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FREEDOM MATRIX

By
JAMES STANDISH

Every morning the president starts his day in the Oval Office, surrounded by attorney general John Ashcroft, FBI director Robert Mueller, and CIA director George Tenet, reviewing the threat matrix. The threat matrix provides details on who is trying to attack America, how they are trying to attack, their chances of success, and what is being done to stop them. It must be a startling way to begin each day—particularly knowing that there is no one else the terrorists would rather kill or capture than the commander in chief himself. It is serious business, and the stakes are the highest since the Civil War: in many ways, the very survival of American civilization.

An equally serious business is the brutality meted out to millions of people every day by the tyrannical regimes that rule over them. Our press sporadically reports on this brutality: a gulag story from Pyongyang here, a piece on genocide in Sudan there, thrown together with concerns over religious freedom violations in such unlikely places as France and Belgium, along with the odd piece on religious freedom at home.

One of the problems in reading these articles is that they appear so infrequently that it can be difficult to evaluate the trajectory of the attitudes of the nations mentioned or the relative threat to freedom posed by their actions. This problem is only exacerbated by those who are quick to dub any act that impinges on freedom "persecution," with little attention to the relative severity of the problem in question. A "freedom matrix" can put these stories into perspective in the same way the threat matrix. aims to put the myriad of dangers posed to the nation into an understandable format. A freedom matrix is particularly easy to build because threats to religious freedoms fit into predictable, repeated patterns.

Understanding and Using the Freedom Matrix

A sample freedom matrix is reproduced in this article. The purpose of the freedom matrix is to put acts against religious freedom into context and provide perspective on their relative severity. As a general rule, the closer the act comes to the upper left-hand corner of the matrix the more severe the act in question. The matrix makes three distinctions: private versus public actions, the frequency of the action, and the type of action in question.

The first natural division between forms of suppression of freedom is between private and public action, that is to say, the division between acts by the state and acts by private entities. Private action is not necessarily less detrimental to fundamental rights than state action. Neither can it be said that the state necessarily has less responsibility for private action than it does for state action. In fact, in some cases the state actively encouraged private atrocities, as in the case of the former Yugoslavia. In addition, the principal function of the state is to protect the rights of its populace. Therefore, even when the

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FREEDOM MATRIX

	MURDER	RAPE	TORTURE	ENSLAVEMENT	STARVATION	IMPRISONMENT	FORCED CONVERSION	EXPULSION	BEATINGS	CONFISCATION OF REAL PROPERTY	EVICTION	BAN ON CONVERSION	PHYSICAL INTIMIDATION	DESECRATION OF RELIGIOUS SITES
STATE ACTION														
SYSTEMATIC			NK	NK, Su	NK, Su	NK	NK, Su		NK		NK	NK, SA, Su	NK, SA, Su	NK
PERIODIC	NK, Su		Su					Su	Su	Tu	Tu	Tu	Tu	Tu, Su
OCCASIONAL						Tu, SA		Tu, Su						
ISOLATED														
PRIVATE ACTION														
SYSTEMATIC														
PERIODIC														
OCCASIONAL									Fr				Fr	
ISOLATED	US								US				US	Fr

NOTE: This Freedom Matrix is provided for the purpose of example. In some instances, the nations rated may be involved in activities not noted

Fr France Problems include private attacks against Jewish sites perpetrated primarily by Muslim immigrants, discrimination against new religions and state discrimination against Muslims in state schools.
NK North Korea Persecution is focused on members of unregistered religious groups, including underground churches.
SA Saudi Arabia Problems focus on strict state control on religious worship.

state does not actively encourage behavior that suppresses freedom, it is responsible to act effectively to stop such behavior.

It is also worth noting that the more frequently the private actions against religious freedom occur, the more likely that the state is complicit in the actions, or, at the very least, complacent in the effort to stop them. Despite the close connection between private action and state inaction, the distinction is useful, as states are always culpable for state action but are not necessarily accountable for private action.

The second distinction made on the freedom matrix is the frequency in which a particular inhibition of freedom occurs. There is a very large difference between one murder in a decade prompted by religious hatred and the systematic slaughter of an entire religious population. The latter does not make the former less deplorable, but in assessing the relative threats to freedoms, the frequency of the problem clearly impacts the severity of the situation. Thus the religiously motivated slaughter during the Sudanese civil war ranks significantly higher than the isolated religiously motivated murders in the U.S. after September 11. The latter indicates isolated pockets of violent bigotry fueled by intense ignorance, while the former represents a state acting with genocidal intent.

The final distinction made is between common types of actions against religious freedom, grouped roughly into five categories of severity. The most severe actions against religion include religiously motivated murder, rape, torture, beatings, enslavement, starvation, imprisonment, forced conversion, and expulsion from a geographic region. These actions are the most severe forms of religious persecution. Even when these occur sporadically, the severity of the action involved requires the most urgent intervention.

The second category of actions also forms the basis of persecution; however, it is reasonable to recognize that these forms of persecution are somewhat less severe than the first category. These actions include religiously motivated confiscations of personal and real property, evictions, bans on conversions, physical intimidation, desecration of houses of worship, graves, and other sites of religious significance.

The third category of actions that frequently form the basis of persecution includes barriers imposed on religious activities. These include prohibitions on the production and/or importation of religious material, registration requirements designed to prevent bona fide religious organizations from registering with the state, barriers to individuals or organizations owning real and personal property based

CONFISCATION OF PRIVATE PROPERTY	BARRIERS TO PRODUCING OR IMPORTING RELIGIOUS MATERIAL	DENIAL OF TRAVEL RIGHTS	BARRIERS TO OWNING REAL PROPERTY	BARRIERS TO OWNING PERSONAL PROPERTY	BARRIERS TO REGISTERING	DISCRIMINATION IN OBTAINING BENEFITS	DISCRIMINATION IN HIRING/PROMOTING	DISCRIMINATION IN EDUCATION	DISCRIMINATION IN THE TAX CODE	DEROGATORY COMMENTS	REFUSAL TO ACCOMMODATE FOR BENEFITS	REFUSAL TO ACCOMMODATE IN EDUCATION	REFUSAL TO ACCOMMODATE IN THE WORKPLACE	UNDULY RESTRICTIVE ZONING REGULATIONS	UNDULY RESTRICTIVE MEDIA REGULATIONS
NK	NK, SA	NK	NK, SA,	NK	NK, SA, Tu, Su	NK	NK, Su,	NK, SA, FR		NK		SA, FR			SA
Tu	Tu	Tu	Tu							SA			US		
										Fr					
													US		
														US	
												US			

. The frequency noted provides a rough approximation.

Su Sudan A prolonged civil war that included genocidal acts against the religious/racial minority in the south.
Tu Turkmenistan A dictatorship that heavily restricts nonregistered religions, and makes it virtually impossible for any but a handful of faiths to register.
US United States Occasional private acts of religious bigotry — particularly post September 11, periodic refusal to accommodate religious practices in the public and private workforce.

on religious criteria, and prohibitions on travel. A good example of a nation that engages in all of these activities is Saudi Arabia. It imposes restrictions on clergy traveling to the nation to provide spiritual services; it prevents the importation of nonapproved religious material; and it prohibits religious groups from owning and operating houses of worship. When imposed in concert, as in Saudi Arabia, the effect is to curtail religious practices of nonapproved faiths almost entirely.

The penultimate category on the matrix involves religious discrimination. While pervasive discrimination may meld into persecution, it is worth noting that discrimination differs significantly from persecution in the severity of its impact. That said, discrimination may make it very difficult to belong to a given faith group, and may impact on the ability to make a living and engage fully in society.

The final category covers the responsibility of society to make appropriate exemptions for religious adherents from the general rules that govern society in recognition of their faith requirements. For a society to ensure that its populace enjoys full freedom of faith, it must recognize that the blind imposition of law does, in some cases, impose a discriminatory religious burden. For example, when a police force requires a particular hat as part of its uniform, it is not unreasonable to expect that an alternative will be made for Sikhs, whose religion requires them to wear a turban. Thus the police forces in many locations, including Great Britain and Washington, D.C., permit Sikh police officers to wear a blue turban with a police badge on the front instead of the standard helmet or cap. Refusing such simple accommodations indicates underlying discrimination and disregard of the goal of ensuring that all members of society are free to practice their faith in dignity and without unnecessary imposition of barriers.

Conclusion

The freedom matrix is as important to the future of our civilization as the threat matrix. Indeed, the majority of threats come from nations and movements that present the greatest failures as measured by the freedom matrix. Nations such as North Korea, Saudi Arabia, and the legacy of a Taliban-ruled Afghanistan are the sources for the threats that the president reviews each morning. The freedom matrix, therefore, is not just a useful tool for measuring religious freedom, but it is a useful tool in identifying the roots of the threats this nation and this world face.

THE MIND of THE SUPREMES

By M. Thorne

How will the Supreme Court view upcoming establishment clause cases?

How have the current justices decided establishment clause cases in the past? That should give us a good idea as to how the Court will rule in upcoming cases such as *Newdow. v. U.S. Congress.* In a previous article (November/December 2003) we reviewed the factors that the Supreme Court is likely to consider in deciding the case of *Newdow.* We looked at these factors in determining what the establishment clause allows and what it prohibits:

- *The intent of the Founders*
- *The Lemon test*
- *The special nature of public schools*
- *Longstanding traditions, our national heritage, ceremonial deism, and* stare decisis.—*Continued on page 22*

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ILLUSTRATION BY SARA TYSON

Nearly three years after violence began, many homes remain empty ruins in Ambon.

As our jet descended rather noisily through thin cloud cover toward Ambon airport in the Maluku province of Indonesia, what we saw suggested a tropical paradise. Turquoise waters revealed fascinating reef patterns from the air. The jungle-covered peaks behind Ambon city matched the great curve of a bay that, in the process of defining the shoreline from the airport to town, seemed to divide the island into two. What we saw in those moments before touchdown was a very natural illusion of tranquility. But since June 2000 the area has seen mostly violence. A violence that has pitted police forces against military units, village against village, and Christian against Muslim. A violence that has left thousands of homes, mosques, churches, and public buildings burned and gutted, caused hundreds of thousands to flee the province, and killed at least 5,000 people.

Three of us had taken a more than four-hour flight from Jakarta eastward across the Indonesian archipelago to Ambon. With me were John Graz, Ph.D., secretary general of both the Christian World Communions and the International Religious Liberty Association (IRLA), and Hiskia Missah, a religious liberty specialist based in Manila, Philippines. Missah, an Indonesian, had visited the area once since the violence began and was eager to see the progress toward peace. While the government had revoked its three-year state of emergency in September of 2003, at the time of our visit in late November 2003 the province still remained closed to tourists and journalists.

While the situation in Ambon may not have attracted the notice of the general public, overwhelmed as it was in the United States by September 11 and the ensuing invasions of Afghanistan and Iraq, the religious liberty community has followed it very closely. Two years ago at an IRLA world conference in Manila we received an in-depth report from the area, including video footage of religious violence that went well into the bestial.

Then about the same time Graz and I attended a U.S. government hearing on the Ambon situation. Chaired by Elliot Abrahams, the committee brought in testimony from various experts and regional officials. It was confirmed that some of the spark for the violence had been provided by

eputy Mayor of Ambon, Syarif adler, Idrus Toekan, Dr. Graz d Dr. Missah. It was an impor- nt first meeting with outside ligious liberty officials.

A church elder points to large caliber bullet hole in the wall of a Seventh-day Adventist church, Ambon city.

Below: The church, in center of city, continues as a place of worship in spite of violence and killings on street out front.

Divided by Religion

By Lincoln Steed

A Report on Religious Violence in Ambon, Indonesia

outside agents with Al-Qaeda connections, and that the local Muslim jihad group Laskar Jihad was receiving help from them.

One of the more troubling moments came during the testimony of an elderly community leader from the province. He attributed some of the violence to jealousy of the fine churches and overseas aid coming to the Christian community. Then, with his palms uplifted in supplication, he said, "Please understand we are a peaceful people. In fact, we never had such troubles till the Christians came." There was a collective sucking in of breath at this self-revelation. But things are rarely so one-dimensional, and we were eager to travel to Ambon and see for ourselves.

Indonesia is a large country in more than one sense. The nation is composed of thousands of islands in the world's largest archipelago, stretching from the island of Sumatra, southwest of Malaysia, eastward to West Papua (formerly Irian Jaya), which shares a land border with Papua New Guinea. Ambon is to the west of New Guinea and to the north of Timor. Even with so many small islands over a huge area of ocean, the landmass of Indonesia is almost three times the size of the state of Texas. The population is 235 million and is approximately 90 percent Muslim and only 8 percent Christian (5 percent Protestant, 3 percent Catholic).

The religious demographic explains much about Indonesia. While the nation is not an Islamic state, laws are heavily weighted toward Islamic norms and designed to protect Islamic control. For example, it is unlawful for Muslims

PHOTOGRAPHS BY LINCOLN STEED

and Christians to intermarry. And if a Muslim attends a Christian school, the school must provide Muslim teachers for him or her. When the focus turns to Ambon, there is a very significant demographic that surely explains why the religious violence could reach such a pitch: Ambon is nearly half Muslim and half Christian. With Ambon now the provincial capital for Maluku, and separatist movements asserting themselves there, it seems self-evident that the religious component would enter the violence and indeed become the defining parameter.

Top: Adventist members meet to welcome Editor Steed and IRLA President John Graz. Above: Downtown Ambon City. New assembly building visible behind white building to the left.

Once on the ground on Ambon Island, we made our way around the bay toward the city of Ambon, nominally a center of 300,000 persons. The trail of violence is marked by thousands of burned-out homes, churches, and other public structures. Even the 30-hectare campus of the Pattimura University, the most prestigious university in Maluku, is burned out and deserted. As we traveled our guides pointed out the religious affiliation of each area: "This is a Christian village; this is a Muslim area; now we are in a Christian area . . ." To an unknowing observer the distinction is hard to see; other than the dome of a mosque or a church steeple in the neighborhood, the people look the same, the lines between areas invisible.

What is hopeful fo
and **RELIGIOUS**

We interviewed many Ambonese to get some sense of what had happened. Yes, they knew about the outside jihadis coming in to provoke violence, although it was an altercation initiated by a Christian taxi driver that seems to have sparked the killing. We were told of gangs of Christians and Muslims facing off in the very center of town: the Muslims shouting "Allah Akbar" and the Christians singing "Everybody ought to know who Jesus is" before both took to slashing the other side with machetes and shooting their opponents with high-powered firearms. As the violence spread, groups of fighters from both factions fanned out into opposing neighborhoods to torch houses and kill anyone that lingered at the scene. Some Christians told us a little too gleefully of how they had sent groups of small children to harass and burn Muslim areas: they called them *agats*, or small insects. But atrocities kept to no religious boundary: when some Christians took to cutting across the bay in fast boats, Muslim fighters intercepted them and cut them to pieces.

At first the local police, mostly Christian, tried to maintain order—perhaps with some partiality. Then the Indonesian military entered the conflict, on occasion leading mobs in attacks on police stations, then handing out the weapons to Muslim fighters.

We visited a number of churches while in Ambon. The downtown Seventh-day Adventist church still stands, although there are large-cal-

iber bullet holes in the wall and bullet-shattered woodwork behind the lectern. Members told us of many people shot down in the street outside, of snipers using the balcony to fire out of upstairs windows at a Muslim base in the hills above. There were many tales of deliverance and a recognition that without divine intervention many more would have been consumed by the violence. They told us of a young man who came and confessed to killing eight Muslims in revenge for the deaths of his parents and two siblings—he had then cut open his victims' chests and eaten their hearts. Can there be any more telling evidence of the bestial nature of religious violence!

It was the Muslim new year during our visit to Ambon. Because city offices were closed, the deputy mayor of Ambon, Sayarif Hadler, met us in his home in the Galunggung suburb, a Muslim stronghold during the violence. He welcomed us graciously, then introduced a special guest, Idrus Toekan, a Muslim community leader for the Maluku region.

"This is a very significant visit," said Deputy Mayor Hadler after the introductions. "You are the first outside Christian leaders to visit us here. Do you realize that during the violence no Christian would dare come here? They would be killed on sight."

He then repeated what we heard many times in Ambon: that outside agitators had stirred animosity, but that within Ambon both Muslim and Christian leaders wanted peace, that they were committed to healing. He gestured toward a large floral display in his living room. "This is a gift from the Protestant Synod Headquarters downtown," he said. "They are wishing us a blessed new year. They show us Christian love." We had earlier visited the Synod leaders and had been impressed by their commitment to dialogue. General Secretary, Reverend S.J. Mailoa told us that they had kept to their post downtown even as buildings burned around them, including those of the nearby provincial legislature.

That same day in another Muslim district—Kebun Cengkeh—we met with H. Marasabessy, head of the department of religion for the Maluku province. Marasabessy was open and optimistic. "We must have the love for one another that Jesus Christ called for," he told us, borrowing from Christian teaching. "We must have dialogue. We must not allow outside agitation to interrupt the determination of our community to heal."

It is hard to predict where Ambon is headed. Is there a blossoming of dialogue and healing based on a shared commitment to community? Or are the wounds too deep, the differences too wide, the outside influences too much to resist?

In Jakarta the headlines in all the major papers warned of a "bloody Christmas" as a result of religious violence in Indonesia. That did not happen. In Ambon, reports were of several hundred jihadis in town for Christmas violence. It did not occur. Yes, there are groups who would continue to stoke the fires of religious intolerance for aims that are probably more political than religious. I note with some dismay that a Laskar Jihad commander, in a message reported by the BBC on May 16, 2002, condemned the peace efforts by both Muslim and Christian leaders in Ambon, and declared ongoing war; saying that "the second Afghanistan war will take place in Maluku."

What is hopeful for Ambon is the readiness of local political and religious leadership to work toward peaceful coexistence. What is needed is for Indonesia itself to become more protective of all religions, not just the majority faith. What is needed is for a world increasingly harassed by terrorism to avoid the trap of religious conflict that the terrorists are laying for all of us. What is needed is a "retreat" to faith solutions. While in Ambon I heard a church music group singing a plaintive chorus that translated into "Lord forgive us for what we have done, and for what we have done to others." And I must agree with Marasabessy that the solution to a community divided by religious intolerance lies in the advice to "love one another."

Ambon is the readiness of local **POLITICAL** *leadership to work toward peaceful coexistence.*

Is France Hostile to Religi

By
Joseph K. Grieboski

After a rather short debate in the lower chamber of the French Parliament, the law banning symbols of religious affiliation in the public schools was adopted on February 10, 2004, with a majority of 494 votes to 36. Actually, the problem has a long history in France, reflecting certain characteristics of the political culture and national mentality that are worth contemplating because of the virtual impact on other aspects of the national life in a major Western democracy.

Through the Concordat of 1801 the Catholic Church lost some of its power in France; First Consul Napoleon Bonaparte imposed draconian controls on the activity of its clergy. Successive political regimes throughout the nineteenth century were constantly at odds with religiously minded people. The continuing spirit of the French Revolution was hostile to any remnant of religious thinking in affairs of state, and eventually pushed religion out of the public place. As the great French scholar Ernest Renan concluded: "Religion has become irrevocably a matter of personal taste."

The culmination of this process was the 1905 law on secularism, which to date is considered the fundamental text of separation of church and state in France.

As always, there was a political process in France that led to this radical legislation. The ideas of the French Revolution evolved into a doctrine of national ideology. The very word "ideology" came out of French thinking in the book *Elements of Ideology* by Destutt de Tracy, with an aim at creating a corpus of ideas replacing religion as a foundation for political beliefs. Later on, the French republic tacitly embraced the nationalism of the revolution as its social cement, uniting its citizenry under a homogenous culture, with the government as the "organizing principle of the social life." A contemporary French scholar, Pierre Rosanvallon, calls it the permanent Jacobinism of the French society, referring to the radical wing of the revolution that instituted the Reign of Terror as a means to deal with the enemies of the state. In the milder form subsistent today

Professor Rosanvallon distinguishes three of its features: a tendency to see the country as homogenous and indivisible by ignoring the diversity of the civil society; the belief that society is able to express itself as a bloc by neglecting individual interests; and the inclination to trust the law to regulate society by absorbing all individual cases. To summarize such beliefs, we will see a perfectly coherent and totalitarian society, which would be an exaggeration as a model for contemporary France. Nevertheless, the danger is always present, and we need to be aware of it.

The fiery debate that preceded the February vote in the National Assembly animated the entire French society. The political parties, the entire press, the leading intellectuals, all wanted to add their voices in support of the ban on wearing religious symbols in public schools. Very few were the dissident voices calling for moderation. Any sign of strong adherence to a display of religious beliefs is perceived as a danger to the very foundation of the republic. It seemed rather strange to see all the luminaries of France—the intellectuals that enjoy so much authority in the society—calling for the intervention of the government in order to promote their cause, and for the use of the repressive power of the state. They all responded, in fact, to the instructions of the president of the republic on December 17, 2003, asking the government to introduce a law in the Parliament. As we have seen for almost two centuries now in France, the liberals are those who reinforce the powers of the government, creating the monopoly of state authority, and alienating the attributes of civil society groups by denying to multiculturalism a right to life in the republic.

Less obvious was the shifting of the accent from the anticlericalism and neutrality of the state contained in the 1905 law to a blatant antireligiosity in the life of the individual in the 2004 law. The ban on wearing obvious religious symbols does not promote impartiality of the government in dealing with its citizens; it only alienates their fundamental right of "observance," clearly stated in Article 18 of the Universal Declaration of Human Rights. Whereas for certain individuals it is not mandatory to display any religious symbols, for others the absence of a turban or veil would mean a separation from their respective allegiance. In such cases the homogenization totally ignores the basic rights of the individual to assert his or her identity.

The trend that led to this controversial law has been obvious since the mid-1980s and the very visible input of a hard-core radical group of antireligious bureaucrats led by the infamous Alain Vivien, who issued a first report on sects in 1995.

In 1996 an investigative commission of the National Assembly created a list of religious groups perceived as dangerous for the French republic, and later on led to the adoption of the About-Picard law in June 2001. The law was designed to prevent and regress sectarian movements that attempted to undermine the human rights and fundamental liberties of individuals; however, the tendency was to hinder the activity of minority religious groups and new religions and to offer a legal basis for the constraints implied in the workings of the commission of 1996 and its list.

The major flaw of the law was that it didn't offer a legal definition of what a dangerous sect really is, and didn't qualify the infraction. A supervisory body, MILS (Mission ministérielle de

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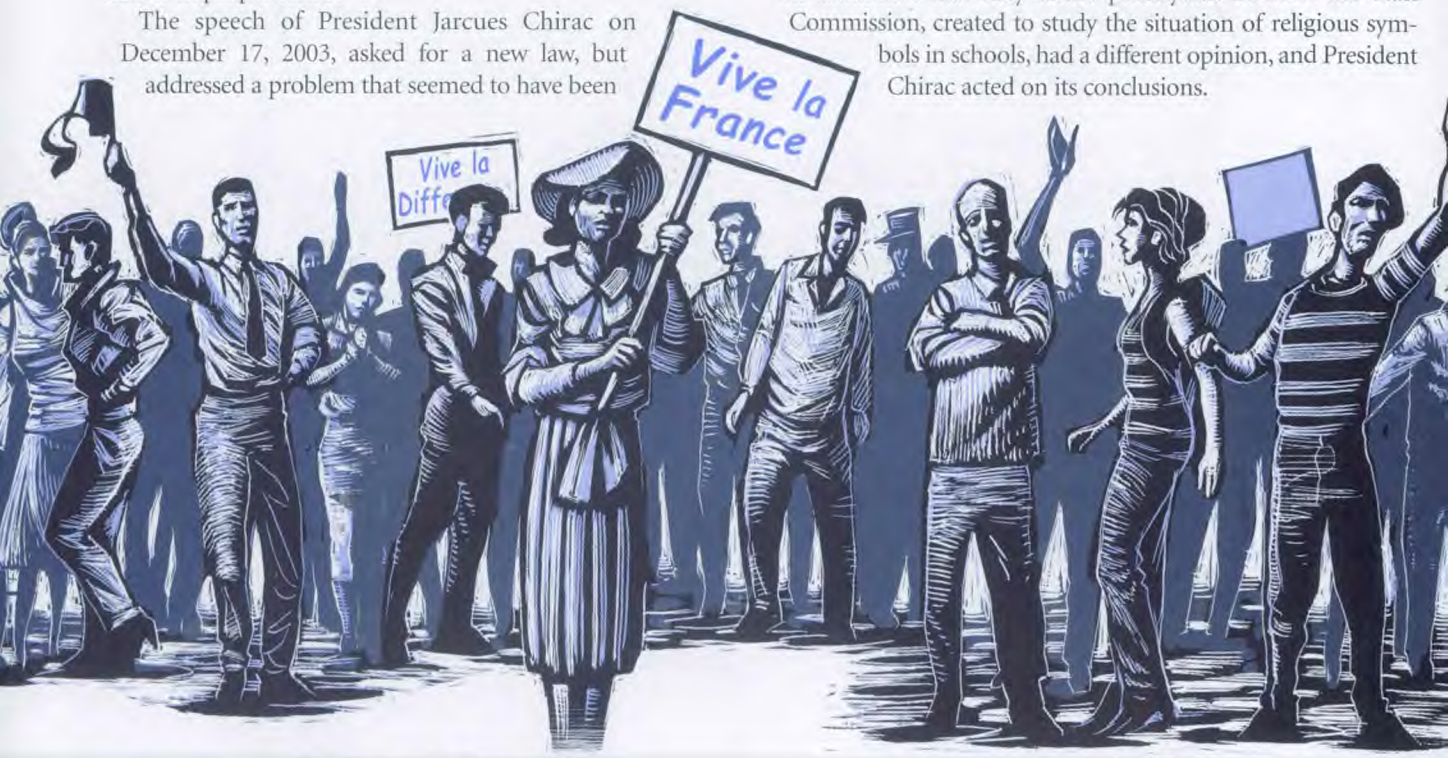
ILLUSTRATION BY DAVID KLEIN

lutte contre les sectes), under the presidency of Vivien, proved to be so militant and abrasive that even the ministries participating in its activities asked for its demise in 2002. When Vivien left the stage, a somewhat more moderate body than MILS was created—MIVILUDES (Mission interministérielle de vigilance et de Lute contre les dérives sectaires—which aims at defining the matter in proper terms.

The speech of President Jarcues Chirac on December 17, 2003, asked for a new law, but addressed a problem that seemed to have been settled in previous years. In the 1980s Lionel Jospin—then a minister of education—sought the advice of the Conseil d'Etat, the top constitutional body of the country, on a case of Muslim girls wearing the veil in school. The answer of the Council of State was that in the name of "freedom of the others" and "pluralism," the girls should not be excluded from the classroom, on the condition that they didn't proselytize. In 2003 the Stasi Commission, created to study the situation of religious symbols in schools, had a different opinion, and President Chirac acted on its conclusions.



Keep Your Religion *at* Home

By John Graz

France clearly has a problem with its religious minorities. But is it a cultural, political, or social problem? A few years ago France took an aggressive stance against cults and sects as part of a strategy for dealing with religious minorities. While this raised opposition around the world, there was indifference within the "hexagon" of France itself. The new government eventually changed its approach under pressure from the international community. Religious minorities began to feel that they could be accepted.

Now we have another controversial religious issue in France. A commission of well-respected scholars gave a negative report about the display of religious symbols in the public sphere and, of course, in the schools. Consequently, President Jacques Chirac, usually a moderate and an ardent defender of human rights, embraced a more rigid position. The majority of the population supported his clear message: "No head scarves in public school!" In fact, any kind of clothes or symbols that "conspicuously show religious affiliation" will not be accepted in public schools. This policy is directed at "plainly excessive" crosses, skullcaps, turbans, and, of course, head scarves. Neither will "religious beards" be accepted, although secular beards will.

There are about 6 million Muslims living in France, and with the Islamic revival, more and more young girls are wearing head scarves. Some for traditional purposes, some because of family or peer pressure, but others are simply proud to show their convictions and to affirm their identity.

Many people, including the authorities, tend to believe that the young girls who wear head scarves are being forced to do so. Their freedom should be protected. But if the state allows them to impose their religious symbols in public schools, it will be the beginning of a new religious war. What is the alternative? What would happen if 1,000, 2,000, 10,000, young Muslim girls were rejected by the public schools? How could a country that supports human rights explain that kind of discrimination? "Your new law will miss its goal," stated Iranian Nobel Prize recipient Shirin Ebadi in a French magazine. In Iran, she commented, where the head scarf is compulsory, the young girls wish to take it off.

The new law in France clearly reinforces the authority of the government to control the basic rights of the individual, to limit the freedom of faith and the public manifestation of religious beliefs. The nuances and prudence of its implementation should not make us forget that in essence it is a legal means of controlling the basic aspirations of the individual, an attempt to undermine fundamental human rights.

In January national French TV interviewed a young teenager who had been expelled from her school because of her head scarf. She was also denied permission to take correspondence courses that are provided free of charge by the state. Her father disagreed with her, but he respected her choice. This young girl said: "I want to be faithful to God, and I don't attack anyone with my head scarf. I am sorry, but I cannot leave my religion at the door of the public school. It makes my life more difficult, but I will give up neither my studies nor my faith."

What will be the benefit for France if it closes the door on national education, knowledge, and progress for those who have religious convictions? Who will educate the thousands of young Muslim girls who might be expelled from public schools? Muslim extremists and the far right will be the winners of that struggle. Muslims will claim there is no place for the Muslims in France. The far right will try to show that the Muslims have already taken over the country. Should the French government build special schools, paid for by the taxpayers, to educate the rejected Muslim girls?

I cannot imagine that such a rigid position will be held for long. The government will have to find a compromise.

John Graz, secretary general, International Religious Liberty Association, Washington, D.C.

THE HAUNTING OF GOVERNM

By
CLAIRE FRAZIER

The chapel and these two residences for children are among the 23 buildings on the Home's campus.

ENT MONEY

The United Methodist Children's Home (UMCH) in Georgia learned an important lesson the hard way; you never can tell when government money will come back to haunt you, in the most unexpected and debilitating ways. UMCH, an admittedly church-related agency, accepts children referred to their care from the State of Georgia's Department of Family and Children's Services (DFCS) or the Department of Juvenile Justice (DJJ). For each child UMCH receives a per diem that provides about 50 percent of the cost of supporting the state child on campus. The North Georgia United Methodist Conference estimates that the total state payments for the children amount to about 57 percent of their total operating expense. The result of this arrangement between the State of Georgia and UMCH is that the children have a safe, if religious, environment in which to live. The state has a place to safely house children who would otherwise be forced to remain in dangerous or damaging environments or end up on the streets. Everyone is happy.

Everyone except Aimee Bellmore and Alan Yorker. Bellmore was employed by UMCH as a counselor. In July 2001 she was notified that she would soon be promoted to the position of family therapist. Instead of the expected promotion, however, Bellmore was terminated in November 2001 because UMCH discovered she was a lesbian. "She was informed that to promote its religious beliefs, the Home would employ only Christian heterosexuals who are married or celibate."[1]

Alan Yorker didn't make it as far as Bellmore did in his search for employment at UMCH. A psychotherapist in adolescent and family therapy for more than 20 years, with more than a decade's experience teaching in Emory University professional schools and a number of appointments to state professional committees, his résumé sparked interest at UMCH. In October 2001 he was called to come interview for a vacant position. Yorker's interview was terminated abruptly as soon as the interviewer realized Yorker was Jewish, a fact he was required to disclose on the application form he filled out just prior to the interview. Bellmore later revealed that a supervisor told her UMCH's practice was to throw away all résumés from candidates whose last names sounded Jewish. Ironically, the fact that Yorker made it as far as he did in the interview process at UMCH was because of discrimination his grandfather had faced. In order to prevent similar discrimination from subsequently affecting him or his family, Yorker's father changed the family's surname from the decidedly Jewish "Monjesky" to the not particularly ethnic "Yorker."

As a privately funded entity UMCH would be entirely within its rights to hire and fire whomever it chose under the religious exemption to Title VII of the federal Civil Rights Act. Being forced to do otherwise would undermine the mission of UMCH as a religious institution. However, UMCH is *not* privately funded. The per diem they receive from the State of Georgia gives the state and its taxpayers a say in how UMCH, or any other agency receiving its funds, is run.

In the nineteenth century James G. Blaine proposed an amendment to the Constitution that was never enacted, but various versions of it were adopted by Georgia and 36 other states. These co-called Blaine amendments originally functioned as essentially anti-Catholic laws designed to prevent state funds from funding Catholic parochial schools. Applied more broadly, the amendments also apply to any

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church-related agency or program. For many years, while Georgia applied the amendment narrowly to Catholic institutions or services, it continued to contract with faith-based organizations such as UMCH. The lawsuit brought by Bellmore and Yorker against the State of Georgia and UMCH brought the issue into the spotlight and forced the State of Georgia to revise its contracts with faith-based service providers.

As UMCH's experience clearly demonstrates, it is not always possible for a religious institution to accept government funds and maintain their religious integrity.

Like many other religious institutions UMCH relied on government money to support its programs, causing a dependence that Marc Stern, general counsel of the American Jewish Congress, is afraid religious institutions will not be able to overcome. "There's no guarantee at all that this sort of attitude won't become prevalent and having taken the money—become addicted to the money—it's not clear that religious institutions are going to be able to walk away."[2]

What is clear is that UMCH has a deep concern for Georgia's at-risk children who, without its help, may have to remain in dangerous home situations or end up on the streets. What is not clear is what, exactly, will change in the future. A position statement on the North Georgia United Methodist Conference's Web site discusses the church's take on the settlement between UMCH and the plaintiffs, claiming, "In relation to staff and volunteers, the agreement reaffirms our policies of non-discrimination and our commitment to training our staff using professional standards and practices relating to all children."[3] As UMCH "reaffirms" its "non-discrimination" policies, it is implied that they are the same nondiscrimination policies that cost Aimee Bellmore her job and Alan Yorker his shot at one. According to the North Georgia United Methodist Conference, nothing much seems to have changed.

Reporting outside of the church gives a different picture. "This settlement is a significant breakthrough in the national debate over whether more taxpayer money should be given to religious organizations," said Susan Sommer, supervising attorney for Lambda Legal, and the lead attorney on this case. "Under the agreement, the State of Georgia will not fund religious groups that use public money to discriminate, and the United Methodist Children's Home will follow policies prohibiting discrimination in hiring and services."[4]

National Public Radio's Barbara Bradley Hagerty, reporting for *Morning Edition*, added further, "The Methodist children's home agreed that it would not discriminate against gay job applicants and that it would not discourage homosexuality or even teach the children its views on the issue."[5]

This case, while legally settled and morally unsettling, generates deep concerns about government money and religiously run social services, which, up to this point, have generally been mutually indulgent. As UMCH's experience clearly demonstrates, it is not always possible for a religious institution to accept government funds and maintain their religious integrity. Not only has UMCH been forced to hire people who do not represent its religious values, but it is prevented from sharing the very values that it represents with the people it set out to help. Government money, in this case, has effectively tied UMCH's hands behind its back.

While the case against UMCH might well have set a benchmark that will be used in other such cases, its roots are entwined in President Bush's faith-based initiatives, which many civil rights, religious, social service, and labor communities oppose on the grounds that funding religious institutions violates the establishment clause of the First Amendment. The outcome of the lawsuit with UMCH clearly validates their concerns.

"If we choose to be in ministry to state children we cannot require the children to go to church or participate in religious activities as a condition of residing in the Home," reads the statement regarding the lawsuit on the church Web site. "While we will be permitted to take children to church if they want to go, we cannot require it and will be obligated to offer a non-religious alternative to worship."[6] Which proves that when government money comes back to haunt you, all that's left are secular services masquerading as sanitized religion.

[1] "New Lawsuit Charges Methodist Children's Home Uses Tax Dollars to Discriminate in Employment and to Indoctrinate Foster Youth in Religion," Lambda Legal News Release, Aug. 1, 2002.

[2] Barbara Bradley Hagerty, "Faith-based Lawsuit Settled," National Public Radio's *Morning Edition*, Nov. 6, 2003.

[3] www.ngumc.org/adobe/umchletter.pdf.

[4] "In a First-of-Its-Kind Example, Lambda Legal Announces Settlement Agreement that Lays Groundwork for Civil Rights Safeguards in Public Funding of Faith Based Organizations," Lambda Legal News Release, Nov. 5, 2003.

[5] Hagerty.

[6] www.ngumc.org/adobe/umchletter.pdf.

Davey v. Locke revisited . . .

Protecting the Wall of Separation OR Punishing a Religious Viewpoint?

By JOHN E. FERGUSON, JR., *and* DAVID L. HUDSON, JR.

A $1,125 scholarship hardly seems worth the attention of constitutional scholars, high-priced appellate attorneys, and the Court of last resort. But that is exactly what happened when Washington Sate student Joshua Davey applied for the Washington Promise Scholarship program and then declared his double major in pastoral ministries and business management.

On May 19, 2003, the U.S. Supreme Court granted certificate in the case of *Davy v. Locke*. The issues raised in this case require the Court to wade through a muddled morass of constitutional doctrines. May the state of Washington erect a higher barrier between church and state than the federal government? May such a barrier allow the state to deny benefits to theology majors that similarly situated nontheology majors can acquire? Is it a case of protecting separation or of discriminating against religion? Is it a free-speech case or a freedom of religion case—or both?

The controversy began in 1999 when state officials pulled Joshua Davey's scholarship from Northwest College after he declared a major in pastoral ministries because of a state statute and a state constitutional provision prohibiting public funding for religious studies. A Washington

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ILLUSTRATION BY MICK WIGGINS

law provides that "no aid shall be awarded to any student who is pursuing a degree in theology."[1] Likewise, the Washington constitution provides in pertinent part: "No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment."[2] (These constitutional provisions are often referred to as Blaine amendments, after the failed federal amendment that restricted public funds from religious institutions and schools. These provisions are found in the constitutions of most Western states and are at the heart of the current debate on use of government vouchers at private religious schools and the president's faith-based initiatives campaign.)

Davey sued state officials, alleging that they violated his free-exercise, free-speech, and freedom-of-association rights. A federal district court rejected his claims in October 2000, writing that "while a citizen may not be unduly prohibited from practicing his religion, he may not demand that the government pay for those religious pursuits."[3] However, a divided panel of the Ninth U.S. Circuit Court of Appeals reversed and sided with Davey in July 2002. The majority wrote that the Washington statute and constitution "on their face discriminate based on religious pursuit."[4]

Now the dispute has come before the United States Supreme Court. An examination of the two lower court decisions shows the intricate interplay between competing strands of First Amendment law.

District court judge Barbara Jacobs Rothstein emphasized that the Washington constitution provides "a more stringent barrier to state funding of religious education" than the U.S. Constitution. She cited the Washington Supreme Court's decision in *Witters v. State Commission for the Blind* for the proposition that the state can deny funding for religious higher education based on its state constitution.[5] While the U.S. Supreme Court had ruled that aid to a blind student who sought funds under a state vocational rehabilitation program did not violate the establishment clause, the state supreme court reached a different decision on remand. Davey's lawyers urged Judge Rothstein to view the case as a free-speech case under the doctrine of viewpoint discrimination. They argued that the state of Washington discriminated against religion by denying aid to Joshua Davey solely because he declared a religious, rather than secular, field of study. Judge Rothstein rejected the argument, writing that Davey "simply cannot identify any restriction on his freedom to speak and has no basis for requiring the state to fund the exercise of his First Amendment rights."[6]

With respect to the analogy to the *Rosenberger* case, which involved the denial of funding to a student religious magazine, the judge would not budge: "Davey's viewpoint is not singled out for disfavored treatment."[7]

Appeals Court Panel Decision

The Ninth Circuit majority saw things much differently. They viewed the prohibition against scholarships for religious purposes as violating the general precept of neutrality.

Decisive 7-2 Opinion in *Locke v. Davey*

On February 25, 2004, the U.S. Supreme Court issued a 7 – 2 decision in favor of the State of Washington's decision not to fund theological training. The case presented the Supreme Court with a thorny question: Does the constitution's guarantee of the free exercise of religion require the state to fund religious activities in some circumstances? Or, to put it another way, does the state unlawfully discriminate against religion when it funds a whole host of activities, but excludes religious activities?

Writing for the seven justice majority, Chief Justice Rehnquist notes that "there are some state actions permitted by the Establishment Clause but not required by the Free Exercise Clause." He further states that funding theology training through indirect means is permitted by the Establishment Clause, but it is not required by the Free Exercise Clause, even when all other academic majors are funded. Concluding the opinion, he states: "If any room exists between the two Religion Clauses, it must be here."

In coming to a decision, Justice Rehnquist notes that although the "Washington Constitution draws a more stringent line [on state funding of religion] than that drawn by the United States Constitution, the interest it seeks to further is scarcely novel. In fact, we can think of few areas in which a State' s antiestablishment interests come more into play. Since the founding of our country, there have been popular uprisings against procuring taxpayer funds to support church leaders, which was one of the hallmarks of an 'established' religion."

Justices Scalia and Thomas dissented from the majority.—*Editors*

They compared the situation to the relatively little-cited 25-year-old *McDaniel v. Paty*.[8] In *McDaniel* the U.S. Supreme Court invalidated a Tennessee law prohibiting a member of the clergy from serving in a state constitutional convention. The Court determined that such a law violated the free-exercise rights of Paul McDaniel, a Baptist minister.

The Ninth Circuit majority found a clear parallel between the plight of Paul McDaniel and that of Joshua Davey. "A minister could not be both a minister and a delegate in Tennessee any more than Davey can be both a student pursuing a degree in theology and a Promise Scholar in Washington," the majority wrote.[9]

The panel majority determined that the state's program discriminated against religion under *Rosenberger* and violated the free exercise clause.

Judge Margaret McKeown dissented in an opinion that realized the judges were "struggling with where to place Davey's case on the spectrum of Supreme Court jurisprudence."[10] She viewed the case as one of funding, rather than free exercise or freedom of speech. She distinguished free-exercise cases such as *McDaniel* and the seminal 1963 *Sherbert v. Verner* decision, finding that Davey, unlike Adele Sherbert and Paul McDaniel, did not face a substantial burden on his free exercise of religion rights.

She also rejected Davey's reliance on what she termed "the seemingly safe harbors" of *Rosenberger*.[11] "As attractive as *Rosenberger* may be in an educational setting, Davey's is not a free-speech case, or at least has not been treated . . . as such by the majority," she wrote. "More explicitly, the decision not to fund Davey's pursuit of a pastoral ministry does not implicate the free speech viewpoint concerns that drove the Court's decision in *Rosenberger*."[12]

Possibly the most interesting element of Judge McKeown's dissent comes in her analogy to abortion-funding cases. She argues that if funding is provided for Davey in this case, then the federal government cannot prohibit family planning services that receive federal funds from also providing information about abortions.

What Will the Supreme Court Do?

While constitutional scholars will seek indicators to the Court's direction on federalism, equal protection, and association rights, the most immediate effect will be felt in the debate over the constitutionality of using vouchers as a means of education reform. After the Court's 2002 decision in *Zelman v. Simmons-Harris*,[13] which found that appropriately structured voucher plans do not necessarily violate the establishment clause, the culture war over vouchers moved to the states. Since 37 states have either Blainelike constitutional amendments or state jurisprudence interpreting their state constitutions as more strictly separationist than the First Amendment's establishment clause, the question of vouchers in many states depends more on state constitutions than on the U.S. Constitution. The Court's decision will color religious liberty and possibly free-speech jurisprudence, with the end result likely based more on how they frame the issues than on the eventual analysis.

The conundrum is how state funding for religious institutions should be viewed. Some believe the Court should treat religious interests of people and institutions differently than other interests. This position has support from historical figures such as Thomas Jefferson and James Madison. The idea is that religious liberty is protected by preventing any taxpayer's money from going to a religious pursuit that would be contrary to the conscience of the taxpayer. It also avoids governmental involvement in religious matters, something several members of the Court are adamant in doing.[14]

Others argue that times have changed and the federal government's minor role in Jefferson and Madison's time has been overshadowed by modern government institutions that greatly impact all areas of people's lives. For this group, treating religion interests differently than other interests seems discriminatory, especially in light of the depleted protections provided by modern free exercise jurisprudence. If the Court opts for the former position, they will likely have little problem with a state that wishes to protect religious freedom more stringently by erecting a high wall of separation. If they frame the situation in light of the latter, the Court will likely find such state schemes discriminatory against religion and religious points of view.

The effects of either position are obvious for the voucher debate. If the Court treats religious interests as different, then the state can use its constitution and laws to deny vouchers for religious schools, which would result in a state-by-state battle over interpretations of state constitutions. If the second view is taken, the battle over state constitutions would be fought once in the Supreme Court, and the voucher battle would move from the judicial to the legislative sphere in most states.

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[1] Washington Revised Code, δ 28B-10-814.

[2] Washington Constitution, Article I, g 11.

[3] *Davey v. Locke*, 2000 U.S. Dist. LEXIS 22273, *13 (W.D. Wash.) (Oct. 5, 2000).

[4] *Davey v. Locke*, 299 F.3d 748, 757 (9th Cir. 2002).

[5] *Davey v. Locke*, 2000 U.S. Dist. LEXIS 22273, *8, 9, citing *Witters v. State Commission for the Blind*, 771 P.2d 1119 (Wash. 1989).

[6] *Ibid.*, *18.

[7] *Ibid.*, *20, 21.

[8] 435 U.S. 618 (1978).

[9] *Davey v. Locke*, 299 F.3d at 754.

[10] *Ibid.*, p. 761 (J. McKeown dissenting).

[11] *Ibid.*, p. 766 (J. McKeown dissenting).

[12] *Ibid.*

[13] *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

[14] See, generally, dissents in *Zelman*.

Rehnquist wrote that the Court's decision "bristles wi
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SUPREMES—*Continued from page 7*

Justice
William H. Rehnquist

We look first at the case of *Stone v. Graham*, decided in 1980. In this case the Court found unconstitutional a Kentucky law that required the posting of the Ten Commandments in every public school classroom. The Court based its decision on the Lemon test, which requires a law to have a "secular legislative purpose." The Court found that the law had no such purpose, that the real purpose for posting the Ten Commandments in classrooms was to promote religion.

Justice Rehnquist dissented. He wrote that "the Ten Commandments have had a significant impact on the development of secular legal codes of the Western world." What a curious thing to say. While the idea that our law is somehow based on the Ten Commandments is popular, it is more myth than reality.

The Western world doesn't have laws that require people to put one god above all others; we don't have laws against using any god's name in vain; we don't prohibit people from working on Saturday. Our laws against murder and theft and adultery aren't derived from the Ten Commandments. They come to us from the founders of Western civilization: the Greeks and the Romans. In this case Rehnquist places a myth before the law.

Justifying his dissent in *Stone*, Rehnquist wrote, "The establishment clause does not require that the public sector be insulated from all things which may have a religious significance or origin." As we noted in the previous article, the Supreme Court has long held that the establishment clause requires government to be neutral toward religion, to not favor some religious beliefs over others. Does posting the Ten Commandments in public school classrooms exhibit such neutrality, or does it favor, say, Judaism over Hinduism?

The next case of interest is *Wallace v. Jaffree*, decided in 1985. The case was about an Alabama law that authorized a one-minute period of silence in public schools. It authorized public school teachers to lead "willing students" in prayer to "Almighty God . . .the Creator and Supreme Judge of the world." The Court relied on the purpose prong of the Lemon test to find the Alabama law unconstitutional.

Again Justice Rehnquist dissented. He attacked as a "misleading metaphor" the notion of a wall of separation between church and state. He dismissed the metaphor, even though the Court has relied on it since 1879. He concluded that the Lemon test should be abandoned, since it "has no more grounding in the history of the First Amendment than does the wall theory upon which it rests." In his dissent he showed his willingness to abandon longstanding precedent.

In *Wallace* Rehnquist offered an essay on the real meaning of the establishment clause. He concluded that the clause was "designed to stop the federal government from asserting a preference for one religious denomination or sect over others." Given that, would Rehnquist find that the Pledge of Allegiance asserts a preference for Jews over Hindus, for those who believe that there's only one God as compared with those who believe there are many gods?

Let's look at one more case, *Santa Fe Independent School District v. Doe*, decided in 2000. In this case the Court found it a violation of the establishment clause for prayers to be given before sporting events at a public school. Justice Rehnquist dissented. He wrote that the Court's decision "bristles with hostility to all things religious in public life." Since the prayer was given by the student body member who composed it, he concluded that it was private speech. He referred to a previous Supreme Court decision that said there was a "crucial difference between government speech endorsing religion, which the establishment clause forbids, and private speech endorsing religion, which the free speech and free exercise clauses protect."

This raises the question: Will Justice Rehnquist agree that the current version of the pledge is government speech endorsing religion, and is therefore unconstitutional? Of course not. In *Santa Fe* he wrote that the Court's opinion, with which he strongly disagreed, meant that adding "under God" to the pledge was unconstitutional. He'll certainly vote to overrule the appeals court's ruling in *Newdow*.

Justice
Sandra Day O'Connor

While Justice Rehnquist says the Lemon test should be abandoned, Justice O'Connor has tried to refine it. Showing much greater respect for precedent, she's tried to come up with a successor to the Lemon test, "a grand unified theory" that would resolve all establishment clause cases. In *Wallace v. Jaffree* she proposed the endorsement test. The endorsement test asks whether a "reasonable observer" would find that a law or government action either endorses or disapproves of religion. If so, then it violates the establishment clause. Why? Because, as she puts it,

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public life."

"the religious liberty so precious to the citizens who make up our diverse country is protected, not impeded, when government avoids endorsing religion or favoring particular beliefs over others."

Consider what O'Connor has had to say about what the establishment clause prohibits:

- "What is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion."
- "Just as government may not favor particular religious beliefs over others, 'government may not favor religious belief over disbelief.'"
- "We have time and again held that the government generally may not treat people differently based on the God or gods they worship, or don't worship."
- "The establishment clause 'prohibits government from appearing to take a position on questions of religious belief.'"
- "It [the endorsement test] does preclude government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred."

That last quote is revealing. In its controversial ruling in *Newdow v. U.S. Congress*, the appeals court found that "under God" in the pledge "is a profession of a religious belief, namely, a belief in monotheism." So we should expect O'Connor to uphold the appeals court's ruling, right? Maybe.

In *Wallace v. Jaffree* she wrote, "In my view, the words 'under God' in the pledge and opening court sessions with 'God save the United States and this honorable court' . . . serve as an acknowledgment of religion with 'the legitimate secular purposes of solemnizing public occasions, [and] expressing confidence in the future.'" What a curious thing to say!

In an earlier case she wrote that such practices as "the printing of 'In God We Trust' on our coins . . . serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs." What happened to the prohibition against government's even appearing to take a position on questions of religious belief, such as how many gods there are?

It's far from certain that imprinting our coins with a motto that reveals an official belief in any number of gods tends to solemnize public occasions. Let's say it does. Let's say it solemnizes the occasion of a class of first graders practicing their finger painting. Does solemnizing public occasions trump the prohibition against the government's taking a stand on religious beliefs, a prohibition the Court has long honored?

O'Connor also acknowledges the special nature of public schools. In *Wallace* she addressed the issue of "state-sponsored indoctrination" of religious beliefs in public schools and the perceptions of "children in their formative years." She agreed with the Court's opinion that the establishment clause prohibits "government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith," and that "government inculcation of religious beliefs has the impermissible effect of advancing religion." She wrote, "This Court's decisions have recognized a distinction when government-sponsored religious exercises are directed at impressionable children who are required to attend school, for then government endorsement is much more likely to result in coerced religious beliefs."

In *Newdow* what might she say about a pledge to monotheism that children recite day after day, year after year? Would she find that state laws requiring daily recital of the pledge amount to government-sponsored indoctrination in a religious belief? Maybe.

Justice
John Paul Stevens

While Justice Rehnquist believes Jefferson's "wall of separation between church and state" is a "misleading metaphor" that should be abandoned, Stevens seems to accept it, just as the Court has since 1879. Just last year, in the case of *Zelman v. Simmons-Harris*, he wrote, "Whenever we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of our democracy."

Stevens seems to think the establishment clause was meant to keep government and religion separate. His thinking is revealed by the quotes he uses from previous Court rulings to support his opinions. Here's a sampling:

- "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the federal government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another" (from *Everson v. Board of Education*, decided in 1947).
- "The place of religion in our society is an exalted one,

Scalia says he would replace the **LEMON**
measure that maintains "fidelity to the longstanding tradition

achieved through a long tradition of reliance on the home, the church, and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of the government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the state is firmly committed to a position of neutrality" (from *Abington School District v. Schempp*, decided in 1963).

- "Neither [a state nor the federal government] can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs" (from *Torcaso v. Watkins,* decided in 1961).
- "The law knows no heresy and is committed to the support of no dogma, the establishment of no sect" (from *Watson v. Jones,* decided in 1872).

Do these quotes argue that it is appropriate for the Congress to enact laws based on a controversial religious belief? Or do they suggest that it is not the business of government to promote religious beliefs, that government lacks the authority to judge the truth of religious beliefs?

Regarding the special nature of public schools, consider these excerpts from the Court's opinion, written by Stevens, in *Santa Fe v. Doe:*

- "School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'"
- "We explained in *Lee* [referring to *Lee v. Weisman*] that the 'preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere.'"
- "Even if we regard every high school student's decision to attend a home football game as purely voluntary, we are nevertheless persuaded that the delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship. For 'the government may no more use social pressure to enforce orthodoxy than it may use more direct means.'"
- "As in *Lee*, 'what to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the state to enforce a religious orthodoxy.'"

Based upon such comments as these, should we assume that Stevens will uphold the appeals court's decision in *Newdow?* Maybe.

Justice
Antonin Scalia

While Justices O'Connor and Stevens accept the Lemon test's purpose prong, Justice Scalia dismisses it:

- "I doubt whether that 'purpose' requirement of Lemon is a proper interpretation of the Constitution" (from *Edwards v. Aguillard,* decided in 1987).
- "Our religion clause jurisprudence has become bedeviled (so to speak) by reliance on formulaic abstractions [e.g., the Lemon test] that are not derived from, but positively conflict with, our long-accepted constitutional traditions" (from *Lee v. Weisman,* decided in 1992).
- "For my part, I agree with the long list of constitutional scholars who have criticized Lemon and bemoaned the strange establishment clause geometry of crooked lines and wavering shapes its intermittent use has produced" (from *Lamb's Chapel v. Center Moriches School District,* decided in 1993).

The crooked lines he refers to are those the Court has drawn to satisfy the purpose prong. While Justice O'Connor writes, "We cannot avoid the obligation to draw lines, often close and difficult lines, in deciding establishment clause cases," and Justice Anthony Kennedy writes, "Our jurisprudence in this area is of necessity one of line-drawing," Justice Scalia rejects all that and says that drawing these lines leads to such unreasonable results as Nativity scenes on public property sometimes being considered constitutional, sometimes not.

While Justice O'Connor has searched for a test that can be applied consistently, Justice Scalia says the Lemon test has left it unclear what the establishment clause prohibits and what it allows. In one of his opinions Scalia put it this way:

- "Our cases interpreting and applying the purpose test have made such a maze of the Establishment Clause that even the most conscientious governmental officials can only guess what motives will be held unconstitutional" (from *Edwards v. Aguillard*).

In another opinion Scalia mocked the test:

- "As to the Court's invocation of the Lemon test: like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad after being repeatedly killed and buried, Lemon stalks our establishment clause jurisprudence

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our people."

once again" (from *Lamb's Chapel v. Center Moriches School District*).

Scalia says he would replace the Lemon test with some other measure that maintains "fidelity to the longstanding traditions of our people." Like Rehnquist, Scalia makes many references to tradition in establishment clause cases. Consider the case of *Lee v. Weisman*, in which the Court ruled that it violated the establishment clause for public schools to have clerics lead prayers at graduation ceremonies. In his dissent Scalia said the Court's decision "lays waste a tradition that is as old as public school graduation ceremonies themselves." He noted the "longstanding American tradition of nonsectarian prayer to God at public celebrations," and he said, "The longstanding American tradition of prayer at official ceremonies displays with unmistakable clarity that the establishment clause does not forbid the government to accommodate it."

In short, if something has been allowed long enough, it must be constitutional; else it would not have been allowed for so long. (We should be thankful that Scalia was not on the Court when *Brown v. Board of Education* was decided.) This raises an interesting question: How long is long enough? Fifty years? Another interesting question arises from Scalia's comments: If longstanding traditions are inherently constitutional, how is it that longstanding Court precedents—such as the Lemon test—are to be mocked? (Perhaps Scalia is living testimony against O'Connor's belief that opening the Court with a plea to a god solemnizes the occasion.)

One final observation about Scalia's dissent in *Lee v. Weisman*. Scalia noted that the Court's decision meant that the current version of the Pledge of Allegiance is unconstitutional. Sarcastically he said that finding the pledge unconstitutional "ought to be the next project for the Court's bulldozer." Might that turn out to be a prophetic comment?

Justice
Anthony M. Kennedy

Justice Kennedy agrees with Justice Scalia that tests such as the Lemon test or the new and improved endorsement test yield "bizarre results," such as making the existing national motto a violation of the establishment clause (as President Theodore Roosevelt warned when the idea was proposed), and invalidating such traditional practices as opening sessions of the Supreme Court with a request that "God save the United States and this honorable Court."

Consider the case of *Allegheny County v. ACLU*, in which the Court found that a Nativity scene in a county courthouse violated the establishment clause. Kennedy took the opportunity to discuss the application of such tests to the current version of the pledge. He wrote that "it borders on sophistry to suggest that the 'reasonable' atheist would not feel less than a 'full member of the political community' every time his fellow Americans recited, as part of their expression of patriotism and love for country, a phrase he believed to be false." Given the "bizarre results" that come from these tests, he said he'd rather take the strict separationist view: Let's just eliminate all religious displays on public property and be done with it.

In *Allegheny* Kennedy said the local community should decide what are appropriate displays for a religious holiday: "In my view the principles of the establishment clause and our nation's historic traditions of diversity and pluralism allow communities to make reasonable judgments respecting the accommodation or acknowledgment of holidays with both cultural and religious aspects. No constitutional violation occurs when they do so by displaying a symbol of the holiday's religious origins."

This raises some interesting questions. What if the local community happens to be New York City, a community with many different cultural and religious groups? Kennedy's prescription may work if the entire community belongs to one religion, but what about real communities? What about religious minorities in real communities? Consider the situation of a Catholic family living in a predominantly Muslim community. The children attend public school in the community. What are they to do when the teacher leads the class in a pledge to "one nation under Allah"? What are they to do when the class breaks for afternoon prayers?

Like Scalia, Kennedy feels that establishment clause rulings lack consistency. He says the Court's rulings should be consistent with "historical practices that, by tradition, have informed our First Amendment jurisprudence." In Kennedy's opinion, no matter what test the Court uses in establishment clause cases, "the reference to God in the Pledge of Allegiance . . . the Court will not proscribe." But he gives no reason at all for such a refusal. Is there something in the Constitution that says any practice that's been accepted for X number of years is exempt from constitutional scrutiny? If so, what is the value of X? If it is 50 years, then the appeals court's decision can be upheld *only* if the Court decides *Newdow* before Flag Day, 2004. After that, it becomes exempt.

Consider another quote from Kennedy:

■ "The First Amendment's religion clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the state. The design of the

In Lee v. Weisman *Justice Souter agree*
indirectly COERC

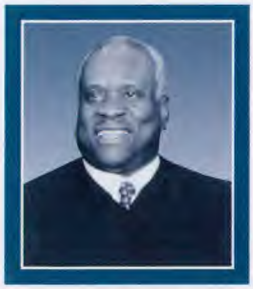
Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission."

How does that jibe with a refusal to proscribe the "reference to God in the Pledge of Allegiance"? If the state cannot prescribe religious beliefs, shouldn't the appeals court's decision be upheld? Shouldn't Congress be barred from passing laws that endorse controversial religious beliefs?

Like O'Connor and Stevens, Kennedy considers the special nature of public education. Consider these excerpts from his opinions:

- "No holding by this Court suggests that a school can persuade or compel a student to participate in a religious exercise. That is being done here, and it is forbidden by the establishment clause of the First Amendment" (from *Lee v. Weisman*).
- "The injury caused by the government's action, and the reason why Daniel and Deborah Weisman object to it, is that the state, in a school setting, in effect required participation in a religious exercise."
- "We think the state may not, consistent with the establishment clause, place primary and secondary school children in this position [of participating in a religious exercise unwillingly, or of protesting]."
- "What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the state to enforce a religious orthodoxy."

How will Kennedy vote in *Newdow*? Hard to tell. Judging from his opinions, he could go either way. His decision might depend on the arguments presented by *Newdow* and by those arrayed against him: the United States, the attorneys general of 50 states, a number of religious rights organizations, a school district, and public opinion.



Justice
Clarence Thomas

What does the establishment clause mean to Justice Thomas? Consider his opinion in *Rosenberger v. University of Virginia*, in which he commends the view "that the Framers saw the establishment clause simply as a prohibition on governmental preferences for some religious faiths over others." This is pretty much the same view advanced by Rehnquist in *Wallace v. Jaffree*. We should expect Thomas to rule against a law that prefers some faiths over others, right? Wrong.

Speculating as to what James Madison intended by the establishment clause, Thomas wrote, "Madison saw the principle of nonestablishment as barring governmental preferences for particular religious faiths." From that, might we suppose that Thomas would vote to uphold the appeals court's decision, as the pledge's wording prefers particular religious faiths, i.e., those that hold there is but one god? Not likely.

Justice
Stephen G. Breyer

The newest member of the Court offers some revealing comments in his dissenting opinion in *Zelman v. Simmons-Harris,* an opinion that was joined by Justices Souter and Stevens. Consider these comments from that opinion:

- "The First Amendment begins with a prohibition, that 'Congress shall make no law respecting an establishment of religion,' and a guarantee, that the government shall not prohibit 'the free exercise thereof.' These clauses embody an understanding, reached in the seventeenth century after decades of religious war, that liberty and social stability demand a religious tolerance that respects the religious views of all citizens, permits those citizens to 'worship God in their own way,' and allows all families to 'teach their children and to form their characters as they wish.'"
- "The upshot [of twentieth-century establishment clause cases] is the development of constitutional doctrine that reads the establishment clause as avoiding religious strife, not by providing every religion with an equal opportunity (say, to secure state funding or to pray in the public schools), but by drawing fairly clear lines of separation between church and state—at least where the heartland of religious belief, such as primary religious education, is at issue."
- "In a society as religiously diverse as ours, the Court has recognized that we must rely on the religion clauses of the First Amendment to protect against religious strife, particularly when what is at issue is an area as central to religious belief as the shaping, through primary education, of the next generation's minds and spirits."

Newdow says the existing pledge deprives him of his right to raise his daughter as he wishes, that the state is competing with him when it comes to his daughter's religious upbringing. If he makes that argument before the Court, look for Breyer to vote in Newdow's favor.

at "prayers at public school graduation ceremonies ligious observance"

Justice
David Hackett Souter

In *Lee v. Weisman* Justice Souter agreed that "prayers at public school graduation ceremonies indirectly coerce religious observance," and that violates the Constitution. If hearing a prayer at a high school graduation ceremony is coercion, what is it to be required by state law to recite a pledge to one nation under one god, day after day, for 12 years?

Consider these excerpts from Souter's opinions about the rights of nonbelievers, such as the plaintiff in *Newdow:*

- "The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."
- "Neither a state nor the federal government . . . can constitutionally pass laws or impose requirements which aid all religions as against nonbelievers."
- "The state may not favor or endorse either religion generally over nonreligion or one religion over others."
- "The political interest in forestalling intolerance extends beyond intolerance among Christian sects—or even intolerance among 'religions'—to encompass intolerance of the disbeliever and the uncertain."
- "The establishment clause applies 'to each of us, be he Jew or agnostic, Christian or atheist, Buddhist or freethinker.'"

Slam dunk! Anyone who thinks that listening to a prayer at a high school graduation ceremony is an unconstitutional form of coercion is sure to find that having to recite a pledge acknowledging there's only one god, and doing it more than 2,000 times before graduation, is a much more serious form of coercion, right?

Justice
Ruth Bader Ginsburg

Justice Ginsburg hasn't had much to say about what the establishment clause allows and prohibits, exactly what the Founders meant by it, how our national heritage fits into all of this, or whether ceremonial deism is a valid legal concept, but in these cases she always votes the opposite of Rehnquist, Scalia, and Thomas. If they vote to uphold the existing pledge, look for her to vote against it.

Conclusion

When the *Newdow* ruling was first announced, the public was anxious about it, but then lots of constitutional scholars appeared on TV. "The Supreme Court will surely overrule this decision," they said. And they gave all sorts of reasons. The pledge has called this a nation "under God" for 50 years, but that hasn't resulted in a national religion. The reference to God in the pledge doesn't advance a religion or a religious belief. It's just an acknowledgment of our nation's religious heritage. It merely acknowledges the fact that the people who wrote our Constitution believed this to be a nation under God. Besides, it's a cultural fact—as Ted Olson, U.S. solicitor general, claims—that we're a "religious people whose institutions presuppose a Supreme Being."

But an analysis of how the current Supreme Court justices have ruled, and a review of the opinions they've expressed in cases involving the establishment clause and public education, leave it far from certain that they'll overrule the appeals court. In fact, it provides strong evidence that they'll uphold the appeals court.

In *Lee v. Weisman* Justices O'Connor, Kennedy, Stevens, and Souter agreed that having a cleric say a prayer at a graduation ceremony coerced students to participate in a religious exercise. From that, it's not hard to see those four agreeing with the appeals court ruling. It's not hard to see Justices Breyer and Ginsburg agreeing with the ruling as well. It's easy to see Justices Rehnquist, Scalia, and Thomas voting to overrule the appeals court, based on their dissent in *Lee* as well as their opinions in other cases. That leaves us with a likely 6 - 3 decision in favor of upholding the appeals court ruling. That is, until we consider that Justice Scalia is going to sit this one out.

Since Justice Scalia made references to this case in a speech he made earlier this year, and since Michael Newdow did what experienced lawyers never do, he asked a Supreme Court justice to recuse himself or herself from a case—Scalia is out. That means eight justices will decide this matter. That leaves us with a potential 4 - 4 tie, and a likely 6 - 2 ruling *if* the Court decides to rule on the central issue in this case.

There's no guarantee that the Court will rule on the central issue: the wording of the Pledge of Allegiance. It could skip that issue altogether. It might consider only Newdow's standing in the matter.

The appeals court decided that Newdow had standing because his daughter attended public school, and daily recitation of the pledge was interfering with his right to raise his daughter as he wished. According to the appeals court, "parents have a right to direct the religious upbringing of their children and, on that basis, have standing to protect their right."

But there's a twist. Newdow never married the girl's mother. The girl's mother is a Sunday school teacher, and she claims the girl is happy to say the pledge just as it is. When the appeals court issued its ruling, the mother had sole custody of the child. And she's petitioned the Court to rule that Newdow had no standing in this matter.

It's quite possible that the Supreme Court could look no further than the standing issue. It could rule that the question of standing is something for the California courts to decide. It could leave the central issue just where it is right now: up in the air.

Beware Shallow Reasoning

I am not sure when I started receiving *Liberty*; however, it was sometime after I took the bench in 1986. Working in a civil trial court all these years and doing the daily grind has at times allowed my once-sharpened social, religious, and moral sense to become dulled. Reading *Liberty* restores some of those intangible qualities in me.

The material in the January/February issue prompted this communication. It screams of the risks of shallow reasoning and the convenient mixing of the secular and the religious for political purpose. I fear that judges such as Moore and legislators such as Kehoe, who obviously come from different perspectives, are like the many who have mastered the ability to blend toward their own ends. Is *Liberty* the voice of reason? Because I agree with your positions more often than not, from my perspective it is. Please keep speaking out.

JUDGE DAVID SAUER
E-mail.

How Political?

As a subscriber to *Liberty* magazine, which I enjoy very much, I have become convinced by you that separation of church and state is in danger. As a Seventh-day Adventist and one who does not get involved in politics, I wonder if it is time that we as church members do get involved. Should *Liberty* magazine or the church leadership or whoever get word out to all church members to write letters to their elected officials about the "faith-based initiative" bill? Or should our church stay out of these issues? It seems to me that we should take a stand for right.

DAN BALLEW
Shattuck, Oklahoma

The Seventh-day Adventist Church has always deeply respected the First Amendment of the Constitution and the separation between church and state that it mandates. Churches should not be partisan political players. However, the church does make its positions known to legislators—to do otherwise would be irresponsible. Individual members are encouraged to be responsible citizens and vote according to their conscience. Never has the church sought to influence members' voting on partisan "political" issues. The church rallied members to support the temperance issues of a century ago and continues to participate in nonpartisan and religious coalition issues such as the current proposal for a Workplace Religious Freedom Act. —Editor.

Paying the Piper

Alan J. Reinach ("Churches Attacked," Jan./Feb. 2004) claims that a new law in California will force churches to "violate their faith" by forcing religious institutions to pay marital employment benefits to the church's gay employees.

Yes, that law does require religious institutions to pay the same benefits to "domestic partners" as it does to heterosexual partners. But what Reinach conveniently fails to drive home is that the requirement applies only to religious institutions that receive state money. It needs to be said again—*only* for religious institutions that receive state money. While he writes as if that is an insignificant technicality, Reinach sounds the alarm that churches are under attack! Batten down the hatches; the gays are invading the churches!

While Reinach presents himself as "seeking to protect the autonomy of [church] hospitals and colleges," he demands that the churches be allowed to receive state money. If he wants the churches to be autonomous, why does he demand a state sustenance?

He even admits that "such dependency [on state funding] has now made these institutions vulnerable to attack." If so, then why demand state funding? Reinach champions free exercise, but government involvement in churches only reduces the free exercise of religion.

Churches, or any other institution, that receive taxpayer funding cannot use that money in an inequitable manner. The fact that they are a church does not negate the fact that it is tax money from a public source. Gays pay taxes too! Reinach, in effect, argues that it is the right of churches to do whatever they please with government money.

Reinach's alarm is a false alarm. More than that, it is a call to unite church and state.

In arguing that government must fund churches, Reinach actually prohibits the separation of church and state. The culminating statement of the article actually plants the suggestion that the separation of church and state may become a thing of the past.

DEAN MILLER
E-mail.

Your point is well taken. Liberty *has long maintained that churches and church institutions should not take state funds, as it will compromise their autonomy and make them party to a weakening of the establishment clause. That so, it is still wrong for the state to attempt to force a church to compromise principle. In fact it is the open claim of the present federal administration that the faith-based initiative can proceed safely precisely because the state will not force churches to change their views. I do not believe that author Reinach "demands" that churches be allowed to receive state money. I believe he is uncomfortable with the present funding situation. —Editor.*

Metaphor and Reality

The letter by Edd Doerr in the January/February 2004 edition of *Liberty* got my attention. He is critical of books by Hamburger and Dreisbach, who have an issue with the church and state separation metaphor. I have not read these books but am familiar with their issue. They are reported to regard the separation principle as a worthless slogan. I am a strong believer in the separation of church and state and always will be as long as it means that church and state each stay within their own domains and do not interfere with each other.

It is true that the separation principle is a metaphor coined by Jefferson and is not actually written in the Constitution. The separation principle is not a useless metaphor, but is often a metaphor misused. Many liberal judges see the separation principle as an adversarial relation between church and state—whereby you separate the church from the state by pushing the church off the map, so to speak. This is done by ruling against any public expressions of religious faith. This kind of ruling by judges suggests that religious freedom is something to be confined to one's place of worship or one's home, but not

allowed outside of those domains. This is not exactly the free exercise of religion.

I don't believe Jefferson envisioned that his metaphor would be misused in this way. Why must we interpret metaphors? What is wrong with the religious freedom clause of the First Amendment the way it is written? "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Now, that says it right!

GLENN SAUNDERS
New Orleans, Louisiana

Uncommon Bond

May I say up front that I thoroughly enjoy and look forward to each issue of your magazine. If I were to become a"born-again Christian" or convert, I would be strongly led to your church based upon your publication and its published philosophies.

As a secular humanist, atheist, freethinker, and promoter of freedom from religion, etc., for more than 50 years, and a fairly recent new subscriber to *Liberty* magazine, I am extremely encouraged by the obvious common bond that exists between the Seventh-day Adventist Church and the above-referenced national, state, and local groups of "unbelievers." I refer to the premise of separation of church and state!

Where these groups differ in their beliefs is whether the ultimate responsibility for improvement of humanity rests with humans or with God. Regardless of whether or not one follows the Christian Bible and believes in a supernatural God, I see both sides agreeing on the affirmation that we, as humans, must protect our natural resources from human predators, and promote love, compassion, scientific and medical exploration, and moral education for the world masses.

As a famous "humanist," Thomas Jefferson, wrote in 1786 in the Virginia Statute for Religious Freedom: "Our civil rights have no dependence on our religious opinion. . . . No man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever . . . ; but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion. . . . We are free to declare, and do declare, that the rights hereby asserted are of the natural rights of mankind."

DEAN RAY
Lake Wales, Florida

Always good to read such warm thoughts—even from those whose views on religion are at odds with ours. Yes, in defending the separation of church and state, we increasingly find ourselves shoulder to shoulder with nonreligionists. That is not an embarrassment, but a rebuke to the increasing numbers of religious leaders who have cast aside the concerns of the Founders in favor of co-opting the state to help advance their religious agenda. God help them if the state chooses badly, and backs the "wrong" religious faction!
—Editor.

No Bones Broken

I want to commend Steven Mosley on a thoughtful and well-written article. I appreciated his depth of analysis of the controversial movie "The Passion of the Christ." While I agreed with his insights, there was one reference that I found unbiblical. When Mosley refers to contributions of each of the Gospel authors, he details John's memory as including the act of Roman soldiers breaking Jesus' legs. He would have been more correct to write that John remembered the Roman soldiers breaking the legs of the two thieves and then choosing NOT to break the legs of Christ, since He was already dead. Instead they speared His side, and in doing so unconsciously fulfilled an Old Testament prophecy concerning the Messiah. (See John 19:32-37.)

Thank you for the timely, informative and perceptive article.

SARAH K. ASAFTEI
Berrien Springs, Michigan

As with the film itself, our Liberty *article on "*The Passion of the Christ" *has stirred an unprecedented reader response. Our readers, already presumed perceptive as supporters and defenders of religious liberty, have shown that they read the magazine very carefully, indeed. The letter from Sarah Asaftei is quite representative of the* many *(with emphasis-many) letters pointing out the factual error in the article. They were made even more stinging in their rebuke by the kind words invariably expressed about the article itself and about* Liberty *Magazine. Thank you, one and all for contacting us. How this error escaped me and the other staffers and copy editors is one of the mysteries of life. Anyone familiar with the gospel account knows the emphasis placed on the fact that Jesus' legs were not broken. Very importantly, Mel Gibson's "Passion" is accurate to the gospels in its portrayal–no broken bones. It is worth mentioning that our article was premised on the right of religious expression, not on a demand that it be accurate. I would hope we could as easily defend "Passion" if it were inaccurate and even biased.*
—Editor.

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.

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GOD, COUNTRY, *and the* JUSTICES

In the public library with my children recently I spotted a DVD version of *Gods and Generals*. I've long had an interest in history—It was for a time my major in college—and the Civil War was an area I particularly concentrated on. Filmmakers have a tendency to rewrite history, but I couldn't resist checking out the DVD.

Gods and Generals is about civil war. It shows combatants falling like scythed wheat onto the farm fields of some of the early clashes. But it is a stylized killing, made transcendent and ultimately bloodless by elevating it to a pseudo religious event amid the grand chords of triumphal music.

At first touching, the film's insistent equating of religious faith with political identification became for me the real violence of this retelling of an epic contest between two parts of what is again a whole. I was reminded of Abraham Lincoln's famous comment that both sides prayed to the same God, and that both could not be right. True and a truism, I suppose. Still, truisms are not so obvious to those submerged in their genesis.

The Civil War was many things at once. It was, of course, the transfer of real power from an agrarian South to the rapidly industrializing North. It was in many ways the victory of the machine of modern society and methods of war over the arcane old-world views of tradition and entrenched social norms, however problematic some of them may have become. It can be seen as part of the mechanism that moved the U.S. from its English roots to our present multicultural identity. And I think it can be argued that the struggle ushered in a new state-federal paradigm that broke with much of the vision of the Founders—laying the ground for some of today's religious liberty dialogue.

The Civil War also reached into the religious sentiments of the time and co-opted them. "The Battle Hymn of the Republic," immensely popular at the time, shows how militant the religiosity could be in the North—and it ignores the subtlety of Lincoln's observation. The issue of slavery allowed the Northern leaders to invoke the religious "jihad" of the abolitionists almost as a cover for some very real and structural political differences that had led to secession. In the South there was indeed the conflation of political aims and the bedrock issues of spiritual faith. However, the film I saw ignored the real and often cynical aim of many in the South to defend a lifestyle and an economy that was not only out of sync with the rest of the country but passé in the larger world, England itself having already outlawed slavery by popular demand.

With this melange of motives and aims, I think the invocation of the Deity was almost profane and, as always, dangerous to true liberty of conscience.

This brings me to the present and the need to comment on the pending Supreme Court review of the *Newdow* Pledge of Allegiance case. As I write this the news is peppered with reports of Michael Newdow's surprisingly nimble presentation of his case before the justices. Much hinges on the outcome of this case. At hand are issues of original intent, separation of church and state, the "culture wars" (the most recent skirmish being the battle of the gay married on courthouse steps), and perhaps some sort of recapitulation of the concept of ceremonial deism.

God has indeed shone His favor on the United States in times past. That must be a truism made more real depending on your eschatological outlook. And, as our president said recently, God bless him, the Deity couldn't have blessed a more deserving people. Self-congratulating theological certainty is certainly a general human tendency, knowing no national boundary. It becomes a little more severe in its effect when we encapsulate our God as a property of the state rather than the state being just one of the stars under

His wide heaven. In other words, if we have God, we *are* just, we *are* right, we *are* His authorized agents.

This last construct was exactly the logic, worked to its feudal conclusion, that led to the doctrine of the divine right of kings. It was an arbitrary theology that needed only a supporting prelate or two to have a lock on the people. Eventually the people of Europe threw off this concept. France did it violently in the French Revolution, for a while rejecting the God of the ruling class. England did it in a Puritan Protestant revolution that replaced the king's certainty of divine authority with one of divine national destiny. In the cold recesses of Russia the czars kept their divine autocracy until exterminated by a militant atheistic revolution.

And thereby hangs a tale with a link to the Pledge of Allegiance!

We all know by now what many had forgotten following years of schoolroom recitation: the words "under God" were added in 1954 at the urging of religious groups, the Knights of Columbus most prominently. The reason: to define this nation as Christian as opposed to godless Communism. It was the height of the cold war, after all. No matter that the conflict was a little more nuanced than that—that Eastern Europe feared a resurgent Germany; that capitalism—freed of the inhibitions against predatory gains that characterized Christian Europe of the Middle Ages and that led to the marginalization of Jews for dealing in usury, etc.—was in a global battle for market access and control; that Russia and the U.S. were in many ways involved in a classic game of global imperialism; that MAD was, after all, a *mutually* assured destruction pact. Never mind all the ambiguities; many needed to characterize the battle as simply between good and evil—and of course God would be on our side. In retrospect, His will most likely has been served by the collapse of the godless force of global communism. But a certain violence was itself done by the insertion in the Pledge of Allegiance.

Justice Antonin Scalia is wont to talk of original intent on constitutional matters. His point is well taken when we can divine it. Most usually it should be safer to depend on textual interpretation of documents such as the Constitution. He has recused himself from this particular deliberation because he clearly favors the words in the pledge. I think this is one case in which the *intent*, or expectations of the culture in eighteenth-century America, may be at odds with the text and aims of the Constitution itself.

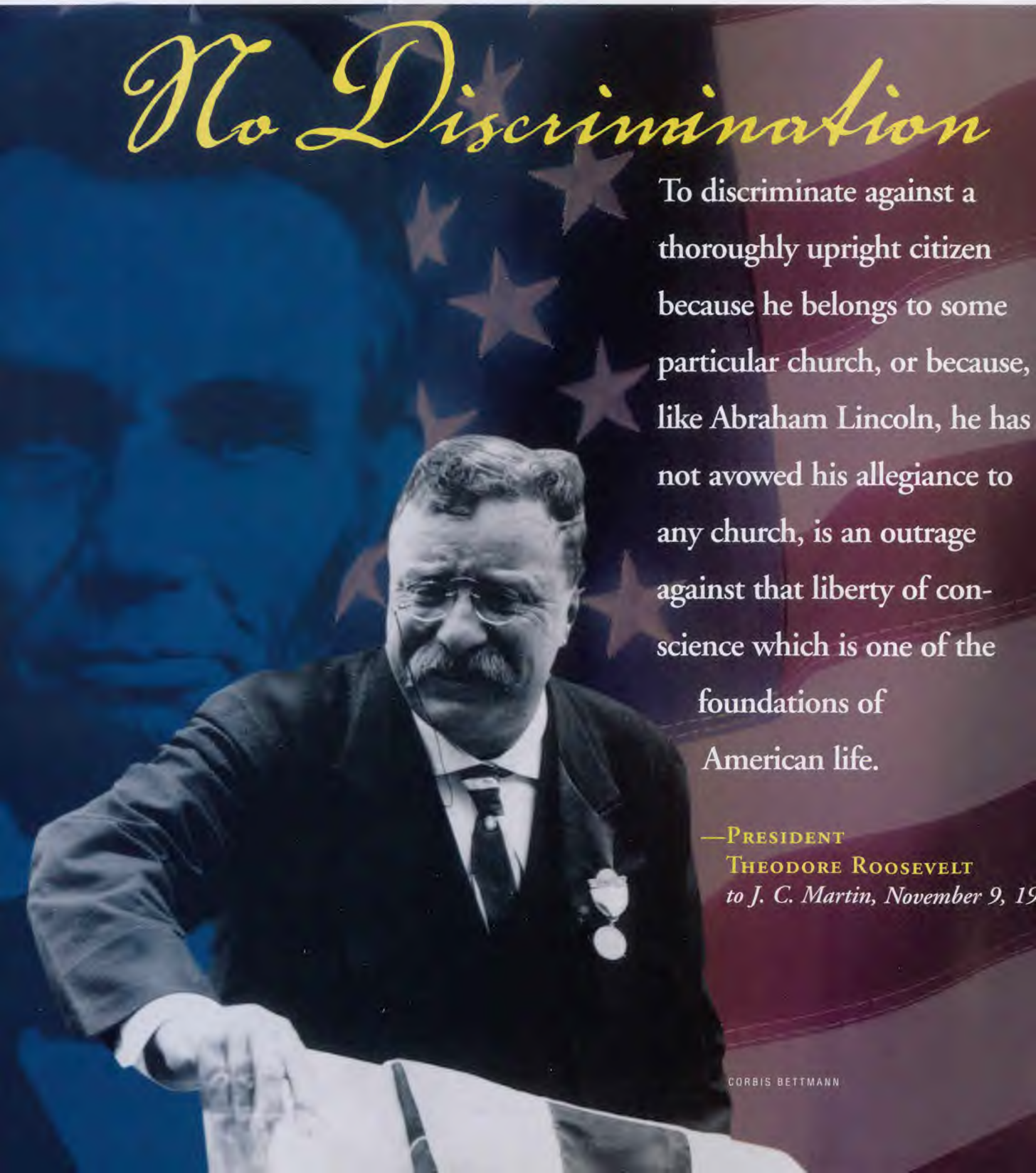
The society was overwhelmingly Christian—more specifically, Protestant—back then. It is easy to show, as various politically aggressive religious spokespersons have of late, that the conflation of state and God was routine. Even as Franklin, Jefferson, Washington, and others set up a calculatedly secular government, borrowing from the British norms and aping much of the classical ideals of Rome and Greece, they clearly shared the assumption that this new endeavor had the blessing of the Almighty.

The question is in some ways whether we perpetuate the usually quaint, but oftentimes dangerous, co-option of God for national behavior; or recommit ourselves to a civil compact made more workable by the personal faith dynamic of an increasingly diverse community. The First Amendment has been worked over many times for meaning—no establishment of religion/no inhibition to its practice. But in this pledge question it might also be well to remember that the Constitution is explicit in prohibiting any religious test for public office. With the pledge, we are very much faced with a religious test—especially if the pledge is required of all students. It seems illogical for the framers of this constitutional requirement to so definitely object to a religious test for public office and yet allow it for all citizens, thereby accomplishing the same negative they clearly desired to prevent.

We can only hope the justices treat this with Solomonic care. To discard the wording out of hand will only inflame the national religious sense that has been so easily co-opted in the past. It might also empower those who have a general antipathy to faith. Perhaps the best course is a narrowly defined opinion that rests on the recognition of the role of ceremonial deism, and makes clear the limits beyond this.

Lincoln E. Steed
Editor,
Liberty Magazine

ILLUSTRATION BY DON STEWART


No Discrimination
To discriminate against a thoroughly upright citizen because he belongs to some particular church, or because, like Abraham Lincoln, he has not avowed his allegiance to any church, is an outrage against that liberty of conscience which is one of the foundations of American life.
—President Theodore Roosevelt
to J. C. Martin, November 9, 19
CORBIS BETTMANN