his concurrence in *Schempp* to more aggressively contend that the Constitution is a living document that must change with the times — an argument that he fleshed out in the mid-1980s.[92] Although he conceded that history is not irrelevant for constitutional interpretation, his use of it fell off dramatically in his remaining eleven Religion Clause opinions, which contain an average of only 0.8 appeals per opinion. This contrasts with his first 19 opinions where he appealed to history 69 times with an average of 3.6 appeals per case. Clearly something had changed.

4. Wallace to *Cutter*

In *Everson*, the Court embraced a syllogism that defined its Religion Clause jurisprudence — especially in Establishment Clause cases — for almost forty years. Although this syllogism was occasionally criticized — either tacitly or in short, separate opinions by individual Justices — it did not receive a sustained and substantial challenge until Justice Rehnquist's dissenting opinion in *Wallace v. Jaffree*.[93] In this case Justice Stevens, for the majority, declared Alabama's moment of silence law to be unconstitutional.[94] He conceded that there is evidence

that the Founders did not oppose government support of general Christian practices.[95] However, he contended that the Court had rejected the Founders' views in favor of a broader conception of religious liberty.[96] Ironically, he supported this proposition with citations to *Everson* and *Schempp* (cases that rely heavily on history) and quotations from Madison's *Memorial and Remonstrance*.[97] Similarly, Justice O'Connor, in her concurring opinion, acknowledged the value of using history to illuminate the Religion Clause but argued that "[w]hen the intent of the Framers is unclear, I believe we must employ both history and reason in our analysis."[98]

Rehnquist, in his dissenting opinion, unequivocally endorsed the first premise of *Everson*'s syllogism: "The true meaning of the Establishment Clause can only be seen in its history…. As drafters of our Bill of Rights, the Framers inscribed the principles that control today."[99] From his perspective, the problem was not with relying on history but that "[t]here is simply no historical foundation for the proposition that the Framers intended to build the 'wall of separation' that was constitutionalized in *Everson*."[100] In short, according to Rehnquist, the critical error in the Court's approach to history was its proclivity to focus on a few select documents written by Madison and Jefferson — particularly Jefferson's letter to the Danbury Baptists — rather than the Founders more generally.[101]

Three other Religion Clause opinions contain more appeals to history than Rehnquist's dissent in *Wallace*, but none come close to drawing from as many different sources. Among other things, Rehnquist leads his readers through the most extensive discussion to date of the framing of the First Amendment's Religion Clause. In doing so, and in setting the broader context by examining in detail the actions of the First Congress, he discussed a more diverse group of Founders than any other Religion Clause opinion ever written. Throughout his dissent he appealed to the beliefs or actions of twelve different Founders — including indisputably significant ones such as John Adams and George Washington (who had collectively been cited in only five Religion Clause opinions)[102] and important but neglected Founders such as Roger Sherman, Elias Boudinot, and Daniel Carroll.[103] Rehnquist did appeal to Madison nine different times, but never to his *Memorial and Remonstrance*.

Rehnquist agreed with *Everson*'s premise that history is relevant for interpreting the Religion Clause, but he disagreed with Black's and Rutledge's interpretations of history. Recognizing that he was challenging almost forty years of precedents, he poignantly noted that "*stare decisis* may bind courts as to matters of law, but it cannot bind them as to matters of history."[104] To be faithful to this history, he concluded, the Court should abandon attempts to create a wall of separation between church and state and return to the Framers' understanding that the Establishment Clause merely prohibits the designation of a "national" church or the preferential treatment of one religious denomination or sect over others.[105]

Given Rehnquist's assault on the Court's Establishment Clause jurisprudence, it is interesting that no Justice responded to his arguments until *County of Allegheny v. ACLU*.[106] In his majority opinion upholding one religious display on public land and striking down another,

Justice Blackmun acknowledged that the Founders may not have found such displays to be problematic.[107] Indeed, he noted that:

> [P]erhaps in the early days of the Republic [the words of the Religion Clause] were understood to protect only the diversity within Christianity, but today they are recognized as guaranteeing religious liberty and equality to "the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism."[108]

Blackmun's strategy, apparently, was to paint the Founders' understanding of religious liberty as being so limited as to be unpalatable. Accordingly, he rejected Rehnquist's interpretation that they desired neutrality with respect to the support of religion and pointed out that:

> [T]he history of this Nation, it is perhaps sad to say, contains numerous examples of official acts that endorsed Christianity specifically.... Some of these examples date back to the Founding of the Republic, but this heritage of official discrimination against non-Christians has no place in the jurisprudence of the Establishment Clause.[109]

Thus, Blackmun concluded, in spite of the Founders' views, "the bedrock Establishment Clause principle [is] that, regardless of history, government may not demonstrate a preference for a particular faith."[110]

Blackmun, following Brennan's lead, largely abandoned the use of history in Religion Clause cases. Justice O'Connor, in her concurring opinion, suggested something similar.[111] However, Justice Stevens, in his concurring opinion, made several general appeals to the Founders to support his separationist conclusion.[112] Kennedy, in a dissent joined by Rehnquist, White, and Scalia, reiterated Rehnquist's argument that the Religion Clause should be informed by the Founders' intent.[113] He argued that when one looks at a broad range of Founders it becomes evident that their chief concern was prohibiting coercion or favoritism in matters of religion.[114] In his view:

> [T]he principles of the Establishment Clause and our Nation's historic traditions of diversity and pluralism allow communities to make reasonable judgments respecting the accommodation or acknowledgement of holidays with both cultural and religious aspects. No constitutional violation occurs when they do so by displaying a symbol of the holiday's religious origins.[115]

In *Allegheny*, Kennedy appealed to history to support religious displays on public land, but in *Lee v. Weisman*[116] he did the same to prohibit prayer at public school graduation exercises. The critical distinction for Kennedy was an element of coercion that was present in *Lee* but absent in *Allegheny*.[117] Justice Blackmun, apparently regretting his retreat from history in *Allegheny*, offered a substantial defense of *Everson*'s logic and history.[118] Not surprisingly, in doing so he emphasized, in practice if not by argument, the priority of Thomas Jefferson, James Madison, and Roger Williams, to whom he appealed a total of six times out of a total of nine historical appeals.[119]

Lee is most notable for Justice Souter's remarkable effort to restate *Everson*'s argument on a wider evidentiary base. His concurring opinion is also significant as the first explicit reply to Rehnquist's dissent in *Wallace*.[120] In it, he conceded that Rehnquist and others have made a

case for the nonpreferentialist position but contended that "it is not so convincing as to warrant reconsideration of our settled law; indeed, I find in the history of the Clause's textual development a more powerful argument supporting the Court's jurisprudence following *Everson*."[121]

Souter's concurrence provides a detailed discussion of the legislative history of the First Amendment, and he concluded, contrary to Rehnquist, that it requires the separation of church and state.[122] Throughout his opinion, Souter made numerous broad appeals to the Framers in general. But when he turned to specific Founders to support his position, he appealed to Madison seventeen times, Jefferson seven times, and all other Founders twice. To his credit, Souter acknowledged that some of Madison's and Jefferson's actions work against his argument, such as the latter's treaty with the Kaskaskia Indians.[123] His response to such actions, following Brennan's earlier lead, is that they "prove only that public officials, no matter when they serve, can turn a blind eye to constitutional principle."[124]

Souter contended that history supports a separationist reading of the First Amendment's Establishment Clause, but he was clearly aware that the argument was weaker than it was portrayed in *Everson*. Central to his conclusion, as suggested by the passage quoted above and as articulated elsewhere in the opinion, is that the accomodationists' arguments are not so powerful as to require the Court to rethink its precedents.[125]

Justice Scalia, in a dissent joined by Rehnquist, White, and Thomas, offered a response to Souter. He began by forcefully reminding his fellow Justices that they have time and time again agreed that "our interpretation of the Establishment Clause should 'comport with what history reveals was the contemporaneous understanding of its guarantees.'"[126] He proceeded to document from a variety of sources that "[t]he history and tradition of our Nation are replete with public ceremonies featuring prayers of thanksgiving and petition."[127] Even Jefferson and Madison, he highlighted, invoked God in their inaugural addresses.[128] Like Kennedy in both *Allegheny* and *Lee*, Scalia contended that the Establishment Clause is intended merely to prohibit coercion in religion, and he argued that there is no coercion in having a prayer at a voluntary high school graduation.[129]

Having reinvigorated historical debates about the Establishment Clause, Justice Souter also helped ignite a similar debate with respect to the Free Exercise Clause. As we have seen, Justices have appealed to history to shine light on this Clause, but they have done so with significantly less regularity than they have in Establishment Clause cases. In *Employment Division, Department of Human Resources of Oregon v. Smith*,[130] Scalia's majority opinion significantly reduced the degree to which the Free Exercise Clause protects actions based on religious conviction (at least according to many jurists and scholars).[131] In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*,[132] Justice Souter, in his concurring opinion, pointed out that Scalia had reduced the vitality of the Free Exercise Clause without considering "the original meaning of the Free Exercise Clause."[133] He then suggested that "when the opportunity to reexamine *Smith* presents itself, we may consider recent scholarship raising serious questions about the *Smith* rule's consonance with the original understanding and purpose of the Free

Exercise Clause."[134] He made it clear that if *Smith* departs from the original understanding of the Clause, this would be a "powerful reason" to overturn the case. [135]

Justice O'Connor accepted Souter's invitation to examine the "original understanding" of the Free Exercise Clause in her dissenting opinion in *City of Boerne v. Flores*.[136] Specifically, she announced, "I examine here the early American tradition of religious free exercise to gain insight into the original understanding of the Free Exercise Clause."[137] In one of the richest historical opinions to date, and the richest ever with respect to a Free Exercise Clause case, O'Connor offered a sweeping examination of Founding era history to support her thesis that the "drafters and ratifiers more likely viewed the Free Exercise Clause as a guarantee that government may not unnecessarily hinder believers from freely practicing their religion."[138] To support her claim, she quoted at some length numerous colonial and Founding era laws and constitutions.[139] Although they figure less prominently than in many Establishment Clause cases, Jefferson and Madison play significant roles in her argument, particularly Madison's contributions to the Virginia Declaration of Rights, Madison's authorship of *Memorial and Remonstrance*, and Jefferson's *Bill for Establishing Religious Liberty*.[140]

In his concurring opinion, Scalia rejected O'Connor's contention "that historical materials support a result contrary to the one reached in [*Smith*]."[141] Scalia questioned neither the relevance of history nor the texts to which O'Connor appealed. Rather, he challenged her interpretation of these documents, arguing that the Founders' support of religious liberty did not include the right to refuse to obey generally applicable laws unless a legislature explicitly sanctioned an exemption.[142]

Although Justice O'Connor is no longer on the Court, history suggests that debates over the original intentions of the Founders regarding the Free Exercise Clause will continue and expand. As we have seen, Justices have spilled a great deal of ink debating the Founders' views of the Establishment Clause, and these disagreements show little sign of abating. Indeed, recent Justices have evidenced an inclination to expand these debates. For instance, Justice Thomas, in his concurring opinion in *Rosenberger v. Rector & Visitors of the University of Virginia*,[143] criticized the tendency of some Justices to rely on the views of James Madison — noting poignantly that "the views of one man do not establish the original understanding of the First Amendment."[144] As well, he aggressively challenged the view that Madison favored the strict separation of church and state.[145]

The significance of history for contemporary Religion Clause jurisprudence is perhaps best demonstrated by the recent Ten Commandment cases *Van Orden v. Perry*,[146] and *McCreary County v. ACLU of Kentucky*.[147] Authors of seven of the ten opinions in these cases collectively appealed to history sixty-two times.[148] Four of these seven opinions opposed displays of the Ten Commandments on public property, and the Justices authoring them made thirty-three appeals to history, sixteen of which (almost fifty percent) were to Jefferson and Madison.[149] On the other hand, the three Justices appealing to history who favored allowing such displays made twenty-nine historical references, of which only four were to Jefferson and Madison

(about seven percent of the total).[150]

Justice Stevens, in a dissenting opinion in *Van Orden* joined by Justice Ginsburg (one of the two Justices in the last half-century who has never appealed to history in a Religion Clause opinion),[151] criticized the majority's use of history. Throughout his opinion, he reiterated traditional separationist arguments, including the idea that "the widely divergent views espoused by the leaders of our Founding era plainly reveal [that] the historical record of the preincorporation Establishment Clause is too indeterminate to serve as an interpretive North Star."[152] Implicitly acknowledging that accomodationists can marshal a large amount of evidence, he contended that such "early religious statements and proclamations made by the Founders is also problematic because those views were not espoused at the Constitutional Convention of 1787 nor enshrined in the Constitution's text."[153] As well, he took the accomodationists to task for neglecting the views of important Founders, notably Madison and Jefferson, to whom he appeals eight times to shine light on the meaning of the Establishment Clause.[154]

Like Justice Blackmun in *Allegheny*, Stevens conceded that "the requirement that government must remain neutral between religion and irreligion would have seemed foreign to some of the Framers; so too would a requirement of neutrality between Jews and Christians."[155] The word "some" in this passage could be taken to imply that he thinks only a few Founders believed this, but his claim a few sentences later that "we are not bound by the Framers' expectations — we are bound by the legal principles they enshrined in our Constitution"[156] suggests otherwise. Although Stevens's opinion still has an element of an appeal to the "legal principle" embraced by the Founders, it is clear that in his mind these principles are only to be understood in light of Jefferson's and Madison's vision of how church and state should be related. In her concurring opinion in *McCreary*, Justice O'Connor emphasized this point, noting that the Court's "guiding principle has been James Madison's — that '[t]he Religion … of every man must be left to the conviction and conscience of every man.'"[157]

Justice Scalia's dissent in *McCreary* challenges Stevens's claim that accomodationist sentiment and actions were "idiosyncratic," arguing instead that "they reflected the beliefs of the period."[158] Appealing to a range of Founders, documents, and actions, he added a twist to the accomodationist argument by pointing out that his opinion primarily relies on

> [O]fficial acts and official proclamations of the United States or of the component branches of its Government, including the First Congress's beginning of the tradition of legislative prayer to God, its appointment of congressional chaplains, its legislative proposal of a Thanksgiving Proclamation, and its reenactment of the Northwest Territory Ordinance; our first President's issuance of a Thanksgiving Proclamation; and invocation of God at the opening of sessions of the Supreme Court.[159]

Notably, Scalia appeals to the actions and addresses of President Washington seven times — a record number of appeals in a single opinion to any Founder other than Jefferson or Madison.

One implication of Scalia's suggestion that "official acts and official proclamations" of federal officials are more important than the thoughts and deeds of private or state officials is

that *Everson*'s reliance on documents penned by Jefferson and Madison before the creation of the Bill of Rights (e.g., *Memorial and Remonstrance* (1785) and *Bill for Religious Liberty* (1786)) or afterward when Madison was a private citizen (e.g., his *Detached Memoranda* (c. 1817)) is problematic. That Scalia had *Everson* in mind is evident when, early in his opinion, he quoted Edward S. Corwin's famous observation that the Court had been "sold … a bill of goods" in *Everson*.[160]

Cutter v. Wilkinson,[161] the last Religion Clause opinion considered in this study, contains a historical argument by Justice Thomas that could have even more profound implications than that made by Scalia in *McCreary*. In his concurring opinion, Thomas reiterated and explained his controversial claim that "a proper historical understanding" of the Establishment Clause should lead the Court to understand it as a "federalism provision."[162] In concurring opinions in *Elk Grove Unified School District v. Newdow*[163] and *Zelman v. Simmons-Harris*,[164] he had earlier contended the primary purpose of the Establishment Clause was to protect "state establishments from federal interference" and as such "it makes little sense to incorporate the Establishment Clause."[165] In *Cutter*, he was forced to clarify his argument, rejecting Ohio's contention that it prohibited "Congress from legislating on religion generally."[166] Instead, he concluded that it merely prohibited "legislation respecting coercive state establishments."[167]

Justices have hesitated to accept Thomas's 2004 invitation in *Newdow* to "begin the process of rethinking the Establishment Clause" based on a more accurate account of the history of the Founding era.[168] At least one Justice has refused, not because he thinks it is wrong as a matter of history, but because of its consequences. In his dissenting opinion in *Van Orden,* Justice Stevens conceded that constricting "the reach of the Establishment Clause to the views of the Founders" would "leave us with an unincorporated constitutional provision," but he rejected this outcome as "unpalatable."[169]

Justice Stevens's opinions in recent Religion Clause cases often, but not always, have the virtue of clearly rejecting the relevance of history for interpreting the Establishment Clause. Few Justices, notably Blackmun, Douglas, and, to a lesser extent, Brennan, have joined him in doing this. Others, including Justices Ginsburg, Marshall, and White, have perhaps implicitly endorsed this approach through their neglect of history. However, as shown above, most Justices have regularly used history to help them interpret the Religion Clause.

Conclusion

The current Court contains an interesting mix of views on the propriety of using history to interpret the Religion Clause and, where applicable, the requirements of this history. On balance, Justices Stevens and Ginsburg fairly consistently reject the use of history and support liberal outcomes; Justices Souter and Breyer often use history to support liberal outcomes; Justices Scalia, Thomas, and Kennedy regularly use history to support conservative outcomes; and Justices Roberts and Alito have yet to vote on a Religion Clause case. Moreover, Scalia and Thomas have made historical arguments that could radically change the Court's Establishment Clause jurisprudence. It is perhaps therefore an opportune time for Justices

and scholars to reconsider the relevance or irrelevance of history for Religion Clause jurisprudence. Understanding how Justices have used history in previous cases may help answer the question of how they should use it in the future — or if they should use it at all.

In this essay, I have shown that the vast majority of Justices who have written Religion Clause opinions have used history to shine light upon its meaning. This has been particularly true with respect to Establishment Clause jurisprudence, and appeals to history in this area of law have been steady throughout the Court's cases. The Court has been far less likely to appeal to history to illuminate the Free Exercise Clause, but recent opinions suggest that history may become increasingly important for understanding this Clause. As well, the data show that liberal Justices are slightly more likely to appeal to history than conservative Justices, although these Justices do not necessarily appeal to the same history.

I have not attempted to resolve broader theoretical questions about the appropriateness of Justices appealing to history, and I have not evaluated the accuracy of their use of history. Cynics might reply that such questions are meaningless because Justices simply reach conclusions they desire and then use history to justify them. A slightly less cynical observer might suggest that the policy preferences of Justices color their understanding of history so that they give greater weight to evidence that supports their desired outcomes. It is true that there is no such thing as historical objectivity, but as Bernard Bailyn has written, "the fact that there is no such thing as perfect antisepsis does not mean that one might as well do brain surgery in a sewer."[170] Some historical arguments are better than others, and if it is appropriate to interpret the First Amendment in light of its "generating history," it is reasonable to expect Justices to make an effort to get that history right.

This is not the place to evaluate the Court's use of history throughout the entirety of its Religion Clause jurisprudence, but I will suggest that the syllogism developed by Black and Rutledge in *Everson* is flawed. Simply put, relying on the views of Jefferson and Madison to represent the Founders' intent is bad history.[171] Both were, to be sure, important Founders, and if Jefferson was not involved in writing or ratifying the First Amendment, arguably no single American played a more significant role in drafting it than Madison. Yet the First Amendment did not spring fully clothed from Madison's mind like Athena from Zeus's head. Madison's proposals were revised significantly in the House of Representatives, changed by the Senate and Conference Committee, agreed to by Congress, and ratified (initially) by nine state legislatures. Surely any attempt to delineate the meaning of this critical Amendment must go beyond the views of two Founders — no matter how prominent.

When Justices have looked beyond the drafting and ratification of the First Amendment to cast light on its meaning, many have still found it difficult to escape the gravitational attraction of Madison and Jefferson. When they consider pre-amendment history, they often appeal to Madison's *Memorial and Remonstrance* (1785) and Jefferson's *Bill for Religious Liberty* (1786), and when they turn to post-amendment history, they appeal to Jefferson's letter to the Danbury Baptist (1802) and Madison's *Detached Memoranda* (c. 1817). Although these docu-

ments are undoubtedly important, it is not self-evident that they reflect the views of the men who wrote and ratified the First Amendment.

An accurate account of the "generating history" of the First Amendment necessarily involves careful consideration of the debates over it in Congress and the state ratifying conventions. Records of these debates are notoriously scanty, but many of the men involved in them reveal their views of the proper relation between church and state elsewhere. An obvious place to begin this investigation is with actions of the first Congress, but a thorough study would go beyond this to subsequent Congresses, the other branches of the federal government, and the state legislatures.[172] In looking at the latter, Justices should move beyond their almost singular focus on Virginia to consider similar debates in other states. And if Justices conclude that they should focus only on the thoughts and deeds of prominent Americans, surely they should consider the views of men such as George Washington, John Adams, James Wilson, Roger Sherman, John Witherspoon, and John Jay, in addition to Thomas Jefferson and James Madison.[173]

As indicated by the above paragraph, carefully exploring the history of the First Amendment is hard work, and perhaps Justices simply do not have the time to do it well. But as Michael Flaherty says with respect to legal theorists, this is no excuse for "habits of poorly supported generalization — which at times fall below even the standards of undergraduate history writing.[174] At a minimum, he contends that legal theorists should take advantage of "the often tedious work that keeps historians employed."[175] Justice Souter makes a similar claim with respect to Justices in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*.[176] Of course Justices cannot be expected to keep abreast with every minor development in the literature on religious liberty and church–state relations in the Founding era, but they clearly should do more than simply rely on *Everson*'s account of this history.

A cursory reading of Religion Clause cases reveals that Justices do in fact use academic scholarship to support their Religion Clause opinions. Selected examples include works by James M. O'Neill,[177] Leo Pfeffer,[178] Robert Cord,[179] Leonard Levy,[180] Michael McConnell,[181] and Akhil Amar.[182] It goes without saying that influence is not always reflected in the number of citations a work receives in Supreme Court opinions (for instance, Corwin's famous and influential response to *Everson* has been cited in only one Religion Clause case — and this more than a half a century after it was written).[183]

Proposals that Justices seriously consider academic scholarship raise questions about how they have used such scholarship in the past. Do Justices use the best scholarship available? Do they consider a range of scholarship, or do separationist Justices simply cite separationist works and accomodationist Justices accomodationist works? Undoubtedly Justices appeal to books and essays simply because they support their desired outcomes — and of course citations may only be padding added by law clerks. Yet it is not unreasonable to assume that some articles and books have changed the way Justices view the First Amendment. Studying these issues in the context of the information provided in this essay could help resolve questions about the

impact of academic scholarship on the Supreme Court's Religion Clause jurisprudence.

More broadly, this essay suggests lessons for how scholars might evaluate the use of history by Supreme Court Justices. Most literature on this subject relies on broad, unsupported generalizations about Justices' use of history or careful consideration of only a handful of cases. If studies such as this one are replicated for other areas of law, students of the Court will be able to better answer questions about whether Justices should use history to help them interpret the Constitution and the degree to which they are good historians.

In this essay, I have systematically investigated how Justices have used history in Religion Clause cases. I have shown that both liberal and conservative Justices often appeal to history to help them interpret the Religion Clauses, especially the Establishment Clause. I have not addressed the propriety of using history in this way, but I have suggested that *if* Justices are going to use history they should use good history. In the words of Edward S. Corwin, "the Court has the right to make history … but it has no right to *make it up*."[184]

Appendix

List of Religion Clause Cases Considered in this Study

The United States Supreme Court has decided 115 cases in which at least four Justices considered the Free Exercise or Establishment Clauses (or both) to raise substantial issues. This count does *not* include cases in which religion plays a significant role but were decided upon other constitutional or statutory grounds. Nor does it include cases where a Religion Clause claim is dismissed without serious consideration. Of these 115 cases, 60 primarily involved the Establishment Clause, 44 the Free Exercise Clause, and 11 concern both clauses:

1. *Reynolds v. United States*, 98 U.S. 145 (1878) (Free Exercise Clause).
2. *Davis v. Beason*, 133 U.S. 333 (1890) (Both Establishment and Free Exercise Clauses).
3. *Late Corp. of the Church of Jesus Christ of Latter-day Saints v. United States*, 136 U.S. 1 (1890) (Free Exercise Clause).
4. *Bradfield v. Roberts*, 175 U.S. 291 (1899) (Establishment Clause).
5. *Quick Bear v. Leupp*, 210 U.S. 50 (1908) (Establishment Clause).
6. *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (Free Exercise Clause).
7. *Minersville School District v. Gobitis*, 310 U.S. 586 (1940) (Free Exercise Clause).
8. *Cox v. New Hampshire*, 312 U.S. 569 (1941) (Free Exercise Clause).
9. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (Free Exercise Clause).
10. *Jones v. City of Opelika (I)*, 316 U.S. 584 (1942) (Free Exercise Clause).
11. *Jamison v. Texas*, 318 U.S. 413 (1943) (Free Exercise Clause).
12. *Largent v. Texas*, 318 U.S. 418 (1943) (Free Exercise Clause).
13. *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (Free Exercise Clause).
14. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (Free Exercise Clause).
15. *Prince v. Massachusetts*, 321 U.S. 158 (1944) (Free Exercise Clause).
16. *Follett v. Town of McCormick*, 321 U.S. 573 (1944) (Free Exercise Clause).
17. *United States v. Ballard*, 322 U.S. 78 (1944) (Free Exercise Clause).

18. In re *Summers*, 325 U.S. 561 (1945) (Free Exercise Clause).
19. *Marsh v. Alabama*, 326 U.S. 501 (1946) (Free Exercise Clause).
20. *Tucker v. Texas*, 326 U.S. 517 (1946) (Free Exercise Clause).
21. *Cleveland v. United States*, 329 U.S. 14 (1946) (Free Exercise Clause).
22. *Everson v. Board of Education*, 330 U.S. 1 (1947) (Establishment Clause).
23. *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948) (Establishment Clause).
24. *Niemotko v. Maryland*, 340 U.S. 268 (1951) (Free Exercise Clause).
25. *Zorach v. Clauson*, 343 U.S. 306 (1952) (Establishment Clause).
26. *Kedroff v. Saint Nicholas Cathedral*, 344 U.S. 94 (1952) (Free Exercise Clause).
27. *Fowler v. Rhode Island*, 345 U.S. 67 (1953) (Free Exercise Clause).
28. *Poulos v. New Hampshire*, 345 U.S. 395 (1953) (Free Exercise Clause).
29. *McGowan v. Maryland*, 366 U.S. 420 (1961) (Establishment Clause).
30. *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961) (Establishment Clause).
31. *Braunfeld v. Brown*, 366 U.S. 599 (1961) (Free Exercise Clause).
32. *Gallagher v. Crown Kosher Super Market of Massachusetts, Inc.*, 366 U.S. 617 (1961) (Both Establishment and Free Exercise Clause).
33. *Torcaso v. Watkins*, 367 U.S. 488 (1961) (Establishment Clause).
34. *Engel v. Vitale*, 370 U.S. 421 (1962) (Establishment Clause).
35. *Abington School District v. Schempp*, 374 U.S. 203 (1963) (Establishment Clause).
36. *Sherbert v. Verner*, 374 U.S. 398 (1963) (Free Exercise Clause).
37. *Flast v. Cohen*, 392 U.S. 83 (1968) (Establishment Clause).
38. *Board of Education v. Allen*, 392 U.S. 236 (1968) (Establishment Clause).
39. *Epperson v. Arkansas*, 393 U.S. 97 (1968) (Establishment Clause).
40. *Presbyterian Church v. Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969) (Free Exercise Clause).
41. *Walz v. Tax Commission of New York City*, 397 U.S. 664 (1970) (Establishment Clause).
42. *Gillette v. United States*, 401 U.S. 437 (1971) (Establishment and Free Exercise Clause).
43. *Lemon v. Kurtzman (I)*, 403 U.S. 602 (1971) (Establishment Clause).
44. *Tilton v. Richardson*, 403 U.S. 672 (1971) (Establishment Clause).
45. *Cruz v. Beto*, 405 U.S. 319 (1972) (Free Exercise Clause).
46. *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (Free Exercise Clause).
47. *Lemon v. Kurtzman (II)*, 411 U.S. 192 (1973) (Establishment Clause).
48. *Norwood v. Harrison*, 413 U.S. 455 (1973) (Establishment and Free Exercise Clause).
49. *Levitt v. Committee for Public Education & Religious Liberty*, 413 U.S. 472 (1973) (Establishment Clause).
50. *Hunt v. McNair*, 413 U.S. 734 (1973) (Establishment Clause).
51. *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (Establishment Clause).

52. *Sloan v. Lemon*, 413 U.S. 825 (1973) (Establishment Clause).
53. *Johnson v. Robison*, 415 U.S. 361 (1974) (Free Exercise Clause).
54. *Meek v. Pittenger*, 421 U.S. 349 (1975) (Establishment Clause).
55. *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976) (Free Exercise Clause).
56. *Roemer v. Board of Public Works*, 426 U.S. 736 (1976) (Establishment Clause).
57. *Wolman v. Walter*, 433 U.S. 229 (1977) (Establishment Clause).
58. *New York v. Cathedral Academy*, 434 U.S. 125 (1977) (Establishment Clause).
59. *McDaniel v. Paty*, 435 U.S. 618 (1978) (Free Exercise Clause).
60. *Jones v. Wolf*, 443 U.S. 595 (1979) (Free Exercise Clause).
61. *Committee for Public Education & Religious Liberty v. Regan*, 444 U.S. 646 (1980) (Establishment Clause).
62. *Harris v. McRae*, 448 U.S. 297 (1980) (Establishment Clause).
63. *Stone v. Graham*, 449 U.S. 39 (1980) (Establishment Clause).
64. *Thomas v. Review Board*, 450 U.S. 707 (1981) (Establishment and Free Exercise Clause).
65. *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981) (Free Exercise Clause).
66. *Widmar v. Vincent*, 454 U.S. 263 (1981) (Establishment and Free Exercise Clause).
67. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982) (Establishment Clause).
68. *United States v. Lee*, 455 U.S. 252 (1982) (Free Exercise Clause).
69. *Larson v. Valente*, 456 U.S. 228 (1982)(Establishment Clause).
70. *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (Establishment Clause).
71. *Bob Jones University v. United States*, 461 U.S. 574 (1983) (Establishment and Free Exercise Clause).
72. *Mueller v. Allen*, 463 U.S. 388 (1983) (Establishment Clause).
73. *Marsh v. Chambers*, 463 U.S. 783 (1983) (Establishment Clause).
74. *Lynch v. Donnelly*, 465 U.S. 668 (1984) (Establishment Clause).
75. *Tony & Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985) (Establishment and Free Exercise Clause).
76. *Wallace v. Jaffree*, 472 U.S. 38 (1985) (Establishment Clause).
77. *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985) (Establishment Clause).
78. *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985) (Establishment Clause).
79. *Aguilar v. Felton*, 473 U.S. 402 (1985) (Establishment Clause).
80. *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986) (Establishment Clause).
81. *Bender v. Williamsport Area School District*, 475 U.S. 534 (1986) (Establishment Clause).
82. *Goldman v. Weinberger*, 475 U.S. 503 (1986) (Free Exercise Clause).
83. *Bowen v. Roy*, 476 U.S. 693 (1986) (Free Exercise Clause).
84. *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986)

(Establishment and Free Exercise Clause).

85. *Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136 (1987) (Free Exercise Clause).
86. *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (Free Exercise Clause).
87. *Edwards v. Aguillard*, 482 U.S. 578 (1987) (Establishment Clause).
88. *Corporation of the Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327 (1987) (Establishment Clause).
89. *Lyng v. Northwest Indian Cemetery Protection Ass'n*, 485 U.S. 439 (1988) (Free Exercise Clause).
90. *Bowen v. Kendrick*, 487 U.S. 589 (1988) (Establishment Clause).
91. *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989) (Establishment Clause).
92. *Frazee v. Illinois Department of Employment Security*, 489 U.S. 829 (1989) (Free Exercise Clause).
93. *Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680 (1989) (Establishment and Free Exercise Clause).
94. *County of Allegheny v. ACLU*, 492 U.S. 573 (1989) (Establishment Clause).
95. *Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378 (1990) (Establishment and Free Exercise Clause).
96. *Employment Division, Department of Human Resouces of Oregon v. Smith*, 494 U.S. 872 (1990) (Free Exercise Clause).
97. *Board of Education v. Mergens*, 496 U.S. 226 (1990) (Establishment Clause).
98. *Lee v. Weisman*, 505 U.S. 577 (1992) (Establishment Clause).
99. *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993) (Establishment Clause).
100. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (Free Exercise Clause).
101. *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993) (Establishment Clause).
102. *Board of Education v. Grumet*, 512 U.S. 687 (1994) (Establishment Clause).
103. *Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753 (1995) (Establishment Clause).
104. *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995) (Establishment Clause).
105. *Agostini v. Felton*, 521 U.S. 203 (1997) (Establishment Clause).
106. *City of Boerne v. Flores*, 521 U.S. 507 (1997) (Free Exercise Clause).
107. *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000) (Establishment Clause).
108. *Mitchell v. Helms*, 530 U.S. 793 (2000) (Establishment Clause).
109. *Good News Club v. Milford Central School*, 533 U.S. 98 (2001) (Establishment Clause).
110. *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150 (2002) (Free Exercise Clause).
111. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002) (Establishment Clause).
112. *Locke v. Davey*, 540 U.S. 712 (2004) (Free Exercise Clause).

113. *Cutter v. Wilkinson*, 544 U.S. 709 (2005) (Establishment Clause).

114. *Van Orden v. Perry*, 545 U.S. 677 (2005) (Establishment Clause).

115. *McCreary County v. ACLU of Kentucky*, 545 U.S. 844 (2005) (Establishment Clause).

* Mark David Hall is the Herbert Hoover Distinguished Professor of Political Science at George Fox University. I am grateful to Janna McKee for her contributions to this essay, and to Daniel L. Dreisbach, Truman Stone, and Jonathan Griffin for their comments on it. I would like to thank Margaret Monahan Hogan and Jamie Powell for organizing and inviting me to participate in the Garaventa Center's stimulating conference "The American Experiment: Religious Liberty."

[1] 330 U.S. 1 (1947).

[2] *Id.* at 33 (Rutledge, J., dissenting).

[3] By "history," I mean general history that is external to the law, not legal history that concerns the particular background of a case, legal precedents, or the legislative history of a statute. Even more specifically, I am concerned with the Justices' use of history to shine light on the meaning of the Religion Clause, as opposed to the use of history to illuminate general American practices or mores. An example of the latter use of history is Justice Stewart's dissent in *Engel v. Vitale*, 370 U.S. 421, 446 (1962) (Stewart, J., dissenting), where he provided a lengthy list of examples to show that prayer has long been a part of American public life. For further elaboration on the distinction between general and legal history, see Charles A. Miller, The Supreme Court and the Uses of History 20-28 (1969); Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 Sup. Ct. Rev. 119, 119-32. For discussion and criticism of the Court's use of history, see Miller, *supra;* Kelly, *supra*; William M. Wiecek, *Clio as Hostage: The United States Supreme Court and the Uses of History*, 24 Cal. W. L. Rev. 227 (1988); and John G. Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. Chi. L. Rev. 502 (1964).

Debates about the relevance of history are closely related to, and often overlap with, debates about originalism. See, for instance, the well-known exchange between Edwin Meese and William J. Brennan in Edwin Meese III et al., The Great Debate: Interpreting Our Written Constitution 1-25 (1986). Dennis J. Goldford, The American Constitution and the Debate over Originalism (2005) discusses much of the literature published on this subject since the Meese–Brennan exchange.

[4] The Court's use of history in Religion Clause cases has often been critiqued. *See* Mark DeWolfe Howe, The Garden and the Wilderness: Religion and Government in American Constitutional History 1-31, 149-76 (1965); Edward S. Corwin, *The Supreme Court as National School Board*, 14 Law & Contemp. Probs. 3 (1949); John Phillip Reid, *Law and History*, 27 Loy. L.A. L. Rev. 193, 220 (1993) ("There are no other decisions dealing with American constitutional law that owe more to violations of the canons of historical interpretation than those dealing with the establishment and free exercise of religion."). A good overview of this literature is provided by Daniel L. Dreisbach, *Everson and the Command of History: The Supreme Court, Lessons in History, and the Church-State Debate in America*, *in* Everson Revisited: Religion, Education, and Law at the Crossroads 23-58 (Jo Renée Formicola & Hubert Morken eds., 1997).

[5] For an example of an article that makes a number of unsubstantiated claims about the Court's use of history in Religion Clause cases, see David Reiss, *Jefferson and Madison as Icons in Judicial History: A Study of Religion Clause Jurisprudence*, 61 Md. L. Rev. 94 (2002). For a good example of an article that provides careful consideration of the Court's use of history in a select number of Religion Clause cases, see John E. Joiner, Note, *A Page of History or a Volume of Logic?: Reassessing the Supreme Court's Establishment Clause Jurisprudence*, 73 Denv. U. L. Rev. 507 (1996). The most thorough and broad examination of the Court's use of history in Religion Clause cases is Robert L. Cord, Separation of Church and State: Historical Fact and Current Fiction (1982).

Martin S. Flaherty notes that "habits of poorly supported generalization — which at times fall below even the standards of undergraduate history — pervade the work of many of the most rigorous theorists when they invoke the past to talk about the Constitution." Martin S. Flaherty, *History "Lite" in Modern American Constitutionalism,* 95 Colum. L. Rev. 523, 526 (1995).

[6] Most lists of Religion Clause cases contain numerous cases that were not decided upon either Establishment or Free Exercise grounds. I combined several lists and read through each case, eliminating cases where fewer than four Justices considered one of the Religion Clauses to raise substantive issues. I adopted this "rule of four" because I wanted to include only cases where at least a substantial minority of Justices thought the case should be determined on Religion Clause grounds. This rule led me to exclude cases like *United States v. American Friends Service Committee,* 419 U.S. 7 (1974), and *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004), where only one and three Justices, respectively, believed the cases should be decided on the basis of the Free Exercise or Establishment Clause.

General lists of Supreme Court cases involving religion include John Witte, Jr., Religion and the American Constitutional Experiment 272-303 (2d ed. 2005) and Carl H. Esbeck, U.S. Supreme Court Decisions Relating to Religious Liberty and Church–State Relations (the January 2006 version was generously provided to me by the author). Witte's list contains 190 cases and Esbeck's contains 290. My list of 115 cases is in the Appendix.

[7] For instance, it does not include cases involving church property that are decided upon non-Religion Clause

grounds, *e.g.*, Watson v. Jones, 80 U.S. 679 (1871); significant religious claims that are decided upon statutory grounds, *e.g.,* United States v. Seeger, 380 U.S. 163 (1965); and cases involving religious speech if the decision is based on freedom of speech or press, *e.g.*, Lee v. Int'l Soc'y for Krishna Consciousness, Inc., 505 U.S. 830 (1992).

[8] For example, in the Selective Draft Law Cases Chief Justice Edward White wrote in his majority opinion that "we pass without anything but statement the proposition that an establishment of a religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the act to which we at the outset referred, because we think its unsoundness is too apparent to require us to do more." Arver v. United States, 245 U.S. 366, 389-90 (1918). Nor do I include cases in which petitions for certiorari are denied or that are summarily affirmed, even if the cases involve Religion Clause issues. *E.g.*, Heisey v. County of Alameda, 352 U.S. 921 (1956) (mem.), *denying cert. to* Lundberg v. County of Alameda, 298 P.2d 1 (Cal. 1956); Luetkemeyer v. Kaufmann, 419 U.S. 888 (1974) (mem.), *aff'g* 364 F. Supp. 376 (W.D. Mo. 1973).

[9] Only cases where at least four members of the Court believed the case involves significant Establishment and Free Exercise issues are classified as "both." As suggested in note 4, *supra*, if Justices mention but do not treat seriously issues raised by one of the Clauses, the case is not counted as involving that Clause. See, for example, Chief Justice Rehnquist's treatment of the Establishment Clause claim in *Locke v. Davey*, 540 U.S 712, 719 (2004).

[10] I include in this number opinions of Justices who simply concur or dissent without opinion or who explicitly deny that the case should be decided upon Religion Clause grounds.

[11] Everson v. Bd. of Educ., 330 U.S. 1, 11-12 (1947) (footnotes omitted).

[12] *Id.* at 13.

[13] 98 U.S. 145 (1878).

[14] 544 U.S. 709 (2005).

[15] If the author of an opinion clearly associates a statute with someone's name (e.g., "Thomas Jefferson's Virginia Statute for Religious Liberty"), I consider the phrase to be an appeal to the person. However, if the bill is referred to without a name (e.g., "Virginia Statute for Religious Liberty"), I count it as an appeal to "context." I have not categorized appeals to specific laws, constitutional provisions, and documents. Books and essays that trace the influence of individual texts include Daniel L. Dreisbach, Thomas Jefferson and the Wall of Separation Between Church and State 97-106 (2002) and Cushing Strout, *Jeffersonian Religious Liberty and American Pluralism, in* The Virginia Statute for Religious Freedom: Its Evolution and Consequences in American History 201-35 (Merrill D. Peterson & Robert C. Vaughan eds., 1988).

[16] Because the phrase "a wall of separation between church and state" is so identified with Jefferson in the context of Religion Clause cases, I consider its use without Jefferson's name to still be an appeal to him. On the other hand, I do not count the broader phrase, "separation of church and state," as an appeal to Jefferson, specifically, or history, more generally.

If the author of an opinion mentions someone negatively, or cites evidence that goes against his or her historical argument, I do not count these as appeals to history. For instance, when Justice Rutledge wrote about Patrick Henry's general assessment bill in *Everson*, he did so not to shine light on the meaning of the First Amendment but to set the stage for a discussion of Madison's *Memorial and Remonstrance*, which he believed was "the most concise and the most accurate statement of the views of the First Amendment's author concerning what is 'an establishment of religion.'" *Everson*, 330 U.S. at 37 (Rutledge, J., dissenting).

[17] *Everson*, 330 U.S. at 15 (applying Establishment Clause to states under Fourteenth Amendment); Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940) (applying Free Exercise Clause to states under Fourteenth Amendment).

[18] I discuss *Everson* in detail in Part I.D.1.

[19] 508 U.S. 520, 575 (1993) (Souter, J., concurring).

[20] 521 U.S. 507, 537-66 (1997) (Scalia, J., concurring in part, and O'Connor, J., dissenting).

[21] Lee Epstein et al., The Supreme Court Compendium: Data, Decisions, and Developments 597-99 tbl.6-11 (3d ed. 2003). This figure covers 1946 to 2001.

[22] This figure, derived from my calculations, includes cases decided in and after 1940 (thus excluding five earlier cases). I limit my discussion to these cases because the earlier cases were so spread out that most Justices only had one or two cases come before them. As such, the percentage of cases in which they did or did not write opinions is artificially high or low. As well, the earlier jurists served in an era where concurring and dissenting opinions were less common.

[23] For instance, Justice William O. Douglas issued almost thirty-six opinions a year as contrasted with Justice Charles E. Whittaker, who wrote slightly more than four opinions per year during his five years on the Court and issued no opinion in the five Religion Clause cases that came before him as a Justice. Of course these are extreme cases. Indeed, Henry J. Abraham reports that Douglas drafted a majority opinion for Whittaker in a case in which Douglas was dissenting. Henry J. Abraham, Justices, Presidents, and Senators: A History of U.S. Supreme Court Appointments from Washington to Clinton 204 (rev. ed. 1999).

[24] For example, Justice O'Connor repeatedly concurred or dissented to promote her endorsement test, and in the late 1970s and mid-1980s Justice Rehnquist's originalist approach to the Establishment Clause often left him at odds with

his colleagues.

[25] This definition is compatible with that used in the United States Supreme Court database. *See* EPSTEIN ET AL., *supra* note 22, at 489. Table 6-2 of this volume provides a breakdown of votes cast by Justices between 1946 and 2001 on First Amendment issues generally, but not specifically on Religion Clause cases. *Id.* at 486-89 tbl.6-2.

[26] 310 U.S. 296 (1940). I begin in 1940 rather than with the five preceding Religion Clause cases for reasons mentioned in note 23 and, in this case, because the votes in these cases were unanimously conservative with the exception of three dissenting votes in *Late Corp. of the Church of Jesus Christ of Latter-day Saints v. United States*, 136 U.S. 1 (1890). As well, adding so many individuals to the table makes it unwieldy. The twenty-two Justices who voted on Religion Clause cases who are not included in the table as well as the number of votes they cast and the percentage of liberal votes are as follows: Bradley (3, 0%), Peckham (2, 0%), Waite (1, 0%), Brown (1, 0%), Shiras (1, 0%), E. White (2, 0%), McKenna (2, 0%), Holmes (1, 0%), Day (1, 0%), Moody (1, 0%), Brewer (4, 0%), Blatchford (2, 0%), Gray (3, 0%), Harlan I (4, 0%), Hunt (1, 0%), Strong (1, 0%) Miller (2, 0%), Swayne (1, 0%), Clifford (1, 0%), Field (3, 33%), Fuller (4, 25%), and Lamar (2, 50%).

[27] Of course just because a Justice is liberal or conservative in one area of jurisprudence does not mean he or she is liberal or conservative in other areas. As well, combining all Religion Clause votes may obscure the extent to which jurists shift their approach to these clauses over their careers.

Also problematic is deciding how to count votes where a Justice votes to uphold some programs and strike down others in the same case (e.g., Justice Stewart's vote in *Meek v. Pittenger*, 421 U.S. 349 (1975)) or where cases are combined and Justices vote in a seemingly contradictory manner (e.g., Justice O'Connor's votes in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989)). In these relatively rare instances, I characterized the votes as liberal or conservative based on the overall context.

[28] 98 U.S. 145 (1878).

[29] *Id.* at 162.

[30] *Id.* at 162-63.

[31] *Id.* at 163-64.

[32] *See id.* at 163.

[33] *Id.* at 162-64.

[34] *Id.* at 164.

[35] 310 U.S. 296 (1940).

[36] *Id.*

[37] 319 U.S. 624 (1943).

[38] These opinions include Justice Frankfurter's opinions in *Minersville School District v. Gobitis*, 310 U.S. 586, 591 (1940) and *Barnette*, 319 U.S. at 646 (Frankfurter, J., dissenting) (overruling *Gobitis*); and Justice Reed's dissent in *Murdock v. Pennsylvania*, 319 U.S. 105, 117 (1943) (Reed, J., dissenting).

[39] Everson v. Bd. of Educ., 330 U.S. 1, 8 (1947).

[40] *Id.* at 12 & nn.12-13, 16.

[41] *Id.* at 11 n.10.

[42] *Id.* at 18.

[43] *Id.* at 19 (Jackson, J., dissenting).

[44] *Id.* at 28-29 (Rutledge, J., dissenting).

[45] *Id.* at 33-34 (footnotes omitted).

[46] *Id.* at 34-44.

[47] *Id.* at 63-72 app.

[48] Daniel L. Dreisbach offers a different syllogism explaining *Everson*'s historical argument in his essay, *A Lively and Fair Experiment: Religion and the American Constitutional Tradition*, 49 EMORY L.J. 223, 230 (2000).

[49] *See supra* note 3.

[50] 333 U.S. 203 (1948).

[51] *Id.* at 205-33.

[52] *Id.* at 244 (Reed, J., dissenting).

[53] *Id.*

[54] *Id.* at 244-47.

[55] *Id.* at 246-48.

[56] 370 U.S. 421 (1962).

[57] 366 U.S. 420 (1961).

[58] *Id.* at 437-39 (majority opinion); *id.* at 492-95 (Frankfurter, J., concurring).

[59] *Id.* at 437-39 (majority opinion); *id.* at 492-95 (Frankfurter, J., concurring).

[60] *Id.* at 438-39 (majority opinion); *id.* at 494-95 & nn.67-68 (Frankfurter, J., concurring).

[61] *Engel*, 370 U.S. at 428-29 (footnote omitted).

[62] *Id.* at 428-32.

[63] *Id.* at 434 n.20; *see also* discussion of Roger Williams's role as a "Founder," *supra* note 17.
[64] *Id.*
[65] *Id.* at 442 (Douglas, J., concurring).
[66] *Id.* at 443 n.9. Douglas quoted Article III of the Northwest Ordinance to support this claim. *Id.*
[67] *Id.* at 442.
[68] 374 U.S. 203 (1963).
[69] *Id.* at 214 (footnote omitted).
[70] *Id.* at 237 (Brennan, J., concurring).
[71] *Id.* at 237-38, 240-41.
[72] *See, e.g.*, Gerald Gunther & Kathleen M. Sullivan, Constitutional Law 1466 (13th ed. 1997); David M. O'Brien, 2 Constitutional Law and Politics: Civil Rights and Civil Liberties 731-33 (6th ed. 2005).
[73] *Schempp*, 374 U.S. at 294-95 (Brennan, J., concurring).
[74] *Id.* at 295.
[75] 397 U.S. 664 (1970).
[76] *See, e.g.*, Justice Powell's opinion in *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 770 (1973) ("The history of the Establishment Clause has been recounted frequently and need not be repeated here.") (citing Everson v. Bd. of Educ., 330 U.S. 1 (1947)). Although primarily relying on *Everson* and precedents, Powell, a proud son of Virginia, did include a defense of the centrality of debates about religious liberty in Virginia for interpreting the First Amendment. *Id.* at 770 n.28.
[77] *Walz*, 397 U.S. at 692-93 (Brennan, J., concurring).
[78] *Id.* at 684-85.
[79] *Id.* at 704-17 (Douglas, J., dissenting).
[80] *Id.* at 719-27.
[81] 392 U.S. 83 (1968).
[82] *Id.* at 126 (Harlan, J., dissenting).
[83] Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 820 (1973) (White, J., dissenting).
[84] 463 U.S. 783 (1983).
[85] *Id.* at 786-95.
[86] *Id.* at 787-88.
[87] *Id.* at 788 n.5.
[88] *Id.* at 814 (Brennan, J., dissenting).
[89] *Id.*
[90] *Id.* at 815.
[91] *Id.* at 816-17 (footnote omitted) (quoting Abington Sch. Dist. v. Schempp, 374 U.S. 203, 241 (1963) (Brennan, J., concurring), and W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 639 (1943)).
[92] In the Court's next term, Brennan continued his retreat from history in his dissenting opinion in *Lynch v. Donnelly*, 465 U.S. 668 (1984). Arguing that the Court had theretofore "limited its historical inquiry to the particular practice under review" (a highly questionable characterization of the Court's use of history in Religion Clause cases), he contended that the multitude of religious practices engaged in by governments in the Founding era are irrelevant to the question of whether or not religious displays are permissible on public land. *Id.* at 719 (Brennan, J., dissenting). For instance, Brennan noted, "[T]he widespread celebration of Christmas did not emerge in its present form until well into the nineteenth century." *Id.* at 720.

Brennan's most significant nonjudicial statement on this subject is his 1985 speech at Georgetown University. There he contended that:

[w]e current Justices read the Constitution in the only way that we can: as Twentieth Century Americans. We look to the history of the time of the framing and to the intervening history of interpretation. But the ultimate question must be, what do the words of the text mean in our time. For the genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs."

William J. Brennan, Jr., in Meese et al., *supra* note 3, at 17.
[93] 472 U.S. 38 (1985).
[94] *Id.* at 61.
[95] *Id.* at 52.
[96] *Id.* at 52-53.
[97] *Id.* at 52-55.
[98] *Id.* at 81 (O'Connor, J., concurring).
[99] *Id.* at 113 (Rehnquist, J., dissenting) (citations omitted).
[100] *Id.* at 106.
[101] *Id.* at 91-114.

[102] John Adams is referenced by Frankfurter in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 653 (1943) (Frankfurter, J., dissenting); Brennan in *Larson v. Valente*, 456 U.S. 228, 244 n.19 (1982); and Burger in *Lynch v. Donnelly*, 465 U.S. 668, 675 n.2 (1984). Washington is appealed to two times by Brennan in *Abington School District v. Schempp*, 374 U.S. 203, 296 n.71 (1963) (Brennan, J., concurrung); and Burger in *Lynch*, 465 U.S. at 675.
[103] *Jaffree*, 472 U.S. at 95-104 (Rehnquist, J., dissenting).
[104] *Id.* at 99.
[105] *Id.* at 113.
[106] 492 U.S. 573 (1989).
[107] *Id.* at 590, 604-05.
[108] *Id.* at 590 (quoting *Jaffree*, 472 U.S. at 52 (majority opinion)).
[109] *Id.* at 604-05 (citations & footnotes omitted).
[110] *Id.* at 605.
[111] O'Connor wrote that "[h]istorical acceptance of a practice does not in itself validate that practice under the Establishment Clause if the practice violates the values protected by that Clause." *Id.* at 630 (O'Connor, J., concurring).
[112] *Id.* at 646 (Stevens, J., concurring).
[113] *Id.* at 669-73 (Kennedy, J., concurring).
[114] *Id.* at 659-61. In his opinion, Kennedy made it clear that it is the principles embraced by the Founders that are significant, not specific practices. Hence, it is irrelevant that "displays commemorating religious holidays were not commonplace in 1791." *Id.* at 669.
[115] *Id.* at 679.
[116] 505 U.S. 577 (1992).
[117] *Id.* at 587-93.
[118] [1] *See id.* at 599-609 (Blackmun, J. concurring).
[119] [2] *Id.* at 600 n.1, 608 & n.11.
[120] *Id.* at 612 (Souter, J., concurring).
[121] *Id.*
[122] *Id.* 612-16.
[123] *Id.* at 616 n.3.
[124] *Id.*
[125] *Id.* at 612, 622.
[126] *Id.* at 632 (Scalia, J., dissenting) (quoting Lynch v. Donnelly, 465 U.S. 668, 673 (1984)). Scalia went on to quote similar passages from *Schempp*, *Marsh*, and *Walz*. *Id.* at 632-33.
[127] *Id.* at 633.
[128] *Id.* at 633-34.
[129] *Id.* at 640-44.
[130] 494 U.S. 872 (1990).
[131] *See, e.g.*, *id.* at 891 (O'Connor, J., concurring); Douglas Laycock, *The Remnants of Free Exercise,* 1990 SUP. CT. REV. 1.
[132] 508 U.S. 520 (1993).
[133] *Id.* at 574 (Souter, J., concurring).
[134] *Id.* at 575.
[135] *Id.* at 576.
[136] 521 U.S. 507 (1997). The majority decided the case on separation of powers grounds, but four Justices considered the case to involve substantial Religion Clause issues. Justice Souter dissented in this case because he thought the Court should not have granted certiorari. *Id.* at 565-66 (Souter, J., dissenting).
[137] *Id.* at 548 (O'Connor, J., dissenting).
[138] *Id.* at 549.
[139] *Id.* at 550-60.
[140] *Id.* at 555-57, 560-62.
[141] *Id.* at 537 (Scalia J., concurring in part).
[142] *Id.* at 537-44.
[143] 515 U.S. 819 (1995).
[144] *Id.* at 856 (Thomas, J., concurring).
[145] *Id.* at 852-63.
[146] 125 S. Ct. 2854 (2005).
[147] 125 S. Ct. 2722 (2005).
[148] The Justices appealing to history were O'Connor, Rehnquist, Scalia, Souter, and Stevens.
[149] *See Van Orden,* 125 S. Ct. at 2883-86 & nn.23-26 (Stevens, J., dissenting); *id.* at 2892 (Souter, J., dissenting); *McCreary*, 125 S. Ct. at 2746-47 (O'Connor, J., concurring).

[150] *See Van Orden*, 125 S. Ct. at 2858-62 (Rehnquist, C.J., plurality opinion); *id.* at 2865 (Thomas, J., concurring); *McCreary*, 125 S. Ct. at 2748-50 (Scalia, J., dissenting).
[151] The other is Justice Arthur Goldberg.
[152] *Van Orden*, 125 S. Ct. at 2888 (Stevens, J. dissenting).
[153] *Id.* at 2883 (footnote omitted).
[154] *Id.* at 2883-85 & n.27.
[155] *Id.* at 2889-90.
[156] *Id.* at 2890.
[157] *McCreary*, 125 S. Ct. at 2746 (O'Connor, J., concurring) (alteration and omission in original) (citing *A Memorial and Remonstrance Against Religious Assessments*).
[158] *Id.* at 2749 (Scalia, J., dissenting).
[159] *Id.* at 2754.
[160] *Id.* at 2751 n.2 (omission in original) (quoting Corwin, *supra* note 4, at 16).
[161] 544 U.S. 709 (2005).
[162] *Id.* at 726-27 (Thomas, J., concurring).
[163] 542 U.S. 1 (2004).
[164] 536 U.S. 639 (2002).
[165] *Newdow*, 542 U.S. at 49-50 (Thomas, J., concurring); *see also Zelman*, 536 U.S. at 677-80 (Thomas J., concurring). *Newdow* is not included in this study because only three Justices thought the case should be decided on Religion Clause grounds.

Other Justices have raised Thomas's point about federalism, but none have advocated it as vigorously as Thomas. *See, e.g.*, Abington Sch. Dist. v. Schempp, 374 U.S. 203, 309-10 (Stewart, J., dissenting) ("[T]he Establishment Clause was primarily an attempt to insure that Congress not only would be powerless to establish a national church, but would also be unable to interfere with existing state establishments."); *see also* Lee v. Weisman, 505 U.S. 577, 641 (Scalia, J., dissenting) ("The Establishment Clause was adopted to prohibit such an establishment of religion at the federal level (and to protect state establishments of religion from federal interference).").
[166] *Cutter*, 544 U.S. at 729 (Thomas, J., concurring).
[167] *Id.*
[168] *Newdow*, 542 U.S. at 45 (Thomas, J., concurring).
[169] Van Orden v. Perry, 125 S. Ct. 2854, 2887 (2005) (Stevens, J., dissenting).
[170] Bernard Bailyn, On the Teaching and Writing of History 73 (1994).
[171] *See* David Hackett Fischer, Historians' Fallacies: Toward a Logic of Historical Thought 109-16 (1970). Of course some scholars deny that it is possible to distinguish between good and bad history. I presume these scholars do not believe that history is relevant for constitutional interpretation (except perhaps for rhetorical purposes), and I invite them to skip the remaining paragraphs.
[172] Of course when looking at the actions of state legislatures, scholars must take into account the possibility that some political leaders believed that the state governments could do things that the federal government could not.
[173] Good overviews of a broader range of Founders' views of church–state relations may be found in Daniel L. Dreisbach, Mark D. Hall & Jeffry H. Morrison, The Founders on God and Government (2004) (containing essays about Washington, John Adams, Jefferson, Madison, Witherspoon, Franklin, Wilson, Mason, and the Carrolls); Daniel L. Dreisbach, Mark David Hall & Jeffry H. Morrison, The Forgotten Founders on Church and State (forthcoming) (containing essays about Abigail Adams, Samuel Adams, Oliver Ellsworth, Alexander Hamilton, Patrick Henry, John Jay, Thomas Paine, Edmund Randolph, Benjamin Rush, Roger Sherman, and Mercy Otis Warren).
[174] Flaherty, *supra* note 5, at 526.
[175] *Id.* at 590.
[176] *See* 508 U.S. 520, 575 (1993) (Souter, J., concurring) (suggesting that the Court consider scholarship on the Free Exercise Clause's original purpose and understanding).
[177] James M. O'Neill, Religion and Education Under the Constitution (1949). Written in response to *Everson*, this book has only been cited in three Religion Clause opinions, but "it is still widely regarded as a leading manifesto for the nonpreferentialist position." Dreisbach, *supra* note 4, at 35.
[178] Leo Pfeffer, Church, State, and Freedom (1953). Pfeffer authored, coauthored, or edited numerous books supporting the strict separation of church and state. This volume is cited in six different Religion Clause cases: *McGowan v. Maryland*, 366 U.S. 420, 578 n.9 (1961) (Douglas, J., dissenting); *Abington School District v. Schempp*, 374 U.S. 203, 227 (1963); *McDaniel v. Paty*, 435 U.S. 618, 622 n.3 (1978); *Larson v. Valente*, 456 U.S. 228, 244 n.17 (1982); *Marsh v. Chambers*, 463 U.S. 783, 791 n.12 (1983); and *Lynch v. Donnelly*, 465 U.S. 668, 716 n.23 (1984) (Brennan, J., dissenting).
[179] Cord, *supra* note 5. The book helped lay the groundwork for Rehnquist's dissent in *Wallace. See Wallace v. Jaffree*, 472 U.S. 38, 104 (1985) (Rehnquist, J., dissenting). It has also been referenced in four other Religion Clause cases: *Lee v. Weisman*, 505 U.S. 577, 612 (1992) (Souter, J., concurring); *Lamb's Chapel v. Center Moriches Union Free School*

District, 508 U.S. 384, 399 (1993) (Scalia, J., concurring); *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 855 (1995) (Thomas, J., concurring); and *McCreary County v. ACLU of Kentucky,* 125 S. Ct. 2722, 2745 (2005) (Souter, J., dissenting).

[180] LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT (1986). Levy's attack on the non-preferentialist interpretation of the Establishment Clause was written at least in part as a response to Rehnquist's opinion in *Wallace. See* LEVY, *supra*, at xvii-xviii. It has been cited by the Court in five Religion Clause opinions: *County of Allegheny v. ACLU*, 492 U.S. 573, 646 (1989) (Stevens, J., concurring in part and dissenting in part), *Lee*, 505 U.S. at 613 (Souter, J., concurring); *Rosenberger*, 515 U.S. at 869 (Souter, J., dissenting); *Agostini v. Felton*, 521 U.S. 203, 214 (1997); and *Cutter v. Wilkinson*, 544 U.S. 709, 729 (2005) (Thomas, J., concurring).

[181] Michael W. McConnell, *The Origins and Historical Undestanding of Free Exercise of Religion,* 103 HARV. L. REV. 1409 (1990). McConnell's article played a particularly prominent role in Justice O'Connor's opinion in *Boerne. See* City of Boerne v. Flores, 521 U.S. 507, 551, 553, 557-59 (1997) (O'Connor, J., dissenting). As well, it is cited in two other Religion Clause cases: *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 574 (1993) (Souter, J., concurring); and *Board of Education v. Grumet*, 512 U.S. 687, 723 (1994) (Kennedy, J., concurring).

[182] Akhil Reed Amar, *The Bill of Rights as a Constitution,* 100 YALE L.J. 1131 (1991). Amar's article, along with other scholarship, seems to have encouraged Justice Thomas to embrace a jurisdictional understanding of the Establishment Clause. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 679 n.4 (2002) (Thomas, J., concurring).

[183] Corwin, *supra* note 4. Corwin's article is cited by Scalia in *McCreary*, 125 S. Ct. at 2751 n.2.

[184] EDWARD S. CORWIN, A CONSTITUTION OF POWERS IN A SECULAR STATE 116 (1951) (emphasis in the original). This is a slightly revised version of *The Supreme Court as National School Board.* Corwin, *supra* note 4.

JACQUES MARITAIN, RELIGION, AND THE AMERICAN EXPERIMENT

BY THOMAS ALBERT HOWARD*

Since the birth of the United States in the late eighteenth century, this "land of the future," in the philosopher Hegel's words, has received no shortage of commentary from European intellectuals. Oscillating between paternal interest and fraternal rivalry, Europe's ambitious scribes have braved the Atlantic, written sprawling books, instructed us in manners and morals, measured our development against *Old World* benchmarks, and patched us into various schemes of the progress of the human mind. Sometimes this interest has exhibited a positive mien, sometimes ambivalent; more often in recent years it has been negative and condescending, hence, the much-discussed topic of European anti-Americanism.[1]

The French have proven especially eager and prodigious explainers of America. From Crevecoeur, Chateaubriand, and Tocqueville long ago to Simone de Beauvoir, Jean Baudrillard, and Bernard Henri-Lévy in more recent decades, French thinkers have left lasting guideposts of interpretation, if not always on the actual America of Iowa City and Cleveland, then on the symbolic "America," that golem of soulless modernity, which nourishes "critical theory" in the academy and inspires oppositional righteousness across the globe.

As the process of post-Cold War European unification has unfolded, hostility to this "America" has proven to be a useful intellectual reflex to help define the new European identity, with French elites in the vanguard often decrying the actions of what France's former Minister of Foreign Affairs, Hubert Védrine, dubbed history's first *hyperpuissance* (hyper-power). To be sure, American intellectuals have given as good as they've got, lobbing criticism and contempt across the Atlantic, often erroneously assuming Europe to be a much more homogenous entity than it actually is, or claims to be. One thinks, for instance, of Robert Kagan's much-discussed *Of Paradise and Power*, which divvied up the transatlantic world into denizens of Mars (America) and Venus (Europe).[2]

In an intellectual landscape of vitriolic anti-Americanism and cavalier over-generalization on both sides of the Atlantic, one wonders where to turn to gain a more judicious outlook on America from an outsider's perspective. The French neo-Thomist philosopher Jacques Maritain provides a good starting point. Often ignored by secularists as an overtly religious thinker and of interest to philosophers for a myriad of other reasons, Maritain's *image de l'amérique* is one to reckon with, especially as glimpsed in his *Reflections on America* (1958), based on a seminar held at the University of Chicago in 1956, but also in other works. What one finds in Maritain's pages is not universal praise, but speculative curiosity nourished by long experience in the United States, constructive criticism tempered by restraint, and, overall, a profoundly sympathetic reading of the United States, one that deftly mixes theological reflection and an acute regard of American history and society.

That such a sympathetic treatment of the United States by a leading French Catholic

thinker would appear in the middle of the twentieth century is far from obvious and deserves a word of historical contextualization.

For the "throne and altar" Catholic imagination of the nineteenth century, the United States long stood under a cloud of suspicion. As an expression of political modernity, the new nation was regularly viewed through the lenses of the French Revolution, the European-wide revolutions of 1848, and the Italian *Risorgimento*, all of which had made scant room for Rome in their blueprints of human emancipation. Despite the appeal of a handful of Catholic thinkers, such as a Félicité de Lammenais, to the constitutional liberties of the United States, the Church came to regard notions of religious freedom and the separation of church and state as the error of "indifferentism." Pope Gregory XVI made such a pronouncement in the encyclical *Mirari vos* (1832), and the sentiment was driven home in Pius IX's better-known *Syllabus of Errors* (1864).[3]

The image of America from Rome was not helped by the fact that Italian liberals and nationalists, often rabidly anticlerical, regularly lionized the United States as a model for Italy's future. When Rome was sacked in 1848 and the last vestiges of the Papal States dissolved in 1870 by revolutionaries appealing to American-style liberties, the association of America with impiety and a wrongheaded social order became an *idée fixe* among many ultramontane Catholics. The so-called "Americanist crisis" during the papacy of Leo XIII further contributed to misgivings about the United States — misgivings that persisted well into the twentieth century.[4] John Courtney Murray, it will be remembered, received a censure from Rome as late as the 1950s for his optimistic endorsement of church-state relations in the United States.

European Catholic skepticism toward the United States cannot be isolated from more pervasive *Old World* doubts about the upstart nation. Some of these doubts have longstanding historical antecedents. In the eighteenth century, for example, putatively "scientific" theories of the "degeneracy" of flora and fauna in the New World circulated widely among intellectual circles — what Philippe Roger has called "the Enlightenment's strange hostility to the New World."[5] Unfit for human habitation, full of bizarre beasts and wild men, "the conquest of the New World . . . has been the greatest of all misfortunes to befall mankind," summed up Cornelius de Pauw in his *Philosophical Reflections on the Americans* (1768-69), widely regarded as a founding text of anti-American sentiment.[6]

In the early nineteenth century, misgivings about America passed from a focus on the natural environment to a focus on the social and political conditions of the new nation. After the collapse of the democratic experiment in France in 1815, the American republic was for a time the only state of size in the world to practice what many believed were the invalidated ideas of democracy, equality, and religious freedom. That a reactionary milieu in Europe coincided with the emergence of "Jacksonian America" produced an especially jarring contrast between the continents. During this period, lasting anti-American images first gained wide currency in European thought and have since been passed down, across the political spectrum, to subsequent generations. The post-1815 age of Romanticism and Restoration, notes Dan

Diner, "can with all justification be considered the main workshop for lasting anti-American images and metaphors."[7]

Many criticisms first voiced in this era have a familiar ring: America was a nation of boors and backwoodsmen; it was barren of the arts and high culture; it had no sense of history or tradition; it lacked an appreciation of the finer things of life; it was deficient in manners and propriety; its religious life was sectarian and driven by populist passions; it was a land of swindling in business and libel in the press; it had produced no great writers or artists; industry and the dollar mixed with all things; it was destined for mediocrity, ignominy, or worse; and on and on. While not all Europeans were given to such one-sided sentiments (Tocqueville's high-minded outlook comes to mind), the fact that such criticisms appear consistently among leading intellectuals is quite striking. (See Talleyrand, Hegel, Jacob Burckhardt, Stendhal, Baudelaire, Hölderlin, Dickens, Frances Trollope, Nietzsche, and Matthew Arnold, among many others.)

The United States' growing industrial might in the early twentieth century and its involvement in European affairs as a result of the Great War often exacerbated anti-American feelings. The politically polarized 1920s and 1930s stand out for the high volume of anti-American literature published in Europe, both on the political left and right. In France, Georges Duhamel's 1930 book *Scènes de la vie future* (translated as *America the Menace: Scenes from the Life of the Future*) may be taken as an illustrative example. With obsessive intensity, the noted French novelist felt bound to express his loathing of industrialization, crowd culture, and entertainment in America. He recorded his depression and horror at American religion, movies, jazz, advertisements, college life, automobiles, and mass production. Three years before Hitler came to power in Europe, he saw in the United States nothing but the brutalization of conscience, the standardization of culture, the debasement of all civilized values. America was the ugly face of a gangly new Leviathan, destined to drown *Old Europe* in a sea of banalities, trivialities, and overweening power.[8]

Maritain laconically wished Duhamel had enjoyed a better visit in the United States, and he regretted that Duhamel's attitude was not isolated to few malcontents, but, if in less extreme form, increasingly characteristic of Europe's intelligentsia as a whole, especially after mid-century among those influenced by growing currents of Marxist thought in Western Europe. UNESCO meetings in Sao Paulo and Geneva in 1954, which witnessed the eruption of much antipathy toward the United States, confirmed for Maritain, who always considered himself a man of the Left, the blinkered ideological reasoning of many of his fellow Europeans.[9]

What distinguished Maritain from many other European commentators on America was that he and his wife Raïssa actually lived in the United States. What is more, his first encounter with America was not on the coasts, but in the Midwest, in Chicago, where he lectured in 1933. Returning to the states frequently in the 1930s, Maritain left war-torn Europe altogether in 1940 for what was to be a brief exile in the United States. As things turned out, he accepted academic appointments in New York and Princeton and wound up living in the United States

until 1960, punctuated by a three-year period as French Ambassador to the Vatican directly after the war. His time in America, in other words, corresponded to the fascist undoing of Europe and the anxious early years of the Cold War.[10]

In *Reflections on America*, European elite criticism of the United States is never far from Maritain's mind. When unwarranted, he contravenes this criticism; when justified, he seeks to present it shorn of more general antipathy toward America; throughout, he speaks in what we might call a transatlantic voice, neither American nor European, but paradoxically both and neither. But his stance is not dispassionate: he exhibits the affection of a grateful refugee and divines in the American constitutional order and society promising elements of what he sought to articulate theoretically in *The Things That are Not Caesars*, *Integral Humanism*, *Scholasticism and Politics*, *Man and the State*, and other works of philosophy and political thought.

That Americans lacked any sense of history or tradition was a refrain among European critics. Maritain did not categorically dispute this charge, but he gave it a more nuanced and positive valuation. For him, "openness to the future" was a salutary consequence of America's very historical conditions, which he regarded as "an element of the greatness of America." In Europe, the "rotten stuff of past events, past hatreds, past habits" amounted to an "overwhelming historical heredity," a "sclerosis"; and it was well and good that Americans might be delivered from much of this. The *Old World's* past was not theirs in a direct sense; it was their "pre-history."[11] By implication, Americans possessed an important vantage point to help distinguish the valuable and enduring in Europe's own history, being less constricted by national(ist) attachments and long-standing hostilities.

But openness to the future did not mean that Americans had no historical consciousness. Maritain was struck by how the spirit of America's founding era continued to penetrate the present, as evidenced by widespread knowledge of Jefferson's *Declaration of Independence*, a lively sense of personal freedom and human rights, even the desire to preserve colonial-era furniture and architecture. This ongoing sense of a living past, instead of an exhausted one, and a palpable sense of a future amenable to human initiative, appeared to him to have inoculated Americans from revolutionary ideologies, claiming "historical necessity," that swept the Continent in the first part of the twentieth century. Accordingly, he posited a "root incompatibility … between the American people and Marxist philosophy." "For Marx," he elaborated,

> [H]istory is … an immense and terrible set of concatenated necessities, in the bosom of which man slaves toward his final emancipation. When he becomes at last, through communism, master of his own history, then he will drive the chariot of the Juggernaut which had previously crushed him. But for the American people it is quite another story. They are not interested in driving the chariot of the Juggernaut. They have gotten rid of the Juggernaut. It is not in any future messianic freedom of mankind, nor in mastering the necessities of history, it is in man's present freedom that they are interested.[12]

One might read this as Maritain's reply to European socialists, who had wrung their hands for decades over the ideologically telling question, enshrined in the title of Werner Sombart's famous book of 1906, *Why is there no Socialism in the United States?*

In a chapter on "The Old Tag of American Materialism," Maritain sought to rebut the persistent European charge that Americans were a people *peculiarly* given to materialistic pursuits. He did not deny that untoward attachments to consumer goods and pleasures constituted a problem throughout the industrialized world, but he wondered if Americans, at least in some respects, were in fact the least materialistic among the wealthy nations. "[F]ew things," he wrote, "are as sickening as the stock remarks with which so many persons in Europe, who are themselves far from despising the earthly goods of the world, reproach this country with its so-called materialism." This reproach did not derive from empirical evidence alone, he felt, but drew its strength from an *Old World* elitist tradition of "confusing spirituality with an aristocratic contempt for any improvement in material life." This elitist or "pseudo-spiritual" critique — perfected "among certain high-brow Europeans with large bank accounts and delicious wine in their cellars" — exerts such a powerful moralistic appeal, that "you yourselves [Americans] are taken in by it."[13]

To make the countervailing case, Maritain, in the spirit of Tocqueville, pointed to the "infinite swarming" of American charitable organizations, philanthropic foundations, private schools and colleges, and religious societies, which, in size and scope, had no counterpart in modern Europe. The enormous creative energy of the American private sector, both in generating wealth and giving it away, constituted for Maritain an historically unprecedented contribution to human welfare. While he admired the efforts of America's largest foundations — "born of freedom and immune from state control" — he equally praised the voluntarist and giving spirit of average Americans as upholders of "the ancient Greek and Roman idea of the *civis praeclarus*, the dedicated citizen who spends his money [and time] in the service of the common good."[14] While he does not explicitly invoke statistics, the sizable imbalance in private-sector giving between the United States and western Europe from the time of Maritain until today would seem to bear out his observation. Arthur C. Brooks of Syracuse University, for example, speaks of "the huge transatlantic charity gap," with Americans in the past few decades giving away, per capita, considerably more than citizens in most European countries.[15]

In his writings on political philosophy, Maritain esteemed democratic forms of government because of their potential to give political expression to the Judeo-Christian belief in the inviolable dignity of the individual. While true about all genuine democracies, in his view, Maritain nonetheless felt that the United States added something significantly to the theological underpinnings of democracy: the widespread reality of immigration, the fact that a modern nation had been conjured up by peoples once persecuted, rejected, offended, and humiliated. The cultural memory of past suffering coupled with a chance to make good in a New World had deposited for Maritain "a reminiscence of the Gospel in the inner attitude of people" and a resolve that misery and want need not be the accepted lot of humankind. "Here lies," he elaborated, "a distinctive privilege of this country, and a deep human mystery concealed behind its power and prosperity. The tears and suffering of the persecuted and unfortunate are transmuted into a perpetual effort to improve human destiny and to make life bearable; they are

transfigured into optimism and creativity." This "concealed" spiritual identity did not always avail itself to urbane, aesthetically sensitive critics of America; it was under the surface, "hidden in the secret life of souls, and covered by all the ordinary selfish desires and concerns of human nature. It exists, however, and is active in the great mass of the nation. And what is more valuable in this poor world than to find a trace of Gospel fraternal love active among men?"[16]

Maritain placed great value on the American experiment in "voluntary" religion, a historical *novum*, he believed, and a phenomenon quite distinct from some European efforts to separate church and state. In *Integral Humanism* (1936), before having extensive first-hand knowledge of the United States, he had argued for the goodness of a secular polity in which people of diverse religious backgrounds worked for the common good, albeit in a constitutional framework inspired by an implicitly theological sense of natural law and the dignity of the individual.[17] He felt this to be a proximate reality in the United States, and this constituted for him one of the sharpest points of contrast between American and European (particularly French) civilization. As he expressed it in *Man and the State* (1951):

> [A] European who comes to America is struck by the fact that the expression "separation between Church and State" … does not have the same meaning here and in Europe. In Europe it means … that complete isolation which derives from century-old misunderstandings and struggles, and which has produced most unfortunate results. Here it meant, as a matter of fact, together with a refusal to grant any privilege to one religious denomination in preference to others and to have a State established religion, a distinction between the State and the Churches which is compatible with good feeling and mutual cooperation.… [T]here's a historical treasure, the value of which a European is perhaps more prepared to appreciate, because of his own bitter experiences. Please to God that you keep it carefully, and do not let your concept of separation veer round to the European one.[18]

Although the religious settlement of the United States represented the most dramatic departure from the *Old World* in Maritain's view, he regarded the whole of its constitutional order truly as a *novus ordo seclorum*. But he was less inclined to locate its origins strictly in English common law or among Enlightenment-era thinkers, many of whom, particularly Rousseau, he viewed as deeply flawed. Rather, it reflected and resonated with much older, classical and medieval Christian, conceptions of natural law and a flourishing polity. His line of reasoning on this point strikingly parallels that of John Courtney Murray's in *We Hold These Truths* (1960).[19] Not bonds of strict necessity and custom, but the collective decisions of free men, Maritain maintained, characterized the good state for both Aristotle and Thomas Aquinas. Theirs is a community based on virtue and reason, and "implies a will or consent to live together, which freely emanates from the … people.… [N]owhere in the world has this notion of the essence of political activity been brought into existence more truly than in America."[20] Since he located his own political thought in the Aristotelian-Thomistic tradition, the United States, in short, represented the fortuitous historical approximation of realities that he had long theorized about.[21] Unlike in Europe, where secularist forces increasingly defined

modern democracy against an older natural law tradition, America preserved this tradition in its founding documents and political structures, never losing sight of the implicitly "Christian principle" quietly animating democracy, as he noted in *Christianity and Democracy* (1943).[22]

Accordingly, he felt that the United States had a special role to play in the postwar world. Nowadays when many educated American Christians (perhaps with a volume by Stanley Hauerwas lying around) equate political theology with prophetic jeremiads against "liberal democracy" and "globalization," the language of America's historical role might come across as dangerously providentialist. And of course, a dose of caution is in order, given the widespread abuse of providentialist claims in American history. But, as an outsider to America and a trenchant observer of the political convulsions that shook Europe in the 1930s and 1940s, Maritain cannot be easily brushed aside in the name present-day moralisms.

Maritain mounted his case by noting what he called "the obvious fact" of America's unusual identity. This was not a nation among nations, in the European sense, based on race, religion, and geography, but, in Lincoln's phrase, a novel "proposition" that diverse peoples could live in freedom and preserve, in a modern secular order, a vital residuum of the classical natural law tradition and the Christian belief in the dignity of all people. Upholding this dignity — the dignity of the least among us — constituted America's historic vocation, even if this meant, as in the Civil Rights Movement or in present-day debates about foreign policy and war, "a perpetual process of self-examination and self-criticism" — an ongoing interrogation of *practices* in light of *principles*.[23] This might not constitute a high calling, understood as producing great art or literature, but rather one at once quotidian and indispensable. Americans might lack many refinements from the standpoint of Paris or Florence, Maritain could admit, but

> [T]here is one thing that America knows well and that she teaches as a great and precious lesson to those who come into contact with her amazing adventure: that is the value and dignity of the man of common humanity…. In forms so simply human that the pretentious and pedantic are at pains to perceive it, we find [in this country] a spiritual conquest of immeasurable value. The mainspring of American civilization is this dignity of each one in daily existence.[24]

Maritain connected the "spiritual conquest" of American democracy to what he had earlier, perhaps infelicitously, called a new Christendom, a *nouvelle chrétienté*, not the coercive, hierarchical order of the Middle Ages, but a progressive world system of democratic states imbued by "evangelical sap" — an appreciative, instead of an antagonistic, regard for the historical influence of the Gospel on the modern quest for freedom and human rights.[25] Often at pains to make clear he was advocating a way forward, not a restoration of the deservedly obsolete, Maritain reiterated, "I am far from saying that today's American civilization is a new Christendom, even in outline. It is rather a combination of certain continuing elements of ancient Christian civilization with new temporal achievements and new historical situations."[26] To bring about this new order on a wider scale in the postwar world, the American experiment was pivotal. "If we want civilization to survive," he wrote during the darkest period of World War II, the "American spirit" must help lead the way in creating "a world of free men penetrat-

ed in its secular substance by a real and vital Christianity, a world in which the inspiration of the Gospel will direct the common life of man toward an heroic humanism."[27]

While perhaps fairly criticized for overvaluing the potential of the political, Maritain had no illusions about the difficulty and complexity of his proposition — one he knew would be met by ridicule among pro-socialist, anti-American voices in postwar Europe, and obscured in America by unsavory McCarthy-era forms of patriotism. He also candidly recognized that the religious element in American civilization could, in the wrong hands, degenerate into impermissible forms of civil religion, instrumentalizing Christianity for "national or temporal interests." Immanent, moralistic religiosity, "temporalized" belief in the service of this-worldly causes, he opposed in the strongest terms, insisting that Christianity was essentially otherworldly and supra-political.[28] When it touched the political order, it did so as a salutary leaven, not as a fundamental substance. The realm of Caesar possessed its own justification.

But he also worried about the secular drift of Europe, an outright animus toward any religious leaven in society. These worries have been amply confirmed over the past few decades as secularization has continued apace on the Continent and as shapers of a unified Europe have insisted, against the logic of historical causality, that modern democracy could only arise from the ashes of Europe's theistic past. "Europe's problem is to recover the vivifying power of Christianity in temporal existence," Maritain had presciently written in the 1940s, for without this power the machinery of democracy might go on, but the individuals in this machinery have been stripped of the transcendental justification of their dignity.[29]

In light of his assessment of Europe, it is, finally, of moment that Maritain also worried about the obsequiousness with which the American academy and elite culture, then and now, habitually looked to the Continent for intellectual respectability and fashion. The "cultivated American," he noted, who is "anxious to have America criticized" listens with "special care and sorrowful appreciation" to "any [European] writer who bitterly denounces the vices of this country." This reality, combined with populist anti-intellectual sentiments in the United States, did not augur well for the articulation and dissemination of Maritain's ideas. Still, to American audiences, he pled for "the need for an explicit philosophy," which would take its cue from American political arrangements, however experimental and imperfect, and extrapolate them into "the philosophical formulation of a universal ideal," the centerpiece of which was the nonnegotiable principle of the dignity of the individual — the least among us foremost.[30]

Of course, Americans concerned about the life of the mind on these shores might justifiably ask whether taking Maritain at his word, once again, would risk indulging our craving for Continental tutelage. But then again, might one also make a virtue of our national docility? The reign of Marx, Sartre and Foucault has passed. Derrida is dead. The age of Maritain: has its hour come round at last?

* Thomas Albert Howard is Associate Professor of History and Director, Jerusalem and Athens Forum at Gordon College in Wenham, Massachusetts.
A previous, much shorter version of this essay appeared as "Maritain's America" in the journal First Things (January 2007): 13-16. I am grateful to the editors of this journal for allowing me to reprint material here.

[1] For an introduction to the sizeable literature, see Russell A. Berman, *Anti-Americanism in Europe: A Cultural Problem* (Stanford, Ca.: Hoover Institution Press, 2004), and D.W. Ellwood, Anti-*Americanism in Western Europe: A Comparative Perspective*, Occasional Paper, European Studies Seminar Series 3 (John Hopkins University, Bologna Center, 1999).
[2] Robert Kagan, *Of Paradise and Power: America and Europe in the New World Order* (London: Atlantic Books, 2004). Cf. Jean-Philippe Deranty, "European and American Intellectuals at War," *Contretemps* 4 (September 2004): 19-28.
[3] See John Noonan, *The Church that Can and Cannot Change: The Development of Catholic Moral Teaching* (Notre Dame: University of Notre Dame Press, 2005), 145ff.
[4] On the condemnation of "Americanism," see Gerald P. Fogarty, S.J., *The Vatican and the American Hierarchy from 1870 to 1965* (Collegeville, Minnesota: Liturgical Press, 1982), 143-94.
[5] Philippe Roger, *The American Enemy: The Story o French Anti-Americanism*, trans. Sharon Bowman (Chicago: University of Chicago Press, 2005), xi.
[6] Quoted in C. Vann Woodward, *The Old World's New World* (New York: Oxford University Press, 1991), 6.
[7] Dan Diner, *America in the Eyes of the Germans: An Essay on Anti-Americanism* (Princeton: Markus Wiener, 1996), 31.
[8] Georges Duhamel, *Scènes de la vie future* (Paris: Mercvre de France, 1930).
[9] See *The Old World and the New: Their Cultural and Moral Relations*, UNESCO International Forums of Sao Paulo and Geneva (Basel, Switzerland, 1956).
[10] On Maritain's time in America, see Ralph McInerny, *The Very Rich Hours of Jacques Maritain: A Spiritual Life* (Notre Dame: University of Notre Dame Press, 2003), 139ff.
[11] Jacques Maritain, *Reflections on America* (New York: Charles Scribner's Sons, 1958), 25-27.
[12] Maritain, *Reflections on America*, 27.
[13] Maritain, *Reflections on America*, 29ff.
[14] Maritain, *Reflections on America*, 34-35, 110.
[15] Arthur C. Brooks, "Are Americans Generous? Shattering the Myth of American Stinginess," *Philosophy Roundtable* (1 May 2006), accessed at *http://prt.timberlakepublishing.com/printarticle.asp?article=1222* (23 May 2007).
[16] Maritain, *Reflections on America*, 83-86.
[17] See Maritain, *Integral Humanism*, trans. Joseph W. Evans (New York: Charles Scribner's Sons, 1968), 127ff. Cf. his essay *The Person and the Common Good*, trans. John J. Fitzgerald (Notre Dame: University of Notre Dame Press, 1947).
[18] Maritain, *Man and the State* (Chicago: University of Chicago Press, 1951), 182-83.
[19] John T. McGreevy, *Catholicism and American Freedom* (New York: W. W. Norton, 2003), 189-215.
[20] Maritain, *Reflections on America*, 168.
[21] See John P. Hittinger, "Jacques Maritain and Yves R. Simon's Use of Thomas Aquinas in their Defense of Liberal Democracy," in David M. Gallagher, ed., *Thomas Aquinas and his Legacy* (Washington, DC: Catholic University of America Press, 1994), 149-72.
[22] Maritain, *Christianity and Democracy*, trans. Doris C. Anson (San Francisco, Ignatius Press, 1943), 24.
[23] Maritain, *Reflections on America*, 150, 193.
[24] Maritain, *Reflections on America*, 195.
[25] Maritain, *Christianity and Democracy*, 23.
[26] Maritain, *Reflections on America*, 189.
[27] Maritain, *Christianity and Democracy*, 84.
[28] Maritain, *Reflections on America*, 186-87.
[29] Maritain, *Christianity and Democracy*, 24.
[30] Maritain, *Reflections on America*, 43ff.

CONSTITUTIONAL PROPHETS

ANCIENT PARADIGMS AND MODERN EXPECTATIONS[1]

BY CHRIS STADLER*

The durable role of biblical text as available tradition, which the community tends always to utter and experience again, is not done, characteristically, either with a full-blown canonical awareness or with a full-blown critical awareness (Walter Brueggemann).

Presidential scholar Thomas Cronin is quoted in *The Presidency and the Challenge of Democracy*, as saying,

> The American presidency is a uniquely necessary, and always potentially dangerous, leadership institution. The framers of the U.S. Constitution were aware of this: they knew that if they designed a presidency with too much power, they risked ending up with an arbitrary tyrant, yet if they designed a presidency with too little power, the nation might not have the decisive leadership needed in times of emergency. Today, 11 generations later, we face the same questions the framers faced: what kind of president do we need, and what kind of presidency do we want.[2]

We face these questions because the rise of America has also meant the rise of presidential power. When the United States became a world economic and political power, a strong presidency emerged. With World War II, the Cold War and now the current war against terrorism the notion of a dominant president who moves the country and the government by means of strong, effective leadership has taken root. As Genovese and Han point out, "With the United States as the world's only super power, foreign policy animates and empowers a swollen presidency."[3] Although driven and shaped by crises, does this heroic model of the presidency run contrary to constitutional design? "War," as Cronin points out, "has always nourished the possibility of an imperial presidency and the abuse of powers."[4] The concern is not new. "War is in fact," as James Madison warned in 1795, "the true nurse of executive aggrandizement."[5]

The title of this presentation is *Constitutional Prophets: Ancient Paradigms and Modern Expectations*. The purpose of the paper is two-fold. First, and more narrowly, it is to provide a corrective emphasis on current explanations of the Bush presidency. Secondly, and more broadly, it seeks to illustrate the role and functions of the American presidency from a cultural perspective, that is, reflecting on how presidents lead as a social institution.

Methodologically, the questions that surround Bush's claims of inherent constitutional powers[6] (for example, his actions are non reviewable by the other branches) stem from the issue of how to conceptually identify the dynamics of presidential leadership without *missing or distorting* their actual implications. In as much as scholars must grapple over whether or not Bush's justifications are "farfetched and dangerous"[7] the issue should be rephrased. In the current political environment, have the claims of presidential power changed or has the environment merely brought to light different aspects/possibilities of its purpose? In other words, crises and wars have not changed the wording of the Constitution, but has the scope of presi-

dential power been altered? This is the reference to ancient paradigms and modern expectations in the title.

The specific focus for explanation will be on a regularly noticed but under-conceptualized symbolic paradigm of presidential leadership during times of crisis. Analytically this is driven by the proposition that foreign policy is a product of the actions officials take on behalf of the nation-state they lead. Because of this, it can be argued that the way a government is structured for purposes of policy-making will also affect the conduct and content of foreign affairs. In other words, a relationship can be hypothesized to exist between the substance of policy and institutional setting from which it derives. The importance of leadership in this regard, as Murray Edelman reminds us, is that its very idea makes a complex and largely unknowable social world understandable even while it assuages personal guilt and anxiety by transferring responsibility to another. As an individual, leaders can be praised and blamed and given "responsibility" in a way that processes cannot.[8] That the American presidency is the central and preeminent leadership focus of the American political system is beyond dispute. Several studies, most notably by Fred Greenstein, have articulated that claim:

> The president is first a symbol for the nation; second an outlet for affect — a way of feeling good about one's country; third a cognitive aid, allowing a single individual to symbolize and substitute for the complexity and confusion of government; and fourth a means of vicarious participation through which people identify with the president and feel more a part of events occurring around them.[9]

In other words, the president is the initial point of contact, the general symbol of the government, and orientation point from which the rest of the government is perceived. And that this leadership function often narrows to essentially a speaking role is at least by implication in many accounts, hardly more disputable. Certainly among contemporary scholars there is nearly unanimous agreement that among other presidential responsibilities, the designation of America's number one office holder as "tribune of the people" and/or "spokesman of the nation" must be included. Bruce Lincoln puts it more precisely "the American state speaks to the American nation through him [the president] as its representation and conduit."[10] Nowhere is this more evident than in the area of foreign affairs. "The President" as Clinton Rossiter designated him fifty years ago, is the nation's "Chief Diplomat."[11] Although authority in the field of foreign relations is shared constitutionally between two organs — President and Congress — "his position is paramount, if not indeed dominant."[12] In times of war, few citizens would question the obligation of the president to preserve and protect the nation. Few would deny the president the constitutional and statutory authority to do so.

Yet it is also a fact that the terms of crisis leadership remain little defined.[13] By focusing more on how individual presidents structure and manage the decision-making process, scholars have explained little, specifically about how this role colors — or does not color — the manner or style officeholders fulfill their duties as commander-in-chief or faithfully execute the office of the President. We have been told even less that would consistently elucidate the basis or platform on which a president should rise to defend the interests of the assembled

people, or of the kinds of words he should utter in the nation's name and why. Why is it, for example, that no other country's leaders so frequently invoke the Lord's name to bless its international enterprises? It seems mostly left to common understanding to accept, without detailed specification or explanation, that what presidents do in this role, sometimes well, sometimes poorly, is a politically significant attribute of the office. But if there are no explicit specifications for this role, how and by what criteria is it determined that some have performed it well, others ill? More importantly, is this a role that is well assigned to the president, one which — if we knew with precision what it was — we would want given to the president in its present form in times of crisis?

This paper will attempt to answer these unattended questions by applying to this central speaking role in the presidency a paradigm of leadership drawn from biblical sources. Scholars have long recognized that, although American civilization is complex and counts many points of origin, the Bible remains a source of great significance. It should not be surprising that the historical development of the presidency might be supposed to have been influenced by biblical thought patterns. Many evaluations of current policy do in fact highlight some aspect of this feature. At best however, analysts only go so far as identifying such biblical influences as the source of the moral certainty that American leaders have traditionally carried abroad.[14]

With roots going back to John Winthrop's sermon, "A Model of Christian Charity," this moral certainty is commonly referred to as American exceptionalism. Jerel Rosati identifies three attributes of this self-image: innocence (the desire merely to be the "City upon a hill," a model for other nations to emulate); benevolence (the desire to do good for the world and not merely for oneself); and exceptionalism (a confidence and optimism about the superiority — not merely the distinctiveness — of the American experiment to create "a new nation, conceived in liberty").[15] These three attributes — innocence, benevolence, and exceptionalism — are those to which, according to Anders Stephanson, Woodrow Wilson turned. Of Wilson, Stephanson wrote,

> [W]hen he wanted to accentuate the providentially assigned role of the United States to lead the world to new and better things. To him, what defined "America" was precisely this special calling or mission. The nation had been allowed to see the light and was bound to show the way for the historically retrograde. There was a duty to develop and spread to full potential under the blessings of the most perfect principles imaginable.[16]

To be sure, this is a language and style seemingly far removed from the language and provisions of presidential duties under the Constitution.

With regard to the presidential role as it is to function during times of national stress, it should be noted that some commentators have been prompted to talk of Americans as having recovered the oldest form of human government, the "elected king." In stressing the immersion of political systems in their historical contexts, it should be pointed out, however, that Americans have no experience with elected kings. On the other hand — and this is a subtle

but crucial distinction — because culturally they were predominantly and profoundly a Protestant people they have had right from the beginning, a ready available leadership image from the Bible. As such, what matters to the present paper is that there is a remarkable "fit" between the Bible's leadership paradigm and what is from time to time expected of modern presidents.[17] Moreover, it will be argued that it is this fit between the ancient paradigm and modern expectations that both confirms and illuminates their relationship, that the first is both the source of the second and a reliable guide to its definition and analysis. And it will finally be argued that this confirmation and illumination will bring to prominence aspects of the presidency which now require urgent attention.

1) The Mosaic Leadership Paradigm[18]

In this paper, the biblical leadership paradigm will be identified with Moses. It could have been identified just as easily with Abraham, Joshua or David. Moses is chosen because all biblical examples are seen being called to account against an original paradigm that is applied with great consistency to all of them.[19] In a word, they all expected to be "prophetic." The biblical prophetic role is essentially concerned with words, with language, with dialogue. The prophetic leader must utter words and the people must hear them and respond to them. The prophetic emphasis on words arises from the fact that the Hebrews were situational thinkers.

> Without even a remote capacity for philosophical reflection and detachment, they spoke and wrote exclusively about experience, their own, personal and subjective. They wrote of experience directly as they remembered it, had it, anticipated it. Words, designating subjects and objects actions and attributes, brought experiences to mind, evoked them in all their vivid particularity, and thereby compelled hearers to relive those events, to suffer and endure them again, or alternatively, to feel them in the offing, impending, and disturbing.[20]

The essential Hebrew literary structure is, therefore the narrative. The essential problem the story teller leaves with his hearers or attempts to solve for them is always the same: what does the story do to the hearer, where does it put the hearer in the story, how does it demand that he or she respond to its telling? There are typically three parts to the narrative. The first is an account of the past to recall or associate the hearer with it. In other words, the story teller reminds the listener of how they became a people — the trials and victories which brought them to their present place and time. The second part of the narrative is an experiential now, a moment of crisis occasioned if only by the hearing of the story being told. The final narrative part is concerned with an unfulfilled future — what the hearer will do now that the story has been told.

The Hebrew prophetic leader is essentially the teller of a story, the hearers are his people, and the story he tells is the story of their life together. Technically the prophetic leader's words are an act of congregation. He is not there to debate or to negotiate. Rather, by his call, he summons the people before him into one body, one life or enterprise of souls, so that, in the Bible's repeated phrasing, they may go out as one man and speak with one voice. In generating their unity the prophetic leader also becomes, to quote Roelofs, "as a father to them[;]

a patriarchal hero gathering them into the ambit of his instruction of their story."[21]

The interpretation of the moment in which the people stand is not, however, exhausted by its announcement. The prophetic leader now presses upon his people their moment of choice. They have come this far in their history, they have achieved what they have because they have been true to their tribal commitments and loyal to their god of destiny. But now troubles heap up on every hand. There has been a falling away of commitment, a weakening of identity, a dispersion of social and psychic energy, a loosening of community. The patriarch demands the people's attention to meet the need to choose again the objects of their highest loyalties, to reach again for a life with their god and his chosen hero, the national leader. Alternatively the people can choose to go their separate ways, to abandon their founding commitments, loyalties, and social meaning.

The choice is historic, existential, moral and redemptive. "I" said Moses to the people of Israel, "call heaven and earth to witness against you this day, that I have set before you life and death, blessing and curse; therefore choose life, that you and your descendants may live" (Deuteronomy 30:19). "Now therefore" said Joshua to all the people assembled at Shechem, "choose this day whom you will serve" (Joshua 24:14-15). When the choice is made positively the soul of the heroic leader will meld again with that of the people, magnifying them, unifying them, and they and he will together be renewed, historically ennobled to go forward with their god. The covenant between god, man, and people has been renewed: god will protect, man will lead and the assembled people in love will obey.

2) The Prophetic Presidency

It is clear that the prophetic leadership paradigm delineates a role that, in its communal significance is both powerful and important. To an extraordinary degree, it has the power to cultivate community identity, solidarity and a belief in community legitimacy. The quick statement of evidence for the presence of the prophetic character in the American presidency — now that the pattern is recognizable — comes so easily from presidential speeches as to seem not to need justification. Here is Abraham Lincoln at Gettysburg focusing on our need to choose again to be a chosen people.

> It is rather for us to be here dedicated to the great task remaining before us — that from these honored dead we take increased devotion to that cause for which they gave the last full measure of devotion — that we here highly resolve that these dead shall not have died in vain — that this nation, under God, shall have a new birth of freedom — and that government of the people, by the people, for the people, shall not perish from the earth.[22]

Here are the words of John F. Kennedy informing and reassuring Americans of who they legitimately are:

> We dare not forget today that we are the heirs of that first revolution. Let the word go forth from this time and place to friend and foe alike, that the torch has been passed to a new generation of Americans — born in this century, tempered by war, disciplined by a hard and bitter peace, proud of our ancient heritage — and unwill-

> ing to witness or permit the slow undoing of those human rights to which this Nation has always been committed, and to which we are committed today at home and around the world.[23]

Similarly, one need look no further than Woodrow Wilson's written commentary on the presidential office. A more literal summons for a charismatic patriarchal Moses would be hard to find:

> For he [the president] is also the political leader of the nation, or has it in his choice to be. The nation as a whole has chosen him, and is conscious that it has no other spokesman. His is the only national voice in affairs. Let him once win the admiration and confidence of the country, and no other single force can withstand him, no combination of forces will easily over power him. His position takes the imagination of the country. He is the representative of no constituency, but of the whole people. When he speaks in his true character, he speaks for no special interest. If he rightly interpret the national thought and boldly insists upon it, he is irresistible; and the country never feels the zest of action so much as when its President is of such insight and caliber. Its instinct is for unified action, and it craves a single leader.[24]

The purposes of this paper will not be served, however, unless it can be shown why — for what reasons — the ancient Hebraic paradigm worked its way into the Oval Office. We begin with a discussion of the *Federalist Papers* — the best guide to how the framers understood the Constitution when they wrote it.[25] To what degree does the Constitution welcome presidential activity that reasserts national identity and regime legitimization? In *Federalist* no. 70, Alexander Hamilton outlines its importance in the following.

> Energy in the executive is a leading character in the definition of good government. It is essential to the protection of the community against foreign attacks; it is not less essential to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy.

In what seems a strange defense of an office designed for a people fearing tyranny, Hamilton unflinchingly goes further:

> Every man the least conversant in Roman history knows how often that republic was obliged to take refuge in the absolute power of a single man, under the formidable title of dictator, as well against the intrigues of ambitious individuals who aspired to the tyranny, and the seditions of whole classes of the community whose conduct threatened the existence of all government, as against the invasions of external enemies who menaced the conquest and destruction of Rome.
>
> There can be no need, however, to multiply arguments or examples on their head. A feeble executive implies a feeble execution of the government. A feeble execution is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be in practice, a bad government (emphasis in original).

Clearly the framers wanted the president's function to go beyond the Constitution's simple phrasing of "see[ing] that the laws are faithfully executed."[26] What the framers were seeking to

address through the institution of the presidency was the principle of "crisis government" or to use Rossiter's term: "constitutional dictatorship."[27] The importance of this principle was first raised by Hamilton in *Federalist* nos. 23, 25, 26 and 31. It was argued that the new government "ought to be clothed with all the powers requisite to complete execution of its trust" and that "it is both unwise and dangerous to deny [it] an unconfined authority in respect to all those objects which are intrusted to its management." In a struggle between "parchment provisions" and "public necessity" necessity will invariably win out. When certain actions are demanded by the force of events, political leaders will take them whether or not constitutionally authorized to do so. History proves, Hamilton writes, that:

> Nations pay little regard to rules and maxims calculated in their very nature to run counter to the necessities of society. Wise politicians will be cautious about fettering the government with restrictions that cannot be observed, because they know that every breach of fundamental laws, thought dictated by necessity, impairs that sacred reverence which ought to be maintained in the breast of rulers towards the constitution of a country, and forms a precedent for other breaches where the same plea of necessity does not exist at all, or is less urgent and palpable.

A constitution which is not comprehensive enough to meet the dangers posed by extraordinary events will soon lose, through the precedent of disobedience, much of its restraining force even in ordinary times. According to Rossiter, the principle of constitutional dictatorship finds its rationale in these three fundamental facts:

> [F]irst, *the complex system of government of the democratic, constitutional state is essentially designed to function under normal, peaceful conditions, and is often unequal to the exigencies of a great national crisis*.... Therefore, *in time of crisis a democratic, constitutional government must be temporarily altered to whatever degree is necessary to overcome the peril and restore normal conditions.* This alteration invariably involves government of a stronger character; that is, *the government will have more power and the people fewer rights.*[28]

A properly framed constitution must, then, embrace two distinct and conflicting characteristics. It must genuinely channel and moderate governmental power while at the same time assuring that, according to *Federalist* no. 31, "it contain in itself every power requisite to the full accomplishment of the objects committed to its care ... free from every other control but a regard to the public good and to the sense of the people." The need to limit authority does not imply a need to weaken it. This is not to say that the Constitution, as Lincoln noted, "is different in time of insurrection or invasion from what it is in time of peace and public security," but rather that "the constitution is different, *in its application* in cases of Rebellion or Invasion, involving Public Safety, from what it is in times of profound peace and public security."[29]

The Founders' solution was to make the executive the key to achieving both limited (for normal or routine issues) and forceful (for issues of crisis or regime legitimation) government. By establishing the legislature as the *de jure* "supreme power," but then restricting it to the formulation of general rules, the executive was made responsible for much of the real work of government, i.e. its day-to-day operations. In consequence, Article II that sets out the

bulk of presidential powers under the Constitution should be read as containing a set of principles which both restrain and empower.

First, the office is to carry out the law where it is clear and easily stated. Derived from the need to remedy the administrative problems occurring under the nation's first constitution (the Articles of Confederation), executive power is to serve Congress as an effective but subordinate instrument. The second principle addresses the fact that not all the circumstances of political life can be foreseen or encompassed by laws. Although the rule of law was designed expressly to replace personal discretion, the executive must be left sufficient latitude for confronting the unexpected.

Possessing a legitimate right to mold the commands of legislators,[30] this greater independence signifies an equality — if not, indeed, a superiority — of the executive to the Congress. To paraphrase *Federalist* no. 71, executives are expected, 'to dare to act [their] own opinion with vigor and decision.' A then former President Thomas Jefferson would write in 1810:

> The question you propose, whether circumstances do not sometimes occur, which make it a duty in officers of high trust, to assume authorities beyond the law, is easy of solution in principle, but sometimes embarrassing in practice. A strict observance of the written laws is doubtless one of the high duties of a good citizen, but it is *not* the highest. The laws of necessity, of self-preservation, of saving our country when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means.[31]

Lincoln would ask half a century later: "Was it possible to lose the nation and yet preserve the Constitution? By general law, life and limb must be protected, yet often a limb must be amputated to save a life; but a life is never wisely given to save a limb. I felt that measures otherwise unconstitutional might become lawful by becoming indispensable to the preservation of the nation."[32] Theodore Roosevelt would proclaim that the president is "a steward for the people bound actively and affirmatively to do all he could for the people, and not content himself with the negative merit of keeping his talents undamaged in a napkin."[33] Wilson put it this way: "Crisis gives birth and a new growth to statesmanship because they are peculiarly periods of action … [and] also of unusual opportunity for gaining leadership and a controlling and guiding influence. . ."[34]

This sort of prophetic power, which places strong emphasis on the organic quality of political life, is enhanced by the absence of any formal internal check. In consciously rejecting a plural executive or one checked by an executive council, the framers ensured that the presidency would display the elements, they believed, best characterized any well-constructed executive office: "decision, activity, secrecy, and dispatch."[35]

3) Institutionalized Charisma

To this point the focus has been on defining the dimensions of the prophetic paradigm in presidential terms. It is appropriate that we now turn to an examination of the limits and haz-

ards the role encompasses as an institutional practice. The prophetic tongue with which the American president speaks in his legitimizing role is powerful, emotional, and deeply evocative. Its mutually reinforcing and balancing concepts of national identity and heroic leadership — of shared experience in memory, present trial, and hope — answer to the needs in the psychology of all Americans.

But compelling as it may be the fact remains that the concept of the heroic, charismatic, prophetic leader, is inherently unstable. It is naturally given to taking those who would operate in its conceptual terms to the furthest extremes. "Even presidents who are themselves of mild and pacific nature can get caught up in its demands for clarion call to exalted hopes."[36] When crisis looms, presidents must step forward with a mind set to undertake the work of the Lord in the name of a people aroused in history. Speaking to the uncertainties of the 1920s, here is the conservative and constrained Calvin Coolidge (or "silent Cal"):

> America seeks no earthly empire built on blood or force. No ambition, no temptation, lures her to thought of foreign dominations. The legions which she sends forth are armed not with sword, but with cross. The higher state to which she seeks the allegiance of all mankind is not of human but of divine origin. She cherishes no purposes save to merit the favor of Almighty God.[37]

The language of biblical prophecy is, however, narrow. To use it in its own terms and for its own ends is no great difficulty. To translate it, to move from it to other grammars and vocabularies without loss of meaning, without profound moral compromise is virtually impossible. Yet this, given the general character of both the American political system and the international community, is what presidents are compelled to attempt in order to translate their legitimizing efforts into practical courses of political action. Many of the difficulties are lodged in the office's first responsibility and primary power: to inspire, focus and legitimize American enthusiasms. In the forceful words of Richard Nixon, a president "has to take *hold* of America before he can move it forward.... He must articulate the nation's values, define its goals and marshal its will."[38]

In understanding the greatest strength of American people to be its communal vision of itself, incumbents come to hold that political consensus is possible in all realms, goals and methods. If there is a national purpose, if all Americans stand for the same values, all political discord and divisions can be resolved. Consensus for the prophetic hero comes to mean what he can convince the people to do. Lyndon Johnson pointedly defined consensus as "first deciding what needed to be done regardless of the political implications and, second, convincing a majority of the Congress and the American people of the necessity for doing those things."[39]

The process of confusing a consensus about ends with a consensus over means is the result of a truncated presidential perspective that centers on the prophetic hero's moral mindset. To be "the one man distillation of the American people" is an inherently difficult and dangerous claim. George Reedy eloquently describes the gravity of this prophetic disposition:

> The presidential burden does not lie in the workload. It stems from the crushing responsibility of political decisions, with life and death literally hanging in the bal-

> ance for millions of people. A president is haunted every waking hour of his life by the fear that he has taken the wrong turn, selected the wrong course, issued the wrong orders. In the realm of political decision he can turn to no one for authoritative counsel. Only *he* is authoritative.[40]

Even the modest and unprepossessing Jimmy Carter was quoted in 1976 to the effect that, "the president is the only person who can speak with a clear voice to the American people and set a standard of ethics and morality, excellence and greatness."[41] Two consequences flow from this centralization of political responsibility. The first is that presidents must not only be the genuine architects of U.S. policy, but they must approach the policy-making process with vigor. Here is Franklin Delano Roosevelt:

> We do not distrust the future of essential democracy. The people of the United States have not failed. In their need they have registered a mandate that they want direct, vigorous action. They have asked for discipline and direction under leadership. They have made me the present instrument of their wishes. In the spirit of the gift I take it.[42]

George W. Bush put it this way: "If America is under attack, my job as the President is to protect the homeland, to find out the facts, and to deal with it in a firm way."[43] Strong leaders do not tarry with indecision; they weigh the alternative, choose a line of action, and once committed to it, see it through to the end. Any change in course of action has to be resisted because it implies error; and error implies incompetence and/or a lack of courage. From his April 30, 1970 address Nixon states, "Here I stand, I can do no other…. I would rather be a one-term President and do what I believe is right than to be a two-term President at the cost of seeing America become a second rate power."[44] Here is George W. Bush two weeks before hostilities got under way in Iraq in 2003:

> The risk of doing nothing, the risk of hoping that Saddam Hussein changes his mind and becomes a gentle soul, the risk that somehow — that will make the world safer is a risk I'm not willing to take for the American people … I think the threat is real. And so do a lot of other people in my government. And since I believe the threat is real, and since my most important job is to protect the security of the American people, that's precisely what we'll do.[45]

When asked, in his news conference of April 13, 2004, by a reporter to indicate his biggest mistake after September 11 (given the absence of a "first shot" or "smoking gun" in the rush to war with Iraq), Bush replied:

> I wished you had given me this question ahead of time, so I could plan for it. John, I'm sure historians will look back and say, gosh, he could have done it better this way, or that way. You know, I just — I'm sure something will pop into my head here in the midst of this press conference, with all the pressures of trying to come up with an answer, but it hasn't yet.[46]

The second consequence that flows from centralized responsibility is that incumbents, as Doris Kearns observed of one president, "are unable to foresee the possibility of resentment based, not on objections to [their] social goals or to the practicality of specific measures, but

on hostility to the implicit assertion of increased central authority to define the general welfare and confer benevolences which, however desirable in themselves, should not be imposed by presidential will."[47] The independent role of Congress is delegitimized. As Samuel Kernell has noted, this type of leadership "usurps [congress members'] prerogatives of office, denies their role as representatives and questions their claim to reflect the interests of their constituents." At best Congress is reduced to being viewed as the handmaid of the president and at worst — should it be bent on doing its duty — an outright obstacle in the way of progress. Truman would defend his actions to deploy troops in Korea without consulting Congress by stating: "The congressional power to declare war has fallen into abeyance because wars are no longer declared in advance."[48] When confronted with criticism for disregarding congressional advice and consent in ordering troops into Cambodia, Nixon's administrative spokesman concluded: "It is not the proper posture for anyone to correct the President of the United States."[49]

This situation is compounded by the fact that there is little in the root Hebrew tradition to give prophetic or charismatic leadership a rational, principled, and above all, restrained content. Indeed, the record in the Bible of Hebrew leaders is on balance an unhappy one. Abraham Heschel observes, "To be a prophet is both a distinction and an affliction. The mission he performs is distasteful to him and repugnant to others; no reward is promised him and no reward could temper its bitterness." [50] All too often content is to be filled by pure faith, love, anger, fear, daring, and exalted intuition. To be sure, combinations such as these make for high drama. They also make, as Roelofs reminds us, "for extremes of megalomania and paranoia, however disguised."[51]

When Moses came down from the mountain and found the people worshipping the golden calf, his anger was kindled. He ground up the calf into powder, put it in water, and made the people drink it. More than that, he stood in the gate of the camp and said, "Who is on the Lord's side? Come to me." He then made the sons of Levi go to and fro through the camp and slay every man his brother and every man his companion and every man his neighbor. Thousands fell (Exodus 32: 19-29). Is this what a modern critic would call a proportionate response — or vengeance of the Lord?

In presidential terms, the lack of prophetic restraint creates an almost insidious mentality in situations threatening war. It tilts those possessed by it to prefer decisive, military solutions. Enemies are dehumanized, condemned not only for what they have done but also for being themselves evil. In a press conference the day after September 11, 2001, Bush said, "The deliberate and deadly attacks which were carried out yesterday against our country were more than acts of terror. They were acts of war … This will be a monumental struggle between good and evil. But good will prevail."[52] At the national prayer service at the Washington Cathedral, the President reiterated, "Our responsibility to history is already clear … to answer these attacks and rid the world of evil."[53] To the nation on September 20, 2001 Bush announced: "This is not … just America's fight. And what is at stake is not just America's freedom. This is the world's fight. This is civilization's fight. This is the fight of all who believe in progress and

pluralism, tolerance and freedom."[54] Fortunately, there is no need to debate issues of right and wrong: "Moral truth" Bush told graduating West Point cadets in 2002, "is the same in every culture, in every time, and in every place…. We are in a conflict between good and evil, and America will call evil by its name."[55] So self-evident is the distinction between right and wrong that Bush expressed utter amazement that others did not see it that way:

> I'm amazed that there is such misunderstanding of what our country is about, that people would hate us … like most Americans, I just can't believe it. Because I know how good we are…. We are fighting evil. And these murderers have hijacked a great religion in order to justify their evil deeds. And we cannot let it stand.[56]

So too did Dwight Eisenhower express amazement when faced with angry anti-American demonstrations in the Middle East. He wondered why it was so hard for "people in these down-trodden countries to like us instead of hating us."[57] Of course, to imagine one's national self image in an exemplary manner, that its values are universal is not unique to the United States. "Every nation-state" as Anders Stephanson notes, "lays some claim to uniqueness, and some nations or empires, historically, have even considered themselves Higher Authority the anointed focal point of world or universal history." [58] [T]o lead the world" in the words of Woodrow Wilson, "in the assertion of the rights of peoples and the rights of free nations,"[59] leads, however, to a blatant disregard for the sovereignty or rights of others. Listen to the moral certainty couched in the Roosevelt Corollary of 1904:

> All this country desires is to see the neighboring countries stable, orderly, and prosperous. Any country whose people conduct themselves well can count upon our heady friendship. If a nation shows that it knows how to act with reasonable efficiency and decency in social and political matters, if it keeps order and pays its obligations, it need fear no interference from the United States. Chronic wrongdoing, or an impotence which results in a general loosening of the ties of civilized society, may in America, as elsewhere, ultimately require intervention by some civilized nation, and in the Western Hemisphere the adherence of the United States to the Monroe Doctrine may force the U.S., however reluctantly, in flagrant cases of such wrongdoing or impotence, to the exercise of an international police power.[60]

By 1950 the pushing aside of state sovereignty would expand globally. Here is part of the National Security Council paper 68 — the document that would become the blueprint for the Cold War:

> In a shrinking world, which now faces the threat of atomic warfare, it is not an adequate objective merely to seek to check the Kremlin design, for the absence of order among nations is becoming less and less tolerable. This fact imposes on us, in our own interests, the responsibility of world leadership. It demands that we make the attempt, accept the risks inherent in it, to bring about order and justice by means consistent with the principles of freedom and democracy….
>
> Even if there were no Soviet Union we would face the great problem of the free society, accentuated many fold in this industrial age, of reconciling order, security, the need for participation, with the requirements of freedom. We would face the fact that in a shrinking world the absence of order among nations is becoming less and less tolerable.[61]

Thus endowed with prophetic vision, Eisenhower would authorize a CIA operation to overthrow the Iranian leadership. Lyndon Johnson would worry that unless the Vietnamese communists were put in their place, revolutionaries everywhere would "sweep over the US and take what we have."[62] Faced with the election of a socialist president of Chile in 1970, President Nixon would determine that the United States could not accept the result. It was irresponsible, so he reasoned, since Allende had been elected with only 36 percent of the vote in a three-way race. Shortly after Allende was overthrown and died (although apparently without direct U.S. involvement) Operation Condor began. Under Operation Condor, Latin American dictators banded together, with the knowledge and approval of U.S. leaders, to carry out political assassinations of Pinochet's opponents who were active outside of Chile.[63] It is but a short step to the remarks of Richard Haass, a senior state department official, in 2002:

> Sovereignty entails obligations. One is not to massacre your own people. Another is not to support terrorism in any way. If a government fails to meet these obligations, then it forfeits some of the normal advantages of sovereignty, including the right to be left alone in your own territory. Other governments, including the United States, gain the right to intervene. In the case of terrorism, this can even lead to a right of preventive, or peremptory, self-defense. You essentially can act in anticipation if you have grounds to think it's a question of when, and not if, you're going to be attacked. [64]

In his address to the nation on September 20, 2001, Bush would first make this ultimatum to Islamic fundamentalist Taliban government of Afghanistan: "Give the United States full access to terrorist training camps, so we can make sure they are no longer operating. These demands are not open to negotiation or discussion. The Taliban must act, and act immediately. They will hand over the terrorists, or they will share in their fate." The president would then go on in charismatic presentation to say:

> We will starve terrorists of funding, turn them one against another, drive them from place to place, until there is no refuge or no rest. And we will pursue nations that provide aid or safe haven to terrorism. Every nation, in every region, now has a decision to make. Either you are with us, or you are with the terrorists. From this day forward, any nation that continues to harbor or support terrorism will be regarded by the United States as a hostile regime. [65]

From the perspective of Mosaic paradigm, American presidents must be unflinching and unyielding as they prove themselves and the nation worthy of the mantle of history. There can be no negotiations, surrender must be unconditional. In thinking about current U.S. actions it is important to not simply view them through the prism of political realism (that is, the U.S. is merely acting like a normal state that has achieved a position of dominance), or that it is an accident of history (that is, the new American stance was precipitated, if not caused by the interaction between the terrorist attacks, the election of George W. Bush, and the influence of neoconservatives in the White House), or that there has always been both a strong pull and precedent in the direction of unilateralism.[66] What this paper has aimed to show is that the general principles and institutional functioning of presidential crisis govern-

ment is, in Rossiter's phrase, "political and social dynamite." "Each incumbent," as Cronin reminds us, "defines and exploits, up to a point, the formal and latent authority that exists in the … presidency."[67] The question of whether Bush's leadership will prove to be the most effective way to conduct the war on terror is for history to say. It is for us to ask whether the construction of presidential leadership, as it has been defined within the American political tradition, is strong and safe for democracy.

[*] Chris Stadler is Assistant Professor of Politics and Government, Western State College of Colorado.
[1] This article was originally published in the *Forum on Public Policy Online*, Winter 2007 edition under the title of "*Ancient Paradigms and Modern Expectations: Is the United States acting like a normal state?*"
[2] Quoted in Michael Genovese and Lori Cox Han, eds., *The Presidency and the Challenge of Democracy* (New York: Palgrave Macmillan, 2006), 191.
[3] Quoted in Michael Genovese and Lori Cox Han, eds., *The Presidency and the Challenge of Democracy* (New York: Palgrave Macmillan, 2006), viii.
[4] Quoted in Michael Genovese and Lori Cox Han, eds., *The Presidency and the Challenge of Democracy* (New York: Palgrave Macmillan, 2006), 192.
[5] Quoted in Michael Genovese and Lori Cox Han, eds., *The Presidency and the Challenge of Democracy* (New York: Palgrave Macmillan, 2006), 192.
[6] A digest of the Bush administration's view of presidential power under the Constitution appears in at least two documents made public. The first document is: Jay S. Bybee, assistant attorney general, U.S. Department of Justice, "Memorandum for Alberto R. Gonzales," August 1, 2002. The second document is titled: "Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations," April 4, 2003. For a discussion surrounding these documents see Robert J. Spitzer, "The Commander in Chief Power and Constitutional Invention in the Bush Administration," in Michael Genovese and Lori Cox Han, eds., *The Presidency and the Challenge of Democracy* (New York: Palgrave Macmillan, 2006).
[7] Michael Genovese and Lori Cox Han, eds., *The Presidency and the Challenge of Democracy* (New York: Palgrave Macmillan, 2006), ix.
[8] Murray Edleman, *The Symbolic Uses of Power* (Urbana: University of Illinois Press, 1985), 78.
[9] Fred Greenstein, "What the President means to Americans," in James David Barber, ed., *Choosing the President* (New York: American Assembly, 1974), 130-131.
[10] Bruce Lincoln, *Holy Terrors: Thinking about Religion after September 11* (Chicago: University of Chicago, 2003), 24.
[11] Clinton Rossiter, *The American Presidency* (Baltimore: Johns Hopkins, 1987). See Thomas Cronin and Michael Genovese, *The Paradoxes of the American Presidency*, 2d. ed. (Oxford University Press, 2004), 139.
[12] Clinton Rossiter, *The American Presidency* (Baltimore: Johns Hopkins, 1987). The Supreme Court has confirmed as much with the "sole organ" doctrine introduced in 1936 in *Untied States v. Curtiss-Wright Export Corporation*, 299 U.S. 304 (1936). For an excellent discussion surrounding this issue see Barbara Hinckley, *Less than Meets the Eye: Foreign Policy Making and the Myth of the Assertive Congress* (Chicago: University of Chicago, 1994).
[13] H. Mark Roelofs, "The Prophetic Presidency: Charisma in the American Political Tradition," Paper presented at the annual Meeting of the American Political Science Association 1991.
[14] See Mel Gurtov, *Super Power on Crusade: The Bush Doctrine in US Foreign Policy* (Boulder, CO: Lynne Rienner Publishers, 2006; and Anders Stephanson, *Manifest Destiny: American Expansion and the Empire of Right* (Hill and Wang, 1995).
[15] Jerel Rosati, *The Politics of United States Foreign Policy*, 2d ed. (Ft. Worth, Texas: Harcourt Brace College Publishers, 1998), 408.
[16] Anders Stephanson, *Manifest Destiny: American Expansion and the Empire of Right* (Hill and Wang, 1995), xii. It should be noted in this quote that Stephanson refers to "manifest destiny" as an alternative to what others have described as American exceptionalism.
[17] It should be noted that this is an argument first made by H. Mark Roelofs in his "The Prophetic Presidency: Charisma in the American Political Tradition," Paper presented at the annual Meeting of the American Political Science Association 1991. Although this paper differs from Roelofs in several ways (most notably his notions of myth and reality) it seeks to be an extension of his work. See also H. Mark Roelofs, *The Poverty of American Politics: A Theoretical Interpretation* (Philadelphia: Temple University Press, 1992).
[18] Throughout this section we will be following very closely the work of H. Mark Roelofs on this point. H. Mark Roelofs, "The Prophetic Presidency: Charisma in the American Political Tradition," Paper presented at the annual Meeting of the American Political Science Association 1991.
[19] See for example Exodus chapter 23; Joshua chapters 23 and 24. For secondary sources see Bernard Anderson,

Understanding the Old Testament (New Jersey: Prentice Hall, 1957); Johann Pederson, *Israel its Life and Culture* (London: Oxford University Press, 1926); Abraham J. Heschel, *The Prophets: An Introduction* (New York: Harper and Row, 1962); Thorleif Boman, *Hebrew Thought Compared With Greek* (New York: W. W. Norton, 1960).
[20] H. Mark Roelofs, "The Prophetic Presidency: Charisma in the American Political Tradition" Paper presented at the annual Meeting of the American Political Science Association 1991, 10.
[21] H. Mark Roelofs, "The Prophetic Presidency: Charisma in the American Political Tradition" Paper presented at the annual Meeting of the American Political Science Association 1991, 14.
[22] Roy S. Basler, ed., *Abraham Lincoln: His Speeches and Writings* (New York: Da Capo Press, 1990), 734.
[23] John F. Kennedy, "Inaugural Address," January 20, 1961.
[24] Woodrow Wilson, *Constitutional Government in the United States* (New York: Columbia University Press, 1908), 68.
[25] All references to the *Federalist Papers* are to be found in the following edition: Hamilton, Madison and Jay, *The Federalist Papers*, (New York: Signet Classic, 1999).
[26] When Wilson and Morris (members of the Convention's Committee of Detail) used the term "The Executive Power" as Richard Pious notes, "they were seeking deliberately to build into the Constitution an open-ended clause useful to expand the powers of the presidency. Indeed, the common rules of constitutional construction that then prevailed assumed that general terms might imply more than the enumerated powers that followed." Richard Pious, *The American Presidency* (New York: Basic Books, 1979), 30. See also Charles Thach, *The Creation of the Presidency 1775-1787* (Baltimore: The Johns Hopkins Press, 1969), 138-139.
[27] Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in Modern Democracies* (Princeton: Princeton University Press, 1948). John Locke would refer to this as the discretionary or prerogative power of government. See John Locke, *The Second Treatise of Government* (New York: Macmillan, 1952), chapter XII.
[28] Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in Modern Democracies* (Princeton: Princeton University Press, 1948), 5.
[29] Quoted in Joseph M. Bessette and Jeffery Tulis, eds., *The Presidency in the Constitutional Order* (Baton Rouge: Louisiana State University Press, 1981), 21.
[30] See Richard Pious, *The American Presidency* (New York: Basic Books, 1979), 41. See also Ruth and Stephen Grant, "The Madisonian Presidency," in Joseph M. Bessette and Jeffery Tulis, eds., *The Presidency in the Constitutional Order* (Baton Rouge: Louisiana State University Press, 1981), 43-49.
[31] Letter of Thomas Jefferson to John B. Colvin, quoted in Clinton Rossiter, *Constitutional Dictatorship: Crisis Government in Modern Democracies*, (Princeton: Princeton University Press, 1948), ix.
[32] Quoted in Sidney M. Milkis and Michael Nelson, *The American Presidency: Origins and Development, 1776-2007*, 5th ed. (Washington D.C.: Congressional Quarterly Press, 2008), 158.
[33] Quoted in Sidney M. Milkis and Michael Nelson, *The American Presidency: Origins and Development, 1776-2007*, 5th ed. (Washington D.C.: Congressional Quarterly Press, 2008), 211.
[34] Woodrow Wilson, "Cabinet Government in the United States," in Ray S. Baker and William E. Dodd, ed., *College and State* (New York: Harper & Brothers, 1925), 1:34-35.
[35] *Federalist* no. 70.
[36] H. Mark Roelofs, "The Prophetic Presidency: Charisma in the American Political Tradition" Paper presented at the annual Meeting of the American Political Science Association 1991, 38.
[37] Calvin Coolidge, "Inaugural Address," March 4, 1925.
[38] Quoted in Stephan Ambrose, *Nixon: Triumph of a Politician, 1962-1972* (New York: Simon and Schuster, 1989), 354.
[39] Lyndon B. Johnson, *The Vantage Point: Perspectives of the Presidency, 1963-1969* (New York: Holt, Rinehart and Winston, 1971), 28.
[40] George Reedy, *Twilight of the Presidency from Johnson to Reagan* (New York: Mentor, 1987), 45.
[41] *National Journal*, August 7, 1976, 993.
[42] Franklin D. Roosevelt, "Inaugural Address," March 4, 1933.
[43] George W. Bush, "Interview with Claus Kleber of Ard," May 21, 2002.
[44] Richard Nixon, "Address to the Nation," April 30, 1970.
[45] George W. Bush, "Presidential Press Conference," March 6, 2003.
[46] George W. Bush, "Presidential Press Conference," April 13, 2004.
[47] Doris Kearns, *Lyndon Johnson and the American Dream* (New York: Harper and Row, 1976), 180.
[48] Quoted in Sidney M. Milkis and Michael Nelson, *The American Presidency: Origins and Development, 1776-2007*, 5th ed. (Washington D.C.: Congressional Quarterly Press, 2008), 304.
[49] Quoted in Stephen Ambrose, *Nixon: Triumph of a Politician, 1962-1972* (New York: Simon and Schuster, 1989), 369.
[50] See Abraham J. Heschel, *The Prophets: An Introduction* (New York: Harper and Row, 1962), 17-25.
[51] H. Mark Roelofs, "The Prophetic Presidency: Charisma in the American Political Tradition" Paper presented at the annual Meeting of the American Political Science Association 1991, 38.
[52] George W. Bush, "Presidential Press Conference," September 12, 2001.
[53] Quoted in Stephen J. Wayne, "Presidential Decision Making," in George Edwards, ed., *Readings in Presidential*

Politics (Belmont, CA: Thomson/Wadsworth, 2006), 150.
[54] George W. Bush, "War on Terrorism Address," Septermber 20, 2001.
[55] George W. Bush, "Address at West Point," June 1, 2002.
[56] George W. Bush, "Presidential Press Conference," September 16, 2001.
[57] Quoted in Mel Gurtov, *The Bush Doctrine in US Foreign Policy* (Boulder, CO: Lynne Rienner Publishers, 2006), 15.
[58] Anders Stephanson, *Manifest Destiny: American Expansion and the Empire of Right* (Hill and Wang, 1995), xii.
[59] Quoted in Anders Stephanson, *Manifest Destiny: American Expansion and the Empire of Right* (Hill and Wang, 1995), 117.
[60] Quoted in Anders Stephanson, *Manifest Destiny: American Expansion and the Empire of Right* (Hill and Wang, 1995), 107.
[61] S. Gleason, ed. *Foreign Relations of the United States 1950* (Washington, D.C.: U.S. Government Printing Office, 1977), 1:241, 263.
[62] Quoted in Mel Gurtov, *Super Power on Crusade: The Bush Doctrine in US Foreign Policy* (Boulder, CO: Lynne Rienner Publishers, 2006), 15.
[63] Stephen Kinzer, *Overthrow: America's Regime Change from Hawaii to Iraq* (New York: Times Book, 2006), 210-214.
[64] Quoted in Mel Gurtov, *Superpower on Crusade: The Bush Doctrine in US Foreign Policy* (Boulder, CO: Lynne Rienner Publishers, 2006), 41.
[65] George W. Bush, "War on Terrorism Address," September 20, 2001.
[66] As Robert Jervis notes: "[I]t is almost a truism of the history of American Foreign relations that the United States rarely if ever engages in deeply cooperative ventures with equals." Robert Jervis, "Understanding the Bush Doctrine," in G. John Ikenberry, ed., *American Foreign Policy: Theoretical Essays,* 5th ed. (New York: Pearson/Longman, 2005), 585.
[67] Quoted in Michael Genovese and Lori Cox Han, eds., *The Presidency and the Challenge of Democracy* (New York: Palgrave Macmillan, 2006), 194.

SECTION 4

THEORETICAL ANALYSES

CONSCIENCE AND RELIGIOUS LIBERTY

ANTIDOTE TO THE TOTALITARIANISM OF THE POSITIVIST MIND

BY ROBERT JOHN ARAUJO, S.J.*

Now that the court has determined to condemn me, God knoweth how, I will discharge my mind … concerning my indictment and the King's title. The indictment is grounded in an Act of Parliament which is directly repugnant to the Law of God … I am the King's true subject, and I pray for him and all the realm … I do none harm, I say none harm, I think none harm … Nevertheless, it is not for the Supremacy that you have sought my blood — but because I would not bend to the marriage![1]

The sphere of action of the State has grown steadily larger until it now threatens to embrace the whole of human life and to leave nothing whatsoever outside its competence.[2]

I always say, as you know, that if my fellow citizens want to go to Hell I will help them. It's my job.[3]

I. Introduction

The issue of conscience and religious liberty has had a prominent role when conflicts arose between individuals and the civil authorities about the extent to which an individual had to endorse publicly particular views favored by the state. Conscience and its frequent companion, religious liberty, form that core of the person who, with the exercise of right reason guided by the quest for objective truth and frequently in the exercise of the practice of faith in God, deliberates and discerns regarding what is right and what is wrong and formulates the belief that guides one's path in life. The path chosen and the choices made along the way clearly have an impact on the individual and his life; moreover, one person's exercise of conscience can have a bearing on the lives of other individuals and society at large.

The exercise of conscience within a legal system that affirms religious liberty has often presented itself as a difficult task when conflicts arose between the individual's exercise of conscience and faith and the expectations of the civil authorities. Often, this has taken place when an individual had to endorse publicly the views favored by the state which this individual could not endorse. People like Thomas More and Rosa Parks were brought before the law because they disagreed with some rule that they knew was unjust or wrong in some important way. In spite of pressure, they maintained their position, typically in a quiet and dignified way. They reinforced their positions with reason and objectivity. Any public message they conveyed was done without violence, pressure, vitriol, or sensation. It was accomplished through the harmonious synthesis of mind, heart, and soul.

The objective of this paper is to examine the exercise of conscience and religious liberty in a particular light — removed from the drama and heroism — of peaceful civil disobedience. My effort is designed to look at the nature of properly formed conscience and the corresponding exercise of religious freedom and what it may mean in the context of the legal setting of the

United States today. The dual expression of conscience and the exercise of religious belief is often relied upon as a defense when the law and its rules — the fruit of positive law — go in one direction but the person of high principles, scruples, and ethics chooses to go the opposite or a different way.

In other contexts, this manifestation may be a mechanism by which an individual defends resistance to an unjust law. The manner in which conscience and religious liberty are and will be exercised in the future continues to evolve. This is due, in part, to what I perceive as an emerging danger residing in a new type of totalitarianism that confronts and finds a home in western democracies, including that in the United States. I suggest however that the proper exercise of conscience and religious freedom may just be the antidote the United States, and, for that matter, the rest of the world, need to avert the form of totalitarianism that beckons the present age.

Let me continue by providing my explanation of the nature of conscience and religious freedom. Consider the example of the lunch counter civil rights activists of half a century ago. They attempted to sit and dine where the law forbade because of their race. The law was defied, and the justification for the defiance was frequently rooted in conscience and belief in the justice of God — the need to take action and show why the law and its application are wrong and why those who are disobedient are justified in their defiance.

But conscience and religious belief can be manifested in more subtle ways. Thomas More, unlike the lunch counter protesters, took no action in defiance of the law. He merely chose not to do something which the civil law mandated to justify a problematic marriage desired by the King. For the most part during the legal controversy involving King Henry's marital situation, More chose to remain silent, but he prayed for God's guidance. He had no public quarrel with Parliament or the King, and he said nothing about the propriety or impropriety of the Act of Succession until after he was convicted of treason. He recognized that both the King and Parliament had proper roles in the making of law — human, positive law. If Parliament said that the King were God, he would not have interfered, even though, in the exercise of reason, conscience, and faith, More knew that this could not be. But when Parliament said the King rather than the Pope was head of the Church and commanded More to declare openly his agreement by subscribing to a public oath that conflicted with his convictions about the respective authorities of the Church and the King, he could not comply. This was due to the fact that in his conscience and because of his faith More also knew that he was subject to God's law, and to make such a declaration would violate the higher law that More, and for that matter everyone else, was bound to follow. Whether they chose to follow the way of More or a totalitarian law was up to them.

These cases of Rosa Parks, the lunch counter protesters, and Thomas More provide insight into the nature of law in a democratic society as it relates to the exercise of conscience and the religious faith that is often its companion. Fundamentally, democratic societies need law. Typically, the law is often considered a good, or at least a necessity, which promotes an ordered

society whose objective is to protect all its members and their peaceful coexistence with one another. Normative principles that are known in advance through the promulgation of law guide everyone including those who make, administer, and decide under the law. By way of illustration of one fundamental principle, both the Decalogue[4] and the common sense underlying most democratic systems, dictate that one person should not kill another human unless it is absolutely necessary in the act of self-defense.

This basic principle, also found in Judaism and Christianity, has a wide appeal in civil society and leads the lawmaker to declare that homicide is a criminal act, the commission of which is punishable by law. However, there may be occasions when, in conscience, a person might be justified in taking the life of another. One illustration would be the law-abiding citizen who is accosted by an assailant who intends to kill our model citizen. The only way in which the latter can repel the attack is through the use of deadly force because any other alternative would be ineffective under these circumstances. It might be said that conscience has justified the homicide in this case because an internal sense or conviction leads the would-be victim to the conclusion that it is good to live and that, while regrettable, it is essential to take the life of the assailant if no alternative is present in order to preserve the would-be victim's life. This exercise of conscience supports justification of what the intended victim did, which considered by itself, would normally contravene the law against taking human life. But, in fact, civil law typically provides a rationale for taking human life through the principle of justifiable self-defense when it is essential to the preservation of the innocent. Here, conscience and the law coincide in that the exercise of conscience is protected by the civil law.

In the contemporary world of the twenty-first century, the law also may be viewed as something that promotes the common good or welfare even though it may cause inconvenience to some individuals (e.g. legal requirement to pay taxes) or outright frustrations to others (e.g. legal prohibition against robbing banks). It can also be concluded that good laws respect human dignity, the exercise of conscience and the need for religious liberty, which often accompanies the exercise of conscience. At this stage, we can begin to assemble some core principles about the law and the good citizen whose conscience has been informed by religion. Typically the good citizen dutifully complies with the law. This person greets in friendly attitude all that come his way and is a productive member of the community and contributes physically and spiritually to the common good. But then one day, obedience to law demands that this person compromise on a principle the individual holds dearly. It is not simply the authority saying "you must think this way" and leave it at that (for then the person could go on thinking as before), but the authority now insists, "You must do it this way, and if not, you will have to face consequences that are not of your liking for the force of the law is against you."

This is the story of Thomas More, but it likely is the story of many others less well known to us and to history. The three quotations that appear at the beginning of this essay set the stage for what is to follow. I begin this examination with the exercise of conscience by Thomas More. Thomas More was lawyer, husband, father, statesman, legislator, judge, and saint. He

was scrupulous in what he did in all these contexts. But one day, his reasoned intellect informed him that he could not publicly assert what he believed in his reasoned judgment to be a falsehood about the sanctity of marriage — especially the one between King Henry and Queen Catherine — and the proper authority of the Church. If he could say nothing, which was the course he preferred to take, he may have retained his high status in the community and died an old man in his bed surrounded by the company of his family and friends. But because he would not bend to something that the positive civil law required, he was declared a traitor, tried, sentenced and executed under the law. The first quotation cited at the beginning captures the essence of the exercise of properly formed conscience.

And this brings us to the second quotation appearing in the introduction of this essay. Christopher Dawson — who was the first holder of the Charles Chauncey Stillman Professor of Roman Catholic Theological Studies at Harvard University — was a gifted student of history and of his times. He understood well the threats that the nascent National Socialist Party, the Communists in Russia, and the Fascists in Italy posed not only within their own countries but also throughout the world. He expressed his insights about these dangers in much of his writing. But he also warned that even the western democracies could duplicate, in their own fashion, enormous challenges and menace to religious faith as expressed through the exercise of conscience.

In the present moment, we accept as essential to the democracy we expect and enjoy — although the reality sometimes leaves much to be desired — that the law cannot transgress into certain places (as it did in Germany, Russia, and Italy) because the law and the state are instruments and servants of humanity. The human family is not the vassal of the state or the law it promulgates; it is the master with the state, government and law as servants. But in Germany, in Russia, and, to a lesser extent, in Italy, the state (or the "party"), exceeding its rightful role, claimed the sustaining of its existence to be the paramount justification of human existence. Humanity was understood to serve the state; the state did not exist to be the servant of humanity. The state and its highly centralized authority determined not only what people must do but also what they must think — and if they thought and acted contrary to the views and dictates of the state, they would do so at their peril.

When this constriction adversely impacts on the moral decisions properly formed by conscience and religious faith, the state is a totalitarian one, in spite of the fact that the state insists that it governs by law that is both knowable and known. And this brings the present examination to a consideration about the role of positivism in the totalitarian system — where the law is made and exists simply because the lawmaker presents the law without any further evaluation of its impact on society. The law's objective is not to serve society and the common good but to achieve the goal of the uniformity mandated by the state. Here the positivist mind of the lawmaker exercises a will but not a moral intellect for justification of a rule.

Although he has been highly regarded as a skilled lawyer and jurist, Justice Holmes's observation, in the correspondence quoted in the prelude to this paper, captures the essence

of the kind of positive law that does not venture farther from the pen or computer keyboard of the drafter. The law is what the lawmaker says and, without further evaluation or critique, that is that. The lawmaker who so engages the lawmaking process in this fashion has the positivist mind of which I speak. And when the law made by this type of person evolves to mandate a uniform adherence from which there is no dissent, the political system in which this law is promulgated is a totalitarian one.

One might think that the matters I raise here are of no concern to the Americans of the early twenty-first century because the totalitarian state is a relic of the past, or so that is the common belief. Moreover, most law of today is posited because it is the function of the lawmaker to posit. But this is not positivism with which I am concerned where the culture and citizenry have no ability to evaluate critically, objectively, and morally the law. Positivism generates a type of human-worship that knows only the mind of the lawmaker and what this person or group sees as the end of the human purpose. As Dawson suggested, it is the "dominant prejudices of the moment" rather than some objective and moral compass that guide society.[5]

This point can be illustrated by the 2003 Massachusetts Supreme Judicial Court opinion in the *Goodridge* case where the four-member majority asserted that "civil marriage is an evolving paradigm" and redefined marriage to include unions of homosexual couples.[6] The conclusion of the court and the declaration it used to justify its decision is a display of the positivist spirit of which I speak. This approach to law making is the basis of the totalitarian state's legal, positivist system. But surely the world of today does not have to worry about such matters, does it? And if it did, would not the exercise of conscience/religious liberty and the ability to object through their exercise as guaranteed by applicable law of the United States make this problem disappear at least in the domestic context?

Conscience and faith are at that core of the person who, with the exercise of right reason guided by the quest for objective truth,[7] deliberates and discerns regarding what is right and what is wrong and formulates the beliefs that guide one's path in life. The path chosen and the choices made clearly have an impact on the individual and his life; however, they can also have a bearing on the lives of others. The exercise of conscience and religious freedom endorsed here is *not* the one that permits a person to conclude that one has the right to do whatever one's conscience instructs simply because this conscience decides this. This is precisely what John Courtney Murray warned about in his commentary on the *Declaration on Religious Freedom* (*Dignitatis Humanae Personae*) promulgated by the Second Vatican Council. As Father Murray stated,

> [T]he Declaration nowhere lends its authority to the theory for which the phrase frequently stands, namely, that I have the right to do what my conscience tells me to do, simply because my conscience tells me to do it. This is a perilous theory. Its particular peril is subjectivism — the notion that, in the end, it is my conscience, and not the objective truth, which determines what is right or wrong, true or false.[8]

The peril of this view of conscience in the context of religious liberty, as demonstrated by Father Murray, is that it is purely subjective and makes no provision for considering the

objective truth extending beyond one's self that is needed to determine what is right and wrong not only "for me" but for everyone who may be affected by the exercise of individual conscience. Otherwise the exercise of conscience risks confusing falsehood and wrong with truth and right. A person has the right to express the view of his conscience and to say the other person is wrong. In doing so, the individual who has relied on the objective truth may also have to be prepared to be persecuted — as was the case of those who objected to many of the policies of National Socialism in Germany — when they asserted, based on conscience and religious belief, that the state and its enforcement arm were wrong. But the threat of persecution or the persecution itself is not sufficient to preclude the exercise of these rights of conscience and religious freedom as I have explained them. Surely there is a need for public peace and security, but when properly understood and used, conscience and faith, objectively formed, pose no threat to the common good. In fact, they enhance and safeguard it.

Let me now provide a few illustrations of the exercise of conscience to demonstrate between those claims of conscience which are not objective and those which are based on this objective truth that is claimed by religious liberty. While people have the right to claim conscience, the question is whether their exercise is founded on "objective truth" or on individual fancy.

Private Smith is a vegetarian. No one in the service requires Smith to eat meat; however, she is required one day to serve Kitchen Police duty and refuses, in conscience, to assist the cook in preparing the meat loaf dinner. This is an exercise of conscience not based on objective truth but, rather, on personal preference and conviction. The case of Private Jones is quite another matter. He is a member of an elite unit sent to a dangerous assignment to pursue terrorist suspects. His unit finds a terrorist suspect, and he joins in the apprehension. Eventually a superior decides to use interrogation techniques that violate applicable legal norms for the permissible extraction of information. Jones resists participation in these activities and demurs based on an objectively formed conscience. He realizes that his superior may reprimand and punish him, but Jones, in the reliance on good conscience, cannot unduly harm the suspect who has been apprehended, for in his conscience and his religious upbringing, he knows that there are permissible ways of interrogating the prisoner and those that are not.

The subject of conscience and religious freedom that I am addressing deals with the matter of where no government authority should go — into the innermost convictions of those who are its citizens, subjects, and ultimately masters. The state may properly ask for citizens' allegiance on issues of public import affecting the common good, but the state ought not to go any further. The manifestation of conscience and religious belief is a fundamental right. The state does not confer it; its source is not the state. Its foundation is in authentic human nature, authored by the Creator. And for those who make no claim to and even deny any theistic belief, I say this: the state did not create you; it is neither your author nor your final master. What the state cannot give, the state cannot lawfully retrieve even though it tries to on occasion.

II. A Basic Understanding of Conscience and Religious Liberty

The need to have a clearer understanding of conscience and its companion religious liberty is

now in order. Conscience and the correlative religious freedom must be more than simply subjective views and beliefs, particularly when one considers the reality that some people may believe strange things that should not be put into practice as John Courtney Murray suggested. Conscience and religious liberty do not confer the freedom to believe in whatever one chooses to believe simply because an interior and personal directive says so. These exercises are guided by pure subjectivity. For example, someone may consider that, in conscience, it is permissible to do terrible acts such as to rape, kill, or steal. The justifications for these acts that threaten others are flimsy. Authentic conscience is far more than a thin veil to follow whatever is the fancy of the individual. A major source of the corruption of conscience is that it is based on a purely subjective approach to what is right and what is wrong — there is no safeguard other than the individual who regulates the exercise of conscience and determines what it means and what it does not.[9] This point is noted throughout the *Declaration on Religious Liberty*.

In the United States today, the exercise of false conscience is exemplified by the famous *Casey* dicta: there is "a promise of the Constitution that there is a realm of personal liberty which the government may not enter."[10] Had the Court plurality stopped there, this dictum may not have become the problem that exists today. However, the plurality continued in its elaboration of what it meant by "liberty." This personal liberty is premised on additional *Casey* dicta stating that, "At the heart of liberty is the right to define one's own concept of existence, of meaning of the universe, and the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."[11] While Justice Kennedy may have been correct in placing some limit on what the state can do in the formulation of liberty, critical thinking, right reason, and points of reference beyond the purely subjective assuredly have a role in determining the boundaries of personal liberty. The *Casey* dicta offers no guidance when the conceptions of liberty offered by two or more persons following the decision's roadmap end up on a collision course. The highly subjective *Casey* definition of liberty is not a desirable method of finding out what conscience means and what it does not.

One can begin to ask some questions about conscience and the degree to which it can be exercised without running afoul of the limitations on some acts which can restrain the proper exercises of conscience. This investigation raises a distinction between active and passive exercises of the right to conscience. The active exercise might be characterized in this fashion: "not only will I disobey the rule that conflicts with my conscience, I will be proactive against the rule; if the rule states that I cannot do something, I will, out of an active exercise of conscience, do that which is forbidden by the law." This could be a legitimate exercise of conscience or it could simply be the act of a non-conformist. In contrast to the active exercise is the passive exercise of conscience. It typically surfaces in those cases where the person exercises conscience by stating: "I will not do that which is required, but I will do nothing else contrary to that which is required; I will simply not act." In the case of active exercise, the state may

take action to arrest the activity that the conscientious objector pursues. In the case of passive exercise, the state may coerce the conscientious objector into doing what the rule requires. Another way of considering these two forms of the exercise of conscience can be viewed as active conscience having a person do something not in conformity with the rule. With the passive exercise, the rule requires an action, but the objector does not visibly respond to the situation.

In both active and passive exercises, there is disobedience to the law. Even though the conscientious objector is in some fashion being disobedient, this individual is still a citizen or a member of society. He may very likely be concerned about the society, but he fears the impact that the rule, which is actively or passively being disobeyed, will have on the society.

I would like to illustrate this point with a story about England and the Second World War. Many years ago, an elderly woman, who was a retired member of the English faculty at Oxford University, befriended me. We would get together from time to time so that I could celebrate the Eucharist for her since she was housebound. After Mass, we would have some refreshments, and she would tell me many stories about her past. She was a woman of profound faith, and she did not miss much about the ups and downs of human existence. She grew up in Oxford and escaped the devastation of London during the blitz. One day when we were outside, she looked up into the sky and said that Oxford was a target of the Luftwaffe since it was an industrial center as well as the home to a great teaching and research university; nevertheless, the city was spared. She explained why she thought this to be the case. Either the Luftwaffe pilots and targeting officers were terribly bad at their assignment or they were exceedingly good, moral men who saved Oxford and its environs. She doubted that they were bad at their craft because her husband had been in the Royal Air Force and informed her otherwise. They likely represented passive conscience because they did not deliver the ordnance to the intended targets — they refused to drop the bombs on the city and its center of learning and research. They also represented active conscience because they knew they could not return to their home base with a complement of bombs still on board their aircraft, so they did what they were not supposed to do and probably dropped their bombs in the English Channel rather than on the intended targets.

III. Challenges to Conscience and Religious Liberty in the United States

We begin in this segment of my presentation by recalling the Pledge of Allegiance cases involving the objections of Jehovah's Witnesses and the array of cases dealing with young men who claimed conscientious objector status during the Viet Nam War. In the case of the Pledge cases, the conscientious objectors based their position on religious claims that forbade worship of graven images — in these cases, the flag of the United States. In the context of the draft cases, some complainants based their claim on religious grounds against all combat; others based the religious claim not on war in general but to a particular war (Viet Nam)[12]; however, others did not establish their claim on any religious belief, but they maintained their opposition to war on the basis of a humanist (secular) conscience.[13] As the Court worked its way

through these cases, which often presented different circumstances about and attitudes of the claimants, the decisions, while not necessarily in neat accord with one another, gave some indication of how an argument based on conscience could insulate a young man from military service and how it could not.

Today in the early twenty-first century, new issues are emerging that pertain to the exercise of conscience by medical personnel and pharmacists who object to certain medical practices (in particular, abortion or assisted suicide/euthanasia) or to the distribution of pharmaceuticals that destroy nascent human life.[14] Waiting in the wings are cases about mandates to perform marriages of same-sex couples. I suspect the list will grow.

Over the past several months, ominous developments regarding "conscience exceptions" have been emerging, and the state legislatures and Congress have been responding. Abortion providers such as the Planned Parenthood Federation (PPF), have been alarmed by the exercise of conscience clause protections invoked by pharmacists, physicians, and other health care providers that would excuse them from having to give "emergency contraception" to women who request these agents. PPF has argued, "Prescription refusal is a disturbing trend that can jeopardize woman's (sic) reproductive health."[15] Apparently, the jeopardy to the health of the infant is of little or no consequence. The same report of PPF also raises a challenge to religious liberty by noting that access to "reproductive health care diminishes as an increasing number of non-religiously affiliated hospitals are merging with Catholic hospitals."[16] PPF has asserted that while it believes that individuals have the right to their own opinions and moral beliefs, "it is unethical for health care providers to stand in the way of a woman's access to safe, effective, legal, and professional health care" as PPF defines it.[17] PPF supported the efforts of the Illinois Governor who issued an executive order requiring health care providers and pharmacies in that state to dispense "emergency contraception" and other birth control pharmaceuticals.[18] It is clear that many of the health care providers who have objected to prescribing or dispensing abortifacients are doing so out of conscience or religious or moral conviction.

When the democratic state has alternatives to obtain the goals (and "orthodoxy") it pursues in these kinds of debatable situations, should it not respect the innermost convictions of those persons who choose to be excused for reasons substantiated on conscience and religious convictions? This claim is all the more substantiated when one acknowledges that there are medical providers and pharmacists who are willing to perform the services demanded by some. To put the point candidly: if some are willing to take actions that threaten human life and the law permits this, should the law not also recognize and respect those members of the society who, in the exercise of conscience and religious belief, elect not to participate in these activities that someone else will readily perform? The answer would appear to be yes. If the legislature has the competence to say the governor is the head of the state, why should the citizen be required to swear in a public oath that this is indeed the case? If the state is able to secure goals the positive law deems legal, should all persons be made to comply when these

goals are not interfered with when persons of conscience based on religious belief ask to be excused? Surely this protection seems consistent with a fair and objective reading of the First Amendment which declares that Congress shall make no law prohibiting the free exercise of religion.

The right to conscience and the exercise of religious liberty are also protected under international law, which has some bearing on these rights within the United States. For example, one needs to consider Article 18 of the *Universal Declaration of Human Rights* (UDHR) which states: "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance." The rights conferred by this text have both public and private dimensions. There is the private component of "innermost conviction," and there is the public expression of it. Importantly, this text correlates to principles found in the *Declaration on Religious Liberty* promulgated at the Second Vatican Council.

Article 18 of the *International Covenant on Civil and Political Rights* (ICCPR)[19] duplicates much of this provision from the UDHR. Although the ICCPR contains some limitation on the exercise of the right when "necessary to protect public safety, order, health, or morals or the *fundamental* rights and freedoms of others" in accordance with the law, this limitation itself is subject to the "non-derogation" provisions of Article 4 of the ICCPR.

The drafters of the UDHR realized on the one hand that no one could ever really know what beliefs or thoughts a person had (unless of course they were extracted by unlawful means such as torture); however, they realized that a person's innermost convictions would mean little if the holder had to proclaim in a public manner a contrary position. As Professor Johannes Morsink concludes in his book, *The Universal Declaration of Human Rights,* which studies the *travaux prèparatoires* of the UDHR, "Behind this seemingly innocuous right lies the profound right not to be compelled to profess a belief or ideology which one does not hold."[20] The drafters of the *Universal Declaration of Human Rights* agreed with René Cassin, a French delegate and member of the drafting committee, that a person should not be compelled to do something indirectly that one could not be forced to do directly.[21] And this point reiterates a theme presented by Pope Benedict XVI in his address at Regensburg in September of 2006 when he quoted the Koran in which it is stated, "there is no compulsion in religion." When one carefully considers what the Holy Father said, with the backdrop of the *Declaration on Religious Liberty* in mind, the prohibition against compulsion means two things. The first is that no one, individually or in community, should be forced to believe in something to which they cannot subscribe. The second follows: no one, individually or in community, should be forbidden to believe in something that is important to them particularly when this belief is founded on the basis of right reason.

IV. The Problem — A New Form of Totalitarianism

As already suggested, we live in a nation of positive law. Typically Congress and the state leg-

islatures promulgate or posit the law, and judges interpret and apply this law when disputes about its meaning arise. This is an accepted way of life in our democratic and legal culture. Positive law is the vehicle by which the natural law — as objectively derived by right reason — is articulated and appropriately implemented; this is essential to the success of any democratic institution where faith and reason are accepted as compatible and cooperative members of the body politic. A significant problem arises, however, when a singular reliance on positive law, unchecked by the application of right reason, leads to positivism. This concern was addressed by H. L. A. Hart in his discussion of the Nazi regime and post-war Germany where he stated, "Wicked men enact wicked rules which others will enforce."[22] Even Hart, a strong advocate for positive law, conceded that in dealing with the abuse of power and law making authority exercised by the Nazi regime, obedience is not simply contingent on "legal validity;" it may also require some kind of moral scrutiny that transcends the official legal system.[23] This abuse of power can exist even in a democratic state where free thinking based on conscience and religious belief may not only not be welcome but not tolerated. Professor Michael Scaperlanda, who holds the Gene and Elaine Edwards Family Chair in Law at University of Oklahoma, has carefully studied and written about this phenomenon in the context of parents desiring to use vouchers to educate their children in the manner they deem proper for the younger members of their family.[24]

Tudor England provides a framework for a related abuse of power that ignored objective right reason and moral scrutiny in the making of law by an elected assembly, Parliament. From Thomas More's perspective, it was not only possible but also necessary for the law that Parliament made to reflect the harmonious relationship between human law and the law of right reason. In More's mind the connection between the two bodies of law was both indispensable and compatible. But the *Act of Succession* unsettled this balance for him and many others in the realm. More initially believed that he could ignore the Act (an exercise of passive conscience), which would continue on its course without any further expression of opinion from him. Perhaps that would have been to his liking; however, the King, or those close associates advising him, demanded a public endorsement, and therein lay the problem. Not the reason for the law but, rather, the King's and Parliament's ability to make and enforce it became the justification for obedience to the law — and this is the hallmark of the positivist state.

A significant problem began to emerge for More when this approach was subject to his discreet moral scrutiny that was an essential part of his public and private life. But the King and Parliament would not permit this; and they concluded that private views critical of the Act had to be neutralized and eradicated by a public oath of allegiance proclaimed by the citizens, and most assuredly by those in prominent positions within society like Thomas More.

More's refusal to profess publicly the oath would expose his innermost conviction that the Act and its underlying justification were seriously flawed. But if More could remain silent and preserve his religiously formed conscience, no one would ever know his conviction against the Act, and the law *and* More's life could continue. By this time More's public allegiance be-

came a crucial element of the Act's success, Henry's England had evolved into a totalitarian state in which conscience was no longer a protection for inner conviction. For the King, there was "a canker in the body politic, and he would have it out."[25] The process he adopted for its extraction was totalitarianism. Public support of and allegiance to the law was required, and there would be no exception. Thought, action, and belief had to be uniform — this is the hallmark of totalitarianism.

Totalitarianism is a dictatorship that relies on a centralized, universal control of all aspects of public life that can include the disclosure of even the "innermost convictions" of society's members.[26] The totalitarian state often conjures means of ensuring public endorsement of its control by demanding the uniform support of all over whom the state exercises dominion. The oath required by the *Act of Succession* in Tudor England guaranteed the uniformity and cohesion within society is an important component of the totalitarian state.[27]

In spite of efforts at universal and central control, there often remain elements of the society that preserve a moral force and function as a counterpoint to the pressure of this state. In the context of Nazi Germany and the Soviet Union there were religious and intellectual groups who served as counterpoints, usually at their peril. By pursuing their goals, the members of these groups themselves faced persecution and annihilation if discovered by the state's enforcement mechanisms. What they thought and believed could never become public if their views were to survive. Perhaps with knowledge of this, those states pursued means of discovering ways of forcing disclosure so that uniformity and cohesion of action and belief would be guaranteed.

Christopher Dawson, who spent a career studying conscience, religious faith, and public life, noted that in more modern times, Christianity needed to become an underground movement in order to survive.[28] But Dawson properly conceded that Christianity as a way of life is ultimately faced with a dilemma in that the display of conscience that goes along with it cannot always be concealed. He recognized that not only the totalitarian state but even the modern, democratic state "is not satisfied with passive obedience; it demands full co-operation from the cradle to the grave."[29] Dawson continued by stating that such obedience often was necessary to avoid being "pushed not only out of modern culture but out of physical existence."[30]

In the context of evolving situations in the United States regarding conscience-based exceptions on policy issues of the day (e.g. abortion, morning-after pills, public education, and marriage to mention but a few issues), Dawson's words from the first half of the twentieth century may be an accurate prophecy about the transformation of the democratic world of the early twenty-first century. The views and beliefs of religiously formed conscience that are targeted today by the democratic state need not be held by a few isolated individuals; they can and likely are held by many other persons. In this context, the hallmark of the totalitarian regime is its plan to eradicate beliefs and actions based on these beliefs. Surely this is the case with perspectives on abortion, same sex marriage/unions, euthanasia, and the "emergency contraception" that are more and more becoming not only the permissible policies but the re-

quirements of the modern state. These are not only interesting times, they are challenging as well. And how should these challenges be met? With resignation? With defiance? Or, with the reasoned response of conscience and the exercise of religious liberty?

V. A Hopeful Response

The exercise of conscience and religious liberty can often, even in democratic countries like the United States, trigger unexpected and peculiar reactions. If there can be freedom for "choice" exercised by an individual to take the life of a baby *in utero*, why should the same society prevent freedom of choice for an individual who does not wish to participate in this action? If there is freedom to marry whomever one wishes, should there not also be the freedom to say that there is a problem with this choice? If there is freedom for a person to take one's own life, should there not also be the freedom for others to announce that they will neither participate nor assist in taking life.

Let us return to the "mystery of life passage" from *Casey*. Some might argue that the positions contained in this dicta of the Supreme Court represent the natural and proper evolution of the liberal and democratic state and the exercise of conscience,[31] but others (perhaps keeping in mind the counsel of Thomas More who suggested that "when statesmen forsake their own private conscience for the sake of their public duties … they lead their country by a short route to chaos"[32]) can reasonably argue that this is not correct.

If American society today would applaud the doctor who, in the exercise of his conscience, refused to conduct some morally problematic scientific experiment encouraged or required by the law of a totalitarian state on persons without their consent, why would that same society disapprove of the doctor who, also in the exercise of conscience, refused to terminate human life at its early stages when this is permitted by the law of a democratic state that considers itself liberal or progressive? Put simply, this society's action would indicate that it is more totalitarian than it is democratic and liberal. This society would be guided by a dangerous subjective whim and caprice that demands uniformity rather than diversity of opinion. It would, notwithstanding its democratic claims, be a totalitarian society. As John Paul II once said, "the value of democracy stands or falls with the values which it embodies and promotes."[33] What values are being promoted today by "liberal democracies" such as the United States? Are they truly consistent with and respectful of the principles, including the right to conscience and religious liberty, that should under gird them?

If some are prepared to cheer the physician depicted in the film "The Cider House Rules" who, in the exercise of his ether-molded "conscience," would abort the babies of young, unwed mothers,[34] why could they not also commend the physician who, in the exercise of his conscience, refuses to associate himself with such actions when the regulatory mechanisms of the state require the doctor to terminate innocent life that has not given its consent? Perhaps because, as Dr. Edmund Pellegrino, a physician and ethicist, has cautioned, this kind of society offers an "immediate utopianism of a man-made heaven on earth" where there is no world — nothing beyond the here and now.[35] In Pellegrino's view, this kind of utopianism

determines the secular society's choices about what is permitted and what is not.[36] Pellegrino has admonished members of liberal democracies that the kinds of policy mandates I have identified parallel those of totalitarian systems that subverted the use of medical knowledge to further particular political and economic purposes, which are riddled with grievous errors.[37]

Dr. Pellegrino, in the company of many other Americans, laments the 1973 decision in *Roe v. Wade* that effectively removed all, not just some, prohibitions against abortion.[38] Under the guise of protecting physicians from criminal liability, the decision has been transformed into the basis of an unrestricted "right" to kill another human being. Pellegrino reminds us that the decisions in *Roe* and its progeny are "morally repugnant to many physicians and the public."[39] If there is any question about this, one need only consider the number of attempts which state legislatures and the Congress have undertaken to regulate the abortion practice and the judicial responses overturning much of the democratically enacted legislation, which may not eliminate but regulates abortion practice. By way of illustration of my point, one need only consult *Stenberg v. Carhart*[40] to survey the degree to which judges are capable of affording legitimacy to a particularly barbaric form of abortion. For the time being, the legislative conscientious objection protections exempting physicians from participation appear to remain intact. But a chill wind is beginning to precede a coming storm in the lawsuits against pharmacists who are resisting mandates to dispense contraceptives they believe morally offensive. Is there any hope that the law might properly respond to this quandary?

Thomas Aquinas's first principle of the law to do good and avoid evil offers an initial answer to this important question.[41] Of course it is critical to this principle that the good identified and the associated conscience that is its natural companion of religious belief be well and properly defined. Otherwise, as Dr. Pellegrino states, errors of conscience can occur when individuals or groups relying on the "conscience defense" misidentify the good.[42] If the good is misidentified, the subsequent acts based on conscience can also be flawed. And, in societies that pride themselves in being diverse and pluralistic, such as the United States, the good identified and the conscience claimed in its support can be mistaken.

Recognizing that there is a potential problem in justly dealing with claims of conscience, some cases offer clear distinctions about competing claims to the good that may underlie the exercise of conscience. For example, the highest court of the United States declared in 1973 in *Roe*, that the physician, in the exercise of professional judgment, could determine if nascent human life could be sacrificed. Some would celebrate this as a legitimate exercise of conscience. However, others would assert that this exercise of conscience is flawed because the result, mistakenly identified as a good, is in fact not a good from the perspective of the child who is destroyed. What would happen to the second physician who, in the exercise of her professional judgment and conscience, concluded, "I cannot take this life." Does the "mystery of life" of *Casey* supply the sole solution to this predicament? Or, might there be some search for a solution that goes beyond *Casey's* endorsement of exaggerated personal liberty, which takes little or no recognition of others into the exercise of conscience and religious belief?

If *Casey* remains the solution, would the second physician, like Thomas More, be compelled to bend to the mother's demand for terminating the pregnancy? If not, it could be said that the society and its law respect the conscience of all rather than some. If, on the other hand, the doctor who objects is in some manner compelled to participate in the practice to which she objects (e.g. referring the patient to a doctor who will perform the abortion), this society has begun its metamorphosis toward totalitarianism. In this case, the admonition attributed to Edmund Burke needs to be taken into account: "All that is necessary for the triumph of evil is that good men do nothing."[43]

Some may view the labeling as totalitarian the liberal democratic state, which removes conscience protection from the second doctor, a harsh or unsubstantiated conclusion. But is it when one considers that this type of state may be pursuing a well-crafted plan that dictates which beliefs or convictions and actions on those beliefs and convictions are permitted and which are not? When the modern state can legally insist on the following: that all who sell prescriptions must provide abortifacients; that all who are physicians must be trained to do and perform abortions; that all clergy and justices of the peace must perform weddings between same-sex couples, has not this modern state assumed the power to dictate which beliefs are protected and from which there can be no dissent? When reality demonstrates that people can and do differ about the propriety of abortions, same-sex unions, and the use of abortifacients, should the state demand that all comply with its rules on these subjects knowing that there are those who will offer, even gladly, these services to which others object through the exercise of objective reason, conscience, and religious belief? If the state, which calls itself a liberal democracy, in fact commands uniformity of opinion and action on these divisive issues of the day, does it remain valid to use the appellation "liberal democracy" to describe that state? The answer becomes obvious.

The problem does not end here. In the early twenty-first century we believe that we are remote from the attitude of the German concentration camp commander who, when asked, "Where was your conscience?" replied that he was simply following orders. In fact, we may not be so removed from this circumstance as we might like to think. Dr. Pellegrino has noted that some "ethicists" of the present day have begun to suggest that physicians "must separate their personal moral beliefs from their professional lives if they wish to practice in a secular society and remain licensed (by the state) … "[44] He points out that "health care" is beginning to merge with "death care." Thus, physicians may begin to wonder that if they raise objections about specific procedures, would they only be entitled to a limited license to practice the healing arts?[45] This question can be taken a step further, that is, would they be given a license at all? And, if they have a license, would it be stripped from them when they refuse, out of conscience or religious belief, to engage in these procedures?

The problem does not stop here. Let us assume that the state is willing to respect the exercise of conscience of this physician but then insists that this doctor provide the patient with the identity of those physicians willing to perform the services to which the first doctor ob-

jects on conscience? The physician's conscience has still been compromised, but this time indirectly. It is one thing for the physician to turn over a medical file to another doctor when the patient authorizes this; it is quite another for the physician to be required to search for this doctor, for then he or she would become an accomplice to the activity that strikes at the very heart of the conscientious objection that had been previously registered.[46]

The "liberal democracy" continues on its path, either by itself or after heavy lobbying from interested parties, of mandating compliance with a uniform regime. The state has no qualm about this even if 99% of the physicians are willing to comply. Should the state, however, be concerned if the compliance number decreases? What if it were 60%, or 40%, or 30%, or 1%? As the "liberal democracy" becomes more totalitarian in its outlook, all will have to comply whether this is necessary or not. In the case of performing abortions or euthanasia, assisting in state-sanctioned suicides, distributing poisons to destroy nascent human life, sanctioning same-sex unions (be they in the name of God or of the state), there can be no diversity or tolerance of opposing views — there is insistence that all comply whether the need for universal compliance is necessary.

Today's reality demonstrates this. In the context of abortion, euthanasia, assisted suicide, morning-after cocktails, or same-sex unions, there are others willing to comply — sometimes in the name of conscience or something like that.[47] There is no need to coerce all citizens with state sponsored sanction (imprisonment, denial of licenses, or fines) to perform acts to which they object in good conscience and faith, based not on "feeling" but on sound and reasoned views of rightness and wrongness. Nevertheless, the totalitarian state insists universal compliance simply because there can be no different voice, there can be no diversity of opinion on matters that previously one could hold as a matter of conscience and religious belief.

In the past experience of the twentieth century, one totalitarian state demanded adherence to the view that not all persons were equal on fundamental points of human nature — some were subhuman and could be annihilated. But reasoned judgment said otherwise. To have been a law-abiding citizen in that state, one had to hold and practice the view advanced by the state or suffer dire consequences. In the past, another totalitarian state required its citizens to proclaim that there is no God when reason and belief said there is. If a person held and expressed the state's view, he or she was a comrade and patriot. But if one did not, that person became a traitor and would risk calamity.

The views that are suppressed by the totalitarian state need not be unpopular ones. Rather, they may demonstrate that a society or community is deeply divided on certain issues — such as abortion, euthanasia, morning after pills, and same sex unions or marriages. The views that are the subject of the suppression may be widely held, even by a majority of the polity. But the state has a plan to change all that. So, what is one to do?

One can respond with violence — but that raises serious concerns and can quickly remove the cloak of legitimacy from the divergent view. One can resist through peaceful civil disobedience, but some may consider the deleterious effect this will have on the desire to be a

contributing member to one's family and community. And then there is the approach of Thomas More.

From the observations and conversations of one present at his trial, Will Roper his son-in-law, we learn that More was simultaneously a principled and pragmatic individual. The combination made for a remarkable person clever in dealing with and confounding adversaries but straightforward enough to let the honest listener understand why he did what others would or could not. Thomas More, a man of profound faith in God, often spoke of conscience and used the term in his correspondence that was written after his arrest and prior to his trial. But during his trial, writing and sending correspondence became difficult. However, Roper was able to capture the essence of More and his final understanding of conscience. Roper noted that at the end of his trial when the Lord Chancellor pressed him with the fact that "all the bishops, universities and best learned of this realm" had agreed to the *Act of Succession* and that More stood by himself by not joining his voice with theirs, More spoke from conscience.[48]

In doing so, he began his reply to this question as the astute lawyer: with this abundance of evidence that the Act is Lawful as demonstrated by such overwhelming endorsement of so many distinguished persons, what need was there for one final endorsement by Thomas More? As More expressed, "why that thing in my conscience should make any change."[49] His comment rhetorically asked if the legitimacy of the Act were truly in question, what could his humble opinion offer at this late stage? He made the distinction between all those alive who had subscribed to oath and those in heaven who might have thought otherwise.[50] If he were to be in the second category rather than the first, what matter would it make? It mattered a great deal, apparently. Yet More persisted in his tack, and so the Lord Chief Justice declared, "I must confess that if the act of Parliament be not unlawful, then is not the indictment in my conscience insufficient"?[51] With that, More's condemnation was sealed.

The man who returned More to the Tower where he would await his execution had this to say to Roper: "I was ashamed of myself, that, at my departing from your father, I found my heart so feeble, and his so strong, that he was fain to comfort me, which should have rather comforted him."[52] By this time, the condemned man — an ordinary man who, nonetheless, has become a man for all seasons — had been fortified by a remarkable synthesis of conscience and faith. In a letter sent to his daughter Margaret from his Tower cell, he explained how his conscience guided him: he would take precaution not to deny outright what the act of Parliament required, but the oath itself must be avoided — for by taking it he would condemn himself to a much higher authority, namely God. As he said, "in good faith my conscience so moved me in the matter that though I would not deny to swear to the succession, yet unto the oath … I could not swear, without the … [jeopardizing] of my soul to perpetual damnation."[53] More demonstrated graciously and courageously the essence of his identity as a prudent man, but in doing so, he maintained that he was also a man of conscience. On the one hand, he searched for ways of remaining the faithful citizen, but on the other, he knew well there was a boundary beyond which he could not pass, for if he did, a far more basic law binding all

humanity would be violated.

More was quick to point out that by exercising his conscience, he could not demand how others should exercise theirs.[54] Certainly it was his fervent hope to do what he could to remain publicly the good citizen who would abide in all respects by what the earthly sovereign commanded. But when his Rubicon had to be crossed, he had no expectation that others out of necessity must follow him and the path he chose. Conscience was simultaneously a private matter between him and the higher authority of God's law. By fulfilling the transcendent requirement, he neither expected nor demanded that others must follow him in his calling. As he said: "As for other men's consciences, I will be no judge … [but, if he did subscribe to the oath] ye may reckon sure that it were expressed and extorted by duresse and hard handling [torture]."[55] He was resolved to remain true to the conviction of his conscience, but he would oblige no other — "as for other men's, I will not meddle of."[56]

It was the style of More to keep his exercise of conscience a quiet matter. But on the other hand, his life was a very public act. His silence proclaimed to the realm where he stood when the law demanded what his conscience would not permit: to profess the oath. He would not meddle with the conscience of others, for they would stand or fall on their own deeds. As for himself, he declared, "I am no man's judge."[57] But he also knew he must be prepared to meet his final judge who is not of this world. Conscience was not exercised for the convenience of the continuation of his earthly life; it was exercised to determine the righteousness of how he would live this life as he prepared for the eternal one.

Another and more recent example of the exercise of conscience and religious freedom is Clemens Cardinal von Galen. In the early stages of the Second World War, Galen was a diocesan bishop in Germany. In July of 1941 he delivered a homily in Münster. The homily was delivered in the context in which the enforcement mechanisms of the Third Reich, once the Reich had tightened its strangling grip on the Jewish community, were being applied to the Christian, especially the Catholic, community. Galen understood well what was going on and the effectiveness and the brutality of the totalitarian state. But he was also a faithful disciple for whom conscience and religious freedom meant a great deal — so much so that he was willing to sacrifice himself by proclaiming the Good News. With these words, he exhorted his Münster congregation:

> [S]teel yourselves and hold fast! At this moment we are not the hammer, but the anvil. Others, chiefly intruders and apostates, hammer at us; they are striving violently to wrench us, our nation and our youth from our belief in God. We are the anvil, I say, and not the hammer, but what happens in the forge? Go and ask the blacksmith and see what he says. Whatever is beaten out on the anvil receives its shape from the anvil as well as the hammer. The anvil cannot and need not strike back. It need only be hard and firm. If it is tough enough it invariably outlives the hammer. No matter how vehemently the hammer falls; the anvil remains standing in quiet strength, and for a long time will play its part in helping to shape what is being moulded.

The memories of Thomas More and Clemens von Galen remain vividly today. Our tradition is richer, better, and more just because of who they were: men of well-formed conscience

and filled with faith in God and His Church. As I have attempted to illustrate, there still remain challenges in exercising conscience and religious liberty today even in places that claim to be liberal democracies. Will there be new scaffolds to mount and new jail cells to inhabit as a result of the exercise of conscience and religious freedom? If so, may those who choose this path because of conscience remember these extraordinary and wise predecessors in faith. Their guidance offered through the manner in which they lived and confronted the imposing challenges of their times may just be what the world and our beloved country need to avert the totalitarianism that beckons and lures the present age.

[*] The Rev. Robert J. Araujo is a member of the Society of Jesus. He currently holds the Jesuit Chair at Boston College. He teaches at the Gregorianum in Rome and at Gonzaga University Law School where he holds the Bellarmine Chair.
[1] Robert Bolt, A Man for All Seasons (1962), at 92-93. These are close to More's own words. In a letter to his daughter, Margaret, dated 2 or 3 May 1535, he said: "I am, quoth I, the King's true faithful subject and daily… pray for his Highness and all his and all the realm. I do nobody harm, I say none harm, I think none harm, but wish everybody good. And if this be not enough to keep a man alive in good faith I long not to live." St. Thomas More: Selected Letters (1961), at 247-48.
[2] Christopher Dawson, *Religion and the Totalitarian State*, XIV The Criterion No. LIV (October 1934), at 1.
[3] Justice Oliver Wendell Holmes, letter to Harold J. Laski, March 4, 1920, Holmes-Laski Letters, ed. Mark DeWolfe Howe, vol. 1 (1953), at 249.
[4] *Deuteronomy* 5:1-21; *Exodus* 20:1-17.
[5] Christopher Dawson, Christianity and European Culture (1998), at 127.
[6] *Goodridge v. Department of Public Health*, 440 Mass. 309, 339; 798 N.E.2d 941, 967 (2003). The majority did state in footnote 29 that, "Our decision in no way limits the rights of individuals to refuse to marry persons of the same sex for religious or any other reasons. It in no way limits the personal freedom to disapprove of, or to encourage others to disapprove of, same-sex marriage. Our concern, rather, is whether historical, cultural, religious, or other reasons permit the State to impose limits on personal beliefs concerning whom a person should marry." *Id.*, at 337; 965. But the court's dicta would not impose any restriction on the Massachusetts legislature from enacting a law to this effect.
[7] The significance of right or practical reason and the law was relied upon and developed by Thomas Aquinas in his Treatise on Law, where he stated, as the first principle of the law, that "good is to be done and pursued, and evil is to be avoided." Thomas Aquinas, Summa Theologiae, I-II, q. 94, art. 2 (Fathers of the English Dominican Province, trans., Benzinger Brothers 1947). Right reason is a search for truth that is not only conceptual but also practical. The search for truth is inextricably combined with the application or implementation of the truth undistorted. In this way, the rational and the moral merge through the exercise of right reason. For a more contemporary explanation of right reason, *see* Austin Fagothey, Right and Reason: Ethics in Theory and Practice 99-101 (6th ed 1976). *See also*, *Gaudium et Spes*, No. 63, wherein the Second Vatican Counsel stated, "the Church down through the centuries and in the light of the Gospel has worked out the principles of justice and equity demanded by right reason both for individual and social life and for international life, and she has proclaimed them especially in recent times."
[8] *Declaration on Religious Freedom*, from The Documents of Vatican II — with Notes and Comments by Catholic, Protestant, and Orthodox Authorities, Walter M. Abbott, SJ general editor, America Press (1966), p. 679, n. 5.
[9] For an important discussion which suggests that there can be an argument from subjectivity for conscience as well as a strong argument for objectivity, *see* Kathleen Brady, *Foundations for Freedom of Conscience: Stronger than You Might Think*, 10 Roger Williams U. L. Rev., 359 (2005).
[10] *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 847 (1992).
[11] *Id.,* at 851.
[12] *Gillette v. United States*, 401 U.S. 437 (1971).
[13] *United States v. Seeger*, 380 U.S. 163 (1965).
[14] *See, e.g.*, Robert Vischer, *Conscience in Context: Pharmacists Rights and the Eroding Moral Marketplace*, 17:1 Stanford L. & Pol. Rev. (2006).
[15] *See*, *http://www.plannedparenthood.org/pp2/portal/files/portal/medicalinfo/birthcontrol/fact-041217-refusal-reproductive.xml*
[16] *Id.*
[17] *Id.*
[18] Washington Post, April 2, 2005, Page A02, *http://www/washingtonpost.com/ac2/wp-dyn/A19703-2005Apr1?language+printer*. NARAL Pro-Choice and other "reproductive rights" lobbies have also been hard at work supporting the Illinois governor's initiative that is now facing legal challenges.
[19] The article reads in its entirety: "1. Everyone shall have the right to freedom of thought, conscience and religion.

This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching. 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice. 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions."

[20] Johannes Morsink, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS — ORIGINS, DRAFTING & INTENT, (Philadelphia: University of Pennsylvania Press, 1999), at 261.

[21] *Id.*

[22] H. L. A. Hart, THE CONCEPT OF LAW (1961), at 206.

[23] *Id.*

[24] Michael A. Scaperlanda, *Producing Trousered Apes in Dwyer's Totalitarian State*, 7 TEX. REV. L. & POL. 175, 195-202 (2002).

[25] *A Man for All Seasons*, Columbia Pictures (1966).

[26] Arendt, Friedrich and B, etc. H. Arendt, *The Origins of Totalitarianism* (1958, new ed. 1966); C. J. Friedrich and Z. K. Brezinski, *Totalitarian Dictatorship and Autocracy* (2d ed. 1967); M. Curtis, ed., *Totalitarianism* (1979); S. P. Soper, *Totalitarianism: A Conceptual Approach* (1985); H. Buchheim, *Totalitarian Rule* (1962, tr. 1987); A. Gleason, *Totalitarianism* (1995).

[27] Pierre Renouvin and Jean-Baptiste Duroselle, INTRODUCTION TO THE HISTORY OF INTERNATIONAL RELATIONS (1967, Praeger Translation), at 333.

[28] Christopher Dawson, CHRISTIANITY AND EUROPEAN CULTURE: SELECTIONS FROM THE WORK OF CHRISTOPHER DAWSON (1998), at 81.

[29] *Id.*

[30] *Id.*

[31] As Professor Steven D. Smith notes, the *Casey* decision "invoked the sanctity of conscience as a central rationale for a right to abortion." *See*, Steven Smith, *The Tenuous Case for Conscience*, 10 ROGER WILLIAMS U. L. REV. 325 (2005).

[32] Robert Bolt, *A Man for All Seasons* (Vintage Books: New York, 1962), Act One, p. 13.

[33] John Paul II, *Evangelium Vitae*, N. 70. In his earlier encyclical letter *Centesimus Annus* of 1991, he made a related observation: "As history demonstrates, a democracy without values easily turns into open or thinly disguised totalitarianism." *Id.*, N. 46.

[34] *The Cider House Rules*, Miramax Pictures, 1999.

[35] Edmund D. Pellegrino, *The Physician's Conscience, Conscience Clauses, and Religious Belief: A Catholic Perspective*, 30 FORDHAM URB. L. J. 221, 224 (2002).

[36] *Id.*

[37] *Id.* As Dr. Pellegrino points out, "We need not recite again the way the Soviet Union distorted the Hippocratic Oath to make it serve the purposes of Communism, the Nazi physicians' acquiescence in using their knowledge in the service of genocide, or the participation of physicians as instruments of torture or terrorism by so many petty dictators and war lords. The laws and social conventions of pathological societies justified all these violations of the ethics of medicine." *Id.* (footnotes omitted)

[38] *Id.*, at 225.

[39] *Id.*

[40] *Stenberg v. Carhart*, 530 U. S. 914 (2000).

[41] Thomas Aquinas, SUMMA THEOLOGIAE, *supra* note 7, I-II, q. 94, ans. 2.

[42] Pellegrino, *supra* note 35, at 227.

[43] A quotation often attributed to Edmund Burke but not found in any of his works. *See*, *http://www.bartleby.com/73/560.html* .

[44] Pellegrino, *supra* note 35, at 233.

[45] *Id.*, at 224.

[46] *Id.*, at 239.

[47] *See*, Nina Totenberg, *Harry A. Blackmun: The Conscientious Conscience*, 43 AM. U. L. REV. 745 (1994), wherein the author discusses the "conscience" of Justice Blackmun who authored the majority opinion in *Roe v. Wade*.

[48] William Roper, A MAN OF SINGULAR VIRTUE (1980), at 91.

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*, at 92.

[53] Letter of Thomas More to his daughter, Margaret, 17 April 1534, ST. THOMAS MORE: SELECTED LETTERS (1961), at 217.

[54] *Id.*
[55] *Id.*, at 243, Letter to a Master Leder, 16 January 1535.
[56] *Id.*, at 244.
[57] *Id.*, at 253.

HOW PROTECTING RELIGIOUS FREEDOM SUSTAINS FREEDOM ITSELF

BY DAVID CARROLL COCHRAN*

Why does religious freedom matter? Most answers to this question begin with the importance of religion. Since religion matters it should not be suppressed. I agree, but, my purpose here to come at the question from the other direction. I want to claim that religious freedom matters because freedom itself matters. Religious freedom plays an inescapably vital role in sustaining freedom more generally, even in those areas where freedom does not touch on religion directly. So if we value freedom itself, then we must also protect religious freedom in particular. I will develop this argument by examining two broad understandings of freedom and the role played by religious liberty in each. After a brief look at the first, freedom understood as negative liberty, I will draw on the work of Charles Taylor to develop and argue for the second, freedom understood as autonomy.[1]

Freedom as Negative Liberty

It is obligatory to begin any investigation into different concepts of freedom with Sir Isaiah Berlin's famous distinction between negative and positive liberty.[2] Negative liberty understands freedom as noninterference. It is the ability to act without external restraint, either by government or fellow citizens, within a private sphere marked off by strong individual rights. In contrast, positive liberty understands freedom as self-realization or self-direction. It is the capacity to act in accordance with truth or reason. Rather than external constraints, positive liberty is more concerned with the standards by which we decide how to live, and this is why Berlin saw positive liberty as so dangerous. He believed that it easily slipped into authoritarianism when those in power sought to coerce people into embracing a particular variety of truth or reason, essentially forcing them to be free in Rousseau's infamous formulation.

Berlin's concept of negative liberty is the basis for the first view of freedom I want to examine. Freedom understood as negative liberty has long been the predominant view of freedom in Western liberalism. It is what John Locke meant when he pointed to the "equal right that every man hath to his natural freedom, without being subjected to the will or authority of any other man."[3] This understanding relies on what Taylor calls an "opportunity-concept" of freedom, one that sees it primarily as a lack of external obstacles that block the opportunity of individuals to live their lives as they see fit.[4] On this view, I should have an opportunity to pursue my goals in life without undue interference or barriers thrown up by others.

This view of freedom comes in both libertarian and egalitarian varieties. The libertarian version keeps close to Locke's original focus and emphasizes the threat of an overweening state. Government power, especially its tax and regulatory functions, threatens to hem in individual liberty by blocking opportunities for free action according to one's own lights. The egalitarian version emphasizes economic and social inequalities as the real barriers to individual liberty. Poverty, racism, sexism, and other injustices are what limit opportunities individuals

face in pursuing their goals in life. While often opposed to each other, what these two streams of liberalism share is the understanding of freedom as a lack of external obstacles. They just disagree about the nature of those obstacles.

This account of freedom as negative liberty is familiar to those who know the long-running communitarian-liberal debate. It emphasizes a sphere of thought and action marked off by strong individual rights and procedural protections of due process. Its moral understanding of individuals is prior to or abstracted from their particular social and cultural contexts. It is neutral when it comes to competing notions of the good, instead emphasizing procedural notions of fairness that afford all persons an equal right to pursue their own version of the good with as little interference as possible.

In some ways, an understanding of freedom as negative liberty has been good for religious liberty specifically. Locke, for example, was an early and eloquent proponent of religious toleration. What is significant, however, is that religious liberty tends to be a subsidiary rather than constituent principle in this understanding of freedom. As a result, the grounds and extent of religious liberty can vary widely. Indeed, it is not hard to identify a least four different views of religious liberty, each perfectly consistent with this understanding of freedom:

1. Religious liberty is important because religion is an important part of some people's lives. If it matters to them, they should be free to express it, just as they are free to pursue other personal interests.
2. Religious liberty is important because it takes a potentially divisive issue off the table. Since government should be neutral when it comes to competing visions of the good, letting individuals cultivate their own religious views in the private sphere helps keeps the procedural peace provided by value neutrality.
3. Religious liberty is a prudent form of benign neglect (John Stuart Mill comes to mind here). A society characterized by individual freedom will include the right of religious conscience, but such a progressive society will also eventually evolve beyond the outmoded superstitions of organized religion altogether.
4. Religious liberty can actually be dangerous for individual freedom. If some religious beliefs and practices threaten to oppress, discriminate against, or otherwise limit the opportunities people face, then rather than being protected, religion is something that must at times be regulated and controlled.

If within freedom understood as negative liberty there can be such a wide range of views about religious liberty specifically, then there is nothing unique about it. Religious liberty is not special. It can be part of freedom or it can threaten freedom. It can be important or it can be trivial. In other words, religious liberty is incidental rather than inherent in this understanding of freedom. And so if we want to find an understanding of freedom in which religious liberty is much more central, then we must look elsewhere.

Freedom as Autonomy

Taylor's work on the nature of human freedom provides the basis for an alternative to under-

standings based solely on negative liberty. In his essay called "What's Wrong with Negative Liberty," he argues that an opportunity-concept of freedom cannot fully capture what it means to be free.[5] Any compelling understanding of freedom must also include what he calls an "exercise-concept" that recognizes the internal dimension of freedom, the process by which we are self-directing persons. External opportunities are not the only things that make us free. We also need the internal capacities necessary to take advantage of those opportunities. Internal reflection and judgment about the kind of person we want to be and the kind of life we want to lead are as much a part of being free as the range of external options that we face in life.

In making this argument, Taylor does not reject negative liberty. He just thinks it isn't sufficient. But at the same time he does not embrace positive liberty as Berlin describes it. On Taylor's account, traveling from negative to positive liberty requires two steps. The first moves from a view of freedom as doing what we want to one that includes elements of internal self-direction and the process of deciding exactly what it is that we want. The second brings in some kind of state authority attempting to shape this internal process through coercion or indoctrination. Taylor's notion of an exercise-concept of freedom endorses the first step but avoids the second, the one that Berlin rightly sees holding totalitarian dangers.

The internal dimensions of freedom, those capacities that allow us to actually take advantage of the opportunities that negative liberty guarantees, are what we mean by the term autonomy. Autonomy literally means self-rule. We are autonomous if we are the authors of our own lives, developing and pursuing projects that are authentically our own. This hinges on the difference between first-order and second-order desires. First-order desires are what we want at any particular time, and freedom understood as negative liberty usually refers to our ability to act on these without external obstacles to their fulfillment. Second-order desires, on the other hand, are desires about first-order desires themselves. In the words of Gerald Dworkin:

> It is characteristic of persons that they are able to reflect on their decisions, motives, desires, and habits. In doing so they can form preferences concerning these. Thus a person may not simply desire to smoke but also desire that he not have that desire. He may not only be motivated by jealousy or anger. He can also desire that his motivations be different (or the same).[6]

This capacity to evaluate and control our own desires and motivations, discarding some and embracing others, is how we exercise autonomy.

No one has written more perceptively on this process of reflecting on one's own motivations than Taylor. For him, a fundamental feature of human agents is the capacity for what he calls "strong evaluation." He writes: "Our emotions make it possible for us to have a sense of what the good life is for a subject; and this sense involves in turn our making qualitative discriminations between our desires and goals, whereby we see some as higher and others as lower, some as good and others as discreditable, still others as evil, some as truly vital and others as trivial, and so on."[7] This is the ability to rank and evaluate desires according to their value

rather than standards inherent to the desires themselves. In Taylor's words, "It means we are not taking our de facto desires as the ultimate in justification, but are going beyond that to their worth."[8] Rather than evaluating desires by how best to achieve them, or just delaying gratification of one desire in order to satisfy another, strong evaluation means drawing on standards independent of desire itself. Taylor points to contrasts like good/bad, noble/base, higher/lower, and virtue/vice to illustrate how we make distinctions of qualitative worth among alternatives. Rather than simply calculating maximum satisfaction of desires, we reject some desires because they conflict with the type of person we want to be or the kind of life we want to lead. Strong evaluation is the process of reflecting on and evaluating desires according to judgments about what constitutes a good life. It is how we exercise autonomy as we strive to construct meaningful lives from the inside.

As this account of strong evaluation shows, for Taylor autonomy is inescapably linked to morality. We are moral creatures, ones with fundamental "moral and spiritual intuitions" that form the basis for strong evaluation.[9] According to Taylor, as humans we rely upon moral "frameworks" that incorporate a "crucial set of qualitative distinctions" to tell us that certain ways of living or acting are "incomparably higher" than others, thereby providing the basis for strong evaluation.[10] Doing without such frameworks is "utterly impossible" since the moral horizons they provide are "constitutive of human agency," and as humans we are necessarily "oriented in moral space" defined by such frameworks.[11] For Taylor, then, this orientation in moral space means people "cannot do without some orientation to the good."[12]

Autonomy requires moral frameworks and the orientation to the good that they provide, but such moral frameworks don't just appear out of thin air. Taylor is clear that the moral materials we use for strong evaluation are rooted in particular communities, cultures, and traditions. As he says, "We first learn our languages of moral and spiritual discernment by being brought into an ongoing conversation by those who bring us up."[13] This is why the "full definition of someone's identity thus usually involves not only his stand on moral and spiritual matters but also some reference to a defining community."[14] The link between autonomy and morality is only one that is established in specific social and cultural circumstances. For Taylor "the free individual or autonomous moral agent can only achieve and maintain his identity in a certain type of culture."[15] This is why the internal process of autonomy depends upon particular external social and cultural institutions to sustain it, to furnish it the moral materials it needs to operate.

Drawing from Taylor, then, we can summarize our second understanding of freedom — freedom as autonomy — this way. Negative liberty is important but not sufficient. In addition to external threats to freedom, we must also pay attention to the internal capacities that allow persons to exercise freedom. Critical here is the process of strong evaluation, one in which we make fundamental moral judgments about the kind of person we are to be and the kind of life we are to live. Such moral reflection and evaluation is made possible by the moral materials we draw from particular communities and traditions, which help orient us in moral space and

provide connections to substantive notions of the good.

So what is the role of religious liberty in this understanding of freedom? It is a critically important one. At the very heart of this view of freedom are the moral frameworks provided by particular moral traditions, and the most important moral traditions, both historically and today, are religious ones. Religion has always been and still remains the most significant source of moral reflection and orientation to the good that people draw upon. This is certainly true of devout religious believers, but it is more widely applicable as well. Even those who are not strict adherents of a particular religion benefit from the moral wisdom of religion generally. They may be loosely affiliated with a religious tradition; they may have moved among several traditions; or they may not be believers at all, but they still participate in a culture rich in religious meanings, one in which the basic moral understandings at work are shaped by religious sources. The voices of religion enrich the moral dialogue that we all, believers or not, participate in and draw upon.

What this means is that a public culture with an array of rich and vibrant religious voices helps provide the moral underpinnings of autonomy. It furnishes the moral materials autonomous reflection needs. This requires a space in which such religious voices can develop and express themselves, and religious liberty helps create this space. A civil society in which religious groups and their members are free to worship, evangelize, and practice the tenets of their faith is critically important. This is why the various protections for religious institutions and forms of expression detailed elsewhere at this conference are so important, not just on their own terms but in the sense that they help create a civil society with robust religious traditions in dialogue with each other and the culture at large, a dialogue that helps furnish the moral meanings and orientations to the good that citizens need to exercise autonomy.

So we are left with a fairly straightforward formula: Freedom requires the internal capacity for autonomy, which requires moral frameworks and orientations to the good, which require a civil society with robust religious traditions, which requires strong protections of religious liberty. This is why working for religious freedom is not just good for religion but for freedom itself.

*David Carroll Cochran is Associate Professor of Politics and Director of the Archbishop Kucera Center for Catholic Intellectual and Spiritual Life at Loras College in Dubuque, Iowa.

[1] My treatment of different theories of freedom and their implications for religious freedom specifically draws on ideas I developed in David Carroll Cochran, *The Color of Freedom: Race and Contemporary American Liberalism* (Albany: State University of New York Press, 1999), where I made similar arguments in the area of racial and ethnic identity.

[2] Isaiah Berlin, *Four Essays on Liberty* (London: Oxford University Press, 1969), 122-153.

[3] John Locke, *Second Treatise of Government*, ed. Richard Cox (Arlington Heights, IL: Harlan Davidson, 1982), 33.

[4] Charles Taylor, *Philosophy and the Human Sciences: Philosophical Papers*, vol. 2 (Cambridge: Cambridge University Press, 1985), 212-215.

[5] Ibid., 211-229.

[6] Gerald Dworkin, "The Concept of Autonomy," in *The Inner Citadel: Essays on Individual Autonomy*, ed. John Christman (New York: Oxford University Press, 1989), 59.

[7] Charles Taylor, *Human Agency and Language: Philosophical Papers*, vol. 1 (Cambridge: Cambridge University Press, 1985), 65.

[8] Ibid., 66.

[9] Charles Taylor, *Sources of the Self: The Making of the Modern Identity* (Cambridge: Harvard University Press, 1989), 3-5.
[10] Ibid., 19-20.
[11] Ibid., 27-28.
[12] Ibid., 33.
[13] Ibid., 35.
[14] Ibid., 36.
[15] Taylor, *Philosophy and the Human Sciences*, 204-205.

"TWO THERE ARE"
UNDERSTANDING THE SEPARATION OF CHURCH AND STATE

BY RICHARD W. GARNETT*

I. Introduction

With respect to problems of church-state relations, or "law and religion" more generally, we do well to start from a fundamental, bedrock premise: As President Clinton put it, over a decade ago, "religious freedom is literally our first freedom."[1] The freedom of religion is not only listed early in the Bill of Rights; it was central to our Founders' vision for the American experiment. To be sure, the Framers — just like Americans today — did not always agree about what precisely the "freedom of religion" meant or means. But they knew, as we do, that it matters.

The protections afforded to religious freedom in our constitutional text and tradition are not accidents, anomalies, or anachronisms. They are not, as one prominent scholar has claimed, "aberration[s] in a secular state."[2] Quite the contrary: in our traditions, religious freedom is cherished as a basic human right and a non-negotiable aspect of human dignity. Correctly understood, our Constitution does not regard religious faith with grudging suspicion, as a bizarre quirk, or as a quaint relic, left over from a simpler past. The goal of our First Amendment is not to push religion to the margins, in the hope that it will wither; it is to protect religion from government distortion, so that it can flourish. The Establishment Clause is not a sword, driving private religious expression from the marketplace of ideas; rather, the Clause constrains government, and serves as a shield, protecting religiously motivated speech and action. As Professor Garvey once observed, our laws protect and promote the freedom of religion because, put simply, "the law thinks religion is a good thing."[3]

This point might seem obvious. Still, it is easily and often forgotten. It means, among other things, that we should regard restrictions on religious life, not religious life itself, with sober skepticism. In a free society like ours, the "[t]he calculus of religious liberty … is determined" not by the extent to which we confine religion to the private sphere, but instead "by the measure of religiously motivated thought and action that is insulated from [state] authority."[4]

And so, with this bedrock premise in mind, step back to "kinder, gentler" days. In 1988, while out on the campaign trail, then-Vice President George H.W. Bush recalled his experience, as a young pilot in World War II, being shot down over the South Pacific. He said:

> Was I scared floating in a little yellow raft off the coast of an enemy-held island, setting a world record for paddling? Of course I was. What sustains you in times like that? Well, you go back to fundamental values. I thought about Mother and Dad and the strength I got from them, and God and faith — and the separation of church and state.[5]

This train-of-thought probably strikes us as a bit absurd. And yet, it is entirely American. That

"God" and "faith" could not be invoked by a would-be President, as "fundamental values," without the awkward addition of "the separation of church and state," speaks volumes — for better or worse — about how we Americans think about the content and implications of our "first freedom."[6]

An earlier President, Thomas Jefferson, in his 1801 Letter to the Danbury Baptists, famously professed his "sovereign reverence" for what he saw as the decision of the American people to constitutionalize church-state "separation."[7] In so doing, he supplied what is for many the "authoritative interpretation" of the First Amendment's Religion Clauses.[8] Indeed, Professor Dreisbach observed not long ago that "[n]o metaphor in American letters has had a greater influence on law and policy than Thomas Jefferson's 'wall of separation between church and state.'"[9] "Jefferson's words," Professor Hamburger has observed, "seem to have shaped the nation"[10] and are, for many of us, "more familiar than the words of the First Amendment itself."[11]

However, that we are familiar, even intimate, with Jefferson's words hardly means we agree about their meaning. Notwithstanding our third President's "reverence" for church-state separation, and the comfort it supplied to our 41st President, the idea remains both controversial and contestable. What does it mean, really, for "church" and "state" to be "separate"? Is church-state "separation" even an imaginable reality, let alone a constitutional requirement? Or, are Professors Eisgruber and Sager right to insist, in their recent and important book, that "[c]hurch and state are not separate in the United States, and they cannot possibly be separate"?[12] The bookstores and blogs are awash in dire warnings of attacks by theocratic fascists on the wall of separation,[13] but has such a wall ever really existed?

Indeed, what about the recent assertion by Rep. Katherine Harris that the separation of church and state is a "lie we have been told" to keep religious believers out of politics and public life?[14] This charge seems well off the mark. And yet, there is no denying that separation is often presented, both by its opponents and by many of its self-styled defenders, as an aggressively anti-religious program, rather than — as John Courtney Murray once put it — a "policy to implement the principle of religious freedom."[15] To hear some tell it, the point of church-state separation is not merely to rule out a formally established church, or test-oaths for public office, or official meddling in churches' internal disputes, or even financial aid to religious schools. It is, more broadly, to engineer through law the privatization of religion, the secularization of civil society, and the exclusion from the political arena of religiously grounded arguments about the common good, and how to achieve it. Many appear to share Professor Rorty's opinion that it is in "bad taste to bring religion into discussions of public policy."[16] On this view, as Professor Carter memorably put it, religion is "like building model airplanes, just another hobby: something quiet, something trivial–not really a fit activity for intelligent … adults."[17]

Scholars continue to wrestle, of course, with the question of the appropriate place for religiously grounded arguments in public life. This is a rich and important conversation. Still, the bottom line is clear: Neither the Constitution, nor a correct understanding of church-state sep-

aration, imposes a "don't ask, don't tell" rule on religious believers who participate in public life[18] or demands that they "sterili[ze]" their speech before entering the public forum.[19] If a member of the Sierra Club, or the AARP, may bring her values into civic life, so may a member of the United Methodist Church.

William James once quipped, "in this age of toleration, [no one] will ever try actively to interfere with our religious faith, provided we enjoy it quietly with our friends and do not make a public nuisance of it[.]"[20] Sometimes, though, religious people are called precisely to "make a public nuisance" — and also to engage respectfully their fellow citizens in dialogue about how we should live together. There is no good reason why religious citizens should not speak and act as though their faith had consequences for state and society. Indeed, as Justice Thomas has insisted, it would be a "most bizarre" reading of the First Amendment that would "reserve special hostility for those who take their religion seriously, [and] who think that their religion should affect the whole of their lives."[21]

Of course, there are plenty of good reasons for reasonable, faithful believers to decide that it is unwise for church leaders to address difficult political questions, particularly when they are questions — as most are — about which reasonable, faithful believers can disagree. It compromises and disrespects religion to offer clunky, hasty baptisms of one's policy proposals. But — and this is crucial — it is not unconstitutional to do so, and the question whether one should has little to do with "separation." Indeed, we should remember, as Professor Elshtain has warned, that "if we push too far the notion that, in order to be acceptable public fare, all religious claims … must be secularized, we wind up de-pluralizing our polity and endangering our democracy."[22]

In any event, neither French-style *laicite* nor Fr. Neuhaus's "naked public square"[23] connects well with our history, traditions, and culture. Justice Douglas's observation, more than 50 years ago in the *Zorach* case, needs careful qualification, but is still basically on target: "We are," he said, "a religious people" and so, for us, that church and state are and should be "separate" does not, and could not, mean that "the state and religion [must] be aliens to each other."[24]

What, then, does it mean — what should it mean, for us — that "church" and "state" are "separate"? What is the place of church-state separation, properly understood, in the legal regime mandated by the First Amendment and, more generally, in the religious freedom that should exist in a constitutional democracy? What goods and values do we think separation helps us to attain and affirm?

We should agree that the "separation of church and state" is an important dimension of, and safeguard for, religious freedom under constitutionally limited government. It is not a "lie," even if it is widely misunderstood and misused. And the reason it is misunderstood, I suggest, is because we often fail to appreciate that the "separation of church and state" concerns, in fact, the relationship between "church" and "state." To say this is not to be cute or banal; this is a serious, if obvious, point: The "separation" that protects religious freedom and that, we might think, our Constitution requires, need not be between "religion" and "society,"

or between "faith" and "politics." In the end, these things are not and could not be separate (which is not to deny, of course, that they can and should be distinguished). Well understood, what the term "separation of church and state" describes, or calls for, is not a civic conversation or social landscape from which God is absent or banished, but rather a structural arrangement, a constitutional order, in which the institutions of religions are distinct from, other than, and independent of, the institutions of governments.

II. The "Serpentine" Wall of Separation

As Professor Witte has noted, the "wall" of separation has, in public law and in public discourse, proved far more "serpentine" — in the sense of winding and twisting, and in the Edenic sense of "seductively simple" — than many who invoke it appreciate.[25] Where did this image, and the idea it communicates, come from?

Certainly, the idea of a distinction between the Church and the political authorities, between what Calvin called the "spiritual kingdom" and the "political kingdom," between believers and the world, between the City of God and the City of Man, is much older than the American Constitution and long predates those Enlightenment thinkers widely thought to have influenced it.[26] In Professor Witte's words, although "[s]eparation of Church and state is often regarded as a distinctly American and relatively modern invention[,]" it is, in fact, "an ancient Western teaching rooted in the Bible."[27] Christ's followers were taught to "repay to Caesar what belongs to Caesar and to God what belongs to God."[28] More than 1,500 years ago, Pope Gelasius instructed the Emperor Anastasius that "[t]here are indeed … two powers by which this world is chiefly ruled"; Pope Boniface VIII identified "two swords, a spiritual … and a temporal"[29]; and Roger Williams contrasted the "Garden of the Church and the Wilderness of the world."[30]

Usually, though — as was noted earlier — the American separation-story opens in October of 1801, when the Baptist Association of Danbury, Connecticut wrote to President-elect Thomas Jefferson, congratulating him on his election to the "chief Magistracy in the United States."[31] In their letter, no doubt hoping to ingratiate themselves and their cause to the new President, the Danbury Baptists trumpeted their disagreement with Jefferson's Congregationalist and Federalist opponents, who had energetically attacked him during the 1800 campaign as "an enemy of religion[,] Law & good order," and noted also that their own "[s]entiments are uniformly on the side of Religious Liberty[.]"[32]

For the Baptists, the letter explained to the President, as for many other dissenters from Founding-era religious establishments, "religion [is] an essentially private matter between an individual and his God. No citizen, they reasoned, ought to suffer civil disability on account of his religious opinions. The legitimate powers of civil government reach actions, but not opinions."[33]

Jefferson, of course, was "keenly aware of the political implications of his pronouncement on a delicate church-state issue," and he replied a few months later in a well considered and carefully crafted letter of his own. He wrote, in the letter's key and famous passage:

> 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.[34]

Jefferson's letter was published in Massachusetts, shortly after it was received, but it seems to have then been forgotten for a half-century.[35] (Indeed, the Danbury Baptists themselves were reluctant to publicize the letter or its contents.[36]) It does not appear that Jefferson ever employed the "wall of separation" image again.[37]

As Professor Hamburger has explained, the idea of "separation" between church and state served, during most of the 19th century, less as a Jefferson-inspired constitutional doctrine than as a nativist and anti-Catholic rhetorical weapon.[38] However, in the 1879 case of *Reynolds v. United States,* one of the Supreme Court's first major decisions interpreting the First Amendment's Religion Clauses, the Justices quoted Jefferson's letter to the Danbury Baptists, invoked the "wall" metaphor, and reported that Jefferson's response "may be accepted as an almost authoritative declaration of the [Clauses'] scope and effect."[39]

The Court did not have occasion to return to the metaphor for almost 70 years. Then, in the landmark 1947 case, *Everson v. Board of Education,* Justice Black went even further than had the *Reynolds* Court, and announced that — notwithstanding its text — the First Amendment's Establishment Clause constrains not only the actions of Congress, but also those of state and local officials.[40] Justice Black followed *Reynolds* in giving Jefferson's letter, and the "wall," controlling, canonical weight. After a lengthy, though misguided, account of the Establishment Clause's history, context, and meaning, Justice Black summed up in this way: "In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.' … That wall must be kept high and impregnable. We could not approve the slightest breach."[41]

To be sure, a great deal has changed in constitutional law — and, in particular, in the understanding and application of the Religion Clauses — since 1947. But even though many of these changes have been in a non-strict-separationist direction, what Chief Justice Rehnquist once called Jefferson's "misleading metaphor"[42] remains deeply and indelibly ingrained in Americans' thinking about church-state relations and religious freedom. As the Court has moved in recent years from a no-aid-to-religion understanding of the First Amendment to a more accommodating view, it has been impossible to avoid warnings by the Court's critics that the "wall of separation" is being lowered, knocked down, weakened, or breached.

But again, that some invocations of faith in the civic arena might be unwise, unfaithful, or unseemly does not mean that they violate the "separation" principle, properly understood. To join Pope Benedict in insisting on the "distinction between Church and State" is not to demand disengagement by religious believers, communities, or institutions.[43] In the context of the

modern, activist, welfare state, "separation" or "segregation" of church from state — let alone of religion from public life — seems neither possible nor desirable. We would do better, I think, not to invoke or rely on the image of a "wall" of separation, but to think instead in terms of what my colleague, Professor Rodes, has called the "church-state nexus."[44] A "nexus," according to my dictionary, is a "means of connection; a link or tie."[45] It suggests not a "wall" but a relation, even a symbiosis, between two distinct things — neither a collapse of one into the other nor a rigid segregation of the one from the other. In this nexus, "churches" are not, and must not be, arms or auxiliaries of the "state." But again, the point of this arrangement is not to privatize religion or secularize civil society; it is to protect religious freedom — and political freedom more generally — under and through constitutionally limited government.

III. The Freedom of the Church

Whether we speak in terms of a "wall" or a "nexus," however, the point to emphasize is that, notwithstanding the idea's history and baggage, there are good reasons for wanting to get church-state "separation" right. We should neither embrace, nor war against, a mistaken version of the idea. Again: "Separation," well understood, involves a structural arrangement, a constitutional order in which churches — not "faith," "religion," or "spirituality," but "churches" — are distinct from, other than, and independent of, the state. And yet, consider the hot button "church-state" issues and disputes that are the stuff of front-page stories and high-profile court decisions: May governments allow privately owned menorahs and nativity scenes in public parks, or display the Ten Commandments on the grounds or in the halls of public buildings, or include the words "under God" in the Pledge of Allegiance? May the state ban ritual animal sacrifice, or the religiously motivated use of hallucinogenic tea, or peyote? May a child in public school read a Bible story from his favorite book, or hand out pencils with a religious message, or start a Christian after-school club? And so on.

Cases presenting questions like these are touted in the press as "church-state" disputes. And, there is no doubt that these cases involve important questions about the freedom of conscience and the powers and prerogatives of governments. The image of the lone religious dissenter, heroically confronting overbearing officials or extravagant assertions of state power, armed only with claims of conscience, is evocative and timeless. No account of religious freedom would be complete if it neglected such clashes or failed to celebrate such courage. And yet, while the "state" is (usually) easy to spot in these cases, where, exactly, is the "church"?

It is not new to observe that American judicial decisions and public conversations about religious freedom tend to focus on matters of individuals' rights, beliefs, consciences, and practices. The distinctive place, role, and freedoms of associations and institutions are often overlooked. This pattern is consistent with the widespread assumption that, because the individual religious conscience is free, religion itself is entirely private. However, an understanding of religious faith, and religious freedom, that stops with the liberty of conscience, and neglects institutions, will be incomplete. And — this needs to be emphasized — so will the legal arrangements that such an understanding produces.

If we want to understand well, and appreciate, the "separation of church and state," we need to broaden our focus. We need to think not only about the clashes between religious believers and government officials, and about the conflict between government regulations and individuals' conduct, but also about institutions, groups, communities, associations, clubs, families, and — especially — about churches. That is, we need to ask, as two leading law-and-religion scholars have put it, about the "distinctive place of religious entities in our constitutional order."[46] The separation of church and state involves legal arrangements and constraints whose point is not so much to artificially exclude religious faith from political life as to respect religious institutions' independence and autonomy. And so, we should remember that religious liberty involves not only the immunities of believers, but also the "freedom of the church."

But what, in the context of contemporary American law and politics, could one mean by the "freedom of the church"? This is a hard question. At the same time, this question should be at the heart of our conversations about, and understanding of, the separation of church and state. This ancient idea, or something like it, is a crucial component of any plausible and attractive account of religious freedom under and through constitutionally limited government.

A (very) brief historical review is in order here. Today, relatively few in America have heard of an 11th century monk named Hildebrand, who eventually reigned as Pope Gregory VII. For three days in late January 1077 — during what we now call the "Investiture Crisis" — the excommunicated German king, Henry IV, stood barefoot in the snow outside the Countess Matilda's castle in Canossa, in Italy. Henry was seeking reconciliation with the Pope, who had refused to give in to the king's assertion of power to appoint bishops. These three days, however, were as important to the development of western constitutionalism as the later events at Runnymede, or Philadelphia, or Appomattox. As the great legal scholar, Harold Berman, has described, Pope Gregory VII waged a historic struggle with secular powers for self-government by the Church. In so doing, he led a "revolution" that worked nothing less than a "total transformation" of law, state, and society.[47] And the battle-cry for this revolution — an idea that, according to Berman, would serve as the catalyst for "the first major turning point in European history" and as the foundation for nearly a millennium of political theory[48] — was *libertas ecclesiae,* or the "freedom of the Church." Here, and not in Jefferson's letter to the Danbury Baptists, are the foundations of church-state separation, properly understood.

The "freedom of the Church" claimed by Pope Gregory was the "independence of the Church from secular control."[49] What was at stake at the Countess's castle — as at the Cathedral in Canterbury, a century later, when the "meddlesome priest" St. Thomas Becket was murdered by another ambitious King Henry[50] — was the "principle that royal jurisdiction was not unlimited … and that it was not for the secular authority alone to decide where its boundaries should be fixed."[51] In George Weigel's words:

> Thanks to the resolution of the investiture controversy in favor of the Church, the state … would not be all in all. The state would not occupy every inch of social space. Indeed, the state had to acknowledge that there were some things it couldn't do because it was simply incompetent to do them — and *that* acknowledgment of

> limited competence created the social and cultural conditions for the possibility of what a later generation of constitutionalists and democrats called the limited state.[52]

No Justice of the United States Supreme Court has ever mentioned — at least, not according to Westlaw — Hildebrand, Gregory VII, or Canossa in any published opinion. Nevertheless, engagement with the 11th century Investiture Crisis, Hildebrand's "revolution," and the idea of the "freedom of the church" is essential to an understanding of constitutionalism generally and, more specifically, of religious freedom under law. As Fr. Murray once observed, persons are not really free if their "basic human things are not sacredly immune from profanation by the power of the state[.]"[53] And so, the challenge has long been to find the limiting principle that would "check the encroachments of civil power and preserve these immunities" and, Murray thought, "[w]estern civilization first found this norm in the pregnant principle, the freedom of the Church."[54]

It is tempting to assume that such a "great idea," or "revolutionary" principle of limited government in the service of human freedom, must be deeply rooted and comfortably well established in our Constitutional law. It is not entirely clear, though, that there actually is, in American constitutional doctrine, a commitment to the freedom of the church, revolutionarily understood. This is not to ignore the fact that there are a number of constitutional doctrines that, in effect, guard the churches' right to control their internal structure, to select their own ministers, to propose their own messages, to administer their own sacraments, to conduct their own liturgies, and so on. Appearances are deceiving, though, it is not clear that these doctrines evidence a robust, foundational commitment to church autonomy as structural principle of constitutional government. Instead, it could well be that we are living off the capital of this idea — that is, we enjoy, embrace, and depend upon its freedom-enabling effects — without a real appreciation for, or even a memory of, what it is, implies, and presumes.

For us today, the principle or idea that does the hard work of ensuring that the state is not "all in all" is not the freedom of the church, but the freedom of the individual conscience. In our religious-freedom doctrines and conversations, it is likely that the independence and autonomy of religious institutions are framed as deriving from the free-exercise rights of individual persons, rather than as providing the foundation for those rights. A better understanding is one that appreciates both that authentic freedom of religion does not exist when its manifestation in and expression through the work of institutions is burdened, and also that independence for such institutions is a necessary condition for political freedom. It is one that treats the freedom of the church, or something like it, as a structural feature of social and political life — one that promotes and enhances freedom by limiting government — and also as a moral right of religious communities, not simply as an implication of individuals' immunity from government coercion in matters of religious belief.

Is there a place — could there be a place — in American thought, politics, and law for a "revolutionary" principle like the "freedom of the church"? Is this a principle that could be incorporated into our Religion Clauses doctrine and categories? Perhaps. True, again, there are

a variety of constitutional cases, tests, and rules that evoke and resemble the *libertas ecclesiae* principle. Most notably, there is the doctrine of "church autonomy" which, in Professor Bradley's words, is "the issue that arises when legal principles displace religious communities' internal rules of interpersonal relations (as opposed to prescriptions for personal spirituality)."[55] So understood, Bradley insists, "church autonomy" is the "flagship issue of church and state," the "litmus test of a regime's commitment to genius spiritual freedom."[56] But even the "church autonomy" doctrine seems as much a collection of themes, or a grab-bag of discrete holdings in particular cases — a mood, even — as a clear rule, prohibition, or principle. It remains unclear and unsettled what exactly are the content and the textual home in the Constitution for the church-autonomy principle. It does not seem unfair to suggest that — like the "right to privacy," perhaps — the doctrine has something of an imprecise emanations-and-penumbras air about it.[57] And this, I submit, is something we might reasonably worry about, because the freedom of the church, as the heart of separation, matters — and for many reasons.

It matters, for starters, because — as was suggested earlier — there is a plausible argument that it plays an important, even if unnoticed, role in protecting the freedom of conscience. The case can be made that the freedom of the church has mattered and does matter for the development and sustaining of constitutionally limited government. And, as Professor Brady has explained, freedom for churches and religious institutions makes it possible for them to continue proposing "national values" and "preserving new visions of social life for us all." After all, these values and visions are best, and "prophetically," nurtured not just in private consciences but in religious communities.[58] What's more, the freedom of the church would seem to matter more than the issues at the heart of most contemporary law-and-religion disputes. If religious freedom is the good for which we are aiming, then advocacy and litigation efforts are probably better directed at defending the freedom of the church than, say, at insisting on snippets of civil religion on the walls of secular courthouses or in professions of national loyalty. Even if it is true that the First Amendment is best understood to permit official acknowledgments of religion and public displays of religious symbols, it is still worth remembering that the attention and efforts of religious believers is almost certainly better spent shoring up the structures on which their ability to challenge and transform the world depends. Better to insist on the freedom that religious institutions and communities require to evangelize than to urge the state to take up the task of evangelization for itself.

That the freedom of the church matters in many ways makes it all the more troubling that it is vulnerable. In part, this vulnerability is connected to the limited, and perhaps dwindling, appeal in public discourse of the term "church autonomy." We are, generally speaking, enthusiastic about autonomy, or self-rule, but many of us are uneasy about connecting "church" with *nomos.* Matters are not helped by the fact that the idea is often understood as entailing the assertion that clergy and church employees are entirely "above the law," and unaccountable for wrongs they do or harms they cause.[59] To the extent the church-autonomy principle is thought to privilege institutions over individuals, or structures over believers, its appeal will

suffer, given that people today think about faith — and, by extension, about religious freedom — more in terms of personal spirituality than of institutional affiliation, public worship, and tradition. We are — many of us, anyway — like the woman, Sheila Larson, described by Robert Bellah and his colleagues in *The Habits of the Heart*, who described her faith as "Sheilaism."[60] If we approach religious faith as a form of self-expression, performance art, or therapy, we are likely to regard religious institutions as, at best, potentially useful vehicles or tools or, more likely, stifling constraints or bothersome obstacles to self-discovery.

At perhaps a deeper level, though, the freedom of the church would seem vulnerable because of the increasingly widespread acceptance of the idea that liberal values and nondiscrimination norms ought not only to constrain state action, but also to inform state action constraining mediating institutions. It is more likely today that churches and their autonomy are regarded as dangerous centers of potentially oppressive power, as in need of supervision and regulation by the state in its capacity as protector of individual liberty and conscience.[61] But if, as Professor Berman proposed, the freedom of the church is not easily separated from both the history and the health of political freedom under constitutionally limited government, it would appear that, in Professor Hamburger's words, the illiberal expansion of "liberal ideals … could … become a threat to freedom."[62]

IV. Conclusion

Many argue today that the "separation of church and state" requires governments to scrub clean the public square of all "religious" residue, or mandates a thoroughly secular civil society. But this view of church-state separation is just as mistaken as the claim that separation is a "lie." It is untrue to the vision of our Founders and to the text of our Constitution. To quote John Courtney Murray again, arguments like these stand the First Amendment "on its head. And in that position it cannot but gurgle juridical nonsense."[63] In fact, our Constitution separates "church" and "state" not to confine religious belief or silence religious expression, but to curb the ambitions and reach of governments. In our laws, "Caesar recognizes that he is only Caesar and forswears any attempt to demand what is God's. . . . The State realistically admits that there are … limits on its authority and leaves the churches free to perform their work in society."[64]

Having offered these reflections on the idea of "separation," I would like to close with a few thoughts on the integration, not of church and state, but of faith and vocation. I teach and write at the Notre Dame Law School. At Notre Dame, our goal is to invite and — we hope — inspire young lawyers to bring their values to their studies, and then to carry them into their lives in the law. Of course, we do not always succeed. Still, in our view, we cannot expect young lawyers to think well about law, justice, and the common good if we tell them to privatize their ideals, or to radically separate their fundamental moral commitments from their law practices. And so, we encourage our students to approach their vocations — as lawyers, spouses, parents, friends, and citizens — as whole persons. That is, we challenge them to integrate their work, their beliefs, their values, and their activism. We urge them always to

remember who they are, what they believe, where they came from, and whom they love, and to resist the temptation to "check their faith at the door" of their professional and public lives.

So, with respect to my topic today — that is, the "separation of church and state," properly understood — I want to start with this claim: Those of us who are religious believers and citizens are entirely free — indeed, we are entitled — to participate in public life, in the civic arena, and in politics as whole persons. Nothing in the text, history, or structure of our Constitution requires us to accept dis-integration as the "price of admission" to the life of active, engaged citizenship. We need not, to be good citizens, bracket our faith, or translate our commitments.

To be sure, in our tradition, we wisely separate the institutions of religion from those of government. The Church is not, and must not be, an arm or auxiliary of the state. We do this, though, precisely in order to protect religious freedom, which includes the freedom to construct and live a faithful, coherent, integrated, public life.

* Richard W. Garnett is the John Cardinal O'Hara, C.S.C., Associate Professor of Law at the University of Notre Dame.
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[30] Roger Williams, Letter from Roger Williams to John Cotton (1643).
[31] Letter from the Danbury Baptist Association to Thomas Jefferson (Oct 7, 1801) (on file with the Thomas Jefferson Papers Manuscript Division, Library of Congress, Washington, D.C.).
[32] Letter from the Danbury Baptist Association, *supra.*

[33] Daniel L. Dreisbach & John D. Whaley, *What the Wall Separates: A Debate on Thomas Jefferson's "Wall of Separation" Metaphor,* 16 Const. Comm. 627, 631 (1999).
[34] Letter from Thomas Jefferson to the Danbury Baptist Association (Jan. 1, 1802) (on file with the Thomas Jefferson Papers Manuscript Division, Library of Congress, Washington, D.C.).
[35] James Hutson, *A "Wall of Separation: FBI Helps Restore Jefferson's Obliterated Draft,* Library of Congress Information Bulletin, Vol. 57, No. 6 (June 1998).
[36] Hamburger, *supra,* at 163-80 (contrasting the Baptists' views relating to religious freedom with Jefferson's version of separationism).
[37] Dreisbach & Whaley, *What the Wall Separates, supra,* at 635.
[38] *See generally* Hamburger, *supra.*
[39] 98 U.S. 145, 164 (1879).
[40] 330 U.S. 1 (1947).
[41] *Everson,* 330 U.S. at 16, 18.
[42] Wallace v. Jaffree, 472 U.S. 38, 91 (1985) (Rehnquist, J., dissenting) ("It is impossible to build sound constitutional doctrine upon a mistaken understanding of Constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years.").
[43] Pope Benedict XVI, *Deus caritas est* ¶ 28(a) (2005) ("The Church . . . cannot and must not replace the State. Yet at the same time she cannot and must not remain on the sidelines in the fight for justice.").
[44] Robert E. Rodes, Jr., *The Last Days of Erastianism — Forms in the American Church-States Nexus,* 62 Harv. Theo. Rev. 301 (1969).
[45] The American Heritage Dictionary of the English Language 1120 (3rd ed. 1992).
[46] Ira C. Lupu & Robert W. Tuttle, *The Distinctive Place of Religious Entities in our Constitutional Order,* 46 Villanova L. Rev. 37 (2002).
[47] Berman, *supra,* at 22-23.
[48] Id. at 87.
[49] Id. at 50.
[50] In the Academy Award-winning 1964 film, Becket, England's King Henry II — played by Peter O'Toole — says of Thomas Becket, the Archbishop of Canterbury — played by Richard Burton — "will no one rid me of this meddlesome priest?"
[51] Berman, *supra,* at 269.
[52] George Weigel, The Cube and the Cathedral: Europe, America, and Politics Without God 101 (2005).
[53] Murray, *supra,* at 204.
[54] Ibid.
[55] Gerard V. Bradley, *Forum Juridicum: Church Autonomy in the Constitutional Order*, 49 La. L. Rev. 1057, 1061 (1987).
[56] *Ibid.*
[57] *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965) ("[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.").
[58] Kathleen A. Brady, *Religious Organizations and Mandatory Collective Bargaining Under Federal and State Labor Laws: Freedom From and Freedom For,* 49 Vill. L. Rev. 77, 81, 167 (2004).
[59] *See, e.g.,* Marci A. Hamilton, God v. the Gavel: Religion and the Rule of Law 8 (2005) (contending that "[i]n recent decades, religious entities have worked hard to immunize their actions from the law" and "lobbying for the right to hurt others without consequences").
[60] *See* Robert N. Bellah, et al., Habits of the Heart: Individualism and Commitment in American Life 221, 235 (1996).
[61] *See generally, e.g.,* Hamilton, *supra.*
[62] Philip Hamburger, *Illiberal Liberalism: Liberal Theology, Anti-Catholicism, and Church Property,* 12 J. Contemp. Legal Iss. 693, 694 (2002).
[63] Murray, *supra,* at 33.
[64] William Clancy, *Religion as a Source of Tension*, *in* Religion and the Free Society 27-28 (1958).

RESPECTING RESPECTIVE SPHERES

THE ROLE OF RELIGION IN PUBLIC LIFE

BY STEVEN K. GREEN*

Too frequently, discussions about the proper role of religion in American culture and public policy have been cast in absolutist terms, for example, the claim that religious voices have unfairly been excluded from participating in public matters, resulting in a "naked public square" and the claim that religious voices are divisive and should remain private in order to avoid an Establishment Clause violation.[1] Alternatively, this latter perspective often seeks to limit public religious discourse to issues that are either uncontroversial or involve "traditional" matters of religious concern , for example, "no" to politically charged commentary; "yes" to talk about helping one's neighbor. Both perspectives fail to appreciate that the appropriate public role and voice of religion turns less on the issue such as abortion, war, or political partisanship, or of how closely is it associated with a church tenet such as, again, abortion or a particular tax policy, and more on the particular domain or sphere that serves as the stage for the issue.

The ground rules governing the role of religious expression in public life should turn less on the identity or substance of those voices and more on the spheres of discourse. When religion is acting in its private capacity without any government involvement, its ability to express its religious voice in an uncorrupted manner and to become involved in public matters is at its greatest.[2] When religion acts or speaks religiously as a result of a government created forum that allows for a diversity of voices and approaches, religion's role and voice may be constrained by the neutral limitations imposed by that forum. Religion's voice will likely be more constrained in this sphere than when it acts in a fully independent or private capacity. But when the sphere is in the form of a government program or function, the ability to exclude religious voices and approaches is heightened. In this latter sphere, the government may choose nonreligious voices and approaches without discriminating against religion.

In order to explain this schema, this essay will discuss three recent church-state controversies: (1) religious involvement in partisan politics, (2) religious involvement in government funded social services under Charitable Choice concepts, and (3) religious displays on public property. The ground rules proposed are as much aspirational as they are of a constitutional nature. In fact, the constitutional doctrine governing private religious speech in public settings, though long in developing, has reached a relatively settled and uncontroversial place. Building on the Jehovah's Witness colporteur cases of the 1940s and 1950s where religious expression was awarded protection under emerging free speech doctrines, the Supreme Court between 1980 and 1997 clarified that religious groups should have similar access to government property, buildings, and forums that are otherwise open for expression by private actors.[3] Although I have previously expressed concern that this expansion could raise issues of government attribution of religion (as with a private display of a religious symbol in a govern-

ment building leading to impressions of official endorsement of religion) or could result in the capture of public forums by dominant religious groups, I generally embrace this development.[4]

Provided the government has not manipulated a forum to favor religious voices but truly treats religious and nonreligious voices alike, then perceptions of endorsement — and citizen isolation from government — should be minimal. Significant issues remain whether equal access principles from speech doctrine should transfer to funding contexts,[5] but generally the clarification that private religious speech is entitled to the same treatment and protection as other forms of expression has been an important development. This is an area where the constitutional rules chiefly set the outer boundaries, hence, important and necessary discussions need to take place on a non-constitutional level.

I. Principles

The threshold principle just discussed — regarding the co-equal status of private religious expression with its secular counterpart — may seem self-evident; however, it deserves brief elaboration. It is beyond peradventure that the government may place no restrictions on the religious content or perspective of expression that takes place within the confines of a private sphere such as within a home or house of worship. Thus clergy and others may from pulpits and in newsletters condemn the war, oppose abortion or criticize government spending policies, provided the expression does not cross the line into criminal incitement or other unprotected speech.[6] This same allowance extends to similar religious pronouncements to public audiences beyond co-religionists as in evangelism. The primary limitation on this principle rests not on the expressive locus, method, or audience but on the subject matter: churches and other houses of worship are forbidden under the Internal Revenue Code from endorsing or opposing candidates for public office or becoming engaged in partisan political campaigns if they remain tax exempt. While courts have acknowledged the free exercise and free speech rights of churches to express such preferences, they have found no violation by the government imposing such a restriction as a condition for receiving an exemption from paying federal income taxes.[7]

Free exercise and expression values thus protect the ability of churches to become involved in social and political issues.[8] This constitutional pass-key only says what churches can do; it does not say what churches should do. For most churches, matters of faith cannot be cabined in theology, doctrine and liturgy. The prophetic voice of our religious community on social issues, and its involvement in social matters, has made our society far richer and more humane. Religion has an indispensable role in speaking out about injustice and calling our leaders to moral accountability. Many of the great moral and social movements of our nation — abolition, women's rights, civil rights — would not have taken place without the vocal leadership of churches, their clergy and their laity. That voice is clearest and most effective, however, when it maintains its autonomy from the government it is petitioning or critiquing. History has taught that religion loses its moral authority, effectiveness, legitimacy and, eventually, its independence when it relies on the sovereign for support or too eagerly ratifies government

policies and programs.

That religion should have a strong public voice does not mean that there is an opposite counterpart. The Establishment Clause bars the government from reciprocating by speaking with a religious voice. The Establishment Clause, as well as the structure of the Constitution, ensures that we have a secular form of government. Thus the government may enact programs to advance important social goals and speak on matters of social and political significance, but the government is disabled from acting with the purpose of advancing religion or speaking with a religious voice. On one level, government simply lacks jurisdiction or authority over religious matters. On a different level, since the Founding Era we have recognized the threat to the legitimacy and independence of both government and religion when government expropriates religion for its purposes. James Madison wrote that the claim that government could judge religious truth or "employ religion as an engine of civil policy" was "an arrogant pretension" as well as an "unhallowed perversion of the means of salvation."[9]

The two clauses thus exert tension on the issue of religion in public life: religion must have a public voice, but at the same time it must remain private, that is, separate from government; government must remain secular, but not inhibit religious voices.

This tension is reflected in public attitudes. Americans take a schizophrenic approach to the mixing of religion with politics and social policy. Polling data indicates that an overwhelming majority of Americans object to excessive political activity by churches and religious leaders. Most people view it as unseemly for a religious leader to closely align himself with an elected official or partisan organization or for him to advocate that the government should promote a religious agenda through public policy or law. Not surprisingly, many Americans were rebuffed by the religious demagoguery of Pat Buchanan at the 1992 Republican Convention where he anointed the party as the party of God. People prefer that matters of faith and politics not be too closely associated. As a result, religious leaders like Pat Robertson and Jerry Falwell are generally reproved by the public, despite the devotion of their core followers.

This disdain tends to vanish — or at least lessen — when a religious leader's political pronouncements or a politician's "God talk" matches one's own religious/social perspective. What was once a "religious-political agenda" becomes a compelling basis for policy implementation. Religious justifications and rhetoric that were once off-putting are now affirming. Because of the inherent myopia of faith, people tend to exaggerate the universality of their own beliefs and have a difficult time seeing that their deeply felt positions may not be shared by others and, in fact, may be offensive. Moreover, because of the certitude of belief in many faith traditions, particularly within the more fundamentalist communities, differing interpretations or views of religious truths are not worthy of equal regard. Thus, for example, many religious conservatives have supported President George W. Bush's normative policies not only because they agree with values and outcomes they represent, but also because they believe they are the religiously "correct" positions to hold. In such instances, discourse frequently becomes absolutist in its terms and political compromise becomes all but impossible.

The schizophrenia with respect to religious-political discourse is most apparent, however, when it comes to many Americans' attitudes about the government's use of religious rhetoric, imagery or symbolism. So long as our government officials are not too overt or sectarian in their religiosity, we appreciate a little religious or moral rhetoric by our leaders. Sixty-eight percent of Americans state that it is important that the President have strong religious beliefs (a number that rises to 87% if you ask evangelicals). There is a bit of a paradox in fact that Americans readily embraced the religious sound-bites of Ronald Regan but were uncomfortable with the intensely personal faith of Jimmy Carter. George W. Bush's apparently deep personal faith is attractive to moderate and conservative Christians, but raises suspicions among religious liberals and secularists. Still, no avowed atheist or agnostic will be elected President (or governor or senator or other significant office) in our lifetime.

We also want our government and its policies to reflect our religious beliefs, notwithstanding the continual threat to religion presented by government misappropriation of things holy. Witness the furor over the removal of the word "God" from the Pledge of Allegiance or whenever ACLU seeks to banish the Ten Commandments from public buildings. Madison's warning about the dangers to both liberty and religion that are presented when the government uses religion as "an engine of civil policy" seems antiquated and far removed from the American democratic experience. This self-assurance, however, fails to appreciate our own history where Catholics, Mormon, and Native Americans, among others, were on the short-end of nineteenth century government policies that reflected the dominant Protestant values of times.

II. Proposal

First with religious voices. There is a temptation to cabin religious voices to issues that are "clearly religious": expressions of faith or doctrine; statements on "core" moral issues; or humanitarian concerns for the homeless, hungry and dispossessed. While churches should engage in self-reflection and self-definition for their own legitimacy, pressure to define the boundaries of "proper" religious discourse is often external from popular culture, the media, or government. There is a real threat to religious liberty when government defines as public matters religious importance. Many years ago I was involved in a controversy over whether a local church's feeding program for the homeless conflicted with the city's zoning policies. I remember being told by a city official that the issue could be resolved if the church would simply stick to its primary function of providing worship. The prophetic voice and mission of the church will mean little if others can define those areas that are appropriate for religious engagement.

Thus the ground rules governing private (i.e., non-governmental) religious discourse in the public square cannot turn on the substance of the message. This is why I propose a *spatial* approach to these issues. The rules governing the religious expression in public life should turn on the spheres of discourse rather than on the substance of those voices. I offer a three level schema.

1. When religion is acting in its private capacity without any government involvement, its

ability to express its religious voice in an uncorrupted manner and become involved in public matters is at its greatest.

2. When religion acts or speaks religiously as a result of a government created forum that allows for a diversity of voices and approaches, religion's role and voice may be more constrained than when it acts in a fully private capacity.
3. Finally, when the sphere is in the form of a government program or function, the ability to exclude religious voices and approaches is heightened. In this latter sphere, the government may choose nonreligious voices and approaches without discriminating against religion.

Maximum: Churches should have absolute control over their liturgy and church doctrine. When churches speak with respect to those teachings, in instructional or worship settings, their expressive rights are at their greatest. They are not seeking a government subsidy to express their views and, usually, are speaking inwardly to their own congregations.

As a result, in these private settings, the ability of churches to speak out on social and political issues should generally be unconstrained. For example, a bishop or priest should be able to condemn a public official for supporting the war or abortion or failing to provide for the needy. The common question that arises concerns the endorsement or criticism of political candidates by religious leaders. Episodes of "voters' guides" or political rallies in churches are legend. The Internal Revenue Code forbids churches from engaging in any political electioneering, and a few churches have run into trouble. Recently, the Internal Revenue Service threatened an Episcopal Church in California with revocation of its tax exemption for the rector's condemnation of the President's war policy shortly before the 2004 election. The church had a long history, however, of speaking out on political and social matters, such that its criticism of the President was neither exceptional nor selective in its timing. After several years of an impending government sanction, the I.R.S. dropped its investigation. Even though the church "won," the investigation may have had the same chilling effect on religious speech as any loss of an exemption.

I believe the Internal Revenue Code's prohibition of religiously motivated political speech should be read narrowly. Religious leaders should be able to speak out on matters of religious and political significance, particularly when the church is already on record with respect to the issues and is speaking to its congregants. Thus, a priest or minister should be able to urge his parishioners to vote for pro-life or pro-choice candidates without violating the I.R.C. I would draw the line at express endorsements of candidate X or lending a pulpit to a candidate the Sunday before the election (Congress has legitimate interest in the integrity of elections). But general admonitions to vote one's religious conscience should be protected, particularly when it takes place within this first sphere.

More Constrained: When the government has created or opened a forum for diverse expression or participation, it may not exclude religious voices. Thus, if government allows public use of government buildings (libraries, schools, municipal halls), it may not exclude religious

groups or voices. Similarly, if the government allows for temporary display of private symbols on government property, it cannot exclude symbols with religious messages such as nativity scenes.

But the government can always limit the purposes for the access or set criteria for its use, provided those criteria are neutral. It can also consider the compatibility of speech with particular property: general discourse in airports is appropriate; political rallies or religious revivals are incompatible. When churches decide to broadcast their messages by way of government provided forums, they are subject to the same time, place and manner rules governing other private expression. In some instances, religious speech may not be compatible with a particular forum, regardless of its message. Thus, religious expression is not at its apex in such contexts.

A related example concerns government funded programs, such as social service programs. Depending on the program structure and goals (for example, how competitive is the Request for Proposal or how much discretion a social service provider has in the content of its programs), then religious organizations and religious voices may be prominent in such programs. Much may depend on whether one characterizes a particular government funded program as an open forum such that government cannot discriminate on the basis of a religious viewpoint or more restricted government offering over which government goals and messages dominate.[10] But if the government chooses to structure its program offering more narrowly, then certain religious approaches may not qualify.

Minimal Religious Voice: As said, the history and structure of our government contemplate a secular public order. The Establishment Clause recognizes that America has a secular democratic government, one in which government may promote liberal democratic principles to the exclusion of other ideologies, including religious ones. Thus government may and should promote secular goals over religious goals and voices. This also means an affirmative obligation on government to maintain a secular order, and a collective right of citizens to enforce this arrangement, a value which recently was undermined by the Court's narrowing of taxpayer standing in *Hein v. Freedom From Religion Foundation*.[11]

Outside of mandatory or designated expressive forums, government is not obligated to support private expression, religious or otherwise. Similarly, government is not obligated to enhance religious voices through its own programs. This is historically true; our experience has taught that government is ill equipped to enhance religion without reverting to favoritism and inviting those concerns that drive the Establishment Clause.

Supporters of neutrality theory have made claims, to a large degree unchallenged, of government's obligation to treat religion as favorably as non-religion, even in its own programs or speech. In the words of Stephen Monsma, "[t]he key to governmental neutrality is that government does not recognize, accommodate, or support any one particular religion over any other nor either religious or secular worldviews and groups over one another."[12] As Professor Suzanna Sherry has summed up the argument:

> The claim that the Establishment Clause should be subordinated when it conflicts with religious or speech rights of believers is really a claim that … the government must remain neutral not only on the potential truth of religious claims but also on their epistemology. It is a claim that the government should not be permitted to privilege reason over faith as a method of obtaining and verifying truth claims.[13] This argument is inconsistent with the secular nature of democratic government, under which the government is entitled to privilege secular values over religious ones. The government may favor rational approaches to policy formation over alternative epistemologies, including religious systems. The government need not be neutral or evenhanded toward religion in administering its own programs; it may prefer rational empirically based solutions and outcomes over religiously based ones.

Importantly, the preference for and advancement of secular policies over religious policies is not the same as discrimination against religion. Where government promotion of secularism crosses the line into coercion is when the government requires private citizens to agree with its positions or policies. Government must also avoid taking sides on matters of contested religious belief. But this on its own does not disable the government from promoting secular policies and perspectives to the exclusion of comparable religious ones.[14] In essence, government is generally not required to treat religion equally with nonreligion, only not to treat religion unfairly.

Contrary to what some may claim, the boundary between secularism and religion is not a zero-sum game, such that every secular value is advanced at the cost of a comparable religious value. Government may advance secular ideals without disparaging religion. Neither government nor society operates in a Manichean framework. While government should not consciously disparage religion or religious choices, it may create incentives for secular ones. Thus, within government funded programs, particularly those with express policy goals and outcomes, the government may impose restrictions on the religious (or secular) messages by private providers in the administration of those programs.

Charitable Choice. As a result, the federal government was under no obligation to change the rules with respect to the eligibility of Faith-Based Organizations to compete for government grants and contracts. The rhetoric surrounding the enactment of Charitable Choice and the Bush Administration's promotion of the Faith Based Initiative has been full of claims of government *obligations* to include more religious groups. The implication was that the failure to expand the offering infringed on free exercise and free expression principles. On one level, the evidence is overwhelming that prior to Charitable Choice the government did not discriminate against religious providers or beneficiaries, but only as against certain religious uses. But more fundamentally, considering the affirmative quality of nonestablishment with the negative quality of free exercise, the federal government was under no obligation to restructure its funding goals to include religious alternatives. No free exercise burden would be presented by a secular-only program, neither with respect to beneficiaries nor potential religious providers. To quote former Chief Justice Burger:

> Never … has the Court interpreted the First Amendment to require the Government itself to behave in ways that the individual believes will further his or her spiritual development or that of his or her family. The Free Exercise Clause simply cannot be understood to require the Government to conduct its own internal affairs in ways that comport with the religious beliefs of particular citizens. …"[T]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government."[15]

Religious Displays. As discussed, the government lacks authority to speak religiously; additionally, we should raise alarm at the government's use of religious imagery and discourse for its policy purposes. Not only should the government use of religious symbolism be prohibited — as Justice Stevens argues, there should be "a strong presumption against the display of religious symbols on public property" outside of a clear public forum.[16] Additionally, there exists an affirmative obligation to disassociate self from impressions of government endorsement. Again, as Justice O'Connor has stated: "[T]he Establishment Clause forbids a State from hiding behind the application of formally neutral criteria and remaining studiously oblivious to the effects of its actions.[17] Thus, this is why the Texas Ten Commandments decision — *Van Orden v. Perry* — is wrong. Except for those rare situations that are overwhelmingly aesthetic — National Gallery Madonnas; the frieze in the Supreme Court chamber — the government should not expropriate, use, or even associate itself with inherently religious symbols. When the government is speaking — and there was no claim in *Van Orden* that Texas had created a public forum for free expression on the state capitol grounds — it must support a secular public order.

This does not mean that government cannot acknowledge religious traditions or customs. It is particularly able to do so when it accommodates the religious needs of its citizens, such as through religious holidays. But acknowledgement is different from normative proof-claims: that we are a "Christian Nation," or that "the Ten Commandments serve as the basis for American government." In such instances, government must speak with a secular voice.

In a related vein, churches should not encourage the government to engage in religious discourse or acquiesce to the government's appropriation of religious imagery or symbolism. People of faith should understand that religious messages are most effective and legitimate when they take place apart from the realms of the profane. Respecting the appropriate spheres of discourse will go far to ensuring the credibility and durability of religious commentary on matters of public life.

* Steven K. Green is a professor of Law at Willamette University and Director, Willamette University Center for Religion, Law and Democracy in Salem, Oregon.

[1] See generally John Neuhaus, The Naked Public Square (1984); Stephen Carter, The Culture of Disbelief (1993); Sarah Diamond, Spiritual Warfare (1989); Flo Conway and Jim Siegelman, Holy Terror (1984).

[2] The terms "private" and "public" take on multiple meanings in this essay. "Private" may mean "belonging to a particular group," "in secret," or "not of the government." "Public" may mean "a matter of general interest," "open," and "of the government." Hopefully, the particular usage will be understood by the context.

[3] Widmar v. Vincent, 454 U.S. 263 (1981); Board of Education v. Mergens, 496 U.S. 226 (1990); Lambs Chapel v. Center Morishes School Dist., 508 U.S. 384 (1993); Capitol Square Review & Advisory Board v. Pinette, 515 U.S. 753 (1995).

[4] Steven K. Green, *The Misnomer of Equality Under the Equal Access Act*, 14 Vermont Law Review 369 (1990).

[5] See Rosenberger v. University of Virginia, 515 U.S. 819 (1995).
[6] See Brandenburg v. Ohio, 395 U.S. 444 (1969).
[7] See Bob Jones University v. United States, 461 U.S. 574 (1983); Branch Ministries v. Rossotti, 211 F.3d 137 (D.C. Cir. 2000).
[8] In using the word "churches," I do not intend to be exclude any faith traditions; instead, I use the word as a shorthand for all houses of worship and their auxiliaries.
[9] James Madison, Memorial and Remonstrance (1785).
[10] Compare Rosenberger, 515 U.S. 819, with Rust v. Sullivan, 500 U.S. 173 (1991).
[11] 127 S. Ct. 2553 (2007).
[12] Stephen Monsma, *When Sacred and Secular Mix*178 (1996).
[13] Suzanna Sherry, *Enlightening the Religion Clauses*, 7 J. Contemp. Leg. Issues 473, 477 (1976).
[14] Rust, 500 U.S. at 193.
[15] Bowen v. Roy, 476 U.S. 589, 699-700 (1985) (Quoting Sherbert v. Verner, 374 U.S. 398, 412 (1962) (Douglas, J., concurring).
[16] Van Orden v. Perry, 545 U.S. 677 (2005).
[17] Pinette, 515 U.S. at 777.

NEITHER ROBBER BARONS NOR PHILOSOPHER KINGS

POLITICAL PRUDENCE IN THE JUST POLITY

BY JOHN O'CALLAGHAN*

Introduction

In the very beginning of the *Republic*, and thus in the very beginnings of Western political thought, Plato presents his readers with an interesting quandary about justice. He has Socrates suggest that a community constituted from the joint pursuit of an unjust goal can itself embody justice. He poses this quandary in the famous "band of thieves" argument against Thrasymachus's claim that justice is nothing other than the pursuit of the advantage of the rulers through the exercise of power. Socrates appears to be successful in his argument, but the quandary begins when we ask what his success implies about how such an idea of justice might apply to an entire city-state or nation. After all, the *Republic* is not about a measly band of thieves, but about the conditions necessary for establishing a self-sufficient political community. Could one have a nation that by all appearances is just within its boundaries, and yet is constituted for the pursuit of injustice? If not, why not?

I think that when we reflect upon our own age and its political practices, we see the genius of Plato in putting before us what appears to be a timeless philosophical, but also practical problem. How should we think about our participation in modern democratic politics? In our democracies it sometimes seems that the choices we face in electoral politics call for an attitude approaching despair, as we are confronted with having to choose between two or more bad options, and no particularly good ones, as our politicians appear to be, if not always thoroughly corrupt, nonetheless beholden to powerful interests that do not act for the public and common good. Our own individual political participation in such a setting can appear to degenerate into nothing more than pursuing our own individual interests, indeed our own individual advantages against our fellow citizens. Perhaps this perception and attitude contribute to the extraordinary lack of political participation on the part of citizens in modern western democracies, the participation that is necessary for them to function well as self-governing political communities. Perhaps we have a strong desire to remain pure in the midst of political corruption, which leads us to a kind of indifference to politics, lest our purity be stained by it.

The question of purity and perfection on the one hand, and political corruption on the other hand, is at the heart of Plato's *Republic*. It is portrayed in particularly striking terms at the very beginning in the argument between Socrates and Thrasymachus in Book I. But the discussion of this problem is carried on in different ways after Plato and into Western political thought by Aristotle, Augustine, and Aquinas, among others.

In the *City of God*, Augustine describes looking out upon the span of history and its empires, only to judge those empires, and in particular the Roman empire, as little more than large bands of thieves, led, presumably, by rulers who are little more than very powerful robber

barons. Human relations within a city or state that otherwise might have the appearance of justice are in reality little more than instruments of state sponsored thievery. This judgment of Augustine's is strikingly negative. But, apart from any sense we may have that it applies equally to our own political institutions, it is difficult to read it without thinking of the "band of thieves" argument that Socrates uses to positive effect in establishing the positive character and strength of justice as a political virtue.

What I propose to do here is to look at Plato's "band of thieves argument," and the difficulty about justice that I think it raises, a difficulty that Plato himself does not explicitly raise, but may have wanted to intimate. *Prima facie* he uses the argument to *defend* justice; Socrates's listeners show every sign of being convinced by it, and no doubt countless readers of the dialogue since have been convinced by it as far as it goes. I, on the other hand, think it is a failed argument about justice, and I suspect Plato knew that it was. I will discuss its failure, and turn to a distinction drawn by Aristotle that distinguishes thieves from citizens in order to address its failure. Finally, in light of the appeal to Aristotle, I will turn to a similar discussion in Aquinas, which both relies upon but also differs from Aristotle, in order to say a few things about the difficult and often negative choices we face in the electoral politics of our modern democracies.

Justice and Thievery

In the first book of the *Republic*, Plato dramatically poses an interesting problem for a virtue based political theory of governance. Is justice strength in those who possess it, or weakness; if virtues are forms of strength and vices forms of weakness, is justice a virtue or a vice? Thrasymachus suggests that justice is in fact a kind of weakness. It is a weakness that makes those who possess it subject to the political governance of the strong. Thrasymachus describes justice as a weakness in order to support his earlier claim that justice is the advantage of the strong. Plato's reader initially thinks that Thrasymachus is claiming that justice is a power possessed by certain ruling individuals, a power that makes them strong. On the contrary, in the heat of discussion it becomes clear that Thrasymachus thinks that the strong are strong precisely by their lack of justice. Justice is the advantage of the strong in the following sense: it is advantageous *to* the strong that there should be weak individuals whom they can control, and rule. But it is the justice in the weak that makes them weak; and thus the justice that is the *weakness* of the weak is the advantage of the strong in ruling them. Justice as weakness renders those who suffer from it incapable of pursuing their desires in a straightforward way; it makes them timid, and overly careful in their acts. Thus the strong who are not timid, and who do not worry about the justice of their acts, pursue their desires without scruple, and can manipulate the weakness of the just to fulfill those desires. So justice is the advantage of the strong, in the sense in which the lack of skill at playing cards in the seasoned gambler's opponent is the advantage of that seasoned gambler. And since the rulers do not possess justice, but use it to their advantage, justice is not the ruling skill, but an instrument of the strong because it is the characteristic fault of those members of society too weak to pursue their

desires through ruling others.

Thus, Thrasymachus paints what appears to be a very cynical portrait of government, whether or not, as he points out, it is democratic, aristocratic, or tyrannical.[1] The just in Thrasymachus's portrait are like Nietzsche's little lambs. Nietzsche writes in the *Genealogy of Morals:*

> That lambs bear ill-will towards large birds of prey is hardly strange: but is in itself no reason to blame large birds of prey for making off with little lambs. And if the lambs say among themselves: 'These birds of prey are evil; and whoever is as little of a bird of prey as possible, indeed, rather the opposite, a lamb — should he not be said to be good?' then there can be no objection to setting up an ideal like this, even if the birds of prey might look down on it a little contemptuously and perhaps say to themselves: '*We* bear them no ill-will at all, these good lambs — indeed, we love them: there is nothing tastier than a tender lamb.'[2]

The unjust rule through strength, while the just are ruled in their weakness, and it is their very justice that is their weakness; the just are the lambs awaiting their honored place at the table, right there in the middle, as the rulers gather round the feast.

Still, Socrates tries to demonstrate that however much Thrasymachus may have the appearances on his side, his portrait of justice as a kind of weakness simply does not express the reality of justice. The way in which Socrates wrestles with Thrasymachus is highly paradoxical. He asks us to consider a band of thieves. Allow me to fill out the example in ways that Plato does not, but that I think are faithful to his intent. One thief may well have the power to achieve a certain amount of success in fulfilling his desires to possess the property of another. But thievery being what it is, it feeds that desire in an intemperate way, and so the desire grows and grows. Perhaps the desire to possess the goods of another will grow so strong that the individual thief will no longer be able to slake it without help from another. So in order to satisfy his desires, he must enter into a cooperative relationship with some other thief, who, presumably, also cannot slake his own desires for the property of others without help. They are now a band of thieves, if only two.

Within their cooperative relationship, Socrates claims that the thieves must treat each other with a certain amount of respect, keeping to their agreements with one another, divvying up the spoils between one another, and, in particular, divvying them up in such a way as to preserve the bond of thievery that they have established. If they are good thieves, they will not be satisfied with a one-off act of joint thievery. They will want the relationship to continue. So they will look out for the good of one another, make sure that each other is well fed, clothed, housed, and healthy. In short, they will give each other their due — that is, they will act justly toward each other, even as they continue to steal from those who are not in the band of thieves.

The crucial point here is that the justice the two thieves show one another is what makes them strong as thieves. The justice they direct at one another doesn't weaken them. On the contrary, it makes them more capable of achieving the end that they set for themselves, thievery. However, and again thievery being what it is, they will not rest satisfied with being a

band of two thieves. The two, seeing the growth of their success in thievery, brought about by the justice they extend to one another, may well desire even more than they can achieve as two. So one can imagine the band of thieves growing in strength, as more members are incorporated into the cooperative relationship that is characterized by justice being extended to those who enter into the band of thieves, even as they exploit the weakness of those outside the band. Whether the ruling body consists in a common agreement of all, the decisions of a few of them, or only one, the ruling body of the band of thieves will care for the members and seek to promote justice within the bounds of the band of thieves, precisely so that the band of thieves can be strong in the injustice it perpetrates upon those who are not members of the band.

So, contrary to Thrasymachus's claim, Socrates's argument is that justice is actually strength among those who possess it. It is a strength that enables a community to achieve its ends. And because it is the strength that informs the rule of the band of thieves, it is the ruling strength or virtue. Thus, Socrates point is that even if Thrasymachus is right about what the ruling class looks like, namely, a band of thieves, nonetheless, their actual strength in exploitation derives from the justice they extend to one another — justice extended to one another makes them strong. On the other hand, if Thrasymachus is wrong, then justice is simply seen to be strength among those who possess it. So, whether Thrasymachus is right or wrong about the rulers, justice is in fact strength among those who possess it.

However, I want to extend the band of thieves argument beyond the limited point that it establishes against Thrasymachus. I want to use it to raise a question about the justice that Socrates assumes characterizes such a band of thieves, and those who rule them. Is the strength that the band of thieves displays really a form of justice? Socrates's listeners appear to think so, and countless readers of the dialogue who are convinced by it must think so as well. But consider the band of thieves again. It lives within a larger community from which it steals. Let us say that the larger community is the city. Now consider again that thievery being what it is, it will most likely not rest satisfied with mere success in a particular instance of theft, or a particular amount of theft. Even if the band of thieves embodies justice among its own members, what characterizes thievery, apart from its injustice directed at outsiders, is that part of the vice of intemperance that might be called greed, the intemperate desire to possess material goods not due to one. It must always have more. So imagine that the band of thieves recognizes that with its current size it cannot satisfy its greed. In order to have more goods, it must incorporate more thieves. More members must be brought into the band, and they must be treated justly. The ruler of the band must have the authority to enforce an equitable treatment of all the members, seeing to the food, clothing, shelter, health, and perhaps even education in thievery of the members of the band. Dissension breads weakness, while unity breads strength. With greater success in thievery comes greater desire. And so the band continues to grow, and grow, and grow within the boundaries of the larger city.

Of course one paradoxical feature of this growth of the band of thieves is that the growth in justice within the band of thieves will diminish the arena of injustice beyond its boundaries.

In order that it may grow stronger in the injustice of thievery, it must in some measure diminish the opportunities for injustice available to it, by incorporating within its scope of justice individuals who were once possible objects of its injustice. The marginal rate of return of the balance of justice to injustice diminishes as their greed grows and the justice within the band increases. So, one might think that there must be a natural limit to the growth of the band of thieves.

This diminishment of the rate of return on injustice will probably not be much of a problem, as long as the band of thieves remains relatively small compared to the size of the city. But I want to push the boundaries even further, and consider what might happen to the balance of justice and injustice in the city if the band of thieves simply continues to grow, beyond its natural limits. Imagine it has now grown to be the largest part of the city. That is, the part that is subject to its injustice is actually smaller than it, perhaps quite smaller than it. As it continues to grow, one begins to see a picture in which more and more justice is being done within the band of thieves precisely because it is larger and larger, more individuals are subject to the justice of the band, and there are fewer and fewer individuals outside the band who can be subject to the injustice. Indeed, as the band approaches the size of the city itself, it would seem that for the most part justice reigns supreme precisely because most members of the city are in the band, while only a few remain outside as objects of the band's injustice.

Now imagine that the band of thieves grows to encompass the entire city; no one is left out. Everyone has become a member, and thus must be treated justly by the band, as ruled by the leader. What have we here, except a just city pure and simple, in which every member is treated justly, and acts justly toward every other member. Indeed, it appears that we have a perfect community of justice. No injustice is done in this city, for the band of thieves has grown so large, and so perfectly encompasses the city, that there are no individuals left in the city who could suffer injustice at the hands of the band of thieves. Has not our city achieved perfect justice through the unrestricted, intemperate, and even unnatural growth of an unjust band of thieves, a band of thieves that, for the purpose of slaking its greed, perfectly incorporated within itself all the members of society in order that its strength might be perfect, and unchallenged? And don't we have in the ruler of such a city the perfectly just ruler, as his authority assures that there will be no injustice done to a member of the band of thieves; since the band of thieves just happens to be coextensive with the citizens, this fact entails that under his rule no injustice will be done to a citizen. Where could one possibly find injustice associated with such a band of thieves? This is paradoxical indeed — so great is the strength of justice that it wins out every time, even from the unfettered desire for and pursuit of injustice.

Of course, as I mentioned earlier, there is little reason to expect that a band of thieves would grow to encompass an entire city. A smart ruler of a band of thieves would keep an eye out to make sure that his band excluded a sufficient number of other citizens that it could continue to prey upon in its thievery — a parasite does not seek to kill its host, and the bird of prey does not carry off all of the sweet little lambs, lest they not be able to reproduce and con-

tinue the supply. Greed has its just limits. Unfettered greed will destroy itself. But controlled greed that promotes the good of its members, and keeps its outsiders just healthy and wealthy enough to make them subject to injustice establishes a kind of harmony of justice and injustice.

But wait. Isn't it just possible that a smart ruler of a band of thieves might realize the gains to be had by incorporating the entire city within the bonds of justice because of the gain to be had by preying upon other cities? Why not make the world itself subject to one's thievery. There is little chance that one will simply exhaust the fertile fields of greed when the entire world is thought to be ripe for cultivation. And then it does not seem so extraordinary to suggest that a band of thieves may grow so large as to be coextensive with the boundaries of city or state, embodying something like perfect justice within those boundaries, while seeking to do injustice to those communities that live beyond the frontier or shore, or those individuals who reside within the city, but are not citizens. Indeed, isn't that just what St. Augustine meant: the so called justice of cities and states is little more than thievery writ large upon world political communities.

The philosophical questions raised by this imaginative case that I want to pursue are twofold. First, going all the way back to Plato's small scale example of a band of thieves within a city, is it really justice that characterizes the social form of the band of thieves within its boundaries? The answer to that question will answer the larger question raised by St. Augustine's judgment in the *City of God*, whether a city like the one I have described can in fact be just within its boundaries, if it is devoted to injustice without. The second question addresses the philosopher-king problem that Plato's *Republic* raises both at the level of the city, and at the level of the band of thieves. If the first question has a negative answer, that is, if there is no real justice within the band of thieves, but merely the appearance of justice, why is that? What must characterize the ruler of a political community who seeks to be genuinely just? Must he or she be something like the philosopher-king Plato portrays in the *Republic*?

At first sight, as it unfolds in the *Republic*, perhaps we are not troubled by Socrates's use of the "band of thieves" argument, in which it is a relatively small part of the city. Perhaps it does not strike us as a paradox to claim that the small band of thieves embodies a form of justice within its confines, even as it seeks to do injustice without, or that it is precisely the justice that it embodies within itself that strengthens the injustice that it does without. In English, anyway, we have the perfectly ordinary phrase, "honor among thieves" that would appear to capture ours and Socrates's companions' placid acceptance of his argument. But I hope that my expansion of the case does trouble us. We ought to be troubled by the idea that a community ordered toward doing injustice is perfectly just simply because a) it needs to be internally just in order to be successful in its external injustice, and b) there just doesn't happen to be anyone left to be unjust to once it has become coextensive with the city. Counterfactually, if that city of perfect justice had the opportunity to do injustice to someone, it would. It needs a victim, lest it be simply and perfectly just. Its justice will not be complete, will not achieve its goal, unless it goes in search of other communities to abuse and treat un-

justly. But how can the goal of justice be injustice? How can justice be frustrated in its end by its inability to achieve injustice?

Consider then the original band of thieves. Do we have reason to think that in fact Socrates's argument is a bad argument about justice? I think we do. Socrates's argument tries to show that justice is strength in those who possess it. But what it presupposes is that the habits of action giving rise to the ways in which the members of the band treat themselves are correctly described as just — they give each other their due in seeing to the food, clothing, shelter, health, and education, and so on, necessary to make the band successful in its pursuit of thievery.

I want to challenge that presupposition. Here is my argument against it. At the very least we should recognize that the justice of the band of thieves presented to us by Socrates is nothing more than a means to an end — it is an instrumental good, if it is good at all. An instrument derives its character from the end or goal to which it functions as a means. A good hammer in carpentry is different from a good hammer in sculpture because of the difference between the good of carpentry and the good of sculpture. A hammer good for carpentry will be bad for sculpture, and vice versa. The instrument is good because it is well adapted to promoting the good pursued through it, and thus its goodness is a participation in the goodness of the end; the goodness of the end is why it is good as a means. Conversely, an instrument is bad either because it is not well adapted to promoting the end for which it is employed, or because it is employed to bring about some bad end. Put another way, it does not participate in the goodness of an end either because it is ill suited as a means to a good, or because there is no good in the end that it can participate in. The use of a carpentry hammer to make a chair is good. The use of a jackhammer to make a chair is bad. Even more, the use of a carpentry hammer to kill an innocent is bad; as an instrument for killing innocents it participates in the bad end for which it is used.

However, the habits and the acts that flow from them that Socrates attributes to the band of thieves within their community, the habits and acts he calls just, are instrumental means for achieving the end or goal of the community, thievery. But thievery is bad as embodying injustice. Everyone grants that. Therefore those habits and acts that are instrumentally ordered toward that bad end participate in the bad character of the end, and are themselves bad. However, whatever is just is good and not bad. Therefore, those habits and acts characteristic of a band of thieves ordered instrumentally toward thievery cannot be just. What Socrates presented us with in the Band of Thieves argument was not the reality of justice, but the appearance of justice.

I think we have reason to believe that Plato knew this problem in the construction of the dialogue. Almost immediately after Socrates gives the argument, he expresses frustration that they have been talking about justice, and yet they haven't actually defined it, and do not know what it is; the expression of this frustration ends Book I. In addition, the argument I just made relied upon the fact that what Socrates calls justice among the band of thieves is treated purely instrumentally in his argument. It is not treated as an end in itself. As a pure instrument

it shares in the bad character of the end for which it is a means. But at the beginning of Bk. II, Glaucon and Adeimantus criticize Socrates for failing to praise justice for itself. They do not want to see justice praised for the rewards it brings, that is, as a means to some rewarding end. They want to see it praised simply for itself as a good. The discussion leads to distinguishing between goods that are purely instrumental, goods that are in some respects instrumental and in other respects non-instrumental, and goods that are purely non-instrumental or good in themselves. Left with the band of thieves argument, which does nothing more than praise a form of life embodying habits of action justified for the sake of material gain through thievery, we must conclude that that form of life and those habits of action are merely instrumental goods.

It is plausible to think that the criticism directed at Socrates by Glaucon and Adeimantus is Plato's way of undermining the justice among thieves argument immediately after he puts it into the mouth of Socrates, precisely because the nature of justice there has been reduced to the nature of a mere instrument, and instruments are good or bad according to the ends to which they are put as means. On the contrary, the only chance that justice really has to be good is insofar it is something good in itself. Otherwise it is as bad as it is good, depending upon the character of the one who is wielding it.

Prudence and Cleverness

The real question of justice, then, is the question of its end or goal. To what end, to what good is justice ordained? Is its end itself, or something else? Even if it can be used instrumentally, is its nature non-instrumental? And here, perhaps, we begin to see the root of the difficulty in the band of thieves. We have seen that the form of life presented within the band of thieves that appears to be justice is ordered toward a bad end, toward injustice. I argued above that justice cannot be ordered toward injustice. What the Band of Thieves argument shows us is that we have not apprehended the good of justice, either in itself or in relation to other goods for which it may serve as a means. We are all experiencing a kind of blindness here that causes us to fail to recognize the good of justice itself, or to see how it is to be adapted as means to good ends.

But what is this blindness within the thieves, Socrates, his friends, and Plato's readers? In order to see what it is, I think it useful to turn to the sixth book of Aristotle's *Nichomachean Ethics*. In book six, Aristotle tells us what prudence is. We tend to think prudence is a kind of carefulness that shies away from taking action for fear of failure of unknown bad consequences. On the contrary, Aristotle says that it is that habit of mind called practical wisdom or practical intelligence that allows one to recognize goods to be pursued, and how to successfully adapt means and instruments to the pursuit of those goods. Prudence is a power within us that drives us to pursue goods, not a kind of considered inaction. One lacks prudence either if one is incapable of recognizing genuinely good ends, or one is incapable of successfully adapting means and instruments to achieve those ends. So when we look back at our quandary about the band of thieves, it appears to be precisely prudence that is missing. The band of thieves

does not recognize justice as an end. Nor does it appear capable of adapting justice as a means to a good end, so that it could participate as a means or instrument in the goodness of the end. Lacking prudence, the habits of action possessed by the band of thieves of providing for the food, clothing, shelter, health, and education of its members are unjust precisely because they are done neither for themselves nor for a good end. It is certainly unjust to fatten up an innocent man just so that one can kill him; it is equally unjust to fatten up a man just so that he can kill an innocent.

Still, there is no question that the band of thieves and its rulers are successful in pursuing their end. They do adapt those actions of caring for one another to the end of thievery. Aren't they good practical reasoners? Aristotle would say no, on the basis of a distinction he makes in the sixth book between prudence and cleverness[3] (*phronesis* and *deinotes*). Prudence must recognize good ends and successfully adapt means to the pursuit of those good ends. But there is a kind of success in adapting means to ends regardless of the character of the end. Aristotle calls it cleverness. Cleverness is a kind of neutral characterization of practical means-end reasoning, instrumental reasoning, abstracting from the questions of the goodness of the end. Prudence is the ability to order means toward the achievement of a good end, successfully balancing the various virtues that bear upon any particular course of action, in particular, temperance, courage, and justice. Cleverness, on the other hand, is like prudence, but falls short of it in its neutrality toward good ends. Thus the prudent are certainly clever, but they are also good for they pursue good ends. Aristotle then describes villains (*panourgia*) as those who apply their cleverness to bad ends. So it appears that the prudent and the villains share an activity or power in common, namely cleverness, a power that is applied differently in the two cases.

Still, there may well be those who are successful at practical reasoning, who nonetheless are not good, and thus not prudent. They are merely clever. The merely clever man gives no thought to the goodness of the end, even if he is pursuing what is in fact a good end. He is pursuing the good *per accidens*, that is, by accident. And that is why he could just as well be pursuing a bad end. And in pursuing the bad end, he is what the philosopher Candace Vogler calls "reasonably vicious."[4]

That is the way to read the failure of the band of thieves argument for establishing justice as a kind of strength. The band of thieves is clever, but it is not prudent. Its reasoning is merely instrumental. And being merely clever, it fails to be just. Therefore, insofar as the argument does not present us with a case of genuine justice, it cannot function as an argument that justice is a kind of strength. The strength that is characteristic of a successful band of thieves is no form of justice at all. It is greed coupled to mere cleverness that is their strength. On the contrary, prudence, not cleverness, is what genuinely empowers justice with its strength.

Consider for a moment Socrates himself. In presenting this argument he shows himself at this stage of the *Republic* incapable of grasping the good of justice itself or the successful ordering of justice as a means to a good end. In that failure he demonstrates that he too lacks

prudence, as do his friends, and all those who take the argument to be a good argument. Socrates is portrayed as being able to successfully achieve an argument that convinces those around him, despite the bad end to which it is put. So Plato portrays Socrates at this stage in the *Republic* as merely clever in argument, not prudent; in other words, at this point in the *Republic*, Socrates is portrayed as a mere sophist making the weaker argument appear stronger; he is unjustly stealing the victory from Thraysmachus, and is thus a thief himself. Indeed, he is the ruler of the band of thieves he calls his friends who cooperate in this sophistry. Paradoxically, Thrasymachus in his weakness is the object of their strength, and they take advantage of his weakness. Socrates is the bird of prey, with Thrasymachus the little lamb that Socrates loves so much carried away for the slaughter and feast of Socrates's sophist friends.

In any case, the band of thieves lacks justice even within its own boundaries because it lacks prudence within the community and its leaders. And Augustine's worldly empires that are little more than bands of thieves writ large lack justice within them because they too lack prudence in their leaders.

Perfect and Imperfect Prudence in Modern Democracies

So, it looks as though leaders of government need the virtue of prudence. Negatively stated, we can say that the failure to recognize good ends is a sufficient condition for judging that a leader is a bad leader, and ought not to rule. But this raises troublesome issues against the background of Plato's *Republic*. How deep and comprehensive must a leader's recognition of good ends be? Is there some one comprehensive good for all, and if so, must it be grasped by the rulers in order to have good government? The *Republic* itself goes on to portray the supposed necessity for the philosophers, those who have grasped the form of the good, to rule in order that justice might reign.

That is, supposing for the sake of argument that it is the philosopher who possesses prudence, must we have something like Plato's philosopher-king ruling the ancient political community, or, to turn to our modern time and place, a philosopher-president ruling our political community? One would hope not, given the bizarre utopia that Plato portrays for us in the *Republic*. How can a philosopher, the lover of wisdom who has seen the form of the good tell the noble lie that Plato portrays as necessary for good government, without betraying the vision of the good, and thus ceasing to be a philosopher? Indeed, the particular conditions of the utopian *Republic* are so bizarre in their authoritarian and draconian dictates concerning sexual relations between men and women, reproduction, education, art, and so on, that one cannot help but believe that Plato is undermining the very plausibility of such a philosopher-king even as he portrays it.

So, to answer the question of whether the need for prudence requires philosopher-kings or philosopher-presidents, I think it useful to turn now to a discussion of prudence in Thomas Aquinas that is heavily indebted to Aristotle, but also reminds us in its own way of the justice among thieves argument. As we have seen, one of the achievements of prudence is to grasp the good of an activity, and the good of its end. In representative democracies, if there is any

hope for a just political order, it appears to be the case that citizens must take into account more than a mere consideration of the policies advocated by candidates in an election; they must also consider something of the character of the politician promoting those policies. They must ask whether the candidates possess genuine prudence, or mere cleverness. But prudence is the virtue of judgment by which we integrate in our actions other virtues, generally justice, temperance, and courage. More particularly, it is the habit of successfully integrating these virtues while adapting appropriate means to good ends. It has its place in evaluating the good circumstances in which and the good goals for which one proposes to engage in an act good in its kind. But there is no prudence involved in an act that is bad in its kind, for example the killing of innocents, sleeping with another's spouse, sexual intercourse without consent, appropriating the property of another without consent, mental and physical abuse designed to coerce the spirit, and so on.

When Aquinas discusses prudence he is clear that it can be considered with regard to our own particular lives, or with regard to our lives as part of the common good. In the first case within our own particular lives it is personal prudence, while in the second within the context of the polity and the common good it is political prudence. And perfect prudence concerns the whole or integral good of human life, one's personal good and the common good integrally related in pursuit of ultimate human fulfillment. Perfect prudence is that prudence that the philosopher is concerned with as such.

But according to Aquinas, one can fall short of perfect prudence, personal or political, in at least two ways. One way he calls a kind of imperfect prudence, the other false prudence. Imperfect prudence is "true prudence" and yet it may be imperfect according to Aquinas because of two quite different reasons. On the one hand it may be in pursuit of a genuine but limited good simply, rather than in pursuit of the whole or integral good of human life. On the other hand it may recognize genuine goods as goals, and yet fail in some way to carry through with a proposed course of action because of some defect in adapting means to those goals, or in incorrectly integrating the other virtues in pursuit of those goals, or simply from weakness in the execution of the well thought out plan.[5] The first type of imperfect prudence is not a failure of prudence, while the second is. Marital prudence, no matter how well one engages in it in pursuit of the good of sexual relations, is a kind of imperfect prudence in the first sense because it does not bear upon the whole of the integral human good, but, rather, a part. So also for the exercise of prudence in one's job, or friendships, or the management of one's household, and so on. There is no *failure* of prudence in the pursuit of these limited goods, however imperfect it may be, and thus no error in one's acts. The sense of imperfection here is that sense in which Aquinas might say that human nature is imperfect with regard to angelic nature. But in making that claim, he is not claiming that human beings are failed angels.

On the other hand, if one mistakenly takes any one of these limited goods, or many of them together, as the whole of the integral human good to the exclusion of others there is a failure of prudence, and one will commit error even as one pursues these goods. So there is a

kind of imperfect prudence here as well, but it is imperfect in the sense of failure, as a man may be an imperfect investor because of his failures at investing. This kind of imperfect personal prudence is the kind of prudence one ought to desire to have as a minimal condition, with the conscious recognition that it falls short of, but may be on the way toward acquiring perfect prudence. One has hope. One still recognizes and pursues those things which are good in their kind, however much one's pursuit of them is disordered. One's hope then is that one can bring order into one's pursuit of these genuine goods in kind, and thus aspire toward perfect prudence.

Nonetheless, however imperfect as a failure of prudence, it remains genuine prudence because the goods one is pursuing in disordered ways are genuine goods; as those good goals participate in goodness as such, so this prudence imperfectly participates in perfect prudence. One simply fails in some way in one's ordering of the good ends, one to another, or in adapting means toward those good ends, or in the evaluation of appropriate circumstances and goals for performing certain acts good in their kind.

Now suppose we turn from personal prudence to consider the question of political prudence ordered toward the common good. At the level of political prudence in oneself or in one's leaders, one ought to hope that we make good well ordered judgments in pursuit of genuine goods. If we do not, one ought to hope that we see the disorder in our pursuit of genuine goods, and correct them. But it is absolutely necessary that the political goals we pursue should be policies involving acts good in their kind, for example health care, economic development, just wages, punishment, and so on.

However, there is no political prudence involved in legitimating and promoting acts bad in their kind, like torture, slavery, and the killing of the innocent, just as there is no prudence involved in a band of thieves engaged in thievery. Aquinas describes what he calls "false prudence." This is not prudence at all. It is called prudence because it resembles prudence in its ability to adapt means to an end; but it is called false because the end in view is in fact a goal bad in its kind. It is a matter of the appearance of prudence rather than the reality. He writes, "in this way a thief is called a good thief because he adapts means well to the end of thievery. It is this kind of prudence of which the Apostle says in Romans that the prudence of the flesh is death."[6] Here we are again back at the consideration of thieves and thievery. Aquinas had no access to Plato's *Republic*, but for us it is impossible to read this passage in him without thinking of Socrates's band of thieves argument. The very fact that a thief or a band of thieves pursue theft is sufficient evidence for claiming that they do not possess prudence, for they do not apprehend the good. But lacking prudence, they cannot have justice, for they cannot even badly attempt to order their acts of giving what is due to one another to a genuinely good end.

Thus the use of the term 'good' here in Aquinas, but also back in the "band of thieves" argument, does not signify moral or political goodness, but mere success. And the reasoning displayed by those who pursue bad ends is not imperfect prudence precisely because it is not any form of prudence at all. It is success in achieving a goal bad in its kind. Where imperfect

prudence is called prudence by analogy, this false prudence or cunning is called prudence simply by simile or metaphor. Aquinas is clearly relying upon Aristotle's account of the difference between prudence and cleverness in this discussion. However, he goes on to analyze false prudence. In order to distinguish the kind of practical reasoning involved in true prudence, perfect or imperfect, from that involved in false prudence, Aquinas mentions Aristotle's discussion of cleverness in the *Nicomachean Ethics*, describing it as a kind of reasoning about means and ends that can be put to a good or bad end. But he goes beyond Aristotle in distinguishing what he calls "cunning" ("*astutia*").[7] Aristotle granted that the prudent man was clever; his cleverness was characterized by its ordering to a good end. Still, cleverness for Aristotle appears to be neutral between the good and the bad man. That is, in Aristotle there seems to be an activity common to the good and the bad man — cleverness. In some respect the good man and the bad man are doing the same thing when they engage in practical reasoning, but they happen to be ordered toward different ends, good or bad as the case may be. Practical reasoning appears to remain neutral in that respect, and to be related to the good merely *per accidens*.

But according to Aquinas "cunning" is the reasoning that characterizes the man who possesses false prudence. It is not a neutral instrumental rationality that exists in both the good and the bad. The good man does not possess cunning. So for Aquinas there is no mere cleverness shared by the good man and the bad man, related in extrinsic ways to the question of the good or the bad in action. "Cleverness" is a mere abstraction or way of considering the different reasoning processes engaged in by the good man and the bad man. In reality, the cunning and the prudent agents do not share a common act ordered to different ends. In that respect the good is not simply the end toward which prudence is directed in the good man, but the good is in fact its form; it in-forms the practical reasoning, making the practical reasoning of the good man a different kind of act from the practical reasoning of the bad man that lacks that form. So strictly speaking, if we want to avoid confusion, we should not say the thief is a good thief, but a cunning thief. The bad end corrupts practical reasoning, rendering it incapable of being in-formed by the good.

In addition, Aquinas's use of the notion of false prudence suggests that it is not simply a failure of prudence with respect to one goal, namely the possession of material goods. That would be a form of imperfect prudence. No. It is a failure *tout court* to have true prudence with respect to any goods. One with this "false prudence" is not capable of discerning true goods from apparent goods. If, perchance, he happens to hit upon a real good, it is not because of his capacity to recognize goods, or a genuine willed desire for it as good. He may happen to achieve a good goal. But because of the lack of true prudence, it is mere happenstance. Most likely it will be a happenstance driven by selfish interest. The cunning agent or ruler reasons that it happens to be a key to success here and now to pursue this goal, good or bad. In one set of circumstances he will pursue the good involved in some goal, while in another set of circumstances he will act to destroy that same good; in either case he is probably motivated

by the desire for success in advancing his interests, as Thrasymachus's ideal ruler is portrayed in the *Republic*.

In the cunning or clever ruler, true goods become merely instrumental goods in service to apparent goods. This implication of Aquinas's discussion is stark indeed, for we do not want to think that we can appear to be doing good in pursuing a genuine good, and yet not be except by accident. In false prudence the appearance of all of the other subordinate virtues that Aquinas describes as involved in true prudence ("memory, understanding and intelligence, docility, shrewdness, reason, foresight, circumspection, and caution") will be nothing other than ersatz likenesses as well. In short there are two quite different ways to fail with regard to prudence, the failure of prudence which is imperfect disordered prudence, and the failure to have prudence at all which is false prudence or cunning.

Aquinas's picture of false prudence is stark, which is why we ought to hope to have at least disordered imperfect prudence in our political leaders. But with these aspects of Aquinas's discussion of prudence in mind, what is there to be said about the need for something like a philosopher-king or philosopher-president in democratic polities? One ought to aspire to integral human fulfillment. Thus one ought to aspire to perfect personal prudence in one's own life. But perfect prudence in one's own life, bearing upon the integral human good, requires, among other things, judgments ordered toward protecting and promoting the common good of one's community. Thus one must take care for that community through the means available and appropriate to the form of government, if one aspires to perfect prudence.

Generically, in any community there are many acts that political prudence must seek to order as means to the end of protecting and promoting the common good, integrating justice, temperance, and courage — generally committing one's time, energy, and goods to the good of others. And it is important to recognize that commitment to the common good does not extend only as far as the shores of one's own community. Aquinas writes, "by nature every human being stands as friend to every other human being with a kind of universal love; as *Ecclesiastes* says, 'Every animal loves its kind.'" Notice that for Aquinas the basis for inclusion within the scope of this universal love and the justice that animates it is human nature itself. And yet, particular judgments of prudence will place greater emphasis upon the familial, and local in accord with a principle of subsidiarity. The ways in which we pursue these personal acts are all political acts in some sense.

However, specifically in democracies like ours, we protect and promote the common good by electing those who would lead us locally and nationally. In addition to the particular policies promoted by those who would rule us, we should try to determine to what extent those rulers possess political prudence. Most likely they will not possess perfect prudence. Who among us does?

In fact, I think it follows from Aquinas's discussion that perfect prudence, the prudence of the genuine and complete philosopher, is not necessary at all to governance. So long as the integral and comprehensive common good is not exhausted by the common political good,

which, according to Aquinas, it is not, this claim is true. The integral and comprehensive human good for Aquinas is a life of friendship among human beings, with the beatific vision as the *telos* that friendship. As Aquinas says, "we are companions in beatitude." On this view, to identify the common political good with the integral good is a form of idolatry in which God becomes the local god of the nation, or the nation itself takes on a divine status in our politics. And it is the fact that the integral human good transcends the common political good that allows us to accept something less than perfection in human governance.

If we suppose, on the other hand, that the task of the philosopher is to grasp and make known the integral human good, and if, contrary to Aquinas, we suppose that the integral human good does not transcend the common good, but is, rather, identical with it, then it does look like the philosopher ought to rule in a kind of benevolent totalitarianism akin to what the *Republic* seems to suggest, that is, we ought to have something like a philosopher-king. It appears then that far from posing a threat to democratic politics, a religious form of life that claims that the integral human good transcends the political good is perhaps the best bulwark against a kind of benevolent totalitarianism of the majority in democratic politics.

So, if we accept that the integral human good transcends the common political good, then it is not clear at all that the task of the philosopher is to rule by grasping, making known, and ruling concerning the common good. Ruling for the common good would in a sense be a betrayal of the task of the philosopher, as it would mistake the common political good for the integral human good, and display imperfect prudence in the sense of failure, a failure that the philosopher in pursuit of perfect prudence ought to do his best to avoid.

Thus, insofar as the common political good is not the whole of the integral human good, we need have no desire at all for one who has or pursues perfect prudence to rule us; we risk idolatry in pursuing such a one. And we are in no more need of philosopher-kings than of the robber barons; neither ought to rule in a just community. I think in our time, given recent developments at home and abroad, this argument can be modified in straightforward ways to show why religious leaders, claiming to have an insight through revelation into the integral human good as transcending the common good and the political, also should not rule from that insight. Of course, as a student of Aquinas I would be remiss if I did not point out that there are some things in Jewish and Christian revelation that can be know apart from it, and that bear upon the common political good as well as the integral human good.

In conclusion, lest we become disenchanted with the important questions of politics, and alienated from participation in it, we need to learn the prudence of imperfection in ourselves and in our leaders. Ideally we should want a ruler who possesses imperfect and well ordered political prudence. Short of that, a leader who possesses imperfect but more or less badly ordered political prudence. What we must avoid are leaders who possess false prudence or cunning. If we wish to avoid Augustine's censure, we must act to limit the damage of the cunning thieves in our midst, lest we become complicit in their thievery and tacitly join them, in which case our political communities will become little more than bands of thieves ruled by

robber barons. Our hope for justice is in our imperfection.

[*] John O'Callaghan is a professor in the Philosophy Department at the University of Notre Dame in Indiana. He is Director of the Jacques Maritain Center at Notre Dame.

[1] *The Republic of Plato*. New York: Basic Books, 1991. Trans. Allan Bloom, 338e, p.16.

[2] *On the Genealogy of Morals*. Oxford: Oxford University Press, 1996. Trans. Douglas Smith, p. 29.

[3] "There is a faculty which is called cleverness; and this is such as to be able to do the things that tend towards the mark we have set before ourselves, and to hit it. Now if the mark be noble, the cleverness is laudable, but if the mark be bad, the cleverness is mere villainy; hence we call clever both men of practical wisdom and villains…. It is impossible to be practically wise without being good." *Nicomachean Ethics* in *The Complete Works of Aristotle: Revised Oxford Translation*. Ed. by Jonathan Barnes. Princeton: Princeton University Press, 1984. 1144a4-30.

[4] *Reasonably Vicious*. Cambridge: Harvard University Press, 2002.

[5] This is an admittedly expansive view on my part of what might fall under the heading of what Aquinas has in mind with the simple statement "he fails in the chief act of prudence, as when a man takes counsel aright, and forms a good judgment, even about things concerning life as a whole, but fails to make an effective command." Summa Theologiae, II-II, q. 47, a. 13, ad 3.

[6] Summa Theologiae, II-II, q.47, a. 13.

[7] Summa Theologiae, II-II 47.13 ad 3. Sinners can take good counsel for an evil end, or for some particular good, but they do not perfectly take good counsel for the end of their whole life, since they do not carry that counsel into effect. Hence they lack prudence which is directed to the good only; and yet in them, according to the Philosopher (Ethic. vi, 12) there is "cleverness," [*{deinotike}] i.e. natural diligence which may be directed to both good and evil; or "cunning," [*{panourgia}] which is directed only to evil, and which we have stated above, to be "false prudence" or "prudence of the flesh."

CLOSING HOMILY

HOMILY

MASS FOR THE SECOND SUNDAY AFTER EASTER
THE AMERICAN EXPERIMENT:
RELIGIOUS FREEDOM CONFERENCE

BY HIS EXCELLENCY ARCHBISHOP JOHN G. VLAZNY
ORDINARY FOR THE ARCHDIOCESE OF PORTLAND IN OREGON

Conversations about the place of religion in American culture, in fact, in the culture of every age, inevitably result in noteworthy variations on the theme and the temperature in the room. These have been interesting days here in Portland, I am sure, as many of you have considered, under the sponsorship of the University of Portland's Garaventa Center, the American Experiment in Religious Freedom. But as I reviewed the program, I would say the conversation has been rather in-house. Sometimes I find it is interesting to hear what other nations have to say about life and faith in this great nation.

In recent years I have become a subscriber once again to *The Tablet*, an international Catholic Weekly published in London which traces its history back to the year 1840, six years before the establishment of the Archdiocese of Portland. In this year's March 24th issue I found a rather interesting article on the subject of religion. The author, Richard Rodriguez, declared that today, a new atheism is abroad in America, one that is both adolescent and shrill. He pointed out how recently on TV the comedians Bill Maher and George Carlin claimed that "most of society's ills have been caused by religion." And the audience cheered.

The author went on to assert that he does believe that many atheists are correct in their assertion that religion deserves some serious criticism in this new century. But he regrets their inability to take seriously the human yearning for a transcendent experience.

This university is a proud Catholic institution, serving people here in the Northwest for more than one hundred years. As a religious institution, it seems to have more freedom than even some of the great private universities like Harvard on the east coast. It seems that Harvard recently considered making a course on religion an undergraduate requirement. The proposal was quickly shot down. Even at a time when religion seems to be in the forefront of much discussion, Harvard undergraduates will remain out of the loop.

But all this doubt and denial is nothing new. It goes right back to the day of the Lord's resurrection. There he is in today's gospel — poor St. Thomas! For many folks he is perceived as spiritually dense, a skeptic, a truly doubting Thomas. But the picture isn't completely accurate. Thomas was no more a doubter than were the other disciples. Thomas had no doubts about Jesus. But he had plenty of doubts about the word of his fellow disciples. Yet, when Thomas stood in the presence of the risen Lord, he did believe.

The problem, you see, was not so much the doubt of Thomas. The problem was the credibility of the other disciples. The sad fact was that this group of frightened followers and recent deserters, who still locked their doors, did not present a convincing sign of faith. Thomas truly did want to see Jesus again. But what he saw in his friends did not inspire faith. Those of

us who style ourselves as believers and followers of Jesus are sometimes troubled by the nay-sayers and unbelievers all around us in today's world. They may indeed have a problem with their doubts and their lack of faith. But we too may have a problem with the quality of our lives as effective Christian witnesses.

On this second Sunday of Easter Jesus Christ gives us all some valuable insights into what it means to be a good Christian witness. The existence of a Lord risen and gloriously present in the human family is not demonstrated convincingly by a beautiful church, an inspiring homily, uplifting church music, successful programs of religious education, not even by a full church on Sunday morning, although this is no longer a regular happening, especially on the Sunday after Easter. Even putting our fingers into the wounds of Jesus Christ will not necessarily change the quality of people's lives. They will only be convinced that the Easter event is truly good news when they see that it has transformed the lifestyle of those of us who claim to be believers, a lifestyle so at variance with the secular culture of our day, that the usual known norms of ownership and support are perceived as inadequate. In place of these must be found a unity of mind and heart that compel us to place the concerns of others before our own.

The standards of faith which Jesus Christ holds up to all of us are challenging and demanding. He calls us all to a change of heart from that all-too-natural instinct to take care of ourselves and our own needs first and always, and then only secondly to deal with the needs of others sometimes.

The church often fails to be a credible sign for people in the world today of the work and presence of our God. That may be troublesome and even scandalous to some, but it should not come as a surprise. We are all sinners and it often shows. The church (that means all of us) like those first disciples, can be a bad sign, a bad witness to the wonderful events of the paschal mystery of Jesus. Because of this some choose to walk with us no longer. Many others are not even attracted to be our companions on the journey for a while. Atheism is not new. Nor is the abuse of religious practice by the scribes and pharisees of every time and place.

Whenever we gather at the Lord's Table, we confess our faith in the church because of the promise of Jesus Christ to be with us, with the church, forever. St. Thomas doubted a weak and sinful church at its inception, but yet it was there that he met the glorified Jesus Christ. So it is now and so it will ever be.