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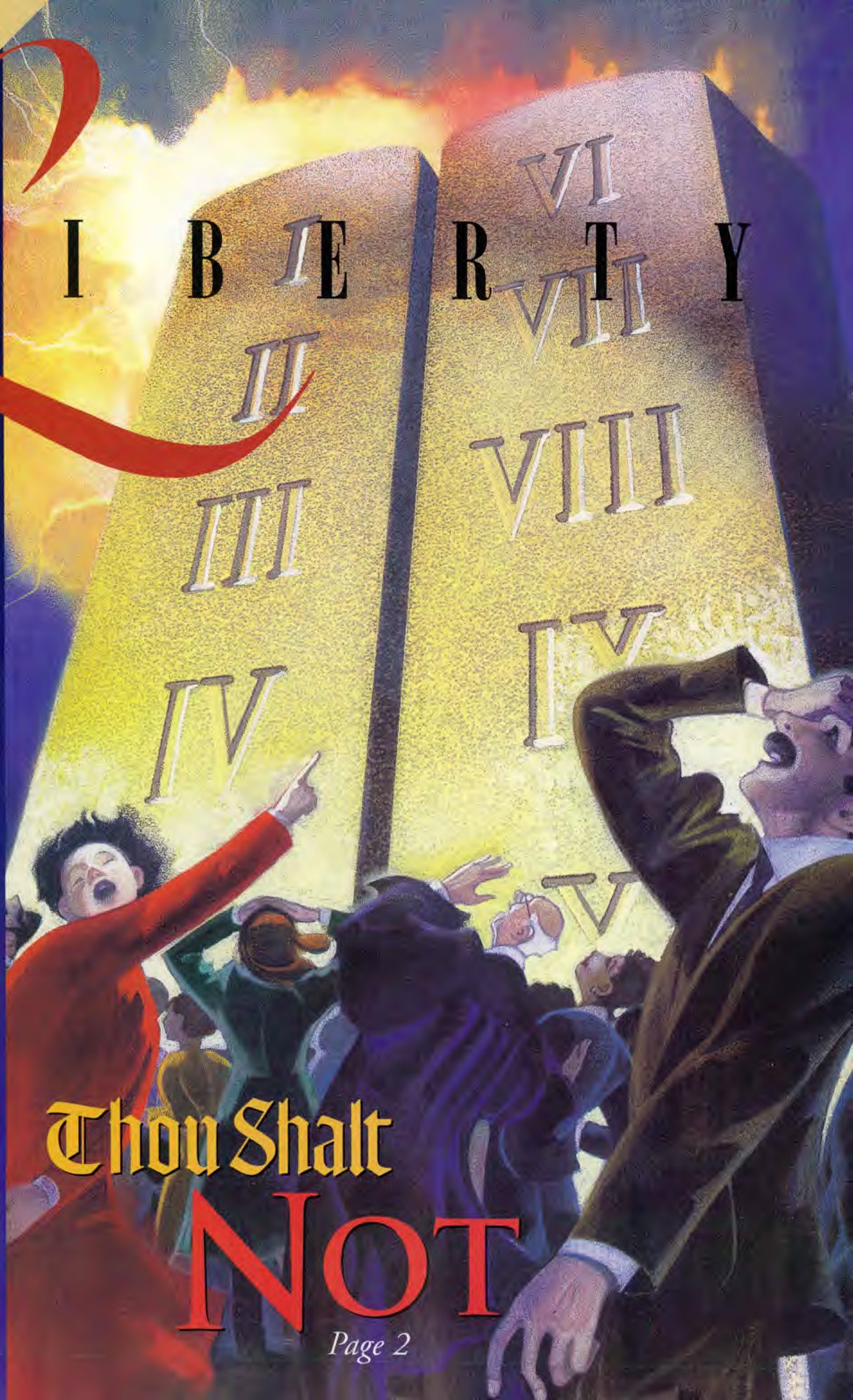

Thou Shalt NOT

Page 2

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By John Furguson & David Hudson

Thou Shalt NOT

Public Display of the Ten Commandments?

With a surge toward a violent culture, many things must happen to redirect our society. I understand that simply posting the Ten Commandments will not instantly change the moral character of our nation. However, allowing states the freedom to decide these matters is an important step in promoting morality and religious freedom in our society.—Rep. Robert Aderholt (R. Ala.), sponsor of the Ten Commandments Defense Act of 2002.

We'd all be better off if members of Congress started following the commandments and stopped using them for crass political purposes.—Barry Lynn, Americans United for Separation of Church and State.

A DIVISIVE BATTLE in the culture war over religion in public life concerns the display of the Ten Commandments on public property. The firing lines in this conflict include public interest groups, state and federal legislators, and even judges with different understandings of the establishment clause. The dispute has gained momentum after the Columbine High School and September 11 tragedies.

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On February 6 Representative Brian Kerns introduced the Ten Commandments Public Display Resolution of 2002,[1] which requires the prominent display of the Ten Commandments in the chambers of the House of Representatives and the Senate. Then in March, Representative Robert Aderholt followed suit by reintroducing his Ten Commandments Defense Act.[2] This measure would empower state and local governments "to display the Ten Commandments" on public property. Representative Aderholt and others have championed such legislation since 1997, in the wake of the Judge Roy Moore controversy in Alabama.[3]

State Legislation

At the state level, representatives introduce Ten Commandments legislation at an even greater pace. Because of adverse court decisions, state bills focus on "historical documents" legislation. These measures call for the public display of the Ten Commandments alongside other important historical documents.

Examples include a measure in South Carolina that would allow the posting of the Ten Commandments on state-owned property, alongside the Magna Carta, the Declaration of Independence, and the U.S. Constitution.[4] North Dakota passed a bill last year allowing schools to post the Ten Commandments as part of a larger display of religious and historical documents.[5] Similar measures have been introduced in Alabama, Georgia, Michigan, Missouri, Mississippi, New York, Oklahoma, Pennsylvania, Tennessee, and Virginia.

Court Cases

As active as the legislative branch may be in this area, the judiciary bears the brunt of resolving the conflicts they create. Unfortunately, the U.S. Supreme Court declined to review two hotly contested cases from the state of Indiana, thus failing to provide clear answers for lower courts. *O'Bannon v. Indiana Civil Liberties Union*[6] in 2001 and *City of Elkhart v. Books*[7] in 2001 were both decided by a three-judge panel of the Seventh Circuit. In both instances the panel ruled 2-1 that a Ten Commandments monument violated the establishment clause.

The refusal by the Supreme Court to hear these cases was not without controversy. Three justices—Chief Justice William Rehnquist, Antonin Scalia, and Clarence Thomas—voted to review the *Elkhart* decision, and took the unconventional action of writing a dissent to the denial of review, stating that the marker "simply reflects the Ten Commandments' role in the development of the legal system."[8]

Split in the Lower Courts

Even as the Supreme Court declines to hear these cases, lower courts continue to issue rulings. In March a federal district court in Pennsylvania ruled in *Freethought Society v. Chester County* that government officials could not maintain a Ten Commandments plaque at the local courthouse, as it was found to be primarily a religious document.[9] The court went so far as to count the number of words in the Ten Commandments. According to the court, "no less than 241 words are explicitly religious, while only 84 could be fairly regarding as conveying a secular, moral message." Federal judges in Nebraska and Tennessee have also recently ruled that Ten Commandments monuments must be removed from government buildings.

THE COURT WENT SO FAR AS TO COUNT THE NUMBER OF WORDS IN THE TEN COMMANDMENTS.

While most courts have struck down displays of the Decalogue, other courts disagree. In *Anderson v. Salt Lake City Corporation*, the Fifth Circuit upheld the constitutionality of a "passive monument" of the Ten Commandments on courthouse grounds.[10] The court found that the Decalogue "has substantial secular attributes" and is "primarily secular." Also, in 1995 the Colorado Supreme Court ruled 4-3 in *State of Colorado v. Freedom From Religion Foundation, Inc.*, that a Ten Commandments monument in a public park was constitutional.[11] The majority noted that the monument was displayed in the context of many other secular symbols, representing "a cornucopia of different cultural events and experiences that make up the history of our nation and reflect upon a history that is Colorado."[12]

Controlling Authority

This is not to say the Supreme Court has never addressed the Ten Commandments controversy. In 1980 the High Court waded into the troubled waters with its decision in *Stone v. Graham*.[13] The High Court struck down a Kentucky law requiring all public schools to post copies of the Ten Commandments in every classroom. The majority wrote "the preeminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature."[14] This requires any use of the Ten Commandments

to be part of the school's academic curriculum, in which students may be taught about the Decalogue. It forbids any devotional use of this portion of Scripture.

At least with regard to the disputes over the Ten Commandments in public schools, *Stone v. Graham* provides clear guidelines. However, when courts analyze the display of the Ten Commandments on public property outside of schools, they often look for other precedent. These courts say that *Stone v. Graham* is confined to the impressionable young minds of young students.

As the High Court has not definitively ruled on posting the Ten Commandments in public buildings outside of schools, lower courts must look other places for answers to this establishment clause question. For purposes of government displays of religious symbols, many courts have adopted Justice Sandra Day O'Connor's "endorsement" test, developed in her concurring opinion in the crèche display case *Lynch v. Donnelly*.[15] This test asks whether the governmental act has "the purpose or effect of endorsing religion." Courts determine this primary effect by focusing on the content and the context in which the religious symbol appears. Courts using this method of analysis have found displays to be allowed in some circumstances (especially when the Ten Commandments are part of a larger display) and other times have found displays to be in violation of the Constitution.

As political and legal battles continue to rage over displays of the Ten Commandments on public property, certain recurring questions remain to be answered. Do these displays constitute an impermissible endorsement of religion or merely pay respect to the most important historical and legal document of Western civilization? Even if a constitutional means to post the commandments can be found, should the government do so?

Proponents argue that the Ten Commandments represent a shared moral code that reinforces important values, particularly among schoolchildren. They contend that the Decalogue includes "Thou shalt not kill," "Thou shalt not steal," and "Thou shalt not commit adultery." As such, they form the basis of the shared civic code in the Western world. They also argue that even the religious portions of the commandments should not be constitutionally problematic, as they are also part of the shared religious background of the West.

While initiatives to post the Ten Commandments are often proposed with the best of intentions, these attempts are misguided for several reasons. Barry Lynn of Americans United has even created a top-10 list of reasons for not posting the Decalogue in public places. Yet two reasons overshadow all the rest: the Ten Commandments are not a common civic code that everyone can agree on, and having the government post the Ten Commandments is bad for religion.

While posting proponents argue that the Ten Commandments *are* just a civic, moral code that forms the foundation of Western civil law, admonitions to "have no other gods before Me" and to "not make for yourself an idol" seem to contradict this view. Known by some as the first tablet, these commandments are specifically religious in nature. As U.S. District Judge Stewart Dalzell points out, more than three fourths of the words in the Ten Commandments directly address religious issues.[16]

AS U.S. DISTRICT JUDGE STEWART DALZELL POINTS OUT, MORE THAN THREE FOURTHS OF THE WORDS IN THE TEN COMMANDMENTS DIRECTLY ADDRESS RELIGIOUS ISSUES.

It is not surprising that various groups differ theologically in their understanding of this portion of Scripture. Roman Catholics, evangelical Protestants, and Jewish groups all have different formulations of the commandments. While some argue these are minor points, these differences have led to political conflict and even violence in this country. The controversy over which version of the Ten Commandments the government should use has stretched intermittently over the past 160 years in America alone. In the Bible wars of the 1840s and 1850s Catholics and Protestants fought over whether the Catholic or Protestant version of the Bible should be used for daily Bible readings in the public schools. The rancor over this issue led to violence, mobs, riots, and even the deaths of several people.

In 1859, for example, Thomas Wall, a student at Eliot School in Boston, refused to recite the Protestant version of the Ten Commandments, at the instruction of both his father and his priest. Other Catholic students in the school had already received similar instruction, and when they failed to comply with teachers' requests to recite the Protestant version of the Ten Commandments, they were whipped. When Wall refused, he was turned over to the assistant principal, who placed him before the class, informing them that young Wall would be beaten with a rattan cane across the hands until he repeated the Protestant version of the Ten Commandments. After a half hour of beatings, his hands laid open and bleeding, Wall relented. Such anti-Catholic sentiments remain. Many Web sites can

be found that point to the ordering of the Ten Commandments as proof of Catholic error and Protestant superiority. In particular, the omission from the Catholic version of the prohibition against graven images that is found in Protestant versions has led to charges of idolatry by some. This charge is based on deeply held theological ideas about use of iconography and similarly fundamental differences between these two Christian groups.

This does not begin to mention the differences between Christian and Jewish versions of the Ten Commandments. The Jewish version of the first commandment is traditionally "I am the Lord your God, who brought you out of the land of Egypt, out of the house of slavery." Many Christian groups do not consider this a commandment at all, as there is not imperative (though Jews do not always perceive this as a group of commandments, preferring the Hebrew, which refers to the 10 *words*).

This creates a conundrum for those who wish to post the Ten Commandments on public buildings, for they must first pick which version will be posted. The solution to these variations in ordering involves either picking one faith group's version or finding some way of homogenizing the text. Obviously, picking one version over others will indicate a preference among religions. Even for the most devout proponents of displaying the Decalogue, such preferences should cause unease. The other option, which, sadly, has been proposed by some lawmakers, invites the government to alter the text of sacred Scripture to form some homogenized amalgam. In a nation as religiously and culturally diverse as America is today, any such solution is bound to lead to dissension and political conflict. Modern establishment clause jurisprudence is understood to keep government out of such controversies, thus providing the greatest freedom for all people.

IF THE TEN COMMANDMENTS ARE TO PLAY A PART IN CHANGING AMERICAN CULTURE, IT WILL NOT BE BECAUSE JUDGES, LEGISLATORS, AND SCHOOLTEACHERS PLACE THEM ON THE WALL.

Bad for Religion

The issue of which version of the Ten Commandments to post is divisive in the body politic because it causes the government to make preferences among religions. But political coopting of the Ten Commandments should be deeply offensive to religious people for another reason: it is harmful to religion. Allowing government to use sacred Scriptures for political purposes harms religion in two ways: it makes religious people lazy, and it taints religion in the eyes of the rest of society.

If the Ten Commandments are to play a part in changing American culture, it will not be because judges, legislators, and schoolteachers place them on the wall. Religious people should not look to the government to assume the responsibility of providing salt and light to the world. If people are really serious about changing the moral climate in this country, they should start by posting the Ten Commandments in their homes or, better yet, by living lives that comport with the commandments. Living a moral life will be a far better stimulant to the moral common weal than any plaque posted on a courthouse wall.

One of the most damaging aspects of posting the Ten Commandments is that it makes religion (and religious Scripture) into the handmaiden of the state. Politicians must not be allowed to use this controversy as a means of achieving personal political goals. The use of religion by the government reduces religion's prophetic position in society. How can religion adequately criticize and correct flaws in government and society when it is merely another appendage of the state? Religious advocates of posting the Decalogue should mind the words of Martin Luther King, Jr.: "The church must be reminded that it is not the master or the servant of the state, but rather the conscience of the state"

[1] H. CON. RES. 315.

[2] H.R. 3895.

[3] As a circuit court judge, Moore had refused to remove a Ten Commandments display from his courtroom. Campaigning that he was "still fighting for the Ten Commandments," Moore later won a seat on the Alabama Supreme Court, eventually becoming the chief justice. Then last summer, without consulting or notifying his colleagues on the bench, Moore placed a 5,000-pound Ten Commandments monument in the rotunda of the state judicial building.

[4] S.C. H.B. 4409.

[5] N.D. Cent. Code, Section 15.1-06-17.1 (2001).

[6] *Indiana Civil Liberties Union v O'Bannon,* 259 F.3d 766 (7th Cir. 2001).

[7] *Books v. City of Elkhart,* 235 F.3d 292 (7th Cir. 2000).

[8] *City of Elkhart v. Books* (00-1407).

[9] *Freethought Society v. Chester County,* 2002 U.S. Dist. LEXIS 3588 (E.D. Pa. Mar. 6, 2002).

[10] 475 F.2d 29 (5th Cir. 1973).

[11] 898 P.2d 1013 (Colo. 1995).

[12] *Ibid,* p. 1025.

[13] 449 U.S. 39 (1980).

[14] *Ibid,* p. 41.

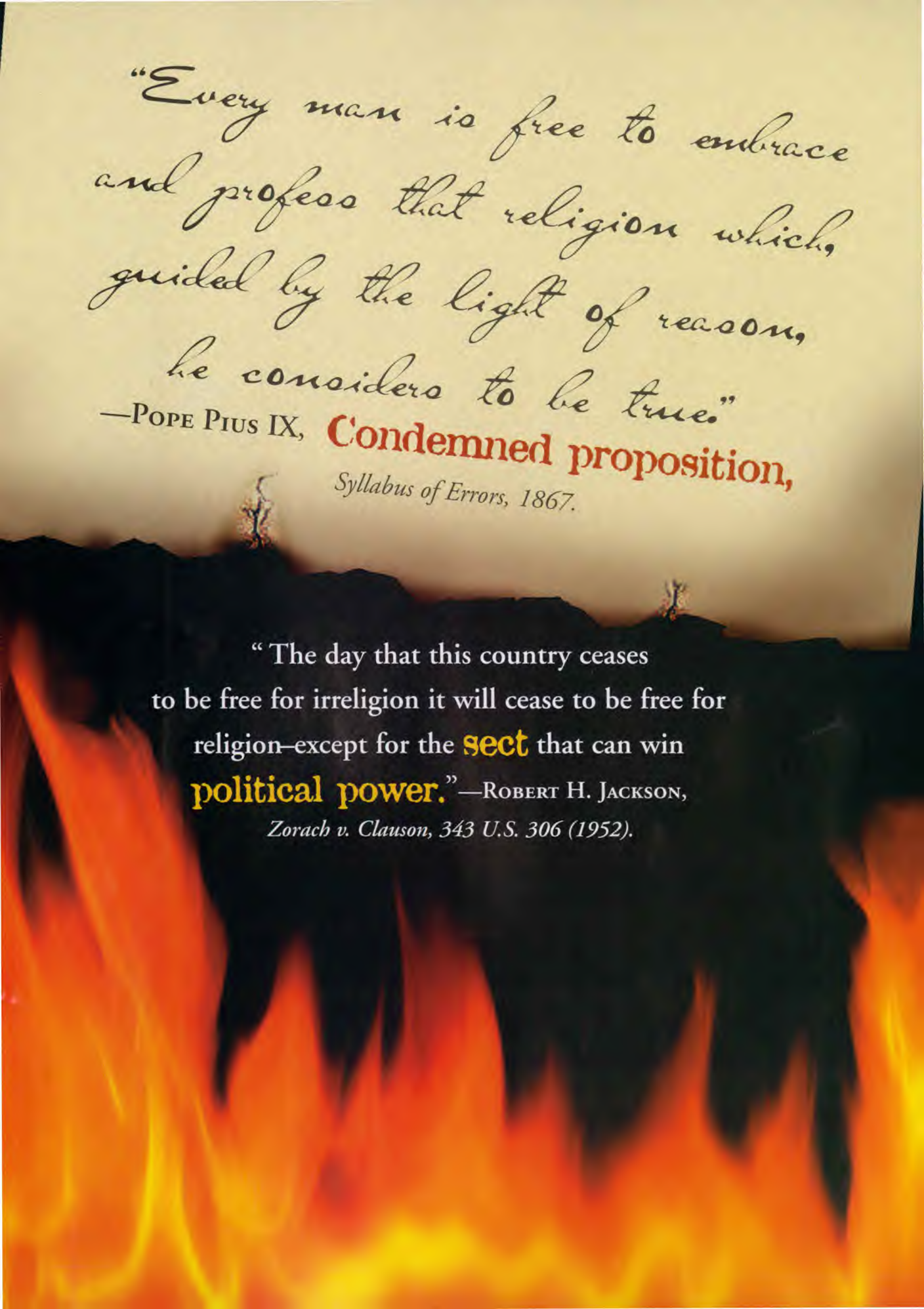
[15] 465 U.S. 658 (1984).

[16] *Freethought Society,* p 18. ("Thus, discerning the 'purpose' from the face of the tablet, no less than 241 words are explicitly religious, while only 84 could be fairly regarded as conveying a secular, moral message.")

"Every man is free to embrace and profess that religion which, guided by the light of reason, he considers to be true."

—Pope Pius IX, **Condemned proposition,**

Syllabus of Errors, 1867.



"The day that this country ceases to be free for irreligion it will cease to be free for religion–except for the **sect** that can win **political power.**"—Robert H. Jackson,

Zorach v. Clauson, 343 U.S. 306 (1952).

By
MARCI A. HAMILTON

STONE Words

Ownership of the Ten and a Battle to Define Public Faith

The Supreme Court recently denied *certiorari* in a case testing whether state government could post the Ten Commandments. At the same time, a federal district court in Pennsylvania held that the government's display of the commandments violates the establishment clause.

As I have noted in my www.FindLaw.com column, serious constitutional problems arise when the government displays the Ten Commandments. The typical defense is that the commandments are the ground for much of our criminal law and therefore constitute a legal and historical document—not a religious one. But this argument, upon examination, is so weak that it ought to be rejected out of hand.

Indeed, the only real question the argument raises is why some courts have found its flawed logic persuasive. To that question, I will offer two possible answers.

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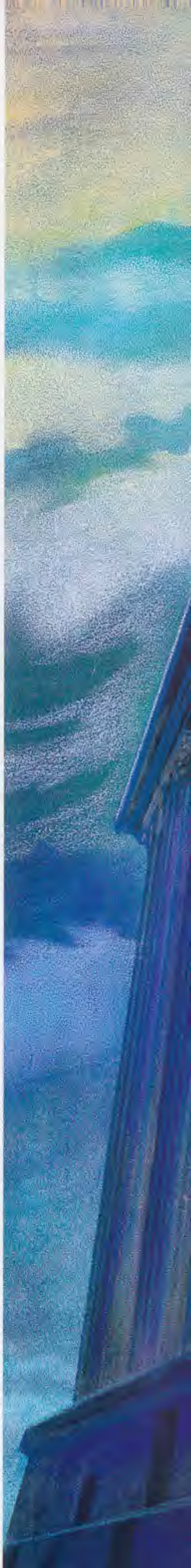

ILLUSTRATION BY SALLY WERN COMPORT


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Dividing the Ten Commandments in Two

The misguided argument that the Ten Commandments are merely legal and historical treats them as though they are an indissoluble whole. Of course, they are not.

To be sure, the principles expressed in the last six commandments—honor thy mother and father, don't kill, don't commit adultery, don't steal, don't lie, and don't covet—can be found in various aspects in many laws in the United States. The first four commandments, though, contain directives that no government official in this land of religious liberty may say or endorse on behalf of the government.

Were the president to give a speech (which he, of course, would not) reminding Americans to obey the first four commandments—there shall be only one God, there shall be no graven images, do not take the Lord's name in vain, and keep holy the Lord's day—there would be a huge uprising in opposition. Those are not messages this government may endorse, and thank God for that.

Similarly, when the government displays the Ten Commandments by themselves, the unconstitutional endorsement of a particular religion is patently obvious. This is not a hard case, despite the divisions among the courts that have addressed the issue.

The hard case is whether they can be displayed along with other historical sources of the law as an educational tool. This one is hard, because it depends on context and the viewers' likely interpretation. No one believes that the Ten Commandments can never be displayed; that would be ridiculous. The trick is displaying them in a way that does not carry the government's endorsement of their religious content.

NO ONE BELIEVES THAT THE TEN COMMANDMENTS CAN NEVER BE DISPLAYED; THAT WOULD BE RIDICULOUS.

Discrimination Against Nonbelievers

So how does one explain the lower courts' inability to embrace the clear, simple, and obviously true proposition that the Ten Commandments are religious? The answer is that there are two forces at work in these cases that tend to muddy the constitutional waters.

First, the most reviled minority in America is characterized neither by race nor sex nor religion, but rather by a lack of religious belief. When nonbelievers challenge government-backed religious messages, they are typically treated with contempt and often face threats and harassment, as well.

For example, in the Pennsylvania case the female plaintiffs—atheists who brought the suit with the help of the ACLU—were threatened and harassed both before and after the court's decision validating their argument. In Texas, students challenging government-sponsored prayer at football games asked (and were granted the right) not to be named in the lawsuit, so they could avoid harassment. Who are the actual and feared harassers? Believers, of course.

This is an unfortunate example of the intolerance of a majority whose members ought to know better. After all, if the believers were to be told by the government that they must stop believing in God tomorrow, they would heat up their lobbying machines and their members to a fever pitch. Their representatives in the state and federal legislatures would self-righteously decry the violation of the believers' rights. Believers know well how to defend, and defend strenuously, their rights to believe as they choose—as well they should.

But when nonbelievers suggest that the government ought not endorse a religious message, the same believers tell the nonbelievers to "get over it" and move on to another issue. If the nonbelievers, too, must have their own views, they should at least keep them to themselves when they conflict with the believers' agenda. The believers' attitude is: Commitment and conviction for me but not for thee. And you can be sure no member of Congress or a state legislature will defend the nonbelievers' rights.

As a believer I find this all rather embarrassing. I find embarrassing and unfortunate, too, believers' efforts to lobby for government support for their beliefs—whether through the posting of the Ten Commandments or otherwise. Actions such as these make all believers look bad.

Religious Connotation Retained

The second argument that has muddied the waters for courts is the claim, recently repeated again and again, that the Ten Commandments can be displayed by the government because they have lost their religious connotation. According to this argument the commandments are nothing but legal history.

Think about this. Government, pandering to religious voters, goes out on a limb, engaging in expensive and risky litigation, to defend the display of a document that is deeply religious for both Jews and Christians, on the theory that it is no longer truly religious. The very reason that the government is attempting to post the commandments—because believers so fervently want them posted—belies the claim that the commandments are not religious.

This is secularization as a cover for the drive to power,

and it is too transparent to be believed. The next time a believer complains about "secularization," one might ask who has been pushing the theory of secularization the hardest, and for what purpose.

Those who bemoan the alleged "loss" of the power of religion in public life should pause before attempting to drain a powerful, moving, sacred, and overwhelmingly significant religious document of its power by pretending it is not even religious in the first place. Sometimes ends do not justify the means, particularly when the means involve being disingenuous about the very institution one is purportedly defending.

The Hegemony that Never Existed

At the heart of the debate over the public display of the Ten Commandments is a struggle that always has existed but that has become more pitched as the United States has matured. In the wave of Asian and European immigration in the late nineteenth century, Protestants responded by embracing the phrase "a Christian nation" in legal opinions and popular editorials. Despite these protestations, our religious diversity continued to increase through the twentieth century and into the twenty-first. Even so, some Christians have held tight to the belief that this is "their" country, and therefore their symbols deserve government endorsement in the public square.

WHEN THE SUPREME COURT FINALLY ADDRESSES THE TEN COMMANDMENTS ISSUE, WHICH IT EVENTUALLY WILL, ONE CAN ONLY HOPE THAT THE JUSTICES TAKE THE STRAIGHT PATH ON THIS ISSUE.

The problem with this vision is that this country has never been one of a singular religion. It is an abstraction to argue that this was a unified Christian country even at the time of the framing of the Constitution, when Christian sects battled for political control, the right to be *the* established church, and not infrequently expelled nonbelievers from their communities. The Quakers were important in introducing tolerance, but that tolerance was sorely needed *because* of the religious diversity present from the beginning.

Harvard professor Diana Eck has written a fascinating book documenting the current diversity in religious belief and practice, *A New Religious America: How a "Christian Country" Has Become the World's Most Religiously Diverse Nation.* For anyone who continues to insist that this country is any single religion and that any religion's symbols have a right to a place of power, this book is a strong corrective. Hindus, Buddhists, Muslims, and Sikhs are no longer fringe religions but, rather, thriving communities of *Americans.*

Those pushing display of the Ten Commandments would say at this point: Even if there are many religions now, the religion that is the foundation of America is Christianity, and therefore its symbols deserve pride of place. This is a beguiling argument, but it is offpoint. There is no doubt—and actually my life's academic work is devoted to this subject—that principles found in some Christian theologies were interpolated by the framers and incorporated into the Constitution. The organizing principles of the Presbyterian Church, for example, were an important source of ideas for some of the most influential framers, for example, James Madison and James Wilson.

Ideas, however, do not carry with them a right of ownership. They are not indelibly stamped with "Owned by—." Rather, they travel and mingle with others. In the case of the Constitution, it was a blend of theological, philosophical, and political ideas combined with practical insights. That the framers borrowed some Christian ideas that were powerful at the time of the framing does not mean that Christians can claim ownership of the Constitution.

Even if our legal system borrowed principles from the Ten Commandments (elements of which actually appear in other religious traditions as well), that does not make the system Christian, or owned by any Christian religion. Christians should be proud of the contributions of their tradition's ideas, but that is a far cry from instituting a right to claim ownership of either the legal or cultural construct.

Indeed, the constitutional and legal experiment in the United States is not validated so much by its Christian sources as by the fact that it has succeeded. It is true with constitutions as with everything else: nothing succeeds like success.

The Future

When the Supreme Court finally addresses the Ten Commandments issue, which it eventually will, one can only hope that the justices take the straight path on this issue. They did so in an earlier, and equally easy, decision when they declared that school-sponsored football game prayers violate the establishment clause. That case echoed their earlier, and correct, decision that school-sponsored prayers at high school graduations send a message of endorsement that disenfranchises those who do not believe in the content of the prayer. Because of these precedents, there is good reason to hope that the religious liberty set in motion by the Constitution will continue to flourish in this land of religious diversity. That vision of religious liberty is the antidote for religious tyranny.

The Fifth World Conference of the IRLA proved to be a...

Religious Liberty *Thriller in* Manila

Reported by Lincoln Steed

Top: President Arroyo at the Palace reception. IRLA President John Graz is to her left. *Courtesy IRLA.*

Left: Partial view of the IRLA Congress in session at the Westin Philipines Plaza center. *Courtesy IRLA.*

The allusion to a boxing extravaganza in Manila some decades ago might seem too predictable. But the thrill remains in this post-September 11 world and an ongoing war on terrorism. During the June 10-13 conference of the International Religious Liberty Association Filipino and U.S. military forces ambushed an Abu Sayef guerrilla force and rescued some of the hostages; with the regrettable death of hostage Graeme Burnham. The war goes on, and it has a distinctly religious tinge.

In that context the 400 delegates gathered at the Westin Philippines Plaza Hotel were very much an expeditionary force to battle for continued religious liberty where it now exists, and for a new freedom where it is denied.

Support from the Philippine government could not have been stronger, with various top officials like Senate President Franklin Drilon, House Speaker Jose de Venecia, Jr., Philippine Ambassador to Papua New Guinea Bienvenido V. Tejano, Imee Marcos-Mantoc, daughter of the late ex-president Marcos, and the Mayor of Manila and Pasay giving of their time and advice to the assembly. President Arroyo took time also to receive congress delegates at the Malacanan Palace and affirm her country's commitment to religious liberty.

That commitment is already tested, but in its resolutions the congress acknowledged just how close to "home" the problem can be. "Many citizens of this country do not enjoy reciprocity of religious freedom protection when working abroad." And in the post-September 11 house-cleaning some of those states that routinely abuse the religious and civil rights of foreign workers must be challenged to cease this crime against the rights of mankind.

A very interesting part of the congress was a hearings session on the second evening. Attendees were given firsthand information on the repression of Falon Gong by the government in China, and village victimization of Seventh-day Adventists in Chiapas, Mexico–where semiautonomous rule there has enabled church destruction, property confiscation, and mass detainment of believers. Probably the most shocking presentation was a home video of the Muslim/Christian warfare in Indonesia–the street butchery was a visceral illustration of religious intolerance.

It was a full program, with a broad spectrum of faiths and nations represented. Part of the glue was the participation of Abdelfattah Amor, U.N. Special Rapporteur on Freedom of Religion or Belief, and Robert Seiple, former U.S. Ambassador-at-Large for International Religious Freedom. We heard from many voices. In an official summation Attorney Mitchell Tyner noted that "we even heard from editors." And I did represent this magazine and its principles to the congress, not as a different life form but in rededication to our shared goal of enabling all human beings to freely choose their spiritual path. My God, I believe, would have it no other way.

A CHURCH *by Any Other* NAME

By Marjorie Hansour

What is a church? The Nebraska Supreme Court was asked to decide this question in a case stemming from a liquor license granted to a Kum & Go convenience store in Omaha. The Kum & Go is located across the street from the House of Faith, a nondenominational Christian congregation that has been worshiping in its rented building since 1990. In Nebraska a zoning exclusion law prohibits the issuance of a liquor license to an entity located within 150 feet of a school or church. No party disputed the zoning law, but a legal battle quickly erupted over a murkier issue—whether the House of Faith could really be called a church.

The controversy began in 1998, when the Kum & Go store applied for a liquor license. The Omaha City Council, citing the 150-foot zoning exclusion, denied the license, noting that the front door of the store is only 138 feet away from the front door of the House of Faith. Under Nebraska law the Kum & Go then had the right to appeal the city's decision to the Nebraska Liquor Control Commission. The commission overrode the city council's decision, stating that the House of Faith did not meet the liquor commission's definition of a "church."

The commission defined a church as "a building owned by a religious organization used primarily for religious purposes which enjoys tax-exempt status." Since the House of Faith rents space in its building and is not tax-exempt, it clearly does not qualify as a church under the commission's definition.

Kum & Go lawyer Michael Lehan defended the commission's law, saying it is no different from those requiring schools to be certified or colleges to be accredited.

Though the House of Faith was not considered a church according to the liquor commission, Lehan stated, "This does not mean that people do not assemble on occasion at the building and worship God."

While the House of Faith itself never disputed the issuance of the liquor license—its pastor, Mary L. Sherman, stated in her affidavit that the congregation "had chosen to use its energies to help its community in other ways"—the city of Omaha did take issue with the state's decision.

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ILLUSTRATION BY DAVID KLEIN

The city appealed the liquor commission's decision to the Lancaster County District Court, and the court once again sided with the city, but that wasn't the end of the dispute. The case of *City of Omaha v. Kum & Go* went on to the Court of Appeals, where the Nebraska Supreme Court pulled it, choosing to hear the case directly.

The American Civil Liberties Union (ACLU) filed a brief in support of the city. "We got involved because of the issue of separation of church and state," said Tim Butz, executive director of the Nebraska ACLU. "We took on [the case] on the basis of the First Amendment argument that the commission's ruling infringed upon the rights of the members of the House of Faith to associate with one another, and that the government's definition of what constitutes a church amounted to a violation of the Establishment Clause."

In its brief the ACLU argued that the state was discriminating against small churches and poor worshipers.

"The House of Faith is a store front church," said Butz. "Its congregation is poor. It has no assets and therefore has never attempted to become certified as tax exempt or to incorporate. They're just people who for more than ten years have met in the same rented building for the purpose of worship."

The ACLU argued that, while ownership of a building and tax-exempt status should certainly be *factors* in determining what is or is not a "church," these criteria should not be hard *requirements.* As stated in its brief, the ACLU maintains that "such a definition is not only contrary to the plain and ordinary usage of the word 'church,' but so narrowly defines the term that it would operate to infringe upon the free exercise rights of religious organizations and would constitute a denominational preference in violation of both the Nebraska and federal establishment clauses . . . . The freedom of Nebraskans to practice the religion of their choice without interference from nearby liquor stores should not depend on the worshipers' ability to pay a mortgage."

The ACLU maintained that the Nebraska Liquor Control Commission exceeded its statutory authority when it promulgated a definition of "church" that requires the building to be owned by a religious organization that has tax-exempt status. It noted that the precise issue of the meaning of the word "church" was decided by the Nebraska Supreme Court in past cases and defined as: "The plain, ordinary, and popular meaning of the word 'church' would indicate a building where Christians gather to worship God or a building in which people assemble for non-Christian worship."

Based on this definition, the House of Faith would certainly constitute a church. According to the brief filed by the city of Omaha: "The House of Faith has a congregation of between 75 and 150 members and holds religious worship service each Sunday and Friday; prayer meetings each Monday; and choir practice each Saturday. Services at the House of Faith are open to any person wishing to attend. The building's sole use and function is for worship or religious purposes. . . . Photographs of the entrance of the House of Faith clearly show that the building is held out to the public as a place for religious services open to the public. Religious symbols of a cross and dove are publicly displayed on the entrance door and on the sign above the door."

According to Butz, "[the ACLU] felt that if the government is going to give a benefit to a church it must do so in a way that doesn't infringe upon people's right of association

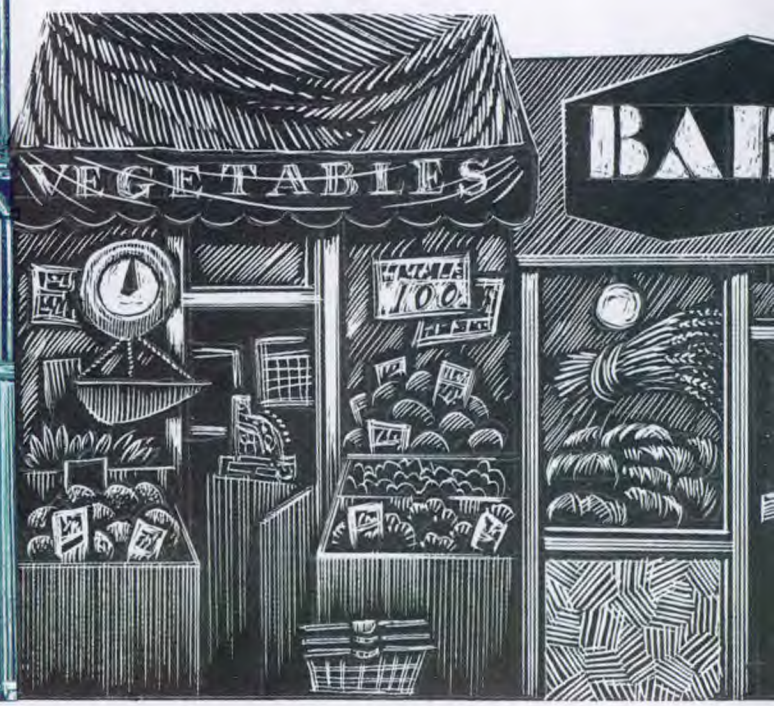
Whether or not a building is a **church...** *does not depend on the legal ownership of the building.*

and doesn't discriminate or give preference to any type of religion. While this case does not involve a denominational preference, there is certainly a preference based on economics. An affluent church would never have a liquor license this close to its front door."

On April 19 the Nebraska Supreme Court agreed with the arguments presented by the city of Omaha and the ACLU, vacating the commission's order granting Kum & Go a liquor license and reversing the decision of the commission.

In its ruling the court stated that "the House of Faith is a church. Whether or not a building is a church . . . does not depend on the legal ownership of the building. The plain meaning of the word 'church' encompasses buildings in which persons regularly assemble for religious worship, regardless of whether the building is owned or rented by those persons. . . . The mandatory criteria for a church, set forth [by the liquor commission] are contrary to the plain meaning of the word. . . and may arbitrarily exclude from their definition a number of churches that are entitled to the protection of the statute."

While the court's decision was certainly a victory for the separation of church and state in Nebraska, it remains to be seen whether the ruling will have broader implications. "I think it may," said Amy Miller, Nebraska ACLU legal director. "These issues come up relatively frequently and sometimes how a court rules on one matter can have outside implications. Whether this decision will have an impact on courts outside of Nebraska is hard to say. It may be looked to for guidance by other courts but it won't be binding on any other court outside of Nebraska."



Torii Gate Troubles

By David A. Pendleton

Constitutional troubles lurk in a gift to Honolulu from Hiroshima.

In September of 2001 the people of Honolulu, Hawaii, received a gift that appeared harmless enough. But it quickly became a matter of debate, and what should have been a focal point of peace and quiet became a magnet for cacophony and controversy.

David A. Pendleton is an attorney, Seventh-day Adventist minister, and member of the Hawaii House of Representatives.

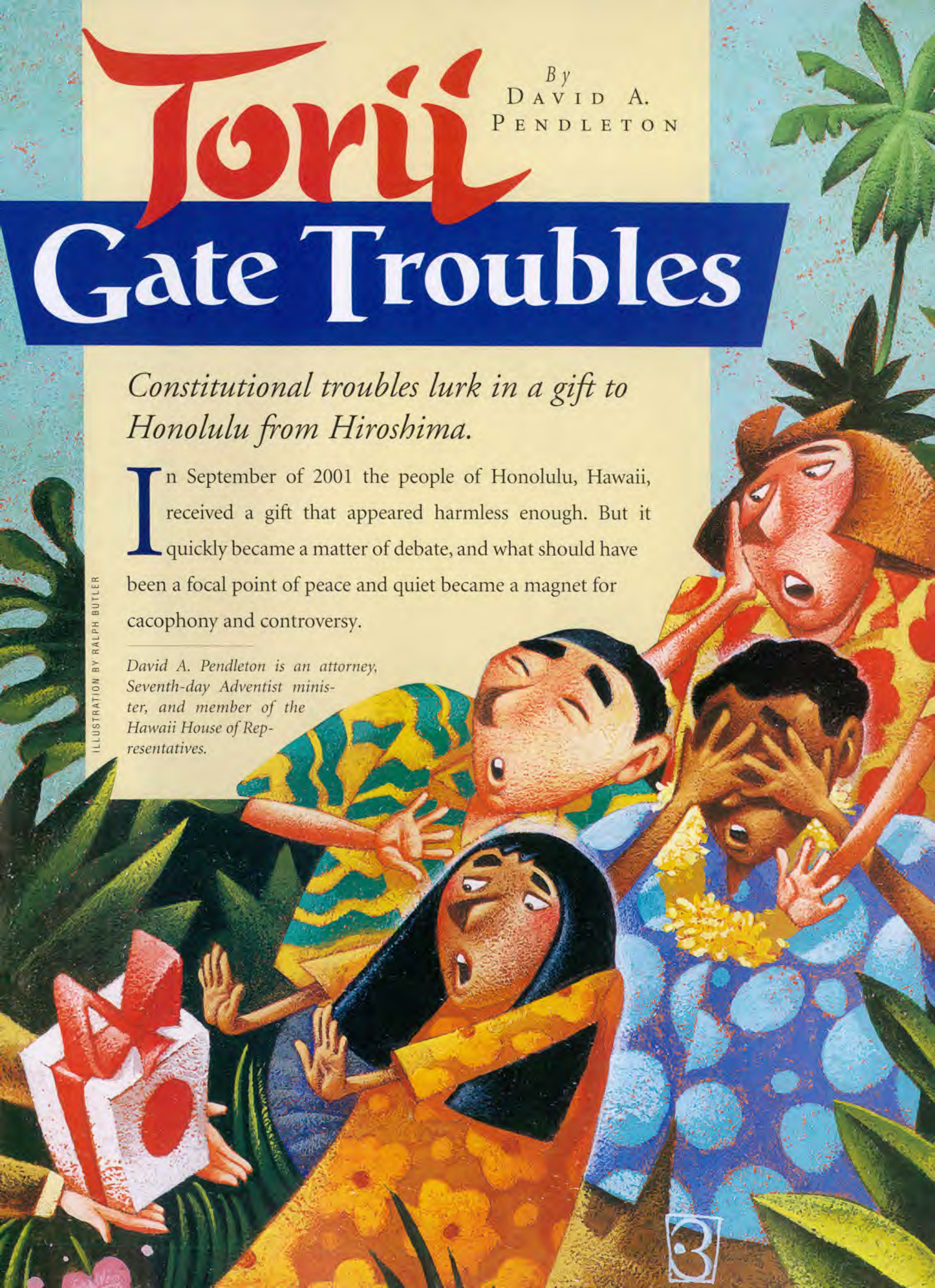


ILLUSTRATION BY RALPH BUTLER

How could a simple torii gate, a replica of a famous torii gate on Miyajima island, near Hiroshima, Japan, stir so much controversy when bestowed as a goodwill gesture to the people of the state of Hawaii? The answer lies in the nature and origin of the torii gate. For it is no ordinary gate, but a Shinto gate.

The city of Hiroshima and the prefecture of Hiroshima[1] as well as the Hiroshima Chamber of Commerce arranged for a torii gate, modeled after the famous one on Miyajima island, to be given to the people of Hawaii. The Honolulu Japanese Chamber of Commerce was delighted to facilitate the gift because it was not only an "art and cultural piece" but also a symbol of the close robust "ties between the people of Hiroshima and the people of Hawaii," adds Ron Ushijima, president of the Honolulu Japanese Chamber of Commerce.

One cannot **negate** *the intrinsi nature of an object simply by pointing to its* **cultural** *significance withi*

Hiroshima has had a longstanding relationship with Hawaii. In 1885 large numbers of immigrants from Japan began arriving in Hawaii to start a new life. A significant number of those Japanese immigrants were from the city of Hiroshima or at least the prefecture of Hiroshima. It was to be expected, then, that Hiroshima and Honolulu would become sister cities.

"The torii is not religious but cultural," argues Ushijima, "because the government of Japan, or any subdivision of it, is also prohibited from making any contributions of a religious nature." The fact that Japanese government officials used public funds would seem to make this clear.

However, Lawrence Foster, dean of the University of Hawaii School of Law, indicates that it is not sufficient for Hiroshima officials to go through the analysis under their Japanese constitution. We here on the receiving end must also do our own analysis under our own American Constitution.

Mark Levin, an assistant professor at the University of Hawaii School of Law and a specialist in Japanese law, explains that the present Japanese constitution was enacted after World War II. The United States influenced its drafting, and consequently many legal principles from the American Constitution were adapted for the Japanese constitution. For instance, although prewar Japan had a state-sponsored religion—namely, Shintoism—the Japanese people made a deliberate decision when, on November 3, 1946, a new constitution became the law of the land. That new constitution included Article 20, which can be translated thus: "Freedom of religion is guaranteed to all. No religious organization shall receive any privileges from the state nor exercise any political authority. No person shall be compelled to take part in any religious act, celebration, rite or practice. The state and its organs shall refrain from religious education or any other religious activity."[2]

Insofar as the Japanese constitution applies not only to the "state" (national government) but also to "its organs" (prefectures and cities), explains Levin, Hiroshima's officials presumably went through the process of determining whether the torii was religious (impermissible to fund publicly) or cultural (permissible to publicly fund).[3] But their conclusion is not dispositive of the question we must answer.

"This is a highly contentious issue in Japan," cautions Levin. "There have been lawsuits and court decisions, including Japanese Supreme Court decisions over exactly these kinds of circumstances. The most recent decision was handed down in May of 2001, where a Japanese trial court in the Ehime prefecture ruled that the local government violated the law by erecting a Buddhist statue with public funds. The statue was removed to private property."

Ushijima, of the Honolulu Japanese Cham-

ber of Commerce, insists that the "torii was not entirely paid for out of public funds. The Chamber of Commerce of Hiroshima, in fact, contributed private funds." Professor Levin explains, however, that the presence of private funds does not remove the problem that public funds were used. One must still undertake the analysis required by the law in both countries.

The community of Moiliili in Hawaii was chosen as the site for the torii gate because many Japanese businesses are located there, many of the earliest immigrants to Honolulu settled in Moiliili, and the exact location—a triangle park between King Street and Beretania Street—is in close proximity to the headquarters for the Japanese Chamber of Commerce and the Japanese Cultural Center of Hawaii.

eligious society.

The torii "is a lovely addition aesthetically to the neighborhood," notes Susan Kodani, president of the Japanese Cultural Center of Hawaii. "The piece is beautiful, tranquil, pleasing, and a positive thing for the community," though the triangle park is owned by the state of Hawaii and administered by the city and county of Honolulu. "It should not be a problem," and, in fact, "it would be a shame," says Kodani, "were litigation to force relocation to an alternative site."

Individuals close to the Hawaii chapter of the American Civil Liberties Union have indicated sincere concerns over the presence of the Shinto torii on government—owned and—operated property. They have no problem with the story of Japanese immigrants to Hawaii being told, but they have a problem with "the perceived endorsement of a religion by the government." This, they say, is a constitutional problem. It is not about how much culture is involved or whether there is more culture than religion involved. It is a matter of separation of church and state and a matter of the constitutional scheme.

"Since the city could not constitutionally accept a replica of the city of Rio de Janeiro's giant Jesus statue or Bangkok's giant Buddha statue," says Brent White, legal director for the American Civil Liberties Union of Hawaii, "it stands to reason that the Shinto torii must be removed or relocated to private property."

A Honolulu city official, asking not to be identified, acknowledged that this gift "is more than just a simple legal question to be resolved. It is a matter of protocol and good relations." The people of Hawaii have "already accepted the gift from the people of Hiroshima. We can't lock it up in a warehouse. We cannot give it back," he says.

Alfred Bloom, a retired University of Hawaii professor of religion, and others suggest that the Moiliili triangle park, or a portion thereof, be sold, leased, or rented to the Honolulu Japanese Chamber of Commerce or some other appropriate private party for $1 per year, and that government officials thus permit the torii to remain. Any litigation "would be embarrassing to the community" and possibly harmful to the relations with Hiroshima.

Sam Cox of the Open Table, an informal association of religious leaders who gather monthly for interfaith dialogue, says that he is "ambivalent regarding the torii." He regards the torii as "both a cultural symbol and a religious symbol, and perhaps more cultural than religious." Many years ago Cox was a missionary in Japan for five years. He is inclined to view the torii as more cultural than religious because of the Hawaiian context. "Perhaps the use of the Torii nowadays," he explains, "is parallel to the widespread use of the Christmas tree and Saint Nicholas (a Christian saint) all over Japan (even in public places), although less than 1 percent of Japanese residents identify themselves as Christians."

Yet one cannot negate the intrinsic religious nature of an object simply by pointing to its cultural significance within a society. As Daiya Amano of Izumo Taishakyo Mission of Hawaii, has publicly stated, the torii symbolizes Shintoism in much the same way the cross symbolizes Christianity and the Star of David represents Judaism.[4]

George Tanabe, a religion professor at the University of Hawaii, voices the opinion that the religious and cultural aspects of the Shinto

torii are perhaps inextricably interconnected: "The torii is certainly a symbol of Shintoism. But to others it may have more cultural significance than religious significance."

This can be argued both ways, he concedes. Like Kodani of the Japanese Cultural Center, Tanabe views the torii as "aesthetically very beautiful." But the real question is whether this is a religious gift. It should be noted that for some there is the question of whether Shinto is even a religion at all.

In the middle of the last century the "government of Japan declared that Shinto was not a religion, but can such a question be decided by political fiat?" inquires Tanabe. Perhaps for purposes of the law it is not a religion. But ought not its adherents have the final and ultimate say as to whether it is a genuine religion?

There are those who talk of civil religions. Sociologist Robert Bellah has pointed out that woven into the very fabric of a community are genuine sociopolitical customs that take on a quasireligious status.

"Religion or culture?" This may be the legal question we must ask and answer on this side of the Pacific Ocean, but this either/or means of categorizing the gift is a distinctively American approach, contends Tanabe.

In truth, the torii is somewhere on the spectrum between being purely religious, on the one hand, and purely cultural, on the other hand.

The city and county of Honolulu's position is that the torii is not a religious symbol, and therefore accepting it and displaying it on government property is not constitutionally problematic. But there are those who say that that very decision—whether an item is or is not of religious significance—implicates the establishment clause of the United States Constitution.

University of Hawaii law professor Jon Van Dyke insists that the constitutional concerns are not to be dismissed out of hand. "The government should not be putting religious symbols permanently on government land," he explains. "For example, crosses on military bases in Hawaii have in fact been taken down because of the constitutional problems. They were determined to be religious symbols and public property."

This means that the first question that must be addressed is whether a given symbol is perceived by the average reasonable person as a religious symbol.

Professor Van Dyke uses a hypothetical example to make his point: "Imagine if the mayor of Honolulu were to place pictures of Greek and Roman mythology up on public murals on city property. Though this would probably be unwise, it would nevertheless likely be constitutional because of the cultural rather than religious association."

The first **question** *that must b*

is whether a given symbol is perceived by the averag

person as a religious **symbol**

This analogy reflects reality. On University of Hawaii property, for instance, there is a sculpture that is ostensibly a peace symbol, but to scholars of Buddhism it could very well be an important Buddhist peace symbol. It has been felt that popular culture has sufficiently appropriated this peace symbol to marginalize the religious significance while underscoring the cultural significance. Hence, at the time of this writing it remains on campus undisturbed and is not anticipated to become legally problematic.

Van Dyke acknowledges that for some the torii is viewed primarily, if not solely, as a Japanese cultural symbol. He also acknowledges that others view it as a purely religious symbol. "Ultimately what our local community needs to do," he concludes, "is have a dialogue about whether we view this as a religious symbol or not."

In other words, before litigation and the Lemon test[5] there must be a large amount of what in Hawaii is called "talk story," or discus-

sion. One can safely assume that the government does not wish to endorse the Shinto religion, so the task at hand is how to avoid contravening protocol—by accepting the gift—but in a fashion that avoids violating the American Constitution.

Whether litigation ultimately arises from this situation is uncertain. What is clear, however, is that even with good intentions and respectable motives such issues can and often do arise. While the establishment clause and the free exercise clause of the First Amendment[6] are not incongruous, they are at times in tension. Thus it is up to conscientious citizens using their democratic processes to wrestle with and rightly resolve such issues. No one said it would be easy. But, then again, few things worth doing are easy to do.

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[1] A prefecture is the Japanese counterpart of a state in the United States.

[2] The constitution of Japan as quoted in Percy R. Luney, Jr., and Kazuyuki Takahashi, eds., *Japanese Constitutional Law* (Tokyo: University of Tokyo Press, 1993), p. 321.

[3] Luney and Takahashi argue on page 205 of *Japanese Constitutional Law* that there are three governmental approaches to the relationship between religious organizations and the state. One system is that of a national religion, as exemplified by the United Kingdom. Another system is a "concordant" system that separates the areas managed by government from those managed by religious organizations. Such examples would include Germany and Italy. In the third system there is a "thorough separation of religion and state in its narrowest sense (such as in the United States and France)." Japan falls, not surprisingly, into this third category, along with the United States.

[4] Honolulu *Star-Bulletin,* Oct 28, 2001, p. A1.

[5] In the U.S. Supreme Court case styled *Lemon v. Kurtzman,* 403 U.S. 602 (1971), the Court set forth a three-part test to determine whether there was an unconstitutional establishment clause violation: First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; third and finally, the statute must not foster an excessive government entanglement with religion.

[6] The First Amendment to the Constitution of the United States reads, in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

A·VIOLATION·OF Faith

By
MARK A. KELLNER

California Contraception Benefits Case Highlights Church-State Tensions

The continuing battle over California's Women's Contraceptive Equity Act, or WCEA, is not only due to occupy part of that state's supreme court calendar this fall, but also highlights the continuing tensions between the free exercise of religion and government in America's most populous state.

At issue are the questions What can be defined as a religious organization? Which religious groups can be exempted on moral grounds from a law they oppose? While the immediate case concerns contraception, a decision could have wide-reaching impact across denominational lines. One critic says that if the state can mandate a Catholic group to pay for birth control pills, it could equally require another group to violate its tenets in a different area, such as operating on its Sabbath or contravening dietary restrictions.

Arguments before the court will reprise several issues raised by WCEA, first passed in 1994 but vetoed three times by then-Governor Pete Wilson before his successor, Governor Gray Davis, signed the measure in 1999. The bill, which took effect in 2000, requires employers in the state who offer workers health insurance to pay for contraception. Catholic Charities of Sacramento, affiliated with the Roman Catholic Church, sued, saying that paying for contraception is against church teachings. The California act exempts certain church-based organizations, but not Catholic health care, educational, or social service operations.

After the bill was signed, Catholic Charities sued the state, seeking an exemption, and was rebuffed by a state appeals court in July 2001. The state supreme court case is an appeal of that decision.

"The autonomy of our church has been attacked and the integrity of our religious beliefs *have* been ridiculed and belittled by the California legislature as a pretense to allowing the state to regulate the internal policies of Catholic religious institutions," said Michael F. Kiernan, Sacramento diocesan director for Social Service Ministry and executive director of Catholic Charities of Sacramento, the plaintiff in the case, when filing an initial brief in the appeal.

In September of 2001, the state supreme court said it would grant a review of the appellate court decision on all of the issues briefed, both state and federal:

Is the religious guarantee in the California constitution broader than the one found in the U.S. federal Constitution, thus triggering the "strict scrutiny" standard?

Was the law's narrow definition of religious organization gerrymandered, therefore violating both state and federal establishment clauses on the question of "excessive entanglement"?

Did the appeals court erroneously find the WCEA laws to be "neutral and of general applicability," when the Catholic

ILLUSTRATION BY JEFF DEVER/FRESHART

Charities claims "it can be demonstrated that certain Catholic organizations were targeted in violation of the federal free exercise clause"?

And does Catholic Charities qualify for a "hybrid rights" claim, invoked when more than one constitutional right is infringed?

Groups beyond the Catholic Church are looking closely at the case as well as at the issues it raises. Several evangelical churches and related groups—which on their own have no theological issue with contraception—have filed *amici* briefs because they recognize the larger questions raised in this case.

Those who accept some forms of contraception, but who oppose abortion, for example, could be squeezed by the mandate of this law. Wendy Wright, a senior policy director at Concerned Women for America in Washington, D.C., asserted in an interview, "People who are aware that some of these so-called contraceptives like Depo-Provera, Norplant, IUD—the morning-after pill—are actually abortifacient would possibly have an objection to being forced to carry this."

Wright added, "The state really has no business telling organizations that they have to cover abortifacients."

One supporter of the state's position, American Civil Liberties Union of Northern California attorney Margaret Crosby, sees the matter differently. "Workers should not have their contraceptive decisions made by their employers—unless they are priests," Crosby told the Los Angeles *Times* in July of 2001. (Crosby's spokeswoman declined repeated requests from this writer for an interview.)

In her amici brief, Crosby stated that the restrictive nature of the religious exemption in WCEA "is not unusual in drawing a line between spiritual and secular aspects of a religious organization."

Crosby, who was credited in the Los Angeles *Times* report as the author and prime advocate for WCEA, believes there is a difference between "core worship" duties serving a congregation and "secular services" provided to the public.

In short, she holds that because Catholic Charities (among other religious-based social service organizations) offers its assistance to anyone, regardless of creed, and hires workers outside of its faith community, it cannot claim a religious exemption in this case.

Alan Brownstein, a constitutional scholar and law professor at the University of California at Davis, disagrees.

If Catholic Charities loses, the next regulation that interferes with an autonomous religious institution could have a different mandate.

"This isn't a mere policy practice, but [it is] intrinsic to the religious mission, to why the Catholic Church engages in charity. You can't say because your religion's tenets require nondiscriminatory benefits, we have to comply" with WCEA, Professor Brownstein said in an interview.

"In this particular case, we're dealing with contraception. If Catholic Charities loses, the next regulation that interferes with an autonomous religious institution could have a different mandate. There is no shortage of state regulations that could impinge," he added.

"You can't ask a Jewish organization that runs a community meals program to serve ham sandwiches," Brownstein added. "It doesn't matter that it's not hiring clergy; you're asking them to do something that is directly contrary to their core beliefs."

In the Catholic Charities case Brownstein sees the possibility of harm to a wide range of groups. "The problem for minority faiths is that the state isn't generally thinking about the tenets and mandates of groups that don't have a lot of political clout or are on the forefront of the legislature's agenda," he said.

"This punishes charities who are trying to do a good work because they don't toe the line with Planned Parenthood. If you don't pay for something you don't even need, you could be shut out of business," adds Wendy Wright.

At this writing, it is unclear as to how the California Supreme Court will rule in this case. In May 2002 the court supported another Catholic group in its effort to terminate an employee who was proselytizing for his evangelical faith in the workplace during job hours; some view the ruling as strengthening the rights of religion-based employers to maintain an atmosphere supportive of their beliefs.

But if the panel affirms the state position in the WCEA matter, it would allow the state to define what is and isn't religiously exempt activity. The stakes are quite high in this dispute. Alan J. Reinach, of the Seventh-day Adventist Church's Pacific Union, puts it this way: "If the state wins, then religion's wings have been severely clipped, and we're free to talk to ourselves and minister to ourselves, but we have no freedom to serve the public in Christ's name."

Mark Kellner is a freelance writer living in Marina Del Rey, California. He is a news contributor to Christianity Today *and a weekly columnist for the Washington* Times.

LET MY PEOPLE SPEA

Vacavalle SDA Church—home of KASK, 91.5 FM Maranatha Broadcasting, Inc.

Attorney Fred Blum, from law firm representing Maranatha Broadcasting, Inc., speaking at hearings

Alan Reinach speaking

By
ALAN REINACH

A short drive down a quiet country road, incongruous by its being located between the large population centers of San Francisco and Sacramento, is the Vacaville Seventh-day Adventist Church. Actually, the church itself isn't quite finished. At present the complex consists of a one-room church school and a fellowship hall where weekly worship is conducted. And off to the side of the 21-acre parcel sits a single-story, triple-wide mobile unit, beautifully landscaped and ready for use. It is this structure, or rather, its use, that has been the subject of a six-year-long battle with the county of Solano. It is a battle that is far from over.

On April 4, 2002, the Solano County Planning Commission met and rejected for the second time an application from the church to use that building to house its radio ministry, KASK, 91.5 FM. An overflow crowd of more than 200 supporters showed up and frequently cheered the parade of speakers who told the planners what a positive influence the station would be and why it would be good for the community. Church lawyers told the planners that they were under obligation to apply a new federal law that strongly favors religious uses.

Alan Reinach, a lawyer, is religious liberty director for the Pacific Union Conference of the Seventh-day Adventist Church in North America. He broadcasts a regular radio program called Freedom's Ring. *He writes from Thousand Oaks, California.*

Brad Dacus, Pacific Justice Institute. (Reinach and Toppenberg seated)

Packed assembly hall—all wearing "We Support" badges.

Pastor Stan Caylor

Dr. Glen Toppenberg

Nevertheless, the commission refused even to consider the federal law, and after brief, rambling, and sometimes incoherent comments, simply voted down the application.

The lone planner who voted in support, Ed Stahl, privately accused the county of a long history of antireligious bias. Vacaville church elder Bill Whiteman recounted a long history of church dealings with the county. He characterized the attitude of both city and county planners as one of "disdain." "They just don't want churches in Vacaville," he said.

Whiteman knows what he is talking about. Although a Seventh-day Adventist church has been in Vacaville since about 1865, they have been battling with the county for more than two decades. In 1976 the church renovated its building on Orchard Street, in the city of Vacaville, after a fire. In 1979 they sought to erect an additional structure to house Sabbath school classrooms, but the city denied permission, citing inadequate parking. Yet the classrooms would be used only to accommodate existing membership. The project did not involve expanding the capacity of the sanctuary.

So the church began what would be a 15-year effort to locate a property where they would have sufficient space to conduct their ministry. Property within the city was too expensive, so they began to look outside, where most of the property was zoned for agriculture. Although the county ordinance permits churches in agricultural zones, three times the county denied the church permission to locate in agricultural areas. Twice the church's efforts to purchase property resulted in hearings before the planning commission and the county board of supervisors, in 1979, and again in the early nineties.

Finally church leaders asked the planners where they thought the church should look for property. The planners suggested a rural residential zone. Eventually the church purchased the 22-acre property on Allendale Road for nearly three times what they would have paid in 1979. In the meantime, a segment of the church group had branched off to form a new church in nearby Fairfield, so both the membership and financial strength of the congregation were reduced. When it came time to build, they struggled to erect the small school building and a fellowship hall where

they could conduct worship services until they had the resources to build an actual church. As Pastor Stan Caylor later testified before the planning commission: "We're a small church, and if we could afford to locate the radio station in town, we would have done so long ago, and been on the air already."

KASK is the dream of Dr. Glenn Toppenberg. His day job is serving the medical needs of inmates at the maximum security correctional facility in Vacaville, whose most famous resident may still be Charles Manson. Glenn will freely admit that he has no experience in radio. "God called me to start a radio station," he insists. "I wouldn't have done this by myself." When he retained an engineering firm to locate a frequency, they laughed at him. "You won't find an available frequency in that crowded urban market," he was told. "Do it anyway," he replied. "If God wants me to start a radio station, then He'll find us a frequency."

When the predictable results came back negative, Dr. Toppenberg insisted that the engineers send the printed report. After all, it had cost him $400. One night he sat down and tried to make sense of all the technical jargon. Several hours later he found what he thought was an available frequency. The next day he called his engineers. They were amazed that Dr. Toppenberg had found what they had missed. "But don't get your hopes up," they told him. "The frequency will go to public auction, and you're not likely to outbid everyone."

Dr. Toppenberg was undeterred. He prayed and said: "God, if You want me to have this frequency, then I don't want anyone else to bid on it." His prayer was answered: when the time came for the public auction, there were no other bidders. Eventually he obtained a license from the FCC and began to plan in earnest for a place to house the station.

The church rallied behind the doctor, and they made plans to install the radio equipment in the new facilities on Allendale Road, in a rural area of Solano County. As the project began to take shape, Dr. Toppenberg and the church leaders quickly realized that there was insufficient room in the planned building and that additional space would be needed.

Lacking any funds for a building, Dr. Toppenberg began his search for a lower cost mobile unit. Eventually he located a triple-wide, single-story, 2,500-square foot-unit for sale for $80,000. "It's perfect for our needs," Dr. Toppenberg told the owner, "but I'm afraid we can't afford the price." "How much can you afford?" asked the owner. "Actually, we can't afford to pay anything," replied Dr. Toppenberg somewhat sheepishly. After some thought, the owner offered to donate the unit if the church would pay the cost of moving it, about $9,000.

Hastily Dr. Toppenberg arranged to move the unit onto the church property and to secure it against the impending winter El Niño rainstorms. At the same time, he began to apply for permits for the building. The planning department became irate that Dr. Toppenberg had proceeded with some construction without a building permit in hand, and proceeded to slap a stop work order on the building.

The stop work order was still in effect when the Planning Commission held its first hearing to consider the use of the building to house the radio station. It was still in effect when the church appealed the denial to the board of supervisors. The supervisors then considered whether the radio station was an accessory use to the church, or if it was a "communications facility" within the definition used by the county ordinance that permits communications facilities in any zone.

Dr. Toppenberg made an extensive presentation to the board of supervisors, unrepresented by lawyers, and documented the Adventist Church's historic commitment to radio. He argued that nothing could be more central to the ministry of a church—or in legal terms, an accessory use—than preaching the gospel through all available means. The supervisors were unresponsive. One supervisor insisted that a radio station could not be an accessory use because "no other church in the county has one."

The supervisors also insisted that a manned radio station was not a "communications facility," even though there was no such restrictive definition of that term in the ordinance, and the FCC has used the term for more than 50 years to include manned facilities. Then, in a 3-2 vote, the supervisors denied permission, determining that the radio ministry was not an accessory use to a church, nor was it a "communications facility."

At this point, church lawyers were brought in, to see if legal sense might prevail. They also retained experienced church-state litigator Fred Blum, who pointed out that "saying that an Adventist church can't have a radio station because my church doesn't have one, is like saying that a Jewish synagogue can't have a

mikvah, used for ritual baths, or that a Catholic church can't have a confessional. It's absurd." So Fred Blum argued, to no avail, before two state courts that ultimately refused to seriously analyze the church's weighty constitutional claims.

"State courts traditionally avoid constitutional issues in deciding land use claims," observes Professor Alan E. Brownstein, who teaches constitutional law at the University of California at Davis School of Law. "That's why it is so important that Congress passed the Religious Land Use and Institutionalized Persons Act of 2000 to give the U.S. Constitution its due, and the federal courts the opportunity to require local governments to deny religiously exclusionary land use practices."

Attorney Blum argued that **DENIAL** *of permission for a church to carry out its religious ministry on its own* **PROPERTY** *is precisely the sort of activity that RLUIPA was designed to protect.*

At the recent Planning Commission hearing, Attorney Blum explained how the problem must be analyzed under the federal law. First, the church bears the burden to demonstrate that denial of the religious use would impose a substantial burden on religion. He argued that denial of permission for a church to carry out its religious ministry on its own property is precisely the sort of activity that RLUIPA was designed to protect. That said, the burden shifts to the county, not only to justify their zoning scheme as a compelling government interest, but to demonstrate why such compelling interests would be threatened by accommodating the religious use in question. In the language of the statute, the county must demonstrate that denying the religious use is the "least restrictive means" of achieving the compelling interests the zoning scheme is designed for. In other words, the religious use must be permitted unless the actual impact of such use on the community would be sufficiently severe, and incapable of being mitigated.

Blum pointed out that the report of the planning commission conspicuously omitted any discussion of the impact the radio station would have on the community because, in fact, there would be none. The building was already approved for use as a caretaker facility, and its use for a radio station would not involve any more staffing, traffic, or noise than what would normally be expected from a residential use.

This testimony was not contradicted by neighbors who testified against the church. Their complaints were about the church and its well, not the radio station itself.

Professor Brownstein rebutted the county attorney's suggestion that land use was an entirely local matter, and that Congress had no right to intervene. He testified that section 5 of the Fourteenth Amendment gave Congress authority to apply constitutional rights to the states. "I have a hard time understanding why a planning commission would elect to interfere with something so precious—freedom of religion and speech—to accomplish so little," he testified.

A realtor pointed out that the county frequently grants variances for all sorts of uses, and that this radio station would be a positive benefit to the community.

Despite the overflow crowd, wearing stickers reading "We support a church's right to religious freedom," the planners were unresponsive to either the testimony, the requirements of federal law, or the welfare of the community.

"The planners broke faith with their constituents," observed Brad Newton, government affairs director for the Seventh-day Adventist Church for the region. "They are obligated to implement land use decisions to advance the public good, and reneged on that obligation in this case."

Dr. Toppenberg is determined not to break faith with God. "This radio station was not my idea," he says. "It was God's. I'll stop pushing when God closes all the doors." As of press time, an appeal is pending with the board of supervisors, and an action has been filed in federal court.

Freedom and Security

I enjoy *Liberty* magazine a great deal, and I generally agree with the views expressed in your articles. The November/December 2001 issue made some good points concerning freedom during our present crises, but I think it missed a few points as well. On one hand, you seem to affirm that the right to life should be preeminent to the right of liberty and the pursuit of happiness, but then you go on to negate that principle by suggesting that we cannot allow our constitutional rights to be affected. I am having trouble reconciling the two. It seems that we cannot have our cake and eat it, too. Our enemy hides behind, and uses, our constitutional freedoms as a weapon against us. So how can we say that these freedoms cannot be affected? The free world will never be the same again after September 11, nor should we expect it to be.

It turns my stomach to say this, but what if several, or even just one, American lives were saved as a result of the internment of Japanese Americans during World War II? Would we still regret it? The more important positive results of such actions will never be seen, but the less important negative ones are glaringly apparent. But we allow ourselves to be governed by our reaction to the obvious. Could it be possible that 3,000 people might be alive today if someone's constitutional rights had been compromised? I am not advocating the violation of human rights; I am just having trouble understanding how we can protect lives and rights at the same time in such a situation as this. I can't help thinking it is better to err on the side of caution.

Your magazine seems to be asking: "How many rights are we willing to trade to ensure our personal safety?" But one could also ask: "How many lives (and whose) are we willing to trade to ensure our 'constitutional rights'"?
PAUL FILINOVICH
Downers Grove, Illinois

I think the best answer was given by Patrick Henry: "Give me liberty or give me death!" Lives saved by trading in freedom are surely saved for nothing but tyranny, and thereby not really saved at all. Ditto for the question on the Japanese internment.
Editor.

Thought-provoking

After reading your article "Christian Colleges Under Attack" in the September/October 2001 issue, I became very intrigued and decided for this to be the topic of a multiresource paper for my college English Composition class. Thank you, *Liberty.*
BETHANY, e-mail

Right On!

I am writing to express my sincere gratitude and deep appreciation for *Liberty* magazine. I enjoy your publication and find the articles very informative and insightful. The present direction of our country, with the increasing intermingling of political and religious affairs, bears out distressing implications for the future rights of our religious and civil freedoms. I wholly support the role *Liberty* magazine is playing in defining and defending the context and application that these two spheres can and should influence in American life; and in drawing a clear and distinct separation between the powers of church and state.
EMILIANO L. RICHARDS
Crescent City, California

Liberty *reserves the right to edit, abbreviate, or excerpt any letter to the editor as needed.*

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.

LIBERTY

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Faith & Law

The woman sitting to my left at the May 2 CARE Act Rally in the Hart Senate building turned out to be from a Christian community aid program in Phoenix, Arizona. By her wide-eyed intensity I had picked her to be of the mind-set I'd observed before in various multilevel marketing recruitment situations. But I figured we could talk anyway, so I began to ease up on the question of separation of church and state. Sure, there are many ways of looking at the topic, but I thought to at least encounter a little deference to the concept. Wrong!

"Separation of church and state," she sneered. "Where does it say that in the Constitution?" When I tried to point out the obvious historical reality of the term coming directly from Thomas Jefferson, explaining what he and the other framers of the Constitution intended, I was shouted down. "Are you going to let me speak?" she almost yelled, and resumed the brassy claim that we should demolish any such false wall.

I was at the Charity Aid, Recovery, and Empowerment Act, S. 1924, Rally to observe how the president's bold plan to fund church-operated social programs had changed since introduced into the House last year as HR 7. And it has changed—been diluted, actually, in the very real-world need to get bipartisan support–in particular that of Senator Lieberman, cosponsor of the Senate bill. And I must say that in itself the bill barely presents a threat to a workable and healthy separation of church and state. Largely gone is the bold move to openly fund faith programs.

But the intent remains and was actually celebrated at the rally. As a Christian I exult that people of faith, and so many of my faith, are active in good works and compassion. But I shudder to see an intent to encamp these "Armies of Compassion" within the confines of government and under its banner. It is not decorous for any church to seek to exchange its white garb for the party dress and common-law marriage with the by nature fickle state.

The most curious dynamic of this and other developments in the church-state religious liberty issue is that they take place against no upsurge in piety, but actually in the context of spiritual declension and a growing assortment of activists, revolutionaries and revisionists, who would hijack religion for their own calculating ends.

Later that same day I attended the twentieth anniversary celebrations of the Washington *Times*.

Before we heard a keynote address by owner the "Reverend" Sun Myung Moon, we were treated to testimonials from the likes of George Bush, Sr. (via video), and a truly inclusive prayer by the Reverend Fauntleroy, a preacher cum politician. And then we heard the truth as propounded by the owner of the capital's second largest daily. But before that I was again shouted down by a hater of the wall of separation.

The conversation began innocently enough. I discovered that the man sitting next to me at the banquet table is a regular columnist for the *Times*. He asked about *Liberty*, and soon I was speaking generally about the separation of church and state principle, and how it had done so much to guarantee continued religious freedom in the United States.

The voice was deeper, and thickly accented by its European origins, but I got much the same response as earlier in the day. "Where does it say that in the Constitution?" he demanded in the tone of a commissar. "Ridiculous!" I had noted how the chief editor of the *Times* made a point of distancing the paper from the founder, claiming complete religious neutrality. I had also noted a tendency at the event toward the triumphalist language of those religionists who are currently seeking to extract a holy Christian state from the mists of an avowedly secular establishment and project it on our times. I made the mistake of saying as much to my columnist interrogator, saying that such views were revisionist. He almost literally recoiled at the word. "That is a Communist word," he bellowed. "You are a Communist," he continued to bellow in spite of my attempt to get him to dry ground. That was pretty much the end of the conversation.

In his speech the "Reverend" Moon struck on the themes so often aback of the yearning to "tear down that wall." He spoke repeatedly of "America, a Christian country representing the second Israel." And he spun a construct that moved from a war on Communism to a U. S. role in "these last days" to establish world peace and spiritual harmony. Moon is entitled to his views in a free country, but I wonder if we are

ready to enlist the armies of Christian compassion to this message from the spirit world (Moon made that claim). And any such melding of church and state will lead directly to this confusion. And might by comparison make the world of militant Islam seem one-dimensional in its simplicity.

I guess good judgment is as much a matter of timing as correct evaluation. And on that basis the June 26 ruling by the 9th Circuit Court in California might be called bad judgment. The religious culture war has been heating up of late, and the subtext of the war on terrorism is of a moral and religious world vision. "God bless America" is no empty term; it is functioning to conjure up the spiritual unity seen in such past crises as the long, cold war against godless Communism.

And here is the rub to the furor over the pledge. As institutionalized as it seems, the Pledge was actually written in 1892 by Baptist minister Francis Bellamy to commemorate the 400th anniversary of Christopher Columbus' landing. He intended it to be an international peace pledge. In 1923-1924, as part of a push by the American Legion and the Daughters of the American Revolution to have the Pledge made mandatory in schools the words "my flag" were changed to " to the flag of the United States of America." And then the big change; in 1954, after a two-year campaign begun by the Knights of Columbus, the words "under God" were added by Congress. The history makes it obvious: the Pledge is not the ancient and sacred text many imagine, and the added words came at a point not dissimilar to today. America felt threatened in its very spirituality, and after intense lobbying by religious factions adopted with high motives what first the Supreme Court and then this 9th Circuit recognized as something by its very nature a step in the wrong direction for a state.

I watched a C-SPAN replay of the June 26 Senate debate and came away very troubled at the implications.

Before passing an essentially unanimous resolution condemning the 9th Circuit decision, various Senate heavy hitters weighed in. Senator Robert Byrd of West Virginia, in particular, caught my attention. Often touted as the Senate expert on constitutional matters, Byrd launched into a tirade that began with the amazing *non sequitur* claim that under the court's logic the Declaration of Independence would be unconstitutional. Of course it predated the Constitution and made no claims beyond a statement of revolutionary action.

After some rather pejorative language to describe the judge (I assumed he meant Judge Goodwin, the author of the majority opinion, and rather curiously a Nixon/Republican appointee), he said the judge is "blackballed," "black-listed," and that he would never get the approval of the Senate for any future appointment. He then elaborated on the need to purge the system of these secular judges.

I wince at the prospect that this might be more than rhetoric.

Back in the fifties, the period when the Pledge was updated for faith, we suffered through the McCarthy witch-hunt against Communists and secularists within. And while there were a few legitimate "Commie" sympathizers, the main victims were civility and tolerance.

It's been fashionable of late for both parties to agitate the masses by desperate talk of winning federal elections in order to plant the right judges on the Supreme Court. It's troubling logic, because it ignores the protective value of judicial tenure and the recurring history of such appointees who somehow betray their appointive intent and vote otherwise (maybe by law and conscience!). I have argued against such a view that presupposes a corrupt judiciary.

Regardless of any judicial outcome to an appeal of the 9th Circuit action we seem to have crossed a certain Rubicon after the Senate hissy fit. The next day Judge Alfred T. Goodwin issued a stay on his own Court's decision. I guess we will shortly get the judges we want.

ILLUSTRATION BY JAMES MELLETT

At Least This

"The Establishment of Religion"

clause of the First Amendment means at least this: neither the state nor the federal government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the federal government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and state."—JUSTICE HUGO BLACK, *Everson v. Board of Education, 330 U.S. 15,6.*