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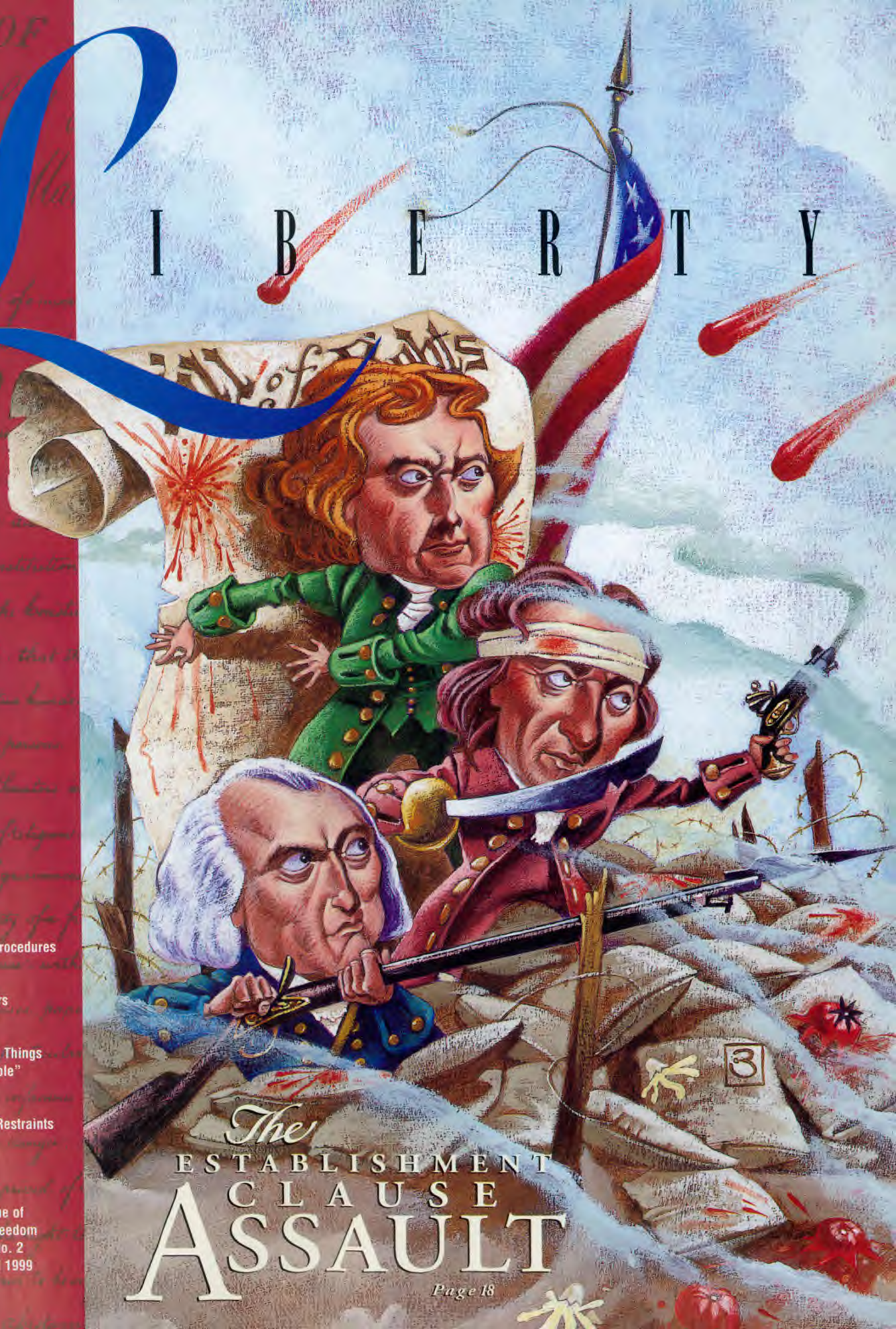
LIBERTY



The ESTABLISHMENT CLAUSE ASSAULT

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Affronted

I found the remark by a reader in your "Op. Cit." January/February issue almost amusing: "I pray that the supreme court of Alabama will rule against Judge Roy Moore and force him to remove the Protestant version of the Ten Commandments—an affront to Jews and Catholics—from his courtroom wall.

I can see that the *nine* Catholic commandments could be an affront to Jews and Protestants, but I am a Protestant, and the *Ten* Commandments we abide by are exactly the same as the ones etched in stone by the finger of God that Moses brought down from Mt. Sinai to present to Israel. I don't know of any Protestants who have a different set.

However, I do agree that whether the Catholic nine or the Jewish/Protestant ten, the commandments have no place in public buildings in America. Since the first four commandments have to do with the relationship between God and man, and are interpreted quite differently by various denominations, no secular judge should make rulings in these matters.

The last six commandments are covered in secular laws, and therefore hardly need to be posted on the wall of a judicial building.
MARY JANE EAKLOR
Penrose, Colorado

A Christian Nation: The Presbyterian Approach

This is a postscript to the parody on talk about a Christian nation by Presbyterian minister Larry V. R. Bunnell in the July/August issue of *Liberty.* In addition to contributing leadership in the formation of a national government, Presbyterians in 1788 were putting together their own national organization. The form of government which they adopted has a preface that is addressed not to the members but to the general public. It describes the relationship of church and state in terms that are at once firm and gentle, and generous to those who differ in belief and organization.

In our present *Book of Order* the opening lines have been revised to introduce the "Historic Principles" that are basic to the Presbyterian concept and system of church government. Here are the original opening lines, and the first two of the eight sections.

The Synod of New York and Philadelphia, judging it expedient to ascertain and fix the system of union, and the form of Government and Discipline of the Presbyterian Church in these United States, under their care; have thought proper to lay down, by way of introduction, a few of the general principles by which they have been hitherto governed and which are the ground work of the following plan. This, it is hoped, will, in some measure, prevent those rash misconstructions, and uncandid reflections, which usually proceed from an imperfect view of any subject; as well as make the several parts of the system plain, and the whole plan perspicuous and fully understood.

The Synod are unanimously of the opinion:

I. That "God alone is Lord of the conscience" and hath left "it free from the doctrine and commandments of men, which are in any thing contrary to his word, or beside it in matters of faith or worship." Therefore, they consider the rights of private judgment, in all matters that respect religion, as universal, and unalienable: They do not even wish to see any religious constitution aided by the civil power, further than may be necessary for protection and security, and, at the same time, equal and common to all others.

II. That, in perfect consistency with the above principle of common right, every Christian church, or union or association of particular churches, is entitled to declare the terms of admission into its *communion* and the qualification, of its ministers and members, as well as the whole system of its internal government which Christ hath appointed. That, in the exercise of this right, they may, notwithstanding, err, in making the terms of communion either too lax or too narrow: yet, even in this case, they do not infringe upon the liberty, or the rights of others, but only make an improper use of their own.
Rev. C. FRED JENKINS, Associate Stated Clerk, PC (U.S.A.)
Louisville, Kentucky

When You Can't See the Forest for the Trees

Even if one were to agree on the principle of church/state separation as stated in your Declaration of Principles, it must be said that just laws made by a separate legislative body of government do not arise from a vacuum, but come from some foundation and standard of measurement for human behavior.

COVER ILLUSTRATION BY RALPH BUTLE

The issue at this time in America's history is less the locating of church/state boundaries (the First Amendment has been reasonably effective for more than two centuries), but more of an assault on the validity of the foundation upon which the successful American system has been built.

The consciousness and view of the nature of God and man as seen by the Founders was not Buddhist, Muslim, Native American, or atheist, rather it was Judeo-Christian based on biblical thought. The political statement in the Declaration of Independence which refers to self-evident truths and inalienable rights endowed by a Creator, was not a thought formed in a vacuum of neutrality, and is clearly a foundation cornerstone quite inseparable from its spiritual (religious) source. Indeed, the very fabric of society with which we are so comfortable, has its roots in biblical thought.

The civil liberty cases that we have witnessed in the last few years—whether a suit against displaying a nativity scene in a public square or an elementary school child reading his Bible in class—are intent on causing a paradigm shift in the very consciousness of America.

If we, in America, cast off godly restraints, allow good to be called evil and evil to be called good, and choose that which the Creator calls "abominable," we do so at our own peril. Therefore, just as godly men are sometimes called to defend their country in the military, so it may be that they are also called to defend it in the political arena. It is my hope that the very gifted and sincere staff of *Liberty* will not lose sight of the forest in its concentration on the trees.

ELHANAN ben-AVRAHAM
Evergreen, Colorado

Political Opinion

The Democratic Party has historically been known as the party of the working man and labor unions. The election of Democratic politicians was consistent with the support, aid, and assistance of unions.

The Republican Party is becoming known as the party of the Christian Right, the Christian Coalition, the ultra-conservative wing of the Roman Catholic and Morman faiths. Republican politicians are wined and dined by PACs affiliated with these religious groups. D. James Kennedy, a television evangelist, has his lobbying group, the Center for Christian Statesmanship, in Washington to wine and dine the Republican demagogues who bow to Kennedy's religious wishes. Since the Christian Right cannot convince the country to obey their religious dogma, they would coerce us by law and by judicial decree. For proof positive, witness the number of religious amendments proposed by "religious" Republican conservatives.

When churches (religion) becomes political and when politicians become religious, beware. The Republicans, pressured and controlled by ultra-conservative religionists—some of whom have infiltrated the Party—would force this democratic Republic to become a bigoted religious theocracy.

MELVIN S. FRANK
Myrtle Beach, South Carolina

The Fourteenth Amendment—In Need of an Overhaul?

For quite a while now I have believed that the biggest problem with constitutional law is the interpretation of the Fourteenth Amendment. I want to thank you for the articles in your September/October issue which finally helped me to solidify my opinion.

Derek Davis, in "Completing the Constitution," comes to the opposite conclusion I do, but he argues fairly, and I appreciate that. All too often, it seems, people rummage through the papers of the Founders looking for isolated quotes to buttress their conclusions.

Dr. Davis believes that the authors of the Fourteenth Amendment intended to impose the Bill of Rights upon the states. The simple response to that argument is the one made by chief justice John Marshall in *Barron v. Baltimore*, quoted by Davis and paraphrased by me, "If that's what the Congress meant, they should have said it." They could have saved a lot of words by saying, "No State shall make or enforce any law which shall abridge the rights guaranteed to citizens of the United States by this Constitution." Why didn't they? Because it would never have been ratified by the states.

The Supreme Court should take a case on Fourteenth Amendment incorporation and settle it once and for all, rather than grinding the Tenth Amendment down to nothing, one grain at a time. Dr. Davis is correct that the Constitution must be flexible, but it should be changed in a straightforward manner, and not by stealth.

GARY D. JENSEN
Lake Jackson, Texas

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DECLARATION OF PRINCIPLES

The God-given right of religious liberty is best exercised when church and state are separate.

Government is God's agency to protect individual rights and to conduct civil affairs; in exercising these responsibilities, officials are entitled to respect and cooperation.

Religious liberty entails freedom of conscience: to worship or not to worship; to profess, practice and promulgate religious beliefs or to change them. In exercising these rights, however, one must respect the equivalent rights of all others.

Attempts to unite church and state are opposed to the interests of each, subversive of human rights and potentially persecuting in character; to oppose union, lawfully and honorably, is not only the citizen's duty but the essence of the Golden Rule—to treat others as one wishes to be treated.

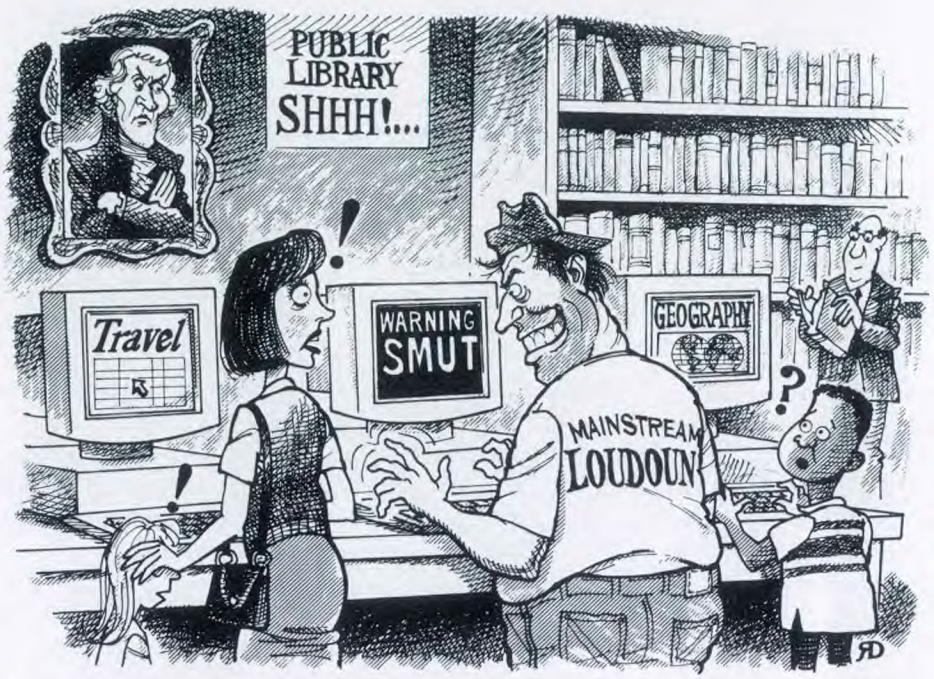


ILLUSTRATION BY RAY DRIVER

THE FILTERING OF FREEDOM?: In the first ruling of its kind, a federal judge in Virginia declared that a public library cannot install filters on its computers. Why? Because the filters could interfere with the right of adults to view whatever smut they want. In other words, though the filters could help keep children from using the public library to view everything from sadomasochism to snuff photos, the collateral damage that this protection could cause to adults who might want to use the library to view sadomasochism and snuff photos was considered violative of what appears to be a newly created constitutional right to view sadomasochism and snuff photos in public libraries (another one of those "penumbras formed by emanations" flowing from the First Amendment, apparently).

There's no doubt the First Amendment does a wonderful job of preventing government from interfering with an open exchange between artists, writers, publishers, filmmakers, and their patrons, no matter how smutty, morally vacuous, and inane the products often are. *Hustler* magazine is the price we pay for the *New Republic*. But, last we heard, the amendment does not require booksellers to stock every kind of book; nor does it require them to cater to the needs or wants of their clientele. Are Christian bookstores required to sell *Das Kapital* or Henry Miller's *Sexus*, *Nexus*, or *Plexus*? Of course not. Public libraries are also not required to place every kind of book on their shelves; they routinely pick and choose what they want on their shelves.

Sure, this is dealing with a *public* library, paid for with tax dollars, but does that mean then that public libraries are required by the Free Speech clause to make available any sort of material that any taxpayer wants, including free access to Internet smut? Apparently a group of Loudoun County citizens, calling themselves Mainstream Loudoun, believed so, and they filed a lawsuit in federal court claiming that the library policy infringed on their First Amendment right to view pornography in the public library. Judge Leonie Brinkema of the U.S. District Court of the Eastern District of Virginia agreed with the plaintiffs, arguing that though the library was under no obligation to provide Internet access to its patrons, once it did, the library is "restricted by the First Amendment in the limitation it is allowed to place on patron access."

Does this mean that once it displays *Time* or *Newsweek* it must also display *Playboy* and *Penthouse?* Suppose the library didn't have books written by white supremacists arguing for the expulsion of all non-Aryans from America? Is that somehow unconstitutional? Could they be sued by those who insist that the library contain neo-Nazi propaganda? After all, like the good folks at Mainstream Loudoun, don't white supremacists pay taxes, too?

SPARE THE ROD (OR LOSE THE CHILD): A Muslim father who claimed that his religion mandated corporal punishment for children lost his bid to have his son returned to him. Thomas B. M. lost custody of his son, Jonathan, after a lower court ruled that the boy was in danger when he lived in the father's home, where the child was reportedly whipped and smacked in the head. The father appealed, arguing that his First Amendment rights were violated because his religion "favors disciplining by corporal punishment." The appellate court stated that Thomas must first establish that spanking was rooted in the practice of his religion, as opposed to being merely a philosophical preference. "The determination of whether a belief is actually rooted in religion is difficult because the line between a religious belief and a philosophical belief may be a fine one," the court stated. The court noted too that Thomas did not present any witnesses from his mosque or from the Nation of Islam to argue that the use of corporal punishment was an integral part of Islam. Rather, the court said, Thomas's position was "based on ideological or philosophical beliefs, not religious tenets" and the court ordered the removal of Jonathan from Thomas's home "to protect Jonathan's physical safety, health, and well-being." Of course, even if Mr. B. M. proved that whacking his kid in the head was mandated by his faith, it's highly doubtful that he would have won anyway. Free Exercise rights mean a lot of things, but not smacking your kid in the head.

"PROJECT FAIR PLAY": Though sometimes Americans United for Separation of Church and State (AU) is so preoccupied with building such a high wall of non-Establishment that it weakens Free Exercise protections, the watchdog group is doing the cause of religious liberty a great service with its "Project Fair Play." Started in September 1998, "Project Fair Play" is a nationwide drive to make houses of worship aware of federal tax law and Internal Revenue Service regulations that bar nonprofit groups from intervening in partisan politics. The catalyst for the drive, among other things, has been the voterguides distributed by Pat Robertson's Christian Coalition. Though supposedly nonpartisan and distributed merely to inform church members of candidates' positions, the guides are clearly stacked to favor conservative Republicans, or anyone who holds the political position the Christian Coalition has decided reflects their version of New Testament theology.

The success of AU's project, at least in the last election, seems apparent by the Christian Coalition's open attack against Americans United, which last year sent out about 80,000 letters to churches warning that if they distributed the guides they could be in danger of losing their tax-exempt status. In response, the Christian Coalition sent out a letter attacking Barry Lynn, the executive director of Americans United. "HE [Barry Lynn] WANTS TO DISCOURAGE CHRISTIANS FROM VOTING AND HE KNOWS PASTORS HOLD THE KEY. IF HE CAN MISLEAD YOU, HE CAN SILENCE MANY CHRISTIANS."

The issue, of course, isn't stopping Christians from voting; rather, it's using nonprofit churches to promote a blatantly partisan agenda. Though the Christian Coalition claims to be merely "a nonpartisan educational organization" that's not out to "advocate the election or defeat of any candidate," anyone who knows anything about the organization could see how blatantly false that claim is (it's also another good example of how political involvement corrupts Christians). If the Christian Coalition is nonpartisan, then so is James Carville. In fact, the Federal Communications Commission filed a suit against the Christian Coalition over, among other things, the distribution of the voter guides, which were obviously slanted in favor of the candidates that the CC wanted to see in office. The voter guides themselves say: "This Scorecard is for informational purposes only and is not intended to influence the outcome of any election. Christian Coalition does not advocate the election or defeat of any candidate." Yet a study of the guides shows that they slant and even distort facts in order to make the candidate they want look good and the ones they oppose look bad. In a book about politics, authors Glenn Simpson and Larry Sabato wrote that "by systematically rigging the content of its voter guides to help Republican candidates, the group has essentially donated hundreds of thousands of dollars (perhaps millions) in free advertising for the Republican Party."

And the Christian Coalition has been doing it in churches, which is what Americans United's challenge is over. Though its campaign did indeed scare off some churches from using the guides, others distributed them anyway, and Americans United has filed complaints with the IRS regarding the most blatant examples, hoping to spark a test case that will lead the IRS to declare the obvious: that the voter guides are not merely informational broadside but are instead partisan politics.

VOUCHING: The U.S. Supreme Court has declined to hear a case that challenged a voucher program instituted in Milwaukee, Wisconsin, thus leaving the program intact (see *Liberty*, January/February 1999). Though the High Court could have used the case to help decide, once and for all, the controversial parochiaid issue, for now the question will stay clouded. The Milwaukee plan allowed for 15,000 lower-income students to use the vouchers in more than 100 private schools, many of which are sectarian. Though two lower courts ruled that the program did, indeed, violate Establishment Clause concerns, the state's top court reversed, arguing that the voucher plan was merely "placing on equal footing options of public and private school choice, and vesting in the hands of parents [the right] to choose where to direct the funds allocated for the children's benefit."

Though opponents of the program were disappointed by the court's decision, the case does not set any kind of nationwide precedent. The Supreme Court's denial of *cert* doesn't mean it approves of the appealed decision (the High Court declines to hear cases for numerous reasons). A *New York Times* editorial said: "The Court's refusal to take up the case does not signal approval of the Milwaukee scheme. But the Court's silence leaves in place a plan that will directly harm the vast majority of the city's school children, namely those left in public schools while others flee to the voucher program. The Court's denial of review will also embolden voucher supporters elsewhere to adopt similar plans that would funnel public money into religious and private education."

And though the Court was able to dodge the question for now, sooner or later—with voucher cases pending everywhere from Vermont to Arizona—the Court is going to have to settle this issue, especially because the lower court rulings in this area have often been contradictory.

Principles or

Rebutting a Narrow View of the Religion Clauses

By NICHOLAS P. MILLER, ESQ.

Do the religion clauses of the First Amendment say anything meaningful about the respective roles of the church and the state? In "Wrong Jurisdiction" (*Liberty*, March/April 1998) law professor Steven Smith argues that the Founders "carefully avoided" adopting *any* principle of religious freedom, but instead deferred the entire question to the state governments. Thus the First Amendment does not guarantee religious freedom of any sort; its sole purpose rather was merely to guarantee to the states the right to do with religion as they pleased. In essence, Smith argues that the religion clauses contain no answer to the question of how church and state should relate.

If Smith is correct, than any examination of the thought and writings of the Framers to discern a principle of religious freedom to guide modern religious liberty jurisprudence is misguided and ultimately fruitless. To base any modern arguments for religious liberty on our country's constitutional heritage and history of religious freedom is, by Smith's reasoning, to appeal to myth and fantasy rather than to constitutional text and history. This is a troubling and ultimately wrong conclusion.

Bill of Rights, Bill of Tyrannies

Smith's argument that the religion clauses merely dictate jurisdiction for religious matters and don't actually protect the religious rights of people turns the Bill of Rights on its head. If one is to argue for a purely jurisdictional role for the Free Exercise Clause, to be consistent, the same must apply to the other First Amendment protections. These would include freedom of speech, freedom of the press, and the right of assembly. If the First Amendment does not protect these rights, at least as to the federal government, but merely hands them over to be protected or abused as the states see fit, then it is not really a Bill of Rights. In fact, its only role would be to prevent the federal government *from* protecting these rights. Sounds more like a Bill of Tyrannies than of Rights.

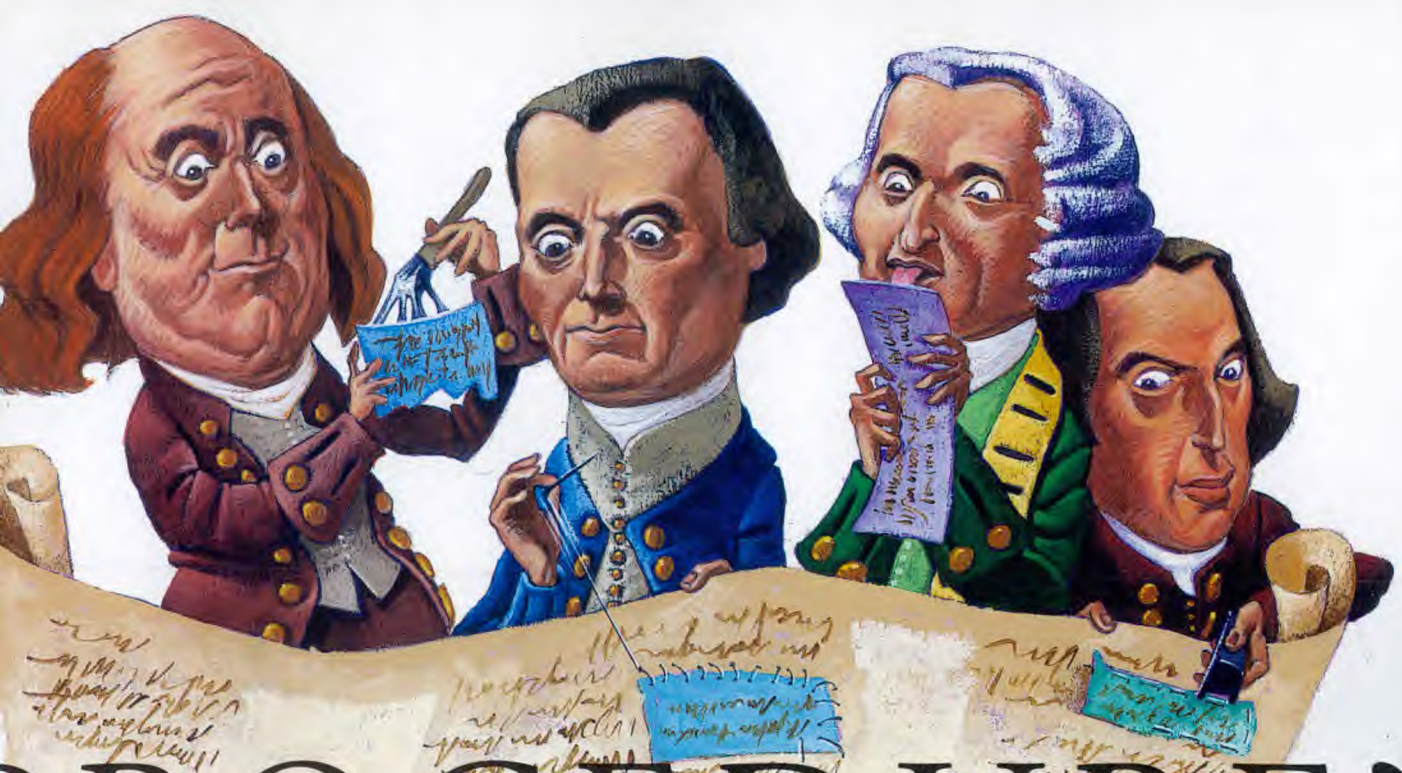
Smith would claim that "the Bill of Rights, rather than enunciating some grand principle of religious freedom, left the states total autonomy in religious matters." He suggests that the Founders envisioned, and even desired, the states to create religious establishments. No support is cited for this position other than a speculation that "representatives from the New England states probably" held such views.

The frailty of this argument is shown when one applies it to other items in the Bill of Rights. Congress also left the regulation of free speech and free press rights to the states. Did this mean that Congress desired the states to infringe on these rights as well? Hardly. The limitation on the Constitution's protection of these rights from state government action came from the Founders' understanding of federalism and the limits on congressional power, and not from limited or cramped views of the contours or importance of freedom of speech or the press.

Neither did the Founders have a limited view of the importance of the freedom of religion. A fair way of putting it would be that in the Bill of Rights, Congress did enunciate grand principles of religious freedom, freedom of speech, and freedom of the press, but because of the limitations of federalism, Congress did not force the state governments to abide by these standards, even if they hoped that the states would follow the federal example in these matters. A few years later James Madison expressly articulated this desire regarding the religion clauses: "Ye states of America, which retain in your constitutions or codes, any aberration from the sacred principle of religious liberty, by giving to Caesar what belongs to God, or joining together what God has put asunder, hasten to revise and purify your systems, and make the example of your country as pure and complete, in what relates to the freedom of the mind and its allegiance to the Maker."[1] Madison's desire became a reality when Massachusetts was the last state to disestablish its state church in 1833.

Jurisdiction or Religious Freedom or Both?

Scholars generally agree that the First Amendment as originally drafted was not meant to bind state governments in regard to matters of religion. However, it does not follow



PROCEDURE?

as Smith suggests, that it contains no principle of church and state. There was still the matter of the federal government and its relationship to religion. The Framers had to decide the general question of how government (in this case, the federal government) should relate to religion. It is no large leap, as Smith would imply, to then apply this principle of religion and government to other kinds of governments, as the Supreme Court has chosen to do in applying the Free Exercise Clause to the states.

Why can't the religion clauses deal with both jurisdiction and the protection of religious freedom? In not allowing for this possibility, Smith runs afoul of the logical fallacy of the excluded middle when he insists that because the clause contains jurisdictional instructions, it cannot contain substantive protection for religious liberty. Smith seems to believe that once the argument is established that the Constitution prevents the jurisdiction of the federal government over religious matters at the state level, that he has defeated the notion that the Constitution can contain a substantive provision of religious freedom.

But both can be true. The Constitution could, and did until the passage of the Fourteenth Amendment, prevent the government from regulating the establishment of religion at the state level, which was a jurisdictional limit. But it also can, and textually does, give the federal government an affirmative role in protecting the "free exercise" of religion at the federal level, which on its face is a substantive provision.

Six Overlooked Words

When the face, or text, of the religion clauses are examined, the most serious flaw in Smith's argument emerges. His arguments essentially ignore fully one half of the religion clauses. The religion clauses read, "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." Smith's argument focuses exclusively on the first 10 words and ignores the remaining six, perhaps the six most crucial words in the Constitution.

If the Framers' only goal in the religion clauses was to leave religion to the states, the first nine words would have done it. This clause, on its own, would suffice to hand jurisdiction over issues of religious establishment to the states. This clause alone would leave no role for the federal government in issues of religious

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ILLUSTRATION BY RALPH BUTLER

establishment. But the Framers did not stop there. The six words "or prohibiting the free exercise thereof" gives the Congress an affirmative duty to respect religious freedom.

While the injunction is worded in the negative, for it to have any meaning it must have an affirmative component mandating that Congress protect religion from intrusion by the federal government. To accomplish what Smith argues it does, the Free Exercise Clause would have to be worded "Congress shall make no law . . . *respecting* the free exercise thereof." But the Founders did not word it that way. And they used the words they did because those words carried widely understood meanings and implications for the protection of religious freedom in Colonial America.

The Founders would certainly have been surprised to learn that the Constitution they created contained no principle or "right of religious freedom."

Freedom at the Founding

The Founders would certainly have been surprised to learn that the Constitution they created contained no principle or "right of religious freedom." The only direct, contemporary explanation offered on the floor of the Congress for the Free Exercise Clause was made by Daniel Carroll. He said that the clause was needed because "the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand; and as many sects have concurred in opinion that they are not well secured under the present Constitution."[2] This language is not that of one hoping only to protect states' rights, to ensure the states' rights to tyranny. Rather it is the language of one who believes he is affirmatively creating protection for personal and corporate religious rights.

In promising to seek a bill of rights, Madison promised to support "the most satisfactory provisions for all essential rights, particularly the rights of conscience in the fullest latitude."[3] Later in his life Madison wrote favorably of the constitutional principle of "the immunity of religion from civil jurisdiction, in every case where it does not trespass on private rights or the public peace."[4]

As Smith astutely notes, it is not generally fair to attribute the statements of a few Founders as representing the beliefs of all of them. However, when clear and public statements are made, like those of Carroll and Madison, and these statements are not publicly and openly opposed or contradicted, then one can safely infer that there was not general or widespread opposition to these views.

Further, while impossible to get inside the head of every Founder, we do have information from each of the Founders' states as to what similar clauses and language meant there. The Framers did not use the phrase "free exercise of religion" in a vacuum, and the background context of those words is much broader than the efforts of Jefferson and Madison in framing the Virginia Statute of religious freedoms. After the Revolution and prior to the Constitution, 11 of the 13 states adopted new constitutions, many with a complete bill of rights. By the time of the framing in 1789, every state but Connecticut had a constitutional provision protecting religious freedom. As one constitutional scholar has noted, "it is reasonable to infer that those who drafted and adopted the first amendment assumed the term 'free exercise of religion' meant what it had meant in their states."[5]

A review of these state provisions indicates that "free exercise of religion" was associated with affirmative government protection of both religious belief and action. New York's 1777 constitution was typical: "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed. . . . Provided that the liberty of conscience . . . shall not be construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state."[6] The Georgia constitution phrased it thus: "All persons whatsoever shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the state."[7]

The limit of "peace and safety" in these clauses is one key for understanding the intended scope of religious free exercise. Such a limit demonstrates that the drafters viewed religious exercise as extending beyond mere belief or opinion to action and conduct within the doors of the church and beyond. Religious exercise was to have free reign throughout society, up to the limit of the "peace and safety" of that society. It was a robust and broad vision of religious protection envisioned by the words "free exercise of religion."

Given the state constitutional context, the phrase "free exercise of religion" was pregnant with weighty and broadly understood content. If the Founders were merely attempting to insert a jurisdictional limit in the Constitution, they could not have chosen a worse phrase to do it with. The states were the seedbeds of political thought and experimentation. The principle of Protestantism—which is that in matters of reli-

gious conscience the majority has no power—had in both its original and enlightenment forms found a home in the constitution of virtually every state.

Further, the early Congress did indeed pass laws that protected religion. The Continental Congress granted religious exemptions from conscription in the revolutionary army. After the passage of the Constitution, the Congress provided for the religious freedom of soldiers by authorizing the hiring of military chaplains. The Congress also provided for certain excise tax exemptions for religious organizations. If Smith is correct, then each of these actions were forbidden to Congress, yet they were taken, with no recorded opposition to them based on lack of constitutional authority. It would seem that the early Congress would have been surprised to learn that the Constitution had "no principle" or religious freedom and that thus they had "no power" to protect religion.

Principle of Protestantism and the Founders

What Smith doesn't seem to understand is that the Framers laid the foundation of religious freedom on a key principle of Protestantism: the sacredness of the individual conscience in matters of faith. In the eighteenth century the "representative thinkers" of the Western political thought influenced by that principle—John Locke, Thomas Jefferson, and James Madison—expressed it in their writings on government. John Locke wrote in his "Letter Concerning Toleration": "All the power of the civil government relates only to men's civil interests, is confined to the care of the things of this world, and hath nothing to do with the world to come." Those most quoted words of Jefferson's magnum opus, the Declaration of Independence, "all men are created equal, that they are endowed by their Creator with certain unalienable rights," represent an "enlightenment" gloss or articulation of this reformation principle.

It was James Madison, though, who expressed it in a manner most true to its original reformation articulation. In his *Memorial and Remonstrance* of 1785 he wrote: "It is the 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 in degree of obligation to the claims of civil society. . . . We maintain therefore that in matters of religion, no man's right is abridged by the institution of civil society, and that religion is wholly exempt from its cognizance."

In 1829, a few years removed from the founding but during the lifetime of many of those present at it, a debate arose in Congress over the propriety of the running of the mails on Sunday. Congressman General Richard Johnson wrote in a Senate report on the issue, that "the Framers of the Constitution recognized the eternal principle that man's relation with God is above human legislation and his rights of conscience unalienable."[8] In this passage Johnson invokes the Framers of the Constitution, who were near contemporaries of his, as supporters of a lofty and protective view of religious freedom in language that directly echoes the Protestant cry that "in matters of conscience the majority has no power." Congressman Johnson would certainly have been surprised by the claim that the Founders had envisioned or enshrined no principle of religious freedom.

Conclusion

Thus it's the ubiquity of the principle of Protestantism that must ultimately defeat the argument of Smith that "free exercise of religion" has no real meaning. In choosing words used with clear meaning in multiple state constitutions, the Framers showed that they were concerned with jurisdiction and with substance. Then they backed up their words by actions in protecting religion in the arena of the federal government. Far from avoiding church/state controversy, the Framers met the issue of religious freedom squarely within the limits of the arena in which they were operating, that of creating a federal government that protected the religious freedom of all those within its realm.

It would seem that the early Congress would have been surprised to learn that the Constitution had "no principle" or religious freedom and that thus they had "no power" to protect religion.

FOOTNOTES

[1] James Madison, "The Detached Memoranda," in Robert Alley, *James Madison on Religious Liberty* (1985), p. 90.

[2] J. Gales, ed. (1834), *Annals of Congress* 1, (Aug. 15, 1789): 757, 758.

[3] Letter to Rev. George Eve, Jan. 2, 1789, in R. Rutland and C. Hobson, eds., *The Papers of James Madison* (1977), vol. 2, pp. 404, 405.

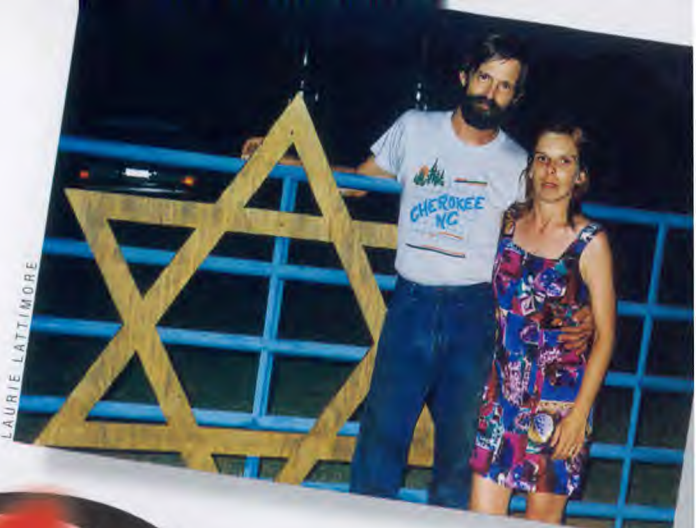
[4] Rutland, vol. 3, p. 274.

[5] Michael W. McConnell, "The Origins and Historical Understanding of the Free Exercise of Religion," *Harvard Law Review* 103 (1990): 1409, 1456.

[6] *Ibid.*

[7] *Ibid.*, p. 1457.

[8] *Report of the Subject of Mails on the Sabbath* (congressional documents, U.S.A.), Serial no. 200, Document no. 271.



LAURIE LATTIMORE

OUT

A Chilling Example

By KATHERINE WALTON

In 1991 the Willis family moved to Troy, Alabama, from Seattle, Washington. Their youngest child, Rachel Willis, stayed home with Mrs. Willis, while their older children, Paul, David, and Sarah, attended the Pike County public schools. Since 1992 Paul (14), David (13), and Sarah (12), the only Jewish children in the district, have suffered religious persecution at the hands of school officials, administrators, teachers, and students. In August 1997, after a long and extensive battle with the school officials, Wayne and Sue turned to the American Civil Liberties Union of Alabama. Martin McCaffery, president of the ACLU of Alabama, wrote, "We were the Willis family's last resort. Unless they convinced another group to take up the cause, things would have continued as they were going in Pike County."

The Willis family did not sue the Pike County school district for money, but to ensure freedom of religious expression and protection from religious harassment for not just their own children, but for everyone.

"We don't consider ourselves as activists," said Sue, "but just Americans trying to preserve everyone's rights. Whether we are Christian, Hindu, Buddhist, or Muslim, we are all equal."

Not, however, if the state promotes religion. Once it does, then those who don't believe in or follow that specific religion aren't treated as equals, but as outsiders—and few things can serve as a better example of just how unequal they become than that of her children's experience in the Pike County schools.

From the start, these kids suffered from blatant, in-your-face violations of the most basic religious freedoms. According to McCaffery, for example, the Pike County school system forced these children to participate in Christian prayers and events. At one of the required school assemblies, Sarah (11 years old and in fifth grade at the time) was traumatized by the message of a minister, invited by school officials, who told students that they would go to hell if they did not accept Jesus Christ. Sarah curled into a ball and tried to plug her ears.

"Sarah had nightmares for weeks after the incident," said her mother. Sue also described how a teacher physically pushed David's head down during prayer at the Pike County High School assembly. And Paul, who was constantly

LAURIE LATTIMORE

Above, *Willis children*
In school, Sarah was told to accept Jesu
or go to hell. Top, *Wayne and Sue Willis: Ju*
Americans trying to preserve their freedon

ridiculed and called "Jew boy" or "Jewish joker" by other students, was assigned to write an essay entitled "Why Jesus Loves Me" as a means of discipline.

Apparently school officials saw nothing wrong with turning the Pike County public schools into evangelistic centers and forcing students to become congregants.

McCaffery said that a teacher told one of the Willis children, "If parents will not save souls, we have to."

Of course, for years the U.S. Supreme Court has made it clear that "saving souls" is not the mission of the state, much less of public schools. Obviously, the "Christians" in Pike County didn't live up to one of their own biblical teachings: "Love thy neighbour as thyself."

In spite of the Willis family's efforts to stop school activities that violated laws separating church and state, Sue said they were told that the harassment would stop if their family converted. According to the Alabama Radio News Network (Aug. 6, 1997), John Key, the superintendent of Pike County schools, thought that the complaints raised over the past five years had been resolved, and he denied charges that he responded to the parents' complaints by telling them to convert to Christianity.

SIDERS!

hat Happens When Government Promotes Religion

In *Zorach v. Clauson* the Court said specifically: "Government may not . . . undertake religious instruction . . . nor use secular institutions to force one or some religion on any person." In numerous other decisions the High Court said that public school systems may not aid religious groups to spread their faith. Public schools are government institutions and are not allowed to violate the Establishment Clause by forcing students to participate in activities that advance any one religion over another religion. Furthermore, teachers and administrators, when acting in those capacities, are representatives of the state and in those capacities are themselves prohibited from encouraging or soliciting student religious or antireligious activity.

After the initial incidents, Sue and her husband went to the school superintendent with their complaints.

"Swastikas," Sue said, "were drawn on everything that belonged to my children: books, bags, coats, shoes, and socks—everything, even their lockers."

She asked school officials how she could teach her children to be tolerant human beings and not bigots when they were subjected to outright religious persecution and bigotry in

In the lawsuit filed on behalf of the Willis family, the ACLU charged that (1) Pike County be enjoined from creating an established religion in the schools; (2) the children be protected from religious harassment; and (3) the children be allowed to exercise their religion and display its symbols. (The third item requested is related to Paul's being ordered to remove his star of David lapel pin. Key said that school officials might have mistaken the star of David for a gang symbol.)

Key also apologized to the Willis family for the "Why Jesus Loves Me" assignment and assured them that it would not happen again. After the apology, Key said that he learned that the assistant school principal had actually assigned an essay entitled "Why God Loves Me." Whatever happened, according to the existing guidelines regarding religion in public schools, it is understood that students may not be required to modify, include, or excise religious views in their assignments.

Sue Willis, who was born and raised Jewish in a rural part of Kentucky, had no idea that moving back to the South meant that she and

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Katherine Walton writes from Annapolis, Maryland.

"Every day that I send my children to Pike County schools, I wonder if I am sending them into a war zone."

her family would be forced to battle on the front lines of Alabama's religious war. In papers filed with the court, Sue Willis wrote, "Every day that I send my children to Pike County schools, I wonder if I am sending them into a war zone." Sue said that she had never experienced such religious persecution, and described how both she and her husband served in the military to fight for what they believed to be freedoms granted and protected by the U.S. Constitution.

Sue believes that the religious rhetoric of Fob James, then governor of Alabama, has created more problems in regard to the issue of separation of church and state. The ousted governor James is well known for his support of a judge who is fighting to keep a plaque of the Ten Commandments in his courtroom. "In fact," Sue said, "on more than one occasion I've heard Governor James say that the Bill of Rights doesn't apply to Alabama, and threaten to use the national guard to keep the Ten Commandments in courtrooms." Despite heated battles waged by Alabama's religious majority to nullify the Establishment Clause, cooler heads have prevailed.

Last spring, prompted by ACLU lawyers, Judge Ira DeMent struck down a 1993 Alabama law stating that voluntary student-initiated prayer, without administration interference, was legal (see *Liberty*, May/June 1998). The ruling of this U.S. district judge caused an uproar with Alabama's religious majority, and one school system, De Kalb County, refused to comply. However, in the case of *Chandler v. James*, Judge DeMent upheld his decision and ruled that public schools in north Alabama's De Kalb County could not promote religion. DeMent went on to devise a set of guidelines that prohibited vocal prayers at school events, including athletic events and graduation; devotionals; and Bible giveaways at the school by Gideons International. Fortunately, DeMent was also the presiding judge of the Pike County case, and this spring board members of Pike County approved a settlement with the Willis family.

"Certainly, the fact the case was in front of the same judge," said McCaffery, "must have entered their thought process." The settlement includes a long list of do's and don'ts on religion in public schools and follows many of the guidelines formulated in the De Kalb County decision. Copies of the settlement, along with these guidelines, were to be made available to school administrators and posted in all Pike County schools. Pamela Sumners, of the ACLU, said, "The Willis family was happy to reach a settlement and not have to subject their children to cross examination." However, Sumners expressed her concerns about repercussions the case would have on the family's community relations.

Since the settlement, the family still experienced a few incidents at the school. "But," Sue said, "at least now the incidents are immediately handled. And although there was a phase during which my children were ashamed or afraid of being known as Jewish, I believe the more harassment they experienced, the more they wanted to be Jewish."

Though the children are protected from religious persecution while on school property, they are still ostracized and mistreated by some in the community who see her family as trouble makers trying to remove religion totally from public schools. But Sue sees herself and her family as simply joining the battle against efforts to blur or erase the line of separation between church and state. At first she believed she could make people of Pike County understand her family's religious beliefs. Now she hopes only that at least one person will be enlightened by the fight she and her family have had to engage in to protect their religious liberty.

"If you see someone trying to right a wrong, you need to help and speak out. If you keep silent, people think you are afraid of them or agree with their views."

As the outcome of this case relates to the issue of separation of church and state, McCaffery wrote: "It is always our hope that people in the religious majority will become aware there are equally sincere and faithful people in the religious minority, and they are deserving of the same respect as the majority. Between this and the Chandler case [of De Kalb County], we hope the schools in Alabama will honestly examine what really goes on in the classrooms and realize the only guarantee of religious liberty in this country is the removal of government from all religious functions. Many people have trouble seeing schools as a part of the government, but slowly, we hope, their awareness will be heightened."

Until government institutions (i.e., public schools) cease to allow themselves to be used to promote or enforce the religious practices of some religions over others, they will continue to violate not only the principles of religious freedom, but basic human decency as well.

"With GOD ALL THINGS ARE POSSIBLE"

Especially With a Little Help From a Federal District Court

By James L. Graham

Would placing Ohio's official state motto, "With God All Things Are Possible," on the state seal at the statehouse violate the Establishment Clause of the First Amendment? The American Civil Liberties Union of Ohio thought so—and sued to stop the motto from being placed there.

The District Court of the United States for the Southern District of Ohio, in *ACLU v. Capitol Square*, disagreed, ruling that the motto could go up. And however minor the particulars here, the principle behind them is significant. This case is no exception; in fact, it goes to the heart of the fundamental issues regarding the scope of the Establishment Clause and this nation's relationship to the religious character of its history.

BACKGROUND

The controversy involved Capitol Square, a 10-acre site in Columbus, where the Ohio state capitol building, or "statehouse," is located. The Capitol Square Review and Advisory Board regulates all uses of Capitol Square, while the governor has the authority to approve all uses of the official state seal. The plaintiffs alleged that Governor George Voinovich approved the use of the motto and that he even originated the idea of displaying it at the statehouse.

In 1959 the General Assembly of Ohio enacted legislation declaring the phrase "With God All Things Are Possible" to be the state's official motto. No official legislative history of the statute exists, but contemporary documents and newspaper accounts indicate that it was suggested by a 12-year-old Cincinnati boy, James Mastronardo, who made several trips to Columbus to speak to the General Assembly on behalf of his proposal, which eventually passed. A press release issued at that time indicates that young James "chose a verse in the New Testament, Matthew 19:26 . . . from which to draw the official motto."

The state seal is a circular device that contains no religious symbols. In the foreground are a sheaf of wheat and a sheaf of arrows. In the background are mountains and a rising sun. Between the background and foreground are a river and cultivated fields. In May 1996 Governor Voinovich recommended that the state motto be inscribed above the main entrance to the statehouse. In November 1996 the board adopted a modified version of the governor's recommendation and decided to engrave the state seal and motto on a granite plaza at the west entrance of the statehouse.

THE ARGUMENTS

The ACLU sought a declaratory judgment declaring the motto unconstitutional, and requested a permanent injunction stopping the defendants from displaying it on the Capitol Square Plaza and from using it in any official way in the future.

James L. Graham is a United States district judge in the Southern District of Ohio.

The Court stated that one of the first actions of the original Congress, the same Congress that drafted the Establishment Clause, was election of chaplains for both houses, men who were, in fact, paid out of the public treasury....

Citing *County of Allegheny v. American Civil Liberties Union*, plaintiffs asserted that Ohio's motto endorsed the Christian religion over other religions, and sought that use of the motto be forbidden unless justified by a compelling government interest (*Larson v. Valente*). The ACLU also argued too that the motto was sectarian because it is taken from the New Testament, specifically from Jesus, arguments that the court found unpersuasive.

First, though the motto appears to have been taken from the New Testament (Matthew 19:26), the words are only part of a sentence, and have been completely removed from their original context. In fact, as they appear on the motto, they do not suggest a denominational preference. In fact, they don't even state a principle unique to Christianity. They could be classified as generically theistic, and certainly compatible with the world's three major monotheistic religions: Judaism, Christianity, and Islam.

The golden rule, "Do Unto Others as You Would Have Them Do Unto You," is also attributed to Jesus. In fact, many common aphorisms originated in the Hebrew Bible or the New Testament. The national motto, "In God We Trust," was, it seems, inspired by the Hebrew Bible. None of these expressions are regarded as sectarian; neither should this motto.

The plaintiffs also presented no evidence that a reasonable person who read the words of the motto would recognize them as coming from Jesus or understand them to suggest a denominational preference. One witness, Rabbi Harold Berman, of Columbus, did not recognize the source of the motto. He said only that it "sounded vaguely familiar." Another witness, David Belcastro, an associate professor of religious studies at Capital University in Columbus, testified that the average college student would not know the source. The court concluded, therefore, that an objective and reasonably informed observer would not perceive the motto as sectarian.

In some of its usages of the motto, the state has included a citation to the New Testament text "Matthew 19:26." However, the statute that established the motto did not contain this reference, nor did the state intend to include it on the Capitol Square Plaza.

Despite the ACLU claim, this case is unlike *County of Allegheny*, in which the sectarian nature of the phrase "Glory to God in the Highest" was manifested by its context: the display of a creche depicting the birth of Jesus. The words of the Ohio motto, instead, were to be displayed in the context of the state seal, a completely secular device.

The ACLU argued that even if not sectarian, the motto constitutes a governmental preference of religion over nonreligion, which the Supreme Court has ruled is not permissible under Establishment Clause jurisprudence. However, the High Court didn't rule out every aspect of official acknowledgment of religion, such as in *Marsh v. Chambers*, which sets the precedent for this case.

PRECEDENTS

In *Marsh* the Court upheld the practice of the Nebraska legislature to begin each session with a prayer offered by a chaplain paid out of public funds. The Court noted that "the opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country."

The Court stated that one of the first actions of the original Congress, the same Congress that drafted the Establishment Clause, was election of chaplains for both houses, men who were, in fact, paid out of the public treasury; that this practice has continued uninterrupted and has been followed consistently in most of the states. Chief Justice Warren Burger, speaking for the Court, said: "Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees, but there is far more here than simply historical patterns. In this context, historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean but also on how they thought that clause applied to the practice authorized by the first Congress—their actions reveal their intent."

He also said: "To invoke divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country."

Like the practice of opening legislative sessions with prayers—official mottoes, oaths, and inscriptions that acknowledge the religious heritage of our nation are also deeply embedded in our history and tradition. Thus the Court, in *School District of Abington Township, Pennsylvania v. Schempp*, referring to that tradition, said: "This background is evidenced today in our public life through the continuance in our oaths of office from the presidency to the alderman of the final supplication, 'So help me God.'" Every justice or judge of the United States is required to take an oath to discharge faithfully and impartially the

duties of the office, "so help me God."

Justice Stewart noted in *Engel v. Vitale*: "At the opening of each day's session of this Court, we stand while one of our officials invokes the protection of God. Since the days of John Marshall our crier has said, 'God save the United States and this Honorable Court.'"

In *Lynch v. Donnelly*, Chief Justice Burger, writing for the Court, said: "There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789. . . . Our history is replete with official references to the value and invocation of divine guidance in deliberations and pronouncements of the founding fathers and contemporary leaders."

In *Lynch* and in other cases, the Court has made specific reference to the national motto, "In God We Trust," and the language, "One Nation Under God," which is part of the Pledge of Allegiance to the American flag.

In *County of Allegheny*, Justice Blackmun, writing for the Court, acknowledged: "Our previous opinions have considered in dicta the motto and the pledge, characterizing them as consistent with the proposition that government may not communicate an endorsement of religious belief."

The Court has never suggested that the national motto or the Pledge of Allegiance are unconstitutional. The national motto has been upheld by three circuit courts.

The national motto, "In God We Trust," is prominently engraved on the wall above the speaker's dias in the chamber of the House of Representatives. It is also engraved over the entrance to the Senate chambers. Congress has set aside a special prayer room in the Capitol for use by members of the House and Senate. This room is decorated with a large stained-glass panel that depicts President Washington kneeling in prayer. Around him is etched the first verse of the sixteenth psalm: "Preserve me, O God: for in thee do I put my trust." Congress has directed the president to proclaim a National Day of Prayer each year. Our presidents have repeatedly issued such proclamations.

The national anthem, adopted by an official act of Congress, concludes with the following verse: "Oh! thus be it ever when freemen shall stand Between their lov'd home and the war's desolation, Blest with vict'ry and peace, may the heav'n-rescued land Praise the Power that hath made and preserved us a nation. Then conquer we must, when our cause it is just, And this be our motto: 'In God is our trust.' And the Star-Spangled Banner in triumph shall wave O'er the land of the free and the home of the brave."

The plaintiffs argued that this case should not be governed by the rule in *Marsh* because, in their view, its holding is limited to practices that "*themselves* were sanctioned by their history and ubiquity." Thus, plaintiffs claimed that *Marsh* must be limited to only those specific practices that began at or before the foundation of the republic and not similar or equivalent practices of later origin.

Yet the rule of *Marsh* is not so limited. Nebraska, of course, was not one of the original 13 states. It was not admitted to the union until 1867, yet the Court upheld its practice of opening legislative sessions with prayer. Furthermore, the Nebraska practice did not precisely coincide with the practice of the original Congress. For example, in Nebraska one Presbyterian minister served for more than 16 years. In contrast, the original Congress provided for the appointment of two chaplains of different denominations who would alternate between the two chambers on a weekly basis.

Ohio's motto was adopted nearly 40 years ago. At least five other states have mottoes that contain some religious content. The national motto, "In God We Trust," was not officially adopted until 1956, just three years before Ohio adopted its motto. The phrase "Under God" was not added to the Pledge of Allegiance until 1954. The national anthem was adopted by an act of Congress in 1931.

The Court in *Marsh* did not limit its ruling to only those practices that could trace their origins to the founding of the republic; instead, the Court said, "It would be incongruous to interpret that clause as imposing more stringent First Amendment limits on the states than the draftsmen imposed on the federal government."

THE LEMON STANDARD

The Court in *ACLU v. Capitol Square* ruled that this case is an exception to the rule of *Lemon v. Kurtzman*, which is not the exclusive test or criterion in Establishment Clause cases. In *Hunt v. McNair* the Court said that the three prongs of the *Lemon* test "are no more than helpful signposts." But even if *Lemon* were applicable here, the result would not change. The motto has a valid secular purpose. "It inculcates hope, makes Ohio unique, solemnizes occasions, and acknowledges the humility that government leaders frequently feel in grappling with difficult public policy issues."

The Court has never suggested that the national motto or the Pledge of Allegiance are unconstitutional.

Viewed in the context of a long tradition of government acknowledgment of religion in mottoes, oaths, and anthems, the Ohio motto does not have the primary or principal purpose of advancing religion, and it does not foster excessive government entanglement with religion.

Fourteen years ago in *Lynch*, Justice Sandra Day O'Connor proposed a new two-pronged test for Establishment Clause cases: "entanglement" and "endorsement." Her endorsement test has received support from other members of the Court, and it appears that a majority of the Court applied it in *County of Allegheny*. Under Justice O'Connor's endorsement test, the Establishment Clause is violated when an objective and informed observer would conclude that the contested government action "sends a message to nonadherents that they are outsiders, not full members of the political community."

Ohio's motto passes Justice O'Connor's endorsement test. In *Lynch* Justice O'Connor said that governmental "acknowledgments" of religion, such as legislative prayers, the government declaration of Thanksgiving as a public holiday, printing "In God We Trust" on coins, and opening court sessions with "God save the United

A SECULAR NATION?

The issue in *ACLU v. Capitol Square* isn't just about a motto in a seal, but about just what values may properly inform and mold public policy. Will they be exclusively secular, or will they include the values embodied in the nation's religious heritage? Some argue that government's position must be one of strict neutrality; others that in the realm of values, there is no such thing as neutrality.

The laws of every society reflect certain moral presuppositions. The law prohibits, allows, or promotes certain behaviors based upon what that society deems right or wrong. In America today, both sides of the debate on such divisive public issues as abortion, euthanasia, homosexuality, and pornography are taking a distinct moral stance. Thus, the issue of the role of religion in public life is an important one that deserves the public's attention.

History has played a significant role in the Court's interpretation of the Establishment Clause. The average citizen, as well as the constitutional scholar, understands that the history surrounding the writing of the Constitution sheds light on what it meant to the men who wrote it, and to the people of the United States who ratified it through their duly elected representatives. Those who oppose government acknowledgment of religion invariably invoke the now famous words of Thomas Jefferson, who said that the Establishment Clause was intended to erect "a wall of separation" between church and state. Many Americans assume that Jefferson played an instrumental role in the adoption of the First Amendment and that his metaphor is an authoritative comment on its meaning. This belief, which has reached the status of a civic myth, has contributed to public confusion about the history and meaning of the First Amendment. Jefferson, in fact, had no role in the drafting of the Constitution or the Bill of Rights; indeed, he was in France, where he served as United States minister to the French government from 1785 to 1789. Jefferson's comment about a wall of separation was contained in a letter he wrote more than a decade after the Bill of Rights was ratified by the states.

Jefferson, the third president of the United States, was an advocate of the antireligious philosophy of the European Enlightenment. His position on the role of religion in public life stands in stark contrast to that of the nation's first president. George Washington was not only the first chief executive but also the president of the Constitutional Convention and presided over that body's deliberations. He was the most highly respected public figure of the day. In his first inaugural address, Washington deliberately made prayer a part of his first official act as president: "It would be peculiarly improper to omit in this first official act my fervent supplications to that Almighty Being who rules over the universe, who presides in the councils of nations, and whose providential aids can supply every human defect, that His benediction may consecrate to the liberties and happiness of the people of the United States a government instituted by themselves for these essential purposes."

The most compelling evidence of the meaning of the Establishment Clause is to be found in the actions of the Congress that drafted it and submitted it to the states for their approval. The first Congress is "a Congress whose constitutional decisions have always been regarded, as they should be regarded, as of the greatest weight in

States and this honorable court" serve, "in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs."

VERDICT

In light of history, there can be little doubt that Ohio's motto, "With God All Things Are Possible," does not violate the Establishment Clause. Thus, the Court ruled that the ACLU's motion that the motto itself be ruled unconstitutional and not placed in the seal was denied. The Court did, however, permanently forbid the state of Ohio from attributing the words of the motto to the text of the Christian New Testament. In light of the argument given above, in an attempt to balance our nation's religious heritage with the protections found in the Establishment Clause, that ruling seemed to be the most judicious and fair one possible.

the interpretation of that fundamental instrument." On the same day it approved the language of the First Amendment, the first Congress urged the president to declare "a day of public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many signal favours of Almighty God." On the very same day it approved the language of the Establishment Clause, the first Congress reenacted the Northwest Ordinance. Article 3 thereof states: "Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."

Congress made adherence to the Northwest Ordinance a condition of statehood.

The actions of the first Congress were a clear signal to the states that the members of that first Congress believed it was proper under the Establishment Clause for the federal government to acknowledge religion in various ways. The states ratified the First Amendment after the first Congress took these actions, and no records exist indicating that the states voiced disagreement with Congress' interpretation of the Establishment Clause, as evidenced by its actions. Thus it is fair to assume that the Bill of Rights was ratified with the understanding that those actions were proper under the First Amendment.

That this nation was founded on transcendent values that flow from a belief in a Supreme Being seems beyond dispute. The Declaration of Independence, which specifically invokes the Deity on four occasions, states: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator, with certain unalienable rights, that among these are life, liberty, and the pursuit of happiness."

Washington, in his farewell address, said: "Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports.... 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."

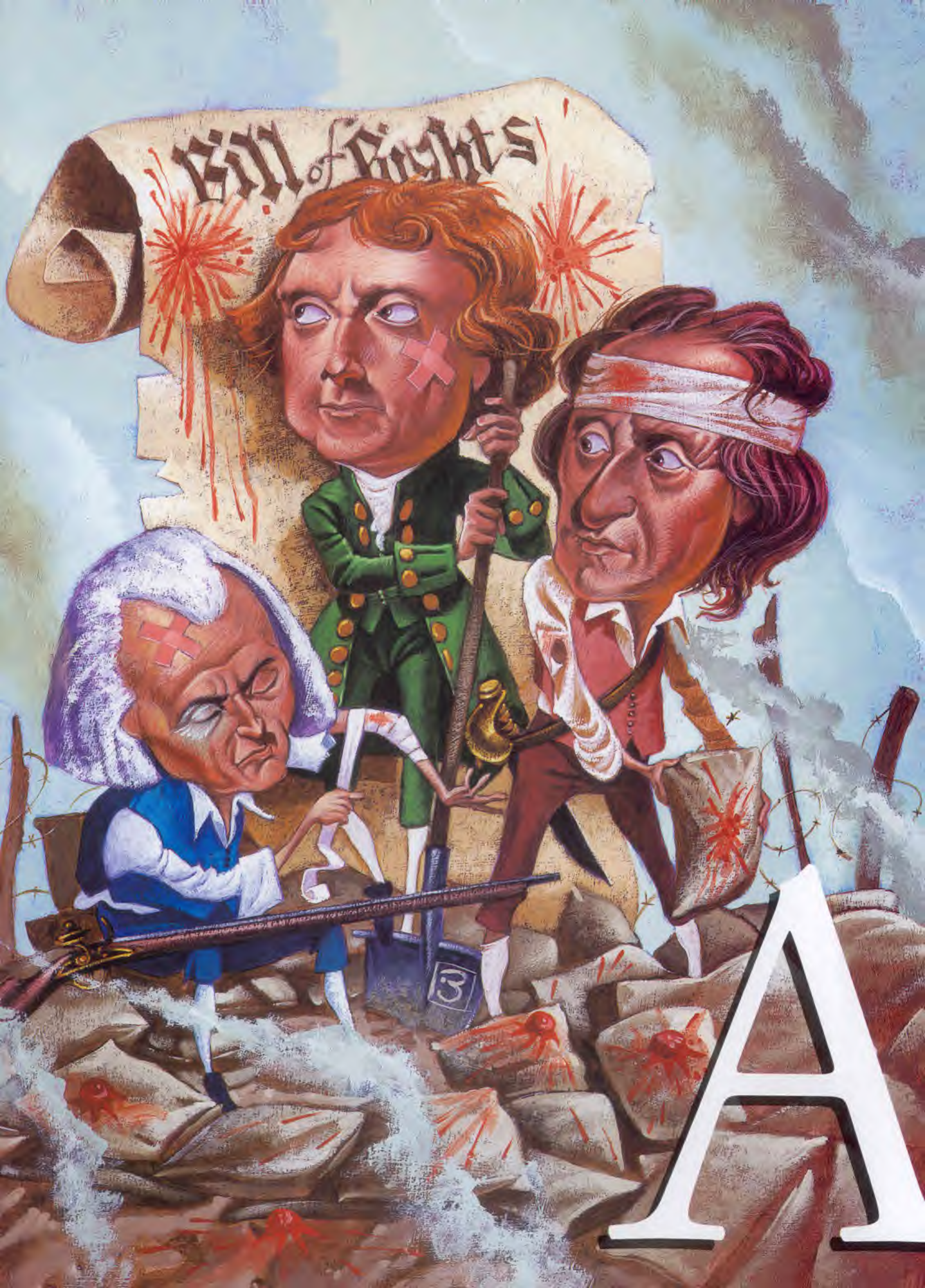
John Adams, the nation's second president, said: "Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other."

In *Zorach v. Clauson*, the Supreme Court said: "We are a religious people whose institutions presuppose a Supreme Being."

In *School District of Abington Township*, 374 U.S. 213, the Supreme Court said: "The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself."

Thirty-five years ago Justice Arthur Goldberg warned that "untutored devotion to the concept of neutrality" can lead to "a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious," a result "not only not compelled by the Constitution, but ... prohibited by it."

For these reasons, I believe that striking down Ohio's motto, "With God All Things Are Possible," would evince the kind of brooding devotion to the secular that Justice Goldberg warned against, and that indeed are contrary both to the Constitution itself and the history of this nation.—**James L. Graham.**


Bill of Rights
A

The ESTABLISHMENT CLAUSE ASSAULT

By Glenn Bergmann

A Major Battle Ended Last Year. The Good Guys Won. But the War Is Hardly Over.

The Bell and McCord children were verbally assaulted at the school, not just by students, but by the faculty as well. Upside-down crosses were taped to their schoolbooks and lockers. The McCords' family pet, a prizewinning goat, had its throat slit. The parents were "publicly vilified" at a school board meeting. Both families received anonymous threatening phone calls at home. Joanne Bell, who went to the school to check on her children, was attacked by a school employee who bashed her head against a car door and threatened to kill her. Later, when she was attending her son's football game, her house burned to the ground. Though police suspected arson, no one was arrested.

These events occurred, not in some distant nation in another era, but in Oklahoma in the 1990s—all because these two families dared to challenge a public school for holding religious meetings during classtime.

Religious meetings in public school during classtime? In America's exceedingly pluralistic society, it's hard to imagine a more volatile recipe for religious strife. Yet this recipe is precisely what the House of Representatives cooked up on June 5, 1998, with the so-called Religious Freedom Amendment, proposed by Congressman Ernest Istook of Oklahoma and 150 fellow House members. Though the bill died in the House, the mere fact that it made it out of committee to the floor should warn Americans that their religious freedoms are still under assault, even by those who swear an oath to protect them.

Though brief and well crafted, the Istook amendment would have radically altered the nature of religious freedom in America. In its final form, the now defeated bill read: "To secure the people's right to acknowledge God according to the dictates of conscience: The people's right to pray and to recognize their religious beliefs, heritage or traditions on public property, including schools, shall not be infringed. The government shall not require any person to join in prayer or other religious activity, proscribe school prayers, discriminate against religion, or deny equal access to a benefit on account of religion."

On March 10, 1998, speaking from the floor of the House of Representatives, Istook stated, "In 1962 the Supreme Court said it did not matter if prayer was voluntary; students could not come together and pray together as they had since the founding of the republic." This amendment would "correct the problems that have been caused by federal courts over the last 30 years and would allow students to pray in schools or even invite a teacher to occasionally offer a prayer."

The 1962 Supreme Court decision referred to was *Engel v. Vitale*, in which the Court ruled that it is not the government's business to compose official prayers for any group of the American people. "When the power, prestige, and financial support of government is placed behind a particular religious belief," wrote Justice Hugo Black for the Court, "the indirect

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ILLUSTRATION BY RALPH BUTLER

coercive pressures upon religious minorities to conform to the prevailing officially approved religion is plain."

What's ironic about the proposed bill is that there was never a need for it. Even without the amendment, students have the opportunity and the right to pray whenever they want, either individually or in groups, at school. They may even discuss their religious views with other students as long as this activity is not disruptive. Students also can read their Bibles, say grace before meals, and pray before tests. Praying may be silent or out loud, as long as it does not disrupt. The limitations apply only to situations in which a student or teacher proselytizes a captive audience or "compels" other students to participate in any kind of religious activity—a limitation that would have been severely curtailed had this dangerous amendment passed.

That a Muslim child isn't forced to pray to Jesus or to sing hymns honoring the Trinity, but is merely required—by law—to listen while the rest of the class does, isn't religious freedom.

While the proposed amendment would not have allowed the government or schools to initiate school prayers, it would have allowed students before captive audiences—even over the intercom—to do so. Once that happens, a number of questions arise: What will the content of the prayer be? Who gets to choose the prayer? What happens to those students who find the prayers offensive or against their own religious beliefs? What happens to those who do not—for whatever reason—wish to take part in the prayer? Will a student of a minority religion get equal time to pray to the God of his or her religion? Will Muslim students be allowed to offer a prayer to Allah over the intercom? Will Jews be forced to attend worships in which Jesus is mentioned? Can Buddhist students offer prayers over the intercom? How about Jehovah's Witnesses, or Christian Scientists, or Mormons?

People forget the power of peer pressure. Students and whole groups would be subject to teasing or alienation for having beliefs different from their classmates. Speaking on behalf of the Religious Action Center of Reform Judaism, Mark J. Pelavin warned that "religious minorities in particular will suffer because it is nearly impossible for a student who wishes not to participate to feel comfortable leaving the classroom without feeling embarrassed or intimidated by his or her classmates, teachers, or school officials."

The bill's guarantee that no person shall be required to "join in school prayer or other religious activity" was no protection either. In numerous rulings the Supreme Court has said that merely pressuring a person, especially a child, to partake of, or even be exposed to, forms of worship that offend them is an establishment of religion. That a Muslim child isn't forced to pray to Jesus or to sing hymns honoring the Trinity, but is merely required—by law—to listen while the rest of the class does, isn't religious freedom.

Nor is excusing the kids from the exercises an answer. As a *New York Times* editorial in 1962 said regarding *Engel*, the archetypical school prayer case: "The establishment clause is a keystone of American liberty: and if there is one thing that the establishment clause must mean, it is that government may not set up a religious norm from which one has to be excused—as was the case with the children in the New York school who did not wish to recite the prayer," and which also would be the case if the Religious Equality Amendment had been passed.

Besides impacting religious behavior in school, the amendment would have also opened the door for sectarian prayer and the display of religious artifacts in courtrooms and other government buildings. It would permit Alabama judge Roy Moore to continue to display his hand-carved representation of the Ten Commandments and allow him to open each day's court session with a prayer by a Christian minister.

"It is time," Istook stated, "to reaffirm Americans' right to religious expression on public property."

According to Jamin Raskin, constitutional law professor at American University's Washington College of Law, these changes would "completely neutralize the Establishment Clause of the Constitution." The Establishment Clause, embodied by the Constitutional Framers in the First Amendment, states, in part, "Congress shall make no law respecting an establishment of religion. . . ." The 200-year tenure of this principle—which has permitted the traditions of religious pluralism and tolerance to flourish in this country sheltering those seeking relief from religious persecution, coercion, and intolerance—would, under the Istook amendment, have effectively been snuffed out.

The vague language of Istook's amendment left other questions unanswered. Who would lead prayer, and what belief would this person have to have in order to give it? Who draws the

line, and where will it be drawn on who gets to decide what religious symbol may be displayed where? This newfound right could also invite religious jealousies and aggressions between groups madly scrambling for the chance to expose their own religious artifacts in government buildings.

Included in the mandate of the amendment was that government shall not "deny equal access to a benefit on account of religion." This language has been interpreted by legal experts to mean that private religious schools could not be denied taxpayer funding simply because they are sectarian in nature. Rep. Henry Hyde (R-Ill.), chair of the House Judiciary Committee, stated that the purpose of the amendment was "to recognize the fact that where freedom of religion is to exist, religious schools are to be treated the same as secular schools are treated. . . . You can't discriminate against a school because it's religious."

Why not? The whole purpose of keeping tax money out of the hands of religions was to ensure that people don't work to support religious faiths that they don't agree with. On a more mundane level, Rep. Robert Scott (D-Va.) asked, "What happens when the Catholics must compete with the Baptists for limited school funding? How much better off will churches be once they become dependent on government funding?"

Also, who would have determined how the government funds are divided? Do the Wiccans, Satanists, and right-wing racist separatist religions get a piece of the pie too? What limitations will be placed on these funds?

Government funding for religion and related activities sooner or later entangles church-state relationships and inevitably weakens church autonomy. The inevitable result of this money means restrictions—on how to manage the money, accounting, monitoring, even sanctions when the money is perceived to be used improperly. Soon churches will come to rely on these funds, creating dependence problems. The government admittedly cannot fund all religious groups. Who gets a share, and who is discriminated against?

Fortunately these questions, though still relevant and manifested in a host of other church-state debates, went off the frontburner along with Istook's amendment. Despite intense lobbying on both sides (the Christian Coalition, strong supporters of the bill since its infancy, expended $500,000 in a last-minute campaign), the numbers 224 for and 203 against narrowly missed the two thirds necessary to carry the House.

The important question needed to be asked here is this: What does it say about the fragility of the Establishment Clause when more than half the members of Congress voted for a bill that would effectively have destroyed the clause? It says a lot.

For now, the Establishment Clause remains intact. But Istook's amendment was just one salvo in the fight that shows no promise of ending soon. Ralph Reed, then executive director of the Christian Coalition, stated, "This we can pledge: We will stay in this battle, and we will keep coming back, not only for this Congress, but in every subsequent Congress until an amendment is passed and sent to the states for ratification. . . . We are confident that we will begin to move the ball forward in this session and that ultimately we will see victory."

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Americans who care about protecting their freedoms better pray he's wrong. Justice Black, speaking for the High Court, wrote that "the First Amendment was written to stand as a guarantee . . . people's religions must not be subjected to the pressures of government for change each time a new political administration is elected to office." Those who won our freedom recognized the occasional tyrannies of governing majorities and amended the Constitution so that religious freedom was withdrawn, as much as possible, from majoritarian despotism.

The prosperity, the vitality, and the growth of faith in America—by far the most religious nation in the industrialized West—didn't happen by chance, but because this country has taken seriously the idea that religion is too sacred, too important, too fundamental to be promulgated and promoted by, of all things, the government. Despite the problems, the flaws, the paradoxes and exceptions, the principle has, indeed, worked well for Americans.

Nevertheless, more than half of the most recent Congress voted for an amendment that, if placed in the U.S. Constitution, would have undone it all. And if that fact doesn't frighten most Americans, it no doubt would have frightened Joanne Bell . . . especially as she stood in the ashes of her home.

ON RIGHTS & RESTRAINTS

By Carl H. Esbeck

The Structural Limits of the Establishment Clause

The purpose of the Establishment Clause is not to safeguard individual religious rights. That is the role of the Free Exercise Clause—indeed, its singular role. The purpose of the Establishment Clause, rather, is as a structural limit, one placed in the Constitution to restrain government from legislating or acting on any matter "respecting an establishment of religion."

What powers fall within the scope of these words and hence are denied to government? The answer greatly affects the authority of the modern nation-state as it interacts with religion and religious organizations.

Individual Rights and Structural Restraints

The difference between rights and structure within the overall Constitution is commonplace. For government to avoid violating an individual right is a matter of constitutional duty. On the other hand, for government to remain within its structural restraints is a matter of confining legislation and the actions of its officials to the scope of its delegated powers. A structural clause, to be sure, often has a laudable effect on individual rights when the branches of government (legislative, executive, and judicial) stay within their authority. Nevertheless, the immediate object of constitutional structure is the management of power: a dividing, dispersing, and balancing of the prerogatives of sovereignty. "Separation of powers" and "federalism" are mere shorthand for familiar forms of constitutional structure running horizontally and vertically, respectively, within the three-branch federal government and the multilayered system of national, state, and local governments.

The Establishment Clause is not an individual rights clause, but a power-limiting clause. Even in such archetypal no-establishment cases as those concerning religion in public schools, such as *Engel v. Vitale*[1] and *McCollum v. Board of Education*,[2] the Establishment Clause is applied not to relieve individual complainants of religious coercion or religious harm, but to keep in proper relationship two centers of authority: government and religion.[3] This is why in popular discourse it is said that the Establishment Clause is about "church/state relations" or the "separation of church and state." It is in this primary role—when invoked to keep the spheres of government and religion in the right relationship to each other—that the Establishment Clause broke free from older European patterns and made its most unique and celebrated contribution to the American constitutional settlement.[4]

The Establishment Clause can be a means of redress for personal harms, but only when the injury is not religious in nature, such as economic harm or damage to property,[5] constraints on academic inquiry by teachers and students,[6] or restraints on freethinking atheists.[7] Even in these situations, however, no-establishment is not transformed into a rights clause with the assigned task of protecting property, academic freedom, and freedom from religion. Rather, these injuries are remedied only consequentially to the Establishment Clause fulfilling its structuralist role. In these cases the role was limiting the power of government in the civil sphere to prefer religious practices over secular concerns. In such a paradigm the no-establishment principle orders, even in the absence of individual harm, the respective competencies of government and religion.

From time to time religious claimants have sought to enlist the Establishment Clause into

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serving as a rights-protecting clause, but the Supreme Court has rarely followed that course. In *Larson v. Valente*[8] the no-establishment principle was applied by the Court to entertain a claim involving discrimination among religious groups and hence redressing allegations of religious harm.[9] But this was most unusual[10] and probably wrongheaded, for *Larson* could just as easily—and more sensibly—have been grounded in the Free Exercise Clause.[11] Unlike the Establishment Clause, the Court utilizes the Free Exercise Clause to protect against personal religious harms and thus to safeguard individual religious rights.

To illustrate, if Congress in 1789 had not proposed an Establishment Clause for enumeration in the Bill of Rights, a *Larson*-type claimant could still have secured relief from official persecution by filing suit under the Free Exercise Clause. But without an Establishment Clause numerous other claimants, such as the department store in *Estate of Thornton v. Caldor, Inc.*,[12] the tavern in *Larkin v. Grendel's Den, Inc.*,[13] and the public school teacher desirous of expanding the science curriculum in *Epperson v. Arkansas*,[14] could not have successfully pleaded a free exercise claim because they suffered no religious harm.

The literature is often uneven when using the terms "religious freedom," "religious liberty," and "religious rights."[15] This essay equates all three, and the terms are used in the sense of an individual right that protects against personal religious burdens or harms. Such a right is secured by the Free Exercise Clause.[16] Moreover, the redressing of personal harm to an individual's religious belief or practice is the Free Exercise Clause's only function.[17] This makes sense because the clause is, by its terms, about prohibiting the free exercise *of religion* rather than unbelief.[18]

The Free Exercise Clause says nothing about prohibiting injuries such as encumbered use of one's property (*Thornton*) or hindered academic inquiry (*Epperson*). Nor does the clause prohibit the forced taking of oaths by freethinking atheists (*Torcaso*).[19] The latter is true because to suffer a personal religious harm an individual must first profess a religion. It follows that the Free Exercise Clause is not an all-purpose conscience clause.[20] It protects religiously informed belief and practice, nothing more. People can incur injuries other than religious harms, as in economic harm, loss of academic freedom, or coercion to profess a religious belief when they are agnostic or atheistic. These are individual harms, to be sure, but not religious harms.[21] They are left to be remedied, if at all, as a by-product of the Establishment Clause.

This is not to say that the Establishment Clause has nothing to do with religious liberty writ large.[22] Moreover, structural clauses do indirectly bear on the protection of individual rights, including religious rights. By delimiting and qualifying governmental sovereignty, structure often redounds to further secure individual rights. Conversely, although rights clauses have as their immediate purpose the protection of individual freedom,[23] they have a consequential impact on governmental power.

But this happy symmetry between structure and rights is no reason to conflate the two. The object of a structural clause is to set compensating checks on the powers of a modern nation-state, checks that must be honored whether or not individual complainants suffer concrete "injury in fact."[24] Because the Establishment Clause is a structural clause rather than a rights clause, it is vital that it be understood as such and be so applied.

In the hands of the Supreme Court, then, the task of the Establishment Clause is independent of the Free Exercise Clause's protection of individual religious rights. Neither clause is subordinate or instrumental to the other.[25] Nor is there "tension" between the clauses, as if they are sometimes pulled in opposite directions causing the courts wrongly to balance one against the other and thereby having to choose between them. This makes no sense.[26] It is not consistent with the First Amendment's text (neither clause has primacy over the other), nor are such conflicts inherent to the religion clauses and thereby logically unavoidable.[27] The religious rights of individuals and the ordering of relations between government and religion—while complementary, not contradictory—are altogether different enterprises.[28]

Unlike the Establishment Clause, the Court utilizes the Free Exercise Clause to protect against personal religious harms and thus to safeguard individual religious rights.

Locating the Boundary Between Religion and Government

Proper relations between religion and government (or "church and state") are codified in the text "make no law respecting an establishment of religion."[29] This structuralist limitation casts the Establishment Clause in the role of boundary keeper. In setting out to locate that boundary, it is a useful reminder that the "keeper's" task is to restrain government, not private individuals, not churches, and not religion.[30] Thus the role of no-establishment is not to pro-

tect people from other people. Nor is it to protect minority religions from majority religions. Nor is it to protect the nonreligious from the religious. Nor is it to protect government from the church. Rather its sole object is to limit government, including governmental decisions, to improperly ally with religion.

Identification of the precise topics that fall within the meaning of the restraint "make no law respecting an establishment of religion" necessarily entails substantive choices. That boundary has been disputed for over 2,000 years, so it would be naive to suppose that there is an easy formula for determining "what is Caesar's and what is God's." From the perspective of an elder statesman after a full life of public service, James Madison said: "I must admit moreover that it may not be easy, in every possible case, to trace the line of separation between the rights of religion and the civil authority with such distinctness as to avoid collision and doubts on unessential points."[31]

On the other hand, the difficulty should not be exaggerated. The differences are often, as Madison said, on "unessential points." In the vast number of cases a ready reference to the historic Western tradition as received on this side of the Atlantic[32] will yield a result on which there is considerable agreement. It is the hard cases that get most of the attention (e.g., aid to K-12 religious schools), thereby leaving the impression that the overall task of boundary keeping is hopelessly conflicted.

The Supreme Court has not left the lower courts, legislators, and litigants without guidance on this all-important question. The cases indicate that government does not exceed the restraints of the Establishment Clause unless it is acting on topics that are inherently religious. The Supreme Court has found that prayer,[33] devotional Bible reading,[34] veneration of the Ten Commandments,[35] classes in confessional religion,[36] and the biblical story of creation taught as science[37] are all inherently religious. Hence, by virtue of the Establishment Clause, these topics are off limits as objects of legislation or any other purposeful action by officials. Likewise, when government is called on to resolve doctrinal questions or related matters bearing on ecclesiastical polity, clerical office, or church discipline and membership, these subject matters are outside the competence of government.[38]

Closely related to these case-by-case designations of what is inherently religious and what is arguably nonreligious is the rule that the Establishment Clause is not violated when a governmental restriction (or social welfare program) merely reflects a moral judgment, shared by some religions, about conduct thought harmful (or beneficial) to society.[39] Accordingly,

overlap between a law's purpose and the mores of well-known religions does not, without more, render the law one "respecting an establishment of religion." Legislation concerning Sunday closing laws[40] and teenage sexual abstinence counseling,[41] laws that limit the availability of abortion,[42] and rules on interracial dating[43] and civil marriage[44] are subject matters that the Court has deemed not inherently religious.[45]

The Supreme Court has successfully avoided two mistakes when drawing the boundary between government and religion. First, the Court has not identified churches and other religious organizations (e.g., educational, charitable, and mission societies) and then assumed that religion is actually confined to those institutions. Churches and their affiliated ministries do not monopolize religion. Religiously grounded convictions and obligations show their influence in every area of life, not merely in church affairs. Hence, Establishment Clause violations can occur notwithstanding the complete absence of involvement by churches, mission societies, religious schools, and the like.[46]

Second, the Supreme Court has not set out to separate government from all that could be said to be religious. Rather, the separation is of government from matters inherently religious. A separation of government from all that is religion or religious would result in a secular public square, one hostile to the public face of religion. The Founders intended no such regime. There are extreme voices claiming for the Establishment Clause the ordination of a new secular order,[47] one that would thereby cabin religion in the "private" spaces of home and chapel. Still others lament that the Court has promulgated a right to a freedom *from* religion.[48] But the cases will not bear either of these readings.

Various justices of the Supreme Court, in short statements, have sought to encapsulate a definition of the boundary between government and the inherently religious. Justice Brennan wrote that the common thread in the Court's analysis of whether legislation transgresses the Establishment Clause restraint "is whether the statutes involve government in the 'essentially religious activities' of religious institutions."[49] Just a few years earlier Justice Harlan said "that where the contested governmental activity is calculated to achieve nonreligious purposes otherwise within the competence of the state, and where the activity does not involve the state so significantly and directly in the realm of the sectarian,"[50] then constitutional restraints are not exceeded. Justice Frankfurter set the no-establishment boundary in structuralist terms with these words: "The Establishment Clause withdrew from the sphere of legitimate legislative concern and competence a specific, but comprehensive, area of human conduct: man's belief or disbelief in the verity of some transcendental idea and man's expression in action of that belief or disbelief. Congress may not make these matters, as such, the subject of legislation, nor, now, may any legislature in this country."[51]

Each of these formulations will do, for they point to the same basic distinction between subjects that are inherently religious and subjects that are grounded in the morals, traditions, and cultural values of the political community and which can be explained in those terms. This approach, of course, unapologetically draws from the historic Western tradition as received in the American colonies.

"Inherently religious," then, means those exclusively religious activities of worship and the propagation or inculcation of the sort of tenets that comprise confessional statements or creeds common to many religions. The term includes, as well, the supernatural claims of churches, mosques, synagogues, temples, and other houses of worship, using those words not to identify buildings, but to describe the confessional community around which a religion identifies and defines itself, conducts its collective worship, divines and teaches doctrine, and propagates the faith to children and adult converts. A structuralist view places these matters—being in the exclusive sphere of religion—beyond the government's jurisdiction.

Of course, by relegating the Establishment Clause restraint to actions on matters inherently religious, the Supreme Court has *not* resolved all of the problems in defining the boundary between religion and government. There will always be boundary disputes, because the task of determining what is "inherently religious" generates tension between the Western tradition and the deeply held beliefs (religious and secular) of others.[52] A structuralist Establishment Clause is not substantively neutral.[53] Indeed, substantive neutrality is impossible, because every theory of government/religion relations necessarily takes a position on the nature and value of organized religion and on the purpose and direction of modern government.

The first line of defense for the Supreme Court's position is that its church/state bound-

ary is the constitutional settlement. As such, it is not to be tampered with under the guise of "judicial updating of our living Constitution." In the end, however, if the Court's government/religion boundary is to have staying power, it has to be defended not because it is neutral or noncontroversial, but because it is good. Indeed, it is a threefold good: it maximizes individual religious choice,[54] protects the institutional integrity of religious organizations,[55] and minimizes government-induced religious factionalism within the body politic.[56]

Under the structuralist settlement, then, the Establishment Clause is not a silver bullet for winning (or ending) the culture war.[57] Although the government/religion boundary—policed by the no-establishment principle—keeps government from taking sides on confessional and other inherently religious matters, moral and ethical questions are still proper objects of legislation. Whose morality will dominate the republic at any point in time and hence be reflected in the positive law of the nation is not predetermined by the Establishment Clause. That determination is left for the making based on who has the more persuasive argument in the marketplace of ideas, as well as the organizational acumen to promote it.

FOOTNOTES

[1] 370 U.S. 421 (1962). In *Engel* the Supreme Court considered a state program of daily classroom prayer in the public schools. Students not wanting to participate were excused without penalty (*Ibid.*, p. 423, n.2). The program was struck down despite the absence of legal compulsion or religion being imposed (*Ibid.*, pp. 430, 431).

[2] 333 U.S. 203 (1948). In *McCollum* the Supreme Court considered a program that permitted persons from the community to come onto the public school campus and conduct elective classes in religion. Enrollment was optional and required permission of the students' parents (*Ibid.*, p. 207, n. 2). The program was struck down despite the absence of legal compulsion or religion being imposed (*Ibid.*, pp. 232, 233 [Jackson concurring]).

[3] As the Court put it in *McCollum*, "the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other to within its respective sphere" (*ibid.*, p. 212). Some will be initially dismayed at the thought that the Establishment Clause does not have the object of protecting individual religious rights. But consider *Lee v. Weisman*, 505 U.S. 577 (1992), and *County of Allegheny v. ACLU*, 492 U.S. 573 (1989). In *Weisman* the Court found violative of the Establishment Clause prayer offered at public school commencement ceremonies. Attendance was voluntary, as was participation in the prayer. Complainants claimed no violation of their religiously informed conscience or other religious burden on their own religious belief or practice. In *Allegheny* the Court found a display on public property of a Christmas Nativity scene depicting the birth of Jesus Christ violative of the Establishment Clause. Viewing the display was, of course, a voluntary act. Once again the complainants claimed no coercion of conscience or other individual burden on their own religious practices as a result of the display. Professor McConnell criticized the Court for these decisions because "they have nothing to do with freedom of religion. There is not a single person in these cases who has been hindered or discouraged by government action from following a religious practice or way of life" Michael McConnell, "Freedom From Religion?" *The American Enterprise*, January/February 1993, pp. 34, 36. McConnell is surely correct in observing that no one in *Weisman* or *Allegheny* had their personal religious rights violated. But McConnell wrongly assumes that a violation of an individual's religious freedom is requisite to a violation of the Establishment Clause. The clause, as applied by the Supreme Court, is about something altogether different: limiting governmental power so as to keep in appropriate relationship religion and government. Thus, to understand *Weisman* and *Allegheny* the cases must be viewed as structural determinations by the Court that government exceeded its power by involving itself in a matter beyond its authority.

[4] Historian Stanford Cobb has observed that America's solution to the "world-old problem of church and state" was "so unique, so far-reaching, and so markedly diverse from European principles as to constitute the most striking contribution of America to the science of government" (Stanford Cobb, *The Rise of Religious Liberty in America* (1902), p. vii). (See Mark DeWolfe Howe, *The Garden and the Wilderness* [1965], pp. 156, 157). In *Joseph Burstyn, Inc., v. Wilson*, 343 U.S. 495 (1952), the Court found violative of free speech rights a law permitting censorship of films found to be "sacrilegious." The Court could have reached the same result under the Free Exercise Clause if the film producer sought to convey a religious belief, either about his own faith or a theological criticism of the faith of others. However, the Court also could have struck down the censorship law under the Establishment Clause and done so regardless of whether the film producer sought to convey a religious or secular message, for a no-establishment violation does not have as its object the redress of personal religious injury.

[5] *Estate of Thorton v. Caldor, Inc.*, 472 U.S. 703 (1985) (upholding claim of department store against labor law); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) (upholding claim of tavern seeking issuance of a liquor license); cf. *McGowan v. Maryland*, 366 U.S. 420, 430-31 (1961) (permitting economic claim by retail stores to be free of Sunday-closing law); *Two Guys From Harrison Allentown, Inc., v. McGinley*, 366 U.S. 582 (1961) (same).

[6] See *Edwards v. Aguillard*, 482 U.S. 578 (1987) (striking down a state law that required teaching of creation in public schools if evolution is taught); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (striking down a state prohibition on teaching evolution in public school science classes).

[7] See *Torcaso v. Watkins*, 367 U.S. 488 (1961). In *Torcaso* an atheist who otherwise qualified for a public office refused to take a required oath that professed belief in God. The Court held the oath requirement violative of the First Amendment without specifying either religion clause. If an individual objects to the oath out of a religious belief that forbids taking oaths, then they have a valid claim under the Free Exercise Clause. As an atheist, however, the claimant in *Torcaso* did not (indeed, by definition could not) suffer a religious injury as he professed to have no religious beliefs. Nevertheless, for a state to mandate taking of the oath would be a violation of the Establishment Clause as to all office seekers, including atheists, because confession of belief in a deity is a subject that remains in the realm of religion.

Atheists and agnostics are sensibly protected as well by the Free Speech Clause, for the rights implicated are freedom to believe and freedom to refrain from speaking.

[8] 456 U.S. 228 (1982).

[9] In *Larson* state charitable solicitation legislation distinguished between religious groups that received over half their revenues from their membership and those that did not. The law thereby favored long-founded churches over new religious movements. The Court held that for government to discriminate intentionally on the basis of religious affiliation is a violation of the Establishment Clause (*Ibid.*, pp. 244-256). The Court assumed the complainant, the Unification Church, was a church subscribing to a bona fide religion (*Ibid.*, p. 244, n.16).

[10] The only other Supreme Court case utilizing the Establishment Clause as a source of redress for personal religious injury is *Gillette v. United States*, 401 U.S. 437 (1971). In *Gillette* the Court held that exemptions from the military draft for those religiously opposed to all war but not for those willing to fight in a "just war" was not intentionally

discriminatory on the basis of religious affiliation and thus did not violate the Establishment Clause (*Ibid.*, pp. 450-454). Hence, *Gillette* acknowledged no-establishment as a source of redress for religious harm caused by religious discrimination but then went on to hold that this particular claim was without merit. *Larson* is thus the only Supreme Court case in which personal religious injury was redressed pursuant to the Establishment Clause.

[11] It is more sensible to conceptualize a government's intentional discrimination between two religious groups as injurious to the disfavored religion. If that had been done in *Larson*, the Court could have decided the case under the Free Exercise Clause. In order to resolve *Larson* under the Establishment Clause, as the Court did, one has to envision the government's discrimination as unconstitutional not because it hindered the disfavored religion, but because the discrimination effected a preference for competing religions. This framing of the claimants' injury is conceptually awkward. Official discrimination against a religion does have the potential of helping other religions, but then again it may turn out to be of no benefit to the competition. It would be better for the Court to focus on the harm to the victimized religion rather than to speculate about benefits to competing religions. The Court did proceed in the more logical fashion suggested here in *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520 (1993) (holding ordinances that ostensibly regulated the ritual sacrifice of animals but whose real object was to inhibit the practices of a particular church as violative of the Free Exercise Clause).

[12] 472 U.S. 703 (1985). In *Thornton* a department store chain successfully sued to overturn a state law giving employees an unyielding right to be excused from work on an employee's Sabbath.

[13] 459 U.S. 116 (1982). In *Larkin* the owner of a bar was denied a municipal liquor license. The relevant ordinance permitted churches within 500 feet of an applicant to veto the issuance of a license. Alleging pecuniary harm as a result of the denial, the owner successfully overturned the ordinance as an unconstitutional delegation of sovereign power to a religious organization.

[14] 393 U.S. 97 (1968). In *Epperson* a high school biology teacher successfully sued to overturn a state law that prohibited the teaching of Darwin's theory of evolution in the public schools.

[15] As used in this essay "individual" or "personal rights" includes the "group rights" of a church or other religious entity in which the entity has organizational standing to assert a rights claim on behalf of its collective membership pursuant to the three-part test set out in *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977). See Erwin Chemerinsky, *Federal Jurisdiction*, 2nd ed. (1994), sect.2.3, pp. 103, 104. The common feature of individual rights and group rights is that in both instances there is no violation of a constitutional right in the absence of a showing of personal "injury in fact." The violation of a structural clause need not be so attended.

There are no Free Exercise Clause rights for a religious group over and above the aggregated individual rights of the entity's membership. However, as discussed below, the Establishment Clause in its role as a limit on governmental power does afford religious groups institutional autonomy when acting on matters reserved to the sphere of religion.

Some may initially be dismayed that the Free Exercise Clause does not protect religious organizations (beyond the aggregate rights of their members) in preserving the group's autonomy and religious character in the face of governmental intrusion. But again, as will be seen below, religious organizations have such safeguards, but they are secured by the Establishment Clause rather than the Free Exercise Clause. The well-meaning project to force such safeguards into the Free Exercise Clause under the banner of "accomodationism" has caused all manner of doctrinal confusion.

[16] The Free Exercise Clause is violated when government enforces a restriction that intentionally discriminates against religion, religious practice, or against an individual because of his or her religion (*Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520 [1993]). However, a law's unintended discriminatory effect adverse to a religious belief or practice is not, without more, a free exercise violation (*Employment Division v. Smith*, 494 U.S. 872 [1990]).

A persistent minority of the justices on the Supreme Court indicate that they would go further and recognize Free Exercise Clause protection for disparate effects on religion. Compare *City of Boerne v. Flores*, 117 S. Ct. 2157, 2176-85 (1997) (Justice O'Connor dissenting) (*Smith* should be reconsidered), with *ibid.*, pp. 2172-2176 (Scalia concurring) (defending *Smith* decision); see also *Lukumi*, 508 U.S., pp. 570, 571 (Justice Souter concurring) (*Smith* should be reconsidered). There is no need in this essay to take sides in the debate over whether *Smith* was correctly decided. Whatever the proper scope of the Free Exercise Clause, the injury it redresses is in the nature of personal religious harm and nothing more. However, some critics of *Smith*, seemingly reeling from their loss, are forgetting that a structuralist Establishment Clause affords considerable autonomy to religion and religious organizations.

[17] *Harris v. McRae*, 448 U.S. 297, 320 (1980) (denying standing to bring free exercise claim in absence of alleged religious compulsion); *Tilton v. Richardson*, 403 U.S. 672, 689 (1971) (rejecting free exercise claim because there was no evidence of impact on claimants' religious belief or practice); *Board of Education v. Allen*, 392 U.S. 236, 249 (1968) (holding free exercise claim without merit in absence of religious burden); *School District v. Schempp*, 374 U.S. 203, 221, 223 (1963) (holding that in a free exercise claim it is necessary to show governmental coercion on the practice of religion); *ibid*, p. 224, n. 9) ("The requirements for standing to challenge state action under the Establishment Clause, unlike those relating to the Free Exercise Clause, do not include proof that particular religious freedoms are infringed."); *Engel v. Vitale*, 370 U.S. 421, 431 (1962) (stating that the Establishment Clause goes much further than to relieve coercive pressure on religious belief and practice); *McGowan v. Maryland*, 366 U.S. 420, 429 (1961) (denying standing to plead free exercise claim when alleged damages were economic rather than religious).

Some may object because this leaves too little work for the Free Exercise Clause. I have two responses. First, the work of prohibiting intentional discrimination on the basis of religion is important work indeed. Second, if the reader believes stopping intentional discrimination is not enough for this venerable clause, then that is not my doing but the doing of the Supreme Court in the controversial *Smith* decision. See note 16.

[18] See John H. Garvey, "An Anti-Liberal Argument for Religious Freedom," *Journal of Contemporary Legal Issues* 7 (1996): 275, addressing the contention that the Free Exercise Clause protects unbelief as well as religious belief: "This conclusion is hard to square with the language of the first amendment, which protects only the free exercise 'of religion.' Rejecting religion is an exercise of freedom, but it is not an exercise of religion. (Amputation is not a way of exercising my foot.)" (*ibid.*, p. 276). It might be argued that liberty in religious matters cannot end with freedom to embrace and practice one's faith, for liberty also includes freedom to reject and refuse to practice the faith of others. And that would indeed be so if the clause read "Congress shall make no law . . . prohibiting religious freedom." But that is not the text. Rather, the text reaches out to individuals who have a religion, assuring their *exercise* thereof. Professor Garvey is right: an individual must first have a faith to exercise before its exercise can be unconstitutionally prohibited. I personally would prefer a broader text, but must work with the text as given. And that more narrow Free Exercise Clause explains why the Supreme Court decides cases devoid of religious harm, such as *McCollum, McGowan, Engel, Schempp*, and *Thornton*, under the Establishment Clause.

[19] See note 7 (discussing *Torcaso*).

[20] *Frazee v. Illinois Department of Employment Security*, 489 U.S. 829, 833 (1989); *Thomas v. Review Board*, 450 U.S. 707, 713-714 (1981); *Wisconsin v. Yoder*, 406 U.S. 205, 215-216 (1972) (identifying claims that are "personal and philosophical" and those "merely a matter of personal preference" as "not ris[ing] to the demands of the religion clauses"). Cf. *Welsh v. United States*, 398 U.S. 333 (1970) (plurality opinion). *Welsh* is not contrary to the point set forth in the text. First, *Welsh* involved the definition of religion for purposes of legislation rather than for the First Amendment. Second, because there was no majority opinion, *Welsh* is binding only on the narrow issue decided.

[21] When the religious harm is to speech of religious content or to associations formed by religious individuals, it has long been the

practice of the Court to protect the free exercise of religion under the Free Speech and Free Press clauses. See, for example, *Widmar v. Vincent*, 454 U.S. 263 (1981) (striking down restrictions on student religious groups wanting to meet in state university buildings designated as limited public fora as violating of the Free Speech Clause); *Lovell v. City of Griffin*, 303 U.S. 444 (1938) (overturning ordinance prohibiting distribution of literature of any kind as abridging right of Jehovah's Witnesses to freedom of the press); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (holding that compulsory flag salute at public school denies freedom of speech and freedom of belief as applied to Jehovah's Witnesses). By subsuming where possible protection from religious harm under the Free Speech and Free Press clauses, the Court has given religious rights a broader and hence more secure base. The constitutional protection for speech and press from content-based and viewpoint-based discrimination by governmental officials is well settled in the courts and widely accepted at the popular level.

The Free Speech and Free Press clauses are unable, of course, to protect religious activity that has no appreciable expressional content. Concerning such activity, the Free Exercise Clause alone must be looked to as the source of constitutional protection from personal religious injury. Justice White, dissenting in *Welsh v. United States*, 398 U.S. 333 (1970) (plurality opinion), stated the matter well: "It cannot be ignored that the First Amendment itself contains a religious classification. The Amendment protects belief and speech, but as a general proposition, the free speech provisions stop short of immunizing conduct from official regulation. The Free Exercise Clause, however, has a deeper cut: it protects conduct as well as religious belief and speech" (*ibid.*, p. 372).

[22] This essay distinguishes between, on the one hand, religious rights personal to individuals and groups of individuals (see note 15) and, on the other hand, religious liberty writ large. The latter is a liberty that is best described as classwide, collective, or in the interest of larger societal competencies. The Establishment Clause has the object of protecting not individuals *qua* individuals, but two large bodies in civil society: the body politic on the one hand, and religion and religious organizations on the other. The natures of the injury to these respective spheres of competence are explored below.

[23] The Free Exercise Clause, as well as the four expressional clauses in the First Amendment (speech, press, petition, and assembly), are all of this ilk. Their object is to protect individual rights. They work only indirectly to limit the power of the sovereign.

[24] This is why federal taxpayers, without any showing of personal "injury in fact," are granted standing to pursue Establishment Clause claims challenging spending programs. See *Flast v. Cohen*, 392 U.S. 83 (1968).

[25] Grammatically there is but one First Amendment clause that explicitly concerns religion. The existence of a single clause has been parlayed into an argument that one Religion Clause has but one meaning, and that one meaning is protecting religious exercise. Thus, it is asserted, the no-establishment text is but a means to serve the free exercise text. The consequence is that no-establishment becomes a mere tool in aid of free exercise. See Richard John Neuhaus, "The Most New Thing in the Novus Ordo Seclorum," in *First Things* 85 (August/September 1998) pp. 75-78. Richard John Neuhaus, "Establishment Is Not the Issue," *The Religion and Society Report* 4, no. 1 (June 1987).

Notwithstanding this grammatical correction, the single clause consists of two prepositional phrases. The question of juridical meaning, therefore, is not advanced by observing that there is but one Religion Clause. Each phrase carries its own idea. Both the Senate and House in the First Congress debated and amended the text of the first clause of the First Amendment as having independent phrase with two distinct meanings. The current style is to refer to two religion clauses, and that practice is followed in this essay. To discard that style and substitute the "establishment phrase" and the "free exercise phrase" still leaves us with two different and independent legal principles.

[26] See *Valley Forge College v. Americans United*, 454 U.S. 464, 484 (1982) ("[W]e know of no principled basis on which to create a hierarchy of constitutional values.").

[27] The analytics of the problem still leads a few academics into thinking that the "tension" between the Free Exercise and Establishment clauses is inherent and irreconcilable. See, for example, Suzanna Sherry, *Lee v. Weisman: Paradox Redux*, 1992 *Supreme Court Review* 123-125, 129, 130. However, when "freedom from religion" is removed from the Establishment Clause side of the ledger as an individual right, the supposed "tension" falls away. Such a move does not leave "freedom from religion" without constitutional protection. It does mean, however, that to the extent that the First Amendment does protect a "freedom from religion," it does so as a by-product of the structural restraint on governmental power found in the Establishment Clause.

[28] There are of course going to be a few occurrences in which a single harm is simultaneously a violation of a rights clause and a use of power by the sovereign that transgresses a structural clause. In the context of this essay, there are situations where a single harm can properly give rise to a claim under the Free Exercise Clause and the Establishment Clause. To illustrate, assume a public school adopted a regulation requiring that the Lord's Prayer be recited by students at the beginning of each classroom day. A third-grade Muslim student is compelled to recite the prayer. As a Muslim, the student has suffered a religious harm for which the Free Exercise Clause gives individuated relief. The student could also claim under the Establishment Clause, leading to both individuated relief and an injunction against school-wide enforcement of the prayer regulation.

[29] While initially restraining only the sovereignty of the national government (*Permoli v. Municipality No. 1*, 44 U.S. [3 How.] 589 [1845]), the Establishment Clause is now applicable to state and local governments through the Due Process Clause of the Fourteenth Amendment (*Everson v. Board of Education*, 330 U.S. 1 [1947]).

[30] The Establishment Clause, indeed the entire Bill of Rights, is a check on government alone. Hence the Establishment Clause can be transgressed only by government. Richard John Neuhaus writes: "The religion clause of the First Amendment is entirely a check upon government, not a check upon religion. Even if a particular religion were to agitate successfully to have itself officially established, it is the government that would have to do the establishing. And that is what the government is forbidden to do. As wrongheaded as it would be, religions are perfectly free to agitate to have themselves established, for that too is part of religious freedom. What is prohibited by the First Amendment is the [use] of government power in giving in to such agitations. . . . The religion clause is not then, as some claim, a check upon both government and religion, nor is it a provision in which two clauses are to be "balanced" against one another. The religion clause is not to protect the state from the church but to protect the church from the state. Similarly, in press-state relations, the First Amendment is not to protect the state from the press but to protect the press from the state. The 'great object' of the Bill of Rights, [James] Madison most explicitly said when introducing his draft to the House [of Representatives], was to 'limit and qualify the powers of Government'" Richard J. Neuhaus, "Establishment Is Not the Issue," *The Religion and Society Report* 4, no. 1 [June 1987]: 3. Secular modernists are prone to assume that religious ideologies are more intolerant and violent than secular ideologies; thus they assume that the Establishment Clause is there to protect them from the excesses of religion. But the clause can protect them from only the excesses of government.

[31] Letter from James Madison to Rev. Adams dated 1832, *The Writings of James Madison* IX (Gaillard Hunt, ed., 1910), p. 487.

[32] It should come as no surprise that a structuralist clause looks to the Western tradition as received in the American colonies. It could hardly look elsewhere. The Founders (as well as the Constitution they wrote) were immersed in Western thought, and America's unique arrangement of government/religion separation comes out of an alliance of two threads within that Western tradition. John Witte, Jr., "The Essential Rights and Liberties of Religion in the American Constitutional Experiment," *Notre Dame Law Review* 71 (1991): 371, 377-388 (discussing separationism as the common cause of Enlightenment rationalists and Protestant pietists); *Donald L. Drakeman, Church-State Constitutional Issues: Making Sense of the Establishment Clause* (1991), pp. 55-58 (Enlightenment thinkers, allied with Baptists and Quakers,

sought the same political result but for reasons that differed). Indeed, the First Amendment's regard for religious freedom and no-establishment cannot be understood apart from their religious justifications. Stephen L. Carter, "The Free Exercise Thereof," *William and Mary Law Review* 38 (1997): 1627, 1632, 1633; Steven Smith, "The Rise and Fall of Religious Freedom in Constitutional Discourse," *University of Pennsylvania Law Review* 140 (1991): 149, 154-166.

[33] *Lee v. Weisman*, 505 U.S. 577 (1992); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *School District v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

[34] *School District v. Schempp*, 374 U.S. 203 (1963).

[35] *Stone v. Graham*, 449 U.S. 39 (1980) (per curiam).

[36] *McCollum v. Board of Education*, 333 U.S. 203 (1948).

[37] *Edwards v. Aguillard*, 482 U.S. 578 (1987); *Epperson v. Arkansas*, 393 U.S. 97 (1968).

[38] Concerning matters that will touch on doctrine, disputes over doctrine, ecclesiastical polity, the selection or promotion of clerics, and dismissal from church membership, the Supreme Court has said that civil courts are without subject matter jurisdiction. See for example *Serbian E. Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-24 (1976) (civil courts may not probe into church polity); *Maryland and Virginia Churches of God v. Church at Sharpsburg*, 396 U.S. 367, 368 (1970) (per curiam) (avoid doctrinal disputes); *Presbyterian Church v. Hull Church*, 393 U.S. 440, 451 (1969) (civil courts forbidden to interpret and weigh church doctrine); *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190, 191 (1960) (per curiam) (First Amendment prevents judiciary, as well as legislature, from interfering in ecclesiastical governance of Russian Orthodox Church); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 119 (1952) (First Amendment prevents legislature from interfering in ecclesiastical governance of Russian Orthodox Church); *Watson v. Jones*, 80 U.S. (15 Wall.) 679, 725-733 (1872) (rejecting implied trust rule because of its departure-from-doctrine inquiry). These subject-matter dismissals do not reference Article III of the Constitution, for there is nothing in Article III that limits federal court jurisdiction as to these matters. Rather, the cases reference the Establishment Clause and the necessity to keep in proper relation the institutions of church and state.

[39] *Bowen v. Kendrick*, 487 U.S. 589, 604, n. 8, 613 (1988) (counseling of teenagers concerning sexuality not inherently religious); *Bob Jones University v. United States*, 461 U.S. 574, 604, n. 30 (1983)(tax regulation prohibiting racial discrimination in education not inherently religious); *Harris v. McRae*, 448 U.S. 297, 319, 320 (1980) (restrictions on abortion not inherently religious); *McGowan v. Maryland*, 366 U.S. 420, 431-449 (1961) (Sunday closing law is not inherently religious); *Two Guys From Harrison-Allentown, Inc., v. McGinley*, 366 U.S. 582, 592-598 (1961) (same); *Gallagher v. Crown Kosher Super Market*, 366 U.S. 617, 624-630 (1961) (same); *Hennington v. Georgia*, 163 U.S. 299, 306-307 (1896) (prohibition on Sunday operation of trains not inherently religious).

[40] *McGowan v. Maryland*, 366 U.S. 420 (1961); *Two Guys From Harrison-Allentown, Inc., v. McGinley*, 366 U.S. 582 (1961).

[41] *Bowen v. Kendrick*, 487 U.S. 589 (1988).

[42] *Harris v. McRae*, 448 U.S. 297 (1980).

[43] *Bob Jones University v. United States*, 461 U.S. 574, 604, n. 30 (1983) (interracial dating).

[44] *Reynolds v. United States*, 98 U.S. 145, 162-167 (1879) (antipolygamy law regulates the civil law of marriage).

[45] See *Bowers v. Hardwick*, 478 U.S. 186 (1986). Although not referencing the Establishment Clause, it is implicit in *Bowers* that the Court does not consider the regulation of intimate sexual relations inherently religious.

[46] See, for example *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985) (striking down state labor law that guaranteed private sector employees right not to work on Sabbath); *Stone v. Graham*, 449 U.S. 297 (1980) (per curiam) (disallowing posting of Ten Commandments in public school classrooms for veneration); *Epperson v. Arkansas*, 393 U.S. 97 (1968) (striking down state law prohibiting teaching of evolution in public schools); *Engel v. Vitale*, 370 U.S. 421 (1962) (disallowing state program of classroom prayer in public school).

[47] See Suzanna Sherry, "Enlightening the Religion Clauses," *Journal of Contemporary Legal Issues* 7 (1996): 473, 483-489 (arguing that rationalism is constitutionally preferred over religion); Kathleen M. Sullivan, "Religion and Liberal Democracy," *University of Chicago Law Review* 59 (1992): 195, 197-214, 222 (contending that the First Amendment's negative bar against an establishment of religion implies an affirmative establishment of a secular public order). The multicentury tradition of American politics being rooted in contrasting theological persuasions is so well documented as to make silly these revisionist claims that the Establishment Clause rendered religion of persuasive force only in the "privacy" of home and church. See, for example, James L. Guth et al., *The Bully Pulpit: The Politics of Protestant Clergy* (1997).

[48] See note 3, McConnell, p. 36.

[49] *Lemon v. Kurtzman*, 403 U.S. 602, 658 (1971) (Brennan concurring).

[50] *Board of Education v. Allen*, 392 U.S. 236, 249 (1968) (Harlan concurring) (internal quotation omitted).

[51] *McGowan v. Maryland*, 366 U.S. 420, 465-466 (1961) (Frankfurter concurring in the judgment). See also *ibid.*, p. 465 (1961) (Frankfurter concurring). ("The purpose of the Establishment Clause was to assure that the national legislature would not exert its power in the service of any purely religious end; that it would not, as Virginia and virtually all of the Colonies had done, make of religion, as religion, an object of legislation.") Douglas Laycock, "The Benefits of the Establishment Clause," *DePaul Law Review* 42 (1992): 373, 381. ("What the Establishment Clause separates from government is theology, worship, and ritual, the aspects of religion that relate only to things outside the jurisdiction of government. Questions of morality, of right conduct, of proper treatment of our fellow humans, are questions to which both church and state have historically spoken.")

[52] Secular modernists are sometimes offended by this, but common sense would indicate that reference to the historic Western tradition should be expected. Any other path would be a deviation from the intent and context of the Framers. See Clifford Goldstein, "The Theology of a Godless Constitution," *Liberty* May/June 1998, pp. 30, 31. That there are those outside the Western tradition as received in America that are displeased with this location of the church/state boundary is cause for sensitivity and (when prudent) accommodation. But it is not a reason to relocate that boundary under the guise of judicial "updating" of the Establishment Clause. Any shifting of the church/state boundary will just create new grievants, for, again, there is no substantively neutral location for the boundary between church and state.

[53] The structuralist settlement is a formal legal rule, but it is not substantively neutral. If it is objective lawmaking that is desired, the best a legal system can do is to pick a formal legal rule and then rigorously and dispassionately apply it without regard to the winners and losers in any fact-specific case that should later come before a judge. Such formal rules provide clarity and reduce judicial subjectivity. But the initial choice of a particular formal rule, necessarily rejecting competing rules, is a value-laden judgment that is in no sense substantively "neutral." At bottom all claims of neutrality are a mask. See note 18, Garvey, pp. 290, 291 (liberalism is not neutral, but makes "assumptions about human nature (the unencumbered self, the value of authenticity) that are inconsistent with convictions that many religious people hold"); Steven D. Smith, *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom* (1995) p. 68. ("A different religion or a secular viewpoint will support different background beliefs that logically generate different views or theories of religious freedom.")

[54] See Douglas Laycock, "The Underlying Unity of Separation and Neutrality," *Emory Law Journal* 46 (1997): 43, 69.

[55] See note 38 (collecting cases on church autonomy).

[56] See Ira C. Lupu, "To Control Faction and Protect Liberty: A General Theory of the Religion Clauses," *Journal of Contemporary Legal Issues* 7 (1996): 357.

[57] Douglas Laycock, "Religious Liberty as Liberty," *Journal of Contemporary Legal Issues* 7 (1996): 313, 327.

THE LOGIC OF HATE

"Men never do evil so completely and cheerfully as when they do it from religious conviction."

—Blaise Pascal

For Aristotle the propositional calculus of negation (if p, then not not-p) was an "ultimate belief . . . the starting point of all other axioms" *(Metaphysics)*. It's the simplest proposition of formal logic: something cannot be true without its contrary, its negation, being false. For Aristotle this truth was too basic for demonstration.

Negation also explains why religious people tend to hate and kill each other. If a person believes in the kenotic theory of Christ, then that person must, of logical necessity, reject all conflicting positions. To hold that imputed righteousness *alone* is salvific demands denial of all theology that includes imparted righteousness as meritorious. Belief in any deity automatically renounces all purely materialistic worldviews.

Religious beliefs, of course, aren't peripherals, such as one's preference for Impressionism over Cubism, Dmitry Shostakovich over Dizzy Gillespie, or (like Tolstoy) *Uncle Tom's Cabin* over *King Lear.* They are, instead, the most important and fundamental of all human beliefs, the first principles from which whole peoples and nations derive their identity, purpose, and meaning. Thus, when you hold fundamental and crucial theological positions that cannot be true without another's fundamental and crucial theological positions being false, then implicitly you are a personified rebuke to all that's (for them) sacred. You never have to challenge their beliefs openly; your mere existence is an affront.

Formal logic, then, explains religious bigotry and persecution. Jesuit Robert Parsons in Elizabethan England, with rigorous consistency, argued that if a person is convinced that his faith is the only true one, then "it followeth necessarily that he must likewise persuade himself that all other religions besides his own are false and erroneous; and consequently all assemblies, conventicles, and public acts of the same [persons] are wicked and dishonorable to God," and must be stopped by whatever means necessary. Lest one believe this intolerance was merely a Catholic problem, Martin Luther once said, "I can no wise admit that false teachers should be put to death. It is sufficient to banish them." However, a year later he changed his mind: the sword, he urged, must be used against heretics.

Religious faith, by seeking to explain the ultimate reality into which all else can be resolved and which itself cannot be resolved into anything else, doesn't—by sheer logical necessity—easily tolerate contraries. Certain "truths" automatically exclude the possibility of others; what "is" inherently implies what "isn't." And when truth—which by its very nature is exclusionary—excludes the premises upon which people build their worldviews, tolerance (for lack of a better word) becomes illogical. "Tolerance in religion," wrote Reinhold

Niebuhr, "frequently means an irresponsible attitude toward the ultimate problem of truth."

There is, however, one way around intolerance as an analytic predicate of religious faith—and that is if (and only if) *inherent in that faith is the fundamental acceptance of those who hold contrary religious beliefs.*

Though Christian history mocks the notion, the Christian faith does have that teaching built into its very fabric. Jesus said that "Thou shalt love thy neighbor as thyself" (Mark 12:31) was the second of the two greatest commandments. With the exception of the first (loving God with all your heart), one can't get more basic than second. Thus, loving even those whose views oppose yours is about as fundamental as fundamental Christianity can get. Indeed, Christ's command didn't say, "Love your neighbor as yourself, just as long as your neighbor doesn't hold teachings that contradict yours." On the contrary, Christ's cryptic statement, without any qualifications, means, "You shall love your neighbor as yourself, even if that neighbor holds beliefs that can't be true without your beliefs—including the one to love your neighbor as yourself—being false."

Jesus never said to love your neighbor's beliefs, only your neighbor—a big difference, one that would have changed the course of Christian history had those who thought they were following the first great commandment by violating the second understood that only by keeping the second were they keeping the first.

Until that truth, that of loving even those whose fundamental views conflict with your own, becomes a practical reality in the lives of the faithful, religious intolerance will follow religious belief.

Anything else would be, well, illogical.

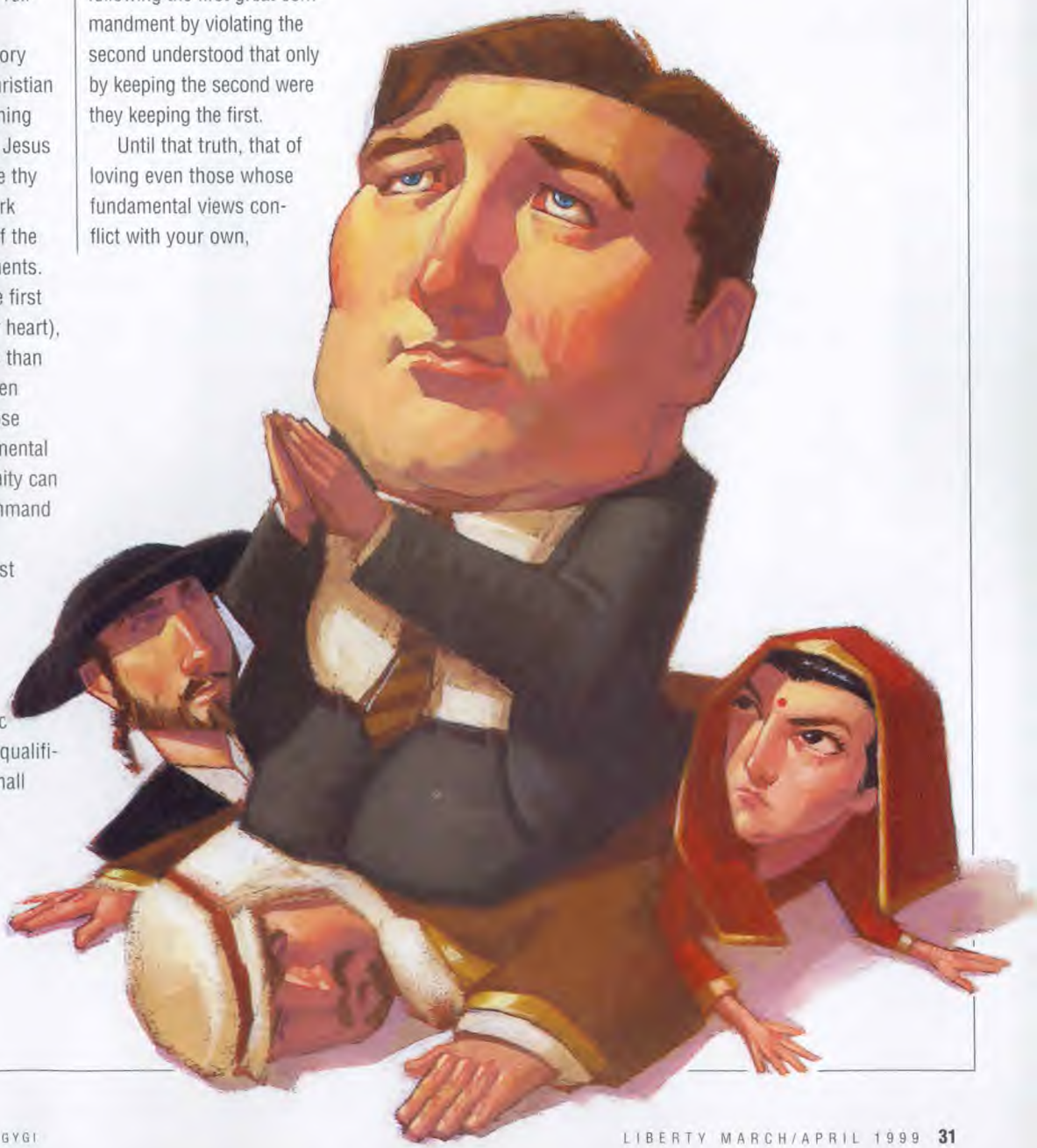

ILLUSTRATION BY DARREN GYGI

"All religions united with government are more or less inimical to liberty. All separated from government, are compatible with liberty."

HENRY CLAY, *American statesman and orator (1777-1852), in an address to the U.S. House of Representatives, March 24, 1818.*