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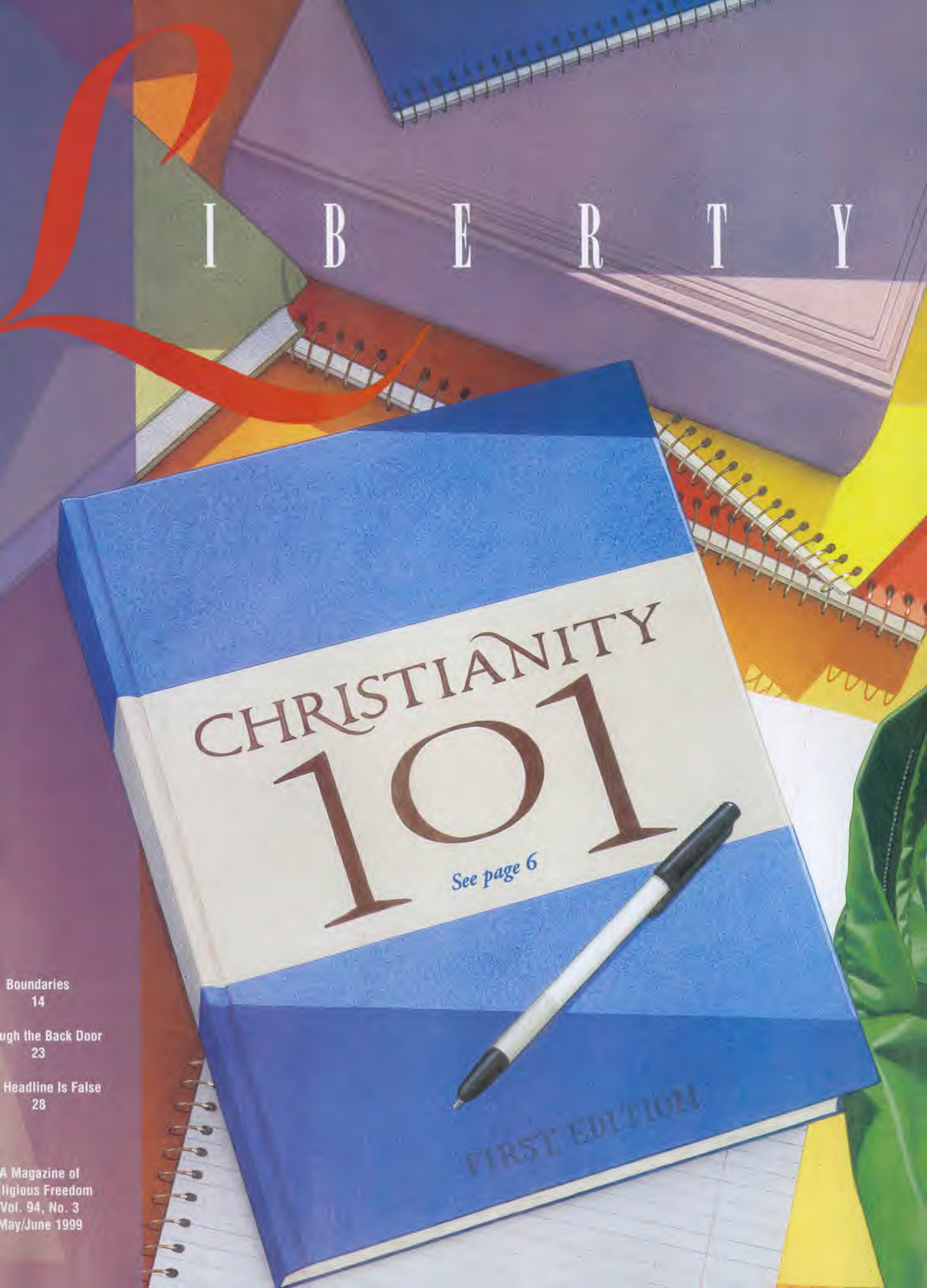

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Goodbye, Goodbye, and *Goodbye!*

If your amateurish, uncharitable, and sophomoric writings as editor of *Liberty* weren't so bigoted and un-Christian, they wouldn't be deserving of a response. Unlike Father John Neuhaus, however, I have yet to shake your dust from my feet (as he apparently has). And despite your rhetoric of "liberty" and "freedom of speech," I am confident you will not print this letter.

So, when you infer that Pope Paul II believes neither in salvation by grace alone or the writings of St. Paul, I will point out how alien your words of deceit and hate are to God's grace. I will point out the harmony between the Pope's behavior, teaching, and life (as the chief shepherd of Christ's Church and successor to St. Peter) to St. Paul's epistles.

If we are to use the reason God gave us to judge your words, we will ask why you persist in either ignorance or lies about the Catholic Church's teaching? In either case, you cannot deny your accountability. You cannot deny God's ability to work His grace through mere men, despite how difficult that may be for you to understand or accept.

When you profess to hold the Bible (both the Old and New Testaments) as your sole authority in faith, all the while abstaining from pork and alcohol, which is plainly inconsistent with "the content and the unity of the whole of Scripture," I will again point out the contrast between your words and your deeds.

Perhaps as you wear your religious libertine streak on your sleeve, you can explain how you rationalize your cries for nongovernment interference in the Seventh-day Adventist Church with your insistence for government interference regarding tobacco use? Can you point out to your readers where the Bible, which you claim to be your sole authority, commands the government to crusade against unhealthy personal practices such as smoking (is eating fatty foods next?), but seems to cause such animosity for you when religious leaders such as Father Neuhaus call on government to protect unborn life?

Finally, let me state, in reference to your editorial quip in Deborah Baxtrom's article "Rules to Live By" (November/December 1998), that once again your position which you find so necessary to add to an otherwise well-written article, is not only infantile but unbiblical. Mr. Di Loreto is not giving "only one version of the Ten Commandments, the one that appears in Catholic catechisms." There is only one version, that found in the Bible. Neither your enumeration or the Catholic one (which dates back at least to St. Augustine, not the deformation as you suggest), fully quotes the biblical text. It is "your" list which came about from the deformation of the sixteenth century, like everything else, as a protest against Catholicism.

If you read carefully, you will note that the prohibition against having "no other gods before me" would include idols, since the Christian understanding of "idols" is that which is worshiped as a god. If any version is deficient, it would be the Protestant version, since the invention in the sixteenth century to combine the ninth and tenth commandments—which are clearly different. Sure, you can claim that coveting your neighbor's wife is identical to coveting his property, but one is adultery in my Bible and the other greed and envy. We Catholics call those different and hence two separate commandments.
PETER M. DYGA
Via E-mail

Your views are too radical for me. I am a conservative, evangelical member of the Religious Right and am proud of my faith in the Lord Jesus Christ. I would rather be a Religious Right advocate than a left-leaning liberal. I find your views too liberal and upsetting. Please remove my name from your mailing list.
E. LYNN MYERS, Pastor
Blue Water Free Methodist Church
Marysville, Michigan

I was surprised at your attack on the ACLU in your editorial on high-tech hate speech in the November/December 1998 issue. In a gratuitous aside, you accused the ACLU of using its "best efforts"

to extend constitutional protection to child pornography. That statement is false. The ACLU supports child pornography laws that protect children from sexual exploitation, as a simple phone call or visit to their web site would have told you. The fact that the editorial would depart from its subject to make a hateful remark about the ACLU is doubly surprising since that organization is one of the leaders in the fight for religious liberty. Among its regular clients are Jehovah's Witnesses, Seventh-day Adventists, Jews, and Native Americans whose freedom to exercise their religious beliefs is being abridged.

Finally, a malicious remark designed to be hurtful to a group of people (whether you like them or not) seems inappropriate in a magazine normally devoted to fostering Christian tolerance toward all. I think you owe the members of the ACLU an apology.
J. ALEXANDER TANFORD
Via E-mail

I was recently given a copy of the May/June 1998 *Liberty.* Not knowing much about the Seventh-day Adventist Church, but hearing that it was a Christian denomination, I thought the publication would be a pro-Christian magazine. Wrong! I found through your articles that your beliefs on the First Amendment to the Constitution were that of the pagan left. Your articles on Alabama's fight to preserve the rights of Americans past the school doors and in other public institutions were straight from the writings of the anti-Christian ACLU. Your publication will probably receive the 1998 Religious Freedom award from the pagan organization, Americans United for Separation of Church and State. An award you will no doubt display with pride.

More than once your articles reminded the reader that the Constitution, since 1962, has separated Christianity from the state. However, for nearly 200 years prior to 1962 our Constitution allowed Christianity and prayer in schools and other public arenas. Which society was saner and safer? The first 200 years of interpretation or the last 36?
JERRY D. DENE
Bowling Green, Kentucky

I am requesting that you remove my name from your mailing list. I can no longer tolerate your spiteful, unkind, mean-spirited treatment of Christian leaders. It is fine to disagree with others and express your own views. However, when you find it necessary to characterize your political enemies as evil men, you have overstepped your bounds.

You have denigrated Pat Robertson, verbally and in cartoon. Obviously, Robertson is not perfect. But is he really an evil man? I have a hard time believing he is deserving of your portrayal. I believe that you misunderstand many of his motives and actions.

Have you been perfect in every way? Have you ever made a mistake, used poor judgment, or mispoken? Would you want to be spoken of in the same manner as you have treated others? Would you like your every sentence to be pulled from its context and displayed before the world? In fairness, have you reported Robertson's positive accomplishments as well as his faults? Have you invited him to respond to your remarks, or would you be ashamed to show him, face-to-face, what you have published? I am not a supporter of Robertson's ministry, but I think he is entitled to a rebuttal when treated so shabbily.

One of your articles said that Robertson must have stopped reading his Bible. Have you stopped reading yours? Or much more important, have you been living it? Are you proud of your work or ashamed of it in light of God's commandments?

While attempting to elevate your own publication by mud-slinging, you have offended many brothers and sisters in Christ. Do you think conservative Christians will listen to your views when presented in such a manner? Surely you could express your views without ugliness. I hope that you will learn from your mistakes and rise above this low level of journalism. I believe you are capable of so much better.
JEANNETTE COOKE
Berrien Springs, Michigan

Readers can E-mail the editor at 74617.263@compuserve.com.

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.

"*For when we were yet without strength, in due time Christ died for the ungodly. For scarcely for a righteous man will one die: yet peradventure for a good man some would even dare to die. But God commendeth his love toward us, in that, while we were yet sinners, Christ died for us.*"—the apostle Paul

"*For in fact what is man in nature? A Nothing in comparison with the Infinite, an All in comparison with the Nothing, a mean between nothing and everything.*"—Blaise Pascal

Though not exactly the Transfiguration, what I experienced from these words (by astrophysicist John Gribbin in *Schrodinger's Kittens and the Search for Reality*) was, nevertheless, almost epiphany: "In very round terms, the quantum world operates on a scale as much smaller than a sugar cube as a sugar cube is compared with the entire observable universe. To put it another way, people are about midway in size, on this logarithmic scale, between the quantum world and the whole universe. . . ."

While hardly *De Teum* (or even the *Kyrie Elisium*), what moved me about Gribbin's text was its relationship to this one, penned by a different author in another work (intellectual historian Richard Tarnas in *The Passion of the Western Mind*): "In an era so unprecedently illuminated by science and reason, the 'good news' of Christianity became less and less a convincing metaphysical structure, less secure a foundation upon which to build one's life, and less psychologically necessary. The sheer improbability of the whole nexus of events was becoming painfully obvious—that an infinite, eternal God would have suddenly become a particular human being in a specific historical time and place only to be ignominiously executed. That a single brief life taking place two millennia earlier in an obscure primitive nation, on a planet now known to be a relatively insignificant piece of matter revolving about one star among billions in an inconceivably vast and impersonal universe—that such an undistinguished event should have any overwhelming cosmic or eternal meaning could no longer be a compelling belief for reasonable men."

Dr. Gribbin's lines don't exactly nullify Dr. Tarnas', but they do impair the punch. Looking outward, one can, indeed, be humiliated by what Pascal called "those frightful spaces of the universe," so degrading in their immensity. In contrast, inwardly, in the quantum world, the realm of sub-atomic particles—things are so infinitesimally small that we humans are, in fact, Brobdingnagian in contrast.

Tarnas's argument, ghastly in its parochialness, works when he looks in only one direction; the phenomenal world, however, contains at least two directions (if not more)—and in the inward one

of the quantum realm, with its vast and frightful ratios and perspectives, the argument for nihilism-from-size-alone loses credibility, especially when (according to some physicists) matter might be *infinitely* divisible—which, if true, makes any attempt at making value judgments from quantity absurd. If infinity goes in both directions, ratio doesn't matter.

Nevertheless, in the present scheme of things, our ratios ("midway" writes Dr. Gribbin) should give some comfort to those tending toward ontological fear and existentialist *angst* regarding their place in the vast and cold acreage of the cosmos. The good news is that we're not, after all, so small and meaningless—which means, therefore, the notion that "an infinite, eternal God would . . . suddenly became a particular human being in a specific historical time and place only to be ignominiously executed" in order to save us from oblivion isn't so unreasonable after all. In fact, that's exactly what Christianity teaches, and it's also why this editorial will be my final one as *Liberty* editor.

By the time you read this, yours truly will be one floor below the *Liberty* offices, firmly ensconced in a new job as editor of the *Adult Sabbath School Study Guides*. If that doesn't sound particularly "sexy"—it's not, nor is it meant to be. As the Bible-teaching tools for the worldwide Seventh-day Adventist Church, these quarterly Bible Study Guides are designed to teach members in about 180 countries (the lessons are translated into many languages on every continent) the wonderful truths we believe regarding the "infinite, eternal God" who did, indeed, become "a particular human being in a specific historical time and place only to be ignominiously executed." Given the nature of the Guides, which are intended to teach Bible truths to church members everywhere—from Rwanda to Iceland, from New Zealand to Serbia—my slash-and-burn-in-your-face journalism, which was so much fun in *Liberty*, and which got me so many endearing and affirming letters (see *Op. Cit.*), will have to stop.

Sooner or later, we all have to grow up. I'm 43 years old; it's about time (plus, this new job will allow me to use my formal training, which was in Ancient Northwest Semitic Languages—not the most handy tool for the editor of a magazine dealing with separation of church and state).

As of this writing, I don't know who my successor will be. Whoever it is, I trust he/she will continue to work for the God-given principle of religious freedom (unless, because the principle is "God-given," he/she decides that its implementation into public policy would violate the Establishment Clause). I hope, also, to continue writing for the magazine as I did for years prior to becoming editor.

The bottom line: however much I believe in religious freedom, religious liberty, and church-state separation—these are all only partial and temporary manifestations of a deeper truth, the truth that we are all beings created by a powerful loving God who has, through the death of Jesus, linked Himself to humanity and to its ultimate fate with bonds that can never be broken. My new job will give me an opportunity to spread this truth in ways that my previous one didn't.

Quantum and cosmic ratios and distances aside, because I believe the gospel of the God who was "ignominiously executed" is the seminal Truth of all human existence (of all existence in fact), the Truth from which all other truth emanates, the Truth upon which all that is real rests, the Truth into which all else can be resolved and which itself cannot be resolved into anything else—and because I believe all this with all my heart, when the door opened for me to promote it as I never could before—what else could I do but step through?

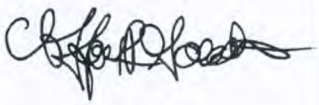

ILLUSTRATION BY RAY DRIVER

CHRIST 101

By
STEVEN
G. GEY

HOW THE LEE COUNTY SCHOOL BOARD GOT RELIGION (AND TRIED TO HELP EVERYONE ELSE GET IT, TOO)

For more than two years the Gulf Coast community of Lee County, Florida, has been in a fracas over the school board's proposal to offer high school students a "Bible history" course based on a curriculum developed by a North Carolina group linked with the Religious Right. What began as (supposedly) a neutral effort to teach the historical and literary aspects of the Bible soon degenerated into a sectarian battle for control of the public schools, complete with name-calling, the resignation of both the school district attorney and the school superintendent, a lawsuit, and general all-around animosity. In the end a federal court stepped in to prevent the school board from implementing the sectarian curriculum, but not before the damage occurred.

The depth of the animosity between supporters and opponents of the Bible course became evident after several heated debates about the new curriculum within the school board's Bible Advisory Committee. According to the *Washington Post*, a committee

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Steven G. Gey is a John W. and Ashley E. Frost professor of law, Florida State University.

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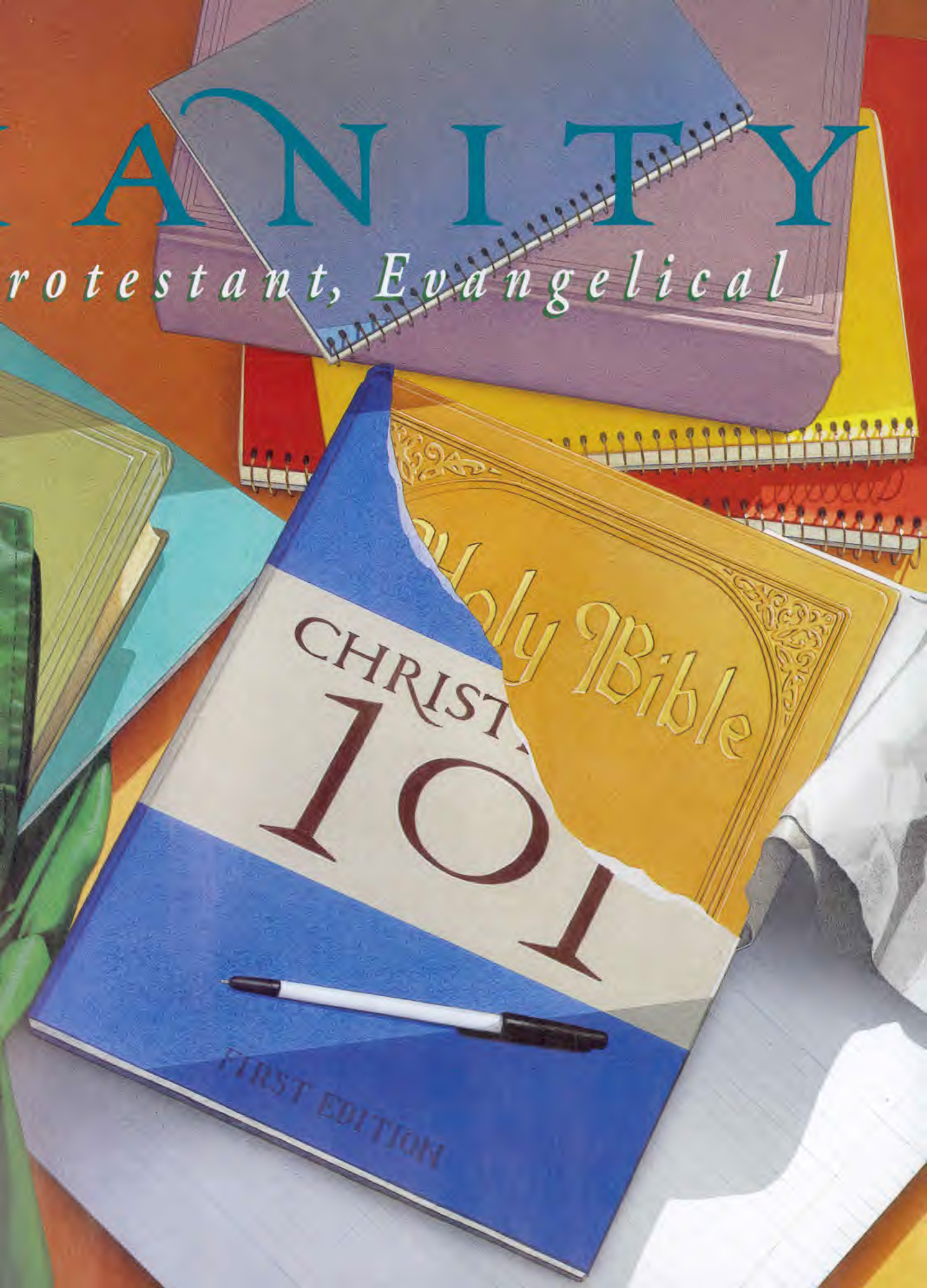
ANITY
rotestant, Evangelical
Holy Bible
CHRIST
101
FIRST EDITION

member associated with the Christian Coalition accused opponents of the Bible course of being "Jews . . . and others [about whom] you wondered if they had any religion at all." The same committee member also noted that when a Rabbi member of the committee did not attend committee meetings "that helped the process quite a bit."[1]

In one sense, the Lee County controversy represents the Founding Fathers' worst nightmare. The dispute over the proposed Bible history course split an otherwise tranquil community along religious lines, creating a volatile and dangerous mix of religion and politics that the Founding Fathers hoped to avoid by adopting the Establishment Clause of the First Amendment. On the other hand, there is also a happier and more hopeful element to the Lee County dispute. Many community members and local educators resisted the infusion of religion into the Lee County public schools, and an overwhelming majority of the local electorate eventually turned out of office most of the school board members who supported the religious course (which included many who controlled both the school board and the advisory committee). Ironically, the battle over religion in the Lee County public schools seems to have ended with a reaffirmation of the principles of church-state separation that the proposed religious curriculum was designed to undermine.

...the Lee County controversy represents the Founding Fathers' worst nightmare. The dispute over the proposed Bible history course split an otherwise tranquil community....

The Lee County controversy began in January 1996, when a member of the county school board received a copy of a model curriculum for a two-semester high school course on the Bible. The curriculum was prepared by an organization called the National Council on Bible Curriculum in Public Schools. The National Council is a conservative Christian group devoted to the "study of the Bible as a foundation document of society," and its proposed Bible instruction curriculum reflects this point of view.

Despite the group's claim that its curriculum intended to use the Bible only as a focal point history, the curriculum includes multiple references to divine events that correspond with the Christian faith and cannot be verified historically. These events include the story of Adam and Eve, the creationist version of the earth's formation, the story of Noah and the Flood, and the resurrection of Jesus. The curriculum suggests several activities in each part of the course that also focus on highly divisive aspects of religious doctrine. In the Old Testament portion of the curriculum, for example, students were asked to "list the days of Creation" and "find what was created on each day." Students are also asked to discuss "the Bible's view of marriage" and calculate the number and size of the animals on Noah's ark. In the New Testament section of the course, teachers are instructed to "hand out a list of Jesus' miracles as they are studied," and told to divide students into groups to discuss "the four accounts of the resurrection of Jesus." The curriculum has almost nothing in common with the typical high school history course. It is, instead, little more than a lesson plan for a typical Sunday school class.

Nevertheless, the Lee County school board voted 4-1 to authorize a high school Bible history course based on this curriculum only two months after the curriculum was first brought to the board's attention. At the same meeting, the school board created a 15-member Bible Curriculum Committee to advise the board on the specific elements of the new course, using the National Council's curriculum as a starting point. These two actions placed Lee County at the center of the growing national debate over the reintroduction of religious instruction into the public schools.

Religious partisanship colored the debates within the Bible Curriculum Committee from its first meeting in the summer of 1996. At that meeting the director of curriculum for the school district instructed the committee that the curriculum for the new course would be limited to the Old and New Testaments. This

gave the new course a much more limited scope than existing comparative religion courses, which used diverse religious texts. Following these instructions, a majority of the committee voted to use the National Council curriculum and another similar curriculum from Marion County, Florida, as the basis for the Lee County's own Bible history course.

From the beginning a minority of the committee objected that the proposed curriculum was "doctrinal and theological in nature"; one dissenting member wrote to the local newspaper questioning whether religion should be taught in the schools. A committee member who supported the curriculum responded with a newspaper column arguing that the schools already taught "secular humanism," and asserting that if the schools did not move from secular humanism to Christianity, "it won't be long until we reach Third World status."

These disputes did not slow the progress of the committee's work. Because there were roughly twice as many supporters of the new curriculum as opponents on the committee, the committee pressed forward hastily so that the new course could be taught in the upcoming spring 1997 semester. At this point, however, the committee ran into opposition from the school board's attorney, who warned that the Bible curriculum would probably result in litigation because it taught the Bible as "an inerrant document" and presented "a single Protestant perspective."

The attorney had good cause to worry. For many years the Supreme Court has prohibited public schools from incorporating any form of religious doctrine into the public school curriculum. Since the early 1960s the Court has prohibited the more obvious forms of religious indoctrination in public schools, such as state-mandated prayer[2] and inspirational Bible reading.[3] But in recent years the Court has banned more subtle infusions of religion as well. Thus the Court has held unconstitutional a Kentucky statute mandating that the Ten Commandments be posted in public school classrooms,[4] and a Louisiana statute that attempted to teach the biblical Creation account in public schools.[5]

Contrary to the claims of some religious conservatives, these cases do not prohibit discussions of religion or the Bible in public schools. The Supreme Court has held specifically that "the Bible may constitutionally be used in an appropriate study of history, civilization, ethics, comparative religion, or the like,"[6] but only if it is integrated into the secular school curriculum. The Bible may not be used where it serves no educational function, but rather is used "to induce the schoolchildren to read, meditate upon, perhaps to venerate and obey" the dictates of a particular faith.[7] This was precisely the problem posed by the Lee County Bible history curriculum.

Despite these obstacles, the school board ordered the committee to develop the Bible history course, although the board moved the prospective starting date of the course to the Fall 1997 semester. The committee pressed forward throughout the spring, debating at length what to include in the New Testament portion of the new course. As a measure of its resolve, the board permitted students to register for the fall course, even though no curriculum or teacher training program had been established.

For many years the Supreme Court has prohibited public schools from incorporating any form of religious doctrine into the public school curriculum.

Meanwhile the board hired an outside law firm to review the legality of the course. The school board attorney, whose advice the board had essentially ignored, submitted his resignation. At approximately the same time, the board voted to buy out the remainder of the contract of the school superintendent. The superintendent told the *Washington Post* that the board "said I was dragging my feet on the course." Even though it had fired the messengers, the board could not avoid the message. In May 1997 the board's new outside counsel submitted its conclusions regarding the Old Testament portion of the course. The counsel noted that the course would probably lead to litigation, and that several parts of the course

conveyed a religious message that "could easily cross constitutional boundaries." The new lawyers therefore recommended removing many of the more overtly sectarian references in the curriculum.

The outside counsel's opinion angered many supporters of the new curriculum on the advisory committee. Many also didn't like one member's suggestion that the new curriculum omit all references to the biblical account of Creation and the resurrection of Jesus. The committee reacted by voting to insert into the curriculum the account of Creation from Genesis, the story of Adam and Eve, a discussion of "the covenant between the Israelites and their God," and an assignment directing students to define "sin." By a 7-7 vote, the committee did decide to omit a discussion of the resurrection from the curriculum, but it then voted to require students to "identify the historical influence of the belief by the Christian community and the resurrection of Jesus on the growth and development of the church."

After this vote the advisory committee presented the Old Testament portion of the Bible history curriculum to the school board—less than three weeks before the course was scheduled to begin. More than 200 people attended, and more than 70 members of the public addressed the board. Supporters and opponents appeared. One of the board members moved to adopt the Bible history curriculum with the changes suggested by the outside counsel, although he expressed reservations about the changes. In support of this motion, the board member quoted former Christian Coalition executive director Ralph Reed: "Not teaching the Bible as history is denying a large number of people a seat at the table." The school board chairman also supported the modified curriculum, noting that he quoted from the Bible when he taught elementary school in the 1960s. "We weren't afraid of a lawsuit at that time," the chairman noted; "we weren't afraid to really give things kids needed in our society." The board then voted 3-2 to approve the Old Testament portion of the curriculum. Six days later, however, the new school superintendent told the board that because teachers had had only minimal preparation to teach the course, the first Bible history class would be postponed until January 1998.

The most contentious battles at the school board level—over the New Testament portion of the curriculum—were yet to come. In a meeting in September 1997, the advisory committee met once again to consider the outside attorneys' recommended changes in the New Testament curriculum. During a debate about the recommendation that the committee delete references to the Resurrection and the Epistles, a committee member named Rev. Michael Balfour tore up a copy of the edited curriculum and threw it over his head.

The most contentious battles at the school board level—over the New Testament portion of the curriculum—were yet to come.

"This class is not history; this is censorship outright," he told the committee. "I move we cease discussions of this garbage on the floor, this atrocity, this blatant malignancy that has grown week after week. . . . Christians died over the last week of Jesus' life. Christians died over this." On Rev. Balfour's motion, the committee voted 6-5 to reject the attorneys' suggestions and to adopt the unaltered New Testament curriculum proposed by the National Council on Bible Curriculum in Public Schools. The committee then voted by the same margin to disband.

This action presented the school board with an overtly religious curriculum cloaked as a history course. Little effort was made to hide the curriculum's sectarian underpinnings. The curriculum even included the use of a proselytizing video distributed by the Campus Crusade for Christ. Meanwhile, the Christian Coalition was becoming more deeply involved in the Lee County conflict. On October 14, 1997, the Lee County Christian Coalition held a "Faith Prayer Breakfast" at a local hotel. According to the state director of the coalition, "the purpose of the breakfast is to honor the Lee County school

board for their decision to offer a Bible history elective, and raise the needed funds to continue the work of the coalition." The breakfast was attended by a member of the school board, and featured a talk by Jay Sekulow, who heads the American Center for Law and Justice, founded by the televangelist Pat Robertson, also the chairman of the Christian Coalition.

The Christian Coalition's influence was also evident at the school board meeting during which the New Testament portion of the Bible history class was approved. Prior to the meeting the school board's attorneys and professional staff had all expressed opposition to the advisory committee's recommendation to adopt the National Council's curriculum. The outside counsel also warned that the curriculum "could be viewed as an attempt to indoctrinate students" in violation of the Establishment Clause. The school board's new staff counsel concurred and recommended deleting much of the religious substance from the curriculum. The school superintendent also opposed the curriculum, and in a news conference held before the school board meeting asserted that the curriculum was not defensible. The superintendent therefore recommended that the board adopt a heavily secularized version of the New Testament curriculum.

The school board had other ideas. After opening its meeting with a local minister's invocation (in the name of Jesus), the board set about approving the New Testament curriculum by a vote of 3-2. The board's majority overrode both their educational staff's judgment and their attorneys' advice. The board even refused to bring in their outside counsel to speak to the meeting about the inevitable legal problems. One board member noted simply that "we know what she wanted to say anyway." In response to concerns about lawsuits, one board member asserted that the board would be provided free representation by Pat Robertson's American Center for Law and Justice. Representatives from the group sat in the front row during the meeting. One month later, in another 3-2 vote, the school board authorized the ACLJ to take full control of the school's legal defense.

At this point the Lee County school board had become something of a national spectacle. Not only did the school board majority do little to underplay the controversial religious nature of their actions—they actually seemed to relish the media's attention. In an appearance on NBC's *Today* show, for example, school board member Lanny Moore discussed at some length his belief that the Bible contained a literally true historical account of real events. According to Moore, these events included Jesus turning water into wine, Jonah living in the belly of the whale, and Jesus' resurrection.

"The events in the Bible happened," Moore argued. "They need to be taught as history."

Religious disputes such as the one in Lee County usually follow a familiar pattern. Such episodes usually arise when a group of well-organized religious activists manage briefly to gain control of the political process and use that process to pursue their own sectarian ends. The single-minded religious zeal that motivates the initial crusade for control of the political process also tends to produce early victories over poorly organized opponents, and inevitably attracts the media spotlight. But this same righteous zeal usually dooms the efforts of religious groups to control the political process in the long run. Even relatively homogeneous areas of the country, such as Lee County, are populated by a large, usually silent majority uncomfortable with sectarian uses of the political processes. This same majority is even more uncomfortable with using public schools to pursue one sect's religious agenda. It did not take long for the Lee County school board to discover what happens when this silent majority becomes aroused and involved in the battle over control of the public schools.

The Christian Coalition's influence was also evident at the school board meeting during which the New Testament portion of the Bible history class was approved.

Soon after the school board adopted the National Council's New Testament curriculum, a diverse group of parents, ministers, and taxpayers brought suit in federal court to enjoin the school board from carrying out its plan. The suit was supported by the American Civil Liberties Union and People for the American Way, and the plaintiffs were represented by Thomas Julin, an attorney at one of Florida's most prestigious corporate law firms.

The school board and its attorneys undoubtedly expected this lawsuit, but the board probably did not anticipate its insurance company's response to the suit. In a conference call with the school board's attorneys soon after the lawsuit was filed, the board's insurance company told the board that its action was illegal and a decision to defend the action in court would not be covered by their policy. A fax sent to the board on the same day bluntly summarized the insurance company's position: "The school board's adoption of the subject Bible study curriculum is facially unlawful and . . . will be struck down by the federal courts." The insurance company chided the school board for rejecting legal advice and going beyond its legitimate role in using the schools for a noneducational agenda. "It should be remembered that insurance policies are designed with an intent to preserve and protect financial assets of an insured, and not to test the legal waters for the advancement of an insured's social or political or legal agendas or missions."

It did not take long for the federal courts to prove the insurance company's predictions correct. Approximately one month after the insurance company criticized the school board for ignoring legal advice about constitutional problems with its new curriculum, federal district court judge Elizabeth Kovachevich granted a preliminary injunction against the implementation of the New Testament portion of the curriculum. Citing cases in other jurisdictions in which similar Bible courses were struck down, the court added: "This court too finds it difficult to conceive how the account of the resurrection or of miracles could be taught as secular history."[8] The court noted that the school board had been warned by its own lawyers about problems with the Bible history course, and concluded acidly that "it is an abuse of public trust when elected officials ignore established legal standards."[9]

Despite its scathing rejection of the New Testament portion of the curriculum, the court refused to enjoin the Old Testament course, which had been modified heavily in response to legal advice. The court recognized, however, that although the course might be legitimate on its face, the implementation of the course could be problematic. Therefore, the court encouraged the plaintiffs to videotape the Old Testament classes "to prevent any veiled attempt to promote religion or Christianity in the guise of teaching history."[10]

Even relatively homogeneous areas of the country, such as Lee County, are populated by a large, usually silent majority uncomfortable with sectarian uses of the political processes.

In the end, the court urged the plaintiffs to "remain vigilant,"[11] and strongly urged the parties to work out a compromise that would preserve the legitimate educational interests represented by an objective religious history course, while avoiding the illegal proselytizing that characterized the National Council course. "Litigation of this dispute is not the most constructive use of counsel's abilities," the court concluded, "nor is it in the best interest of the people of Lee County."[12]

During the next month a tense standoff prevailed. The Old Testament classes went forward, with video cameras taping every class. The tapes revealed some apparent violations of the court's order to refrain from teaching the New Testament, including one class in which a documentary entitled "Jerusalem" was shown, "in which the narrator says, 'The memory of Jesus and the miracle of His resurrection live in Jerusalem every day.'"[13]

During the same period, settlement negotiations continued. Finally, on February 27, 1998, plaintiffs reached an agreement with the school board. According to the terms of the settle-

ment, the school board would abandon the curriculum based on the original National Council proposal, in favor of a secular curriculum designed around the college religious textbook *An Introduction to the Bible*. The book, written by five Stetson University religion professors, presents the Bible as a literary text with religious significance, rather than as a sacred document. The settlement agreement specifically prohibits any attempt to teach any aspect of the Bible as true, or to indoctrinate or proselytize students in any other way. The plaintiffs were also given the right to oversee the teaching of the course, and the right to go back to court if the school board violated the agreement by reintroducing a religious perspective into the classroom.

The supporters of the original plan to teach Bible history in the Lee County public schools accurately viewed the settlement as a moral, legal, and financial defeat. (It was a financial defeat both because of the money spent by the school board to defend its religious curriculum, and because the settlement required the school board to pay the plaintiffs' attorneys' fees.) The fact that the defeat came at the instigation of a federal court judge undoubtedly made the defeat even more bitter.

This case is not an example of religion being excluded from the public schools. As a result of the settlement of this lawsuit, the Lee County schools will offer a course on the Bible, but it will be a rigorously academic course based on an objective college text, not an overtly sectarian curriculum based on materials touting a particular brand of Christian fundamentalism.

Nor is this case an example of a federal judge overriding local desires in the name of "secular humanist" principles that the community does not accept. As it happens, members of the local community had a chance to express their views on the school board's action and the court's response only a few months after the settlement was concluded. In the school board primary elections held in September and October 1998 two of the three school board members responsible for adopting the Bible history course were overwhelmingly defeated. The board chairman was defeated in the first primary after receiving only 31 percent of the vote. The second conservative board member finished a distant second out of three candidates in the first primary, receiving just 32 percent of the vote. In the October runoff he received the same 32 percent share of the vote as in the first primary, and was trounced by his moderate opponent. Katherine Boren, one of only two school board members to oppose the Bible history course, also ran for reelection and was opposed by a candidate supported by the Religious Right. Ms. Boren won her race with 60 percent of the vote. Thus moderates will now control four out of five seats on the Lee County school board.

The resounding defeat of the Lee County religious activists sends a sobering message to the Christian Coalition and others on the Religious Right who have campaigned throughout the country to gain control of local school boards: even in a conservative, suburban, Sun Belt community that is dominated by Republicans, a vast majority of voters continue to support the constitutional separation of church and state—especially in the public schools. A leading opponent of the Lee County Bible history course said it best: "I don't think the Religious Right ever captured the hearts and minds of Lee County. But I do think they hijacked the school board."[14] The people of Lee County demonstrated that with a little political effort by concerned parents, and some help from the courts, school boards will not stay hijacked for long.

FOOTNOTES

[1]Donald P. Baker, *The Resurrection of 'the Oldest Textbook'; Amid Controversy, Christian Coalition Pushes Bible History Class in Florida Public School District*, *Washington Post*, June 15, 1997, p. A3. Unless otherwise noted, the quotations in the remainder of this article are taken from the court papers and exhibits filed in *Gibson* v. *Lee County School Board*, 1 F. Supp. 2d 1426 (M.D.Fla. 1998).

[2]*Engel v. Vitale*, 370 U.S. 421 (1962); *Lee v. Weisman*, 505 U.S. 577 (1992).

[3]*Abington School Dist. v. Schempp*, 374 U.S. 203 (1963)

[4]*Stone v. Graham*, 449 U.S. 39 (1980).

[5]*Edwards v. Aguillard*, 482 U.S. 578 (1987).

[6]*Stone v. Graham*, 449 U.S. p. 194.

[7]*Ibid.*

[8]*Gibson v. Lee County School Board*, 1 F.Supp. 2d 1426, 1434 (M.D. Fla. 1998).

[9]*Ibid.*, p. 1435.

[10]*Ibid.*, p. 1434.

[11]*Ibid.*

[12]*Ibid.*, p. 1435.

[13]Mireyya Navarro, *Florida Case Highlights Conflicts on Use of the Bible as a Textbook*, *N.Y. Times*, Feb. 17, 1998, p. A1.

[14]Douglas Kalajian, *Lee County Bible Battle Wanes as Christian Group Loses Its Influence*, Palm Beach *Post*, Sept. 21, 1998, p. 1A.

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By RONALD B. FLOWERS

Though one of the Founders' boldest inventions, separation of church and state has always engendered controversy over the boundary between religious institutions and government. Today, more than 200 years later, as a result of the Welfare Reform Act of 1996, that boundary remains blurry, especially with the new social experiment known as "charitable choice," i.e., government assistance to faith-based organizations to provide social services.

There are two basic attitudes regarding "charitable choice." One is the "accommodationist" or "nonpreferential" view; the other the "separationist" or "no aid" view. Accommodationists believe that when the founders wrote the no-establishment principle they intended to prohibit a "national church," i.e., government could not single out only one church or tradition for aid or favoritism. As a corollary, accommodationists also believe that the no-establishment principle allows government to aid religion so long as the aid is given to religious groups in a nondiscriminatory or nonpreferential way (hence "nonpreferentialism"). The no-establishment principle will allow government to accommodate religion so long as it does not prefer one over another. Some people have described this position this way: the government may not support an establishment, but it may support multiple establishments.[1]

The "separationist," "no aid" position states that the Founders intended that the no-establishment principle should mean just that—*no* establishment. Government should not aid religion at all, not even in an evenhanded way. Government may not aid religion over nonreligion, or vice versa. Government must maintain a stance of neutrality between religions and between religion and nonreligion. A multiple establishment is no more acceptable than a single one.[2]

How do these two positions deal with the question of charitable choice from constitutional, public policy, and theological/practical perspectives?

To begin, advocates of charitable choice hold an accommodationist view of church-state relations. They believe that charitable choice is a perfect example of how nonpreferentialism ought to work. The government decides that the best way to address domestic social problems is to enlist the energy and expertise of religious groups, many of which have had long experience in dealing with these problems. As long as this is done without favoring some religious groups over others, they argue, there is no constitutional problem—the no-establishment principle is not violated. This is true even though the charitable choice provisions of the Welfare Reform Act[3] allow religious providers of social services to retain all their theological tenets and worship practices.[4]

Historically, "religiously affiliated" groups have been able to provide social services with government funds. The idea was that an agency related to, but not a part of, a worshiping community could implement the worshiping com-

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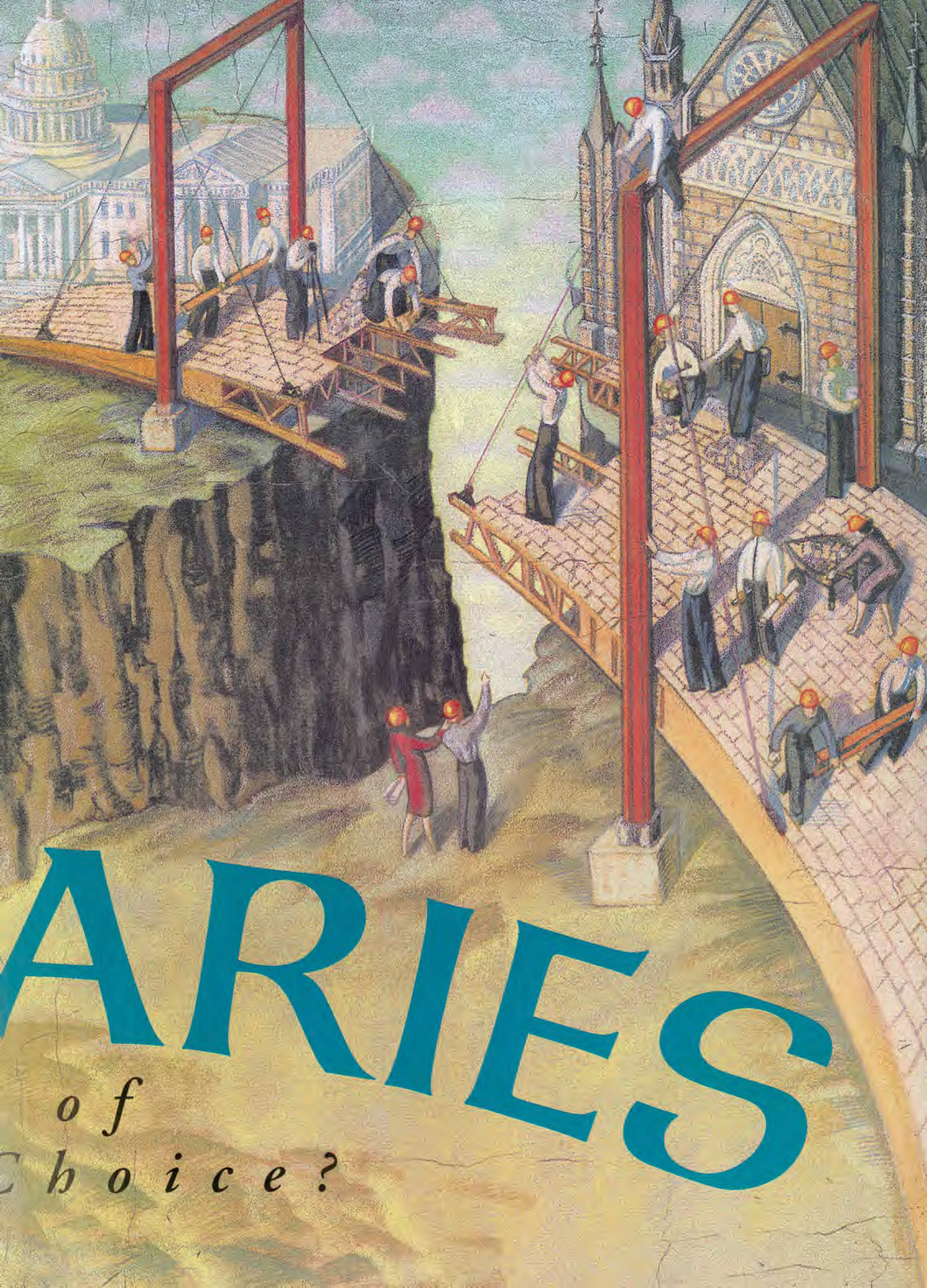
ILLUSTRATIONS BY SALLY WERN COMPORT


ARIES
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THEORETICALLY, TO HAVE TO WITHHOLD RELIGIOUS DISTINCTIVES IN ORDER TO BE A PROVIDER OF SOCIAL SERVICES IS AN INFRINGEMENT ON RELIGIOUS GROUPS' FREE EXERCISE OF RELIGION.

munity's motivation to serve. It was a separately incorporated organization that could identify itself as religious, e.g., Catholic Charities or Jewish Family Services, but did not communicate a religious message with its social services. Under this arrangement it has been possible for religious groups to implement their charitable impulses and receive government funds.

A principal argument for the new charitable choice laws is that religious groups ought not to have set aside or truncate their theological, even evangelistic, messages when providing social services. Theoretically, to have to withhold religious distinctives in order to be a provider of social services is an infringement on religious groups' free exercise of religion. Consequently, the charitable choice laws specifically allow "pervasively sectarian" groups to receive government funds to underwrite their social programs.[5] Furthermore, the law authorizes religious institutions to sue the government (either federal, state, or local) for discrimination if the government denies an institution a contract to provide social services because of the institution's "religious character."[6] That is accommodationism with an attitude. But, in the accommodationist perspective, it is consistent with the Establishment Clause for government money to flow to "pervasively sectarian" groups so long as the money is distributed in a nondiscriminatory way (which the lawsuit provision in the law guarantees).

If the government were to select some applying religious groups for government funds and reject others, so long as the choice was made on the basis of the nature of religion, the Establishment Clause would be violated. The government may not make a judgment about the truth, falsity, or validity of any theology.[7] But if the government did not make these judgments—if it truly distributed funds in a nondiscriminatory manner—the result could be some strangely mismatched religious entities and social programs. A Satanic Center for Juvenile Delinquency Counseling? A Branch Davidian David Koresh Memorial Center for Marriage Counseling? A Hare Krishna Institute for Eating Disorders (vegetarianism is an article of faith for Hare Krishnas)? Or, perhaps more mainstream, a Roman Catholic Center for Reproductive Services? In each circumstance the religious group would advocate a position on the service central to its theological position. Yet under the charitable choice concept, the government would be obligated to give money to the religious applicant or violate the Establishment Clause.

In fact, because charitable choice mandates that government fund social programs provided by "pervasively sectarian" entities, it is a violation of the Establishment Clause. The baseline concept is this: "The 'establishment of religion' clause of the First Amendment means at least this: . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."[8]

Although that principle has been eroded by the Supreme Court,[9] it has not been overturned. The case most on point for charitable choice is *Bowen* v. *Kendrick*,[10] concerning the constitutionality of the Adolescent Family Life Act (AFLA), which authorized government money to go to religious agencies that provided services in adolescent premarital sex and pregnancy counseling. Plaintiffs claimed that the law violated the Establishment Clause. The Supreme Court examined the law both "on its face" and "as applied." Supporters of charitable choice can take no comfort in its conclusion. Although the Court found the law facially constitutional, it was because the law did not focus on religious service providers or specify that religion had to be a part of the counseling.[11] The law that provided government money to religious counselors was constitutional, the Court said, only because their religious views on issues of sexuality agreed with those of secular providers in the same arena. Furthermore, the Court stated that the Establishment Clause would not allow government to give money to institutions that were "pervasively sectarian." "Of course, even when the challenged statute appears to be neutral on its face, we have always been careful to ensure that direct government aid to religiously affiliated institutions does not have the primary effect of advancing religion. One way in which direct government aid might have that effect is if the aid flows to institutions that are 'pervasively sectarian.' . . . The reason for this is that there is a risk that direct government funding, even if it is designated for specific secular purposes, may nonetheless advance the pervasively sectarian institution's 'religious mission.'"[12]

When the Court considered the law "as applied," it found that it did not have enough information to reach a decision. It remanded the case to the district court with the instruc-

tion to determine if AFLA funds were aiding any "pervasively sectarian" groups. The clear implication was that any such aid would be unconstitutional under the Establishment Clause, and that the Secretary of Health and Human Services should withdraw funds from those programs.[13]

In contrast, the charitable choice legislation does indeed authorize government money to go to pervasively sectarian institutions. It enables states to disburse government funds to religious organizations "without impairing the religious character of such organizations."[14] It says that a religious entity that contracts with or otherwise receives government funds shall maintain "control over the definition, development, practice, and expression of its religious beliefs."[15] Furthermore, government shall not "require a religious organization to (A) alter its form of internal governance; or (B) remove religious art, icons, scripture, or other symbols" in order to work with government funds in social services.[16] The cumulative effect of this is that a religious entity may accept direct government funds, vouchers, or certificates and administer its social program with full expression of its theological message, i.e., to be "pervasively sectarian." But, as noted above, the Supreme Court, in *Bowen* v. *Kendrick* and elsewhere, has stated that government funding or sponsorship of such religious entities is prohibited by the Establishment Clause.[17]

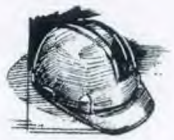
Ostensibly, the law avoids this problem by declaring: "No funds provided directly to institutions or organizations to provide services and administer programs under [this Act] shall be expended for sectarian worship, instruction, or proselytization."[18] There are two reasons this does not solve the problem of unconstitutionality. First, the provision is unenforceable. A principle used to interpret the Establishment Clause is that a relationship between church and state must not breed "excessive entanglement."[19] Although several current Supreme Court justices have expressed dissatisfaction, the concept is still part of the test used to interpret the Establishment Clause.

This prohibition of entanglement has frequently meant that the state may not monitor a program to determine if religion is being propagated in a state venture.[20] The charitable choice law says that government-funded religious social service providers may not proselytize. But how is the state to know? Only by surveillance. But that is exactly what is unconstitutional under the excessive entanglement test. Furthermore, a government official would have to make a determination of whether what he/she observed was, in fact, "sectarian worship, instruction, or proselytization." But, as noted earlier, under the Establishment Clause, government officials are forbidden from making this kind of diagnosis.

The second reason that this "protection" is not enough is the subtlety of its language. It says: "No funds provided *directly* . . . shall be expended for sectarian worship, instruction, or proselytization" (italics supplied). Aside from the enforcement problem, this language means that only contracted agencies would be under the prohibition. If the social services were funded by vouchers, certificates, or any other form of indirect payment, the prohibition mentioned in the statute would not be operative.[21] Furthermore, it does not limit services, just money. That means that volunteers, even though working in the context of the state-financed religious social entity, would not be under the limitations in the law. The nation would be right back in the situation of the government impermissibly supporting and endorsing a pervasively sectarian institution.

Furthermore, the guidelines for charitable choice[22] clearly agree with the previous paragraph: the prohibition against worship and proselytization are not operative when the service is provided through vouchers or certificates. That assertion is based on three Supreme Court decisions, *Witters v. Washington Department of Services for the Blind*,[23] *Zobrest v. Catalina Foothills School District*,[24] and *Mueller* v. *Allen*.[25] Witters was about a young man who used state vocational rehabilitation money to pay tuition to a Bible college at which he was studying for the ministry. Obviously, the Bible school at which he was studying was a "pervasively sectarian" institution. But the Supreme Court held that such use of state money was not a violation of the Establishment Clause. In *Zobrest*, federal and state monies were made available through the Individuals with Disabilities Education Act[26] to pay for a sign language interpreter for a deaf student in a Catholic parochial school. The Court ruled that the fact the government-paid interpreter was signing religious as well as secular subjects was not a violation of the Establishment Clause. *Mueller* involved a tax plan in which every parent who had children in school could deduct an amount from their state income tax, no matter whether their children

A PRINCIPLE USED TO INTERPRET THE ESTABLISHMENT CLAUSE IS THAT A RELATIONSHIP BETWEEN CHURCH AND STATE MUST NOT BREED "EXCESSIVE ENTANGLEMENT."



THAT CHARITABLE CHOICE LEGISLATION AUTHORIZES GOVERNMENT MONEY TO PERVASIVELY SECTARIAN INSTITUTIONS MEANS THAT RELIGIOUS ORGANIZATIONS BECOME ARMS OR AGENCIES OF THE STATE.

attended a public, private, or parochial school.[27] The Supreme Court ruled that even though some parents were able to apply money they had saved through tax deduction to the tuition of church-related schools, the Establishment Clause was not violated.

The reason for these decisions is that the laws in question had secular purposes: either to aid students with disabilities or to be general tax provisions. They had no specific religious component. What injected a religious dimension into the case was the decision of the beneficiary (student, taxpayer), rather than state action. "Any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients. . . . The decision to support religious education is made by the individual, not by the State."[28] The *Guide to Charitable Choice* asserts that the fact that voucher holders would decide whether to go to religious or secular providers guarantees the legality of the program.[29]

However, the reason that a religious component was injected into the aid program was the decision of the client, rather than the state. The laws in question were just general welfare laws. It was only by happenstance, the desire of the client, that a religious institution was involved. The Court, in *Witters*, noted that Washington's vocational rehabilitation law made aid generally available to the disabled without reference to whether the institution providing aid was sectarian or nonsectarian, public or private; it was not skewed toward religion because it took no notice of it. Furthermore, it provided no financial incentive for students to pursue religious education.[30] The justices, in *Zobrest*, described the Disabilities Education Act in virtually the same way and summarized it in this way: "We have consistently held that government programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated benefit."[31]

Yet the link between the charitable choice and these cases isn't so clear-cut. Unlike the laws in these three cases, the charitable choice legislation deals specifically with religious organizations. Although, theoretically, faith-based providers are among a variety of nongovernmental providers authorized to receive government funds under the charitable choice plan, they are the centerpiece of the scheme. To use the language from *Zobrest*, it simply is not the case that the new welfare program is designed "without reference to religion." To use the language from *Witters*, it is not the case that the charitable choice legislation was drawn up without reference "to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited."[32] Finally, *Witters* said the vocational educational law provided no financial incentive for the student to enroll in the Bible school. Here it relied on *Committee for Public Education and Religious Freedom v. Nyquist*, which held that a tax deduction plan that could be used to pay for tuition in parochial schools was unconstitutional only because it provided a state financial incentive for parents to send their children to church schools.[33] The lesson of *Nyquist* and *Witters* is that it is impermissible, unconstitutional, for the state to provide financial incentives for people to avail themselves of religious services. Yet that is precisely what the charitable choice concept does.

The fact that the charitable choice legislation authorizes government money to go to pervasively sectarian institutions means that religious organizations essentially become arms or agencies of the state. When such an organization spends government money on social ministries, it, in effect, is deciding how government funds are to be administered. What is properly the prerogative of a government agency is now performed by a religious organization. The Supreme Court has held that to be a violation of the Establishment Clause. "The core rationale underlying the Establishment Clause is preventing 'a fusion of government and religious functions.' The Framers did not set up a system of government in which important, discretionary governmental powers would be delegated to or shared with religious institutions."[34]

Many states have provisions in their constitutions more restrictive in their prohibition of public funding of religion than is the First Amendment of the U.S. Constitution.[35] The charitable choice statute says that it does not preempt any state constitution or statute that "prohibits or restricts the expenditure of State funds in or by religious organizations,"[36] which means whenever a state were to spend state funds in support of religious social ministries, restrictive state constitutions could interfere. But to the extent that funds expended are federal funds, state constitutions are preempted, i.e.,

the expenditure of federal funds makes them inoperative. If it can be argued that federal block grants, although given to the states for their administration, in fact continue to be federal funds, this provision of the law is ineffective and irrelevant, as are state constitutions. The result is that government money funds projects of pervasively sectarian entities and state constitutions may not prohibit that. But the Establishment Clause of the U.S. Constitution can, as we have seen.[37]

The principal argument in favor of charitable choice is the failure of the former welfare system and the desire to reduce the size of government. Although the welfare system is enormously complex, for some time there has been criticism that in general it has been inefficient. It has rewarded inactivity, supported immorality (children born out of wedlock), created dependence upon government, and been poorly administered, etc. Finally, Congress has decided to cure those problems, along with a bloated government, by welfare reform legislation. However, if government is no longer to be the principal provider of welfare services, who will step into the breach? Many argue that religious organizations, some of whom already have experience in large-scale charitable work, are perfect.[38] That conclusion, accompanied by (even fed by) a proaccommodationist attitude in much of Congress, has led to the idea that faith-based charities, along with private ones, will be fitting replacements for government social services. The result has been charitable choice.

Those opposed to charitable choice can agree that religiously based social agencies have made significant contributions to society and that they could play a larger role in society. The problem is the infusion of government money into denominations, congregations, and other religious entities that may impose their theological distinctives into their activities so that, in fact, the government is supporting and promoting religious faith. Government money comes from taxpayers, and taxpayers should not be compelled to pay for religious worship and social ministries. Because of the great variety of religious groups, it is inevitable that taxpayers would be supporting theologies they may strongly object to.

This infusion of government money raises other public policy problems as well. For instance, when the government, at whatever level, provides money or other resources to agencies, it also regulates those agencies. Indeed, citizens ought to expect the government to demand accountability of the resources it distributes. But when pervasively sectarian religious entities are the subject of that regulation, problems come. As the result of this legislation, government officials will intrude into the operation of the social ministries of religious entities.[39] The nature of that regulation will likely vary, depending on the type of social service provided and its recipients. But government officials will have some say about how the money is spent, given that it is, after all, *its* money.[40] Charitable choice ensures that religious entities that accept the funds will lose autonomy.

Federal law prohibits employers from discriminating in hiring and employment. However, religious entities are exempted from that requirement,[41] an exemption written into the law at the request of religious groups. The point is that religious institutions have the right to insist that their employees' religion be consistent with their own.[42] However, this discrimination was understood to be characteristic of the internal workings of religious organizations. In short, there was no government money involved. But the charitable choice law says that a religious entity's exemption should not be affected by the fact that it receives government funds.[43] This means that people paid with taxpayer funds are exempt from the nondiscrimination laws to which all other employers and employees are subject; it is, in short, government-sponsored discrimination.

What if a welfare recipient objects to the religious character of the entity from which she/he is to receive benefits? This may be because the recipient is not religious or is of a different religion from the entity dispensing the benefits. The law provides that the state is obligated, within a reasonable time, to provide "assistance from an alternative provider that is accessible to the individual and the value of which is not less than the value of the assistance which the individual would have received."[44]

Yet this provision has two problems. One is that the law does not require that the state notify the objecting recipient of the available alternative, i.e., if the recipient does not think to ask, he/she may not be directed to the alternative source of benefits.[45] The other problem is that in small or rural communities there may not be accessible alternative providers, so that a person may be compelled, by geographic circumstances, to receive religiously laden benefits from a religion in which he/she does not believe.

...PEOPLE PAID WITH TAXPAYER FUNDS ARE EXEMPT FROM THE NONDISCRIMINATION LAWS TO WHICH ALL OTHER EMPLOYERS AND EMPLOYEES ARE SUBJECT; IT IS, IN SHORT, GOVERNMENT-SPONSORED DISCRIMINATION.

EXPERIENCE HAS TAUGHT THAT A BOUNDARY BETWEEN CHURCH AND STATE WORKS TO THE ADVANTAGE OF BOTH.

As noted above, an argument for charitable choice is that faith-based agencies have resources to help people that the government does not have. They have charity based on love and compassion. They are concerned for the whole person, not just the comforts of the body but the spirit. In the words of Texas governor George W. Bush, a leading advocate of charitable choice: "Government can hand out money, but it cannot put hope in our hearts or a sense of purpose in our lives. It cannot bring us peace of mind. It cannot fill the spiritual well from which we draw strength from day to day. Only faith can do that."[46] What better way to serve the welfare of the needy, then, than for the state to be the enabler of faith-based entities to provide this welfare for the whole person through government funds given to those providers?[47]

Of course, "religiously affiliated" agencies have received government aid for years. Charitable choice thinking is that religious entities should not have to set aside, suppress, or hide their theological characteristics in order to receive government funds to undergird their charitable activities. It is those very theological dimensions that give faith-based charities their unique ability to help persons wholistically, to deal with the hurting out of compassion rather than just out of duty.

The argument here is not to deny that religious entities may have motivations and "tools" to use in charitable work that are different from, and perhaps superior to, those of government agencies. The argument is whether it is proper for the government to become partners with religious institutions in providing those services. From constitutional and public policy perspectives, the answer is clearly no. From the theological perspective, the answer also has to be no. The problem is that charitable choice, in aiding lawmakers in downsizing government, has moved government into the precincts of faith. With this concept, government, in its interface with religious institutions, has been dramatically upsized.

What are the implications of this situation for religious institutions? There is the potential for government regulation and loss of institutional autonomy, mentioned earlier. But there is also the potential for the loss of institutional vitality. When the government comes to help the churches do their work, the churches lose integrity. They no longer get to make all the decisions about how their missions shall be conducted. Their members may think that with government money funding the social ministries, it is no longer necessary to give contributions to the churches. And what if, in some future time, after religious institutions have depended on government resources and the contributions of the faithful have been reduced or dried up, Congress reduces or eliminates charitable choice or, as is likely to happen, it is declared unconstitutional? What happens to the social ministries and the needy then?

Advocates of charitable choice think of it as a new, more friendly, attitude of government toward religious institutions. Yet in the words of John Leland, the eighteenth-century Baptist minister who vigorously lobbied the Constitutional Convention to include a provision on religious liberty: "Experience . . . has informed us that the fondness of magistrates to foster Christianity has done it more harm than all the persecutions ever did. Persecution, like a lion, tears the saints to death, but leaves Christianity pure: state establishment of religion, like a bear, hugs the saints, but corrupts Christianity."[48]

Experience has taught that a boundary between church and state works to the advantage of both. And though defining that boundary hasn't always been easy, something such as charitable choice (no matter how well-intentioned), if not actually erasing it, does indeed make it almost impossible to find.

FOOTNOTES

[1]The clearest expression of this notion in Supreme Court literature is Chief Justice William Rehnquist's dissent in *Wallace* v. *Jaffree* 472 U.S. 38 at 91 (1985). A scholarly presentation of accommodationism is Robert L. Cord, "Church-State Separation: Restoring the 'No Preference' Doctrine of the First Amendment," *Harvard Journal of Law and Public Policy* 9 (Winter 1986): 129-172, or his book, *Separation of Church and State: Historical Fact and Current Fiction* (New York: Lambeth Press, 1982). See Barry Hankins, "The Terrible 'A' Word," *Liberty:* A Magazine of Religious Freedom 93 (May/June 1998): 16-21. This useful article both explicates accommodationism and exposes its inherent flaw.

[2]The clearest expression of this view in Supreme Court literature is the famous paragraph, that begins "The 'establishment of religion' clause of the First Amendment means at least this: . . .", by Justice Hugo Black in *Everson* v. *Board of Education* 330 U.S. 1 at 15-16. A scholarly presentation of separationism is Leonard W. Levy, "The Original Meaning of the Establishment Clause of the First Amendment," in James E. Wood. Jr., ed. *Religion and the State: Essays in Honor of Leo Pfeffer* (Waco, TX: Baylor University Press, 1985), 43-83 or his book, *The Establishment Clause: Religion and the First Amendment* (Chapel Hill: University of North Carolina Press, 1994).

[3]Officially entitled the "Personal Responsibility and Work Opportunity Reconciliation Act of 1996." Section 604a, the

section of the statute under investigation here, is entitled "Services Provided by Charitable, Religious, or Private Organizations."

[4]42 U.S.C. § 604a (b), (d)(1)(2)

[5]So, in the charitable choice debate, the operative terms to delineate types of entities that might receive government funds are "religiously affiliated" and "pervasively sectarian." The former is an agency that is related to a denomination or congregation but does not disseminate religious doctrine to those with whom it interacts. "Pervasively sectarian" entities do impart theological material and may even try to convert those with whom they interact. "Religiously affiliated" social agencies have traditionally received government funds while "pervasively sectarian" ones have not and, it will be argued, should not.

[6]42 U.S.C. § 604a (c), (i).

[7]This is most clearly expressed in *Watson v. Jones* 80 U.S. 679 at 728 (1872): "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect," and *Epperson v. Arkansas* 393 U.S. 97 at 103-104 (1968):

Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.

In the next paragraph it quotes the passage from *Watson v. Jones* quoted above. See also *United States v. Ballard* 322 U.S. 78 (1944).

[8]*Everson v. Board of Education* 330 U.S. 1 at 16.

[9]By *Everson* itself (government-paid transportation to parochial schools as public welfare); *Board of Education* v. *Allen* 392 U.S. 236 (1968) (state-approved books for parochial schools); *Wolman v. Walter* 433 U.S. 229 (1977) (state-supported standardized testing and scoring, diagnostic services, neutral-site therapeutic services for parochial school students); *Mueller v. Allen* 463 U.S. 388 (1983) (tax deduction for parents of students in public and parochial schools).

[10]487 U.S. 589 (1988).

[11]*Bowen v. Kendrick* 487 U.S. 589 at 604-605:

There is no requirement in the Act that grantees be affiliated with any religious denomination, although the Act clearly does not rule out grants to religious organizations. The services to be provided under the AFLA are not religious in character, nor has there been any suggestion that religious institutions or organizations with religious ties are uniquely well qualified to carry out those services.

Or, again, at 614-615:

In this case, although there is no express statutory limitation on religious use of funds, there is also no intimation in the statute that at some point, or for some grantees, religious uses are permitted. To the contrary, the 1984 Senate Report on the AFLA states that "the use of [AFLA] funds to promote religion, or to teach the religious doctrines of a particular sect, is contrary to the intent of this legislation."

[12]*Bowen v. Kendrick* 487 U.S. 589 at 609-610. At the place of the ellipsis in the quote, the Court came closest to defining "pervasively sectarian." It quoted *Hunt v. McNair* 413 U.S. 734 at 743 (1973):

Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission.

To support its view, the Court referred to a government aid to parochial school case, *Grand Rapids School District v. Ball* 473 U.S. 373 (1985), which denied the aid to the schools because they were "pervasively sectarian." In *Grand Rapids*, at 385, the Court made a statement that is right on the target of charitable choice:

Although Establishment Clause jurisprudence is characterized by few absolutes, the Clause *does absolutely prohibit* government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith. Such indoctrination, if permitted to occur, would have devastating effects on the right of each individual voluntarily to determine what to believe (and what not to believe) free of any coercive pressures from the State, while at the same time tainting the resulting religious beliefs with a corrosive secularism. (emphasis added).

A case the Court did not cite, but easily could have to make the same point, is *Church of Jesus Christ of Latter-Day Saints v. Amos* 483 U.S. 327 at 337:

A law is not unconstitutional simply because it allows churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence (emphases in original).

(The *Lemon* to which the Court refers is *Lemon v. Kurtzman* 403 U.S. 602 (1971), which, at 612- 613, says that, for a government program to be constitutional under the Establishment Clause, it must have a secular purpose, must have a primary effect that neither advances nor hinders religion, and must not create excessive entanglement between government and religion.)

To the extent that, under the charitable choice concept, government funds pervasively sectarian entities that do not impair the religious nature of the organizations (42 U.S.C. § 604a [b]), the government itself is advancing religion, clearly prohibited according to this statement from *Amos*.

[13]*Bowen v. Kendrick* 487 U.S. 589 at 618-622.

[14]42 U.S.C. § 604a (b).

[15]42 U.S.C. § 604a (d)(1).

[16]42 U.S.C. § 604a (d)(2)(A)(B).

[17]42 U.S.C. § 604a (c) says that state programs to provide social services may utilize religious entities "so long as the programs are implemented consistent with the Establishment Clause of the United States Constitution." The argument here is that the other provisions of the act, especially those covered by footnotes 14-16, authorize relationships between pervasively sectarian entities and government that are not consistent with the Establishment Clause.

[18]42 U.S.C. § 604a (j).

[19]See *Walz v. Tax Commission of the City of New York* 397 U.S. 644 (1970).

[20]*Lemon v. Kurtzman* 403 U.S. 602 (1971) (state surveillance of teachers, paid, in part, with state funds, in parochial schools to see whether they are teaching religion is excessive entanglement).

[21]On May 7, 1998, Sen. Ashcroft, R-MO, introduced in the Senate the "Charitable Choice Expansion Act of 1998," S. 2046. In § 3(i) he changed the language to read "No funds provided through a grant or contract . . . shall be expended for sectarian worship, instruction, or proselytization." That broadens the prohibition, but theoretically social services provided through vouchers could still evangelize, etc. *It is important to notice that S. 2046 is only a bill it has not been enacted into law.*

[22]*A Guide to Charitable Choice: The Rules of Section 104 of the 1996 Federal Welfare Law Governing State Cooperation With Faith-based Social-Service Providers* (Washington, D.C.: The Center for Public Justice; Annandale, VA: The Christian Legal Society's Center for Law and Religious Freedom, 1997), 22-23.

[23]474 U.S. 481 (1986).

[24]509 U.S. 1 (1993).

[25]463 U.S. 388 (1983). See *A Guide to Charitable Choice*, 23, note 11.

[26]20 U.S.C. § 1400 *et seq.* and, in terms of this case, Ariz. Rev. Stat. Ann.§ 15–761 *et seq.* (1991 and Supp. 1992).

[27]Minn. Stat. § 290.09(22).

[28]*Witters v. Department of Services for the Blind* 474 U.S. 481 at 487, 488.

[29]*A Guide to Charitable Choice*, 23, note 12:

In the case of vouchers or certificates, the chain of causation between government and a faith-based provider is broken, precluding any possible government endorsement of religion. In such indirect financial relations, how the funds are ultimately used is irrelevant for purposes of the establishment clause. . . .

[30]See 474 U.S. 481 at 487-488.

[31]509 U.S. 1 at 8.

[32]474 U.S. 481 at 487.

[33]413 U.S. 756 (1973).

[34]*Larkin v. Grendel's Den* 459 U.S. 116 (1982) at 126-127. The quotation is from *Abington School District v. Schempp* 374 U.S. 203 (1963) at 222. See also *Board of Education of Kiryas Joel Village School District v. Grumet* 512 U.S. 687 (1994), which reached the same conclusion.

[35]Article I, § 7 of the Texas Bill of Rights says:

No money shall be appropriated, or drawn from the Treasury for the benefit of any sect, or religious society, theological or religious seminary; nor shall property belonging to the State be appropriated for any such purposes.

See Regina Reaves Hayden, ed., *Stars in the Constitutional Constellation: Federal and State Constitutional Provisions on Church and State*, annotated by Steven K. Green, Esq. (Silver Spring, MD: Americans United Foundation, 1993), 119 Edd Doerr and Albert J. Menendez, *Religious Liberty and State Constitutions* (Buffalo, NY: Prometheus Books, 1993), 89.

[36]42 U.S.C. § 604a (k).

[37]However, at the time of this writing no constitutional challenge of the charitable choice concept has been initiated.

[38]A clear articulation of this is the following from a document laying out the principles of charitable choice:

We must move beyond 'devolution'–merely passing duties between different levels of government–and embrace reform that sparks cooperation between government (at whatever level) and the institutions of civil society. We must think anew about the relationship between government and non-government, and, ultimately, vest power *beyond* government back to individuals and social institutions. We must offer a vision of rebuilding–and remoralizing–distressed communities, not through government, but through the ideals and civilizing institutions that nurture lives and transmit values. . . .

Dynamic cooperation between government and faith-based charities, far from offending our principles, does much to honor our time-honored spirit of religious liberty. Ignoring this principle of co-responsibility does immense harm both to the institutions of civil society and to the intended 'beneficiaries' of social programs. This is about letting churches, synagogues, mosques, etc., do what Scripture requires–to feed the hungry, clothe the naked, and heal the sick (emphasis in original).

Faith in Action . . . : A New Vision for Church-State Cooperation in Texas (Austin, TX: Governor's Advisory Task Force on Faith-Based Community Service Groups, December 1996), viii.

[39]42 U.S.C.§ 604a (h)(1) requires that any religious organization participating in charitable choice "shall be subject to the same regulations as other contractors to account in accord with generally accepted auditing principles for the use of such funds provided under such programs." However, it must be acknowledged that the law, in § 604a(h)(2), says that if the religious "organization segregates Federal funds provided under such programs into separate accounts, then only the financial assistance provided with such funds shall be subject to audit." The proposed modification of the charitable choice law, S. 2046, § (g)(2), *requires* that government funds be segregated into separate accounts, with the same implications for audit. Even here, however, although there will not be a comprehensive audit of the religious entity's fisc, there will be an audit and the government is still suggesting how the religious entity should manage its resources. Such segregation of funds does not eliminate the problems described in the text.

[40]This concept, and language, is derived from a clinching argument of the Supreme Court denying Native Americans the right to use government (but their ancestral) land for religious services. Cf. *Lyng v. Northwest Indian Cemetery Protective Association* 485 U.S. 439 at 453 (1988): "Whatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, its land" (emphasis in original).

[41]42 U.S.C. § 2000e-1 (a).

[42]This ability of religious groups to show preference on the basis of religion in employment was challenged as a violation of the Establishment Clause. The Supreme Court disagreed and upheld the privilege in *Church of Jesus Christ of Latter-Day Saints v. Amos* 483 U.S. 327 (1987).

[43]42 U.S.C. § 604a (f).

[44]42 U.S.C. § 604a (e)(1).

[45]The proposed modification of the Charitable Choice law, S. 2046, § 3(e)(2), *requires* that the state notify an objecting recipient of available alternatives.

[46]*Faith in Action . . . : A New Vision for Church-State Cooperation in Texas*, p. v.

[47]This is well-expressed in Texas' rationale for charitable choice:

Religiously-inspired social action embraces strategies that often elude "professionals." No alternative approach to the cultural crisis we face holds greater promise. Faith-anchored institutions offer values and moral belief. They work at a deep, redeeming level. They appeal to matters of the heart and soul. They renew human connections and replace often-distant bureaucracies with individual commitment. They give people what they need spiritually to lead lives of dignity and self-reliance.

Faith in Action . . . : A New Vision for Church-State Cooperation in Texas, p. x.

[48]L. F. Greene, *The Writings of the Late Elder John Leland* (New York: G. W. Wood, 1845; reprint, Arno Press, 1970), 278, quoted in Edwin S. Gaustad, "A Disestablished Society: Origins of the First Amendment," *Journal of Church and State* 11 (Autumn 1969): 414.

ILLUSTRATIONS BY SALLY WERN COMPORT

THROUGH THE BACK DOOR

Martin Luther and Welfare Reform

By Barry Hankins

As a result of the Welfare Reform Act of 1996 and its "charitable choice" provision, churches and their faith-based social service agencies are poised for what supporters refer to optimistically as a new era of partnership between church and state.[1] Yet history is riddled with similar well-intended attempts at this type of partnership, which usually result in disaster for the churches. Even the great Reformer Martin Luther found his own carefully crafted partnership with the state no match for government officials with their own designs. His story, though five centuries old, remains eerily contemporary in its implications.

Luther on Church and State

Many erroneously believe that Martin Luther approved of or even designed Germany's state-church system. On the contrary—he actually attempted to protect the church from state interference. In the 1520s he developed the "two kingdoms" or "two regiments"[2] position. Specifically he divided the functions of church and state according to spiritual and temporal authority, the two regiments. The church, quite naturally, had authority in matters spiritual, the inward concerns of the soul. The state had authority over the temporal or external matters of behavior. Church authority rested in the hands of ministers, not the state, yet the church needed the state and its magistrates to maintain law and order, for without social stability neither the church nor any other social institution could function well.

This position may seem to imply the sort of separation of church and state found in modern America. The church does its thing and the state does its; as much as possible the two leave each other alone. However, Luther did not make much of a distinction between the civil and the sacred, or what we today would call the secular and the religious. Rather, for him, the important distinction was inward (spiritual) versus outward or external. But external matters could still be religious, and all external matters were subject to the magistrate's jurisdiction.

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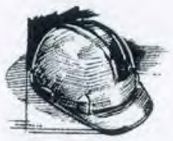

WHILE ALWAYS MAINTAINING THAT THE STATE SHOULD NOT HAVE AUTHORITY IN SPIRITUAL MATTERS, LUTHER ALSO ARGUED THAT THE CHURCH SHOULD NOT SHUN THE AID OF THE MAGISTRATE WHEN OFFERED IN GOOD FAITH.

Thus, there were laws against not only an external matter such as adultery, but also blasphemy, because this clearly outward act could potentially disrupt civil peace. So church and state were two distinct institutions with different responsibilities, but the state could—and, in fact, did—supervise a number of religious acts so long as they were external. The crucial question is What religious acts are strictly internal and therefore off-limits to the state?

Whatever the answer, Luther never envisioned or countenanced state control of the churches. That, for him, was a horrifying prospect. In Luther's theory the state was to have little authority over the church and certainly no authority within it. The state had the authority to police only the outward actions of individual believers, different from setting policy within the churches.

However, as the Protestant Reformation proceeded in the German territories of the 1520s, Luther and other leaders found that it was much easier to strip away Catholic practices within parishes than to replace them with new measures in an orderly fashion. Luther first learned this lesson when he returned to Wittenberg after a year hidden in the Wartburg Castle (the authorities had proclaimed him an outlaw at the Diet of Worms in 1521). Upon his return home he found that the common people were taking into their own hands what they perceived to be the reformation of Catholic churches, actions that often were manifest in the form of disorderly mobs entering church buildings and smashing images and other Catholic artifacts deemed unacceptable to Protestants. Luther, a law-and-order man who believed that all things should proceed methodically and with proper backing from legitimate authorities, chided his people for acting in an unauthorized manner.

The question then became Who shall guide the churches in their new Protestant direction? Here two loopholes in Luther's church-state theory appeared. While always maintaining that the state should not have authority in spiritual matters, Luther also argued that the church should not shun the aid of the magistrate when offered in good faith. Luther believed that the state could act as the "nursing father to the church," provided that the state was represented by a well-meaning Christian magistrate.

The second loophole was Luther's analogy, first articulated in his *Address to the Christian Nobility* (1520), that whenever a fire breaks out, those best positioned to douse it ought to do so even if they are not firefighters. This idea foreshadowed Luther's later concept of "emergency bishop," which held that the magistrate can act as overseer for the church in an emergency, such as the situation in the 1520s. Once Catholicism and its system of bishops had been eliminated from various German territories, there was nothing to put in its place. Who then would oversee the churches? The need appeared dire as the Reformation had spread rather haphazardly from Wittenberg. In some parishes the old Mass was still being used; in others financial matters were in disarray; and in others the clergy were almost wholly without theological education (it was discovered that one pastor thought the "Ten Commandments" was a new book). Even more pressing, perhaps, was the question of how to ensure that property formerly under the jurisdiction of the Catholic Church be not expropriated by wily nobles and used for their own profane purposes.[3] Luther's firefighter analogy suggested that in this sort of situation, the magistrates were in the best position to lend immediate oversight—to put out the fire, as it were. They or their representatives could act as temporary overseers to ensure that reform of the churches proceeded smoothly.

During this burgeoning emergency, Elector John of Saxony came to power in 1524. John was a Luther supporter and fervent Protestant. This combination of ecclesiastical need and a supportive, Protestant magistrate led Luther and his allies to modify their previous views on church and state and adopt emergency measures. The elector accepted Luther's request to help the church but suggested that Luther himself come up with a plan to implement it. So Luther and his right-hand man, Phillip Melanchthon, devised what came to be called the "Visitations." This was actually a revival of the medieval visitations to parishes conducted by Catholic bishops who were charged with oversight authority. The new twist in the Lutheran visitations was the participation of the state.[4] Whereas in the medieval procedure bishops of the church did the visiting, in Luther and Melanchthon's plan the magistrates would appoint visitors. The two reformers collaborated on a manual entitled *Instructions for the Visitors of Parish Pastors in Electoral Saxony*, with Luther writing the preface and Melanchthon writing

the actual body of the work. The plan became a model for most other German territories and even non-German and non-Protestant lands revived the visitations.[5] Luther's preface reveals the kinds of concerns Luther had about this project and the safeguards he believed necessary to ensure the freedom of the churches from state control.

Luther articulated a hairsplitting belief that when the magistrate aided the church, he did so as a Christian and not as a magistrate. In this creative fiction he stipulated that Elector John would undertake the task of appointing visitors "out of Christian love (since he is not obligated to do so as a temporal sovereign) and by God's will for the benefit of the gospel and the welfare of the wretched Christians in his territory."[6] Continuing, Luther wrote, "May God grant that it may be and become a happy example which all other German princes may fruitfully imitate, and which Christ on the last day will richly reward."[7] Evidently recognizing that some parishes might not take kindly to the prospect of state-appointed agents inspecting their churches, Luther continued, "We hope they will not ungratefully and proudly despise our love and good intention, but will willingly, without any compulsion, subject themselves in the spirit of love to such visitation and with us peacefully accept these visitors until God the Holy Spirit brings to pass something that is better, through them or through us."[8]

Luther's preface reads like an exercise in wishful thinking written by a theologian not wholly comfortable with what he was proposing. In these quotations there is the sense that the visitation is not the ideal set of affairs but something necessary that will, one hopes, be superseded later by a happier arrangement. In the concluding paragraph to the preface Luther again justified the use of state authority within the churches by reminding the visitors who would be reading the instructions that the whole process was out of the ordinary: "While His Electoral Grace is not obligated [He might better have said "not authorized"] to teach and to rule in spiritual affairs, he is obligated as temporal sovereign to so order things that strife, rioting, and rebellion do not arise among his subjects."[9] In effect, Luther was attempting to tie the visitation, which smacked of state meddling in the internal affairs of the churches, to the magistrate's God-ordained duty to maintain law and order in external matters.

Far from being a temporary set of circumstances limited by Luther's safeguards, the visitations opened the door for permanent government intervention in, and eventual control over, the Lutheran churches of Germany. Within a short time the concept of visitors had evolved into superintendents, then a consistory made up of theologians and state officials. Once this pattern of government intervention had been set, other magistrates simply began to introduce church reforms themselves, assuming that as the governing power they had authority over the churches in their territories.[10]

Twenty years after the first *Instruction* Luther—in the year preceding his death—wrote a preface for another edition for another diocese. The emergency measure had become permanent. Within a generation or so of Luther's death the Lutheran churches of Germany had become state churches, under the auspices of the magistrates. Luther never desired this, but as several Reformation scholars have written, Luther's well-intended policies allowed the magistrates into the churches through the back door.[11]

Implications for Today

Though no good historian believes that history repeats itself, and though all good scholars accept that the lessons of history are hard to come by (if they can be learned at all), there are some striking parallels between the Lutheran situation of the sixteenth century and current calls for government funding of faith-based social services and Christian schools.

First, Luther was willing to accept the help of his magistrate (i.e., his government) largely because Elector John was a believer willing to help. John's predecessor had supported Luther politically, but John himself was a fervent Protestant who cared deeply about the church. His offer, therefore, was nearly irresistible for Luther, especially when the Reformation ran into the trouble outlined above.

Much like Luther, many religious conservatives today seem much more willing to link up with government now that the Republican Party controls Congress. For the Religious Right, the Republican Party is the Elector John, the religion-friendly government. Whereas in the past the stock and trade of most evangelical and fundamentalist political activists has been to attempt to reign in the overbearing leviathan (the federal government) this effort is now accompanied by the paradoxical hope that gov-

MUCH LIKE LUTHER, MANY RELIGIOUS CONSERVATIVES TODAY SEEM MUCH MORE WILLING TO LINK UP WITH GOVERNMENT NOW THAT THE REPUBLICAN PARTY CONTROLS CONGRESS.

MANY CHRISTIANS TODAY ARE LESS WARY OF A REPUBLICAN GOVERNMENT IN THE NINETIES THAN THE WELFARE STATE OF THE SIXTIES AND SEVENTIES. THEY ARE READY FOR A CHURCH-STATE PARTNERSHIP.

ernment can be made more accommodating toward religion, and that its funds can be used to help religious institutions do their jobs. Like Luther's attitude toward Elector John, many Christians today are less wary of a Republican government in the nineties than the welfare state of the sixties and seventies. They are ready for a church-state partnership.

A second similarity between Luther's situation and the present concerns the concept of an emergency situation. Just as Luther envisioned a crisis that only the government was well situated to address, so today many who support the Charitable Choice provision of the 1996 Welfare Reform Act argue that social justice demands this new partnership between church and state. Those in this camp are by no means confined to the Religious Right. Rather, some are progressive members of the evangelical Left. Ronald Sider of Evangelicals for Social Action and Jim Wallis of *Sojourners* have spent their careers working to bring justice for the poor; they have earned the right to be heard on issues related to poverty and discrimination. Unlike Religious Right spokespersons, these social justice evangelicals and some progressive Catholics have not been part of the political conservatism that usually opposes government welfare programs. Rather, they have always argued that government has a role to play in the alleviation of poverty. They see the government as being in the best financial position to deal with massive poverty and injustice, but the churches have the spiritual resources that are needed for a wholistic approach to these social problems.[12] So the near-crisis proportions of social dislocation and injustice, combined with the need for both funds and spiritual resources to address these problems, seem to have created an emergency situation that can be addressed only by mobilizing the efforts of church and state in tandem.

A third consideration is that Luther and his cohorts argued that the visitations would really be a function of the church. This was Luther's creative fiction, his way of convincing himself that he really wasn't violating his own two regiments theory. Rather, he was calling on the state merely to appoint the visitors and give them official status while the church would exercise all spiritual authority. The state's participation was to be minimal and not intended to suggest that the ruler actually had authority to set religious policy.

So it is with today's supporters of Charitable Choice. They seek the money to engage only in the social ministries they believe the emergency situation requires. "Just give us the money, even indirectly in the form of vouchers," many are arguing today, "and we will make more efficient social service agencies." Please, no strings attached.

These three elements, present in Luther's time as well as now, seem to suggest that the time is right for a church-state partnership previously deemed a breach of the wall separating church and state. But before moving too quickly, supporters of charitable choice should consider what happened in the sixteenth century. Luther and his supporters discovered that unintended consequences resulted from their partnership with government.

Concerning the first point of comparison, a friendly government can cut two ways. Rather than merely appointing the visitors and stepping aside, John ignored the subtleties of Luther's preface, assumed the visitors derived their authority from the magistrate, not the church, and sent them into the churches as direct agents of the state. From the outset John called them "our authorized visitors."[13] Luther's finely tuned distinctions between the authority of the church and that of the state was too much for John to grasp, and the state began exercising its authority over the churches in a way that Luther thought inappropriate and that he was powerless to stop.

In the present situation those supporting charitable choice may want to consider the prospect of creeping regulation. If Elector John could scarcely stifle the tendency to monopolize all that his government touched, isn't it even more likely that the pervasive U.S. governmental bureaucracy will do likewise? It is not hard to envision an eventual department of religious affairs visiting, overseeing, and regulating the activities of churches that receive direct or indirect federal funds. Church and parachurch organizations whose budgets rely on the money may find themselves with an unhappy, as opposed to charitable, choice of shutting down for lack of funds or accepting government regulation. Even the friendly magistrate usually wants some, if not complete, control over what he or she subsidizes.

A second unforeseen consequence for Luther was that his own closest advisor, Melanchthon, proved to have somewhat differ-

ent church-state views. He actually believed that the magistrates, by virtue of their God-ordained office, held a preeminent place in the churches. They were *praecipuum membrum ecclesiae,* or the principal members of the church. This differed from Luther's view that within the church the magistrate held no greater status than anyone else. Yet Luther's view that the magistrate was best positioned "to put out the fire" served as a prelude to Melanchthon's position, and Melanchthon's reformulation of Luther's views proved more influential than Luther's original position, partly because Luther died first.[14] Whenever Luther's position proved to be an obstacle to the state, the state needed only to turn to Melanchthon instead of Luther.

In similar fashion some who today advocate charitable choice programs sincerely proclaim their support for separation of church and state. They truly believe that the government can fund religious activities without assuming authority over them. But there is a wide variety of viewpoints within the camp that supports church-state partnership. Wily government officials can always cast about the ideological horizon for the theological views that best suit the government's purposes. When the safeguards against government intrusion are personalized instead of institutionalized, it takes merely a change of personnel to effect momentous changes in the relationship of church and state.

Conclusion

The suggestion is not that the kind of church-state partnership being proposed today is likely to lead to the type of state churches that Germany produced. America is far too pluralistic and America's religious institutions far too insistent on equality before the law for a full-blown state-supported church to gain legal sanction. Nevertheless, those who advocate the sort of changes necessary to bring about government funding of explicitly religious, faith-based social service agencies should consider past church-state partnerships that have gone awry. The changes being made now may over fundamentally alter America's unique church-state arrangement in ways more problematic for the churches than for the state. Luther, Calvin, Zwingli, and others who sought support from magistrates are known as the magisterial Reformers of the Protestant Reformation. As scholar Harro Hopfl has written, "indeed, all the Reformers who took this course soon learnt what indeed they might have anticipated, namely that the favor of princes is fitful and unreliable, and never comes without strings."[15]

FOOTNOTES

[1] Among those calling for such partnerships see: Jim Wallis, "The Hurricane Is Coming," *Sojourners* 26 (May-June 1997): 8. Here Wallis writes, "We need new partnerships between government, business, churches, and service providers." At an April 1998 symposium at the J. M. Dawson Institute of Church-State Studies at Baylor University, Wallis delivered the keynote address entitled "Overcoming Poverty: A New Era of Partnership."

[2] While old, the most accessible biography of Martin Luther remains Roland Bainton's classic *Here I Stand: A Life of Martin Luther* (New York: Mentor of Penguin Books, 1977, 1950). This is one of several editions that have been published since the book first appeared in 1950.

[3] W.D.J. Cargill Thompson, *The Political Thought of Martin Luther* (Sussex, England: Harvester Press; Totowa, New Jersey: Barnes and Nobles Press, 1984), 144; For a list of the problems in the Saxon churches see: Clyde Manschreck, *Melanchthon: The Quiet Reformer* (Westport, Connecticut: Greenwood Press, 1975), 136-37.

[4] Gerald Strauss "Visitations," *The Oxford Encyclopedia of the Reformation,* Hans J. Hillerbrand, ed. in chief (New York: Oxford University Press, 1996), 4:238.

[5] Strauss, 239. Both Luther's preface and Melanchthon's instructions are included in volume 40 of Luther's Works ed. Conrad Bergendoff, general ed. Helmut T. Lehmann (Philadelphia: Muhlenberg Press, 1955), 265-320.

[6] *Luther's Works,* 40: 271.

[7] *Ibid.*, 272.

[8] *Ibid.*, pp. 272-273.

[9] *Ibid.*, p. 273.

[10] Thompson, p. 148.

[11] See: Thompson, 154; and Alister McGrath, *Reformation Thought: An Introduction,* 2d ed. (Cambridge, Massachusetts: Blackwell, 1993), 209-210. Concerning the unworkable technical distinctions inherent in Luther's church-state thought and its application, McGrath writes, "The way was opened to the eventual domination of the church by the state, which was to become a virtually universal feature of Lutheranism."

[12] For example, see: Jim Wallis, "The Church Steps Forward," *Sojourners,* March-April 1997, 8, where Wallis writes, "We need new approaches beyond relying either on government programs alone or hoping that churches and charities can, by themselves, take care of the problem. Religious communities and other profits must enter into public-private collaborations with both government and business to find the answers that work."

[13] Quoted in: Roland Bainton, *The Reformation of the Sixteenth Century* (Boston: Beacon Press, 1952), 71. See also: Thompson, 148.

[14] Thompson, 147 and 151.

[15] Harro Hopfl, ed. and trans. *Luther and Calvin on Secular Authority* (New York: Cambridge University Press, 1991), p. xi.

U.S. Supreme Court justice William Rehnquist's dissent in *Wallace* v. *Jaffree* (472 U.S. 38), 1985, is considered by many (see p. 14) one of the best historical defenses of a limited view of the reach and meaning of the Establishment Clause, a view that's increasingly gaining ground in American jurisprudence. Included in his dissent is this sentence: "It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history."[1]

THIS HEADLINE IS

FALSE

By Gene Garman

U.S. Supreme Court Justice William Rehnquist Attempted to Show in His Jaffree Dissent That Sound Constitutional Doctrine Can't Be Built on "a Mistaken Understanding of Constitutional History." He's Right—And Few Things Prove His Point Better Than the "Mistaken Understanding of Constitutional History" in His Jaffree Dissent Itself.

The justice is right, for how could one build sound constitutional doctrine upon historical error? There's a great irony here, however, because his dissent is itself built on "a mistaken understanding of constitutional history." In short, however logically paradoxical, his *Jaffree* dissent proves the point that Justice Rehnquist wanted to make (though probably not in ways that the good justice intended).

Justice Rehnquist's first historical mistake comes early when, talking about the influence of what he called "Jefferson's misleading metaphor" (the "wall of separation between church and state") he declares: "Thomas Jefferson was of course in France at the time the constitutional amendments known as the Bill of Rights were passed by Congress and ratified by the states."[2]

Wrong. The House of Representatives of the Congress of the United States approved the final draft of the religion clauses on September 24, 1789, and the Senate on September 25, 1789 (Religious Freedom Day). Jefferson left France aboard the ship *Anna* on October 8, 1789, arrived in Virginia on November 23, 1789, and soon thereafter became President George Washington's secretary of state. Ratification occurred on December 15, 1791 (Bill of Rights Day). Jefferson had been back in America for more than two years.

In his next sentence Justice Rehnquist says: "His [Jefferson's] letter to the Danbury Baptist Association [where Jefferson used the "misleading metaphor"] was a short note of courtesy, written 14 years after the amendments were passed by Congress."[3] Jefferson's letter was, in fact, written on January 1, 1802; the amendments were passed on September 25, 1789, which is closer to 12 years than to "fourteen years" after the amendments were passed by Congress.

These mistakes, admittedly nitpicky and trivial, do, however, demonstrate a basic historical inaccuracy (as well as Justice Rehnquist's effort to question President Jefferson's credibility and to reduce the significance of his letter to the Baptists, which the historical record proves was much more than a "short note of courtesy" [see *Liberty*, January/February 1997, p. 19]) that gets worse as the dissent continues.

Justice Rehnquist's next sentence reads: "He [Jefferson] would seem to any detached observer as a less than ideal source of contemporary history as to the meaning of the religion clauses of the First Amendment."[4]

To the contrary. Any detached observer or historian should conclude that Jefferson would be a much better source of contemporary history as to the meaning of the religion clauses than would Justice Rehnquist. After all, Jefferson was a contemporary of the Americans who ratified the Bill of Rights, and he was one of the most well-known and pivotal figures in early American history. The man was, after all, there when it happened, as opposed to looking back on it 200 years after the fact.

In the attempt to establish his position regarding President Jefferson's "wall of separation," Justice Rehnquist

wrote: "When we turn to the record of the proceedings in the First Congress leading up to the adoption of the Establishment Clause of the Constitution, . . . we see a far different picture of its purpose than the highly simplified 'wall of separation between church and State.'"[5] Justice Rehnquist then cites the printed version of the proceedings of the First Congress, commonly known as the *Annals of Congress*, and directs attention specifically to debates in the House of Representatives dated Saturday, August 15, 1789. "The entire debate on the religion clauses," he wrote, "is contained in two full columns of the *Annals*, and does not seem particularly illuminating."[6]

Was "the *entire* debate on the religion clauses . . . contained in two full columns of the *Annals*"? In his book *The Establishment Clause* constitutional historian and Pulitzer Prize winner Leonard W. Levy wrote: "No official records were kept of the debate in either the Senate or the House. Because the Senate during the First Congress met in secret session, no reporters were present to take even unofficial notes. . . . No account of the debates [in the Senate] exists, and the only Senate document we have is a meager record of action taken on motions and bills.

"The situation in the House is considerably better but unsatisfactory. . . . The House, unlike the Senate, permitted entry to reporters who took shorthand notes. But these unofficial reports, which were published in the contemporary press, have numerous deficiencies. The reporters took notes on the debates and rephrased these notes for publication. The shorthand in use at that time was too slow to permit verbatim transcription of all speeches, with the result that a reporter, in preparing his copy for the press, frequently relied upon his memory as well as his notes and gave what seemed to him the substance, but not necessarily the actual phraseology, of speeches. . . . The *Annals of Congress* was published in 1834. . . . The House debates, as recorded in the *Annals of Congress* for the session of the Congress that framed the Bill of Rights, derive from contemporary newspaper accounts, especially from the pages of a weekly periodical known as Lloyd's *Congressional Register*. . . . The reports of these House debates 'were so condensed' by the compilers of the *Annals of Congress* 'that much information about the debates was omitted entirely or was presented only in garbled form.' Lloyd recorded 'skeleton' versions of speeches, which he could make intelligible only by imaginative and knowledgeable editing. He used few connectives or articles, and he embellished considerably. Madison spoke of his 'mutilation and perversion.' . . . Madison observed of Lloyd that he 'was indolent and sometimes filled up blanks in his notes from his memory or *imagination*,' and added that Lloyd had become a 'votary of the bottle and perhaps made too free use of it sometimes at the period of his printed debates.'

"Thus, our record of the House debates does not necessarily reveal all that was said about the Bill of Rights, nor is the report necessarily accurate as far as it goes. Accordingly, quotations from the *Annals of Congress* purporting to represent a speaker's words must be regarded with some skepticism, a fact of particular importance in cases where slight changes in phraseology may shift the speaker's meaning, as in the debate on the establishment clause. Relying on one article rather than another in a motion that was not adopted . . . is absurdly naive.

"Finally, there is no record of the minutes of the special House committee on amendments; it was this committee that, using Madison's original proposals, drafted the version of the Bill of Rights submitted to the House for approval. Nor is there any existing record of the minutes of the joint Senate-House conference committee that worked out a compromise draft between Senate and House versions of the proposed amendments. . . .

"Moreover, as a historian who scoured the sources has pointed out, 'the finished amendments were not the subject of any special newspaper comment, and there is little comment in the available correspondence.' . . . Because no records were kept of the debates, we do not know what the legislators of the various states understood to be the meanings of the various parts of the Bill of Rights. Nor has any scholar who has read the contemporary newspapers uncovered anything particularly revealing as to these meanings. Public interest in the proposed amendments was desultory, and public discussion of them largely confined to generalities."[7]

THE MAJORITY OF MEMBERS OF THE FIRST CONGRESS INTENDED THAT CONGRESS WOULD HAVE NO AUTHORITY TO MAKE ANY LAW ESTABLISHING "RELIGION"...

Therefore, contrary to Justice Rehnquist's assertion, it would seem that the *Annals of Congress* do not represent "the entire debate on the religion clauses" in the House of Representatives on August 15, 1789. The *Annals* record of that debate is useful as a newspaper reporter's summary, but it does not provide an actual word-for-word transcript.

Nevertheless, Justice Rehnquist relied heavily upon the *Annals of Congress*, particularly regarding a few suggestions that use of the word *national* be included in the Establishment Clause. In fact, despite the historical record, which clearly shows that the debates and the numerous revisions concerning wording of the Establishment Clause included various suggestions (both with and without the idea of a "national" religion), Justice Rehnquist still declares: "The true meaning of the Establishment Clause can only be seen in its history. . . . The Framers intended the

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Establishment Clause to prohibit the designation of any church as a 'national' one."[8]

To the contrary. The *Annals of Congress* and the *Journal of the First Session of the Senate* show that use of the word *national* was only one of the suggested wordings for the amendment, a wording that was, in fact, rejected. Obviously, if the Framers intended the Establishment Clause to prohibit only the designation of any church as a "national" one (as Justice Rehnquist claims), they would have included the word *national* in text. The "true meaning" of the religion clauses should be determined by what was finally adopted, not by what was rejected!

The last version of the religion clauses as presented by the House is worded as follows: "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience."[9] The last version of the Senate reads: "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion."[10] Neither final proposal uses the word *national*. In fact, the House version speaks of establishing "religion," and the Senate speaks of establishing "articles of faith." The majority of members of the First Congress intended that Congress would have no authority to make any law establishing "religion" or "articles of faith," terms much broader than merely a "national" church. The majority in the First Congress intended for the Establishment Clause to prohibit more than an official church or a national religion. The record of history shows that a majority in the First Congress wanted the Establishment Clause to read that "Congress shall make no law" establishing religion, articles of faith, or a mode of worship.

The debate was over. The issue of a compromise wording was submitted to a joint Senate-House conference committee, which drafted the following proposal: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

This wording was accepted by the House on September 24 and by the Senate on September 25, 1789. On December 15, 1791, the Bill of Rights was ratified by the states. The historical record does not support Justice Rehnquist's notion that the Framers of the Establishment Clause simply intended to "prohibit the designation of any church as a 'national' one." Through their representatives, the American people amended the Constitution to read that "religion" would not be established by law, a term that, though including a prohibition on a "national church," certainly extends beyond it.

Furthermore, after adoption of the religion clauses by the First Congress, only one of the six members of the conference committee, which composed the final wording, left any specific definition as to what the Establishment Clause means and to what it applies. This was James Madison, who more than once expressed his views on the meaning of the Establishment Clause, views that seem to extend the Establishment Clause provisions far beyond Justice Rehnquist's position.

In 1790 Congressman James Madison wrote: "The general government is proscribed from the interfering, in any manner whatever, in matters respecting religion."[11]

In 1811 President James Madison wrote: "To the House of Representatives of the United States:

"Having examined and considered the bill entitled 'An Act incorporating the Protestant Episcopal Church in the town of Alexandria, in the District of Columbia,' I now return the bill to the House of Representatives, in which it originated, with the following objections:

"Because the bill exceeds the rightful authority to which governments are limited by the essential distinction between civil and religious functions, and violates in particular the article of the Constitution of the United States which declares that 'Congress shall make no law respecting a religious establishment.' ...This particular church, therefore, would so far be a religious establishment by law.

"Because the bill vests in the said incorporated church an authority to provide for the support of the poor and the education of poor children of the same, an authority which, being altogether superfluous if the provision is to be the result of pious charity, would be a precedent for giving to religious societies as such a legal agency in carrying into effect a public and civil duty."[12]

THE GENERAL GOVERNMENT IS PROSCRIBED FROM THE INTERFERING, IN ANY MANNER WHATEVER, IN MATTERS RESPECTING RELIGION.

In 1811 President James Madison wrote: "To the House of Representatives of the United States:

"Having examined and considered the bill entitled 'An act for the relief of . . . the Baptist Church at Salem Meeting House, in the Mississippi Territory,' I now return the same to the House of Representatives, in which it originated, with the following objection:

"Because the bill in reserving a certain parcel of land of the United States for the use of said Baptist Church comprises a principle and precedent for the appropriation of funds of the United States for the use and support of religious societies, contrary to the article of the Constitution which declares that "Congress shall make no law respecting a religious establishment."[13]

In 1819 James Madison wrote: "The Civil Government... functions with complete success; whilst the number, the industry, and the morality of the priesthood, and the devo-

tion of the people, have been manifestly increased by the total separation of the Church from the State."[14]

In 1822, James Madison wrote: "Notwithstanding the general progress made within the two last centuries . . . , there remains . . . a strong bias towards the old error, that without some sort of alliance or coalition between Government and religion neither can be duly supported. . . . Every new and successful example therefore of a perfect separation between ecclesiastical and civil matters is of importance."[15]

In an undated essay (probably 1817 or later) James Madison wrote: "Strongly guarded as is the separation between religion and Government in the Constitution of the United States, the danger of encroachment by ecclesiastical bodies may be illustrated by precedents already furnished in their short history. . . .

"But besides the danger of a direct mixture of religion and civil government, there is an evil which ought to be guarded against in the indefinite accumulation of property from the capacity of holding it in perpetuity by ecclesiastical corporations. . . .

"The Constitution of the United States forbids everything like an establishment of a national religion. The law appointing chaplains establishes a religious worship for the national representatives, to be performed by ministers of religion, elected by a majority of them; and these are to be paid out of the national taxes. Does not this involve the principle of a national establishment, applicable to a provision for a religious worship for the constituent, as well as of the representative body approved by the majority, and conducted by ministers of religion paid by the entire nation?

"The establishment of the chaplainship to Congress is a palpable violation of equal rights, as well as of constitutional principles. . . .

"If religion consist in voluntary acts of individuals singly, or voluntarily associated, and it be proper that public functionaries, as well as their constituents, should discharge their religious duties, let them, like their constituents, do so at their own expense. How small a contribution from each member of Congress would suffice for the purpose? How just would it be in its principle? How noble in its exemplary sacrifice to the genius of the Constitution; and the divine right of conscience?"[16]

Madison's words show that while the Establishment Clause clearly forbade a "national religion," it forbade a lot more as well.

In spite of these statements from James Madison, in which he described applications of the Establishment Clause in specific terms of separating religion and government, Justice Rehnquist proclaims that "there is simply no historical foundation for the proposition that the Framers intended to build the 'wall of separation' that was constitutionalized in *Everson*"[17] and that "the 'wall of separation between church and State' is a metaphor based on bad history."[18] James Madison was a member of the Constitutional Convention in 1787, he was a member of the joint Senate-House conference committee, and he used the word *separation* (just as President Jefferson did) in defining the meaning of the Establishment Clause and the Framers' intent regarding the Constitution and First Amendment. Interestingly enough, Justice Rehnquist did not refer to even one of Madison's above statements, which were made after the adoption of the religion clauses.

The majority of justices in *Wallace* v. *Jaffree* rejected Justice Rehnquist's dissenting argument and understood that the Establishment Clause prohibits more than just a single official church or national religion. *Wallace* v. *Jaffree* ruled that the state of Alabama does not have authority to, even indirectly, promote "prayer" during a moment of required silence in public schools. The Court ruled correctly because the promotion of religion is not the business of government, and it has no authority to require "prayer" any more than it could by law require belief in the Trinity, infant baptism, transubstantiation, or Christianity.

Justice Rehnquist's dissent creates one of these paradoxes that drive mathematicians and logicians crazy. It's like Epimenides' line: "This statement is false." If it's true, it's false; if it's false, it's true. But how can it be both false and true? The same with this dissent. Justice Rehnquist uses "a mistaken understanding of constitutional history" to argue against using "a mistaken understanding of constitutional history." But how can his point be correct if what he uses to make it refutes the very point he's making? The dissent is self-refuting and, therefore, *logically* absurd, even if it still does prove his point (talk about paradox!).

Fortunately, and for more reasons than pure logic alone, it was only a minority dissent, not a majority opinion.

FOOTNOTES

[1] *Wallace* v. *Jaffree*, 472 U.S. 38, p. 93 (1985).

[2] *Ibid.*

[3] *Ibid.*

[4] *Ibid.*

[5] *Ibid.*

[6] *Ibid.*, p. 96.

[7] Leonard W. Levy, *The Establishment Clause* (Chapel Hill, N.C.: University of North Carolina Press, 1994), pp. 257-259.

[8] *Wallace* v. *Jaffree*, 472 U.S. 38, p. 114.

[9] *Ibid.*, p. 98.

[10] *Ibid.*

[11] William T. Hutchinson and William M. E. Rachal, *The Papers of James Madison* (Chicago: University of Chicago Press, 1962), vol. 13, p. 16.

[12] Gaillard Hunt, *The Writings of James Madison* (New York: G. P. Putnam's Sons, 1908), vol. 8, p. 132.

[13] *Ibid.*, p. 133.

[14] *Ibid.*, p. 432.

[15] *Ibid.*, vol. 9, pp. 101, 102.

[16] Elizabeth Fleet, ed., "Madison's 'Detached Memoranda,'" *William and Mary Quarterly* 3 (October 1946): 555.

[17] *Wallace* v. *Jaffree*, 472 U.S. 38, p. 107.

[18] *Ibid.*, p. 108.

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