Church-State Issues in America Today

RELIGION AND GOVERNMENT

EDITED BY ANN W. DUNCAN AND STEVEN L. JONES

volume 1

PRAEGER PERSPECTIVES

How to go to your page:

This eBook contains three volumes. Each volume of the original hardcopy set is numbered separately. In order to avoid duplicate pagination in this eBook, we have included volume numbers within the page numbers.

For example, to go to page 5 of the first volume, enter 1-5 in the “page #” box at the top of the screen and click “Go”. To go to page 100 of the second volume enter 2-100. To go to page ix of the third volume enter 3-ix, and so on.

CHURCH-STATE ISSUES IN AMERICA TODAY

CHURCH-STATE ISSUES IN AMERICA TODAY

Volume 1: Religion and Government

Edited by
Ann W. Duncan and Steven L. Jones

PRAEGER PERSPECTIVES

PRAEGER

Westport, Connecticut
London

Library of Congress Cataloging-in-Publication Data

Church-state issues in America today / edited by Ann W. Duncan and Steven L. Jones.
p. cm.
Includes bibliographical references and index.
ISBN 978-0-275-99367-2 (set : alk. paper)—ISBN 978-0-275-99368-9 (vol. 1 : alk. paper)—ISBN 978-0-275-99369-6 (vol. 2 : alk. paper)—ISBN 978-0-275-99370-2 (vol. 3 : alk. paper)
1. Church and state—United States. 2. United States—Church history.
I. Duncan, Ann W., 1978– II. Jones, Steven L., 1971–
BR516.C4925 2008
322′.10973—dc22 2007030692

British Library Cataloguing in Publication Data is available.

Library of Congress Catalog Card Number: 2007030692
ISBN: 978-0-275-99367-2 (set)
978-0-275-99368-9 (vol. 1)
978-0-275-99369-6 (vol. 2)
978-0-275-99370-2 (vol. 3)

First published in 2008

Praeger Publishers, 88 Post Road West, Westport, CT 06881
An imprint of Greenwood Publishing Group, Inc.
www.praeger.com

Printed in the United States of America

The paper used in this book complies with the Permanent Paper Standard issued by the National Information Standards Organization (Z39.48–1984).

10 9 8 7 6 5 4 3 2 1

Contents

Preface

Ann W. Duncan and Steven L. Jones

At first glance, the separation of church and state in the United States seems a rather straightforward and clear-cut concept. The U.S. government should neither establish a certain religion nor limit the free exercise of religion by its citizens. However, the broad spectrum of church and state issues hotly debated in Washington, D.C., and in American communities suggests that this separation carries with it a bit of ambiguity. The most recognized applications of this doctrine come when religion surfaces in our schools or specific policy decisions that affect the lives of ordinary Americans. Yet, it is in the context of the government itself that some of the most interesting tensions arise in negotiating the relationship between religion and politics in the American government.

Indeed, the complexities of church and state issues in the United States of America began with the founding of the nation. While the founding fathers are remembered for their particular insistence on maintaining a separation between religion and the government, they were also very religious men who would never have denied the importance of faith in God for a just government. In this time of increasing diversity, the question arises: in a nation still primarily Christian, to what extent is latent influence or traditional reference to God acceptable? Clearly, the government cannot establish a national church, but can it incorporate prayer into its regular rituals? Clearly, the government cannot endorse a particular religion, but can a president express particular doctrinal beliefs? What are the limits of establishment? How do the state and national governments rectify sometimes

conflicting views on the subject? To what extent can or should the United States seek to spread its ideas about morality and the proper relations between church and state throughout the world?

It is to these questions that the first volume of this three-volume collection turns by focusing on intersections of religion and politics in the federal, state, and local governments. Covering topics including international relations, the rhetoric of political leaders, and the use of religion to support governmental candidates and programs, this volume demonstrates the difficulties in defining establishment of religion. Barbara McGraw's introduction provides a theoretical framework for understanding the variety of particular issues presented in these three volumes. Examining the role of religion in American identity and at its founding, McGraw suggests an inclusive yet deeply meaningful foundation on which to build the national identity. The first chapter, by Richard Bowser and Robin Muse, discusses strategies of interpretation of the Establishment and Free Exercise Clauses of the Constitution. Bowser and Muse outline the surprisingly varied perspectives on the meanings of these clauses and the ramifications of these perspectives for public policy and judicial decision. Ann Duncan's chapter highlights some of the subtle and, in many cases, unlegislated intersections of church and state in the U.S. government. Elaborating on one such intersection, W. Jason Wallace focuses on expressions of faith by political leaders. Taking a historical and sociological approach, Wallace surveys the changes in such expressions and their reception by the American public. Zachary Calo then moves beyond the domestic legal issues addressed in other chapters to take an international perspective on issues of church and state through a discussion of U.S. policy regarding international religious freedom and human rights laws. Douglas Koopman discusses faith-based initiatives by examining their effectiveness in comparison to their secular counterparts and presents an overview of the recent controversies and court cases. In a chapter on political endorsement by churches, Mary Segers surveys the varieties of ways in which religious leaders can and have issued endorsements of politicians through voting instructions from the pulpit, voting guides, and allowing political candidates access to church directories. Segers discusses the competing rights of individuals, religious or not, to express political preference and engage in free religious expression and the constitutional constraints of the Establishment Clause. In his chapter on the future of federalism, David Ryden highlights what he anticipates to be a central issue in the realm of church and state for the future: the applicability of state constitutional religion clauses to church/state issues and the interplay between state and federal constitutions in this arena. In an interesting turn from chapters dealing primarily with either free exercise or es-

tablishment issues, Tim Barnett delves into those cases in which these two American ideals appear to conflict. Through a discussion of theoretical points of controversy and specific case studies of intersections of religion and politics, the chapters in this volume highlight many of the key debates and issues relevant to the specific case studies in Volumes 2 and 3.

Introduction: Church and State in Context

Barbara A. McGraw

Today, there is a battle over the hearts and minds of the American people about the meaning and purpose of the nation and its legacy of the past for America's future. As a consequence, contemporary debates about society's issues abound with arguments about the relevance of the founding era, in particular the founders' original intentions for the nation. Debates about the meaning and reach of the "religion clauses" of the First Amendment to the Constitution (that is, church and state issues) often take center stage: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . "[1] One might frame the issue this way: to what degree has or should religion inform the underlying values, symbols, structures, laws and public policies of the nation? Hence the question: is our nation a nation under God? One side in the debate, the religious right, answers "yes." The other side, the secular left, answers "no." And confusingly both sides claim the mantle of the American founders.

It is no wonder, then, that there is a "culture war" involving debates about history as foundational to the meaning of the American founding for its own time as for our time. In fact, the stories we tell ourselves about our history are imparted in court briefs and opinions from the U.S. Supreme Court on down, where various historical narratives are repeated as support for one argument or another,[2] and in the public schools, from which future generations gain their understanding of what it means to be an American.

Those stories also are recounted in public policy debates and election politics, on television and radio talk shows, in films and other media, and even at the "kitchen table" and the "water cooler."

On one hand, the Christian right, which often includes other religious people on the right, claims that the nation was founded on Christian or Judeo-Christian principles. The argument is that although there is no specific reference to Christianity in the nation's founding documents, it was the founders' understanding and assumed context that the nation's moral referent for its basic political framework and laws was Christianity. Any conception of a "separation" of the state from the church was meant to protect the church from the intrusions of government, not the government from the church. Those on this side of the debate often support this point by quoting the founder of Rhode Island, Roger Williams (c.1603–1684), who wrote in 1644:

> When they have opened a gap in the hedge or wall of separation between the garden of the church and the wilderness of the world, God hath ever broke down the wall itself, removed the Candlestick, etc., and made His Garden a wilderness as it is this day. And that therefore if He will ever please to restore His garden and Paradise again, it must of necessity be walled in peculiarly unto Himself from the world, and all that be saved out of the world are to be transplanted out of the wilderness of the World.[3]

Accordingly, the Christian right contends that the "garden" of the church is to remain unspoiled by the "wilderness" of the world. But nevertheless the world is in the purview of Christians and their religion.

Those holding this view point to the Declaration of Independence, which credits our "Creator" with having "endowed" human beings with their "unalienable rights," and refers to "Nature's God"—all religious tenets derived from Christianity, they claim. In addition, they note that the words "separation of church and state" do not appear in the religion clauses or anywhere else in the Constitution. They conclude, therefore, that religion, in particular Christianity, is the ultimate foundation of our nation. This "side" of the debate has its heroes, for example, John Adams, who said, "Our Constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other."[4] They conclude that not only does Christianity serve as the nation's foundation, but it is also the bulwark against the exercise of ever-increasing state power. That is, Christians and their churches can be better trusted with the preservation of our liberties than can the state.

On the other hand, the secular left, which includes religious people who believe that a secular nation is conducive to liberty, claims that the founders

distrusted religion and therefore established the nation on "secular," meaning non-religious, foundations.[5] They point to historical events involving abuses on account of religion combined with state power, including the Catholic Spanish Inquisition and the abuses of Protestant John Calvin's Geneva city-state (where, in both cases, burning heretics at the stake was the order of the day); the age of religious wars in Europe from 1559 to 1715; and similar abuses and conflicts in colonial America as reasons for keeping religion and government separate so as to ensure the freedom of the people.

Consequently, those holding this view conclude that the founders sought to separate church and state not only to protect the church from the state, but also to protect the state, and therefore the liberty of people it represents, from the church. They point to the U.S. Constitution, noting that it contains no references to God. Accordingly, the religion clauses mean, as Thomas Jefferson (1743–1826) said in 1802, that there is a "wall of separation between church and state,"[6] regardless of the fact that the phrase itself is not in the Constitution. This "side" also has its heroes. For example, James Madison expressed considerable reservations about religion when he said

> The conduct of every popular Assembly, acting on oath, the strongest of religious ties, shews that individuals join without remorse in acts agst. which their consciences would revolt, if proposed to them separately in their closets. When Indeed Religion is kindled into enthusiasm, its force—like that of other passions—is increased by the sympathy of a multitude.[7]

They quote Jefferson, as well, who rejected the notion that any civil or ecclesiastical "legislators and rulers" have any legitimate authority over "the faith of others." He stated that the imposition of "their own opinions and modes of thinking" has "established and maintained false religions over the greatest part of the world and through all time . . . "[8] This side believes that secular sources serve as the foundation of our nation and that the state's legal and political procedures are the bulwark against the potential for state encroachments on individual liberty and against creeping ecclesiastical power aligned with the state. That is, the state, as established by the founders, can be better trusted with the preservation of our liberties, than can the church.

Still others hold a third view: the founders' original intent is not particularly relevant today. According to this view, looking back more than 200 years to a time very different from our own in order to surmise the founders' original intent is an exercise in futility. New times require us to solve

today's problems with new ideas. Among those with this view are those who contend that all morally foundational claims, whether on the left-progressive liberal side or right-conservative traditional side, threaten the existence of the plurality of views we now enjoy, many of which arise out of the various multicultural perspectives that thrive in the nation today.[9] I submit, in response to this argument, that the failure to take account of our place today in the overall historical context that led America to its founding can only lead to the potential for history to repeat itself—and it is not a history we are likely to wish to repeat.

It very well may be that we all have a lot to argue about. Perhaps we always have. However, while we are not likely to settle the debate once and for all here, there is no doubt that it is helpful to take a broader view than perhaps has any particular "side" in the contentious culture war debates. Accordingly, let us take a brief look at the historical context for the founding of America, specifically as it relates to ideas about the relationship of state and religion, that is, the contested concept of the "separation of church and state" and religious liberty, including the role of religion in public life. But let us not begin with a favored resolution of a particular issue as our goal and then read back into history what would support that resolution. Instead, let us take into account the evidences of history that various "sides" in the debate have proffered and consider them as a whole in an effort to gain guidance for what should be the context of the discussion today. That is, rather than tracking through history and choosing a secular or religious narrative as a lens through which to consider church and state issues today, let us consider them together as they appear in history: a complex combined narrative that both includes and transcends polarized views. Then we can answer the fundamental question—What grounds the American system?—so that the various arguments and debates about church/state issues can take place without undermining what makes all of the conversations possible in the first place.

SEPARATION OF CHURCH AND STATE AND RELIGIOUS LIBERTY IN CONTEXT

The idea of a boundary between church and state did not begin in the founding era. It did not begin with Thomas Jefferson's Danbury Letter reference to the "wall of separation between church and state." It did not even begin with Roger Williams's reference to the need for a wall to protect "the garden of the church" from "the wilderness of the world." In fact, many supporters and detractors of the concept embodied in the much

aligned and praised phrase "separation of church and state," if not the "wall" metaphor itself, might be surprised that it has a long history that predates the colonial period and the founding of the United States and the states by centuries—and can be found in both theological and secular sources. One could reasonably conclude, in fact, that it was the convergence of theology and secular philosophy in the thinking of the founding generation that made founding a nation on the principles of "life, liberty and the pursuit of happiness" possible, and that to attempt to separate them today obscures the foundations of the nation, distorts its purpose, and undermines the promise of the nation for its own future and its legacy for the world.

For most of human history there was no conception of religion being something that could even be thought of as separate from culture as a whole and, therefore in turn, from the governing authorities and structures of a particular society. We even see this today in tribal communities around the world. That which appeals to the spiritual in society—the "other world" and its transcendent or immanent being or beings—is all of one piece with daily rituals, work, community life, life passages, and so on.[10] When agriculture was discovered and the great civilizations of Egypt and China arose, the state and religion functioned as one entity with the emperor or pharaoh as the head of governing authorities *and* as either a god or as the gods' representative on earth. The idea was one of a grand hierarchy with the ruler at the top as a god with inherent authority or with the gods at the top, providing the sanction of divine authority to the ruler. In either case, the ruler would then wield state power in exercise of divine authority over the people.[11] Thus "church" and state not only were joined, they were not even thought of as two things combined; they were one.

As Christendom developed in Europe, however, the idea of religion and state as one was challenged. During the medieval period, the Catholic Church, growing in power, opposed the sovereignty of the rulers, who previously had claimed the mantle of authority over matters temporal and religious.[12] The Church, in the person of the pope, claimed universal supremacy over the weak states of the period as "divine right" to absolute sovereignty vested in the pope by God, and asserted that canon law superceded secular law and that the authority of the emperor or king derived from the Church.[13] This political theology held, consequently, that God's law is the higher law over even the king.[14] That is, the king's actions could be adjudged in error by reference to the divine law of God, as interpreted by the pope.[15] As a result, the king's law and divine law were no longer understood as being one and the same, but separate—with God's law as the ultimate sovereign referent. Thus, resistance against such supreme spiritual power is resistance against God and therefore was prohibited as a mortal sin.[16]

In response, temporal rulers also claimed "divine right." This counterclaim took shape as "the Divine Right of the Emperors" in the fourteenth century[17] and emerged in the seventeenth century as the "Divine Right of Kings."[18] There the idea was that the emperor or king has divine sanction to come into power and therefore derives his authority directly from God. Moreover, it was held that sovereignty, which cannot be divided between secular and religious authorities, must be unified in the king.[19]

Hence, the church stood apart from the state and interpreted state authority according to the church's interpretation of God's law, while the state claimed authority directly from God according to the state's own interpretations, thus standing apart from the church. Of course the application of the authority of church or state was uneven in practice, as power struggles persisted and various entitles (monarchy, parliament, barons/nobles, and various ecclesiastical authorities after the Protestant Reformation) pressed their claims. Still, although in one sense church and state were separated, they were joined in one thing: regardless of who is sovereign over earthly realms, such sovereignty derives from God and divine law reigns over all.[20] Each, then, in its own view stood as a "check" on the power of the other. Nevertheless, they worked together, particularly in England after the Protestant Reformation there made the king the head of the Anglican Church.

Christian political theory combined the two in a joint effort to create a uniform moral order in society, using state authority to enforce church doctrine, while the state used church doctrine to justify its punishments.[21] This justification for the exercise of absolute power over the people was based on the doctrine of original sin, which holds that human beings are inherently sinful.[22] Consequently, this reasoning continues, the state must enforce the moral order on the people as a whole to prevent them from straying from accepted religious doctrine—all in an effort to create a uniform society based on religious moral precepts. That is, government's role is to restrain the sinful nature of human beings to help ensure their salvation for the eternal realm and for an orderly society in the world. Moreover, it was believed that because state and church would not tolerate deviance from established norms, discord would be stifled and peace would prevail.

However, the seeds of the concept of the separation of religious authority and state authority had previously been planted, which would prove to have far-reaching implications. As a consequence, further theological developments came to the fore that stood at odds with the prevailing arrangement between church and state and their claims for absolute authority. These involved the nature of human beings and their relationship to God and society. First was the belief that human beings have inherent dignity and worth because they are made in the image of God and they are God's

children. Consequently, there is something inviolable in every human being's nature, and that inviolability is at the very center of what it means to be a human being. Because this is equally so in all human beings, human beings have equal dignity; ultimately, no one is more worthy than another—not even the king. Some people may put on vestments or gain the power of armies, but in the beginning and in the end, they all are of equal dignity before God. Second was the belief that God created human beings with free will. Consequently, human beings are free to conduct their lives as they will. There also developed a great faith in human beings' capacity for knowledge and reason, potential for understanding, and a consequent ability to improve themselves and their world.[23]

Moreover, because of human beings' freedom and equal inherent dignity and the accountability of everyone to the law of God, a strain in Christian theology held that the people can legitimately resist the state when the state strays from a right course and fails to adhere to God's law.[24] In other words, no longer were the people bound by the laws of the state by virtue of its absolute authority. Instead, it was deemed to be the people's prerogative, even duty, to hold the state accountable, if the state violated the law of God. In other words, the conscience of the people was separated from the authority of state and church.

Still, the notion of a grand hierarchy that ruled over the masses persisted in most quarters. Now, however, another view emerged to challenge that hierarchical order. Liberty and inherent dignity and all that implied gave rise to what were viewed as legitimate claims—that is, rights—superior to state *and* church authority.[25] But questions remained: Should the ultimate protector of these rights be an all-powerful autocratic ruler charged with the obligation, as Hobbes (1588–1679) advocated? Should the "general will" of the people as gleaned by those in power serve to accomplish the goal, as Rousseau (1712–1778) believed? These questions were much debated at the time of the founding and during its immediately preceding history. The American founders found their answer primarily in the writings of John Locke (1632–1704). Through Locke, the idea of God's law as the ultimate authority persisted and was very influential in the political philosophy that eventually would make its way into the ideas that formed the basis for the American founding and beyond. Now, however, the sovereignty derived from God would be vested not in the king or any church but in the people.

LOCKE'S "ENLIGHTENMENT" POLITICAL THEOLOGY

Locke is known as a pivotal Enlightenment Era (c.1650–1800) philosopher. Enlightenment philosophers eschewed tradition and custom (thought

to be based on superstition and ignorance) in favor of the use of human reason in each individual's "search and study"[26] and "argument and debate"[27] to discover the true and the good in all areas of human endeavor, including religion, law, and politics. Often enlightenment philosophers are characterized as secular philosophers because they eschewed religious dogma, in particular its bases for government. However, as we shall soon see, Locke's writings can be seen as a clear articulation of the line of thinking outlined briefly in the previous section, but taken further. That is, Locke did not leave religion behind. Rather, the ground that began with religion and governing authorities as one and then shifted to place God's law over state and church had shifted once again in Locke's works.

Locke began his political philosophy by returning, metaphorically, to the "state of nature," a state prior to the formation of societies. Locke asserted that in the state of nature the people are free and equal as created by God; that is they inherently have free will and equal dignity as human beings. For Locke, the liberty and equal dignity of the people constitute, then, the fundamental natural law—the law of the state of nature. And Locke concluded that, because freedom and equality are the natural state of human beings in the state of nature, freedom and equality are legitimate claims against the state. Consequently, those claims should be secured as civil rights when societies are formed—so as not to thwart the essential nature of human beings as God intended.[28]

However, Locke noted that there is a significant problem in the state of nature that must be solved when societies are formed so as to preserve the natural rights of the people: in the state of nature there is no impartial judge of disputes between various people. As a result, when violations of the natural law occur or there are other disputes, there is no one to arrive at an unbiased resolution.[29] Without a way to provide unbiased resolutions of disputes, there is only the "state of war"—battles among those making various claims.[30] Locke concluded that the eventual result of this is either an anarchistic and violent chaos or, more likely, a powerful ruler rises to the top—the winner of the battles.[31]

Locke challenged the monarchy on this basis, concluding that the king was merely the descendent of the brute who rose to power in the battles of the "state of war" in the state of nature. In other words, there was no "divine right" of kings—only the assertion of power. And that power was not likely to be exercised in an unbiased way to preserve the natural rights of the people, as history had shown. Europe's own history was filled with battles for power and religious wars, as well as the torture, hanging, and burning at the stake of those deemed to be heretics by the dictates of whomever came to power at any particular time. Thus, Locke rejected out-

right the state's and ecclesiastical authorities' claims that using the coercions of the state to impose a church dictated uniform moral order on the people as a whole would produce a good and peaceful society.[32] Locke concluded that a different approach was needed. Government must be established on laws that affirm the natural rights of the people and provide an unbiased legal and political system—the impartial judge.[33] That is, God's law—the natural law—should be over the state *and* the churches and be preserved and interpreted through an unbiased political and legal system established by and for the benefit of the people.[34] No longer was the ultimate authority the king or any church. Now the people would ensure that God's natural law would rule.

Central to Locke's approach to government was the need to secure the people's civil right to tolerance of their religious beliefs, which he believed requires "just bounds" between the state and religion.[35] One reason was practical and secular. Locke saw religious tolerance as the means to creating a more peaceful society than had been the case when uniformity was imposed on the people from the top down through the sanction of the church and the power of the state. However, another reason rested on Locke's adoption of a line of thought that opposed on theological grounds top-down governing authority. That is, it was not a rejection of religion that led Locke to religious toleration, as some have concluded. Instead, Locke shifted to a different religious idea. Consequently, Locke rejected traditional political theory based on the doctrine of original sin and the whole idea of uniformity derived from it.[36] He held instead that a moral and peaceful society is not more likely to come from the top down through religious doctrine enforced by the state over the people. Rather, it is more likely to come through the people, whose good will is not corrupted by power and who therefore are more likely to hear the voice of God.[37]

Locke's approach to government and religious toleration was based on a simple theology: there is God and God communicates with the people. Hence, God's relationship is not with the elites of religious institutions and the state who then tell everyone what to do and persecute those who do not follow their attempts at uniformity. Instead, God's relationship is with each individual human being through conscience informed by revelation, spiritual or other insight, nature and reason.[38] Thus, freedom of conscience was fundamental to Locke's approach to government. The people must be free to listen for the voice of God, however they understand that, and answer that call. Locke said, in effect, that the only way that it is even possible for a good society to be realized is to trust the people.[39]

Accordingly, Locke concluded that government should be a "social contract."[40] Under the social contract the people would consent to a govern-

ment to which they would give up their right to punish violators of the natural law in exchange for an impartial legal and political system that would secure their natural rights (freedom, especially freedom of conscience and its expression, and equal dignity, which requires equal justice) and would ensure their safety and general welfare. The purpose of this form of government is not only to secure the people's best chance for a just and peaceful society. Locke held that his proposed legal/political system, his social contract, also is central to the search for the true and the good, which he reasoned could never be attained through the auspices of the powerful, be they state or ecclesiastical authorities. As Locke said

> For truth certainly would do well enough, if she were once left to shift for herself. She seldom has received, and I fear never will receive, much assistance from the power of great men, to whom she is but rarely known, and more rarely welcome. She is not taught by laws, nor has she any need of force to procure her entrance into the minds of men. Errors indeed prevail by the assistance of foreign and borrowed succours, but if truth makes not her way into the understanding by her own light, she will be but the weaker for any borrowed force violence can add to her.[41]

Thus, Locke put his trust in the people over the powerful, believing that history had shown that the powerful are prone to corruption and therefore violate the natural rights of the people. While there is no guarantee, Locke said, the only way it is even *possible* for a good society to be realized is to limit the power of the state and eliminate the power of the churches. A free people of inherent dignity, equal to that of kings and popes, would be able to be and do good in society because the "social contract" would provide a secure framework within which freedom could be exercised.

But while Locke sought to limit the power of the state and eliminate the power of any church over the people, he did not argue against religion *per se*. In fact, be believed that his approach would strengthen religion, curtail the potential for religion to be corrupted by power, and make it possible for true faith to flourish.[42] To accomplish this, Locke turned the old hierarchical order (God → church/state → the people) on its head. Locke did not abandon the idea that God's law should prevail, but now it would be given effect in society by the people who would build the good society not via a top-down hierarchy, as had been the previous approach, but from the ground up (God → the people → the social contract → limited government by the people and for the people by their consent → creating an open space for the freedom to be and do good).

It follows, then, that Locke never intended religion to be relegated to a

private sphere in the sense that it is irrelevant to common concerns and therefore should remain out of sight. Rather, it was to take part, through the people—through their own individual activities and through the voluntary societies that the people formed and joined. Moreover, religion was to be welcomed as a contributor to discussions about law and public policy, but the resulting law and public policy could go only as far as the limited authority of the unbiased political/legal system extended and only so far as those contributions were consistent with all of the people's natural rights. And those natural rights had a very far reach in Locke's political thought.[43]

Asserting that toleration is "the chief characteristical mark of the true church,"[44] Locke claimed the right to toleration for those in all of the most controversial Protestant sects of his day, as well as Catholics,[45] Jews,[46] Muslims (Mahometans),[47] Native Americans,[48] and pagans,[49] and consequently said,

> [I]f solemn assemblies, observations of festivals, public worship be permitted to any one sort of professors [i.e., religious people], all these things ought to be permitted to the Presbyterians, Independents, Anabaptists, Arminians, Quakers, and others, with the same liberty. Nay, if we may openly speak the truth, and as becomes one man to another, neither pagan, nor Mahometan, nor Jew ought to be excluded from the civil rights of the commonwealth because of his religion.[50]

Locke even concluded that true toleration requires that those practicing "idolatry, superstition, and heresy" and "heathens" should be given their civil right to freedom of conscience.[51] Unlike those who came before him, Locke eschewed any sort of enforced conformity, holding instead that toleration reflects the natural law, that is, the religious values that form the foundations for a political system based on the liberty and equal dignity of the people.

Thus, the "just bounds" between church and state would be achieved. God, including reason (which, according to Locke, is "natural revelation"[52]), would inform the people's consciences directly, rather than through the dictates of the state armed with the sanction of church authority, and the people would be free to answer that call. As a result, there would be an open space where the people could pursue the good society from the perspective conscience gives them. The people would form and join voluntary associations (including churches)[53] to pursue their individual, group, and common ends beyond governmental interference, not only in their effort to find way to live together in society in peace, considering their differences, but also in their ultimate search for the true and the good.

FOUNDING A NATION BY THE PEOPLE AND FOR THE PEOPLE

In the founding era, developments within Christianity rose to meet Lockean fundamentals and merged religious faith with political aspirations to inspire a nation. Because of this, it was no longer "church" that stood as a check on the state. The people, persuaded by Locke's arguments and principles and motivated by faith, joined fundamental religious ideas about the nature of man and man's relationship with God to ideas about how to constrain power so that its potential for corruption would be severely limited, if not eliminated altogether.[54] The ultimate purpose: a free people of equal inherent dignity who could bring the good into the world through their participation in a government by and for the people and in their daily lives.

Mid-eighteenth century America was in the grip of a profound religious revival. Traveling preachers such as George Whitefield (1714–1770) galvanized large segments of the population through emotional sermons, which called the people to "new birth" in Christ.[55] Those involved in this "great awakening" believed that authentic religion was exhibited not through church membership, but through one's own profound conversion experience.[56] Status and power were leveled as Christ-centered converts gathered in revival meetings that inspired these members of the founding generation. They rejected ecclesiastical authorities and their doctrines and discovered a faith, not grounded in unconfirmed belief, but in the experience of being embraced by God. At the same time, Locke's much quoted phrase "life, liberty, and property," as well as the "laws of nature," the "state of nature," and the "social compact," inspired church sermons that awakened the people to their natural rights and galvanized them to take up the political cause against oppressive arbitrary government.[57]

This great awakening had a counterpart that shared its antiauthoritarianism and its focus on individual religion, though this was a movement that came from a significantly different direction—"rational religion." Contrary to the usual narrative, the founders who believed in rational religion were not adherents of a kind of "deism" that held that God was a divine Creator who then absented the world, leaving it to run like a finely tuned clock.[58] Instead, rational religion involved real faith. (Even Jefferson, often thought of as one of the most "deist" of the founders, was known to practice regular private devotions.[59]) Here, however, the emotionalism of "new birth" evangelical revivals was eschewed in favor of reasoned reflection. The light of reason was believed to be more authentic than emotions, which might be flamed into a passion that could irrationally spur a "mob" to infringe the

inalienable natural rights of others.[60] That is, rational religion was deemed by its adherents to be a more reliable source of inspiration consistent with "Nature's God" and therefore God's natural law[61] than the emotional religion of revivals.

Nevertheless, despite differences, the two religious impulses were closer cousins than one might think at first blush. The reason is that both eschewed authority that sought to limit human beings' ability to find happiness and godliness in their own way. Thus both espoused limitations on governmental power and eschewed church authorities aligned with government in state establishments.[62] Consequently, although they were strange bedfellows in some respects, they were bedfellows nevertheless in the struggle for liberty as the revolutionary period was upon them. Locke's influence was pervasive in both, and therefore clearly he was not merely the most influential political philosopher of the age; he was "the head and heart of the Revolution."[63]

As a consequence, the founders adopted Locke's approach to the basic foundations of government and formed a nation by the people and for the people to secure their natural "unalienable rights."[64] They established a legal and political system designed to provide the greatest chance for securing the people's "safety and happiness."[65] This was a nation founded not on the dictates of any particular religious sect, but on God's law—"nature and nature's God"[66]—and all that that implied: the inherent equal dignity and liberty of the people and their potential to bring their best forward, to be and do good as they understood it. They could build a good society from the ground up. Therefore, this was not a wholly "secular" endeavor, as some argue. Rather, it built upon centuries of political philosophy and theology, both of which found their expression in the political theology of John Locke and were given effect by the American founders in the political/legal system of the new nation. The Declaration of Independence, which begins by referencing "the Laws of Nature and of Nature's God," is based on that political theology:

> We hold these truths to be self-evident, that all men are created equal that they are endowed by their Creator with certain unalienable rights Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it . . . And for the support of this Declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our Lives, our Fortunes, and our sacred Honor.

The U.S. Constitution and the constitutions of the states established a political/legal system that was to be unbiased—to provide the "impartial judge" of which Locke had spoken, a system where, as Thomas Paine famously declared, "the law is king."[67] That is, the governments were designed to be, in the words of John Adams (1735–1826), "government of laws and not men."[68] The law, then, became the ultimate ruler; hence the oft-cited phrase "the rule of law." Embodied in that phrase is the whole notion that the ultimate law is the law of nature—God's law, which requires liberty of the people and respect for the inherent equal dignity of every human being. That is, no matter how revered or powerful any persons or groups may be, their decisions may not be substituted legitimately in place of the law. Moreover, the unbiased legal/political system is based on equal justice. Hence, no one, no matter how exemplary she or he is thought to be, is exempt from—that is, "above"—the law.

To best ensure that the law, and not men, shall be and remain the ruler, Locke had advocated the idea of the consent of the governed through a social contract. However, his approach did not necessarily require democratic processes. The founders, on the other hand, took Locke's social contract a step further. Looking back into history and discovering there the concepts of democracy and republicanism, the founders combined the two to form what can be termed a "democratic republic." That is, they established a government whereby the people elect representatives through a democratic process that makes those representatives beholden to the people.

Further, to provide the best chance for the political/legal system to be unbiased, it was deemed necessary to check power because, as history had shown, it has great potential to corrupt. Consequently, the founders, following Locke and others,[69] decided that the government of the new nation should provide for the separation of powers: legislative, judicial, and executive. The separation of powers also included the separation of ecclesiastical—that is, church—authority from the government, as well.

Second, the founders established national and state governments that were limited in their authority and thus acknowledged and secured the people's liberties. The "first liberty" is the right to religious liberty, and that liberty was understood to be far-reaching, where "everyone," as George Washington said, "shall sit in safety under his own vine and fig tree, and there shall be none to make him afraid."[70] Thus, following Locke, the founders understood religious liberty to extend far beyond the various sects of Protestant Christianity. As Samuel Adams's "The Rights of Colonists and a List of Infringements and Violations of Rights" (1772) stated:

> In regard to Religeon, mutual toleration in the different professions thereof, is what all good and candid minds in all ages have ever practiced; and both by precept and

example inculcated on mankind: And it is now generally agreed among christians that this spirit of toleration in the fullest extend consistent with the being of civil society "is the chief characteristical mark of the true church" & In so much that Mr. Lock [sic] has asserted, and proved beyond the possibility of contradiction on any solid ground, that such toleration ought to be extended to all whose doctrines are now subversive of society.[71]

In this regard, Richard Henry Lee was even more explicit when he said: "I fully agree with the Presbyterians, that true freedom embraces the Mahomitan [Muslim] and the Gentoo [Hindu] as well as the Christian religion."[72] Thomas Jefferson's "Notes on Religion" stated: "Shall we suffer a Pagan to deal with us and not suffer him to pray to his god? . . . It is the refusing toleration to those of different opinion which has produced all the bustles and wars on account of religion."[73] And regarding the debate about the Virginia Act for Religious Freedom, Jefferson said: "The insertion [of Jesus Christ in the preamble] was rejected by the great majority, in proof that they meant to comprehend, within the mantle of its protection, the Jew and the Gentile, the Christian and the Mohammedan, the Hindoo and the Infidel of every denomination."[74] In fact, the founders went further than Locke to provide liberty of conscience rights to atheists and even to the intolerant. For example, Jefferson said:

Locke denies tolerance to those who entertain opinions contrary to those moral rules necessary for the preservation of society; as for instance . . . [those] who will not own and teach the duty of tolerating all men in matters of religion; or who deny the existence of god (it was a great thing to go so far—as he himself says of the parliament which framed the act of toleration but where he stopped short we may go on. . . .)[75]

But perhaps Richard Henry Lee put it best when he said in 1787: "It is true, we are not disposed to differ much, at present, about religion; but when we are making a constitution, it is to be hoped, for ages and millions yet unborn . . ."[76] Thus, Lee contemplated a nation for "ages and millions" that would be more diverse, perhaps even much more diverse, than the nation for whom he and others were "making a constitution."

These are but a few of the many statements in the founding era that proclaimed religious liberty for all. Clearly, the founders intended the widest possible freedom of conscience.

The founders' political/legal system was designed to create a space for the exercise of liberty, in particular liberty of conscience and its expression. And it was understood that liberty of conscience would serve in large part as the means to building the good society. How would a government that ensured freedom of conscience and its expression foster a society that is

good? The people would listen for the voice of God, however understood (including the voice of reason) and would answer that call. They would then participate in argument and debate, not only in the search for the best ways to live together considering their differences, but also in the search for the true and the good. As Thomas Jefferson said, echoing Locke:

> [S]he [truth] is the proper and sufficient antagonist to error, and has nothing to fear from conflict unless by human interposition [she is] disarmed of her natural weapons, free argument and debate; errors ceasing to be dangerous when it is permitted freely to contradict them. [77]

In other words, there was to be a public forum in which a great conversation would take place, where the people and their elected representatives and those appointed by them would deliberate from all of their various perspectives about the issues of the day.

However, as perhaps is now clear, that great conversation was never meant to exclude religious voices. As a matter of fact, religion continued to be a participant in public debate from the founding era and forward because the "separation of church and state" did not mean that all religious principles were abandoned. It meant that certain general principles—those on which the natural law of freedom and equal dignity, and in turn the rule of law, were based—would prevail over the various sectarian doctrines of the religions of the new nation. Some held that those natural law foundations of the nation are based on the general principles of Christianity. Others held that those principles followed the political philosophy of the Enlightenment Era secular thinkers. Clearly, however, it was both.[78] As John Dickenson (1732–1808) wrote in 1788:

> [A] constitution is the organization of the contributed rights in society. Government is the exercise of them. It is intended for the benefit of the governed; of course [it] can have no just powers but what conduce to that end: and the awfulness of the trust is demonstrated in this—that it is founded on the nature of man, that is, on the will of his Maker, and is therefore sacred. It is an offence against Heaven, to violate that trust.[79]

On these bases, the American founders formed a nation by the people and for the people to secure their natural rights, provide an impartial legal and political system, and ensure the safety and general welfare of the people. This was given effect in the U.S. Constitution and its Bill of Rights, and in the constitutions and declarations of rights of the states, all of which made freedom of conscience and its expression central tenets for the new

nation, and all of which recognized that there were bounds between church and state.

RELIGION AND TRADITION: WORKING OUT THE MEANING AND EXTENT OF ESTABLISHMENT AND LIBERTY

The religion clauses and their counterparts in state constitutions have been at the center of debates about American identity from the beginning. The reason is that while there was a general consensus about the foundations of our first freedom in the founding era, there was not agreement about the implications of those foundations for American law and culture.[80] It was clear that the founders sought to secure the rights of those in a vast diversity of Christian sects, as well as those in myriad minority religions at the time. At the same time, however, there was an understanding among many generally that society must be based on shared values. Debates about what is or should be the source of those values ensued early on.

The antiauthoritarianism of rational religion and evangelical awakenings prevailed in both, as each saw tyranny from state or church authority as the antithesis of a government by and for the people. After all, the founders and those who followed were well aware of the dangers involved in the exercise of power by either. However, deciding which governmental prerogatives encroach on liberties or risk religious establishments was not as easily accomplished in practice, as the general principles suggested. Consequently, the salient question of the time was: what is the meaning of liberty and establishment in a society framed by laws that derive from culturally "established" customs and traditions? After the founding and since, the courts and legislatures have been charged with determining the answer to this question.

As we have seen, debates about natural rights and the demise of tyranny did not begin with the founding generation. That conversation began long before and was reflected in the English common law tradition, which had given early voice to the concept of natural rights and liberties.[81] The founding generation had appealed to English common law tradition as providing the "rights of Englishmen,"[82] and then extended those rights based in large part on the political philosophy of John Locke.

As we all know, however, the founders did not extend them far enough. Clearly, America did not live up to its ideal at the founding: those without property were denied the right to vote; slavery was promoted by the south and tolerated by the north; women did not gain full rights as free human beings; and Native Americans were robbed of their land and liberty. As a consequence, while the founding generation broke with customs and tradi-

tions in some respects, it continued them in others. That is, while the new nation held out the promise of liberty, it also was steeped in a traditional culture influenced by preexisting law and public policy, which predated the new nation and which, consequently, often was at odds with the general principles enunciated in the Declaration of Independence and the constitutions, bills of rights, and declarations of rights of the nation and the states.

Boundaries of Liberty: The Blasphemy Cases and State Constitutions

The traditional culture of the founding generation was reflected in the English common law, on which state and federal courts continued to rely well after the founding, and was persuasive to jurists and others regarding challenges to prior law on constitutional grounds. Blasphemy cases are illustrative. While a detailed account and analysis of blasphemy jurisprudence is well beyond the scope of this introductory chapter,[83] the issue nevertheless reveals an early attempt to mediate between traditional culture reflected in the common law and the new constitutional regime of the United States and the states, the language of which, of course, provides broad liberty protections.[84]

William Blackstone's *Commentaries on the Laws of England*[85] remained authoritative for those making and interpreting state and federal law in the new nation. "Blasphemy," Blackstone wrote, "against the Almighty is denying his being or providence, or uttering contumelious reproaches on our Savior Christ. It is punished, at common law by fine and imprisonment, for Christianity is part of the laws of the land."[86] Relying on Blackstone and the English common law, the states continued to prosecute offenders, who claimed, in a failed attempt to avert punishment, that liberty rights granted under U.S. and state constitutions in effect repealed blasphemy laws.

The liberty issue at stake in the blasphemy cases was, of course, freedom of speech, but the cases also raised the issue of religious establishment—the joining of church and state—because of the reasoning adopted by the courts. For example, in *Updegraph v. The Commonwealth of Pennsylvania* (1824), Abner Updegraph sought to have his conviction for blasphemy overturned on the grounds that the blasphemy law under which he had been indicted was no longer valid because it contravened the clear prohibition against freedom of speech in both the state and federal constitutions. Updegraph's misconduct had been

> not having the fear of God before his eyes . . . contriving and intending to scandalize, and bring into disrepute, and vilify the Christian religion and the scriptures of

truth, in the presence and hearing of several persons . . . did unlawfully, wickedly and premeditatively, despitefully and blasphemously say . . . : "That the Holy Scriptures were a mere fable: that they were a contradiction, and that although they contained a number of good things, yet they contained a great many lies." To the great dishonor of Almighty God, to the great scandal of the profession of the Christian religion.[87]

Interestingly, Updegraph was a member of a debating association and claimed that his statement was made in the context of a debate on a religion question. Nevertheless, the Pennsylvania Supreme Court rejected Updegraph's claim that reliance on Christianity to legitimize blasphemy laws violates the U.S. Constitution and the Pennsylvania constitution. The court upheld Updegraph's conviction and sentence, which included a fine of $500 and a two year prison sentence, stating that "Christianity is part of the common law; the act against blasphemy is neither obsolete nor virtually repealed; nor is Christianity inconsistent with our free governments or the genius of the people."[88]

The *Updegraph* court was correct: Christianity was a part of the common law. After all, the common law against blaspheming Christianity traced back to England's established church. Neither the U.S. nor Pennsylvania constitutions invoked by blasphemers had established Christianity, Pennsylvania being one of the states that never had a religious establishment. Yet the Pennsylvania Supreme Court based its holding on common law foundations in England's established Christianity. Hence the court reasoned that Christianity provided the basis for civil law, and therefore to blaspheme Christianity was to blaspheme the nation's foundations.

We will first dispose of what is considered the grand objection—the constitutionality of Christianity—for, in effect that is the question. Christianity, general Christianity, is and always has been a part of the common law . . . not Christianity founded on any particular religious tenets; not Christianity with an established church . . . but Christianity with liberty of conscience to all men . . . In this the constitution of the United States has made no alteration, nor in the great body of the laws which was an incorporation of the common-law doctrine of Christianity . . . without which no free government can long exist.[89]

This line of reasoning, rather than being an aberration, was consistent with much of the thinking at the time. The idea was that Christianity provided the foundation of the nation and the states.

Similarly, founding era constitutions and declarations of rights, while providing broad liberty rights, including of course freedom of religion, contained references to Christianity, Christian virtues, or belief in God as foun-

dational, as well. For example, the Delaware Declaration of Rights (1776) provided:

> [A]ll men have a natural and unalienable right to worship Almighty God according to the dictates of their own consciences and understandings; and that no man ought or of right can be compelled to attend any religious worship or maintain any ministry contrary to or against his own free will and consent, and that no authority can or ought to be vested in, or assumed by any power whatever that shall in any case interfere with, or in any manner controul the right of conscience in the free exercise of religious worship . . . [A]ll persons professing the Christian religion ought forever to enjoy equal rights and privileges in this state, unless under colour of religion, any man disturb the peace, the happiness or safety of society.[90]

Clearly, many in the founding generation believed that the liberties they revered and secured derived in large part from their long-held traditions—including their Christian tradition. The natural law tradition had developed in large part from a genus of Christian theology, many believed, and therefore its preservation as the foundation of the country's culture and tradition was wise. Consequently, while the general principle of liberty, especially religious liberty, was included in every state constitution, several permitted state funding of their nominally established churches[91] and had religious tests for office, [92] requiring an oath in the belief in Christianity or at least God. It was Christianity, many felt, that had inspired them to travel the path of resistance and liberty in the first place; Christianity had been Locke's own religious ground.

What did all this mean, however, in the face of an immediate history that reflected some of the most severe abuses that had been the consequence of the combination of religion and government—even Christianity and government? The answer was that it was not the authoritarian version of Christianity to which they appealed. It was not even all of anyone's *particular* Christianity to which they appealed. It was the "general principles" or "first precepts" of a "true" or "genuine" Christianity, which informed the foundations of the new nation.[93] The general principles of that true and genuine Christianity were understood to be the font of liberty on which the nation was founded. In other words, the true and genuine general principles of Christianity were those that were consistent with the natural law tradition of inalienable rights that Locke had advocated. As the *Updegraph* court said, it was "Christianity with liberty of conscience to all men" that prevailed. Not Christianity opposed to liberty.

Thus, many in the founding generation relied on the religiously grounded conception of human beings and their relationship with God, the roots of which in large part were in the Christian theology discussed earlier. Accord-

ingly, it was understood that the governments of the states and the United States did not *grant* the people their civil rights. Rather, those rights were endowed by the Creator and merely *secured* in the founding documents; those rights were understood to be a part of what it is to be a human being. That is why those rights are "natural" and "inalienable." In other words, what often is thought to be the "secular" foundations of the nation involve a "religious" imperative for equal liberty as well, and together they constitute what can be termed the nation's "sacred ground." As Noah Webster said of the founding:

> [T]he religion which has introduced civil liberty, is the religion of Christ and his apostles, which enjoins humility, piety and benevolence; which acknowledges in every person a brother, or a sister, and a citizen with equal rights. This is *genuine Christianity*, and to this we owe our free constitutions of government.[94]

Similarly, John Adams famously stated:

> The *general principles*, on which the fathers achieved independence, were the only principles in which that beautiful Assembly of young men could unite, and these principles only could be intended by them in their address, or by me in my answer. And what were these general principles? I answer, the general principles of Christianity, in which all those sects were united: and the general principles of English and American Liberty, in which all those young men united, and which had united all parties in America, in majorities sufficient to assert and maintain her Independence.[95]

Likewise, John Quincy Adams said a generation later:

> [T]he Declaration of Independence first organized the social compact [i.e., Locke's social contract] on the foundation of the Redeemer's mission on earth [and] laid the corner stone of human government upon the *first precepts* of Christianity.[96]

In other words, the privileged place for Christianity in the language of the era was *because* the general principles and first precepts of genuine Christianity were believed to support liberty.

In this regard, it is important to note that, even in those states with "establishments" and "tests," the role of church authority over the government institutions of those states was essentially nil, as the enforcement of orthodoxy had been abandoned by the end of the revolutionary period, and religious toleration was the norm.[97] That is, whatever pronouncements in the founding era regarding the importance of Christianity to the foundations of the nation, they did not imply an authority role for churches and

their doctrines; just bounds between church and state prevailed. Furthermore, the existing weak state religious "establishments" were abolished for the most part by the end of the founding era. The Connecticut, New Hampshire, and Massachusetts establishments were abolished by 1818, 1819, and 1833, respectively. Religious tests for office were abandoned in more than a majority by 1800 and several states expressly prohibited them.[98]

Still, laws that later would be found to violate constitutional principles, such as blasphemy laws, and some states' religious tests for office continued to be upheld until much later.[99] That does not mean, however, that today we should consider returning to the ways of the past in its entirety in order to regain a former cultural hegemony, as some have argued.[100] Nor does it mean that references to Christianity from the past should dictate what should be the law of the land today. Rather, the founding generation set in motion a conversation about the meaning and extent of America's sacred ground: what customs and traditions from English common law and Christianity embedded in federal and state law are consistent with constitutional essentials and which are not? The institution of slavery provides an instructive case.[101]

Abolition: Christianity at the Crossroads of Liberty and Equal Dignity

Remnants of an old order prevailed in the new nation. Top-down authoritarian theologies that were inconsistent with the sacred ground of the nation justified oppression in some parts. Consequently, traditional religion and culture steeped in an ideology of hierarchical societal roles in a state enforced social order ran headlong into ideals enunciated in the founding era over the issue of slavery. However, the debate about slavery that took place in America before and during the founding era, and which was only resolved finally with a civil war, did not occur at the divide between secular and religious camps. Rather, religious arguments based on Christianity were made for and against the institution of slavery.

On one hand, abolitionists argued that slavery was contrary to fundamental laws of justice that originally derived from the belief in the liberty and equal dignity of every human person. Therefore, the enslavement of one man by another, making the former the "property" of the latter to be bought and sold, was thought to violate not only the legal principle of equal justice, but the moral tenets of Christianity, as well. For example, at their General Assembly in 1818, Presbyterians declared unanimously:

> We consider the voluntary enslaving of one part of the human race by another as a gross violation of the most precious and sacred rights of human nature; as utterly

inconsistent with the law of God . . . and as totally irreconcilable with the spirit and principles of the Gospel of Christ.[102]

On the other hand, an authoritarian Christianity bolstered the argument for slavery. The Bible was cited as evidence that slavery is legitimate. George D. Armstrong wrote in *The Christian Doctrine of Slavery* only a few years before the Civil War in 1857 that although wrongdoing may be found in the practice of slavery, the institution itself is not sinful because arguing otherwise would require "mak[ing] the Bible declare that slave-holding is a sin, when it plainly teaches just the contrary."[103] The continuance of the institution of slavery was consistent with the appropriate ordering of society, others argued. In a well-ordered society, when each plays his or her proper role, all are blessed. As Thomas Bacon said in a sermon to slaves in Maryland in 1749:

God hath appointed several offices and degrees in his family, as they are dispersed and scattered all over the face of the earth. Some he hath made masters and mistresses, for taking care of their children, and others that belong to them. . . . Some he hath made servants and slaves to assist and work for the masters and mistresses that provide for them; and others he hath made ministers and teachers to instruct. . . . [A]s Almighty God hath sent each of us into the world for some or other of these purposes, so, from the King, who is his head servant in a country, to the poorest slave, we are all obliged to do the business he hath set us about . . . And while you, whom he hath made slaves, are honestly and quietly doing your business, and living as poor Christians ought to do, you are serving God, in your low station, as much as the greatest prince alive, and will be as much favor shown you at the last day.[104]

Echoing this sentiment, Presbyterian James H. Thornwell (1812–1862) called abolitionists "Atheists, Socialists, Communists, Red Republicans, [and] Jacobins," while arguing that those who support the institution of slavery are "friends of order and regulated freedom . . . [who understand] the principles upon which the security of the social order and the development of humanity depend" because "the spirit of true obedience is universally the same."[105]

Slavery proponents even asserted that the separation of church and state should preserve the right to hold slaves. Because there were varying religious views, the state could not legitimately "impose" one view, that is abolition, on others, they argued. For example, Armstrong argued:

We object to the course proposed by [abolitionists], for dealing with slavery, because it requires the Church to obtrude herself into the province of the State, and

this, in direct violation of the ordinance of God. . . . [Is it] right for the preacher, in the pulpit on the Sabbath, to discuss the claims of rival candidates, and the Church, in her councils to direct her members how to vote? The Church and State has each its own appropriate sphere of operation assigned it of God, and neither can innocently intrude herself into the province of the other.[106]

Yet what was at issue in this debate was not the state's authority to legislate on moral issues that also are in the purview of religion. Such a limitation was never the meaning of "just bounds" between, or "separation of," church and state. Most laws necessarily have moral dimensions that tread on religious territory. As we have seen, the foundational legal principles of the nation are religiously grounded, while serving secular, that is, "this worldly," purposes. These always were intended to be "imposed" on the people. What was at stake were the nation's sacred ground itself and the degree to which authoritarian claims on the basis of Christian precedent would be allowed to continue to supersede it.

Arriving at the answer tore the nation apart. But through speech, debate, and eventually war, the nation rejected all bases for enslavement and relied instead on the core principles of equal inherent dignity and liberty enunciated in the Declaration of Independence. An understanding of what the founders had set in motion reached a new consensus, however uneasy it was at first.

That understanding was not new, of course, and a similar story could be told regarding the rights of other minorities and the rights of women—and other stories are being written still. We have continued to refer back to the beginning and trace the development of our understanding from then to now as we have found our way through all of the crucibles, where America's sacred ground has been challenged and survived, and finds us where we are today: not devoid of all values as some would argue, and not full of all the Christian values of a particular authoritarian Christian ideology. Changing times and evolving policies have clarified the principled foundations of the nation. Those principles have not been rejected in favor of a conception of an authoritarian social order that trumps natural rights. Rather, it has been the appeal to those principles that has led America to "a more perfect union." By reaching back to the past, we have continued to forge the future on our sacred ground.

UNDERSTANDING THE FRAMEWORK, PRINCIPLES, AND PURPOSE OF OUR SACRED GROUND

It is often said that the U.S. Constitution does not provide any positive values on which to build the common good. Those holding this view note,

for example, that the Bill of Rights, including the religion clauses, merely states what the government may *not* do—not what the people *should* do. However, based on what has been written here, it is not difficult to see that those holding that view really have missed the point: the religious ground of a system secured by "negative rights" is also a moral ground that serves the good.

Ours is not a nation with God at the top of a grand hierarchy speaking through ecclesiastical authorities aligned with the state to impose the law on the people from the top down. Ours is a nation with a sacred ground derived from the enlightened and religious conception of the relationship of the people to the ultimate. That is, God's relationship is not with society as a whole or with any particular organization in it. Rather, the idea and belief that stand behind the founding documents of the nation are that God and reason speak to individual people through conscience, and accordingly the people must be free to answer that call. Then, as individuals of conscience freely express themselves from the perspective conscience gives them, they participate in dialogue and debate—a great conversation—in the search for the true and the good. They find a way to work together to create the good society from the ground up.

To give effect to this, the American founders formed a social contract, which established a government by the people and for the people. Founded on the rule of law—the "higher law" from which the liberty and equal inherent dignity of the people derive, such government necessarily must be limited in its reach; absolute government is its antithesis. As a consequence, the intent and effect of such a government was the establishment of an open and free public space—a "public forum." To ensure that the public forum does not devolve into a Lockean "state of war—a "free-for-all" of competing interests where the powerful rise to the top and use their "freedom" to oppress and therefore limit the freedom of others—the public forum has a framework and principles. The people must honor these, if the system is to remain free for *all*. It is this framework and these principles to which we should turn in order to account for and mediate our differences if the system is going to fulfill its intended purpose: to make a better world.

As I have written in more detail elsewhere,[107] the public forum established by the founders has a framework that, in effect, consists of two tiers, each of which has certain basic moral precepts. Each tier creates a space for public participation of different scopes, and together the two tiers of the public forum make possible the people's pursuit of a good society as they continually strive toward a "more perfect union."[108]

The first tier of the public forum involves matters that are appropriate for law and public policy incorporated as fundamental through America's

founding documents. These are matters appropriate for governmental action and, therefore, involve not only discussion about and promulgation of public policy, laws and regulations, but also adjudication of disputes and enforcement of the law. This tier, which I refer to as the "civic public forum," gives effect to John Locke's "impartial judge" of disputes. That is, it is the basis for the unbiased legal and political system that secures the people's natural rights and provides for the safety and general welfare of the people in a way that is consistent with their natural rights.

The civic public forum has, in effect, two foundational principles, which are grounded in liberty and equal inherent dignity. Because they are principles of the civic public forum, they can be thought of as being fundamental "laws." First is the law of no harm, which is derived from the overall principles of liberty and inherent dignity. That is, there is something inviolable about human beings that cannot legitimately be infringed, not even for the benefit of the commons. Consequently, the first law of the civic public forum is that no one may harm another in his or her life, liberty, or property. Now, of course, there may be differing views of the meaning of "harm," but the principle remains as an anchor for debates about law and public policy in the civic public forum. The non-harming law has a companion principle: the law of consistency/no hypocrisy. That is, do not do unto others what you would not want done unto you." This is Locke's reversed statement of the golden rule.[109] Law and public policy, their enforcement, and the adjudication of disputes involving them should strive for consistency in their application to everyone. In other words, they should recognize the equal inherent dignity of every human being and therefore serve equal justice.

The second tier of the public forum does not involve the authority and power of the state. It is the open and free space for persuasion and voluntary actions and acceptance regarding matters that do not involve law or public policy, or enforcement by the state. Nevertheless, matters for this forum are "public" in that they involve speech, debates, and actions that very much are, and were always intended to be, in the public eye.[110] That said, because they do not involve law or public policy, or enforcement by the state, they belong to an arena of persuasion and the voluntary activities of the people. This tier, which I refer to as the "conscientious public forum," creates the space for the exercise of the people's liberty of conscience beyond the purview of the state, and because government is limited, this is the greater of the two tiers of the public forum.

This conscientious public forum also has two fundamental principles. They are "duties" because they are not enforced by the state. That is, they are moral principles that must be adhered to voluntarily if the system is

going to work the way it was intended and fulfill its purpose. First is the duty to raise conscience beyond one's own wants and desires to that higher someone or something—to God, to Universal Compassion, or Universal Reason, the Divine (however understood)—in a sincere effort to glean what conscience directs, not only for oneself, but for the betterment of one's society and even the world. Second, there is a duty to participate. After all, the system is based on trusting the people. Consequently, participation is central to the whole process conceived by Locke and the founders. But that participation should be accomplished not only by one's own speech and activity, but also by listening to the views of others, all with honesty and respect.

Moreover, as we have seen, religious voices were never meant to be suppressed in the great conversations of a legal/political system based on liberty and equal inherent dignity. The idea that society is divided into two spheres, one public and one private, with religion delegated to the private sphere where it is in effect hidden, is a wholly erroneous way to think about the participation of religion in the lives of the people. On the contrary, religious and non-religious voices alike were always meant to be welcomed in the two tiers of the public forum, and historically they have been. However, in both cases, to be legitimate, the participation must be consistent with the framework and principles of the legal/political system. That is, neither religious nor secular participants may legitimately invade the rights of others. Yet there is much room in the conscientious public forum for individuals and the communities they form and join—"communities of conscience"—to set what they believe are even higher standards than what mere law requires.[111]

We can see, then, that even though the founders created a limited government and, as a consequence, the Bill of Rights was framed in negative terms (i.e., what the government cannot do legitimately), when the founders framed the Constitution, they nevertheless grounded it in a framework and set of principles, which have a purpose: to make it possible for the people to build a good society. It is, then, a values-based constitution.

Accordingly, the founders' legal/political system, following Locke, does not produce a state that consists of an absolute authority. Locke and the founders well knew that authoritative governments never produce a society that in any way could be thought of as good. First of all, absolute government breeds corruption because absolute power tends to corrupt. Second, it results in discord because the oppressed always rise up in an effort to right the harms against them. As Jefferson said, "[It is] no wonder the oppressed should rebel, and they will continue to rebel and raise disturbance until their civil rights are full[y] restored to them and all partial

distinctions, exclusions and incapacitations removed."[112] This had been Locke's thinking as well when he said, "[W]hat else can be expected but that these men, growing weary of the evils under which they labour, should in the end think it lawful for them to resist with force, and to defend their natural rights . . . with arms as well as they can?" In other words, absolute authority and its exercise of power often are the direct cause of unrest. Third, when absolute authority is based on religion, it necessarily involves a usurpation of God's authority, which, Locke and the American founders believed, is much more likely to be known by individuals through conscience than by authorities who often are corrupted by power.[113]

Still, government is not to be so limited that it provides no structure or values at all. Rather, there is what has been described here as the sacred ground, which is what creates the space for liberty and thereby becomes the framework of the two-tiers of the public forum and their corresponding principles. That is, the view that currently permeates large segments of American culture today that *no* values should be "imposed" on anyone in our multicultural society is misplaced. This is, of course, the idea that all morals are relative and that everyone is entitled to a morality unto himself. Instead, what has been shown here is that while it is true that the American legal/political system was designed to promote liberty and embrace diversity, it was never meant to promote an absolute moral relativity. Rather, it was meant to create the space where the exercise of virtue would be possible. Such a system has grounding principles, as we have seen. It is not a comprehensive moral order imposed on the people *in toto*. Yet, nevertheless, it has a moral framework that creates the public forum for debate about the moral good. Consequently, the system does not involve a complete free-floating moral relativism, on one hand, nor does it involve an absolute freedom-limiting moral absolutism, on the other hand. This system, with its values-based constitution, is a middle way.

In effect, then, what the founders wrought was a compromise between those who believed in the essential good nature of humankind and those suspicious of human beings' potential to be led astray by the intoxication of power. Consequently, no longer was trust placed in the rule of an absolute king through the auspices of the state; no longer was trust placed in the hands of ecclesiastical authorities. Now a government by the people and for the people would place its trust in the people engaged in the great conversations of the civic and conscientious public forums, anchored in the framework, principles, and purpose of the nation, not only about how to live together in peace considering their differences, but also in the ultimate search for the true and the good.

Hence, beyond its own values, the constitution and the legal/political

system it established anticipate that a free people will use their freedom well. Released from the fetters of an authoritarian government, the people no longer are forced by the government into societal patterns at odds with conscience. The people are free to live a full life according to the "true faith," whatever that may be, and answer its call; the people can be and do all that they believe reflects the true and the good, so long as they do not violate the sacred ground of the nation. That is, the founders' legal/political system places the virtue of a free people at the heart of a nation that makes the pursuit of virtue possible. As James Madison said, "To suppose that any form of government will secure liberty or happiness without any virtue in the people is a chimerical idea."[114] That is, it is *an illusion*. And John Adams said, "Our constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other." In other words, it is *because* the government is limited—not dictating a unified conception of the true and the good—that the true and the good must come from the people. Otherwise, as I have said elsewhere:

> If enough of us do not [fulfill] the conscientious moral principles, then we will end up proving our founders wrong: a society of free individuals does not promote the good—not even as separately conceived by society's various constituents; it promotes a licentious society where individuals have no regard for their nation and its future, only themselves. When that happens—when we have lost sight of what freedom was for—we will surely be in danger of losing the liberties that the founders and all of our forbears fought so hard to give to "ages and millions yet unborn.[115]

Unless the people are raising their minds and hearts to something greater than themselves—to God or Universal Reason or Universal Compassion or the Divine (however they each understand that)—and discerning what conscience wants of them and bringing that to the public forum, the system cannot fulfill its intended purpose: to make a better world. In other words, freedom is not for our own happiness; it is for the happiness of everyone.

CONCLUSION

Clearly, America did not live up to its ideal at the founding. Yet it is an ideal worth keeping, because it has not been the rejection of the original sacred ground of the nation that has led us through the trials of our nation. The abolition of slavery, gaining women's rights, the civil rights movement and its resulting historic legislation, and more have been accomplished by *appealing* to our sacred ground. Accordingly, today the issue regarding the founders' original intentions and American identity is not: how do we re-

turn to the way things were or were understood to be at the time of the founding? Surely, we do not want to return to the days of oppressive laws that supported slavery and subjugated women and others. The issue is: how do we identify and keep what is essential to our sacred ground—the framework, principles, and purpose of our nation—while taking account of new insights and new or newly understood circumstances?

Unfortunately, however, rather than having a conversation about this question, the debate itself has been framed in other terms, terms that undermine the foundations of the legal/political system the founders bequeathed to the nation. On one hand, many argue that the U.S. Constitution is a Christian document and that ours is a Christian nation. On the other hand, others argue that it is wholly secular. Yet it is a mistake to think that references to Christianity at the time of the founding mean that there were no bounds between church and state; it is also a mistake to appeal to an absolutist secular authority that eschews and marginalizes religion and therefore undermines religious liberty. Both tend toward the top-down absolute authority that the American founders repudiated.

Rather, the way we should understand the debate today is that we are continuing to have the conversation we always have had in America—a debate about the line between governing authority, on the one hand, and the authority of conscience, on the other hand. But what grounds those authorities should not be in dispute: it is our sacred ground founded by the people and for the people. Consequently, rather than arguing about whether or not the nation is based on Christianity or secular Enlightenment Era sources, we ought to understand that it is both, but at the same time neither in absolute terms. In other words, the debate is really about the line between the civic and conscientious public forums. And we can only negotiate that line legitimately by reference to our fundamental values: liberty, equal inherent dignity, non-harming, consistency/no hypocrisy (i.e., impartiality and equal justice), raising conscience, and participation with honesty and respect. Surely, debates on the line are difficult, but not more difficult today than they always have been.

Is our nation a nation under God? Perhaps so, if by that we mean that historically our nation is grounded in certain principles that derive from religion as well as secular ideas. Perhaps not, if we mean that God is at the top of a grand hierarchy with a Christian president as the nation's interpreter of God's will. Should the Ten Commandments be posted on public property? Perhaps so, if we mean that there are general moral principles on which the nation stands. Perhaps not, if we mean that the law of the land includes the injunction that "you shall have no other gods before me" or that the law must be based on the Bible. Should minority religions' prac-

tices receive exceptions to laws that are generally applicable to everyone? Perhaps not, when those "laws of general applicability" are truly neutral and are necessary to secure the natural rights of the people and to ensure their safety and general welfare. Perhaps so, if those laws involve traditions and customs that stem from majoritarian religious beliefs. Should homosexuals be permitted to become legally married? Should abortion be legal? Should political leaders use religious language and metaphor to make their points? Should religious schools receive public funds?

Whatever the issue facing us today, as the conversations proceed we have a responsibility to refer back again and again to our touchstone, our sacred ground, whether we think of it as being religious or not. Then when we have our continuing conversations and debates about the reach of government and the authority of conscience, we will not abandon all tradition for progress or all progress for tradition. Instead, we will remember to understand church and state in context as we keep the ship of state anchored in what makes all of the conversations possible in the first place, always remembering that the dichotomy that counts is not religious vs. secular or absolute vs. relative—but is liberty and equal dignity vs. dominance. If we always return to our sacred ground, we can apply its principles to the shifting circumstances of our own time and of the future without unmooring the whole project from what gives us our core identity. This is what we largely have accomplished over time. We should do no less today.

NOTES

1. U.S. Const., Amend. 1.

2. See, e.g., *Church of Holy Trinity v. U.S.*, 143 U.S. 457 (1892); *Everson v. Board of Education* (1947); *Marsh v. Chambers,* 463 U.S. 783 (1983); *Wallace v. Jaffree,* 472 U.S. 38 (1985) (J. Rehnquist, dissenting).

3. Roger Williams, "Mr. Cotton's Letter Lately Printed, Examined and Answered," *The Complete Writings of Roger Williams*, vol. 1, p. 108 (1644).

4. John Adams, "To the Officers of the First Brigade of the Third Division of the Militia of Massachusetts," 11 October 1789, *The Works of John Adams, Second President of the United States with a life of the author, notes and illustrations*, compiled by Charles Francis Adams, 10 vols., vol. 9 (Boston: Charles C. Little & James Brown, 1850–1856), 228–229. (Hereafter *Adams Works*.)

5. At the time of the founding the word "secular" did not have the meaning it has today in common usage: non-religious. Instead, secular referenced "this-worldly" matters. Having been derived from Latin word "*saeculum,*" which means literally "time" or "age," the word "secular" means "of this time," in other words of this world, as distinguished from matters of eternity. Consequently, it would have been possible to speak of religious matters that are secular, that is, focused on

this world in the here and now. Furthermore, the word "religion" also did not have the meaning it has today, which includes the institutions of religion, that is "objective systematic entities," for example, churches. Rather, "religion" meant personal piety and relationship with God or, at most, a system of beliefs, practices, and values. For more on this, see Barbara A. McGraw, *Rediscovering America's Sacred Ground* (Albany: State University of New York Press, 2003), 185–188, discussing Wilfred Cantwell Smith's classic work *The Meaning and End of Religion* (1962; Minneapolis: Fortress Press, 1991).

6. Thomas Jefferson, *The Writings of Thomas Jefferson*, Albert E. Bergh, ed. (Washington, D.C.: The Thomas Jefferson Memorial Association of the United States, 1904), vol. 16, pp. 281–282.

7. James Madison, "To Thomas Jefferson," 24 October 1787, *The Writings of James Madison*, ed. Gaillard Hunt, 9 vols., vol. 5 (New York, London: G.P. Putnam's Sons, 1900–1903), 30–31.

8. Thomas Jefferson, "A Bill for Establishing Religious Freedom," submitted to the Virginia General Assembly 1779, enacted in an edited form in 1789, *The Complete Jefferson: Containing His Major Writings, Published and Unpublished, Except His Letters*, ed. Saul K. Padover (New York: Duell, Sloan & Pearce, 1943), 946. [Hereafter *The Complete Jefferson.*]

9. See generally, Pauline Marie Rosenau, *Post-Modernism and the Social Sciences: Insights, Inroads, and Intrusions* (Princeton: Princeton University Press, 1992).

10. Robert S. Ellwood and Barbara A. McGraw, *Many Peoples, Many Faiths: Women and Men in the World Religions*, 8th ed. (Upper Saddle River, NJ: Prentice-Hall, 2005), 31, 44–50.

11. Ibid., 17.

12. Gregory VII, in what has been called the "Gregorian Reform" (1075–1122), asserted ultimate authority over church and state. Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA and London: Harvard University Press, 1983), 87. This understanding has roots in early Christianity, however. Christianity began as one of the many religions practiced in ancient Rome. However, Christians believed that their God was not of place or state, but stood above as God of the whole world, the universe. As a consequence, Christians refused to place the emperor—who Rome held to be the divine head of Rome—above their God. This is a main reason they came to be persecuted there. Consequently, one could argue that the idea of a religion being separate from the state actually evolved out of early Christian religious beliefs. See John Dominic Crossan and Jonathan L. Reed, *In Search of Paul: How Jesus' Apostle Opposed Rome's Empire with God's Kingdom* (New York: HarperCollins Publishers, Inc., 2004).

13. John Neville Figgis, *The Divine Right of Kings* (1896; Cambridge, UK: Cambridge University Press, 1922), 45–49.

14. Berman, *Law and Revolution*, 145, quoting Gratian, *A Concordance of Discordant Canons* (1140): "[T]he law of princes ought not to prevail over natural law." Even the pope's power "was limited . . . by natural and positive divine law [that is,

divine law laid down in the Bible and in similar documents of revelation]." Ibid., 99. See also ibid., 214.

15. Figgis, *Divine Right of Kings,* 58.

16. Ibid., 50–51, 65.

17. Ibid., 45.

18. The "divine right of kings" involved a "widespread" belief, which consisted of "the following propositions: (1) Monarchy is a divinely ordained institution. (2) Hereditary right is indefeasible . . . The right acquired by birth cannot be forfeited . . . (3) Kings are accountable to God alone . . . (4) Non-resistance and passive obedience are enjoined by God." Figgis, *The Divine Right of Kings*, 5–6. Furthermore, European emperors and kings generally claimed authority over popes and bishops. As Harold J. Berman has said, "The emperor [e.g., Charlemagne or Henry IV] claimed to be the supreme spiritual leader of Christendom, whom no man could judge, but who himself judged all men . . . " Berman, *Law and Revolution*, 89.

19. Ibid., 60, 65.

20. Gratian, an immensely influential Bolognese monk, divided the canon laws into a hierarchy of categories, each lower category being subject to the categories above: divine law ("the will of God reflected in revelation, especially the revelation of Holy Scripture"); natural law (found in "divine revelation and in human reason and conscience"); ecclesiastical laws and enactments; the laws and enactment of princes (secular authorities); and customs. Berman, *Law and Revolution*, 143, citing Gratian, *A Concordance of Discordant Canons* (1140). From this hierarchical division the idea that temporal laws could be "unjust laws" emerged. *Cf.* Anton C. Pegis, ed., *Introduction to St. Thomas Aquinas* (New York: Modern Library, 1848), 530, 542, 622.

21. David Wootton, "Introduction," in *Political Writings of John Locke* (New York: Mentor, 1993), 65.

22. Ibid.

23. This conception of human beings was evidenced in the work of St. Anselm and memorialized by Gratian (see note 20 *supra*), later espoused by Aquinas, and further developed in the modern period as liberalism took hold. See Berman, *Law and Revolution*, 159; Francis Oakley, *Natural Law, Laws of Nature, Natural Rights: Continuity and Discontinuity in the History of Ideas* (New York, London: Continuum, 2005), 70–72.

24. "[T]he canon lawyers laid a legal foundation for . . . resistance." Berman, *Law and Revolution*, 214. "[W]hen he who is chosen to defend the good and hold the evil in check himself begins to cherish wickedness, to stand out against good men, to exercise most cruelly over his subjects the tyranny which he was bound to combat; is it not clear that he justly forfeits the dignity conceded to him and the people stand free of his rule and subjection, since it is evident that he was the first to violate the compact on account of which he was made the ruler?" McIlwain, *Growth of Political Thought*, 209–210, quoting Manegold of Lautenbach (died c. 1103).

25. See, e.g., *Magna Carta* (1215); *Petition of Right* (1628); *Bill of Rights* (1689).

26. John Locke, *A Letter Concerning Toleration*, trans. William Popple (1685,

published 1689), *Political Writings of John Locke*, ed. David Wootton (London: Mentor, 1993), 397. [Hereafter *Letter Concerning Toleration*.]

27. "[S]he [truth] is the proper and sufficient antagonist to error, and has nothing to fear from the conflict unless by human interposition [she is] disarmed of her natural weapons, free argument and debate; errors ceasing to be dangerous when it is permitted freely to contradict them." Thomas Jefferson, "A Bill for Establishing Religious Freedom," 1779, *The Complete Jefferson*, 947.

28. John Locke, *Of Civil Government, Two Treatises of Government, The Works of John Locke*, 9 vols. vol. 4, Ch. II, ¶ 6, p. 341; Ch. XIII, ¶¶ 151–152, pp. 427–428 [Hereafter *Second Treatise*]; Locke, *Reasonableness of Christianity*, ed. George W. Ewing (Washington, D.C.: Regnery Gateway, 1965), ¶ 252, p. 192–193.

29. Locke, *Second Treatise,* Ch. II, ¶ 13, p. 345–346; Ch. III, ¶¶ 20–21, pp. 349–350.

30. Locke, *Second Treatise,* Ch. III, ¶ 16, p. 347.

31. Ibid.

32. Locke, *Letter Concerning Toleration,* 390.

33. Locke, *Second Treatise,* Ch. II, ¶ 13, p. 345–346; Ch. III, ¶¶ 20–21, pp. 349–350.

34. Locke, *Second Treatise,* Ch. VIII, ¶¶ 95–122, p. 394–411; Ch. XIV, ¶ 168, pp. 438–439.

35. Locke, *Letter Concerning Toleration,* 393.

36. "[E]veryone's sin is charged upon himself only." Locke, *Reasonableness of Christianity*, ¶ 4, p. 4; Locke, *Second Treatise*, generally.

37. Locke, *Of Government, Two Treatises of Government, The Works of John Locke*, 9 vols, vol. 4, Ch. IX, ¶ 86, p. 279. [Hereafter *First Treatise* and *Works*.]

38. Barbara A. McGraw, *Rediscovering America's Sacred Ground* (Albany: State University of New York Press, 2003), 26, citing Locke, *A Second Vindication of the Reasonableness of Christianity, Works*, 357; Locke *Reasonableness of Christianity*, ¶ 155, p. 114; Locke, *Essay on Human Understanding*, *Works,* Book IV. Ch. XIX, ¶ 4, vol. II, p. 273; Locke *First Treatise*, ¶ 86, p. 279; Locke, ¶¶ 39–40, pp. 24–26. See also Locke, *Reasonableness of Christianity,* ¶ 238, pp. 165–166; ¶ 241, pp. 169–172; ¶ 243, pp. 178, 180.

39. Locke, *Letter Concerning Toleration,* 431.

40. Locke, *Second Treatise*, generally.

41. Locke, *Letter Concerning Toleration*, 420–421.

42. Ibid., 401, 409, 417. "True religion consists in the inward persuasion of the mind." Ibid., 394. "[Tolerance is] the chief characteristical mark of the true church." Ibid., 390.

43. However, Locke's toleration did not extend to atheists nor to those who are intolerant. Locke, *Letter Concerning Toleration*, 426.

44. Ibid., 390.

45. Ibid., 420.

46. Ibid., 412, 420, 431.

47. Ibid., 431.

48. Ibid., 416.

49. Ibid., 400, 417, 431.

50. Ibid., 431.

51. Ibid., 402, 420.

52. Locke, *Essay on Human Understanding, Works,* vol. 2, Book IV, Ch. XIX, ¶ 4, p. 273.

53. Locke, *Letter Concerning Toleration*, 401.

54. Thomas Jefferson "copied long passages from Locke's *Letter Concerning Toleration* in his commonplace notebook, and used many of Locke's ideas and phrases in his own writing on the need for religious freedom." Charles B. Sanford, *Thomas Jefferson and His Library: A Study of His Literary Interests and of the Religious Attitudes Revealed by Relevant Titles in His Library* (Hamden, CT: Archon Books, 1977), 121. "[The colonists] thought themselves at full liberty . . . to establish such sort of government as they thought proper, and to form a new state as full to all intents and purposes as if they had been in a state of nature, and were making their first entrance into civil society. Bernard Schwartz, "Commentary" in *The Bill of Rights: A Documentary History,* ed. Bernard Schwartz (New York, Toronto, London, Sydney: Chelsea House Publishers, 1971) [hereafter *Documentary History*], 179, quoting a 1764 statement by Thomas Hutchinson (then Lieutenant Governor of Massachusetts). The colonists' writings clearly showed a debt to the writings of John Locke. See also, e.g., Samuel Adams, "The Rights of the Colonists and a List of Infringements and Violations of Rights" in *Documentary History*, 200–211.

55. See Harry S. Stout, "George Whitefield in Three Countries," *Evangelicalism: Comparative Studies of Popular Protestantism . . . . 1700–1900*, eds. Mark A. Noll, et al. (New York, Oxford: Oxford University Press, 1994), generally. See also John Boles, *The Great Revival, 1787–1805: The Origins of the Southern Evangelical Mind* (Lexington: University Press of Kentucky, 1972), 40.

56. Ibid., 63, 69.

57. James H. Hutson, *Religion and the Founding of the American Republic* (Washington, D.C.: Library of Congress, 1998), 39–42.

58. See, e.g., John Toland, *Christianity Not Mysterious* (London, 1696). Instead, those founders generally thought to be deists believed that God has a hand in history. McGraw, *Rediscovering America's Sacred Ground*, 70–71, quoting various founders.

59. Sanford, *Thomas Jefferson and His Library*, 150, citing Henry Stephens Randall, *The Life of Thomas Jefferson,* 3 vols., vol. 3 (New York: Derby & Jackson, 1858), 407–410, quoting Jefferson's grandson. Benjamin Franklin indicated that he had a belief in God and that God plays a role in human affairs when he said: "I have lived, Sir, a long time; and the longer I live, the more convincing proofs I see of this Truth—*that God governs in the Affairs of Men.* And if a Sparrow cannot fall to the Ground without his Notice, is it probable that an Empire can rise with his Aid?" Benjamin Franklin, "Motion for Prayers in the Convention," 28 June 1787, *Benjamin Franklin Writings*, ed. J.A. Leo Lemay (New York: The Library of

America, 1987), 1138–1139 (emphasis in original). Similarly, John Adams declared his belief in the intervention of God into human affairs when, in his proclamation for a national day of fasting, he stated: "[There is] the governing providence of a Supreme Being and of the accountableness of men to Him as the searcher of hearts and the righteous distributor of rewards and punishments . . . " eds. Paul H. Smith, et al., *Letters of Delegates to Congress 1774–1789*, 25 vols. (Washington, D.C.: Government Printing Offices, 1876–1998), 311–312.

60. See, e.g., James Winthrop, "Letter of Agrippa," 1788, *Documentary History,* 517; Thomas Jefferson, "A Bill for Establishing Religious Freedom," 1779, *The Complete Jefferson*, 947.

61. *Declaration of Independence* (1776).

62. Nathon O. Hatch, *The Sacred Cause of Liberty: Republican Thought and the Millennium in Revolutionary New England* (New Haven & London: Yale University Press, 1977), 11–13, 16–17. See also Hutson, *Religion and the Founding of the American Republic*, 39–42.

63. McGraw, *Rediscovering America's Sacred Ground,* 65.

64. Declaration of Independence (1776).

65. U.S. Const., Preamble.

66. Declaration of Independence (1776)

67. Thomas Paine, *Common Sense* (1776).

68. John Adams, *Adams Works*, vol. 4, p. 230; Massachusetts Constitution (1780), art. 30.

69. See, e.g., Montesquieu, *The Spirit of the Laws* (1748).

70. George Washington, "To the Hebrew Congregation," 18 August 1790, *The Papers of George Washington,* Presidential Series, ed. Dorothy Twohig, et al. 7 vols., vol. 6 (Charlottesville, VA: University Press of Virginia, 1987–2000), 284–285.

71. *Documentary History,* 201.

72. Richard Henry Lee, "To James Madison," 26 November 1784, eds. Robert A. Rutland, et al. *The Papers of James Madison,* 17 vols., vol. 8 (Chicago and London: University of Chicago Press; Charlottesville: University Press of Virginia, 1961–1999), 149.

73. Thomas Jefferson, "Notes on Religion," October 1776, *The Complete Jefferson*, 945.

74. Thomas Jefferson, Autobiography, *The Complete Jefferson,* 1147.

75. Thomas Jefferson, "Notes on Religion," October 1776, *The Complete Jefferson,* 945.

76. Richard Henry Lee, "Observations Leading to a Fair Examination of the System of Government," Letter IV, 12 October 1787, *Letters from a Federal Farmer,* 28.

77. Thomas Jefferson, "A Bill for Establishing Religious Freedom," *The Complete Jefferson,* 947.

78. John Adams, "To Thomas Jefferson," 28 June 1813, *Adams Works*, vol. 10, pp. 45–46.

79. John Dickenson, *Letters of Fabius,* 1788, *Documentary History*, 546.

80. See Mark Douglas McGarvie, *One Nation Under Law: America's Early National Struggles to Separate Church and State* (DeKalb: Northern Illinois Press, 2004).

81. "The constitutional amendments proposed by Madison were the logical culmination of what had gone before in both English and American constitutional history. In particular, the federal Bill of Rights was based directly on upon the great Charters of English liberty, which begin with the *Magna Carta* [1215]." Bernard Schwartz, "Commentary," in *Documentary History*, 3.

82. See, e.g., "The Declaration of Rights of the Stamp Act Congress" (1765): "[I]t is inseparably essential to the freedom of a people, and the undoubted rights of Englishmen, that no taxes should be imposed on them, but with their consent . . . " See also, e.g., Samuel Adams, "The Rights of the Colonists and a List of Infringements and Violations of Rights" in *Documentary History*, 202: "The absolute rights of Englishmen and all freemen, in or out of civil society, are principally personal security, personal liberty, and private property."

83. See generally, Alain Cabantous*, Blasphemy: Impious Speech in the West from the Seventeenth to the Nineteenth Century*, trans. Eric Rauth (New York: Columbia University Press, 2002); George Nokes*, A History of the Crime of Blasphemy* (London: Sweet & Maxwell, 1928); David Lawton, *Blasphemy* (Hemel Hempstead: Harvester, 1993), Leonard Levy, *Blasphemy: Verbal Offence Against the Sacred, from Moses to Salman Rushdie* (Chapel Hill: University of North Carolina Press, 1995).

84. There were many challenges to blasphemy laws on constitutional grounds well into the nineteenth century and even a few into the twentieth century. See, e.g., *The People v. Ruggles* (1811). It has been reported that the last blasphemy case resulting in jailing the defendant was in *Commonwealth of Massachusetts v. Kneeland* (1838). Leonard Levy, *Blasphemy in Massachusetts: Freedom of Conscience and the Abner Kneeland Case—a Documentary Record* (New York: Da Capo, 1973). In *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952), the U.S. Supreme Court held that a New York State statute "authoriz[ing] denial of a license on a censor's conclusion that a film is 'sacrilegious'" was held to be "void as a prior restraint on freedom speech and of the press under the First Amendment." Nearly two decades later, in *State v. West* (1970), the Maryland Court of Appeals overturned the defendant's 1968 blasphemy conviction on the basis that the law violated the First Amendment, 263 A.2d 602 (Md. App., 1970). That case involved the last conviction for blasphemy in the United States. See Leonard W. Levy, *Blasphemy: Verbal Offense*. Interestingly, blasphemy codes remain on the law books in some states to this day, even though they no longer are enforced. See, e.g., Massachusetts General Law, Chapter 272, Section 36; http://mass.gov/legis/ laws/mgl/272–36.htm (accessed July 20, 2007).

85. William Blackstone, *Commentaries on the Laws of England* (Oxford: Clarendon Press, 1769).

86. Blackstone, vol. 4, p. 59.

87. *Updegraph v. The Commonwealth,* 11 Serg. & R. 393, 394 (1824), quoted

in David Barton, *The Myth of Separation: What is the Correct Relationship between Church and State?* (Aledo, TX: WallBuilder Press, 1992), 50.

88. *Updegraph v. The Commonwealth*, 11 Serg. & R. 393, 406–407, quoted in Barton, *Myth of Separation*, 55.

89. Ibid., 54.

90. *Documentary History*, 277.

91. Nine of the thirteen original colonies gave tax aid to their "established" churches prior to and at the time of the founding. John K. Wilson, "Religion Under the State Constitutions, 1776–1800," *Journal of Church and State* 32, no. 4 (1990): 754.

92. For example, Pennsylvania required the following oath before one could serve in that state's house of representatives: "I do believe in one God, the creator and governor of the universe, the rewarder of the good and the punisher of the wicked. And I do acknowledge the Scriptures of the Old and New Testaments to be given by Divine inspiration." *Documentary History,* 273. Similarly, the South Carolina Constitution (1778), which expressly established the Protestant Christian religion, required members of the state senate and house of representatives to be "all of the Protestant religion." Ibid., 326. The only states that did not have religious tests at the time of the founding were Virginia and New York. However, by 1792, religious tests were prohibited in Georgia, Delaware, Vermont, Tennessee. Wilson, "Religion Under State Constitutions," 765.

93. See, e.g., notes 94–96 *infra* and accompanying text.

94. Noah Webster, *History of the United States* (New Haven: Durrie & Peck, 1832), 300, ¶ 578, quoted in Barton, *Myth of Separation*, 125 (emphasis added).

95. John Adams, "To Thomas Jefferson," 28 June 1813, *Adams Works*, vol. 10, pp. 45–46 (emphasis added).

96. John Quincy Adams, *The Writings of John Quincy Adams*, ed. Worthington C. Ford (New York: The Macmillan Company, 1914), vol. 4, p. 215, quoted in Barton, *Myth of Separation*, 125 (emphasis added).

97. Edwin S. Gaustad and Leigh E. Schmidt, *The Religious History of America: The Heart of the American Story from Colonial Times to Today* revised ed. (San Francisco: HarperSanFrancisco), 123; Leonard W. Levy, *The Establishment Clause, Religion and the First Amendment*, 2nd ed. (Chapel Hill and London: The University of North Carolina Press, 1994), 146–147.

98. Wilson, "Religion Under State Constitutions," 753–763.

99. See note 84 *supra* and accompanying text.

100. Baron, *Myth of Separation*, passim.

101. The resolution of the issue of slavery and efforts after the Civil War to provide equal protection of the laws and due process rights to everyone regardless of race, among other things, resulted in the Fourteenth Amendment to the U.S. Constitution. Later, the U.S. Supreme Court held that the First Amendment and the other rights of the Bill of Rights were applicable to the states through the Fourteenth Amendment via the "incorporation doctrine." See e.g. *Cantwell v. Connecticut,* 310 U.S. 296 (1940) and *Everson v. Board of Education*, 330 U.S. 1 (1947).

102. Quoted in Gaustad and Schmidt, *Religious History of America*, 184.

103. George D. Armstrong, *The Christian Doctrine of Slavery* (New York: Scribner, 1857), 131–148. In *Religion in American History: A Reader*, ed. Jon Butler and Harry S. Stout (New York, Oxford: Oxford University Press, 1998), 236.

104. Thomas Bacon, *Two Sermons, Preached to a Congregation of Black Slaves, at the Parish Church of S[aint] P[eter's], in the Province of Maryland* (London, 1749), 7–38. In *Religion in American History*, ed. Jon Butler and Harry S. Stout (New York: Oxford University Press, 1998), 74–87. [Edited to modernize punctuation, capitalization, and spelling.]

105. Quoted in Gaustad and Schmidt, *Religious History of America,* 191.

106. Armstrong, *Christian Doctrine of Slavery*. In Butler and Stout, *Religion in American History*, 236.

107. McGraw, *Rediscovering America's Sacred Ground*, 91–105.

108. Declaration of Independence (1776).

109. McGraw, *Rediscovering America's Sacred Ground*, 55.

110. The commonly referred to public/private divide obscures the "public" function of the conscientious public forum. See ibid., 50–54.

111. Ibid., 125.

112. Thomas Jefferson, "Notes on Religion," October 1776, *The Complete Jefferson,* 946.

113. Locke, *Letter Concerning Toleration*, 409, 417; Jefferson, "A Bill for Establishing Religious Freedom." In *The Complete Jefferson,* 946. See also McGraw, *Rediscovering America's Sacred Ground*, 31–32.

114. James Madison, "Speech in the Virginia Ratifying Convention," 20 June 1788. *The Papers of James Madison,* edited by Robert A. Rutland et al., 17 vols., vol. 11, p. 163.

115. McGraw, *Rediscovering America's Sacred Ground,* 98.

FURTHER READING

For more on this author's views on the ideological grounding of the United States and the states, including church-state relations and the role of religion in public life, see Barbara A. McGraw, *Rediscovering America's Sacred Ground: Public Religion and Pursuit of the Good in a Pluralistic America* (Albany: State University of New York Press, 2003). For an interesting polemic that presents a view that opposes the one in this introductory chapter and this author's other work, see David Barton's *The Myth of Separation: What is the Correct Relationship between Church and State?* (Aledo, TX: WallBuilder Press, 1992). To explore further some of the historical themes presented in the beginning of this introductory chapter, study Harold J. Berman's historical analysis of the West's legal tradition in his highly-regarded *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge and London: Harvard University Press, 1983), which locates that legal tradition's roots in the papal revolution, as well as the revolution of jurisprudence arising out of feudal and royal systems. For a challenging account of the develop-

ment of the political philosophy of John Locke, see John Marshall's *John Locke: Resistance, Religion, and Responsibility* (Cambridge: Cambridge University Press, 1994). For thorough accounts of the ideological origins of the United States, see Bernard Bailyn's *The Ideological Origins of the American Revolution*, enlarged ed. (1967 Cambridge, MA and London: The Belknap Press of Harvard University Press, 1992), which argues that republicanism was the most significant influence, and Huyler, Jerome's *Locke in America: The Moral Philosophy of the Founding Era* (Lawrence: University of Kansas Press, 1995), which argues that the nation's ideological origins, including republicanism, are found in the fundamentals of John Locke's liberalism. For an explanation and critique of the current debate between philosophers of democratic liberalism and theological traditionalism, see Jeffrey Stout's *Democracy and Tradition* (Princeton: Princeton University Press, 2004), which argues that democracy is not opposed to tradition, but is itself a tradition, which when understood as such makes possible finding common ground. For a thorough analysis of U.S. Supreme Court jurisprudence on issues involving the role of religion in public life and the degree to which church-state separation has evolved since the nation's founding, see James Hitchcock's *The Supreme Court and Religion in American Life: Volume II From "Higher Law" to "Sectarian Scruples"* (Princeton and Oxford: Princeton University Press, 2004), the second in a two volume series. For an interesting study of Revolutionary Era political thought at the state level, see Mark W. Kruman's *Between Authority and Liberty: State Constitution Making in Revolutionary America* (Chapel Hill and London: The University of North Carolina Press, 1997), which argues that power, even in the hands of elected state legislative representatives, was distrusted and therefore limited. For a worthy discussion of how Contracts Clause, Art. I, U.S. Constitution jurisprudence illuminates U.S. church-state jurisprudence generally, see Mark Douglas McGarvie, *One Nation Under Law: America's Early National Struggles to Separate Church and State* (DeKalb: Northern Illinois University Press, 2004).

1

Historical Perspectives on Church and State

Richard Bowser and Robin Muse

Religion, as most recognize, is an exceedingly potent force in virtually every society. In its authentic forms, it supplies answers to great questions regarding the meaning of life. As such it shapes and molds individuals. It commits them to thoughts and actions that profoundly affect their lives and their life together as a community. Religion is not only an active force, but also a resisting force.[1] It supplies the vision that permits folks who are of little cultural regard to stand against the most compelling of people and institutions. From Peter and later Paul before the Sanhedrin to Fannie Lou Hamer before Lyndon Johnson and Hubert Humphrey,[2] religious believers have stood against those in power, resisting the attempt to press upon them the society's answer to the questions of the meaning of life.

How should government treat the religious beliefs and the religious institutions of a society? Should it seek to affirm some beliefs and suppress others? If so on what basis does it make that choice? Should government, because of the difficulty of selection seek to affirm all? There is good reason to conclude that it cannot. In light of that impossibility, should government seek to affirm no religious beliefs or values at all? Such a position seems to deny the reality of the influence of such ideas in shaping visions of the common good that are shared by the governed. Should government affirm that which seems to be common to all? Some have suggested that such an approach only enshrines as governmentally approved a religion that few if

any espouse. Should government affirm only those ideas and norms that appear to have been harvested from non-religious or secular seed? That only raises the philosophical question, is secularism only another religion because it purports to give an answer to questions regarding the meaning of life?

In the United States, these deeply important questions not only have a political dimension, they have a constitutional dimension because the opening sentence of the First Amendment to our Constitutional document provides the following: "*Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof*." The Religion Clauses,[3] first made applicable to the federal government and then through the Fourteenth Amendment made applicable to the states,[4] are the principle points of constitutional reference in these matters.[5]

The interpretation and application of this sentence has not been easy. The words and phrases themselves have an enigmatic quality about them.[6] Why would the drafters chose to use the word "respecting?" What was in view when they used the word "establishment?" By "religion" did they mean Christian denomination, Christian and non-Christian theism, or one's "ultimate concern?" Partly as a result of the lack of precision with the words and partly as a result of a dispute about constitutional interpretation generally,[7] the Supreme Court has struggled to find coherent and consistent models of interpretation and application for the clauses. In fact, it has been suggested by some that the clauses operate in tension with each other, so much so that to advance the purpose of one clause is sometimes understood to mitigate the value sought to be advanced by the other. Before considering the competing models of interpretation, it will be helpful to consider what animated the framing generation's inclusion of the Religion Clauses in the First Amendment.[8]

The framers of the First Amendment would have been familiar with the establishment of religion. The Church of England was the established religion of the British Empire. Nine of the thirteen colonies had established churches at the time of the Revolution and approximately one-half of the states continued to have some form of established church when the First Amendment was ratified.[9] While establishment of religion was not monolithic in all details,[10] it generally included the government's control over what could be taught and who could teach it. With that control came a prohibition of teaching other doctrine. Such establishment generally would have included a prominent position for church leaders in the political structure of the government. For example, bishops in the Anglican Church sat in the House of Lords. This type of establishment would have also required the citizens to attend church and to support through taxes the work and ministry of the church.[11]

With this as their history, the founding generation supported the disestablishment of religion in the U.S. government. While the disestablishment announced in the First Amendment applied only to the federal government and worked only to retain the status quo with regard to the federal government and religion,[12] the conviction regarding religious liberty that disestablishment represents applied much more broadly. There were, as there are today, a number of sources for a commitment to religious freedom. Some grounded their commitment to religious liberty in their theological convictions; others found the source in political utility. Each different starting point, as well as their collective operation, provided a perspective that not only shaped the perceived contours of religious liberty at the time, but also set a course for its development for years to come. Considering the various sources for a commitment to religious liberty also helps to fight against the tendency to reductionism—a tendency to see the shaping of religious liberty through a single lens or according to a single metaphor, for example, as a wall of separation. The situation at the time of the Constitution ratification is much too complex for that.

While there was a full spectrum of views of religion and society at the end of the eighteenth century, it is helpful to consider at least four views that were represented within the political and theological communities of that day: (1) Puritan; (2) Evangelical; (3) Enlightenment; and (4) Civic Republican.[13]

PURITAN VIEWS

It may seem odd to consider Puritan views regarding religious liberty. Most individuals would assume that the Puritans in the colonies, having escaped the religious persecution of Europe, gave little thought to the subject of religious freedom, having now the freedom to establish a "city on the hill," a theocratic order. That picture, while not without some justification, is a caricature. The Puritans gave great thought to everything. The relationship between church and state was no exception. They considered the church and the state separate, but still covenantal, communities. Each was under the authority of God and each was to exercise that authority according to its calling.[14] The church was called to preach the word, administer the sacraments and care for the poor. The state held the power of the sword, the power to punish evil, to reward the good, to cultivate virtue and provide civil peace. While the institutions of church and state were understood to be separate, each was also understood to be an instrument of God's authority. In short, God reigned, or ought to reign, in both kingdoms. As such, there was considerable cooperation between the church and govern-

ment. For example, the state provided aid to churches in the form of public property donated for the churches' use. The government's criminal law also provided support to the church—requiring church attendance and prohibiting the profaning of the Sabbath.[15]

Reciprocally, the church provided support to the state. Church properties were used for public purposes such as town meetings and educational instruction. Furthermore, the church, through its officials, encouraged support for the government. They preached that because the state was God-ordained, it deserved the obedience of the church members. Members were encouraged to be active participants, according to biblical principles, in political matters—something of which the parishioners were reminded at each annual "election day" sermon.[16]

EVANGELICAL VIEWS

The Evangelical tradition (or Pietistic Separatists) in the United States shared a considerable amount of the Calvinist theological commitments of the Puritans, but they drew different conclusions regarding the role of religion in society and the role of the state in religious affairs. These individuals, the chief proponent of which was Isaac Backus,[17] were not part of the religious insiders of the Anglican middle colonies or the Congregational northern colonies. But not only were they political outsiders, they were outsiders in large part because of their conviction regarding what God required of all men and women. Following the examples and instruction of Roger Williams and William Penn, the evangelicals of the late eighteenth century grounded the protection of liberty of conscience (a term common to the era) in their understanding of true religion—a voluntary obedience to the revealed will of God. For the good of true religion individually and corporately (the church), they considered it necessary to separate religion from the state. The state, for them as it was for Roger Williams more than a century before, was and always would be a wilderness that would overrun and destroy the garden of true religion if a wall separating the two was ever cracked.[18]

Not only should every individual's conscience be at liberty to choose whom and how to worship, but every religious body should be likewise treated. The church should be free from state control. There should be no state interference with the church's doctrine, discipline or government. And also like Williams before, the Evangelicals concluded the church should be free of the state's benevolence toward it, because those religious bodies that took the state's benefits would inevitably become a servant of the state and would no longer fulfill the calling to which God had called it.[19] They saw

little need to develop a political theory. If they would have to choose one, they would no doubt have borrowed the contract theory of Locke. But they were "content with a state that created a climate conducive to the cultivation of a plurality of religions and accommodated all religious believers and religious bodies without conditions and controls."[20]

ENLIGHTENMENT VIEWS

Those within the Enlightenment tradition, men like Franklin, Paine, Jefferson, and Madison, had little interest in providing a theologically informed political theory. However, in shaping separation, and with it some form of religious freedom, they complemented well the theologically grounded views of the Evangelical separatists.[21] It was after all Jefferson who in 1802 availed himself of the wall of separation metaphor that Roger Williams had used more than a century earlier.[22] Whereas the religiously informed separatists had sought to free true religion from the corruptive power of the state, the Enlightenment separatists sought to free the state from the corruptive power of organized religion.[23] As such, most advocated that the state should give no special aid or support to religion. Those encouragements from the state that were common in Congregational New England or Anglican Virginia were to be resisted. There should be no more tax exemptions or subsidies for churches. State law should not be explicitly grounded in religious doctrine. Religious officials should not be used for public service. There should be no chaplains and no more opening of legislative sessions with prayer.[24]

Interestingly, the theory of the Enlightenment-guided activists did not match their practice. No doubt the political reality of governing a religious people and the novelty of having religion absent from public life moderated their theoretical agenda. It was Franklin who suggested that the Constitutional Convention open each day with prayer. Madison, as president, issued three proclamations recommending public humiliation and prayer and one recommending a day of thanksgiving.[25] Jefferson supported state legislation that punished disturbers of religious worship and Sabbath breakers. He also supported a state bill that appointed days of public prayer and fasting.[26]

CIVIC REPUBLICAN VIEWS

The "Civic Republicans," or as some have labeled them "political centrists,"[27] were a "group of politicians, preachers and pamphleteers who strove to cultivate a set of common values and beliefs for a new nation."[28] The label of Civic Republicans seems most fitting. It conveys well the no-

tion that these men, like Washington, Adams, Ellsworth, and Marshall, were not simply attempting to find a common political ground between the other theologically and ideologically driven groups. Instead, these men seemed to sincerely believe that the best course for the new republic was for it to encourage private and public virtue, and the best way to accomplish that was to ground that virtue in the common religious convictions of the American people. While supporting the notion of the liberty of conscience for all and opposing religious influence that would rise to the level of a theocracy, these individuals sought "state support and accommodation for religious institutions, for they were regarded as allies and agents of good government."[29] Therefore, they supported tax exemptions for churches and tax support for religious schools and military chaplains and the offering of prayers at the opening of sessions of government, be they legislative, executive or judicial.[30]

The Civic Republicans seemingly cared little about the specific theological nuances of denominations. The theology that they supported was a morally accented theism that focused extensively on virtues such as honesty, diligence, self-negating love and patriotism. It also saw America as having a unique place in God's providential plan and therefore as a nation that had received and which would continue to receive God's unique blessing.[31] Its sacred texts were the Bible and the Constitution. Its "clergy were public-spirited ministers and religiously devout politicians."[32] Franklin called it "Publick Religion." The notion continues to persist. The twenty-first century term is "civil religion."[33]

CORE VALUES OF THE RELIGION CLAUSES

While the views of these groups in certain places differ significantly, there are some common themes that can serve as values to be secured by the Religion Clauses and therefore also as guides to their interpretation and application. Chief among them are separation, equality, and religious choice.[34]

Separation

All of the views discussed agreed that the there should at least be no formal integration of church and state. Some grounded that notion in the theological doctrine of two kingdoms. Others saw it as the only way to address concerns about intermeddling that would result in the ruin of one or the other institution. Regardless of the source, the history and the Religion Clauses themselves support the proposition that church and state

should be formally separate entities. Formal separation is, however, not a matter of much dispute in the twenty-first century. The questions presented in this era involve the extent to which religion and religious influences should be permitted to have any influence on matters that modern day governments address. In short, the question is whether the value of separation demands the secularization of public political life.[35]

Equality

Incident to the value of separation is the value of equality. If there shall be no institutional unity of church and state, then such disestablishment implies that no single religious vision should be preferred over others. That is the non-controversial application of the equality principle.[36] The principle, in the context of the Establishment Clause, can, however, be applied in two much more controversial ways. First, some have argued that equality demands that non-religion be treated equally with religion so that government cannot prefer the theist to the atheist. Such a position accents the views of the Enlightenment Separatists, largely to the exclusion of the views held by the other segments of the founding generation and pushes in the direction of the secularization that was mentioned above.

The second controversial application of the equality principle is really the flip side of the first—non-religion cannot be favored over religion. In other words, government cannot take religion into account as it provides benefits or presses forward its purposes. It cannot deny its benefits or make participation in its programs unavailable to those who would use the benefit for a religious purpose (e.g., attending a religious institution on a governmentally supplied scholarship) or address a goal of a governmental program from a religious perspective (e.g., faith-based initiatives). As can be imagined, the Supreme Court has struggled as it has sought to bring to bear this equality principle in circumstances of particular cases.

Religious Freedom Non-Coercion

Some have argued that the truly core value of the Religion Clauses is religious liberty or choice and that the other values of separation and equality are actually instrumental to achieving that primary goal of religious freedom. As such, under this view, it would be permitted to sacrifice separation and equality if religious choice is advanced.[37] But religious liberty or choice is not necessarily a self-defining term. Instead, it can be understood to have a spectrum of meanings. On the one hand, it is possible to conceive of religious liberty in some sense in the context of an established church if the

government does not directly coerce one to believe or act in a manner inconsistent with the believer's conscience. On the other hand, a broader definition of religious liberty would mandate that government, in addition to not using forms of direct coercion, should not use forms that indirectly coerce the believer or forms that would communicate that the individual is a political insider or outsider based on the believer's doctrine or practice. Such a definition of religious liberty would prohibit government from sponsoring religious practices or religious displays that have the effect of communicating to non-adherents that they are not full participants in the political community.

THE SUPREME COURT'S TREATMENT OF THE ESTABLISHMENT CLAUSE: A PERSPECTIVAL ANALYSIS

The views outlined and the values discussed have shaped the Supreme Court's treatment of the Establishment Clause. The debate centers around the perspectives of three groups: those in favor of strictly separating church and state, those willing to accommodate religious expression in the marketplace, and those who view government's proper role regarding religion as one of neutrality. These three competing perspectives will be identified as follows: strict separation, accommodation, and neutrality. Each category will be defined and explored through the lens of Supreme Court case law. While a multitude of Supreme Court cases could be explored under each category, only two cases will be used to illustrate the category.

Strict Separation

Strict separationists argue that the Establishment Clause requires complete separation of church and state. Government is a secular entity; religion is a private matter for every citizen to observe freely. Professor Erwin Chemerinsky summarizes the separationists' concern regarding governmental coercion: "When religion becomes part of government . . . there is inevitable coercion to participate in that faith. . . . Moreover, government involvement with religion is inherently divisive in a country with so many different religions and many people who claim no religion at all."[38]

Strict separationists find support in a number of Supreme Court cases. *Everson v. Board of Education* (1947) was the first Supreme Court case to affirm Thomas Jefferson's theory of the "wall of separation."[39] *Engel v. Vitale* (1962) also upheld the strict separation doctrine.[40]

In *Everson v. Board of Education*, the Supreme Court affirmed a New Jersey statute authorizing school districts to reimburse parents of children

who attended any accredited school (public or private) for their children's public transportation to and from school.[41] While the Court ultimately affirmed the statute's constitutionality, the Court's analysis contradicted such a holding by insisting that a strict separation between church and state must be maintained in federal and state governments.

The Court incorporated the First Amendment into the Fourteenth Amendment, thereby making the First Amendment applicable to the states.[42] The Court affirmed Jefferson's words and ruled federal and state governments must keep "high and impregnable" the "wall between church and state."[43] The Court stated, "We could not approve the slightest breach."[44]

New Jersey did not breach the wall of separation when it enacted the statute authorizing school districts to direct school children's transportation to and from school.[45] The statute permitted the Town of Ewing to reimburse parents whose children attended public schools or Catholic parochial schools.[46] The appellant, a Ewing tax-payer, filed suit and argued the school district violated the Establishment Clause and used tax-payer funds to support Catholic education.[47]

In determining a violation did not occur, the Court went to great lengths to identify the First Amendment's purpose and its mandate against state-sponsored religion. The Court provided a brief history of the development of the First Amendment and noted a majority of America's settlers fled Europe to escape religious discrimination and governmental coercion of religion.[48] For centuries before and "contemporaneous to" America's founding, European nations were "filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy."[49] To avoid "turmoil, civil strife, and persecutions" over religion, the First Amendment was created. Its purpose was to prevent federal and state governments from creating a state-sponsored church.[50]

While the Court ultimately detailed the need for a strict separation between church and state to avoid governmental coercion of religion, it identified New Jersey's statutory reimbursement as a public benefit similar to fire and police protection: "parents might be reluctant to permit their children to attend schools which the state had cut off from such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks."[51] According to the Court, the Town of Ewing contributed no direct financial support to the Catholic schools. The legislation merely provided children with a way to get to and from accredited schools.[52] Because the statute, as applied, did not result in government giving aid to the Catholic Church, the Court ruled the statute was constitutional.[53]

Strict separationists point to Justice Jackson's and Justice Rutledge's lengthy dissenting opinions for confirmation that the wall of separation must remain higher than *Everson* envisioned. Justice Jackson criticized the majority for acknowledging the wall of separation between church and state while "yielding support to [church and state] commingling in educational matters."[54] Because the statute only reimbursed parents whose children attended public schools or Catholic schools, it discriminated against families whose children attended private secular schools or private religious schools of other faiths.[55] Justice Jackson also argued the subsidy directly supported the Catholic Church, and the possible ramifications were great: "If the state may aid these religious schools, it may therefore regulate them. Many groups have sought aid from tax funds only to find that it carried political controls with it."[56]

Justice Rutledge agreed and affirmed James Madison's role in creating the First Amendment. Madison was committed to keeping church and state separate. He was opposed to state aid by taxation of a religious institution and stated, "If it were lawful to impose a small tax for religion, the admission would pave the way for oppressive levies."[57] Justice Rutledge argued the Establishment Clause prohibits any public funds from supporting any religious exercise.[58]

For the New Jersey statute to be constitutional, Justice Rutledge suggested state aid could have only been given to students who attended state schools.[59] He concluded by stating, "Now as in Madison's day" the principle of separation must keep the spheres of church and state as separate "as the First Amendment drew them."[60]

In 1962, fifteen years after its decision in *Everson*, the Supreme Court reaffirmed its separationist position. In *Engel v. Vitale*, the Court considered the constitutionality of a New York statute authorizing public schools to permit students to recite a standard prayer at the beginning of each school day.[61] The prayer stated, "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our Country."[62]

The parents of ten students brought an action against the school district challenging the constitutionality of the statute.[63] The parents argued that the New York public school system violated the Establishment Clause by directing students to participate in a religious activity.[64] The Supreme Court agreed.[65] The nature of the prayer was religious, and the government had composed and endorsed the activity.[66] The statute "breach[ed] the wall of separation between church and state."[67]

The Court emphasized the need for church and state to remain separate in light of the historical reasons that "our early colonists [left] England

and [sought] religious freedom in America."[68] Religious groups lacking the political power necessary to affect governmental decisions regarding church and state matters have historically faced political discrimination.[69] The First Amendment was created to "guarantee that neither the power nor the prestige of Federal Government would be used to control, support, or influence the kinds of prayer the American people can say."[70] Because religion is personal, sacred, and holy, to permit a civil magistrate to direct its meaning and application could pervert it with political power and coercion and contradict the purposes of the Establishment Clause.[71]

While the public school prayer did not amount to a total endorsement of one religion, the Court recognized the historical dangers of governmental encroachment of religion and held that the statute was unconstitutional.[72] The Court concluded by quoting James Madison: "Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other sects?"[73]

Justice Stewart dissented and argued against such a strict interpretation of the Establishment Clause.[74] Because the nondenominational prayer did not interfere with the free exercise of religion, government did not establish a religion and therefore did not violate the Establishment Clause.[75] Rather, government provided school children the opportunity to share in the "spiritual heritage of our nation."[76]

Justice Stewart criticized the Court for adopting the metaphor "wall of separation" which is "nowhere to be found in the Constitution."[77] He reminded the Court that each of the Court's sessions begins with an invocation: "God save the United States and this Honorable Court."[78] Also, both the Senate and the House of Representatives begin daily sessions with prayer.[79] As Justice Stewart noted, "countless similar examples could be listed" that evidence the nation's spiritual awareness.[80] The New York public schools did not establish an "official religion;" they provided students the constitutional right to express that awareness by reciting a voluntary prayer.[81]

Accommodation

Those who are in favor of government accommodating religion view Jefferson's "wall of separation" as an analogy made to protect the church from the state's interference. Rather than focus on governmental coercion, accommodationists view the Establishment Clause as merely prohibiting a state-run church and requiring equal treatment among religious and nonreligious activities. Accommodationists argue government has a duty to ac-

commodate the religious convictions of its citizens. The Supreme Court's decisions following *Everson* and *Engel* lend support to these ideas.

In a number of those cases, the Court moved away from strictly separating church and state and toward accommodating religious beliefs. Michael W. McConnell, a federal judge on the United States Court of Appeals for the Tenth Circuit, addresses this trend and writes, "The hallmark of accommodation is that the individual or group decides for itself whether to engage in a religious practice, or what practice to engage in, on grounds independent of the governmental action."[82] The analysis becomes whether the Establishment Clause permits the accommodation.[83]

In *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter* (1989), the Court considered the constitutionality of two holiday displays located on public property in Pittsburgh.[84] The displays included a crèche on the county court house steps and a Chanukah menorah located outside a city building situated next to a Christmas tree and a sign saluting liberty.[85] The Court ruled the crèche display violated the Establishment Clause while the menorah display was constitutional.[86]

The Court applied the non-endorsement test to determine the constitutionality of the displays.[87] The test considers whether the governmental practice has the purpose or effect of endorsing religion.[88] As the Court stated, "Whether the word is 'endorsement,' 'favoritism,' or 'promotion,' the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief."[89]

Regarding the menorah, the Court found Allegheny County had not endorsed the religious perspective, and the display was therefore constitutional.[90] The deciding factor was the display's combination of the menorah, the Christmas tree and the sign.[91] A "reasonable observer" of the display would not interpret the symbols as governmental endorsement of religion.[92] Rather, an observer would recognize the display as "conveying the city's secular recognition of different traditions for celebrating the winter-holiday season."[93]

The county's crèche display was struck down as a violation of the Establishment Clause.[94] A Catholic organization donated the display to the county.[95] The display included a nativity scene with an angel proclaiming, "Gloria in Excelsis Deo."[96] The display was surrounded on three sides by a fence.[97] Two small evergreen trees with red bows were placed beside the fence's end posts. The display was located on the grand staircase of the county courthouse.[98]

The Court evaluated the crèche display in light of its earlier decision in *Lynch v. Donnelly* (1984): "[T]he effect of a crèche display turns on its

setting."[99] In *Lynch*, the Court held a crèche display in Rhode Island did not have the effect of endorsing religion because it stood next to multiple holiday figures and objects.[100]

The Allegheny crèche display stood alone on the steps of the grand stairway.[101] The evergreen trees were not secular objects to detract from the central message: "It is as if the county had allowed the Holy Name Society to display a cross on the Grand Staircase at Easter, and the county had surrounded the cross with Easter lilies."[102] The Court ruled Allegheny County unconstitutionally endorsed the Christian message: "Glory to God for the birth of Jesus Christ."[103]

Four dissenters argued against the majority's use of the non-endorsement test and for application of the non-coercion test.[104] The non-coercion test considers whether government coerces individuals to take part in religious activities: "Non-coercive government action within the realm of flexible accommodation or passive acknowledgment of existing symbols does not violate the Establishment Clause unless it benefits religion in a way more direct and more substantial than practices that are accepted in our national heritage."[105]

Under that test, the dissenters argued city officials in both the crèche case and the menorah case sought only to "celebrate the season" by acknowledging the secular and religious nature of Chanukah and Christmas.[106] Justice Kennedy reasoned that while the Religion Clauses do not mandate governments to recognize these holidays, this country's "strong tradition of government accommodation and acknowledgment permits government to do so."[107] The facts in both cases did not indicate coercion on the part of government.[108] Citizens were not compelled to take part in religious activities.[109] Neither the city nor the county used tax funds to pay for the displays.[110] Observers who disagreed with the spiritual meanings behind the symbols were free to turn away from the displays.[111] Because there was no risk of coercion, both displays should have been found to be constitutional.[112]

In 2005, the Court reaffirmed its willingness to accommodate religion in *Cutter v. Wilkinson*.[113] Justice Ginsburg delivered the unanimous opinion of the Court.[114] The petitioners, current and former detainees at Ohio prisons, alleged that prison officials failed to accommodate their religions in accordance with the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA).[115]

RLUIPA provides, "'No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution' unless the burden furthers 'a compelling governmental interest,' and does so by 'the least restrictive means.'"[116] In response to the petitioners'

allegations, the prison officials challenged the constitutionality of the statute and argued that the statute advanced religion in violation of the Establishment Clause.[117] The Court disagreed with the prison officials and held RLUIPA did not "exceed the limits of permissible government accommodation of religious practices."[118]

The Court discussed the legislative history behind RLUIPA and the necessity to accommodate institutionalized persons of religious faiths who are dependent upon government's permission to exercise their religions.[119] The Court justified the statute's purpose and use.[120] RLUIPA does not "elevate accommodation of religious observances over an institution's need to maintain order and safety."[121] The statute does not differentiate between different faiths and affords persons of all faiths protection against discrimination by prison officials.[122] In affirming RLUIPA's constitutionality, the Court summarized the statute's effect: "It confers no privileged status on any particular religious sect, and singles out no bona fide faith for disadvantageous treatment."[123]

Neutrality

Proponents of the neutrality doctrine argue that "the state may favor religion with public funds while remaining squarely within the bounds of the Establishment Clause, as long as the state favors all religions equally without betraying a preference for any particular religion or religions to the detriment of others."[124] They insist that the Court should revoke its use of the "wall of separation" metaphor and the principles of separation that the metaphor suggests.[125] Professor Frank Guluizza argues that the Court's application of the strict separation doctrine has resulted in hostility toward religion: "all the [C]ourt has managed to do is to confuse the concepts of separation and neutrality, and needlessly engender opposition to religion, generally, when it was probably necessary only to disestablish the Christian church from its previously preferred relationship with the state."[126]

Once disestablishment occurred, the Court should have jettisoned the separation doctrine and adopted a position of neutrality among issues involving church and state.[127] To effectuate a workable neutrality doctrine, Guluizza proposes that, "government must be neutral in its relationship between competing religions, churches, [and] beliefs."[128]

The Court has alluded to this doctrine repeatedly. In *Lemon v. Kurtzman* (1971), the petitioners challenged the constitutionality of Pennsylvania and Rhode Island statutes providing governmental aid to religiously affiliated schools.[129] The Pennsylvania statute authorized the reimbursement for nonpublic schoolteachers' salaries and costs of instructional materials for secular

subjects.[130] The Rhode Island statute provided nonpublic schoolteachers a supplement of fifteen percent of their yearly salaries.[131] Both statutes were held to have violated the Establishment Clause.[132]

The Court conceded a strict separation between church and state is impossible because government and religious organizations will inevitably maintain some relationship.[133] The Court articulated a neutrality doctrine and created a three-part Establishment Clause test.[134] For a statute to be constitutional: "first, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster an excessive government entanglement with religion."[135]

With regard to the first prong of the test, the Court held the statutes had secular purposes—to enhance secular education.[136] The Court bypassed analysis of the second prong. Under the third prong, the statutes resulted in "excessive entanglement between government and religion."[137] The character and purposes of the institutions that benefited, the nature of the state aid, and the resulting relationship between the religiously affiliated schools and government "foster[ed] an impermissible degree of entanglement."[138]

The Court emphasized the need for government not to become entangled with religious matters and to remain neutral due to the disastrous potential for political divisiveness regarding religious practices.[139] To avoid entanglement, "Under our system, the choice has been made that government is to be entirely excluded from the affairs of the church. The Constitution decrees that religion must be a private matter for the individual."[140]

The move towards neutrality continued in *Rosenberger v. Rector & Visitors of the University of Virginia* (1995). The Court ruled a public university funding program could not constitutionally deny funding to a Christian campus newspaper when funding was made available to all campus newspapers.[141] The university violated the Establishment Clause by discriminating against religious publications rather than dealing with all publications in a neutral manner.[142]

The university withheld funding to student newspapers that "primarily promote[d] or manifest[ed] a particular belief in or about a deity or an ultimate reality."[143] The petitioners sought funding for their religious newspaper, Wide Awake Productions.[144] The newspaper's purpose was to "to facilitate discussion which fosters an atmosphere of sensitivity to and tolerance of Christian viewpoints" and "to provide a unifying focus for Christians of multicultural backgrounds."[145] As the Court noted, "The first issue had articles about racism, crisis pregnancy, stress, prayer, C. S. Lewis's ideas about evil and free will, and reviews of religious music."[146] The university denied the request for funding due to the paper's religious nature.[147]

The Court considered "whether the Establishment Clause compels a state university to exclude an otherwise eligible student publication from participation in the student activities fund, solely on the basis of its religious viewpoint, where such exclusion would violate the Speech and Press Clauses if the viewpoint of the publication were nonreligious."[148] Justice Kennedy noted the need for government neutrality regarding religion: "A central lesson of our decisions is that a significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion."[149]

Concerns regarding government's role in advancing religion were misplaced.[150] The university's funding program promoted diverse student thought.[151] The program did not promote or advance religion.[152] The program valued the difference between government-sponsored speech and private speech.[153] The Court addressed the concern that Wide Awake's religious affiliation would be endorsed by the University and held it was not a plausible fear.[154] The state was not endorsing the speech, and it had not coerced the speech.[155] The Court ruled the denying of funds to religious groups "would risk fostering a pervasive bias or hostility to religion, which could undermine the very neutrality the Establishment Clause requires."[156]

While Supreme Court precedent regarding the relationship between church and state has varied in analysis and application, the common theme throughout church state jurisprudence remains: every citizen ought to worship freely without fear of governmental coercion. Religion will remain a potent force in American society. As John Witte notes, "It involves the responses of the human heart, soul, mind, conscience, intuition, and reason to revelation, to transcendent values, to what Rudolf Otto once called the 'idea of the holy.'"[157] To ensure the individual's quest to engage in this sacred pursuit, the Supreme Court must continue to affirm "this bold constitutional experiment in granting religious liberty to all."[158]

NOTES

1. Stephen L. Carter, "Liberal Hegemony and Religious Resistance: An Essay on Legal Theory," in *Christian Perspectives on Legal Thought,* ed. Michael W. McConnell, et al. (New Haven: Yale University Press, 2000), 25–53.

2. Acts 5:23 and Carter, "Liberal Hegemony."

3. Some argue that it is best to understand this phrase as a single Religion Clause. Others have treated it as two clauses, the Establishment Clause followed by the Free Exercise Clause. While there are very good reasons for treating the two as one, because this chapter will focus primarily on the first half of the clause we will treat the phrase as consisting of two clauses and will focus on the Establishment Clause.

4. The constitutional term for this is "incorporation." The Bill of Rights were understood to be applicable only to the federal government. *Barron v. Mayor and City Council of Baltimore*, 32 U.S. 243 (1833). They are now largely understood, with minor exceptions, to be made applicable to the states, having been incorporated in the Fourteenth Amendment's language of "due process." For a good introduction to this concept see Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 3rd ed. (New York: Aspen, 2006), 491–507.

5. This is not intended to imply that the only constitutional text to consider is the Religion Clause. There are other provisions of the U.S. Constitution that may shape the outcome of particular disputes. For example, Article VI of the Constitution provides in part that "no religious test shall ever be required as a Qualification to any Office or public Trust under the United States." In addition, the constitutions of the fifty states provide a constitutional source of protection for the religious liberty of individuals within each respective state.

6. Former Chief Justice Warren Burger once observed that the clauses were "not the most precisely drawn portions of the Constitution." *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 668 (1970).

7. For differing views of constitutional interpretation that exist on the Supreme Court, see Antonin Scalia, *A Matter of Interpretation*, ed. Amy Gutmann (Princeton: Princeton University Press, 1997) and Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (New York: Knopf, 2005).

8. The First Amendment, along with eleven other amendments, were authored by the First Constitutional Congress and sent to the states for their approval in September 1789. Ten of those first twelve amendments—commonly referred to as the Bill of Rights—received the required three-fourths approval by the states when Virginia ratified them in December 1791. For a brief, but helpful, chronology of the Constitution, see Barnes and Noble, *The Constitution of the United States* (New York: Barnes & Noble Books, 1995), 121–127.

9. Michael W. McConnell, "Establishment and Disestablishment at the Founding, Part I: Establishment of Religion," *William & Mary Law Review* 44 (2003): 2105, 2107.

10. McConnell, "Establishment and Disestablishment." McConnell's excellent historical work is most helpful to understanding three things: (1) establishment was in some sense normal to the founding generation; (2) most members of the founding generation believed that some type of religious conviction was necessary for public virtue; (3) if establishment was to no longer be normative, the founding generation had to figure out what would take its place if public virtue was to be maintained and the republic was to succeed.

11. Michael W. McConnell, John H. Garvey, and Thomas C. Berg, *Religion and the Constitution* (New York: Aspen, 2002), 15–17.

12. McConnell, "Establishment and Disestablishment," 2108.

13. This four-category approach is the one offered by John Witte. John Witte, "Essential Rights and Liberties of Religion," *Notre Dame Law Review* 71 (1996): 371, 377–388. See also Arlin Adams and Charles Emmerich, *A Nation Dedicated*

to Religious Liberty (Philadelphia: University of Pennsylvania, 1990) for an analysis using three categories: (1) Enlightenment Separationists; (2) Political Centrists; and (3) Pietistic Separationists. Witte's approach seems superior, because it takes account of the large influence exerted by those whose thoughts on religion and society were still shaped by their Puritan thought and experience.

14. Witte, "Essential Rights," 377–381.
15. Ibid.
16. Ibid.
17. Adams and Emmerich, *A Nation Dedicated to Religious Liberty*, 29.
18. Mark D. Howe, *The Garden and the Wilderness: Religion and Government in American Constitutional History* (Chicago: University of Chicago Press, 1965).
19. Witte, "Essential Rights," 382–383.
20. Ibid., 383.
21. Ibid., 384.
22. Adams and Emmerich, *A Nation Dedicated to Religious Liberty*, 22.
23. Ibid.
24. Witte, "Essential Rights," 383–385.
25. Adams and Emmerich, *A Nation Dedicated to Religious Liberty*, 25.
26. Witte, "Essential Rights," 385.
27. Adams and Emmerich, *A Nation Dedicated to Religious Liberty*, 26–28.
28. Witte, "Essential Rights," 385.
29. Ibid., 386.
30. Ibid., 387.
31. For a full account of America's inclination to see itself as divinely appointed for God's purpose, see Ernest Lee Tuvenson, *Redeemer Nation* (Chicago: University of Chicago Press, 1968).
32. Witte, "Essential Rights," 386.
33. Robert Bellah has written extensively about the contemporary contours of this notion. The Supreme Court addressed the subject directly in *Lee v. Weisman*, 505 U.S. 577 (1992) and refused to permit the "establishment" of this civil religion.
34. Thomas C. Berg, *The State and Religion*, 2nd. ed. (St. Paul: Thompson-West, 2004) 15. For additional justifications see William P. Marshall, "Truth and the Religion Clauses," *DePaul Law Review* 43 (1994), 243. In addition to the ones commonly offered, Marshall catalogues such justifications as eliminating special suffering, reducing the risk of civil disobedience and promoting self identity. He also argues that the search for truth ought to guide the interpretation of the clause.
35. Berg, *The State and Religion*, 18.
36. Ibid., 19.
37. Ibid., 21.
38. Erwin Chemerinsky, "The Establishment Clause," *Constitutional Law Principles and Policies* (New York: Aspen Law & Business, 2002), 1150.
39. *Everson v. Board of Education*, 330 U.S. 1 (1947).
40. *Engel v. Vitale*, 370 U.S. 421, 422 (1962).

41. *Everson*, 330 U.S. at 15.
42. Ibid.
43. Ibid. at 18.
44. Ibid.
45. Ibid.
46. Ibid. at 3.
47. Ibid.
48. Ibid. at 8–9.
49. Ibid.
50. Ibid. at 16.
51. Ibid. at 17–18.
52. Ibid.
53. Ibid. at 18.
54. Ibid. at 19.
55. Ibid. at 20.
56. Ibid. at 28.
57. Ibid. at 40.
58. Ibid. at 41.
59. Ibid. at 60.
60. Ibid. at 63.
61. *Engel*, 370 U.S. at 422.
62. Ibid.
63. Ibid. at 423.
64. Ibid. at 424.
65. Ibid.
66. Ibid.
67. Ibid. at 425.
68. Ibid.
69. Ibid. at 427.
70. Ibid. at 429.
71. Ibid. at 432.
72. Ibid. at 436.
73. Ibid.
74. Ibid. at 445.
75. Ibid.
76. Ibid.
77. Ibid. at 446.
78. Ibid.
79. Ibid.
80. Ibid.
81. Ibid.
82. Michael W. McConnell, "Accommodation of Religion: An Update and a Response to the Critics," *George Washington Law Review* 60 (1992): 685, 688.
83. Ibid. at 687.

84. *County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573 (1989).
85. Ibid. at 578.
86. Ibid.
87. Ibid. at 592.
88. Ibid.
89. Ibid. at 593–594.
90. Ibid. at 620.
91. Ibid. at 615.
92. Ibid. at 620.
93. Ibid.
94. Ibid. at 602.
95. Ibid. at 580.
96. Ibid.
97. Ibid.
98. Ibid.
99. Ibid. at 598.
100. *Lynch v. Donnelly*, 465 U.S. 668 (1984).
101. *Allegheny*, 492 U.S. at 598.
102. Ibid. at 599.
103. Ibid. at 601.
104. Ibid. at 662–663 (J. Kennedy, dissenting).
105. Ibid.
106. Ibid. at 663.
107. Ibid. at 664.
108. Ibid.
109. Ibid.
110. Ibid.
111. Ibid.
112. Ibid.
113. *Cutter v. Wilkinson*, 544 U.S. 709 (2005).
114. Ibid.
115. Ibid.
116. Ibid. at 712.
117. Ibid. at 713.
118. Ibid. at 714.
119. Ibid. at 720–721.
120. Ibid. at 722–724.
121. Ibid. at 722.
122. Ibid. at 723.
123. Ibid.
124. Richard Albert, "Religion in the New Republic," *Lousiana Law Review* 67 (2006) 1, 42.
125. Frank Guluizza, *Over the Wall* (Albany: State University of New York Press, 2000), 117.

126. Ibid., 118.
127. Ibid.
128. Ibid., 123.
129. *Lemon v. Kurtzman*, 403 U.S. 602, 606 (1971).
130. Ibid. at 606–607.
131. Ibid. at 607.
132. Ibid.
133. Ibid. at 614.
134. Ibid. at 612–613.
135. Ibid.
136. Ibid. at 613.
137. Ibid. at 614.
138. Ibid. at 615.
139. Ibid. at 623.
140. Ibid. at 624.
141. *Rosenberger v. Rector & Visitors of the University of Virginia,* 515 U.S. 819, 846 (1995).
142. Ibid.
143. Ibid. at 823.
144. Ibid. at 825.
145. Ibid. at 825–826.
146. Ibid. at 826.
147. Ibid. at 827.
148. Ibid. at 837.
149. Ibid.
150. Ibid. at 840.
151. Ibid.
152. Ibid.
153. Ibid. at 841.
154. Ibid.
155. Ibid. at 841–842.
156. Ibid. at 845–846.
157. John Witte, *Religion and the American Constitutional Experiment* (Boulder: Westview Press, 2000), 230.
158. Ibid.

FURTHER READING

Mark D. Howe's *The Garden and the Wilderness: Religion and Government in American Constitutional History* is a classic analysis of the religious and secular ideas that served as foundations for the political doctrine of separation. Howe's analysis is updated and focused on William Penn's religious freedom experiment in Pennsylvania in Arlin Adams and Charles Emmerich's *A Nation Dedicated to Religious Liberty.* For a broad but good introduction to the constitutional and political issues

surrounding religious liberty, see Thomas C. Berg's *The State and Religion*. For an analysis on how the doctrine of strict separation can be hostile to religion, see *Over the Wall* by Frank Guluizza. John Witte's "Essential Rights and Liberties of Religion," in *Notre Dame Law Review* 77 (1996), is an excellent summary of the political and theological influences in the founding generation that shaped the crafting and understanding of the Religion Clauses of the First Amendment. For the most thorough and detailed treatment of the history of establishment of religion that would have been known to the founding generation see Michael W. McConnell, "Establishment and Disestablishment at the Founding, Part I: Establishment of Religion," *William & Mary Law Review* 44 (2003): 2105.

2

Religion, Rhetoric, and Ritual in the U.S. Government

Ann W. Duncan

In America today, witnesses in courts of law and newly elected officials swear oaths on the Bible, ending with "so help me God." Legislative and judicial bodies begin their sessions with prayers led by government-paid chaplains. U.S. currency bears the motto "In God We Trust." In a country that prides itself on the separation of church and state, the Supreme Court has upheld these practices and others that, at first glance, appear to be an establishment of religion. Why are these seeming violations of the Establishment Clause allowed to continue? Is this blurring of the line between politics and religion a danger to or a logical outgrowth of the separation of church and state?

To understand this complex situation, one must differentiate between historical fact and practiced reality. Despite the celebrated American distinction of religious freedom and anti-establishment principles, religious symbols, ideals and even explicit religious language find their way into the history and central documents of the nation's institutions and the rhetoric of the nation's governmental leaders. While an advocate of strict separation might point to religious language in the Constitution or early American speeches as historic relics, religious language can also be found in governmental practice today. While the Supreme Court has debated some examples such as "under God" in the Pledge of Allegiance and the payment of congressional chaplains with taxpayer money, other examples have been

consciously untouched by the highest court in the country. This apparent selective attention to cases involving intersections of religion and politics raises questions not only as to Supreme Court criteria in choosing cases but also why the Court and the public at large feel comfortable with selective blurring of the separation of church and state.

Attempting to explain this phenomenon, Constitutional historian Leonard Levy has observed that the Supreme Court has exercised "good judgment" in avoiding some of these Establishment Clause cases. Levy argues that many of these issues, if brought to trial, would be found to violate the clause. However, Levy continues, "the Court has enough cunning to avoid rendering such judgments. Public opinion and historical custom dictate a prudent abstention."[1] Such a conclusion raises serious questions as to the nature of the separation of church and state that many Americans take for granted and the extent to which our modern nation differs from the early nation in which explicitly religious language was more widely acceptable. Why, when some issues of establishment are so hotly contested, are some of these more obvious uses of religion in government largely maintained and, in some cases, ignored? What is the utility of such convictions and how might they affect the status of church and state issues in America? Do these religious references amount to a "*de facto* establishment" of religion?[2]

By examining theoretical understandings of the religious element of American politics and some of the particular case studies of public use of religion in government settings, we will explore these questions in an attempt to understand better those many shades of grey in the separation of church and state. Beginning with an overview of theoretical ideas explaining this phenomenon of civil religion, this chapter will present a chronological development of these more amorphous issues involving the intersection of religion and politics, detailing relevant theological and political developments and court cases along the way. Through a thematic retelling of American political and religious development, we will discover that these unique enigmas in the land of separation have long been seen as the characteristics of America that give its policies meaning and purpose and define the distinctive American identity.

AMERICAN CIVIL RELIGION AND THE POWER OF RHETORIC

While many see the United States as a land of clear separation of church and state, from another perspective, the United States of America may appear to be a nation of contradictions and paradox. Numerous scholars of sociology, political science, and religious history have attempted to describe

this unique relationship between religion and politics. Underscoring the high level of religious sentiment and practice in America, G.K. Chesterton called America "a nation with the soul of a church."[3] Similarly, sociologist Robert Bellah argues, "the separation of church and state has not denied the political realm a religious dimension."[4] While this may seem a paradox to some, to others it points to the existence of a civil religion.[5] According to Will Herberg, in civil religion, "national life is apotheosized, national values are religionized, national heroes are divinized, and national history is experienced as a . . . redemptive history."[6] The civil religion thus functions to allow for an interaction with the gods that strengthens and heightens one's feelings about themselves and their society—to allow for greater unity against common enemies and a concern for public morality.[7] This tendency to "harmonize the earth with Heaven" led Alexis de Tocqueville to label religion as primary among America's political institutions.[8]

According to its proponents, American civil religion manifests not only in the rhetoric of American leaders and the ideology of the country but also in its sacraments and symbols. The flag and Statue of Liberty are sacred, as are certain historical documents such as the Declaration of Independence and the Constitution. By sanctifying these elements of American history, Americans create a type of myth about the origins and purpose of the country that is expressed in a particular and, sometimes, religious language.[9] Through this language and myth, the civil religion serves as a source of identity, nationalism and integration of religious and national goals and beliefs, gives purpose to political action, and provides a compass for moral deliberation.

Indeed, from the beginning of the United States' history, the political leaders have used language that could be construed as religious. In his First Inaugural Address, George Washington expressed these ideals by suggesting, "no people can be bound to acknowledge and adore the Invisible Hand which conducts the affairs of men more than those of the United States."[10] This acknowledgment of an "Invisible Hand" that leads Americans to their destiny can be seen throughout presidential speeches up to the present. In his Second Inaugural Address, George W. Bush referred to "the Author of Liberty" and concluded with a simple, "May God bless you, and may He watch over the United States of America."[11]

With their religious tone, these words of our first and most recent president center on the divine as an entity with a special relationship to America and a strong role in the future of the country. But who is this "God" and from what religion does he come? Existing in a country that advocates the separation of church and state, the American civil religion conceives of a God neutral to all religions and, in some way, generic and universal enough

to allow all religious individuals direct appeal. Describing the American God, Bellah writes that he "is not only rather 'unitarian,' he is also on the austere side, much more related to order, law and right than to salvation and love."[12] While this generic type of God can certainly be said to appeal to a broad spectrum of humanity, the growing diversity of religious beliefs within the country raises questions as to the acceptability of such religious language in a country espousing a separation between church and state.

Reference to God by governmental leaders often arises from more than simple personal devotion. According to Bellah, the idea of a country as God's chosen land has two rhetorical uses: it can be used to exert dogmatic influence over the "pagans" and "infidels" by claiming superior knowledge and right to power, and it can be used to express the desire to set an example throughout the world. In this latter view, America not only has a certain superiority and status arising from this chosenness but also a duty to share its wealth and wisdom with the unenlightened and uninspired.[13] Thus, not only does the civil religion in some ways legitimate references to God in governmental ritual and ceremony, but it also emerges in political rhetoric—particularly rhetoric concerning foreign policy. Bellah's schema for understanding the purpose of this civil religion underscores the role of the president as the paramount individual who emphasizes the preeminence of American ideals and a sense of divine duty to aid the world.

In this way, the American civil religion most clearly manifests in the rhetoric of the nation's leaders. As Robert Alley argues, this civil religion "has a history but no predictable future except as a function of the presidential will."[14] While such a statement certainly excludes some important manifestations of the civil religion such as articulations by other political leaders and language in the mottos and rituals of governmental practice, Alley makes an important point. It is the president who stirs the emotions of the people. It is he who rallies them to a cause, and thus the language often emerges most clearly in times of war and crisis. The impassioned language of the president at times of national crisis largely determines the opinions and emotions of the people and shapes the way Americans view their involvement in the world. Moreover, as an individual, the president is able to use religious language as personal expression in a way that religious legislation or policy cannot.

However, the role of the president has changed throughout American history. In their study of civil religious language and the presidency, Richard Pierard and Robert Linder argue that the state of modern media and the ease and speed with which Americans have access to the words and image of the president have affected their perceptions of the president's role. In modern times, "individual citizens have perceived their destinies to

be bound up with that of their president . . . All of this quasi-religious political devotion and emotion is then channeled through many religious and political tributaries into the ocean of the presidency. This office is the single object of their flow."[15] A continuity in emphasis can be traced from Washington to our current president.

Though civil religious language often appears in speech, it also appears in less obvious ways. Other rituals, ceremonies and even monuments in governmental practice and on governmental properties express similar sentiments about the special mission and history of the nation and its undeniably religious roots. As the following historical overview will show, justifications for prayers before legislative sessions, the display of religious monuments and documents in governmental buildings and even national days of prayer and thanksgiving have been advocated and maintained through appeal to the ideals of civil religion. This historical overview will use scholarly perspectives, legal cases, and political and religious trends to demonstrate not only an adaptability of this civil religion to the needs and demographics of the time but also a constancy in the language and ideals of the American government.

INSPIRATION AND SEPARATION: COLONIAL AMERICA AND THE NEW REPUBLIC

This brief overview of theories of American civil religion provides a framework for understanding the non-legislated remnants of religion found in governmental practice and the theoretical roots of those concrete practices that have maintained reference to God throughout American history. We will now move from the theoretical to the historical and track the developments and changes in the use of religious language in governmental practice and rhetoric. Many scholars have located the beginning of civil religion in the earliest European settlements in America. In his study of what he terms the "American jeremiad," Sacvan Bercovitch points to the early Puritans as the first civil religion practitioners in America. As he writes, "Theirs was a peculiar mission, they explained, for they were a 'peculiar people,' a company of Christians not only called but chosen, and chosen not only for heaven but as instruments of a sacred historical design." [16] Arguing against characterizations by Perry Miller and others, Bercovitch describes this jeremiad as "corrective, not destructive," emphasizing that God's punishment for wrongdoing was certain but that "their punishments confirmed this promise."[17] With both an assurance of divine providence and an assurance of divine retribution if the nation fell short of its responsibility, the civil religion took on a restrained tone.

Yet many early Americans did not see this idea of divine judgment as a call for humility so much as a call to great things. John Winthrop, governor of the Massachusetts Bay Colony, expressed his idea of the ideal Puritan community in terms of a covenant philosophy. Speaking to his fellow immigrants as they traveled by boat to America, he famously remarked, "we shall be as a city upon a hill, the eyes of all people are upon us."[18] He then articulated the punishment that would await them if they failed in their duties. The conflation of civic and religious power was not problematic for these religious reformers in light of their firm belief that God's kingdom would come soon and all would be righted.[19]

Yet the Puritan perspective was not monolithic. For those who came to America seeking religious freedom, differentiation between religious and political power was crucial. It was these individuals who spurred the later movement for separation. Indeed, scholars such as Patricia Bonomi and Jon Butler argue that these plentiful and diverse religious groups necessitate as much attention, if not more, than the Puritans. As a result of this dramatic diversity combined with a common depth of religiosity, a new situation emerged. Between 1680 and 1760, a new manifestation of the state church formed in America.[20] Though the ideas of covenant and their role as a chosen people remained in religious rhetoric, the increasing diversity of American religion changed the state church and Puritan ideals were largely replaced by "Christian republicanism and Christian common sense."[21]

This transition was gradual. As the colonies began to multiply, a governing body became necessary to maintain order. The Continental Congress faced the task of reconciling and honoring the various usages of religious language and types of government in the colonies. Meeting from 1774 until the beginnings of our current Congressional system in 1789, this body had the difficult task of maintaining order over diverse and sometimes conflicting states while allowing these states the sovereignty they fervently demanded. Moreover, this Congress helped facilitate, negotiate, and conclude the War for Independence with Great Britain. In attempting both to leave religious matters to the states and also to lead the country effectively through this difficult time period, some recourse to Divine Providence and religious observance led to a complex and multifaceted approach to the relationship between church and state.

Like our present government, the Continental Congress sought both to prohibit the establishment of religion and to maintain religious liberty. For this Congress, these ideals were separate and not necessarily mutually dependent. The conflation of groups coming to America seeking a land without establishment to allow for their religious freedom and those groups who sought religious freedom in order to establish their own religion made such

a distinction vitally important. Much of the attraction of the young country was the ability to establish one's own church-centered colony without outside influence or regulation. This did not necessarily mean the toleration of others and, indeed, often led to persecution of others to maintain the ideal.[22]

The move from establishment to disestablishment was partially a reaction to changed understandings of religion. The individualism and democratizing of American Christianity as a result of the Great Awakening of the 1730s and 1740s marked a growing emphasis on individual religious experience and a more democratic religious community. Prominent theologians such as Jonathan Edwards advanced a post-millennialist theology that advocated social and religious action to improve the world in order to hasten Christ's second coming.[23] Such a pro-active attitude toward Christianity fit well with ideas of the responsibility and active role for the United States on the world stage. As a result of these trends, Puritan ideals of hierarchy and strict rule declined and, in turn, so too did the belief in establishment.[24] This disestablishment increased as evangelicalism flourished and groups desired the freedom to express and forward their ideas.[25]

The years leading up to the Revolutionary War were marked by change in American religious life and the articulation of religious ideals that directly influenced the understanding of political action and the nation. After the Great Awakening, a profusion of denominational factionalism led many to bring their religious convictions to the political arena.[26] As a result, "In eighteenth-century America—in city, village, and countryside—the idiom of religion penetrated all discourse, underlay all thought, marked all observances, gave meaning to every public and private crisis."[27] Such factionalism would turn to unity under the American nation as the Revolutionary War drew near.

Politically, many colonists felt compelled to recommend caution in the face of the daunting enemy of Britain. Religiously, many felt compelled to call for action to bring down tyranny. In a pattern seen again during the two world wars, Americans wrestled with weighing religious and political ideals and eventually united both in a unified and virulent war effort. Indeed, as the war began, it was often clergy members who rallied the country into nationalist fervor. As Bonomi writes,"By turning colonial resistance into a righteous cause, and by crying the message to all ranks in all parts of the colonies, ministers did the work of secular radicalism and did it better: they resolved doubts, overcame inertia, fired the heart, and exalted the soul."[28]

This interaction between religious practice and political activity continued within the official bodies of colonial America, particularly the Continental Congress. The Congress frequently debated traditionally religious

concepts such as "sin, repentance, humiliation, divine service, morality, fasting, prayer, mourning, public worship, funerals, chaplains, and 'true' religion" and never hesitated to use biblical quotations and allusions in its decisions.[29] The Congress formally utilized religion in such ceremonies as group prayer and sermons during gathered sessions, and on September 5, 1774, the Congress regulated prayer in legislative sessions through the appointment of a chaplain, a practice not questioned by the Supreme Court until the second half of the twentieth century.[30] Another practice inaugurated at this time, a day of humiliation and prayer, started on July 20, 1775, and was continued on into the early republic.[31]

Also common during this era were religious tests for public office, the requirements varying throughout the colonies. Of the original seven colonies, one required a Protestant affirmation, and three others mandated some form of Christian identity. Even as many states adopted new state constitutions in the years following independence, most kept these religious tests intact. Massachusetts, South Carolina and others justified exclusion of clergy from public office through an appeal to the desire to ensure clergy were rightly focused on their higher callings. However, anti-Catholic sentiments sometimes were expressed through specific legislation such as the 1777 provision by New York to prohibit "priests of any denomination whatsoever" from running for office.[32] Such provisions were also motivated by anticlericalism though, surprisingly, not because of a desire for separation.[33] Any appeals to the principle of separation—though in a negative way—came only from opponents to the provisions, such as Noah Webster, who wanted clergy involvement to increase their positive impact on society. On this view, separation would limit this necessary influence.[34] Thomas Jefferson's "Statute for Establishing Religious Freedom" of 1786 eliminated the practice of religious tests in Virginia.[35] As more states were formed in the late eighteenth century, many adopted religious tests and maintained them into the nineteenth and twentieth centuries.[36] It was not until 1961 that the Supreme Court weighed in on the matter and settled its constitutionality once and for all by disallowing the practice.

As some of these early examples show, the clean separation we imagine in the founding of the nation was not so clean. Religious language and laws permeated many aspects of colonial and early-republic America. Thus, while some historians place the beginning of this civil religion in the nineteenth century and the Civil War, others such as Catherine Albanese have argued that this American civil religion was firmly in place by the Revolutionary War. Albanese writes that the continued importance of the Revolutionary War as the founding of the nation and Washington as the preeminent founder provides unity and strength to Americans even to this day; in

other words, this early civil religion influenced both its own time and the present day.[37]

Others have argued that the Revolution was largely a secular event. For example, Jon Butler notes that though religious language appears in the Declaration of Independence, the God referred to is a deist god of nature that is distinct from the Christian God worshiped by so many Americans. In this way, "the Declaration of Independence provides clear-cut evidence of the secondary role that religion and Christianity played in creating the revolutionary struggle."[38] Yet Butler also sees the time between the Revolution and the end of the century as a period of rearticulation of Christian views through Christian interpretations of the Revolution and the future American government, critiques of nonreligious individuals, and the proliferation of "distinctively American" new religious groups.[39]

Whatever one's historical perspective might be on the nature of the Revolution, the presence of religious language is undeniable. In many ways, this was the legacy of a century ripe with religious enthusiasm and mired in a deep and passionately believed millennialism. The perhaps natural fear of upcoming war and the difficulties involved in creating a new nation were replaced in the mid-1770s by hope and joy at coming changes.[40] In this way, the country began to use millennialism as a means of connecting their present status and their ideal of the Kingdom of God.[41] Past worries about the coming end time were replaced by an optimistic view towards a bright future and a belief that Americans had a unique role in bringing about the Kingdom of God on earth.

Such language found its way into the official proclamations of the Congress. In its Declaration of the Causes and Necessity for Taking up Arms, adopted on July 6, 1775, the Continental Congress repeatedly mentioned the influence of the "Divine Author," "Divine Favour" and "Providence" as preparing the country for battle and guiding it through the war. The declaration ended with the following invocation: "With an humble Confidence in the Mercies of the supreme and impartial Judge and Ruler of the Universe, we most devoutly implore his Divine Goodness to protect us happily through this great Conflict, to dispose our Adversaries to reconciliation on reasonable Terms, and thereby to relieve the Empire from the Calamities of civil war."[42] Indeed, as the war loomed large, ministers and politicians alike began to use the language of the antichrist to describe the enemy, a trend that would emerge again in later American wars.[43] As the war raged on and the difficulties of its aftermath began to emerge, "the theme of retributive judgment began to compete with that of impending millennial glory" and divisions began to grow again between differing denominational divisions.[44]

In the early years of the nation, the founders struggled to find the appropriate relationship between religion and politics in the diverse nation. In 1782, the initial national motto, *E Pluribus Unum,* or "One from many," reflected the unification of colonies into one country. This was a rather secular motto in comparison to the later motto, "In God We Trust," and was approved by Congress on June 10, 1782, and put onto coins in 1795. This motto celebrated the achievement of unity following the contentious colonial period. Yet with this unity came continued debate over the relationship between religion and government in the young nation.

The country's founders debated the question of religious tests for public office during the drafting of the U.S. and state constitutions. In his efforts to rid the government of untoward religious influence, Thomas Jefferson stipulated in the Virginia Constitution adopted in June 1776 that "all Ministers of the Gospel of every Denomination be incapable of being elected Members of either House of Assembly, or the Privy Council."[45] The Constitution of the United States later declared that "no religious test shall ever be required as a qualification to any office or public trust under the United States."[46] James Madison expressed concern with the exclusions of Jefferson's Virginia Constitution and asked whether this would "violate a fundamental principle of liberty by punishing a religious profession with the privation of a civil right."[47] Even at this early date, what seemed a danger of establishment for one seemed a violation of free exercise for another.

As Jefferson, Madison, and, perhaps most importantly, Washington arose as the nation's first leaders, the myth of the founding fathers began to develop. In their survey of civil religion and the presidency, Pierard and Linder describe this development and the conscious linking of these leaders with biblical figures. In the popular imagination, "Washington had become the Moses-liberator figure, Jefferson the prophet, and Lincoln [who would later serve as] the theologian of the national faith."[48] Washington himself often used biblical language of covenant in describing the nature of America. Articulating the idea of America as a chosen nation of God, he repeatedly asked for divine protection and favor for the country in his public discourses. In his annual message to Congress in 1794, Washington proclaimed, "Let us unite . . . in imploring the Supreme Ruler of nations, to spread his holy protection over these united States: to turn the machinations of the wicked to the confirming of our constitution: to enable us at all times to root out internal sedition, and put invasion to flight: to perpetuate and to verify the anticipations of this government begin a safe guard to human rights."[49] Indeed, it was Washington who, when taking his oath of office on April 30, 1789, added, "I swear, so help me God" to the oath, thus beginning a practice that would be continued to this day.[50] In his

Inaugural Address, Washington made it his "first official act" to emphasize "fervent supplications to that Almighty Being who rules over the universe, who presides in the councils of nations, and whose providential aids can supply every human defect."[51]

Throughout his presidency, Washington continued to infuse the new American political system with religious language and ceremony. It was during his presidency that the first official Thanksgiving Day was proclaimed. On February 19, 1789, Washington asked that all Americans "meet together and render their sincere and hearty thanks to the Great Ruler of Nations, for the manifold and signal mercies which distinguish our lot as a Nation [and] Humbly and fervently . . . beseech the kind Author of these blessings graciously to prolong them to us—to imprint on our hearts a deep and solemn sense of our obligations to him for them."[52] Similarly, Washington recognized this ruling force in American history and destiny in his Farewell Address to the nation, delivered on September 19, 1796. In the midst of a lengthy exhortation on proper government and American identity, Washington touched on this theme of providence. He enjoined all Americans to "observe good faith and justice towards all nations; cultivate peace and harmony with all" and then described the justification for such a role on the world stage:

> Religion and morality enjoin this conduct; and can it be, that good policy does not equally enjoin it? It will be worthy of a free, enlightened, and (at no distant period) a great Nation, an exalted justice and benevolence. Who can doubt that in the course of time and things, the fruits of such a plan would richly repay any temporary advantages which might be lost by a steady adherence to it? Can it be that Providence has not connected the permanent felicity of a Nation with its virtue? The experiment, at least, is recommended by every sentiment which ennobles human nature.[53]

As the man seen by many as the founder of the nation and the purest example of American leadership and identity, Washington's rhetoric established a pattern followed by most subsequent presidents. His emphasis on codifying and explicitly articulating civil religious ideals about the mission and divine providence inherent in American action set the stage for the continued use of such language as the government developed and matured.

Yet there were challenges along the way. Thomas Jefferson and later Andrew Jackson expressed discomfort with the use of Thanksgiving and fast days by the president. Going beyond distinctions drawn in the Constitution, Jackson refused to call a fast day in the midst of the 1832 cholera epidemic by arguing that he could not do so without "transcending the limits prescribed by the constitution for the President; and without feeling

that I might in some degree disturb the security which religion now enjoys in this country, in its complete separation from the political concerns of government."[54] Such concerns continued in regard to other issues throughout the first century of the presidency but were never so clearly vocalized as by Thomas Jefferson.

As a key player in the initial discussions of the nature of American democracy and the founding documents, Jefferson expressed a mixed perspective in his writings and public speeches as president. In his single published book, *Notes on the State of Virginia*, Thomas Jefferson wrote about the extent to which government should influence the practice of religion. He concluded, "The legitimate powers of government extend to such acts only as are injurous to others. But it does me no injury for my neighbor to say there are twenty gods, or no gods. It neither picks my pocket nor breaks my leg."[55] Yet despite his unease at explicit religious language, as president, Jefferson both maintained this belief in separation and continued to appeal to the divine. In his First Inaugural Address, Jefferson proclaimed, "may that Infinite Power which rules the destinies of the universe lead our councils to what is best, and give them a favorable issue for your peace and prosperity."[56] He continued this theme in his Second Inaugural:

> I shall need, too, the favor of that Being in whose hands we are, who led our forefathers, as Israel of old, from their native land, and planted them in a country flowing with all the necessaries and comforts of life; who has covered our infancy with his providence, and our riper years with his wisdom and power; and to whose goodness I ask you to join with me in supplications, that he will so enlighten the minds of your servants, guide their councils, and prosper their measures, that whatsoever they do, shall result in your good, and shall secure to you the peace, friendship, and approbation of all nations.[57]

With his strong stand for religious freedom and political detachment from religious establishment, Jefferson's use of such rhetoric suggests that this religiosity or civil religion extended beyond the personal convictions of a president to a certain mode of discourse and way of understanding the nation's identity that would continue to develop into the next century. The civil religion thus developed less as a product of the particular beliefs of the nation's founder and more from timeless concepts about American identity.

As the nineteenth century began, the dust had largely settled from the Revolutionary War and government formation, but war tested the young country again with the War of 1812. During that war, President James Madison, a champion of religious liberty and church and state separation, declared a day of Thanksgiving, continuing the tradition established by

Washington. In his proclamation, Madison announced the joint resolution by Congress to declare a day "to be observed by the people of the United States with religious solemnity, as a day of Public Humiliation and Prayer and whereas in times of public calamity, such as that of the war . . . that the hearts of all should be touched with the same, and the eyes of all be turned to that Almighty Power, in whose hand are the welfare and the destiny of nations."[58]

Fueled by the religious enthusiasm generated by the Second Great Awakening and growing confidence in American strength and mission, ideas of millennialism and chosenness began to reemerge. In his monumental work, *Democracy in America*, Alexis de Tocqueville recorded his observation of 1830s Americans, remarking that "Americans so completely confuse Christianity and freedom in their minds that it is almost impossible to have them conceive of the one without the other . . . Thus it is that in the United States religious zeal constantly warms itself at the hearth of patriotism."[59] In his study *America's God*, Mark Noll describes these messianic tones in American political and religious speech as being "rooted in English ideas of national chosenness, Puritan assumptions about covenant with God, and the convictions of a wide range of Revolutionary and post-Revolutionary leaders (deists, the orthodox, sectarians) who believed that God had especially blessed the United States."[60] Though the founders themselves were not evangelicals, the religious enthusiasm of the early nineteenth century gave fuel to this fire.

As a result of these ideas, the concept of Manifest Destiny also began to emerge during the 1840s as the country expanded westward. Though the idea had preexisted its American expression by one hundred years, this political philosophy combined these religious ideals of millennialism and the hope and duty inherent therein with an increased desire to enlarge and fortify the country.[61] This confidence in God's unique concern for America combined with a proactive sense of mission and activism would come to a crossroads with the Civil War, in which two warring sides appealed to the same ideals and authority.

DIVIDED PROVIDENCE: THE CIVIL WAR AS TURNING POINT

Though countless books have been written on the subject of the American Civil War, it is only recently that scholars have begun to examine the religious elements of the war in any depth. Considering the themes of divine mission, providence and divine favor articulated and developed in early America, a battle between two segments of the American population inevi-

tably unsettled these long-held notions about the nation. In many ways, the success of the Revolution and massive expansion and industrial growth in the early 1800s led to a widely held confidence in America's status as a chosen people with divine guidance. The Civil War problematized this understanding in a fundamental way. During the Revolutionary War, Americans could easily articulate an understanding of the war as between the God-inspired American freedom fighters and the oppressive British forces; yet when the battle became a fight between Americans, the questions of providence and divine guidance became muddled.

Scholars differ in their conclusions as to the importance of the Civil War for American Christianity and the American civil religion. Charting the theological developments in the American churches at this time, Mark Noll has argued that the Civil War marked a time of theological crisis within Christianity not only regarding the Christian position on slavery but also about the issue of providence.[62] Nowhere is this tension more evident than in Lincoln's Second Inaugural Address, a speech that historian Harry Stout calls, together with the Gettysburg Address, one of "America's greatest sermons."[63]

At this point in the Civil War, many Americans expected a particular type of speech that celebrated American ideals or provided justification for the Union cause. However, Lincoln refused to give a clear statement of divine providence but spoke of an active God who did not side with either of the warring factions. Instead, this God stood in judgment as his people falsely invoked his name and committed violence against one another. As Ronald White writes, Lincoln delivered discomfort and uncertainty instead of justification and encouragement and thus "offered the Second Inaugural as the prism through which he strained to see the light of God in the darkest hour of the nation's history."[64]

Such a unique view of providence certainly shocked many but also reflected the particular circumstances of the Civil War. Ultimately, Lincoln complicated the practice of associating God's providence with a particular cause. As he noted, both sides call to the same God and invoke the same principles and moral strength and, hence, both cannot be right:

> Both read the same Bible and pray to the same God, and each invokes His aid against the other. It may seem strange that any men should dare to ask a just God's assistance in wringing their bread from the sweat of other men's faces, but let us judge not, that we be not judged. The prayers of both could not be answered. That of neither has been answered fully. The Almighty has his own purposes. Woe unto the world because of offenses; for it must needs be that offenses come, but woe to that man by whom the offense cometh.[65]

Appeals to God, Lincoln argued, could not be made so un-self-consciously, indiscriminately or unrepentantly.

Broadening the focus to include political and governmental actions as well as theological ones, Harry Stout has called the Civil War "the incarnation of a national American civil religion."[66] Stout points to the increasing importance of the flag and other national symbols as well as indicating the beginning of true patriotism or nationalism in the young United States of America.[67] Indeed, it was during the Civil War that Lincoln proclaimed a national day of Thanksgiving as "a time to reflect on the sacred destiny of America."[68] While we have seen that such declarations had earlier appearances, this one had a particular meaning in light of Lincoln's somewhat chiding and cautioning civil religion.

It was also during the war that the phrase "In God We Trust" found its place on American currency. Borrowing from the last stanza of Francis Scott Key's *Star Spangled Banner*, an Act of Congress in April 1864 authorized the placement of this phrase on a two-cent coin. A further act in March 1865 and the Coinage Act of 1873 authorized "the motto IN GOD WE TRUST to be inscribed on such coins as shall admit of such motto."[69] This move marked another aspect of Lincoln's careful approach to religion and politics. As Stout writes, "although unwilling to proclaim America a Christian nation on the grounds of the separation of church and state, and aware of the Confederacy's boasted Christianity, Lincoln agreed to a compromise that would strengthen the links between Christianity and America's civil religion, while keeping each distinct."[70] The change in currency was thus a means of appeasing those looking for a more explicit indication of the Christian roots of the country while heading off the worries of those against a Christian nation. This motto was originally billed as a means of expressing the sentiment, articulated in a letter from Secretary of the Treasury Salmon P. Chase to the Director of the Mint at Philadelphia on November 20, 1861, that "No nation can be strong except in the strength of God, or safe except in His defense. The trust of our people in God should be declared on our national coins. You will cause a device to be prepared without unnecessary delay with a motto expressing in the fewest and tersest words possible this national recognition."[71]

The unsettling of American providentialism combined with the increased religiosity common in times of stress, upheaval, and violence made the Civil War a turning point in the American civil religion. Yet, as the subsequent world wars show, such polarizing and distinctly religious language only returned to the American political lexicon as the power of Lincoln's words and the horror of a war between brothers turned to more romanticized views of the war. After the turbulent antebellum periods and the racial

struggles inherent in the end of slavery, the American society faced a new challenge. Growing diversity as a result of immigration and increasing religiously-motivated activism set the stage for the tumultuous twentieth century.

REDEFINING AMERICA: CHALLENGES OF DIVERSITY

Beginning in the 1890s, many Christian communities began to fuse religion and politics in an early configuration of the modern faith-based activism now debated in our courts. The Social Gospel movement involved a concrete means of turning Christian doctrine into actual political and social action. By embracing a post-millennial outlook that maintained the improvability of the world and an optimistic view of human nature and potential, this movement spurred the creation of numerous voluntary societies that explicitly shunned any idea that religion should remain in the private realm. To Social Gospelers like Washington Gladden and Walter Rauschenbusch, a Christian American had certain responsibilities to act morally and to reform society in such a way as to eliminate social problems. For example, in his treatise *Applied Christianity*, Gladden explained that though Christianity and the wealth that came to many from industrialization are not incompatible, wealth "puts the possessor under heavy obligations to multitudes less fortunate."[72] Gladden then proceeded to give a detailed account of the myriad ways in which Christianity and American social and political improvement went hand-in-hand, including the proper actions of a Christian employer and the proper utilization of the Bible for moral education in public schools.

Despite continued concern among Protestant Americans about the growing influence of Catholicism as a result of increased immigration, parallel social movements were occurring within the Catholic population. Many recent immigrants struggled to balance assimilation into Protestant America with maintenance of Catholic identity and struggled to find a way to express Catholic morality in their new communities. Spurred on by the general spirit of faith-motivated social activism prevalent around the turn of the century and inspired by Pope Leo XIII's encyclical on social and labor concerns, *Rerum Novarum*, Catholics moved into action. Pioneers such as John Ryan made dramatic progress in labor and poverty issues.[73]

On a more sinister side, the increasing immigration and concurrent social problems of poverty and illiteracy caused some to articulate an exclusionary ideology. Josiah Strong's 1885 book, *Our Country*, expresses Manifest Destiny in terms of race. Strong's arguments were based on a belief in the vital importance of that particular moment in history for the rest of human existence on earth. He began his book with the claim that "dependence of

the world's future on this generation in America is not only credible, but in the highest degree probable."[74] After describing the perils of immigration, increased racial and religious diversity, including the rise in Roman Catholicism and Mormonism, Strong describes the importance of Anglo-Saxon, Protestant Christianity for the nation's future. Calling for "the evangelization of the world,"[75] Strong wrote with a sense of urgency: "Notwithstanding the great perils which threaten it, I cannot think our civilization will perish; but I believe it is fully in the hands of the Christians of the United States, during the next ten or fifteen years, to hasten or retard the coming of Christ's kingdom in the world by hundreds, and perhaps thousands of years. We of this generation and nation occupy the Gibraltarof the ages which commands the world's future."[76]

Politically, the increased diversity and growing strength of America following the Industrial Revolution led to a more robust and aggressive political ideology. President McKinley continued to use the Manifest Destiny language of the 1840s in the 1890s to allow for involvement in other affairs. As was evident in the Spanish-American War, this led people to believe "it was 'inevitable' that America would carry the message of Christian civilization to the benighted and barbaric peoples in the 'uncivilized' quarters of the world."[77] This type of interventionist and involved political practice foreshadowed the move from isolationism to involvement in World War I.

During this period of increasing world power and religious diversity, President Theodore Roosevelt did not hesitate to continue the religious rhetoric now firmly established as custom in inaugural addresses. In his Inaugural Address of 1905, Roosevelt began by expressing "gratitude to the Giver of Good who has blessed us with the conditions which have enabled us to achieve so large a measure of well being and of happiness." He continued by reminding Americans that "Much has been given us, and much will rightfully be expected from us. We have duties to others and duties to ourselves; and we can shirk neither."[78] Yet his most interesting contribution to the development of governmental religiosity comes in the 1907 controversy over the motto "In God We Trust."

In November of 1907, Roosevelt attempted to remove the motto from the new penny. Though Roosevelt was unsuccessful and Congress restored its placement in July of 1908, Roosevelt's reasoning for the proposed change might seem surprising to modern readers who might object to such a motto for its religious character. Roosevelt articulated his reasons for removing the logo in a letter to Roland C. Dryer on November 11, 1907. As Roosevelt wrote,

> To use it in any kindred manner, not only does not good but does positive harm, and is in effect irreverence which comes dangerously close to sacrilege. A beautiful

and solemn sentence such as the one in question should be treated and uttered only with that fine reverence which necessarily implies a certain exaltation of spirit. Any use which tends to cheapen it, and, above all, any use which tends to secure its being treated in a spirit of levity, is from every standpoint profoundly to be regretted. It is a motto which it is indeed well to have inscribed on our great national monuments, in our temples of justice, in our legislative halls, and in buildings such as those at West Point and Annapolis—in short, wherever it will tend to arise and inspire a lofty emotion in those who look thereon.[79]

In America, Roosevelt argued, this test of emotion was not met. Nevertheless, the Congress decided to maintain the motto as a symbol of the religious foundations of the nation and the continued involvement of God in its history.

RHETORIC AND PUBLIC OPINION: THE CIVIL RELIGION AND THE WORLD WARS

At the beginning of the twentieth century, the living generations had for the most part not experienced war on a wide scale. They lived with both an extremely glorified and extremely removed view of war. They felt it was something unforeseeable in this time of peace, a phenomenon of legends, not reality. Though many had lost family and friends in the Civil War, this war had been romanticized by many into a necessary growing pain for the young country and the inauguration of a time of unity and peace.[80] This idea was carried through to the pre–World War I era as peace efforts and social reforms reached a peak. Churches and inter-church organizations throughout the world felt comfortable in this peace and were able to state, publicly and enthusiastically, their commitments to peace and social reform. To establish and maintain this view, several organizations were created during this time such as the Federal Council of Churches' Commission on Peace and Arbitration in 1911.[81]

When the first declarations of war were made overseas in 1914, America faced an unsettling jolt out of its comfortable isolationism. Reflecting their idealism and aversion to war, Americans were not only shocked that war was a reality but also shocked that their European peers were participating in this tragedy. Moreover, Americans were convinced that no matter how backsliding and unreasonable Europe could be, the United States would never enter into such a conflict.[82] People across the world felt this would certainly be a short war and, thus, American involvement was not necessary. However, America did eventually enter the war. America's entry into the First World War was late and, even at that point, uncertain. America had

no true enemies in the conflict and had previously been most concerned with maintaining free trade with both the Entente and Axis powers. The unrestricted submarine warfare of Germany was the only truly offensive act against the United States and even that was not enough for many to justify involvement in this largely European war. For these reasons and more, the beginning of the war prompted much weariness and concern among Americans.

However, over the course of the First World War, American public opinion underwent a dramatic change. The pacifist ideologies before the war had been whole-heartedly supported by Christians and non-Christians alike, the politicians, and the clergy. The prevailing sentiment supported a largely noninterventionist country that worked to reform its own society while having only a conciliatory and peace-making role in the war. However, once American involvement was deemed necessary, political and religious leaders were able to turn public opinion around completely through propaganda and a deft use of civil religious and even Christian language. The same ideals that led to a pacifist ideology before were transformed into a zealous frenzy of support led by Christians. World War I is perhaps the most dramatic example in history of how the American civil religion can alter the minds of the public. The man most responsible for this transformation is the president during this war, Woodrow Wilson.

Wilson's religious views were largely based on a covenant theology at the center of the American civil religion. In the words of Pierard and Linder, he argued that "the world was a battlefield of good and evil, and one must not compromise principles in the struggle. God's law was the constitution for the world and the Bible the guide for a person's life. Hard work was a fulfillment of one's duty to God and would result in divine favor."[83] In the realm of foreign policy, Wilson also exhibited a sort of missionary approach that he shared with his Secretary of State, William Jennings Bryan. Their political decisions reflected the "desire to promote justice and international peace and give all peoples the blessing of democracy and Christianity, even if that meant interference in the internal affairs of other nations."[84] Though this view was not new to American political rhetoric, it was somewhat novel during this time as the country was only slowly moving to the interventionist philosophy of politics that is so familiar today. Wilson was reluctant at first to pursue an active foreign policy, but over the course of the war he utilized covenant ideology and missionary theology to justify the eventual American involvement.

Wilson articulated a role for the United States as mediator in the conflict through the early years of the war. At an address to the Associated Press in April 1915, Wilson remarked, "We are the mediating Nation of the world

. . . We are trustees for what I venture to say is the greatest heritage that any nation ever had, the love of justice and righteousness and human liberty."[85] Wilson, as a representative of America and democracy, was not attempting to forward America but "the cause of humanity itself."[86]

Though public opinion was mixed and somewhat reluctant to support a concerted war effort, with the unrestricted submarine warfare of the Germans, the infamous Zimmerman telegram, and other offenses, America entered the arena. Since the war was already well underway, the American government faced the need for rapid mobilization of armies and resources as well as public support. Expressing the competing sentiments of many Americans, Wilson remarked on February 2, 1916, in Kansas City, Missouri, "Madness has entered into everything, and that serene flag which we have thrown to the breeze upon so many occasions as the beckoning finger of hope to those who believe in the rights of mankind will itself be stained with the blood of battle, and staggering here and there among its foes will lead men to wonder where the star of America has gone and why America has allowed herself to be embroiled when she might have carried that standard serenely forward to the redemption of the affairs of mankind."[87] In this sense, the war was a tragic necessity. Americans had to support it, not because it was glamorous but because it was their duty.

Under the guise of the Committee on Public Information (CPI), Wilson enacted extreme propaganda to curb American reluctance to enter the war. The Committee produced posters, ads, films, and other such material that worked to demonize the enemy and to celebrate freedom and democracy. John Blum argues that the Committee forwarded two main ideas, "One, the postulate of the President, that Americans fought only for freedom and democracy; the other . . . that the Germans, 'Huns' all, were creatures of the devil attempting by the deliberate, lustful perpetration of atrocities, to conquer the war."[88]

In reaction to such propaganda efforts and similar efforts at mobilization by Christian congregations, discussions of the war began to take on a religious tone. This was particularly true in demonizing the German nation. Propaganda frequently portrayed Germans and the Kaiser himself as the Devil, and this language translated to religious situations as well. Some clergy went so far as to call the war a crusade: "It is God who has summoned us to this war. It is his war we are fighting . . . . This conflict is indeed a crusade. The greatest in history—the holiest. It is in the profoundest and truest sense a Holy War . . . Yes, it is Christ, the King of Righteousness, who calls us to grapple in deadly strife with this unholy and blasphemous power [Germany]."[89] Echoing similar language, Wilson described the ways in which American soldiers were perceived by those they encountered

overseas: "They were recognized as crusaders, and as their thousands swelled to millions, their strength was seen to mean salvation."[90]

Such virulent patriotism reached a peak during this war and was followed by a time of self-examination and reflection for American churches and the nation as a whole. In the aftermath of the war, Americans were forced to examine not only the efficacy of American involvement in the war but also their own reactions and emotions. Those Americans who found Wilson's energetic attempts to spread American values and democracy through the world inappropriate or excessive were satisfied by the more tempered vision of Franklin D. Roosevelt.

Religious communities began to express pacifist philosophies and regret for their explicit patriotism during the war. Many participated in postwar pacts, leagues and councils such as the 1935 National Peace Conference and the 1936 Emergency Peace Campaign.[91] By the dawn of World War II, the majority of Christian denominations had proclaimed some sort of pacifism. Echoing these sentiments, Roosevelt promised "to throw the full weight of the United States into the cause of peace. In spite of spreading wars I think that we have every right and every reason to maintain as a national policy the fundamental moralities, the teachings of religion and the continuation of efforts to restore peace—because some day though the time may be distant, we can be of even greater help to a crippled humanity."[92] Though the political position of the nation and this Christian pacifism were then aligned, as the war progressed, the two became at odds.

As the war developed, it became clear that the only road to peace, for Roosevelt, was the success of democracy over the evil and repressive regimes elsewhere in the world. Even in the face of increased public pacifism in the inter-war years, Roosevelt was able to use this emphasis on democracy and the American ideals (which include Christianity), to garner support for the war effort. On Selective Service Registration Day, Roosevelt used this idea to justify the first draft ever conducted during peacetime in America. To those who were registering, Roosevelt emphasized the importance of their role in the war effort: "We of today, with God's help, can bequeath to Americans of tomorrow a nation in which the ways of liberty and justice will survive and be secure. Such a nation must be devoted to the cause of peace. And it is for that cause that America arms itself."[93]

During the war years, as Hitler's atrocities became public, Americans united behind the war effort and Roosevelt's use of quasi-religious language to justify combat and rally support continued. In a move later echoed by George W. Bush in speeches on terrorism, Roosevelt linked Hitler with evil, Nazism with tyranny. In 1942, Roosevelt spoke to Congress about the Allied Powers' role in the world and concluded that the Axis Powers "know

that victory for us means victory for religion. And they could not tolerate that. The world is too small to provide adequate 'living room' for both Hitler and God."[94] In this way, World War II exemplified this American tendency to map religious language onto political realities as a means of securing national identity and political and ideological goals, as well as of continuing America's influence in the world.

DEFINING AMERICAN IDENTITY: THE SUPREME COURT WEIGHS IN ON THE LIMITS OF ESTABLISHMENT

Despite continued remorse over war and the atomic bombs, the defeat of Germany and Japan in the Second World War and the intimate involvement of most Americans in the war effort led to its romanticization and a continued sentiment that the United States of America should serve a leadership role in a world in crisis. As the 1940s drew to a close and the continued threat of communism loomed large, the American civil religion entered yet another phase. This phase was characterized by a decisive Supreme Court case directly addressing the establishment of religion, the entrance of subtle religious references into the public lexicon, increasing religious diversity, and the threat of non-religious communism.

Interestingly, it was soon after the Second World War that the Supreme Court directly addressed the issue of establishment in 1947's *Everson v. Board of Education of the Township of Ewing et al*. Examining a case involving governmental financial support for bussing to Catholic schools, the Court decided that such funding did not constitute a violation of the Establishment Clause. Though this practice did benefit a religious organization, the funding was also available for other types of schools. The majority opinion cited the First Amendment, the long struggle for religious liberty in early America and James Madison's "Memorial and Remonstrance" to underscore the importance of avoiding establishment. However, this opinion concluded that to deny the funding would mean to discriminate against religion. In the majority opinion, Justice Black interpreted the First Amendment as mandating "the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."[95]

This landmark decision would shape the profusion of later cases to arise out of the particular circumstances of the 1950s and 1960s, particularly in its stipulation that government should not be hostile to religion. This concern for maintenance of a religious culture but avoidance of establishment was a sign of the times. The harmony resulting from the complete mobiliza-

tion of the country in war had helped to soften some of the lines dividing the nativists and immigrants of the late nineteenth century and helped to usher in a more unified vision of American identity. Perhaps most illustrative of this change is Will Herberg's oft-cited book, *Protestant-Catholic-Jew*. Exhibiting an evolution in American identity from the days of Josiah Strong but also a rather limited perspective in light of modern diversity, Herberg sought to paint a positive picture of the new, religiously diverse America. He argued that "both the religiousness and the secularism of the American people derive from very much the same sources." Catholicism, Protestantism and Judaism share a scripture, an Abrahamic heritage, the same God and similar morality.[96] Above all, and in marked contrast to Communism, "the primary religious affirmation of the American people, in harmony with the American Way of Life, is that religion is a 'good thing,' a supremely 'good thing,' for the individual and the community."[97] Americans, Herberg argued, can find unity in this belief in the general importance of faith without needing to reconcile the inevitable doctrinal differences among them.

Just as the Protestant American leaders began to recognize Catholicism and Judaism as acceptable and morally rigorous belief systems, so too did Catholics move toward a more pluralistic view of the country. John Courtney Murray, who had previously come under fire from Catholics at home and abroad for essays in the 1940s advocating religious liberty in America and beyond, began "to urge Catholics to strike a more temperate balance between Catholic principles and public consensus" and often spoke in forums concerning American pluralism.[98] Murray's most extensive treatment of this subject came in his 1960 book, *We Hold These Truths: Catholic Reflections on the American Proposition*, in which he simultaneously lauded religious freedom while also warning against replacing traditional religion with an over-developed faith in American ideals such as religious liberty.[99] Anticipating and later influencing the statement on religious liberty articulated by Vatican II, Murray underscored the vital importance of religious freedom to the American democratic system and, indeed, to the Catholic religion. In this way, he recognized pluralism in religious beliefs and growing conflict between differing groups while advocating a continued separation of church and state as a means of maintaining these differences while allowing for cooperation. For Murray, because "pluralism was the native condition of American society," this trend should not be fought against but embraced with a commitment to dialogue over warfare.[100]

President Dwight D. Eisenhower often articulated a similar sentiment. In terms of presidential politics, some scholars have viewed Eisenhower as a central figure in the trajectory of civil religious language. Hutcheson argues that "If Washington, Jefferson, and Madison were the formulators of

America's civil religion, then, and Lincoln was its major theologian, Eisenhower was its prime exemplar in modern times."[101] Indeed, responding to concerns regarding "atheistic communism" and the rise of McCarthyism, the Commander-in-Chief frequently referenced religion in many ways. Eisenhower's First Inaugural Address, January 20, 1952, began with a prayer written the morning of the Inaugural by the president himself. Through this "private prayer" Eisenhower asked for divine assistance and guidance, "beseeching that Thou will make full and complete our dedication to the service of the people in this throng, and their fellow citizens everywhere."[102]

Continuing in this vein, it was during Eisenhower's presidency that the phrase, "In God We Trust" became the national motto, on July 30, 1956. Though it was in use on currency since the 1860s, Eisenhower made the move to solidify the importance of this motto as a clear indicator of the religious ideals that shaped the lives of many Americans and which lay at the foundation of the country's identity. By 1966, the motto appeared on all paper money. It was also during the 1950s that other references to God appeared in the government such as "so help me God" added to the end of court oaths and "under God" added to the Pledge of Allegiance in schools. In many ways, this was a direct response to the fear of "Atheistic Communism" and a reaffirmation of American Judeo-Christian principles of divine dependence as the basis for government and civil society.

During his administration, Eisenhower also established a staff position in the White House to coordinate religious affairs and continually stressed the conflict between religion and communism.[103] A clear indicator of this increased religiosity in the White House was the institution of the National Prayer Breakfast, officially begun in 1953 by a group then known as the International Christian Leadership and now known generally as "the Fellowship," a Christian organization based in Washington, D.C. While invitations and official correspondence suggest a direct sponsorship by the Congress or president, the Fellowship funds and organizes the event while also avoiding publicity and recognition.[104] The general purpose of such meetings is understood to be "a genuine concern to minister to the spiritual needs of people in places of leadership," and the speakers at such meetings tend to articulate rather general religious sentiments.[105] These events have been low on publicity, and the press is discouraged to attend. Following the general prayer meeting, the Fellowship holds leadership forums or workshops for smaller groups and, in this context, forwards a more explicitly religious agenda.

Though such interaction between the government and Christian organizations has not lead to court challenges or legislative changes, it has elicited condemnation from strict separationists and those outside of Christianity.

Indeed, numerous court cases were tried over the next several decades deciding matters of establishment and where the tricky line of separation should lie. The civil rights movement raised questions as to the inclusiveness of the American civil religion in terms of race. Many began to ask whether racial discrimination suggested an unequal application of American principles of freedom and opportunity.

With the 1960s came increased religious diversity as many Americans became exposed to Eastern religions for the first time and changes such as Vatican II and the various political and social revolutions changed understandings of appropriate morality. With the election of the first Catholic president, Americans adopted broader understanding of the presidency. Yet, much remained continuous. Like Eisenhower before him, John F. Kennedy, Jr., continued the language of an American dependence on a broadly conceived Judeo-Christian God. Moreover, Kennedy demonstrated an intensely personal and private religious life apart from but in cooperation with his public role as president.[106] Kennedy appealed to this sense of public faith in his Inaugural Address:

> Finally, whether you are citizens of America or citizens of the world, ask of us the same high standards of strength and sacrifice which we ask of you. With a good conscience our only sure reward, with history the final judge of our deeds, let us go forth to lead the land we love, asking His blessing and His help, but knowing that here on earth God's work must truly be our own.[107]

Yet, despite these continuities, the changing religious landscape and liberal understanding of morality led to the questioning of many long-held practices in government and schools.

Just as the 1960s marked unrest in the social and political realm at large, so too was there unrest over issues of church and state. During this period, numerous Supreme Court cases addressed applications of the establishment question raised in *Everson V. Board* in the late 1940s. In 1961, *Torcaso v. Watkins* dealt with the issue of religious tests first debated by the founding fathers. Striking down a Maryland decision to deny employment to a notary public based on his refusal to express belief in God, the Court again cited concerns over both religious establishment and freedom of belief. Referring to the historical debate and Article VI of the Constitution and Bill of Rights, the majority opinion by Justice Black sought to "reaffirm that neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion.' Neither can constitutionally pass laws or impose requirements which aid all religions as against nonbelievers and neither can aid those religions based on a belief in the exis-

tence of God as against those religions founded on different beliefs."[108] Interestingly this case concluded that even something as neutral as belief in God, though devoid of any particular doctrinal specifics, preferences belief above unbelief. This has interesting implications for the morality of the American civil religion that, as we saw above, most often manifests in such seemingly innocuous references to a generic "God."

Addressing appeals to God in a different setting, the Court decided in the 1962 case, *Engel v. Vitale*, that daily classroom prayers in public schools were a clear violation of the Establishment Clause. Justice Black again gave the majority opinion writing "there can, of course, be no doubt that New York's program of daily classroom invocation of God's blessings as prescribed in the Regents' prayer is a religious activity. It is a solemn avowal of divine faith and supplication for the blessings of the Almighty." Then reaffirming the importance of religion in the history of mankind, Black wrote, "It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance."[109] The Court would not address similar prayers in congressional meetings until a later date. The difference in conclusions suggests the centrality of age and impressionability in the *Engel* case.

Though the Supreme Court has declined to hear appeals of the 1970s cases regarding the constitutionality of the national motto, "In God We Trust" (which, incidentally, hangs on the wall of the Court), several lower court cases are worth mention. In 1970's *Aronow v. United States*, the United States Court of Appeals for the Ninth Circuit found that this motto has only a "patriotic or ceremonial character" and thus does not constitute an establishment of religion.[110] This decision was upheld in the 1979 case brought by the founder of the American Atheists to challenge use of the motto, *Madalyn Murray O'Hair et al. v. W. Michael Blumenthal, Secretary of Treasury, et. al*. The United States Court of Appeals for the Fifth Circuit referred to the 1970 case in affirming that "the primary purpose of the slogan was secular," a conclusion echoed in later Supreme Court decisions on public monuments of the Ten Commandments.[111]

In 1973, a U.S. Appeals Court decided to allow the erection of a monument to the Ten Commandments at a courthouse in *Anderson v. Salt Lake City Corp*. In addition to the Decalogue, the monument contained various other symbols and references to Abrahamic faiths and U.S. history. The Court concluded that "the monolith is primarily secular, and not religious in character; that neither its purpose or effect tends to establish religious belief."[112] Though the court recommended an additional sign marking the

secular and historical importance of this monument over its specifically religious content, the court maintained the significance as one of heritage and culture. The Supreme Court declined to review this ruling.

With the election of Jimmy Carter came a change in presidential application of religious language and continued change in the political climate. Unlike Kennedy, Carter's religion was both a personal and public matter and his explicit religiosity in public statements rubbed some people the wrong way in light of the increasingly religiously diverse society. Going beyond general reference to God or providence, Carter directly quoted the Bible in his Inaugural Address: "He hath showed thee, O'man, what is good; and what doth the Lord require of thee, but to do justly, and to love mercy, and to walk humbly with thy God." He then spoke of "a new beginning, a new dedication within our Government, and a new spirit among us all," presumably based on this guidance from God.[113] Such a spirit apparently failed to unite all Americans as several new cases came before the U.S. Appeals and Supreme Courts addressing perceived violations of the Establishment Clause. The variety of conclusions reached in these cases suggests a diversity of opinion in the public and within the courts and the complexity of the American civil religion.

Reviving an issue first debated in the eighteenth century, the 1978 Supreme Court ruling *McDaniel v. Paty* addressed seemingly conflicting claims to the Free Exercise and Establishment Clauses. In this case, the Supreme Court reversed a Tennessee statute that disallowed clergy from holding public office. Though Tennessee has not historically been alone in such a law, most states had hitherto removed this law from their books. Seven judges agreed with the majority opinion though for slightly different reasons. However, each judge emphasized the importance of free exercise and the idea of neutrality rather than hostility to or support of a particular religious practice. The ruling in *Torcaso v. Watkins* "does not govern," Burger's opinion stated. As he continued, since the disqualification is based on McDaniel's status as a clergyman, and since the law "is directed primarily at status, acts, and conduct it is unlike the requirement in *Torcaso*, which focused on *belief*. Hence, the Free Exercise Clause's absolute prohibition of infringements on the 'freedom to believe' is inapposite here." However, Burger continued, the Tennessee ruling is to be struck down because the Tennessee government failed to demonstrate that this minister would necessarily violate the Establishment Clause through untoward influence. Appealing to the earliest debates of this issue, Burger wrote, "However widely that view may have been held in the 18th century by many, including enlightened statesmen of that day, the American experience provides no persuasive support for the fear that clergymen in public office will be less careful of anti-

establishment interests or less faithful to their oaths of civil office than their unordained counterparts."[114]

Soon thereafter, another establishment case came before a U.S. Appeals Court based upon events leading up to Pope John Paul II's October 1979 visit to Philadelphia. In the 1980 case *Gilfillan et al. v. City of Philadelphia*, the Court found the expenditure of $200,000 by the city to erect a special platform on which the Pope would deliver the Mass and give a sermon to be unconstitutional.[115] The Court ruled this to be a violation of the Establishment Clause because the city had violated all three requirements of the Lemon Test of 1971's *Lemon v. Kurtzman* by acting for a religious purpose, advancing religion, and promoting "impermissible entanglement."[116] The local Archdiocese reimbursed the city for the expenditures and the Supreme Court denied a rehearing in May 1981.

Using similar justification for disallowing another public religious display, the Supreme Court addressed the issue of display of the Ten Commandments in Kentucky public schools in *Stone v. Graham* in 1980. The court reversed a lower court decision allowing such display and claiming a secular application by arguing that the display of these documents could not have a "secular legislative purpose."[117] Again, appealing to the Lemon test, the court appealed to similar reasoning as the *Gilfillan* case. Interestingly, the court later found that such a display could have a primarily secular purpose outside of the classroom as shown below, again indicating a difference between settings involving children and those involving adults.

During the Reagan presidency, the relationship between religion and politics took an interesting turn. After Carter, Reagan stood as a sign of the changing nature of presidential politics and religion, as this very religious but very private president kept his practice and faith from public view while lending support to the growing Religious Right.[118] In his Inaugural Speech, Reagan spoke of "the American sound" and how Americans "raise our voices to the God who is Author of this most tender music." He then continued with the wish that, "He continue to hold us close as we fill the world with our sound, sound in unity, affection, and love; one people under God, dedicated to the dream of freedom that He has placed in the human heart, called upon now to pass that dream on to a waiting and hoping world."[119] Two years into his presidency, Reagan proclaimed 1983 "the Year of the Bible in the United States," recognizing its influence in the founding and governance of the country and encouraging "all citizens, each in his or her own way, to reexamine and rediscover its priceless and timeless message."[120] Interestingly, his presidency marked the emergence of both stronger and more visible religious political movement but also more awareness and opposition from those outside the movement.

In 1982, the U.S. Court of Appeals, Eleventh Circuit heard the case of the *ACLU v. Rabun County*, a case concerning the erection of a cross on an 85 foot structure in Black Rock Mountain State Park in Georgia. The local Chamber of Commerce was to pay for the upkeep of the cross and planned to dedicate it on Easter Sunday, 1979, saying in a press release that "the cross is a symbol of Christianity for millions of people in this great nation and the world."[121] Soon thereafter, the American Civil Liberties Union (ACLU) demanded the removal of the cross and the court battle began. Ultimately, the Appeals Court found the installation and maintenance of the cross to be a violation of the Establishment Clause of the First Amendment. The decision was made in large part due to the "noneconomic injury" suffered by those utilizing the state park that were unwittingly forced to have a particular religious experience through the unavoidable presence of the cross. Moreover, the installation of the cross violated all three of the criteria for establishment listed in the Lemon Test—it had no secular purpose, had a primary purpose of advancing religion, and suggested an inappropriate entanglement of government and religion.

In a remarkable case that underscored and perhaps affirmed theories of civil religion in America, the Supreme Court acted in 1983 to continue the use of prayer in governmental session. In *Marsh v. Chambers*, the Supreme Court overturned a Nebraska ruling that held that the paying of a chaplain to say a prayer at the beginning of the Nebraska legislative sessions was a violation of the Establishment Clause though the prayer itself was not. The majority opinion, written by Chief Justice Burger, recognized the Nebraska court's finding that such payment violated all elements of the Lemon Test but argued instead that the use of chaplains and prayer in legislative sessions "is deeply embedded in the history and tradition of this country."[122] The fact that such a practice has continued alongside the policies of disestablishment and religious freedom suggests it must remain and is not problematic. However, Burger was careful to articulate that he was not only arguing from historical consistency but from the idea that the founders clearly understood such practice to be consistent with these other principles of separation of church and state.

In an interesting turn in light of the 1982 lower court case, *ACLU v. Rabun County*, the Supreme Court upheld the constitutionality of a public crèche in *Lynch v. Donnelly*. Though four justices dissented, Burger's majority opinion held that since the crèche was part of a city Christmas display and included non-religious holiday elements as well, it did not have an explicitly religious purpose. The court thereby reversed two lower court decisions by pointing to the role of religion in U.S. history and such practices as Thanksgiving, the use of the national motto, and the fact that

Christian holidays are national holidays. In essence, Burger wrote, "the crèche in the display depicts the historical origins of this traditional event [the Christmas holiday season] long recognized as a National Holiday." As he continued, "the display engenders a friendly community spirit of goodwill" in much the same way as prayers before congressional sessions are immediately followed by heated debates over taxes and national defense.[123]

These cases demonstrate both the complexity of the separation of church and state and the increased contentiousness surrounding these issues in modern times. As religious diversity increases, many of the hitherto unquestioned religious elements of the United States government will likely be further questioned in the courts. However, the American civil religion born with the country and most eloquently described by Robert Bellah in 1969 continues strongly to shape our national rhetoric and ritual. In 2000, George W. Bush articulated the principles of this civil religion in his First Inaugural Address. He proclaimed, "We are not this story's author, who fills time and eternity with His purpose. Yet His purpose is achieved in our duty, and our duty is fulfilled in service to one another. Never tiring, never yielding, never finishing, we renew that purpose today; to make our country more just and generous; to affirm the dignity of our lives and every life. This work continues. This story goes on. And an angel still rides in the whirlwind and directs this storm."[124]

This whirlwind reached fever-pitch during the events of September 11, 2001, when America faced the realization that not all the world agreed with the policies and control of American foreign policy. With the effects of the terrorist attacks so devastating and shocking to Americans, it did not take long for President Bush to cast the event in religious tones. In a move reminiscent of the demonization of Germans during the World Wars, Bush quickly set up dramatic dualisms between America and its enemies. In his remarks on the South Lawn on September 16, 2001, Bush characterized the terrorists as "barbaric," as "evil-doers," and proclaimed that Americans had a duty "to hunt down, to find, to smoke [the terrorist organizations] out of their holes." This language makes the enemy simultaneous evil and animal-like and culminated in Bush's characterization of the War on Terror as a "crusade."[125]

These continuities continue in the courts as well. The 2005 case of *Van Orden v. Perry* argued the constitutionality of a public display of the Ten Commandments on the state capital grounds in Texas.[126] The monument was a gift from a private organization in 1961 and, in addition to the text, the monument was inscribed with symbols of Jewish faith, Christ, the American flag and other patriotic symbols and a plaque recognizing the donors of the gift. The Court agreed with the state's contention that such a monu-

ment did not advocate religion explicitly but recognized the importance of religion in the nation's and the state's history. According to the Court, appeal to religion in the context of common heritage continues to be acceptable.

In the same year, another case was decided with different results. In *McCreary County v. ACLU*, the Court argued that a display of a simple posting of the Ten Commandments and a passage from Exodus in two Kentucky county courthouses was unconstitutional in that such a monument had a religious purpose.[127] Without the additional symbols and historical focus of the *Van Orden v. Perry* monument, the court felt such a posting violated the establishment clause. Interestingly, in their dissent, Scalia, Rehnquist, and Thomas argued that the postings were constitutional in that they recognized a basic belief in God common to all Abrahamic faiths as expressed elsewhere in American government. Referring to presidential use of the phrase, "God Bless America" and presidential calls for public days of fasting and prayer, Scalia concluded that a denial of the religious basis of the country was a false belief in the neutrality of the government to religion in general.While one can argue whether these practices should be used as evidence or should be questioned themselves, this chapter has shown this continuity to be undeniable.

PRESENT AND FUTURE DEVELOPMENTS

On the 50th Anniversary of the national motto, "In God We Trust," George W. Bush called on all Americans to "remember with thanksgiving God's mercies throughout our history" and to "recognize a divine plan that stands above all human plans and continue to seek His will."[128] In so doing, Bush articulated the same appeal to a common religious heritage expressed by those on the Supreme Court who have advocated maintenance of religious language in government. The intent of this chapter has been both to provide an explanation for the development and reality of this peculiar role of religious language in American governmental practice and also to show the continuity and evolution of this reality to the present day. Just as debates have raged throughout American history over the appropriateness of such a reality, so too does the debate continue today. In addition to the more specific issues argued in the Supreme Court and political forums such as abortion, stem-cell research, and prayer in schools, political theorists and other figures have weighed in on the likely future intersections between religion and government.

Taking a negative stand towards these manifestations of civil religion, Gary Wills has argued that the Supreme Court should continue to remove

religion from the government, including ceremony and proclamations hitherto untouched by legislative rulings.[129] On this view, references to God are inherently and entirely inappropriate in a diverse nation and should be eliminated. At issue here are two key concerns: the first being a desire to stay true to the founders' intention to avoid establishment of religion, and the second being a growing awareness of the increasing incompatibility between the seemingly innocuous civil religion and the variety of new faiths gaining prominence in the United States of America and abroad. Interestingly, these two issues are intimately and somewhat paradoxically related. As Os Guiness wrote in 1990, "modern pluralism stands squarely as both the child of, and the challenger to, religious liberty."[130]

Whether one agrees with the use of religious language in governmental rhetoric and ritual or not, it is also important to examine the extent to which this situation is likely to change. Hutcheson has articulated a consistency in the figure of the president and writes, "As long as moral questions continue to be asked, religious answers will be sought. American society's experiments with values divorced from religion have not been encouraging. Despite the complex reasoning of secular ethicists, Americans by and large remain convinced that morality and religion are inseparable. And as long as that remains the case, religion is likely to play a continuing role in the presidency, and the presidency in religion."[131] Describing this connection in a more general manner, Jeff Stout has recently written that "democracy . . . is misconceived when taken to be a desert landscape hostile to whatever life-giving waters of culture and tradition might still flow through it. Democracy is better construed as the name appropriate to the currents themselves in this particular time and place."[132] Perhaps it is inherent to democracy to use culture, religion, and tradition to revitalize its systems and inspire its citizens. The challenge of the twenty-first century will be to reconfigure the American civil religion in such a way as to appeal to the broad spectrum of religious and non-religious individuals now within its borders. Whether this can happen without sacrificing the vitality and mobilizing power of the civil religion remains to be seen.

NOTES

1. Leonard W. Levy, *The Establishment Clause: Religion and the First Amendment* (New York: Macmillan Publishing Company, 1986), 126–127.

2. Mark DeWolfe Howe, *The Garden and the Wilderness: Religion and Government in American Constitutional History* (Chicago: University of Chicago Press, 1965), 11.

3. Sidney E. Mead, "The Nation with the Soul of a Church," in *American Civil*

Religion, ed. Russell E. Richey and Donald G. Jones (New York: Harper and Row Publishers, 1974), 45.

4. Robert N. Bellah, "Civil Religion in America," *Daedalus* 96, no. 1 (Winter 1967), 3.

5. The term "civil religion" has received its most sustained and well-known treatment by Robert Bellah in his *Daedalus* article, "Civil Religion in America," and subsequent books, such as *The Broken Covenant: Civil Religion in a Time of Trial*. The term itself has had earlier articulations, most notably in Jean-Jacques Rousseau's *The Social Contract*, Book IV, Chapter 8.

6. Will Herberg, "America's Civil Religion: What it is and Whence it Comes," in Richey and Jones, 78.

7. Jürgen Moltmann, "Christian Theology and Political Religion," in *Civil Religion and Political Theology*, ed. Leroy S. Rouner (Notre Dame: University of Notre Dame Press, 1986), 47.

8. Alexis de Tocqueville, *Democracy in America*, Harvey C. Mansfield and Delba Winthrop, trans. (Chicago: University of Chicago Press, 2000), 275.

9. For a discussion of the history of this rhetoric, see Sacvan Bercovitch, *The American Jeremiad* (Madison: The University of Wisconsin Press, 1978), xi. Bercovitch describes this type of language as the "American jeremiad," which he defines as "a mode of public exhortation that originated in the European pulpit, was transformed in both form and content by the New England Puritans, persisted through the eighteenth century, and helped sustain a national dream through two hundred years of turbulence and change."

10. Arthur Schlesinger, Jr. and Fred L. Israel, eds., *The Chief Executive: Inaugural Addresses of the Presidents of the United States* (New York: Crown Publishers, Inc., 1965), 3.

11. George W. Bush, "Second Inaugural Address, January 20, 2005," http://www.whitehouse.gov/inaugural/

12. Bellah, "Civil Religion in America," 7.

13. Robert N. Bellah, *The Broken Covenant: American Civil Religion in a Time of Trial, 2nd Edition* (Chicago: The University of Chicago Press, 1992), 38–39.

14. Robert S. Alley, *So Help Me God: Religion and the Presidency, Wilson to Nixon* (Richmond, VA: John Knox Press, 1972), 24.

15. Richard V. Pierard and Robert D. Linder, *Civil Religion and the Presidency* (Grand Rapids, MI: Academie Books, 1988), 19.

16. Bercovitch, 7–8.

17. Ibid.

18. John Winthrop, "A Model of Christian Charity," in *The American Puritans: Their Prose and Poetry*, ed. Perry Miller (Garden City, NY: Anchor Books, 1956), 83.

19. Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* (New York: Oxford University Press, 1986), 5.

20. Jon Butler, *Awash in a Sea of Faith: Christianizing the American People* (Cambridge, MA: Harvard University Press, 1990), 128.

21. Mark A. Noll, *America's God: From Jonathan Edwards to Abraham Lincoln* (New York: Oxford University Press, 2002), 32.

22. Derek H. Davis, *Religion and the Continental Congress, 1774–1789: Contributions to Original Intent* (New York: Oxford University Press, 2000), 27–28.

23. Millennial Christianity focuses on the Second Coming of Jesus and the realization of the Kingdom of God and can be further distinguished as pre- or post-millennialist. Pre-millennialists believe that the Kingdom of God cannot be realized here on earth and that Jesus must first come before the Kingdom will come to be. Thus, there are limits as to how much society can be improved by human means. For post-millennialists, the improvements made to society by humans serve to hasten Jesus' Second Coming. Once Christians establish this ideal world on earth, the Kingdom of God will be realized and Jesus will arrive. Thus, these Christians (other examples include the Social Gospelers and Nativists of the late-19th and early-20th centuries) see a need to improve societal conditions and work for the good in this lifetime.

24. Davis, 48. For a discussion of this democratizing element of American Christianity, see Nathan O. Hatch, *The Democratization of American Christianity* (New Haven: Yale University Press, 1989).

25. Noll, *America's God*, 174.

26. Patricia U. Bonomi, *Under the Cope of Heaven: Religion, Society, and Politics in Colonial America* (New York: Oxford University Press, 1986), 186.

27. Bonomi, 3.

28. Ibid., 216.

29. Davis, 65.

30. Ibid., 66.

31. Ibid., 84.

32. Philip Hamburger, *Separation of Church and State* (Cambridge: Harvard University Press, 2002), 81.

33. Hamburger, 83.

34. Ibid., 86.

35. John F. Wilson, "Religion under the State Constitutions, 1776–1800," *Journal of Church and State* 32 (Autumn 1990): 764.

36. Davis, 35.

37. Catherine L. Albanese, *Sons of the Fathers: The Civil Religion of the American Revolution* (Philadelphia: Temple University Press, 1976), 222.

38. Butler, 196.

39. Ibid., 212.

40. Ruth H. Bloch, *Visionary Republic: Millennial Themes in American Thought, 1756–1800* (New York: Cambridge University Press, 1985), 78.

41. Ibid., xiii.

42. "Declaration of the Causes and Necessity for Taking Up Arms: The Declaration as Adopted by Congress, July 6, 1775," *Jefferson & Madison on Separation of Church and State: Writings on Religion and Secularism*, ed. Lenni Brenner (Fort Lee, NJ: Baricade Books, 2004), 20.

43. Bloch, 56.

44. Ibid., 106.

45. "The Virginia Constitution as Adopted: June 29, 1776," Brenner, 23.

46. Constitution of the United States of America, Article VI.

47. "James Madison, Observations on Jefferson's Draught of a Constitution for Virginia [ca. October 15, 1788]," Brenner, 99.

48. Pierard and Linder, 51.

49. George Washington, State of the Union Address to Congress, November 19, 1794, available from the Library of Congress at http://memory.loc.gov/ammem/gwhtml/gwhome.html

50. Hutcheson, 37.

51. "George Washington: First Inaugural Address in the City of New York, April 30, 1789," *I Do Solemnly Swear: The Inaugural Addresses of the Presidents of the United States, 1789–2001* (Philadelphia: Chelsea House Publishers, 2001), 2–3.

52. "Proclamation for a Day of Thanksgiving by the President of the United States of America," containing a facsimile of his Public Accounts, kept during the Revolutionary War, and some of the most interesting documents connected with his military command and civil administration, 4th ed. (Washington, D.C.: Franklin Knight, 1844), 84.

53. "Washington's Legacy: or, Farewell Address to the People of the United States," *Monuments of Washington's Patriotism* (Washington, D.C.: Franklin Knight, 1844), 88.

54. Quoted in Hamburger, 186.

55. Thomas Jefferson, *Notes on the State of Virginia* (New York: W.W. Norton & Company, 1972), 159.

56. "Thomas Jefferson: First Inaugural Address, March 4, 1801," *I Do Solemnly Swear*, 19.

57. "Thomas Jefferson: Second Inaugural Address, March 4, 1805," *I Do Solemnly Swear*, 25.

58. "James Madison, A Proclamation of Thanksgiving, July 23, 1813," Brenner, 207.

59. De Tocqueville, 281.

60. Noll, *America's God*, 15.

61. Ernest Lee Tuveson, *Redeemer Nation: The Idea of America's Millennial Role* (Chicago: University of Chicago Press, 1968), 125.

62. Mark A. Noll, *The Civil War as a Theological Crisis* (Chapel Hill: The University of North Carolina Press), 2006, see especially Chapter 5, pages 75–94.

63. Harry S. Stout, *Upon the Altar of the Nation: A Moral History of the Civil War* (New York: Viking Press, 2006), 427.

64. Ronald D. White, Jr., "Lincoln's Sermon on the Mount: The Second Inaugural," in *Religion and the American Civil War*, ed. Randall M. Miller, Harry S. Stout and Charles Reagan Wilson (New York: Oxford University Press, 1998), 223.

65. Abraham Lincoln, "Second Inaugural Address, March 4, 1865," *I Do Solemnly Swear*, 156.

66. Stout, 459.

67. Ibid., 28.

68. Ibid., 271.

69. "Fact Sheets: Currency & Coins, History of 'In God We Trust," http://www.ustreas.gov/education/fact-sheets/currency/in-god-we-trust.shtml

70. Stout, 373.

71. Quoted in "History of 'In God We Trust,'" Fact Sheets: Currency & Coins, http://www.ustreas.gov/education/fact-sheets/currency/in-god-we-trust.shtml

72. Washington Gladden, *Applied Christianity: Moral Aspects of Social Questions* (Boston: Houghton, Mifflin and Company, 1886), 37.

73. For a detailed examination of the evolution of Catholicism in America with a focus on the relation of Catholic life to American democracy and changing attitudes of non-Catholics, see John T. McGreevy's *Catholicism and American Freedom: A History* (New York: W.W. Norton & Company, 2003). On social and labor issues at the turn of the twentieth century, see especially Chapter Five "The Social Question."

74. Rev. Josiah Strong, D.D., *Our Country: Its Possible Future and Its Present Crisis* (New York: The Baker & Taylor Co., 1891), 15.

75. Ibid., 209.

76. Ibid., 227.

77. Pierard and Linder, 134.

78. Theodore Roosevelt, "Inaugural Address, March 4, 1905," *I Do Solemnly Swear*, 230.

79. "Cheapening 'In God We Trust,' To Roland C. Dryer, Washington, November 11, 1907," *Theodore Roosevelt: Letters and Speeches*, Louis Auchincloss, ed. (New York: The Library of America, 2004), 537.

80. George Marsden, *Religion and American Culture* (Washington, D.C.: Harcourt Brace Janovich, Publishers, 1990), 175.

81. Ibid., 175.

82. Ray Abrams, *Preachers Present Arms* (New York: Round Table Press, Inc., 1933), 15.

83. Pierard and Linder, 146.

84. Ibid., 142.

85. Woodrow Wilson, "Address at a Meeting of the Associated Press, New York, April 20, 1915," in *President Wilson's State Papers and Addresses*, ed. Albert Shaw (New York: George H. Doran Company, 1917), 110–113.

86. Woodrow Wilson, "Address to the Daughters of the American Revolution, Washington, October 11, 1915," Shaw, 125.

87. Woodrow Wilson, "At Kansas City, MO, Feb. 2, 1916," Shaw, 208.

88. John Morton Blum, *Woodrow Wilson and the Politics of Morality* (Boston: Little, Brown and Company, 1956), 142.

89. George Ridout, *The Cross and the Flag* (Louisville, KY: Pentecostal Publishing Company, 1919), 55.

90. Conrad Cherry, *God's New Israel: Religious Interpretations of American Destiny* (Englewood Cliffs, NJ: Prentice-Hall, Inc., 1971), 286.

91. Gerald L. Sittser, *A Cautious Patriotism: The American Churches and the Second World War* (Chapel Hill: The University of North Carolina Press, 1997), 22–23.

92. Franklin D. Roosevelt, "Radio Address on Outbreak of the European War, September 3, 1939," in *The Roosevelt Reader: Selected Speeches, Messages, Press Conferences and Letters of Franklin D. Roosevelt*, ed. Basil Rauch (New York: Rinehart and Co., Inc., 1957), 225.

93. Franklin D. Roosevelt, "Radio Address on Selective Service Registration Day, October 16, 1940," Rauch, 258.

94. Quoted in Cherry, 297.

95. *Everson v. Board of Education of the Township of Ewing et al.* 330 U.S. 1 (1947).

96. Will Herberg. *Protestant-Catholic-Jew: An Essay in American Religious Sociology* (Chicago: The University of Chicago Press, 1955 [1983]), 3.

97. Ibid., 84.

98. McGreevy, 212.

99. John Courtney Murray, S.J. *We Hold These Truths: Catholic Reflections on the American Proposition* (New York: Sheed and Ward, 1960), 56.

100. Murray, x.

101. Hutcheson, 51.

102. Dwight D. Eisenhower, "First Inaugural Address, January 20, 1953," *I Do Solemnly Swear*, 325.

103. Pierard and Linder, 205.

104. For a treatment of the secretive elements of this event based on interviews with Fellowship members, see D. Michael Lindsay, "Is the National Prayer Breakfast Surrounded by a 'Christian Mafia'? Religious Publicity and Secrecy Within the Corridors of Power," *Journal of the American Academy of Religion* 74, no. 2 (March 2006): 390–419.

105. Richard V. Pierard, "On Praying with the President," *Christian Century* 99, no. 8 (March 10, 1982), 262–264.

106. Hutcheson, 55.

107. John F. Kennedy, "Inaugural Address, January 20, 1961," *I Do Solemnly Swear*, 344.

108. *Torcaso v. Watkins, Clerk*, 367 U.S. 488 (1961).

109. *Engel et al. v. Vitale et al.*, 370 U.S. 421 (1962).

110. *Aronow v. United States*, 432 F.2d 242 (9th Cir. 1970).

111. *Madalyn Murray O'Hair et al. v. W. Michael Blumenthal, Secretary of Treasury et al.* 588 F.2d 1144 (5th Cir. 1979).

112. *Alma F. Anderson, Diana Barclay, Betty Jean B. Neilson and Parker M. Neilson, Plaintiffs-Appellees, vs. Salt Lake City Corporation and Salt Lake County, Defendants-Appellands*, 475 F.2d 29 (10th Cir. 1973).

113. Jimmy Carter, "Inaugural Address, January 20, 1977," *I Do Solemnly Swear*, 372.

114. *McDaniel v. Paty et al.* 435 U.S. 618 (1978).

115. *Gilfillan v. Philadelphia*, 637 F.2d 924 (3rd Cir. 1980).

116. The so-called "Lemon Test" derives from the Supreme Court decision *Lemon v. Kurtzman*, 403 U.S. 602, 612–613 (1971). In his opinion, Chief Justice Burger stated that a statute must have a primarily secular legislative purpose with any religious purpose being incidental; the statute must not, as its primary purpose, advance or hinder religion; finally, the statute cannot lead to "an excessive government entanglement with religion."

117. *Stone v. Graham,* 449 U.S. 39 (1980).

118. Richard G. Hutcheson, Jr. *God in the White House: How Religion has Changed the Modern Presidency* (New York: MacMillan Publishing Company, 1988), 5–6.

119. Ronald Reagan, "Second Inaugural Address, January 21, 1985," *I Do Solemnly Swear*, 395.

120. Ronald Reagan, Proclamation 5018, February 3, 1983, available at http://www.reagan.utexas.edu/archives/speeches/1983/20383b.htm

121. *ACLU of Georgia v. The Rabun County Chamber of Commerce*, 678 F.2d 1379 (11th Cir. 1982).

122. *Marsh, Nebraska State Treasurer et al. v. Chambers*, 463 U.S. 783 (1983).

123. *Lynch v. Donnelly*, 465 U.S. 668 (1984).

124. George W. Bush, "First Inaugural Address, January 20, 2001," *I Do Solemnly Swear*, 427.

125. President George W. Bush, "Remarks by the President Upon Arrival," the South Lawn of the White House, September 16, 2001.

126. *Thomas Van Orden, Petitioner v. Rick Perry, in his official capacity as Governor of Texas and Chairman, State Preservation Board et al*, 545 U.S. 677 (2005).

127. *McCreary County, Kentucky et al., Petitioners v. American Civil Liberties Union of Kentucky et al.*, 545 U.S. 844 (2005).

128. George W. Bush, "50th Anniversary of Our National Motto, 'In God We Trust,' 2006: A Proclamation by the President of the United States of America," http://www.whitehouse.gov/news/releases/2006/07/2006727–12.html

129. Gary Wills, *Under God: Religion and American Politics* (New York: Simon and Schuster, 1990), 383.

130. James Davison Hunter and Os Guiness, eds., *Articles of Faith, Articles of Peace: The Religious Liberty Clauses and the American Public Philosophy* (Washington, D.C.: The Brookings Institution, 1990), 8.

131. Hutcheson, 235.

132. Jeffrey Stout, *Democracy and Tradition* (Princeton: Princeton University Press, 2004), 308.

FURTHER READING

On the topic of American Civil Religion, Robert Bellah's *Daedalus* article, "Civil Religion in America," and his book, *The Broken Covenant: Civil Religion in a Time*

of Trial, map out the basic tenets of this "religion" and the ways in which religious language and myths have been engrafted into the foundations of the country. Though perhaps somewhat dated, Bellah's work remains the classic articulation of this concept. For a discussion of the rhetoric of civil religion throughout American history—its origins, development and characteristics—see Sacvan Bercovitch's *The American Jeremiad* or Ernest Tuveson's *Redeemer Nation: The Idea of America's Millennial Role.* For a discussion of how this civil religion relates to the figure of the president, I recommend Pierard and Linder's *Civil Religion and the Presidency*, which provides an historical overview of the distinctive applications of these principles of civil religion by various presidents and the historical context and personal beliefs that shaped each presidency. Moving beyond the theoretical to the historical, several studies are particularly helpful for demonstrating the above themes in particular historical contexts. For a fascinating portrait of the relation between religion and politics before the Revolution, see Patricia Bonomi's *Under the Cope of Heaven: Religion, Society, and Politics in Colonial America* or Jon Butler's *Awash in a Sea of Faith*. For an overview of the early American to Civil War time period and the role of evangelical religion in fashioning public religion, see Mark Noll's *America's God: From Jonathan Edwards to Abraham Lincoln*. For a detailed look at the role of religion in the rhetoric, motivations and political maneuverings of the Civil War, see Harry Stout's *On the Altar of the Nation: A Moral History of the Civil War.*

3

Public Expression of Faith by Political Leaders

W. Jason Wallace

In recent American history, politicians have been both celebrated and chastised for their enthusiastic use of religious rhetoric in the pursuit and maintenance of public office. Although conservatives—specifically, conservative Republicans affiliated with the Religious Right—are considered the primary practitioners of faith-based politics, examples of public expressions of religious convictions can be found across most of the political spectrum.

Religious testimonials abounded in both parties in the months leading up to the 2000 presidential campaign. In December 1999, when Republican presidential candidates gathered in Iowa for an early debate, they were asked by a panelist to name their favorite philosopher. GOP frontrunner and then governor of Texas, George W. Bush earned the admiration of some and the derision of others when he replied "Christ, because he changed my heart." Later, in the heat of the election year, and inspired by the tenth annual "March for Jesus" in Austin, Bush declared June 10, 2000, to be "Jesus Day" in the state of Texas. Democratic presidential candidate, then vice-president Al Gore, garnered equal attention when he told the *Washington Post* in July of 1999 that, when faced with tough decisions, he always asked himself a simple question—"What would Jesus do?" In December of the same year, he explained to a national television audience that he was "born-again" and that he did not like "making people who do believe in God feel like they're being put down."[1]

The man who preceded Gore as the Democratic presidential nominee, President Bill Clinton, also made frequent references to his personal religious beliefs. In 1994 he told a television reporter that "I don't think I could do my job as President, much less continue to try to grow as a person in the absence of my faith in God and my attempt to learn more about what it should be."[2] At his acceptance speech for the Democratic presidential nomination in 1992 Clinton, describing his vision for America, utilized a powerful biblical concept when he called his plan a "new covenant" between the people and their government. Though designed to expose what he believed to be inadequacies in the previous two administrations, Clinton's use of biblical rhetoric was not unlike that which Ronald Reagan had employed in his election eve speech twelve years earlier when, borrowing liberally from the Gospel of Matthew, he inspired Republican imaginations with the notion that they would be the party who kept faith with God and preserved for future generations the "shining city on a hill."

A quick glance at the modern presidency reveals that leaders of both political parties have, for a variety of reasons, indulged in public expressions of faith, and that, at least rhetorically speaking, there is little difference between a Republican president who declares "our nation is chosen by God and commissioned by history to be the model to the world of justice and inclusion and diversity without division," and a Democratic president who admonishes that "God can change us and make us strong at the broken places."[3] Of course, presidents and presidential candidates are not the only leaders who talk openly about their beliefs. Elected and non-elected officials at the local, state, and national levels frequently convey their religious convictions to the public as well. From seemingly innocuous and ill-defined references to "faith" and the "divine," to more serious attempts at providing religious rationales for the country's legal system, many contemporary American political figures have embraced the notion that faith commitments somehow belong in the public square.

Although not limited to the United States, the practice of "public confession" has over time become conspicuously connected with American political life, eliciting both inspiration and frustration from a citizenry who are by and large divided over the degree to which public expressions of faith should be tolerated. Cynics contend that politicians who advertise their beliefs are engaging in nothing less than Machiavellian propaganda, but some believers counter that this practice is a welcome indication of a leader's moral compass. One of the difficulties surrounding public expressions of faith by political figures is that there are no legal prohibitions against a politician conveying his or her personal religious convictions. Still, despite the lack of a positive prohibition, some Americans are uncomfortable with

the practice and they view it, in principle, as a repudiation of the separation of church and state. The debate over the "public face" of American religion is indeed a pressing contemporary concern, but antecedents of the current discussion can be found in the religious and political heritage of America's colonial beginnings and can be traced through the course of the country's history.

RELIGIOUS RHETORIC AND PURITAN POLITICAL ANTECEDENTS

For most historians, the prominent place of religion in American public life began not with the earliest colonials to settle the New World, the Catholics of New Spain who arrived in the sixteenth century, but rather with the Protestants of New England who caught up with the overseas adventures of the Spanish a century later. Although Catholicism remained important throughout the colonial experience, it was Protestantism of the New England variety that provided both the vocabulary and the ideological constructs that would come to shape the religious rhetoric of so many public figures throughout American history. Central to New England Protestantism were the Puritans, or those who dissented from the established liturgical practices of the Church of England as they were forged under the reign of Elizabeth I and promulgated during the rule of the Stuart monarchs in the seventeenth century.[4]

Puritan dissent from the Church of England was neither arbitrary nor characterized by undisciplined enthusiasm for controversy. The disagreement with the established church was fundamentally a disagreement over how the Bible was to be interpreted and applied both to the church and the private life of the believer. What initially separated the Anglicans from the Puritans was a question of the scope and limits of Scripture with regard to regulating what should be normative for the Christian life. Both accepted the authority of Scripture, but Anglicans insisted that priority in biblical interpretation must be given to those matters considered necessary and essential for salvation and God's plan of redemption. They contended that there were many difficult and ambiguous passages in the Scriptures that would always present interpretive problems, but the Bible was nevertheless clear when it came to the indispensable matters of Christianity. Hence, for the established Church of England a degree of latitude was allowed in theological controversies considered superfluous to the primary message of salvation.

Puritans, by contrast, argued that there was nothing in the Bible that could be considered incidental to God's redemptive purposes. To be sure,

Christ was the unifying center through which both the Old and New Testaments were to be interpreted, but all of Scripture was necessary for understanding and living the Christian life, and therefore all of Scripture could be used to regulate any subject about which it spoke.[5] What gave formidable substance to the Puritan approach to Scripture was their formulation of the idea of the "covenant" as a controlling theme of biblical interpretation. Although not unique to the Puritans, covenant theology (or federal theology as it is sometimes called) reached a systematic clarity in their thought, and through Puritanism covenant theology entered the American colonial context.[6]

Covenant theology insists that the normal biblical pattern by which God established a relationship with fallen humanity was through a series of gracious compacts whereby divine favor was extended to his chosen, or elect, people. Attached to these compacts were certain expectations of obedience. If God's people obeyed his commandments they would be blessed, and if God's people disobeyed they would be cursed. This pattern unfolds in the biblical narrative through the Old Testament story of Israel, and it reaches its apex in the New Testament revelation of Christ and the establishment of the church.

The Puritans were divided over the extent to which Jesus transformed the requirements of human obedience necessary to continue in divine favor; however, there was general agreement on several important points: God had providentially provided mercy for the elect; the elect were in turn to respond with faith and obedience; and the proper response of faith and obedience entailed both personal and corporate responsibilities. On the one hand, the Puritan conception of the covenant was intensly individual, experiential, and private, yet on the other hand covenantal faithfulness included public activities—those social and political tasks necessary for the right ordering of a commonwealth. In England, the Puritan model of a society dedicated to the purposes of God would not flower until the interegnum of Oliver Cromwell and the Rump Parliament, but in New England, living as "providentially chosen people" would provide both solace and solidarity in a frightening wilderness far from home. The Puritan idea of "choseness," however, would also have lingering and complicated implications for later American conceptualizations of the proper relationship between church and state.

From its inception, the political project of New England was characterized by the language of covenantal theology, as the public officials of the early colonies intentionally used religious categories to justify and explain the proper purposes of civil government. Although their doctrinal laxity, their working class background, and their formal separation from the

Church of England distinguished the Pilgrims who settled the Pymouth Colony in 1620 from the more orderly and intellectual Puritans who later founded the Massachusetts Bay Colony, the Christian social vision of the Pilgrims was nevertheless in accord with Puritan political thought.

The forty-one male passengers who signed the Mayflower Compact agreed in their initial attempt at formal self-government that their undertaking was for "the glory of God, and advancement of the Christian faith," and they did "solemnly and mutually in the presence of God, and one another, covenant and combine [themselves] together into a civil body politic."[7] William Bradford, the author of the Mayflower Compact and the governor of the Plymouth colony for almost 35 continuous years, recorded in his book *Of Plymouth Plantation* that the primary reason the small group ventured to America was due to the "great hope and inward zeal they had of laying some good foundation, or at least to make some way thereunto, for the propagating and advancing the gospel of the kingdom of Christ in those remote parts of the world."[8] The Pilgrims were undoubtedly committed to the idea of a Christian society premised, even if loosely, on the notion of covenantal political-theology. However, the colony was slow to grow and they never flourished like their neighbor to the north, the Massachusetts Bay Colony.

The majority, but not all, of the first 400 settlers who would form the Massachusetts Bay Colony were Puritans. Although some joined the new colonial venture simply in the hope that they could turn a profit and afford themselves a measure of economic security unavailable to them in England, these enterprising capitalists did not represent the greater part of the undertaking. In 1630, the leadership of the new community explicitly set forth that, even though trade was indeed a partial motivation for their emigration, they were, nevertheless, attempting to form a Christian commonwealth guided by Puritan theological and political principles.

While still aboard the flagship *Arbella*, John Winthrop, the first governor of the colony, outlined the theocratic vision for the settlement in his famous sermon, *A Model of Christian Charity*. After exhorting the colonists to conduct themselves according to "the law of grace or the Gospel" so that they "might be all knit more nearly together in the bond of brotherly affection," he explained that the law of love that was to regulate their social behavior should be understood in terms of the covenantal pattern of blessings for obedience and curses for disobedience. If "the unity of the spirit in the bond of peace" was maintained, urged Winthrop, then "the Lord will be our God and delight to dwell among us, as His own people . . . We shall find that the God of Israel is among us . . . For we must consider that we shall be as a city upon a hill. The eyes of all the people are upon us."

"If," however, "we should deal falsely with our God in this work we have undertaken," he warned, the error of disobedience will "cause Him to withdraw His present help from us, we shall be made a story and a by-word through the world." Winthrop concluded his sermon with a direct quote from Deuteronomy 30 in which Moses says farewell to the Israelites and admonishes them that the Lord's promise of either blessings or curses depends solely on their observance of the law.[9]

Winthrop's message to the colonists was clear. The political and social project of New England was to be understood primarily in theological terms. In particular, public or communal relationships were to be ordered according to the Puritan belief that just as God related to Israel by establishing conditions that had to be met so that they might flourish, so too did God relate to "spiritual Israel," the true and faithful church. In effect, for the Puritans, the sacred history of Scripture had not ended, but continued in the mission of the "true" church, and in particular continued in the social experiment of New England.[10] Here, the purposes of the church and the purposes of politics were fused into the common cause of promoting the divine will.

What is important to note is that public figures like Bradford and Winthrop were not using religion merely as an appendage to political activity; rather, for them, religion, specifically Christianity, was the foundation of political activity. Their social vision was first and foremost a biblical interpretation of how life should be ordered as the true remnant, the elect people of God who allowed no rigid distinctions between the sacred and the mundane. When, in 1645, Winthrop was accused of exceeding his authority as a magistrate, he successfully defended himself by reminding his detractors that all lawful authority "has the image of God eminently stamped on it," and that contempt for those who legitimately hold public office "has been vindicated with examples of divine vengeance." A good servant, he argued, is one who governs to the best of his ability "by the rules of God's laws," maintaining the covenant oath that binds him both to God and to the people.[11]

Puritan theology held that Israel, not Athens or Rome, represented the political ideal of antiquity that believers should seek to emulate. In this regard, the Puritans shared some measure of continuity with the medieval political theology of the Catholic Church.[12] But the Puritan experiment was unique in the history of church-state relations in that theirs was indeed an "errand in the wilderness," a society largely set free from the burden of European history, and yet at the same time sincerely committed to reinventing a new kind of Christian culture with a positive sense of mission. Aspects of this Puritan sense of mission would slowly permeate the collec-

tive identity of both the colonies and the young republic, and in particular it would affect public expression of faith for later generations of Americans in two important ways.

First, the language of Scripture, especially the Old Testament, would easily translate into an American colonial—and eventually national—context that conceived of itself, even if metaphorically, as a covenanted "New Israel" set apart for a special purpose in human history. Second, the Puritan conviction that God was at work in history and that they were providentially chosen to be an example to the world of what a Christian society should look like imbued the American experience with a sense of higher purpose and significance that was readily adopted for political purposes as the United States grew into first its national and then its international identity. Tellingly, however, the theological presuppositions that informed the ways in which the Puritans expressed their faith would slowly be transformed and eventually discarded to meet the demands of an increasingly pluralistic society struggling to understand the practical implications of democracy.

POLITICS, RELIGION, AND THE EARLY REPUBLIC

Even in the early years of the New England experiment, the Puritan way never achieved complete unanimity. Dissenters such as Anne Hutchinson, Roger Williams, and Thomas Hooker emerged within a few years of the founding of the Massachusetts Bay Colony to challenge both the theology and politics of the young Puritan community. Over time Puritan solidarity fragmented and the sense of destiny that accompanied the second and third generations of New Englanders fluctuated with their political fortunes at home and abroad.

Outside of New England, colonists were having even more complicated experiences with religion and public life. By the 1700s, religious diversity was the rule in New York as Dutch Calvinists, Anglicans, Lutherans, German Reformed, Catholics, and Jews swelled Manhattan and the Hudson River Valley. Further south in the middle colonies of New Jersey, Pennsylvania, and Delaware, Quakers, Mennonites, Amish, and various sects of Pietists shared space with Lutherans, Presbyterians, Baptists, and Puritans who had left New England in search of even holier commonwealths. Maryland was founded as a haven for Catholics in 1632, and in 1649 the Catholic-controlled Maryland Assembly adopted an Act of Toleration welcoming all Christian faiths to the colony. Religious tolerance in Maryland, however, would ebb and flow throughout the seventeenth century according to whichever theological community held power.[13] In the southern colonies,

Anglicanism was in general the largest denomination until the English Act of Toleration was passed after the Glorious Revolution of 1689. As a result Protestant dissenters, primarily Baptists and Presbyterians, gradually began to occupy Virginia, the Carolinas, and Georgia.

Both inside and outside of New England seeds of religious pluralism were being sown, but the growth of denominationalism and sectarianism did not undermine the public place of religion in the colonies. Between 1720 and 1750 the revivals of the First Great Awakening rekindled the hopes for providential designs on America, and they provided a kind of ideological unity to the disparate religious landscape that would in time bolster the new nation. In particular revivalist preachers like Solomon Stoddard, George Whitfield, and Jonathan Edwards encouraged the expectation that the millennial Kingdom of Christ would emerge through the earnest efforts of committed Christians.[14] Frequently, the hope of Christ's future reign on earth was associated with the idea that young America would play an important role in God's ultimate plan for extending redemption to the world.

Even Jonathan Edwards, the most skeptical of all the Great Awakening leaders with regard to America's special place in redemptive history, confessed that since "the old continent has crucified Christ . . . 'tis probable that, in some measure to balance these things, the most glorious renovation of the world shall originate from the new continent."[15] By the middle decades of the eighteenth century, many Americans were convinced that the future success of the colonies depended upon the spiritual sincerity and moral fortitude of "converted" Protestants who had come to experience the power of God in very personal ways. This new spiritual personalism marked an important shift in American religious thought as more and more Protestants came to emphasize the emotional and subjective aspects of their faith over and against confessionalism and doctrinal assent.

The turn toward experiential religion in the eighteenth century was accompanied by equally dramatic changes in the relationship between religion and politics. From the late 1600s to the early 1800s, new trends in science and philosophy reshaped the intellectual landscape of both Europe and America by reordering, if not completely overturning, traditional assumptions about God, the natural world, and human nature. In this period, known as the Enlightenment, or the Age of Reason, writers and philosophers such as John Locke, David Hume, Montesquieu, Voltaire, Rousseau, and Immanuel Kant revolutionized human reflection about both God and nature. The consequences of Enlightenment thought were manifold, but particularly affected were conventional notions about the place of religious convictions in public life.

Although there is no single result that captures the impact of the Enlight-

enment on religious thought, in general terms the period witnessed a shift away from supernatural theism toward more rational or natural explanations of God's dealings with humanity. For some religion was dismissed as irrelevant, but for others it was only much more circumscribed than it had been in the Middle Ages and the Early Modern periods. Typically, supernatural events supported by the church such as miracles and divine revelation were rejected in favor of beliefs discovered by human reason and observation of the natural world, and this rational process in turn uncovered natural religious truths—truths that could be universally accepted because they were valid at all times and in all places, or because they had been imprinted into human consciousness by a god who was otherwise quite impersonal.

"Natural religion," or "natural theology," challenged the received confessional positions of both Catholics and Protestants, and it opened-up the possibility of safeguarding moral behavior without recourse to a particular sectarian interpretation of the Bible. Moreover, in the wake of the religious wars that ravaged Europe during the sixteenth and seventeenth centuries, as well as the rise of monarchical absolutism, Enlightenment approaches to religion led to new ways of thinking about how moral justifications for political activity could be retained without committing the state to a particular theological position.[16]

Taken together, the exigencies of religious pluralism, the millennial hopes of the Great Awakening, and the new intellectual currents emerging from Enlightenment thought changed the way public leaders expressed their faith during the American Revolution and the formative years of the early republic. Certain Puritan concepts were retained, but they were largely divorced from the ideal of an organic Christian society that viewed the Bible as a comprehensive guide to all of life. The dogmatic constructions of covenant theology that had been so essential to the Puritan experiment carried sectarian baggage that was in many ways irrelevant to the political purposes of the late 1700s. Yet the belief that government was entrusted with a "sacred purpose" remained viable to a population conditioned by religious awakening and in the main committed to a broadly conceived cultural Protestantism. No doubt religion still mattered, but for many political leaders it slowly began to matter as much for its social utility as its theological implications. "Providence" was still at work, but the idea lacked the well-defined biblical meaning it had carried for earlier generations of creedal Calvinists; the Bible still had something important to say about God and human nature, but not in terms of rigid dogma; theology was still significant, but primarily for its ethical imperatives rather than for its claims of supernatural authority.

As American Christianity—specifically, American Protestantism—evolved,

so too did public expressions of faith by political leaders. On the one hand, public references to religion provided a moral, if not metaphysical, rationale for the American experiment. On the other hand, most political leaders carefully refrained from making dogmatic statements about their faith or referencing any particular confessional system as a guide to the "truth" of Christianity. Religion remained important, but its importance increasingly stemmed more from its usefulness to republican values rather than from its spiritual veracity. Nowhere is this shift more evident than in the political rhetoric of the Founding Fathers.

When Thomas Jefferson penned the Declaration of Independence in June 1776 he studiously avoided any references to Christianity, Jesus, or even God, and the contrast with the Puritan rhetoric of William Bradford and John Witherspoon is striking. Instead of quoting the Bible or referencing an exacting theological system to provide moral grounds for the colonial rebellion against England, Jefferson, and a committee of four others, chose the language of natural religion. People, they urged, are at times entitled to political revolt because "the Laws of Nature and Nature's God" guarantee certain rights. A "Creator" has made these rights possible, and "the Supreme Judge of the World" will, they hope, vindicate the intentions of the colonials to exercise their right to form free and independent states.

The document concludes that the signatories will rely on "protection of divine Providence" to secure their work. Notice there is no theological specificity to this language—no clarification or refinement of what exactly the Founders meant by "Creator," "Supreme Judge," or "Providence." The words no doubt invoked a measure of reverence or respect for the idea of the divine, and they clearly endowed the impending rebellion with a kind of sacral character, but still the religious language of the Declaration of Independence is neither confessional nor is it an expression of praise.

Jefferson's choice of words for the founding document of the United States presents an interesting paradox (one that exists to the present day) in the history of public expressions of faith by political leaders. Although the Founding Fathers understood that religion was important to the future of their political experiment—most argued that the moral authority of Christianity was indeed superior to other religions—they nevertheless made no attempt to secure Christianity as the official or established religion of the new nation, nor did they publicly address the details of the Christian message. In fact, many of the Founders expressed deep appreciation for the moral sentiments of Christianity while at the same time remaining indifferent to the theological claims of any one denomination.

Jefferson's personal beliefs about Jesus and Christianity fluctuated over the course of his life, and it is well known that he twice edited the New

Testament to remove what he considered to be the irrational content. His approach to religion was ultimately practical, and like other Founders he tolerated public expressions of Christianity only to the degree that they served the positive social benefit of cultivating virtue in a free populace. As with many of his contemporaries, Jefferson seemed to hold simultaneous and contradictory opinions about Christianity, and his private correspondence on the subject often differed from his public pronouncements.

He could fume that "Millions of innocent men, women and children, since the introduction of Christianity, have been burnt, tortured, fined and imprisoned," and also speculate, "Can the liberties of a nation be thought secure, when we have removed their only firm basis, a conviction in the minds of the people that these liberties are of the gift of God?"[17] He could dispute privately with a friend that "Christianity neither is, nor ever was a part of the common law," and yet publicly declare in his Second Inaugural Address that he will need "the favor of that Being in whose hands we are, who led our fathers, as Israel of old, from their native land and planted them in a country flowing with all the necessaries and comforts of life."[18] He could argue that "of all the systems of morality, ancient or modern, which have come under my observation, none appear to me so pure as that of Jesus," and yet lament that although many of Jesus' sayings were "of the most lovely benevolence," unfortunately many others were "of so much ignorance, so much absurdity, so much untruth, charlatanism and imposture as to pronounce it impossible that such contradictions came from the same human being."[19] Even in his latter years Jefferson maintained that Calvinism was demonic, that the virgin birth of Jesus was a fable similar to the emergence of Minerva from the head of Jupiter, and that atheists could be just as moral as Christians. But he also held that Jesus was "the most venerated reformer of human errors," and that freedom of thought would one day restore his "primitive and genuine" teachings.[20]

When Thomas Jefferson ran for president in 1800, his opinions about religion pushed many Protestant detractors decidedly into the camp of his Federalist opponent John Adams. In truth, however, Adams was little more interested in orthodox Christianity than Jefferson, and like Jefferson he too conveyed ambivalence in his appraisal of the place of religion in public life. When he helped pen the Massachusetts constitution in 1780, Adams declared it was the "duty of all men in society . . . to worship the Supreme Being, the great Creator and Preserver of the universe." Likewise, soon after he became vice president in 1789, he wrote that "our constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other."[21] In a letter to Thomas Jefferson written in 1813 he said that "the general Principles of Christianity" were the principles that

guided the Founding Fathers in their pursuit of independence from England.

Adams did not elaborate how the Founding Fathers understood the details of those "general principles," nor did he explain what the "general principles" actually were. Like Jefferson, Adams was content to use generic religious language in order to retain the moral capital of Christianity without ceding any particular doctrinal stance. Elsewhere, he decried the fact that "millions of fables, tales, and legends have blended with both Jewish and Christian revelation," making them "the most bloody religion[s] that ever existed," and he insisted that since the Reformation there never "existed a Protestant or dissenting sect who would tolerate a free inquiry."[22] As president, the most significant statement John Adams made concerning the religious character of the young country came when he signed the Treaty of Tripoli in 1796, which was brokered to end Muslim piracy in the Mediterranean Sea and to extend friendship to the coastal countries of North Africa. The treaty stated that "the United States is not, in any sense, founded on the Christian religion," and that "the United States is not a Christian nation any more than it is a Jewish or a Mohammedan nation."

The pattern of at once endorsing the ethical precepts of Christianity while avoiding assent to any specific creedal system can be found in the rhetoric of most of the Founding Fathers. Benjamin Franklin said that he thought religion suffered when orthodoxy was regarded more than virtue, and he urged that virtuous acts were much more important than personal religious beliefs.[23] Although he considered "the system of morals" taught by Jesus to be "the best the world ever saw or is likely to see," he also "found Christian dogma unintelligible" and he avoided going to church.[24]

Just before the outbreak of the revolution James Madison told a friend that "religious bondage shackles and debilitates the mind and unfits it for every noble enterprise, every expanded prospect." Yet, in the heat of the colonial revolt he acknowledged before the Virginia General Assembly in 1778 that the political institutions of the new nation depended upon a moral citizenry conditioned "according to the Ten Commandments of God." Later, before the same body, he advocated for the separation of church and state in his famous *Memorial and Remonstrance Against Religious Assessments*, in which he argued that when the state recognizes an established religion, it erects "a spiritual tyranny on the ruins of civil authority." Madison saw the need for public morality, but he remained a lifelong defender of the separation of religion from the purposes of government.[25]

The first president, George Washington, concurred. When clergy complained to him that the Constitution failed to mention Jesus Christ, he responded that the path of true piety required little political direction. He

later reassured the Baptists of Virginia that everyone "ought to be protected in worshipping the Deity according the dictates of his own conscience."[26] Moreover, he repeatedly denounced religious controversies and disputations as antithetical to the "enlightened and liberal" purposes of the new nation and dangerous to the peace of society.[27]

Still, Washington was a practical leader who understood that religion could have a stabilizing effect on the moral disposition of the nation. Thus, in his farewell address at the end of his second term as president he declared that "of all the dispositions and habits, which lead to political prosperity, religion and morality are indispensable supports," and that "reason and experience both forbid us to expect, that national morality can prevail in exclusion of religious principle." Washington, using language common to so many other Founders, concluded his time in public service by consciously avoiding references to specific religious teachings or doctrines in favor of the importance of religion in general to the social well-being of the republic.

RELIGION AND POLITICS IN A FREE REPUBLIC: THE CHALLENGES OF THE NINETEENTH CENTURY

The Founding Fathers left the country a peculiar legacy with regard to the public expression of faith by political leaders. Virtue and morality were important to the nation, and indeed the ethical precepts of Christianity provided a code of personal behavior that could benefit all citizens. But if Christianity, or any religion for that matter, was to be useful to the republic, it had to be carefully contained. If disputes over nuanced theological positions or doctrinal convictions were to spill into public life, then the social order risked fragmentation and disarray. If, however, Americans could find a common core of religious teachings shared by everyone, then religion offered a powerful tool for unifying a diverse population. Public figures in the nineteenth and twentieth centuries would have to navigate this situation very carefully.

For much of the nineteenth century, most Protestant Americans had little trouble adjusting to the absence of an established religion as they found common cause in trans-denominational crusades designed to alleviate social-ills deemed dangerous to the country. Inspired by the revivalism of the Second Great Awakening (1800–1830s), numerous voluntary moral reform movements actively campaigned for causes such as temperance, maintenance of Sabbath laws, distribution of religious tracts and Bibles, and Protestant control of public education.[28] These activities secured vast networks of local organizations dedicated to transforming society, and they provided

religious reformers a way to make their faith relevant for public life without violating the Founders' directive that moral usages of Christianity were appropriate so long as doctrinal or sectarian disputes could be avoided. Politically speaking, the Whig Party, much more than the Democratic Party, capitalized on the energy of revivalism and reform, and they more than the Democrats kept the moral sentiments of Christianity firmly in the public imagination.

Whigs believed themselves to be direct descendants of the Federalists, and in large measure they were the nineteenth-century standard bearers of conservative social ideals. They did not recoil at the thought of the church influencing moral legislation; they tended to support an industrial aristocracy grounded in Protestant values; they had an extreme dislike for the legacy of Thomas Jefferson, and they absolutely abhorred the populist Andrew Jackson. Whigs enjoyed enthusiastic support among those sympathetic with the notion that government action should be used to secure religious and moral improvement. Indeed, religion as a restraining social influence was believed to provide the perfect compliment to the liberating effects of political and economic freedom that characterized the young nation.

In 1840 the Whigs ran William Henry Harrison as their presidential candidate, and party publicists were careful to portray him as a "sincere Christian" and "a good Sunday School . . . church going man."[29] By contrast, his opponent, Democratic incumbent Martin Van Buren, was characterized as "undisciplined in ethics, morality, and religion," and his party was accused of conspiring to "expunge the whole Decalogue from our morals" and of seeking "the overthrow of the church . . . and the destruction of the ministers of religion."[30] The Whig tactic worked, and after Harrison defeated Van Buren, in disinterested language reminiscent of the Founders he declared that he had "a profound reverence for the Christian religion," and he expressed gratitude to "that good Being who has blessed us by the gifts of civil and religious freedom."[31]

The Whig party was short-lived, but their legacy of using Christian moral rhetoric for political purposes lasts until the present day. In the 1850s, the Whigs split over the two most pressing social issues of the mid-nineteenth century, slavery and Catholicism, and the division in the party over these questions reflected larger fractures developing within American culture. Catholics had faced seasons of intolerance and bigotry since the colonial period, but in the middle decades of the nineteenth century anti-Catholicism reached a new level of intensity. Between 1828 and 1844 over 500,000 immigrants, mostly Catholics, swelled the nation's northern cities, and both devout and nominal Protestants reacted by demanding legislation that would require the foreign-born to shed whatever real or perceived Old

World loyalties they retained in favor of republican values. For many Americans, the mediating institution between the immigrant and Americanization would be a public school system governed by generic Protestant principles and dedicated to ensuring a homogenous moral consensus.

Political leaders were quick to enter the fray over education and Americanization, and more often than not religious presuppositions guided their arguments either for or against the benefits of public schools. One of the leading advocates of the common school movement was Horace Mann, the secretary of the Massachusetts State Board of Education from 1836 to 1848, and member of the U.S. House of Representatives from 1848 to 1852. A former Calvinist turned Unitarian who had experience as an educator, as well as a lawyer and a state senator, Mann brought to the position of secretary of education a vision of how religion divorced from sectarianism could be used in public or "common" schools to build a consensus of good citizenship.

He developed his argument around three themes. First, he believed in the "absolute right of every human being that comes into the world to an education." Second, based on the conviction that people had a right to an education, he argued that it was the "correlative duty of every government to see that the means of that education are provided for all."[32] Finally, Mann suggested schools could use religion to teach people how to be good only if religious principles were extracted from denominational propaganda. He reasoned that religious education was not to be used to persuade a child to "join this or that denomination, when he arrives at the age of discretion." Instead, religious training could be used in schools to help the child "judge for himself, according to the dictates of his own reason and conscience, what his religious obligations are, and whither they lead."[33] To this end, Mann suggested that the best way to cultivate virtue in school children was to read them the "ethical" teachings of the Bible without commenting on the difficult points of doctrine that may surround any one interpretation. Mann's proposals found both supporters and detractors, but significantly his vision for using public education as a means of inculcating character development was premised on the belief that the moral essence of religion could be discerned and taught apart from denominational concerns.

The anti-Catholic, anti-immigrant furor that helped to fuel the common school movement in the 1830s and 1840s culminated in the formation of the Know Nothing Party in early 1850s. Also known as the American Party, the Know Nothings had supporters in every region of the country, and their political representatives in both local and federal assemblies employed pro-Protestant religious rhetoric to bolster their contention that America was not to be governed by Catholics or anyone who held European sympa-

thies. Harangues against the iniquities of the Middle Ages and the papacy peppered Know Nothing political speeches and party literature. Moreover, they promoted proscriptive legislation that would severely limit the influence of Catholics and immigrants on American public life. The Philadelphia Platform, a statement of party principles adopted by the National Council of the American Party in 1855, asserted that Christianity "is considered an element of our political system," and "the Holy Bible is at once the source of Christianity, and the depository and fountain of all civil and religious freedom."

Congressman Lewis D. Campbell of Ohio, a Whig who switched to the American Party, typified Know Nothing rhetoric in his blustering attacks against Catholics on the campaign trail. "My partialities run with the Protestants," he declared before a Washington audience in 1856, "because in youth I was trained in that faith, and in manhood learned from the history of the past that the Protestant church has always been the church of Freedom." He added that Americans intend no union of church and state, and "if there be any Catholic in this country who is not satisfied with this sort of religious liberty I tell him the sooner he 'packs up his duds' and goes back [to Europe] the better."[34] Another Congressman, Joseph Chandler, a Catholic convert from Philadelphia, tried to persuade his colleagues in the House of Representatives that the pope no longer exercised political power as he had in the Middle Ages, and questions of Catholic loyalty to the United States should not be a topic of discussion in Congress. These public arguments over Catholic political loyalties exposed an inherited cultural assumption that although the United States had no established religion, it nevertheless retained a Protestant character that was to be upheld, if not by consensus, then, for some at least, by law.

The idea that the nation retained a certain Protestant character, even if ill-defined, provided a measure of social cohesiveness in the early decades of the nation's history. However, this proposal remained valid only to the extent that both religious denominations and political parties could agree on broad ethical imperatives that steered far away from contentious theological or social issues that exposed fault lines in generic public Protestantism. One issue that could not be avoided in the nineteenth century was the question of free versus slave labor, and entrenched disagreement over the matter manifested not only geographically and politically between the North and the South but theologically as well. Political and ecclesiastical leaders on both sides of the slavery debate were quick to use religion to justify their arguments, and their heated rhetoric portended the bloody calamity of the Civil War.

Eleven years before the war began, John C. Calhoun, the accomplished

senator from South Carolina, recognized that the prelude to disunion could be seen in the divisions occurring in the denominations over the question of slavery. In his last major address before the Senate he told his colleagues that although there were many "chords" that held the Union together, the strongest bond was of a "spiritual and ecclesiastical nature," that is "the unity of the great religious denominations." Unfortunately, the sturdy ties of the denominations "were not able to resist the explosive effect of slavery agitation," and, as a consequence, Calhoun believed the Protestant consensus was slowly coming apart. "If the agitation goes on," he warned, "the same force, acting with increased intensity . . . will finally snap every chord, when nothing will be left to hold the States together except force."[35]

Daniel Webster, the equally distinguished Senator from Massachusetts, agreed with Calhoun. On March 7, 1850, three days after Calhoun's speech, Webster admonished his colleagues that questions like slavery are best left to the political process because once "discussed in religious assemblies of the clergy and laity," passions inevitably subvert good judgment to the point where "every thing is absolute; absolutely wrong, or absolutely right." People impassioned by religious sentiment cannot negotiate, said Webster, because "they are apt, too, to think that nothing is good but what is perfect, and that there are no compromises or modifications to be made in consideration of difference of opinion or in deference to other men's judgment."[36]

Webster and Calhoun proved prescient, but still political figures on both sides of the controversy continued to use religious rhetoric unabated in an effort to make sense of their respective positions. With the outbreak of the war, and as the carnage of battle took its toll, both Northern and Southern politicians described the meaning of it all in religious terms. Jefferson Davis, the president of the Confederacy, echoing the arguments of politicians and ministers throughout the South, passionately maintained a year into the war that slavery "was established by decree of Almighty God . . . it is sanctioned in the Bible, in both Testaments, from Genesis to Revelation . . . it has existed in all ages, has been found among the people of the highest civilization, and in nations of the highest proficiency in the arts."[37] In 1863, after the dramatic defeats of Gettysburg and Vicksburg, he borrowed the old Puritan covenantal theological categories of faithfulness and disobedience to explain the reversal of South's fortunes. Early success had made the South self-confidant, but now southerners were being chastised because they had forgotten their reliance upon God.[38]

Davis's counterpart in the North, Abraham Lincoln, was equally adamant that there had to be some kind of divine purpose behind the conflict, and in speeches that continue to inspire and haunt the American imagina-

tion he portrayed the goals of safeguarding the Union and ending slavery as almost redemptive causes. In fact it was Lincoln, perhaps more so than any other political figure in the nation's history, who used abstract religious rhetoric to try and give transcendent meaning to the purpose of the Union. After the Second Battle of Bull Run in August 1862, he mused that God willed the war for sacred reasons; further, although both sides claimed to act in accordance with the will of God, one side had to be wrong because "God cannot be for and against the same thing at the same time." Though he was never a member of a particular denomination, and at times in his life demonstrated outright skepticism, as president he maintained that a unified country needed a unifying religious sentiment. For Lincoln this sentiment involved carefully portraying the preservation of the nation, albeit a nation "reborn" in its commitment to liberal democracy, as a goal worthy of divine blessing.

With his election to the presidency, southern secession became a reality, and he tried to reassure in his First Inaugural Address that "Christianity, and a firm reliance on Him who has never yet forsaken this favored land," would help guide the country through the impending crisis. After the war began, he passed an executive resolution ordering that members of the military observe the Sabbath so that their cause might not be "imperiled by the profanation of the day or the name of the Most High."[39] When Northern prospects looked grim in the first two years of the struggle, he, like Jefferson Davis, explained the setbacks using language reminiscent of the Puritans. "We have forgotten God," said Lincoln in a call for Northerners to fast and repent, "we have vainly imagined, in the deceitfulness of our hearts, that all these blessings were produced by some superior wisdom and virtue of our own. Intoxicated with unbroken success, we have become too self-sufficient to feel the necessity of redeeming and preserving grace, too proud to pray to the God that made us."[40] Later, the day after the Union triumph at the Battle of Gettysburg, a more optimistic Lincoln allegedly told General Dan Sickles that he never dreaded the outcome of the battle because in prayer he had asked God for victory and told God that "this was His war, and our cause His cause."

That same summer he called for another national day of prayer, and in a rare reference to the third person of the Trinity by a public figure, he invited the people of the United States "to invoke the influence of His Holy Spirit to guide the counsels of the government with wisdom adequate to so great a national emergency," so that the nation might be led to "repentance and submission to the Divine will."[41] With encouragement from the Lincoln administration, Congress authorized the coinage of two-cent coins upon which the motto "In God We Trust" first appeared in April

1864. A year later on March 4, 1865, Abraham Lincoln delivered his Second Inaugural Address just weeks before his own assassination. Here, he framed the war between the North and South in overt theological terms, quoting from *Psalm 19* and *Matthew 18* to emphasize that American slavery was an offence against God which was being providentially purged at a cost of great sacrifice. A month later Lincoln was dead, and many would interpret his death as final price that had to be paid to save the Union. His former law partner, William H. Herndon, wrote in one of the earliest biographies of the president that "Lincoln was God's chosen one" and that the trials of his life had made him "the noblest and loveliest character since Jesus Christ."[42]

PUBLIC EXPRESSIONS OF FAITH IN THE TWENTIETH CENTURY

The Civil War, and specifically Lincoln's use of religious rhetoric in the cause of the Union, inspired a reinvigorated missiological zeal for the meaning of democracy in the modern world. After 1865, as America grew into a competitive industrial nation-state, at least the ideal of "freedom" if not the complete reality gained a consecrated significance not seen since the American Revolution, and the religious nationalism captured in the speeches of Abraham Lincoln continued in the oratory of political figures from all regions of the country. A major shift from the nineteenth to the twentieth century, however, was America's growing presence as a world power that could contend with European nations for military and economic superiority.

Where domestic quarrels divided Americans in the nineteenth century, increasingly international conflicts tended to unite them in the twentieth century. As the United States slowly assumed a dominant role on the world stage, political leaders again invoked God to sanction the meaning of democracy in almost spiritual terms. At the same time, twentieth-century political figures followed the pattern of their predecessors in public life by ignoring nuanced theological disputes in favor of rhetoric that supported a broad ethical consensus that could appeal to all Americans.

In 1915, President Woodrow Wilson continued the politician's habit of employing nonspecific religious language for moral causes while studiously avoiding any detailed denominational controversies in an address before the Federal Council of Churches—an ecumenical Protestant movement committed to progressive social reform. True Christianity, said Wilson, was not simply to be regarded as a "body of conceptions regarding God and man," but was also to be involved in the affairs of the world as well. "The church,"

he noted, "is the only embodiment of the things that are entirely unselfish—the principles of self-sacrifice and devotion," and as such it was "put into this world, not only to serve the individual soul, but to serve society also."[43]

For Wilson and many other elected officials who cut their political teeth in the Progressive Era, an important function of religion was to inspire public service, and after America entered World War I he encouraged participation in the cause overseas by associating public service with the spread of American democracy. On June 5, 1917, a day designated for national registration for the draft, he told a reunion of Confederate veterans that the Union had been preserved through the Civil War so that the United States could be "an instrument in the hands of God to see that liberty is made secure for mankind." Two weeks later he hosted a delegation from the Northern Presbyterian Church at the White House and explained to these ministers that "any great spiritual body" could support America's entrance into the European conflict because "if ever there was a war which was meant to supply new foundations for what is righteous, true and of good report, it is this war."[44]

Twenty-four years later, President Franklin Roosevelt used similar appeals in his State of the Union address one month after the Japanese attack on Pearl Harbor. With America's entrance into World War II the intentions of the United States and the aims of Nazi Germany were cast in terms of a stark dualism. The president urged that "victory for us means victory for religion. The world is too small to provide adequate living room for both Hitler and God." Roosevelt warned that the Nazis planned to enforce "their new, German pagan religion all over the world," and if this plan succeeded, "the Holy Bible and the cross of mercy would be displaced by 'Mein Kampf' and the swastika and the naked sword." He further reminded his audience that "inspired by a faith that goes back through all the years to the first chapter of Genesis," Americans "are striving to be true to that divine heritage" by defending democracy against the hostilities of Germany and Japan.[45]

In the post-war period, at the height of the Cold War and the anti-Communist suspicion of the McCarthy era, the idea of an absolute dualism between democracy and totalitarianism continued to influence public expressions of faith in the political arena. Partly in reaction to Communism, public officials increasingly characterized the United States as more committed to higher religious purposes than the country's ideological adversaries. Indeed, the 84th Congress passed a joint resolution to replace the existing motto, *E Pluribus Unum* (Out of many, One) with "In God we Trust." The new motto officially took the place of the original 180-year-old na-

tional motto when President Dwight D. Eisenhower signed the resolution into law on July 30, 1956.

By the 1950s, an entire generation of Americans had come of age witnessing both the abject poverty of the Great Depression and the devastating effects of a global war, and perhaps one consequence of such experiences was the prominence of public religiosity in the Eisenhower years. The president himself reflected the mood of the nation. On February 1, 1953, at the National Presbyterian Church in Washington, D.C., the newly inaugurated Eisenhower became the first president in history to be baptized while in office. He also took the unprecedented steps of offering his own prayer before his inaugural address, initiating the National Prayer Breakfast, and opening his cabinet meetings with prayer.

After hearing a sermon where the preacher noted that there was little difference between the American Pledge of Allegiance and other similar pledges, including that of Communist nations, Eisenhower concurred and spearheaded the movement to have the words "under God" added to the pledge. Approved by Congress and signed into law in June of 1954, Eisenhower celebrated the occasion by noting that "from this day forward, the millions of our school children will daily proclaim . . . the dedication of our nation and our people to the Almighty . . . In this way we are reaffirming the transcendence of religious faith in America's heritage and future; in this way we shall constantly strengthen those spiritual weapons which forever will be our country's most powerful resource."[46]

For all of his earnestness regarding the place of religious convictions in public life, a comment made while still president-elect in December 1952 indicates that Eisenhower, like most prominent twentieth century political leaders, viewed religion—at least in its public form—as a generic moral resource that served to secure the basic democratic premises of the American experiment. After meeting with Marshal Grigori Zhukov of the Soviet Army, Eisenhower revealed at a press conference that the two did not discuss religious issues because the he felt that efforts to talk about matters of faith with a Communist would be pointless. "Our form of government," he explained, "has no sense unless it is founded in a deeply felt religious faith, and I don't care what it is. With us of course it is the Judeo-Christian concept but it must be a religion that all men are created equal. So what was the use of me talking to Zhukov about that? Religion, he had been taught, was the opiate of the people."[47]

War and international conflict were not the only events provoking public expression of faith in the twentieth century. Like previous episodes in American history, Protestant suspicion of Catholic political loyalties characterized political usage of religion as well. On June 28, 1928, in Houston,

Texas, two weeks after the Republican Party chose Herbert Hoover as their candidate for the presidency, Franklin D. Roosevelt placed in nomination Governor Alfred E. Smith of New York as the Democratic Party's choice for the highest political office in the land. A Roman Catholic with an Irish lineage who openly opposed Prohibition, Smith instantly drew criticism from Protestant detractors. By the time he ran for president, Smith had served twelve years in the New York State Assembly, including a stint as speaker from 1913 to 1915, and he had completed two successful terms as governor of the Empire State. His political pedigree, however, did little to mollify fear that he might have divided allegiance between the Constitution and Rome.

One of the more colorful and antagonistic critics of Al Smith was the rabid anti-Catholic Senator from Alabama, J. Thomas Heflin. Heflin hailed from a small town in Northeast Alabama, and he had gradually worked his way up the party ranks, starting out as a mayor, then serving as a state legislator, a U.S. congressman, and since 1920, a U.S. Senator. He characterized the battle against Smith as nothing less than holy war, and the accusations he made against Catholics in general ranged from the hateful to the absurd. Catholics were labeled agents of the pope. The press who supported Smith was "Romanized." Jesuit priests were involved in a conspiracy to take over America's large cities. Jesuits and other Catholic leaders wanted to poison him, plunge the United States into foreign wars, and convert all Protestants through brainwashing and genocide.[48]

Those who agreed with Heflin's conspiracy theories relished in his rhetoric against Al Smith and the Catholic Church, and they empathized with his self-described sacrifice in the face of the vicious "Roman menace." On the Senate floor he declared for the record, "I have taken my stand for my country against the invisible government of the Pope of Rome, and I am going to uncover it in the United States in spite of what the Jesuits may do with dagger or poison . . . I defy these evil un-American forces of Rome. The people of my State are too high minded . . . [too] grounded in the principles of Martin Luther . . . to bow their knee to this veiled, insidious monster."[49]

Governor Smith tried to answer critics like Heflin by publicly declaring that although he worshipped "God according to the faith and practice of the Roman Catholic Church," he nevertheless believed "in absolute freedom of conscience for all men and equality in all churches," and he affirmed his support for the separation of church and state as well as his commitment to the "common brotherhood of man under the common fatherhood of God."[50] His defense echoed the public sentiments of most Protestant politicians, but it did little good in the election: he won only 87

of the 531 votes in the Electoral College. However, both his campaign and his insistence that Catholics, just as Protestants, could support a benign, non-dogmatic approach to the place of religion in public life anticipated John F. Kennedy's run for the presidency in 1960.

Like Smith, Kennedy also had to convince wary Protestant voters that his faith would not hinder his ability, if elected president, to uphold the Constitution of the United States. Even after he won primaries in Wisconsin and West Virginia, virtually securing the Democratic nomination for the presidency, the religion question would not go away. In September 1960, the Greater Houston Ministerial Association invited Kennedy to address the issue, and here, like Smith before him, he emphatically insisted that he did not speak for his church on public matters, nor did the church speak for him. Also, like many other political leaders, Kennedy upheld the hopeful notion that the United States will be a place where "religious intolerance will someday end," and where the various denominations and religions "will refrain from those attitudes of disdain and division which have so often marred their works in the past, and promote instead the American ideal of brotherhood." To reach this ideal, America had to strive to be a country where no "Catholic prelate would tell the president—should he be Catholic—how to act, and no Protestant minister would tell his parishioners for whom to vote; where no church or church school is granted any public funds or political preference, and where no man is denied public office merely because his religion differs from the President who might appoint him, or the people who might elect him."[51]

Kennedy's insistence that religion should be kept private when it came to matters of state succeeded in calming Protestant worries, and in 1960 he became the first Catholic president in United States' history. Ironically, however, the decade commenced by a presidency that insisted on distinguishing between what properly belongs in the realm of the public and what properly belongs in the realm of the private upended the notion that personal beliefs and interests either could be or should be neutralized in pursuit of the greater political good. It is interesting to note that one of the last successful appeals to the idea of a generic Protestant moral consensus came from the leadership of the African-American community in an attempt to convince the white majority that the country was not living-up to its pretence that "all men are created equal." Some of the most stirring rhetoric in American history can be found in the Civil Rights movement, where leaders frequently borrowed biblical language and imagery to underscore the need for racial justice and to demand equity before the law.

Martin Luther King, Jr. famously described what he believed to be the meaning of America in Christian terms, and in his powerful 1963 "I Have

a Dream" speech he quoted the messianic dream found in the book of Isaiah to stress his hope that one day all "of God's children, black men and white men, Jews and Gentiles, Protestants and Catholics" would indeed be "free at last." But, as inspiring as King was in his ability to wed Christianity to American idealism, in fact he represented a rhetorical tradition that was increasingly fragmenting.

The late 1960s witnessed the birth of new emphases in American politics in which traditional conceptions of citizenship and national welfare were challenged in order that those people considered historically marginalized from making public policy might be empowered. Often referred to as multiculturalism, or identity politics, this dramatic shift in political life called into question the predominant influence commanded by white men from privileged social and economic backgrounds. Increasingly, considerations of ethnicity, class, and gender took precedence over broader conceptions of citizenship, and as the political landscape changed in the latter decades of the twentieth-century, so too did public expressions of faith by political leaders.

One historian has argued that the late 1960s and early 1970s officially mark the end of the Puritan era in American history, where the long-held notion that public morality could at least be nominally premised on abstract Protestant ethical imperatives ceased to hold sway over American political life.[52] Although the causes of this cultural transformation could long be debated, one result was that it fomented a reaction in conservative religious circles that is still being felt to this day. Shaken by the dramatic social upheavals of the Vietnam era, conservative Christians countered by mobilizing a concerted political effort to "return" America to the moral consensus they believed had been lost to the interests of secular elites who promoted a dangerous agenda both in the universities and in the government.

For a brief moment in 1976 these conservatives thought that they had found a politician who shared their perspective in the presidential candidacy of Governor Jimmy Carter of Georgia. Carter was a Southern Baptist who, in the middle of his campaign, casually mentioned to a *New York Times* that he was a "born again" Christian. The phrase became popular for the remainder of his run for the presidency, and Carter capitalized on the attention by frequently referring to the importance of his faith in his life. He even told *Playboy* magazine during the fall of the general election that, according to the precepts of Christ, he had committed adultery because he had lusted after women in his heart. Despite his public religiosity, Carter's record as president disappointed many conservatives; in particular, his waffling on the controversial question of abortion alienated many evangelical Christians who initially supported him.

Labeled the "culture war" in the early 1990s, the debate over the place of religious values in American public life has continued unabated through the administrations of presidents Ronald Reagan, George H.W. Bush, Bill Clinton, and George W. Bush. As the political fortunes of conservative Christians have waxed and waned over the last 30 years, however, the Religious Right has increasingly borrowed a page from the script of their multiculturalist antagonists by claiming that they, like other minorities, deserve a place at the table of public policy making. The 1980s proved a watershed decade for conservatives as organizations such as Jerry Falwell's Moral Majority and Pat Robertson's Christian Coalition rallied the evangelical vote by emphasizing their sense of cultural disaffectedness. A televangelist who founded the Christian Broadcasting Network in 1961, Robertson himself made headlines when, in 1988, he claimed God had told him to enter the presidential race. Robertson lost his bid for the presidency, but the impact of his, and other religious conservatives; efforts to control the Republican Party continues to shape the public dynamic between religion and politics on both sides of the aisle.

Though their agenda has met success in both local and national elections, conservative Christian political leaders have, at times, blurred the line between what reflects the received moral usages of religious rhetoric, and what constitutes a real violation of the separation of church and state. Indeed, the nature of the debate has evolved in recent years to include the extent to which symbolic expressions of faith by public officials can be tolerated.

On November 13, 2003, the Chief Justice of the Supreme Court of Alabama, Roy Moore, was removed from office because of his refusal to remove a 5,280-pound granite monument of the Ten Commandments from the central rotunda of the state judicial building. Standing three-feet wide by three-feet deep by four-feet tall and displaying quotes from the Declaration of Independence, the national anthem, and various Founding Fathers, Moore had the monument constructed and placed in the judicial building in the middle of the night on July 31, 2001. The monument was subsequently ruled a violation of the Establishment Clause and ordered removed by federal U.S. District Judge Myron Thompson. Moore refused on the grounds that the monument "reflects the sovereignty of God over the affairs of men," and that there was no violation of the separation of church and state because "the Judeo-Christian God reigned over both the church and the state in this country, and that both owed allegiance to that God."[53] By appealing to the "Judeo-Christian God" as well as insisting that God is somehow at work in a special way in the United States, Moore continued the rhetorical pattern of using loosely-defined Christian references to frame the theological underpinnings of America. According to the court,

however, he went beyond past public expressions of faith when he used his office as a judge, as well as public property, to advertise his convictions.

CONCLUSION

Public usage of religious rhetoric by political leaders has been a part of the American experience since the country's colonial beginnings, and, at least in recent decades, it has become a source of controversy and division. While the practice has varied according to historical circumstance, there remain certain perennial characteristics to the way religion, specifically Christianity, has been appropriated by public officials in the United States. By and large, past public expressions of faith in America have stemmed from a Protestant theological disposition. In particular, they have orginated with the Puritan notion that Divine Providence secured in the American experiment a kind of sacred purpose unique among the nations. Fueled by revivalism in the eighteenth century, the notion of being "set apart" or "chosen by God" lingered in the American imagination long after Puritan solidarity collapsed and fragmented the New England theological landscape. With the coming of the American Revolution and the birth of the republic, however, the Protestant ethos established by the Puritans underwent a transformation that would have dramatic consequences for the future of religion in American public life.

After the Constitution of the United States was adopted by the various states, two important principles bequeathed by the Founding Fathers became part of the American identity: first, the country would have no established national religion; second, people would have the right to speak freely about religion. Under this arrangement, the confessional or dogmatic Protestantism of the early colonial period—that is, the Protestantism born out of the doctrinal controversies of the sixteenth and seventeenth centuries—slowly ceased to matter in a legal sense to American political life. No doubt within the denominational contexts (Presbyterian, Baptist, Methodist, etc.) the theological content of the faith remained important; however, in the United States, one's theological convictions would not be a prerequisite for citizenship, nor would creedal assent be necessary to participate in American civic life. Rather, in terms of its public importance, Christianity would be valued for its broad ethical imperatives and its ability to proffer a moral consensus for a free but otherwise disparate people. In other words, by the late eighteenth and early nineteenth centuries, owing in large part to the influence of both revivalistic conversionism and Enlightenment political thought, matters of faith became intensely personal.

The move toward the privatization of religious convictions did not, how-

ever, mean the absolute loss of Christian influence upon American culture, and as the religious climate of the nation changed, so too did public expressions of faith by political leaders. The moral and symbolic capital of Christianity, specifically Protestantism, remained and continued to be used by politicians even after nuanced doctrinal arguments became irrelevant to the legal construction of the American political project. Throughout the first half of the nineteenth century, as the responsibilities of democratic citizenship were increasingly viewed through the lens of Protestant social imperatives, sentimental notions of what it meant to be both an American and a Christian replaced the robust "public theologies" of earlier American life. These emotional ties were strong, and they provided a shared moral sensibility that united a number of social causes in the early decades of the republic. Still, they were not strong enough to keep at bay the profound political crises generated by the problems of slavery and immigration, and as these two issues divided the country, public expressions of faith were divided as well.

After the Civil War and well into the twentieth century, religion continued to matter for public life as long as theological disputes remained on the sideline of political discourse. As with previous generations, both the "idea" of God and the "social teachings" of Jesus were valuable to a democratic and free people, but arguments over doctrinal interpretation—such as the nature of atonement or the continuity between the two testaments of Scripture—were not. As the United States grew into a world power, the ideals and idealism of democracy assumed a hallowed place in the moral reasoning of many Americans, and in language that echoed both the Puritans and Abraham Lincoln, twentieth-century political leaders often described both the domestic and the global challenges facing the country in religious terms.[54] With the political and social upheavals of the 1960s and 1970s, however, the strained moral consensus forged out of the union of facile Protestant social sensibilities and democratic idealism collapsed.

Although a conservative cultural reaction continues to keep public expressions of faith at the fore of American politics, the exigencies of pluralism and multiculturalism and the legal difficulties surrounding the Establishment Clause complicate the place of religion in public life. Advocacy groups such as the American Civil Liberties Union and the People for the American Way insist that even though it is not legally forbidden, it is nevertheless bad precedent to interject personal beliefs into any aspect of politics, rhetorical or otherwise. Moreover, the limits of what the electorate will tolerate with regard to public expressions of faith outside the Christian tradition are yet to be fully realized. Although the year 2007 witnessed the first Muslim elected to Congress—Keith Ellison, who was sworn into office using a copy

of Thomas Jefferson's Koran—as well as the first Mormon presidential candidate—former Governor of Massachusetts Mitt Romney—it is not clear how non-conventional religious expression will be received by a population that largely identifies itself as Christian.

Because many Americans value the cultural accord afforded by a common moral vision, the idea of a shared religious heritage carries substantial political cachet for those seeking public office. Even though this alleged religious heritage lacks specific doctrinal commitments, political leaders have successfully integrated it into their public rhetoric for over two centuries. Still, no matter how frequently God or religion is referenced by a politician, certain questions remain. If God matters to the public square, how does he matter? If religion is relevant to liberal democracy, how is it relevant? In the early years of the twenty-first century, answers to these questions still remain elusive; even so, the public usage of religious rhetoric by political leaders continues undiminished.

NOTES

1. Christopher Hanson, "God and Man on the Campaign Trail," *Columbia Journalism Review*, November/December 2000. Juan Stan, "Bush's Religious Language," *The Nation*, December 4, 2003. *Washington Post*, July 12, 1999, Section C, page 1; CBS News Interview by Lesley Stahl, *60 Minutes*, December 4, 2000.

2. ABC News Interview by Peggy Wehmeyer, *American Agenda*, March 22, 1994.

3. George W. Bush to the annual convention of B'nai B'rith International, quoted in the *New York Times*, September 3, 2000, Section 4, page 5; Bill Clinton before the 1998 National Prayer Breakfast, quoted in the *Washington Post*, September 13, 1998, Section C, page 7.

4. Dissatisfied with what were perceived as too many concessions to "Romanism," the Puritans wanted the Church of England to more closely resemble the reformed churches of the continent. Indeed, many essential theological positions of the English Puritans were refined during the Marian exile during which approximately 800 English Protestants fled to the Netherlands, Germany, Switzerland, and France to escape the Catholic counter-reaction to the English Reformation. The label "Puritan," a term of derision invented by their theological opponents, may apply to a number of late sixteenth-century Protestant churches committed in various ways to Reformed theology or Calvinism both on the European continent and in England. The English version, however, manifested around some very specific controversies involving opposition to the use of clerical vestments as well as opposition to the rituals and formulas of the *Book of Common Prayer*. In addition, many of the Puritans from southern England were Congregationalists (in Scotland they were Presbyterian) and hence they were antagonistic toward the Episcopal system of ecclesiastical government practiced by the established church.

5. Rowan Greer, *Anglican Approaches to Scripture* (New York: Crossroad, 2006), 9–15.

6. See Perry Miller, *Errand Into the Wilderness* (Cambridge, MA: Belknap Press of Harvard University Press, 1956, 1984).

7. William Bradford, "Of Plymouth Plantation," in *Anthology of American Literature*, ed. George McMichael, vol. 1, 4th ed. (New York: Macmillan Publishing Company, 1989), 44.

8. Ibid., 36.

9. John Winthrop, "A Model of Christian Charity," in *Anthology of American Literature*, 67–68.

10. See Sacvan Bercovitch, *The Puritan Origins of the American Self* (New Haven: Yale University Press, 1975), 36.

11. Winthrop, "Journal," in *Anthology of American Literature*, 75.

12. See Ernst H. Kantorowicz, *The King's Two Bodies: A Study in Mediaeval Political Theology* (Princeton: Princeton University Press, 1957).

13. Calvinists took control of Maryland in 1655, overturned the Act of Toleration, and banned Catholics from holding public office.

14. Darryl Hart, *A Secular Faith* (Chicago: Ivan R. Dee, 2006), 30.

15. Quoted in Gerald R. McDermott, *One Holy and Happy Society: The Political Theology of Jonathan Edwards* (University Park, PA: The Pennsylvania State University Press, 1992), 84.

16. On the Enlightenment and religion, see Henry F. May, *The Enlightenment in America* (New York: Oxford University Press, 1976), and Peter Gay, *The Enlightenment: An Interpretation* (New York: W. W. Norton & Company, 1996).

17. Thomas Jefferson, "Notes on the State of Virginia," in *Writings*, ed. Merrill D. Peterson (New York: Literary Classics of the United States, 1984), 286, 289.

18. Ibid., Thomas Jefferson, Letter to Thomas Cooper, February 10, 1814, 1325; and "Second Inaugural Address," March 4, 1805, 523.

19. Thomas Jefferson, Letter to William Canby, September 18, 1813; Thomas Jefferson, Letter to William Short, April 13, 1820, in *A Jefferson Profile*, ed. Saul K. Padover (New York: The John Day Company), 211, 311–312.

20. Thomas Jefferson, Letter to John Adams, April 11, 1823; Thomas Jefferson, Letter to Thomas Law, June 13, 1814; in *Writings*, 1466–1469, 1335–1339.

21. *The Works of John Adams, Second President of the United States; With A Life of the Author Notes and Illustrations of his Grandson Charles Francis Adams*. Vol. IX (Free Port, NY: Books For Libraries Press, first published 1850–1856, Reprinted 1969), 228–229.

22. John Adams, Letter to F. A. Van der Kamp, December 27, 1816; John Adams, Letter to John Taylor, 1814; quoted in Norman Cousins, *In God We Trust: The Religious Beliefs and Ideas of the American Founding Fathers* (New York: Harper, 1958), 108.

23. See Benjamin Franklin, *The Autobiography of Benjamin Franklin with Related Documents*, ed. Louis P. Masur (Boston: Bedford/St. Martins, 2003), 93–104.

24. First quote, Benjamin Franklin, Letter to Ezra Stiles, in Carl Van Doren,

Benjamin Franklin (New York: Viking Press, 1938), 777–778. Second quote, Victor J. Stenger, *Has Science Found God?* (Amherst, NY: Prometheus Books, 2003).

25. James Madison, *A Memorial and Remonstrance Against Religious Assessments,* addressed to the Virginia General Assemby, June 20, 1785.

26. George Washington, Letter to the United Baptist Chamber of Virginia, May 1789, in Anson Phelps Stokes, *Church and State in the United States*, Vol. 1. p. 495; George Washington, responding to a group of clergymen who complained that the Constitution lacked mention of Jesus Christ, in 1789, *Papers,* Presidential Series, 4:274,

27. George Washington, Letter to Edward Newenham, October 20, 1792; from George Seldes, ed., *The Great Quotations* (Secaucus, NJ: Citadel Press, 1983), 726; George Washington, Letter to Sir Edward Newenham, June 22, 1792.

28. For a helpful picture of how the idea of social regeneration in the nineteenth century compared and contrasted with the social implications of evangelicalism during and after the Second Great Awakening, see Edwin Scott Gaustad, *The Great Awakening in New England* (New York: Harper & Row, 1965), 1957; Rhys Isaac, *The Transformation of Virginia: 1740–1790* (Chapel Hill, NC: The University of North Carolina Press, 1982); and Nathan O. Hatch, *The Sacred Cause of Liberty: Republican Thought and the Millennium in Revolutionary New England* (New Haven: Yale University Press, 1977).

29. Quoted in Richard J. Carwardine, *Evangelicals and Politics in Antebellum America* (Knoxville: The University of Tennessee Press), 59.

30. Ibid., 65–66.

31. Inaugural Address, March 4, 1841, in *A Compilation of the Messages and Papers of the Presidents*, ed. James Richardson, vol. IV (New York: New York Bureau of National Literature, 1897), 1,875.

32. Horace Mann, in the Massachusetts Board of Education's *Tenth Annual Report* (1847), cited in Robert H. Bremmer, ed., *Children and Youth in America: A Documentary History Vol. I* (Cambridge, MA: Harvard University Press, 1971), 456.

33. Ibid. Also see Carl F. Kaestle, *Pillars of the Republic: Common Schools and American Society, 1780–1860* (New York: Hill and Wang, 1983), 77–103; and Lawrence A. Cremin, *American Education: The National Experience 1783–1876* (New York: Harper & Row, 1980), 133–137.

34. Lewis D. Campbell, "Americanism" speech delivered at the American Mass Meeting in Washington, D.C., February 29, 1856, published in the *American Organ*.

35. John C. Calhoun, "Speech on the General State of the Union," in *Union and Liberty: The Political Philosophy of John C. Calhoun*, ed. Ross M. Lence (Indianapolis: Liberty Fund, 1992), 586–588.

36. Daniel Webster, "The Constitution and the Union," *The Works of Daniel Webster*, vol. V. (Boston: Charles C. Little and James Brown, 1851), 331–332.

37. *Jefferson Davis*, Vol. 1, by Dunbar Rowland, pp. 286, 316–317.

38. Drew Gilpin Faust, *The Creation of Confederate Nationalism: Ideology and Identity in the Civil War South* (Baton Rouge: Louisiana State University Press, 1988), 33.

39. See Lucas E. Morel, *Lincoln's Sacred Effort: Defining Religion's Role in American Self-Government* (Lanham, MD: Lexington Books, 2000), 85.

40. Abraham Lincoln, "Proclamation Appointing a National Fast-Day, March 30, 1863," in *Complete Works of Abraham Lincoln*, eds. John G. Nicolay and John Hay, vol. VIII (New York: Francis D. Tandy Company, 1894), 236.

41. Abraham Lincoln, "Proclamation for Thanksgiving, July 15, 1863," in *Complete Works*, vol. IX, 33.

42. William Henry Herndon, *Abraham Lincoln: The True Story of a Great Life* (New York: D. Appleton, 1892).

43. Quoted in Richard M. Gamble, *The War for Righteousness: Progressive Christianity, the Great War, and the Rise of the Messianic Nation* (Wilmington, DE: ISI Books, 2003), 129.

44. Ibid.

45. *The State of the Union Messages of the Presidents, 1790–1966*, ed. Fred Israel, vol. III (New York: Chelsea House Publishers, 1967), 2863.

46. Speech regarding his addition of "under God" to the U.S. Pledge of Allegiance on June 14, 1954.

47. Quoted in William Imboden, "'One Cheer for Civil Religion'?," *Modern Reformation*, 13, no. 5 (September/October 2004).

48. Glenn Feldman, *Politics, Society, and the Klan* (Tuscaloosa: University of Alabama Press, 1999), 173.

49. Congressional Record, Senate extract, January 18, 1928, quoted in Feldman, *Politics, Society, and the Klan*, 173–174.

50. Hart, *Secular Faith*, 159.

51. Printed in the *New York Times*, September 13, 1960.

52. Sydney E. Ahlstrom, *A Religious History of the American People* (New Haven: Yale University Press, 1972), 1079.

53. *Glassroth v. Moore* (M.D. Ala. 2002).

54. In particular, the struggle against Communism and the struggle for Civil Rights were cast in religious terms.

FURTHER READING

The literature on the subject of public expressions of faith by political leaders is obviously vast and the following titles are meant to serve simply as a start. Works that offer helpful overviews as well as strong introductions to twentieth-century developments include A. James Reichely's *Religion in American Public Life*; Cushing Stout's *The New Heavens and the New Earth: Political Religion in America*, Russell Richey and Donald G. Jones' *Civil Religion*; John F. Wilson's *Public Religion in American Culture*, and Darryl Hart's *A Secular Faith*. Although the literature on

the Puritans is enormous, the best introduction to Puritan theology and Puritan religious rhetoric remain Perry Miller's *Errand into the Wilderness*, Sacvan Bercovitch's *The American Jeremiad*, and Edmund Morgan's *The Puritan Dilemma*. The subject of the religion of the Founding Era and the early republic is also immense, but a good start would include Catharine L. Albanese's *Sons of the Fathers: The Civil Religion of the American Revolution* and Mark Noll's *America's God: From Jonathan Edwards to Abraham Lincoln*. On American Protestantism's democratic impulse in the nineteenth century, see Nathan O. Hatch's *The Democratization of American Christianity*, and on the subject of religious rhetoric and the Civil War consult Allen C. Guelzo's *Abraham Lincoln: Redeemer President* and Mitchell Snay's *Gospel of Disunion: Religion and Separatism in the Antebellum South*. Two good introductions to Catholic and Protestant tensions over the place of religion and American political rhetoric are Ray Allen Billington's *The Protestant Crusade* and John T. McGreevy's *Catholicism and American Freedom*.

4

The Internationalization of Church-State Issues

Zachary R. Calo

The law of church and state has traditionally referred, at least in American legal discourse, to First Amendment jurisprudence involving such issues as prayer in public schools, Sunday closing laws, public displays of religious imagery, and aid to parochial schools. Its particular concern has been the work of courts in interpreting the First Amendment's requirement that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." First Amendment jurisprudence of this type remains the bread and butter of church-state law in America, as federal courts in recent years have considered the pros and cons of such issues as the "under God" clause in the Pledge of Allegiance, the teaching of intelligent design in public schools, and display of the Ten Commandments on government property. However, the twentieth-century human rights revolution, particularly in the area of religious liberties, has globalized the law of church and state and transformed the scope of debate about the relationship between religion, ethics, and government. The promulgation of the Universal Declaration of Human Rights in 1948, which established that "everyone has the right to freedom of thought, conscience and religion," ensured that church-state issues would no longer be within the exclusive province of the sovereign nation-state.[1]

The objective of this essay is to survey the landscape of church-state issues in light of the human rights revolution, recognizing that the interna-

tional law of religious freedom has not yet had any explicit impact on First Amendment church-state jurisprudence in the United States.[2] U.S. courts continue to rule in this area without respect to international law. In fact, the issues at stake in the domestic law of church and state remain fundamentally different from those in the international arena. First Amendment cases typically involve a narrow set of facts interpreted in light of an established constitutional right to religious freedom; international debate, on the other hand, focuses on the existence, scope and content of the very right to religious freedom taken for granted in domestic constitutional law. References to church-state law in this essay should therefore be understood to refer not only to constitutional law but also to the broader relationship of religion, ethics, and government. In spite of these qualifications, it is nevertheless the case that domestic and international legal debates have become increasingly intertwined and that international law in the area of religious freedom has transformed the contours of American law and politics. A full discussion of church and state in America can no longer end with the First Amendment.

This chapter begins by detailing the emergence of international human rights law in the area of religious freedom. The discussion will focus on legal mechanisms established in the post–World War II period to protect the right to religious freedom. The chapter next examines two important areas in which international law and politics have shaped domestic law. First, it considers how the United States is using its foreign policy to promote religious freedom—what one commentator has referred to as "exporting the First Amendment."[3] Particular attention will be given to the International Religious Freedom Act of 1998, which created the Office of International Religious Freedom within the Department of State, a bipartisan commission on international religious freedom, and an ambassador at-large for religious freedom. This legislation established religious freedom as the official policy of the United States and committed the federal government to developing a foreign policy premised on the exportation of constitutional principles. The continuing debate over this legislation not only provides insights into the United States' contested relationship with the international human rights regime, but also into domestic church-state politics. The second topic considered is the burgeoning debate over the role of international law, particularly international human rights law, in shaping constitutional interpretation. International law has played an increasingly prominent role in constitutional jurisprudence, most notably in several recent Supreme Court decisions that invoke international law as persuasive authority. The importance of this legal development is enhanced because

the cases have involved the death penalty, the rights of homosexuals, and other issues at the heart of contemporary moral and cultural debates.

The status of international law remains much debated by scholars, practitioners, and governments. Hovering in the background of these debates about religion, culture, and international law is thus a more foundational debate about the authority of international law, particularly with respect to domestic law. This is a complex and wide-ranging debate, much of which generally takes place among legal academics and which is beyond the necessary scope of this essay.[4] A leading textbook on international law, however, summarizes the debate as follows:

> International law has had to justify its legitimacy and its reality. Its title to law has been challenged on the ground that, by hypothesis and definition, there can be no law governing sovereign states. Skeptics have argued that there can be no international law since there is no international legislature to make it, no international executive to enforce it, and no effective international judiciary to interpret and to develop it, or to resolve disputes about it. International law, it has been said, is not 'real law' since it is commonly disregarded, states obeying it only when they wish to, when it is in their interest to do so.[5]

Even the strongest and most sanguine defenders of international law and institutions accept that there are limitations to expanding international legal regimes. The greatest challenge for international law is that its authority depends ultimately on voluntary compliance by states, as there is no sovereign authority to enforce its provisions.

At the same time, defenders of international law emphasize that its norms shape the behavior of nation-states even in the absence of authorial enforcement mechanisms. Louis Henkin, one of the leading twentieth-century authorities on international law, argues, for instance, that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."[6] The reasons states act in this way are much debated. It is nevertheless clear that the vast web of laws, institutions, norms, and practices, particularly as developed in the post–World War II period, have legitimated international law and structured the way states act towards their citizens and other states. The "authority" of international law, it is true, remains fundamentally different from that of domestic law. Yet international law shapes the world in concrete ways, and the forces of globalization are now expanding the scope of international law's influence into areas of religious and cultural import that were formerly under the exclusive sway of domestic law.

RELIGIOUS FREEDOM IN INTERNATIONAL HUMAN RIGHTS LAW

The *Treaty of Westphalia* in 1648 ended the "Wars of Religion" and established protections for religious minorities. Yet at the same time as *Westphalia* set European society on the path towards religious freedom, it also birthed the sovereign nation-state, the political form that became the greatest threat to religious freedom. Daniel Philpott notes that "what Westphalia inaugurated was a system of sovereign states where a single authority resided supreme within a set of borders."[7] This system of sovereignty gave the state exclusive authority over its internal activities. The actions of a state toward its people were defined as a matter of purely domestic concern in which no external sovereign or authority could interfere. It took the Holocaust and the deaths of tens of millions at the hands of the state to weaken the stranglehold of Westphalian sovereignty and inaugurate the modern human rights movement. With the Universal Declaration of Human Rights came the symbolic end to absolute state sovereignty and the beginning of what Yale Law School Dean Harold Koh has termed "the globalization of freedom."[8]

At the heart of the modern human rights movement is the principle that certain fundamental norms are universal and inviolable. So central are these rights to the essential dignity of the human person that no political authority may deny them. Religious freedom has from the inception of the human rights movement been identified as such a right. In fact, religious freedom has long been deemed a foundational right upon which other rights rest, as attested by its designation as the "First Freedom." The right to free speech and association, the right of indigenous people to preserve their cultural practices, and the rights of parents to raise their children all rest upon a prior right to religious freedom.[9] If the right to religious freedom is impeded so too are these other rights.

Given its foundational importance, the right to religious freedom was clearly established in the founding documents of the human rights movement.[10] Both the United Nations Charter and the Universal Declaration of Human Rights name freedom of conscience and freedom of religion as basic rights. Article I of the United Nations Charter provides that a central aim of the organization is "promoting and encouraging respect of human rights . . . and fundamental freedoms . . . without distinction as to race, sex, language, or religion. . . ."[11] The Charter goes on to provide that the United Nations shall promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[12] The lack of a more robust statement in support of

religious freedom in the Charter reflects the influence of China and the Soviet Union in founding the United Nations.[13] The Universal Declaration of Human Rights (UDHR), promulgated December 10, 1948, is more explicit than the United Nations Declaration in establishing a right to religious freedom. The most important statement appears in Article 18, which provides that "everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."[14] The breadth of this provision is notable. For one, the provision rejects a purely privatized account of religious belief and expression. It recognizes that religious belief is not a purely private matter but necessarily encompasses the whole of human life and community.[15] The UDHR also recognizes that freedom of religious belief is a meaningless right absent freedom to actualize beliefs in public and communal worship.[16] Finally, the UDHR recognizes the right to change religions, a particularly controversial provision that led a number of Islamic countries to abstain from voting.[17]

While the U.N. Charter and the UDHR both recognize a right to religious freedom, there was a lingering concern that these documents failed to provide adequate legal mechanisms for enforcing the right. The hope for establishing more robust legal protections was placed in future documents, most importantly in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights.[18] These two documents remain central pillars of the international human rights movement, and the ICCPR, adopted in 1966 and entered into force in 1976, remains the most important resource for advancing religious freedom. Article 18 of the ICCPR, which corresponds with and expands upon Article 18 of the UDHR, provides that:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 27 is also relevant. Applying principles earlier established in Article 18, Article 27 provides that "in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language." Finally, the ICCPR contains an optional protocol addressing what is widely recognized to be a major problem with the parent treaty: its lack of an effective enforcement mechanism.[19] An optional protocol is a treaty that accompanies and augments an existing human rights treaty. The Optional Protocol to the International Covenant on Civil and Political Rights allows individual citizens of signatory nations to appeal to the U.N. Committee on Human Rights when they believe rights established by the ICCPR have been violated and all domestic remedies have been exhausted.[20] This Optional Protocol effectively creates a private right of action under the ICCPR.

In part to address shortcomings in the protections afforded religion freedom in the UDHR and ICCPR, in 1981 the United Nations also issued the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.[21] The stated purpose of the Declaration is "to adopt all necessary measures for the speedy elimination of [religious intolerance] in all its forms and manifestations."[22] Echoing principles set forth in previous United Nations documents, the 1981 Declaration declares in Article I that "everyone shall have the right to freedom of thought, conscience and religion" and that this right includes the freedom "to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching." The Declaration also requires states to actively prevent and remove religious discrimination, to support the right of parents to raise their children in the faith of their choosing, and to worship, teach, and disseminate written materials. Discrimination on the basis of religion is decried as a violation of "fundamental freedoms" and an "affront to human dignity."[23]

This document was an important victory for the cause of religious freedom. Not only did it contain a broad definition of religious freedom, but it also is the only international human rights document concerned exclusively with religion and religious freedom. This victory, however, has been more symbolic than actual, for the 1981 Declaration has not been an effective vehicle for advancing human rights.[24] Twenty years of work at the United Nations produced only a declaration rather than a more-forceful covenant. A declaration carries only moral authority and is not a legally binding document that can be enforced against parties. Declarations, unlike

covenants, do not establish monitoring committees or require signatory countries to provide annual reports. The 1981 Declaration therefore lacks any effective mechanism for enforcing the rights it establishes. In addition, the Declaration, like the ICCPR, fails to enunciate a right to convert or abandon religion altogether.[25] One commentator attributes this omission to the sizeable influence of Islamic states, many of which regard western conceptions of religious freedom as contrary to the tenets of Islam.[26] A "broad consensus of Muslim scholars" rejects the idea of full religious freedom as well as the proposition that Muslims have a "right" to convert.[27] For all its aspirations, the 1981 Declaration goes no further than previous human rights documents, and in certain respects it offers a more circumscribed definition of religious freedom than the UDHR and ICCPR.

The landscape of religious freedom has changed markedly in the twentieth century. It is now widely agreed that human persons possess a basic right to religious belief and practice and that this right is "firmly ensconced in international law."[28] Nevertheless, religious freedom remains of only marginal concern in the human rights movement and there is little momentum for expanding protections. In his recent book, *Can God & Caesar Coexist? Balancing Freedom and International Law*, Fr. Robert Drinan goes so far as to note that there has been an "absence of any real discussion on religious freedom at the world level."[29] This statement could be disputed, but Drinan is certainly correct to observe that religious freedom lags behind other causes. One commentator observes that "while many of the other protections accorded in UDHR have since been incorporated into binding covenants, the full panoply of religious protections have never attained more than 'declaratory' status."[30] In spite of the various statements affirming religious freedom—the U.N. Charter, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief—there is still not one effective enforcement mechanism.[31] The right to religious freedom remains a right on paper only. A recent analysis, in fact, concluded that international mechanisms for protecting religious liberty are largely a failure, given that the existing legal regime has done little to prevent numerous acts of genocide on the basis of religious identity.[32] In Rwanda, Sudan, and Bosnia, for instance, religiously-motivated genocide took place irrespective of international norms. One scholar has also noted that while almost every country signed the UDHR, at least eighty countries have engaged in documented acts of religious intolerance or persecution.[33] The International Religious Freedom Act reports in its findings that "more than one-half of the world's population lives under regimes that severely restrict or prohibit the freedom of

their citizens to study, believe, observe, and freely practice the religious faith of their choice," while the most recent International Religious Freedom Report issued by the Department of State identifies a number of countries in which there is religious persecution and intolerance.[34]

The troubled state of religious freedom in international law can be attributed to a number of factors. One challenge involves defining "religion."[35] While the rights to life, speech, and political participation can be defined with relative precision, it is more difficult to clearly delineate what religious beliefs and actions ought to receive legal protection. At the most basic level is the question of when a set of beliefs becomes a religion. Does a religion require a community or can a religion exist with only one adherent? Does a religion require belief in a God or gods, or might a deeply held moral worldview qualify as a religion? The challenge of defining religion is not of merely theoretical concern but rather goes to the heart of what it means to protect religious freedom. The question of whether Scientology is considered a religion or a cult, for instance, determines whether European governments can permissibly ban it without violating international law.[36] The U.S. Supreme Court has addressed a number of cases that touch on this issue in the context of First Amendment jurisprudence and has established a fairly broad definition of religion.[37] The issues, however, become even more varied and complex under international law.

Another challenge has involved defining the scope and content of a right to religious freedom.[38] There is broad agreement that religious freedom ought to be protected but less agreement about what specifically are the rights worthy of protection. One problem arises when domestic law conflicts with international human rights law. The First Amendment protection of freedom of speech, for instance, places strict limits on the extent to which U.S. law can limit hate speech against religion.[39] Article 20(2) of the ICCPR, on the other hand, prohibits defamatory speech against adherents of a particular religion.[40] In this instance, the protection given religious freedom under international law is in conflict with U.S. constitutional law, thereby forcing the United States to include a reservation in its ratification of the ICCPR and to refuse to endorse this portion of the agreement. A reservation to a treaty allows a state to become a party without being bound to particular provisions of the treaty. In the case of the United States and the ICCPR, reservations arguably enhance international human rights law by fostering a higher level of state participation in an agreement. At the same time, many commentators believe that the purpose and effectiveness of a treaty is undermined when states condition their ratification on the rejection of certain provisions.

More serious problems arise over the right of governments to limit or curtail religious freedom on the grounds of public order and safety. It is

widely recognized that states have a right to act on such grounds. Few would dispute, for instance, the right to prevent female genital mutilation and honor killings, even when done in the name of religious observance. The right of states to so act is set forth in Article 18 of the ICCPR, which provides that "freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others." Commenting on this passage, Michael Perry of Emory University Law School notes, "So it is not as if there is no room, in a political community that accepts the right to freedom of religion, for the legislators to enact laws that they judge to be necessary to protect the community's morality."[41] The Tandem Project, a non-governmental organization founded to promote the 1981 U.N. Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, follows the language of ICCPR Article 18 in affirming "that States have a right to place limits on the manifestation of a religion or belief" on the grounds of law, safety, order, health, morals, and fundamental rights.[42] In practice, however, Article 18 can also serve as a shield for human rights violations committed in the name of state police power. Is China's policy of restricting foreign missionaries, for instance, a proper exercise of state police power, or is it a violation of religious freedom? Can a Muslim country limit the right of non-Muslims to publicly practice their faith? The "drafting loophole" in Article 18 has allowed countries to both affirm the UDHR while still engaging in what most would call religious discrimination.[43]

Finally, the issue of international religious freedom has become increasingly entangled in a contentious debate about the relationship between religion and politics in modernity. Boston University sociologist Peter Berger has famously quipped that America is a country of Indians ruled by Swedes, a reference to the disconnect between the pervasive religiosity of the American people as compared to the regnant secularism of the nation's elite. This same characterization could also be applied to the human rights movement, whose elite leaders and global bureaucrats often reject the religious views of the people they represent. Peter Berger noted on another occasion that human rights conventions and declarations "were not adopted by nations but by a small clique of lawyers, bureaucrats, and intellectuals who are highly westernized and most of who have absolutely nothing to do with the cultures in which most of their fellow nationals live."[44]

The effects of this disconnect have been revealed most vividly in the area of religion, which more than any other force exposes the cultural fault lines that define the modern world. A 2005 report issued by Human Rights Watch pointedly asked if there is "a schism between the human rights

movement and religious communities." The answer given by this leading international human rights organization was clearly yes, as evidenced by debates over such "contentious issues" as reproductive rights, gay marriage, and blasphemy laws.[45] The report urged that efforts be made to bring about better relations but nevertheless emphasized that "the human rights movement should not sacrifice its most valued principles and objectives in order to protect its good relations with religious communities."[46] The ambivalence of many cultural elites towards religion leaves the cause of religious freedom marginalized within the broader human rights movement. Post-9/11 world affairs have only further marginalized religion by feeding the belief that radical religion is a greater political problem than religious persecution. As Daniel Philpott observes, there is a growing concern that "a religious and cultural backlash will weaken those institutions and practices whose limitations on sovereignty now enjoys a frail consensus—intervention, international judicial norms."[47] Promoting religious freedom, some argue, will unleash religion as a potent agent of political unrest that will undermine human rights more generally.

John Witte writes that that the modern human rights movement was an "attempt to harvest from the traditions of Christianity and Enlightenment the rudimentary elements of a new faith and a new law that would unite a badly broken world." Religious ideas and communities "participated actively as midwives in the birth of this modern rights revolution" but were then relegated to a lower priority.[48] The coming together of religious and secular human rights traditions was an important, and historically underappreciated, aspect of the twentieth-century human rights revolution. But the continued viability of this cooperative enterprise appears less certain. The struggle between religion and the human rights movement is more intense today than it was a half-century ago when the Universal Declaration of Human Rights was promulgated.[49] Religion indeed has the capacity to contribute to the vibrancy of the human rights movement. Some have even argued that the idea of human rights needs religion to maintain political vitality and intellectual coherence. Yet, because religion is such an explosive issue, the promotion of religious freedom also has the potential to "destroy an already fragile global consensus on human rights."[50]

EXPORTING RELIGIOUS FREEDOM: THE INTERNATIONAL RELIGIOUS FREEDOM ACT

Nearly all of the efforts to protect and promote international religious freedom have involved multilateral agreements. In 1998, however, Congress passed the International Religious Freedom Act (IRFA) and inaugurated a

new approach to promoting international religious freedom by means of domestic foreign policy.[51] The text of IRFA begins with a claim about the importance of religious freedom to American democracy: "the right to freedom of religion undergirds the very origin and existence of the United States . . . From its birth to this day, the United States has prized this legacy of religious freedom and honored this heritage by standing for religious freedom and offering refuge for those suffering religious persecution."[52] Having established the centrality of religious freedom to the political ideals of the United States, IRFA proceeds to establish the importance of religious freedom to established international norms of justice: "Freedom of religious belief and practice is a universal human right and fundamental freedom articulated in numerous international instruments," including the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the Helsinki Accords, the Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief, the United Nations Charter, and the European Convention for the Protection of Human Rights and Fundamental Freedoms.[53] In light of religious freedom's importance both to American democracy and to international human rights, IRFA announces that the "policy of the United States" is now "to promote the right to freedom of religion" and "to oppose violations of religious freedom that are or have been engaged in or tolerated by the governments of foreign countries."[54] Though some critics have questioned whether the United States ought to privilege one human right over another, the claim developed in the opening section of the legislation is that religion is so central to the free society that it must receive special protection.

IRFA provides a number of mechanisms to advance religious freedom. First, it created the Office of International Religious Freedom within the Department of State and provided that the president shall appoint an ambassador at-large whose primary responsibility is "to advance the right of freedom of religion abroad, to denounce the violation of that right, and to recommend appropriate responses by the United States Government when this right is violated."[55] Second, the legislation requires the Secretary of State, with the assistance of the ambassador, to provide Congress with an Annual Report on International Religious Freedom.[56] The report must include a description of the status of religious freedom in each foreign country, an assessment of the nature and extent of violations of religious freedom in each country, and a description of the actions and policies of the United States in support of each foreign country engaging in or tolerating violations of religious freedom.[57] Third, IRFA establishes a Commission on International Religious Freedom that is responsible for reviewing the facts and

circumstances of violations of religious freedom and making policy recommendations to the President, Secretary of State, and Congress with respect to matters involving international religious freedom.[58] Most significantly, IRFA sets forth a number of actions the President may take in response to violations of religious freedom. These actions include a private or official public démarche, a public condemnation, delay or cancellation of scientific or cultural exchanges, denial or cancellation of state visits, withdrawal or suspension of development or security assistance, requiring U.S. directors of international financial institutions to oppose or vote against loans primarily benefiting the foreign government, and prohibiting the U.S. government from procuring goods or services from the foreign government found to be in violation.[59]

Following two years of political debate, IRFA passed in both houses of Congress in October 1998. It took three attempts to pass the bill, and the version that did pass Congress was not as tough as earlier drafts that had included automatic sanctions and harsher penalties.[60] President Clinton signed the bill into law, although both he and the State Department had initially opposed it.[61] Religious organizations, on the other hand, were by and large supportive of the proposed legislation.[62] Allan Hertzke has described the emergence of an "unlikely alliance" in which "Evangelical, Catholic and mainline Protestant Christians found allies among Tibetan Buddhists, Iranian Bahai, Buddhists in Southeast Asia and China, and Muslim Uighars in western China."[63] Believing that existing international mechanisms were inadequate, this unlikely coalition persuaded Congress to pass IRFA.[64] American evangelicals played a particularly important role in this process.[65] Troubled by the plight of persecuted Christians abroad, evangelicals in the 1990s embraced the cause of religious freedom and pressured the American government to take a more active role in its prevention.[66] In a 2006 Pew Forum symposium on IRFA, Hertzke noted the importance of "church-based networks here in the United States, and, in particular, the activation of evangelical networks on behalf of the legislation."[67] The interest evangelicals showed in international religious freedom was particularly momentous given their historic focus on domestic political issues. The movement of evangelicals into this area pushed their moral concerns, as well as the nation's policy debate, in an international direction. With reference to conservative Christians, one commentator has in fact described IRFA as an attempt to "re-moralize" American foreign policy.[68]

Supporters of IRFA have been generally pleased with its execution. Reflecting two years after its passage, Elliot Abrams, then president of the Ethics and Public Policy Center, wrote that "[t]he State department has done a highly commendable job (with a few exceptions) in its first two

annual reports of telling the tragic story of religious freedom around the globe."[69] Some supporters, however, have become less sanguine in their assessment, with internal dynamics at the State Department often blamed for IRFA's perceived failure to bring about political change commensurate with the legislation's stated ambitions. Thomas Farr, former director of the Department of State's Office of International Religious Freedom, took note of this problem in writing that the Department "treats religious freedom largely as a sequestered, humanitarian problem. The position of ambassador at-large, created by the act as 'principal adviser to the president and secretary,' is viewed at the State Department as a mere deputy in the human-rights bureau, itself perceived within the building as outside the diplomatic mainstream." "More than seven years into the implementation of the International Religious Freedom Act," Farr adds, "the United States' policy has failed to reduce worldwide religious persecution."[70] Farr made similar comments on another occasion, noting that "IRFA policy has in effect been pigeonholed at the State Department. Few senior U.S. officials believe advancing religious freedom could or should be used to encourage stable relationships between political and religious authorities in key countries."[71] At root, Farr's critique is not directed at the moral and political vision of IRFA but rather at a foreign policy establishment that endorses the "crippling assumption . . . that religious freedom entails the privatization of religion, the strict separation of religion from public life."[72] However, without greater support from the Executive Branch and the bureaucratic machinery at the State Department, IRFA might continue to disappoint its supporters.

While Farr is a friendly critic who supports the underlying objectives of IRFA, other commentators have directly attacked the legislation. One line of criticism has focused on the role of religious groups in passing IRFA. Several observers have argued that IRFA pandered to the interests of religious conservatives at the expense of pursuing more effective means of addressing human rights violations. William Martin of Rice University, for one, has dismissed the IRFA as a byproduct of the Christian Right's opposition to international organizations such as the United Nations, the European Union, and the Council on Foreign Relations.[73] Similar criticisms have been advanced by leaders within the human rights community. The executive director of Human Rights Watch criticized IRFA as a form of "special pleading" on behalf of certain victims, notably persecuted Christians.[74] John Shattuck, the former Assistant Secretary for Democracy, Human Rights, and Labor at the U.S. State Department, speaking at the Harvard Law School in 2002, similarly described IRFA as an effort "by the American Religious Right to advance a political agenda within the United States government that seeks to promote special religious interests over-

seas."[75] These critics have not questioned the existence of serious human rights violations perpetrated on the grounds of religion, but they have questioned whether religion ought to be given a privileged position.[76] One commentator has challenged IRFA on the grounds that it "creates an irrational hierarchy of human rights in U.S. foreign policy that makes the act vulnerable to politicization and abuse of the human rights agenda."[77] Other critics have argued that privileging religion creates practical difficulties in the execution of American foreign policy. "Will torture on the basis of religious belief now receive preferential treatment as a matter of U.S. foreign policy in comparison with, say, disappearances, torture, or suppression on the basis of racial, ethnic, political, cultural, or other factors?" asks one scholar.[78] "Can religious freedom," he adds, "ultimately be respected and ensured without corresponding protections for all other human rights?"[79]

Another criticism leveled at IRFA is that it endorses a narrowly "American or Western" conception of religious freedom.[80] It has been argued, in particular, that IRFA promotes "extreme individualism" as well as a privatized conception of the relationship between religion and the state.[81] David Smolin has thus concluded that IRFA attempts to "[export] our own confused First Amendment jurisprudence to other nations."[82] Another commentator claims that IRFA "views the international order as divided into two camps—liberal and illiberal."[83] Countries that fail to adopt an American version of religious freedom are classified as "illiberal" without respect to the particular nuances of their legal system. In response to such claims it can be noted that the rights protected by IRFA mirror those protected by Article 18 of the Universal Declaration of Human Rights. IRFA, in this respect, is no more overreaching than the Universal Declaration, which most countries have already endorsed. Of course, the real challenge for the United States involves determining whether a particular governmental action violates the right to religious freedom. It is in the course of making such prudential political judgments that controversy is likely to arise.[84]

Perhaps the most common critique of IRFA is that it bypasses existing international laws and institutions in favor of unilateral U.S. action. Rather than promoting religious freedom through international human rights law, IRFA establishes a competing legal instrument and assigns the United States sole responsibility for enforcement. Supporters of IRFA have defended this approach on the grounds that existing human rights laws are ineffective. Persecution on the basis of religion, it is noted, has grown in the half-century since the promulgation of the Universal Declaration of Human Rights. Critics, on the other hand, interpret IRFA as evidence of a deeply rooted American suspicion of internationalism. IRFA, writes one commentator, is "another example of unwarranted U.S. unilateralism."[85] Another

commentator similarly describes IRFA as a "failure of international participation and cooperation," an example of "unilateral monitoring" and "self-help by a powerful state that undermines rather than improves, existing, albeit underdeveloped, multilateral enforcement mechanisms."[86] According to such critics, IRFA bolsters the already widespread belief that the United States freely ignores, and even seeks to undermine, the authority of international human rights law. Those advancing such arguments, however, generally bring to the debate presuppositions about the validity and efficacy of international law and institutions. The most dogged critics of IRFA's unilateralism have been academic commentators, political figures, and human rights advocates who support multilateral and international approaches to problems. These criticisms of IRFA are thus best viewed as part of a broader debate about the relationship between American foreign policy and the international human rights movement.[87] In short, IRFA created an opportunity for considering America's relationship to the global community and its governing institutions.

IMPORTING MORAL NORMS: HUMAN RIGHTS AND CONSTITUTIONAL INTERPRETATION

Few areas of law have escaped the influence of globalization. "Transnational" legal arrangements now exist in such diverse areas as labor law, criminal law, cyberlaw, public health, and refugee law.[88] Global lawmaking has transformed bodies of law that in the past were exclusively or at least primarily domestic in content. Globalization is also changing the face of constitutional law, as one of the most discussed and contested legal questions of the day is whether international and foreign law, particularly in the area of human rights, ought to inform constitutional interpretation.[89] Should international standards on torture, for instance, guide the Supreme Court's interpretation of the Eighth Amendment's "cruel and unusual punishment" provision? Should the Due Process Clause as applied to laws criminalizing homosexual activity be informed by foreign legal standards? To what extent should the Supreme Court's decision in *Bush v. Gore* be subjected to international standards of electoral fairness?

Intense questioning over the use of human rights law in constitutional interpretation during the recent confirmation hearings of Chief Justice John Roberts and Justice Samuel Alito demonstrated the legal and political importance of this issue in American public life.[90] It is not important because of implications for constitutional law, but also as a focal point for a broader political conversation about the relationship between domestic and international law and between American democracy and the global community.

Much of the commentary on this issue has come from legal scholars who have argued for the incorporation of human rights norms into American law by means of constitutional interpretation. The theory advancing this legal tactic is, at this point, ahead of its actual judicial implementation. Robert Lillich, for instance, writes favorably of "the possibility that a court will regard international human rights law as infusing United States constitutional and statutory standards with its normative content."[91] Another commentator speaks of "informing domestic constitutional standards by reference to international norms . . . such as the United Nations Charter, Universal Declaration of Human Rights, or the International Covenant on Social and Economic Rights."[92] ACLU President Nadine Strossen has argued that "international standards may provide guiding principles for interpreting federal and state constitutions and statutes" and serve as a tool "to expand, rather than to limit, protections of individual rights under domestic law."[93] Gordon Christenson has similarly proposed using international human rights norms to create higher levels of scrutiny in Equal Protection and Due Process Clause jurisprudence and "to use those open-ended provisions of the Bill of Rights as windows through which we may peer at the rich resources of fundamental rights or values beyond our own policy."[94] All of these proposals exhibit a basic commitment to bringing international norms to bear on the development of domestic constitutional law.

This development has not, however, been of interest to academics. A number of judges have publicly urged the use of international norms in constitutional interpretation. Supreme Court Justices Stephen Breyer and Justice Ruth Bader Ginsburg have both been very public in urging a greater reliance on international law. Harry Blackmun, writing in 1994 after his retirement from the Supreme Court, likewise expressed a desire to see judges rely more heavily on international law when interpreting the Constitution, and judges have increasingly demonstrated a willingness to do so.[95] The number of constitutional cases referencing foreign and human rights law remains small, and this tactic has not yet been employed in a First Amendment church-state case. This legal innovation, however, has had an impacted on a number of cases involving important cultural issues. Robert Delahunty and John Yoo critically observed in the *Harvard Journal of Law and Public Policy* that the use of international law has the potential to influence important questions in the United States, "including the rights of criminal defendants, the constitutionality of parental notification requirements for abortions . . . the extent of governmental leeway in religion cases, and the validity of various forms of capital punishment under the Eighth Amendment."[96] The potential influence of international law in such cultural

debates will only increase as human rights law reaches into other spheres of society.

Death penalty cases have been most directly impacted by judicial reliance on international sources. In 1988, a plurality opinion in *Thompson v. Oklahoma* cited the views of "Western European" human rights agreements in holding the execution of a fifteen-year-old to be cruel and unusual.[97] The following year in *Stanford v. Kentucky*, a case involving the constitutionality of capital punishment for individuals who committed murders at ages sixteen and seventeen, Justice Brennan wrote in dissent that "[t]he views of organizations with expertise in relevant fields and the choices of governments elsewhere in the world also merit our attention as indicators whether a punishment is acceptable in a civilized society."[98] In *Atkins v. Virginia*, the Court also looked to international sources in holding it unconstitutional to execute a retarded man.[99] Yet, it was the Supreme Court's 2005 ruling in *Roper v. Simmons* holding that the Eighth Amendment prohibits the execution of offenders who were under eighteen years of age at the time the crime was committed that galvanized opinion about the use of international and foreign law in constitutional interpretation.[100] Justice Kennedy's opinion was most significant in its appeal to international sources. In arguing that execution of persons under the age of eighteen constitutes "cruel and unusual punishment" in violation of the Eighth Amendment, Kennedy cited Article 37 of the United Nations Convention on the Rights of the Child (which the United States has not ratified), the laws of the United Kingdom, and "the overwhelming weight of international opinion."[101] The extent of Kennedy's reliance on international authorities went beyond previous Supreme Court practice. One commentator summarizes the importance of Kennedy's *Roper* opinion as follows:

> Justice Kennedy's Roper majority opinion puts paid to the conceit that this is all just a bit of fluff exaggerated into something sinister and conspiratorial by Federalist Society right-wing ideologues. Roper asserts far more, it turns out, than the prior use of foreign law in contemporary constitutional cases would have suggested. It blesses in the contemporary era a new doctrine of constitutional adjudication . . . that is very far indeed from mere flirtation. It invites the deployment of a sweeping body of legal materials from outside U.S. domestic law into the process of interpreting the U.S. Constitution—and, moreover, invites it into American society's most difficult and contentious "values" questions.[102]

The *Roper* decision, and this line of death penalty cases more generally, pushed an important political and cultural battle into the international

arena and provoked an outpouring of commentary on whether international law ought to be used more extensively in constitutional adjudication.

There has also been extensive interest in using international human rights law to advance constitutionally-based economic rights, such as a guaranteed minimum level of subsistence. Academics have been proposing this idea for at least two decades, although it has gained little attention outside the pages of law reviews.[103] The tradition of negative liberty, which concerns the limitations placed on actions of the state, remains too strongly embedded in American law for this concept to gain constitutional traction.[104] Nevertheless, literature on this topic further illustrates the strategy and goals developed by those seeking to advance the interpretive use of international human rights law.

While economic rights have never made domestic headway, international human rights law has repeatedly affirmed their centrality to a just society. Article 22 of the Universal Declaration of Human Rights declares that everyone has a right to "social security" and is "entitled to realization . . . of the economic, social and cultural rights indispensable for his dignity and the free development of his personality." Article 23 establishes a right to work, to join trade unions, to have protection against unemployment, and to receive just remuneration for work performed. Article 24 announces a right to rest and leisure and to "periodic holidays with pay." Finally, Article 25 states that "everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control." The International Covenant on Economic, Social, and Cultural Rights (ICESCR), whose provisions broadly mirror those in the Universal Declaration, is the most authoritative document in this area. Parties to the ICESCR recognize the right of workers to receive fair wages (Article 7), to form and join trade unions (Article 8), to receive "an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions" (Article 11), and to free education including higher education (Article 13).

Given the perceived failure of the United States to address economic inequality and provide adequate social insurance, scholars have argued that a right to economic provision ought to be established by reading these international norms into the Constitution. One scholar has urged courts to interpret the Constitution's Due Process Clause in light of such international norms as "the rights to education and a minimum standard of living."[105] Nadine Strossen has proposed using the "international human rights

trend" to undermine the "negative-rights defining aspect of the Supreme Courts judicial process" in economic rights cases.[106] Leading constitutional law scholar Erwin Chemerinsky, in an article endorsing the idea of a constitutional welfare rights, references this strategy of relying on international human rights law, "which does create a right to a minimum subsistence for all."[107] International sources provide an authoritative counterweight to the traditional American aversion to positive rights.

The Supreme Court's 2003 holding in *Lawrence v. Texas*, overturning a state law that criminalized sodomy on the grounds that it violated constitutional due process, thrust debates about the interpretive use of international law off the pages of law reviews and into more popular venues.[108] Particular attention was given to Justice Kennedy's reliance on international sources in the majority opinion, in which he referenced a decision by the European Court of Human Rights holding that laws prohibiting homosexual activity were invalid under the European Convention on Human Rights.[109] This ruling, Kennedy maintained, undermined the "sweeping" claim that "the history of Western civilization and . . . Judeo-Christian moral and ethical standards" support legal and moral prohibitions on homosexual conduct.[110] Justice Scalia denounced this invocation of foreign law as "meaningless" and "dangerous" dicta.[111] Other conservative critics followed suit, denouncing the decision as a gross example of judicial activism.[112] These criticisms had been previously made in other contexts, but the important symbolic role of homosexuality in the contemporary culture wars heightened interest in the perceived encroachment by international law.

Certain aspects of the debate over international law's role in constitutional interpretation will remain the province of specialized legal scholarship. Yet the issues at stake are not merely scholarly. The attention given to this issue in more popular outlets such as newspapers, political journals, and even talk radio reveals the extent to which it has become part of the nation's political landscape. To look at this debate in exclusively, or even primarily, legal terms is thus to miss its import role in a broader debate about religion, culture, and ethics in an increasingly globalized world. As it now stands, international human rights norms have been invoked in only a few areas of religious and cultural dissension. However, driving the jurisprudential debate both at the scholarly and popular levels is the fear or hope that international law might be expanded beyond the death penalty and homosexuality to also influence constitutional decision-making in such contentious areas as church-state law, abortion, and end-of-life issues.

Progressives have been the most enthusiastic supports of expanding the interpretive role of international law. International human rights norms are often more in sync with progressive political sympathies than is domestic

law. On the death penalty, economic rights, health care, women's rights, and war, international norms are perceived as "liberal" by American standards. Progressives are also less attached to schools of jurisprudence such as originalism that limit the freedom of judges to flexibly interpret the Constitution. Mark Tushnet of Harvard Law School, a leading progressive constitutional theorist, has written that "law, including constitutional law, is politics." As such, Tushnet concludes that "[n]othing generally distinguishes progressive constitutionalism from progressive policy prescriptions."[113] Under such a view of legal process, judges need not be bound by a formalistic interpretation of the Constitution. International human rights norms are nevertheless attractive in that they allow judges to ground their decisions in concrete legal norms. Taking note of this possibility, one scholar recently proposed that "[t]he most trenchant critique of this use of international materials is that it serves as mere cover for the expansion of selected rights favored by domestic advocacy groups, for reasons having nothing to do with anything international."[114]

Yet many supporters of interpreting the Constitution in this fashion unashamedly acknowledge their goal of promoting political and cultural change by pulling American law into conformity with the values of the international community. One commentator, for instance, has urged the U.S. Supreme Court to follow the "contemporary moral values" of the European Court of Human Rights when "determining what human rights are protected rights and who should protect them."[115] Another legal scholar has called on Americans to move beyond the belief that the Constitution "is the best possible constitution." In contrast, he praises "truly modern Constitutions . . . based on generally accepted international human rights norms" and urges the Supreme Court to "open itself to well reasoned foreign jurisprudential approaches."[116] Yet another scholar rejects American "Constitutional hegemony."[117] For its progressive advocates, the interpretive use of international human rights law has become a tool for bringing about political and cultural change that might not be feasible through the democratic process. In particular, international human rights norms serve as a counterweight to conservative, and often religiously-based, political values.

Conservative thinkers have dismissed the interpretive use of human rights law as an attempt to legitimate judicial activism. In 2004, a Republican-controlled U.S. House of Representatives Committee on the Judiciary Subcommittee on the Constitution held hearings on a resolution declaring "that judicial determinations regarding the meaning of the laws of the United States should not be based on judgments, laws, or pronouncements of foreign institutions unless such foreign judgments, laws, or pronouncements inform an understanding of the original meaning of the laws of the

United States."[118] Robert Bork has been a particularly strong critic of domestic internalization of international law. In his 2003 book, *Coercing Virtue: The Worldwide Rule of Judges*, Bork wrote, "International law is not law but politics . . . The problem is not merely the anti-Americanism that grips foreign elites and shapes law; it is also the American intellectual class, which is largely hostile to the United States and uses alleged international law to attack the morality of its own government and society. International law has become one more weapon in the domestic culture war."[119] Jack Goldsmith, an international law scholar at Harvard Law School, has similarly criticized arguments for expanding domestic reliance on international law on the grounds that "nations differ in their moral, political, legal, and cultural commitments . . . Where the human rights community demands that the United States make international human rights treaties a part of domestic law in a way that circumvents political control, it evinces an intolerance for pluralism of values and conditions, and a disrespect for local democratic processes."[120] Conservative legal thinkers, while not rejecting international law *in toto*, have rejected attempts to "give *decisional* effect to foreign materials" that lack any domestic legal authority.[121]

CONCLUSION

In a recent article that has attracted considerable attention, University of Texas School of Law Professor Sarah H. Cleveland argues that the "historical record establishes that our constitutional tradition is significantly more receptive to international norms than is understood in the current scholarly and judicial debate." She adds that "modern assumptions about the uniqueness of the American legal order" must be reconsidered.[122] Cleveland's historical claims will no doubt be further debated, but she is certainly correct to see a future in which legal and constitutional debates increasingly take place along international lines. Church-state issues have not been exempt from this globalizing trend. As this essay has detailed, the internationalization of church-state issues has taken many forms, the most significant of which has been the establishment of legal protections for religious freedom in international law. Closer to home, a host of political and cultural debates implicating the relationship between religion, ethics, and public life have been increasingly drawn into an international debate. This essay has considered two such instances, the International Religious Freedom Act of 1998 and the recent explosion of interest in using international human rights law as a tool in constitutional interpretation. New issues will certainly arise, for, as Harvard Law School's Gerald L. Neuman notes, "Some U.S. observers—and judges—insist that constitutional law should maintain its distance from

the international human rights regime," even as the forces of internationalization make such separation ever more difficult.[123] The increased interdependence of legal institutions will prevent the return to an autonomous and insular legal regime, if indeed such a regime ever existed in America.[124]

These developments aside, international law remains deeply contested and debated. Among judges and academics, debate rages over the authority of international law, its proper scope, and its role in domestic jurisprudence. At a more popular level, politicians, pundits, and citizens debate the consequences of international law for sovereignty, justice, humanitarianism and human rights. In part because of the ever-expanding web of international laws and institutions, political and cultural debates have taken on an international dimension unimaginable not long ago. Americans, by and large, have accepted emerging global political realities and support greater interaction between the United States and international institutions. One leading study found, for instance, that "Most Americans want to pursue foreign policy goals chiefly through cooperative and multilateral means, with a large role for the United Nations."[125] The report adds that there is strong support for participation in international treaties and agreements. A substantial majority of Americans also support the United States assuming a greater role in international affairs, particularly as part of multilateral actions.[126]

Even as Americans have accepted some aspects of internationalization, they have remained suspicious of others. Large numbers of Americans, for instance, oppose U.S. cooperation with the United Nations.[127] A strong commitment to political sovereignty, encouraged by a continuing sense of exceptionalism, leaves many Americans suspicious of legal internationalization.[128] International law has proven to be most contentious when it becomes entangled with the domestic culture wars. Debates over family planning, population control, women's rights, children's rights, the death penalty, and the International Criminal Court have thrust the work of international institutions out of the bureaucratic shadows and into the mainstream of American political life. The deep religiosity of the American people, particularly in comparison to the regnant secularism of many global political elites, creates a divide between the moral views of many Americas and the norms enshrined in human rights law.[129] This moral conflict perpetuates American resistance to more fully embracing international law. Church-state issues have also been thrust into this global arena. Domestic debates about religious freedom have impacted international politics, and international laws have increasingly framed domestic debates about religion and culture. The analysis of church-state issues in America today must take account of developing global circumstances, and the nation's culture wars cannot be appraised without reference to these international dynamics.

NOTES

1. Universal Declaration of Human Rights, Article 18. For a history of the UDHR, see Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (New York: Random House, 2001).

2. Both bodies of law took shape around the same time. The modern human rights movement was born with the promulgation of the Universal Declaration of Human Rights in 1948. Modern church-state jurisprudence began with the seminal case of *Everson v. Board of Education*, 330 U.S. 1 (1947). In a 5–4 ruling, the U.S. Supreme Court voted to uphold a New Jersey statute funding the transport of Catholic schoolchildren to parochial schools. In addition, this decision incorporated the First Amendment into the Fourteenth Amendment so it would henceforth apply to the states as well as the U.S. government.

3. Christy Cutbill McCormick, "Exporting the First Amendment," *Journal of International Legal Studies* 4 (Summer 1998): 283–334.

4. For an important and representative work of scholarship in this field, see Curtis A. Bradley and Jack L. Goldsmith, "Customary International Law as Federal Common Law: A Critique of the Modern Position," *Harvard Law Review* 110, no. 4 (February 1997): 815–876.

5. Lori Fisler Damrosch et al., *International Law: Cases and Materials* (4th ed.) (St. Paul, MN: West Group, 2001): 16.

6. Louis Henkin, *How Nations Behave: Law and Foreign Policy* (New York: Columbia University Press, 1979): 47l.

7. Daniel Philpott, "Religious Freedom and the Undoing of the Westphalian State," *Michigan Journal of International Law* 25 (Summer, 2004): 981.

8. Ibid., 986; Harold Hongju Koh, "The Globalization of Freedom," *Yale Journal of International Law* 26 (Summer 2001): 305–312.

9. Nathan A. Adams, "A Human Rights Imperative: Extending Religious Liberty Beyond the Border," *Cornell International Law Journal* 33:1 (2000): 23–25.

10. Robert F. Drinan, S.J., *Can God & Caesar Coexist: Balancing Religious Freedom and International Law* (New Haven: Yale University Press, 2004): 31.

11. UN Charter, Article 1(3).

12. UN Charter, Article 55(c).

13. Drinan, *Can God & Caesar Coexist*, 31.

14. Universal Declaration of Human Rights, Article 18.

15. "As international legal documents articulate it, religious freedom is a right enjoyed through worship, public expression of beliefs, education of children into such beliefs, the operation of houses of worship, schools, universities, seminaries, enjoyment of freedom from discrimination in employment and political access, and the liberty to take up, abandon, proclaim or dissent from one's religion. States threaten this right when they limit these practices through killing, imprisonment, torture, or otherwise discrimination against believers." Philpott, 991.

16. Courts in the United States have also considered the tension between religious belief and practice. The Supreme Court's decision in *Employment Division v.*

Smith, 494 U.S. 872 (1990), held that a law criminalizing use or possession of peyote did not violate the First Amendment right to the free exercise of religion, even though certain Native American religions consider the use of peyote to be an essential practice. In the majority opinion, Justice Scalia acknowledged that the free exercise of religion "often involves not only belief and profession but the performance of (or abstention from) physical acts: assembling with others for a worship service, participating in sacramental use of bread and wine, proselytizing, abstaining from certain foods or certain modes of transportation. It would be true, we think (though no case of ours has involved the point), that a state would be 'prohibiting the free exercise [of religion] if it sought to ban such acts or abstentions only when they are engaged in for religious reasons, or only because of the religious belief that they display." A majority of the Supreme Court, however, argued that a generally applicable criminal law prohibiting the use of peyote did not violate the First Amendment.

17. Drinan, 32.

18. Ibid., 34–35.

19. Ibid., 37; Adam M. Smith, "The Perplexities of Promoting Religious Freedom Through International Law: A Review of Robert Drinan's Can God and Caesar Coexist?" *North Carolina Journal of International Law and Commercial Regulation* 30 (Spring 2005): 742.

20. Article I of the Optional Protocol provides as follows: "A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol."

21. For a further discussion of this Declaration in historical context see Derek H. Davis, "The Evolution of Religious Freedom as a Universal Human Right: Examining the Role of the 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief," *Brigham Young Law Review* (2002): 217–236.

22. Preamble to the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief.

23. Ibid., Article 3.

24. Drinan, 40–41.

25. Smith, "The Perplexities of Promoting Religious Freedom Through International Law," 740–741.

26. Ibid., 741.

27. Philpott, 992.

28. Ibid.

29. Drinan, 13.

30. Adams, "A Human Rights Imperative," 3.

31. Drinan, 37–38, 41.

32. Adams, 16.

33. McCormick, "Exporting the First Amendment," 284.

34. 22 U.S.C. 6401(a)(4); http://www.state.gov/g/drl/rls/irf/

35. Smith, 4.

36. On Germany and Scientology, see McCormick, 309–310.

37. A court held in *Lee v. Crouse*, 284 F. Supp. 541 (D. Kan. 1967) that "Black Muslims," who combined orthodox Islam with a belief in racial segregation, constitued a religion. The case of *Malnak v. Yoge*, 592 F.2d 197 (Fed. Cir. 1979), held that Transcendental Meditation is a religion. Jonathan Weiss, writing in 1964, captured the challenge in observing that "to define the limits of religious expression may be impossible if philosophically desirable . . . any definition of religion would seem to violate religious freedom in that it would dictate to religions, present and future, what they must be." Jonathan Weiss, "Privilege, Posture and Protection: 'Religion in the Law,'" *Yale Law Journal* 73, no. 4 (March 1964): 604.

38. Smith, 747–748.

39. Drinan, 36.

40. International Covenant on Civil, Political, and Cultural Rights, Article 20(2) provides that "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

41. Michael J. Perry, "A Right to Religious Freedom? The Universality of Human Rights, the Relativity of Culture," *Roger Williams Law Review* 10 (Spring 2005): 413.

42. See http://www.tandemproject.com/part2/article1/art1_3.htm

43. Smith, 2.

44. Quoted in Smolin, "Will International Human Rights be Used as a Tool of Cultural Genocide: The Interaction of Human Rights Norms, Religion, Culture, and Gender," *Journal of Law and Religion* 12, no. 1 (1995–1996): 170.

45. A number of countries have laws that criminalize blasphemy. A number of states including Afghanistan and Pakistan have laws that prohibit blaspheming against the Islamic faith. Some European countries including England, Germany, and Denmark also have blasphemy laws on the books although they are rarely enforced.

46. See http://hrw.org/wr2k5/religion/index.htm

47. Philpott, 993.

48. John Witte, Jr., "Law, Religion and Human Rights," *Columbia Human Rights Law Review* (Fall 1996): 5–6.

49. These tensions became particularly manifest, for instance, during the UN's 1995 Conference on Women, when conflicts arose over issues of family, gender, population control, and abortion. See Mary Ann Glendon, "What Happened at Beijing," *First Things* 59 (January 1996): 30–36; Mary Ann Glendon, "Foundations of Human Rights," *American Journal of Jurisprudence* 44 (1999): 1–10.

50. Philpott, 996.

51. Drinan, 62–85.

52. 22 U.S.C. 6401(a)(1).

53. 22 U.S.C. 6401(a)(2).
54. 22 U.S.C. 6401(b)(1); 22 U.S.C. 6441(a).
55. 22. U.S.C. 6411.
56. 22 U.S.C. 6412.
57. Ibid.
58. 22 U.S.C. 6432; 22 U.S.C. 6432.
59. 22 U.S.C. 6445(a).
60. McCormick, 323.
61. Ibid., 328.
62. Some more liberal religious organizations, such as the National Council of Churches, opposed the legislation. See Peter D. Danchin, "U.S. Unilateralism and the International Protection of Religious Freedom: The Multilateral Alternative," *Columbia Journal of International Law* 41:1 (2002): 100n.215.
63. Pew Forum on Religion and Public Life, Symposium on "Legislation International Religious Freedom," November 20, 2006. A transcript of the event is available at: http://pewresearch.org/pubs/105/legislating-international-religious-freedom. For a more extended discussion of this topic see Allen D. Hertzke, *Freeing God's Children: The Unlikely Alliance for Global Human Rights* (Lanham, MD: Rowman & Littlefield, 2004).
64. The statute is available at http://usinfo.state.gov/usa/infousa/laws/majorlaw/intlrel.htm
65. The connections between the emerging concern of evangelicals with religious freedom and the passage of the IRFA were strong. In a *Wall Street Journal* editorial credited with drawing attention to the issue of religious persecution abroad, Hudson Institute fellow Michael Horowtiz, though himself Jewish, argued that human rights for Christians ought be used to promote human rights more generally. McCormick, 285.
66. See http://www.eppc.org/publications/pubID.1795/pub_detail.asp
67. Pew Forum on Religion and Public Life, Symposium on "Legislation International Religious Freedom," November 20, 2006. A transcript of the event is available at http://pewresearch.org/pubs/105/legislating-international-religious-freedom
68. Jeffrey Goldberg, "Washington Discovers Christian Persecution," *New York Times Magazine* (December, 21 1997): 46.
69. "Candles in the Darkness: Religious freedom is a foreign policy beacon," *Washington Times* (December 31, 2000).
70. Thomas F. Farr, "The Diplomacy of Religious Freedom," *First Things* (May 2006): 12–15; Thomas F. Farr, "Religious Realism in Foreign Policy: Lessons from Vatican II," *The Review of Faith & International Affairs* (Winter 2005–2006): 28.
71. Farr, "Religious Realism in Foreign Policy," 28.
72. Ibid., 28–39.
73. William Martin, "The Christian Right and Foreign Policy," *Foreign Policy* 114 (Spring 1999): 78.
74. Philpott, 995.

75. John Shattuck, "Religion, Rights, and Terrorism," *Harvard Human Rights Journal* 16 (Spring 2003): 185.

76. Ibid.

77. Danchin, "U.S. Unilateralism and the International Protection of Religious Freedom," 41.

78. Ibid., 104.

79. Ibid.

80. Shattuck, 185.

81. Smolin, "Will International Human Rights be Used as a Tool of Cultural Genocide," 8.

82. David M. Smolin, "Exporting the First Amendment?" Evangelism, Proselytism, and the International Religious Freedom Act," *Cumberland Law Review* 31, no. 3 (2000–2001): 685.

83. Danchin, 42.

84. Even among countries that endorse religious freedom, there remains debate about what such a right requires. Proselytizing has been a particularly thorny issue in international human rights law, and Smolin asserts that the IRFA promotes a "laissez-faire attitude towards evangelism/ proselytism" consistent with American liberal principles. While the IRFA promotes a cause "that appears deceptively simple from an American perspective appears," Smolin adds, it involves "for much of the rest of the world . . . a delicate balancing of interests and careful line-drawing, which often can be resolved only on a case-by-case basis." Smolin, "Exporting the First Amendment?" 686.

85. Smith, 4.

86. Danchin, 41, 46, 73.

87. The United States, for example, has not ratified a number of significant human rights agreements, including the Convention on the Rights of the Child, the Convention on the Elimination of All Forms of Discrimination Against Women, and the International Covenant on Economic, Social, and Cultural Rights.

88. Koh, "The Globalization of Freedom," 306.

89. See generally, Roger P. Alford, "Misusing International Sources to Interpret the Constitution," *American Journal of International Law* 98 (January 2004): 57–69; Gerald L. Neuman, "The Uses of International Law in Constitutional Interpretation," *American Journal of International Law* 98 (January 2004): 83–90; Michael D. Ramsey, "International Materials and Domestic Rights: Reflections on *Atkins* and *Lawrence*," *American Journal of International Law* 98 (January 2004): 69–82.

90. See Ronald Dworkin, "Judge Roberts on Trial," *New York Review of Books* 52:16 (October 20, 2005): 14–17.

91. Richard B. Lillich, "Invoking International Human Rights Law in Domestic Courts," *University of Cincinnati Law Review* 54 (Spring 1985): 408.

92. Ann I. Park, "Human Rights and Basic Needs: Using International Human Rights Norms to Inform Constitutional Interpretation" *U.C.L.A. Law Review* 34 (April 1987): 1249.

93. Nadine Strossen, "Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis," *Hastings Law Journal* 41 (April 1990): 805–806.

94. Gordon A. Christenson, "Using Human Rights Law to Inform Due Process and Equal Protection Analyses," *University of Cincinnati Law Review* 52 (1983): 4, 13.

95. Harry A. Blackmun, "The Supreme Court and the Law of Nations," *Yale Law Journal* 104 (October 1994): 45.

96. Robert J. Delahunty and John Yoo, "Against Foreign Law," *Harvard Journal of Law and Public Policy* 29 (2005): 296.

97. *Thompson v. Oklahoma*, 487 U.S. 815 (1988). Justice Scalia, writing in dissent, sharply challenged the majority's invocation of international sources. Scalia argued that: "That 40% of our States do not rule out capital punishment for 15-year-old felons is determinative of the question before us here, even if that position contradicts the uniform view of the rest of the world. We must never forget that it is a Constitution for the United States of America that we are expounding . . . But where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution. In the present case, therefore, the fact that a majority of foreign nations would not impose capital punishment upon persons under 16 at the time of the crime is of no more relevance than the fact that a majority of them would not impose capital punishment at all, or have standards of due process quite different from our own." 487 U.S. at 869n.4.

98. *Stanford v. Kentucky*, 492 U.S. 361, 384 (1989).

99. *Atkins v. Virginia*, 536 U.S. 304 (2002).

100. *Roper v. Simmons*, 543 U.S. 551 (2005).

101. 543 U.S. at 576–578.

102. Kenneth Anderson, "Foreign Law and the U.S. Constitution," *Policy Review* 131 (June–July, 2005): 33–51.

103. In spite of the work of these academics, the idea has gained little judicial traction. There were, to be sure, some important legal victories for welfare rights. In *Goldberg v. Kelly*, 397 U.S. 254 (1970), the first of the so-called new property cases, the Court held that due process forbade the termination of welfare benefits without providing certain procedures, where state law had granted an entitlement to qualified persons. The Court also made favorable rulings in *Plyler v. Doe*, 457 U.S. 202 (1982), in which it struck down denial of public education to certain alien children, and *Shapiro v. Thompson*, 394 U.S. 618 (1969), in which it struck down a one-year residency requirement for receiving welfare benefits. But the Court refused to move beyond these procedural guarantees to recognizing the existence of economic rights not already established in statute. A host of decisions such as *Dandridge v. Williams*, 397 U.S. 471 (1970), and *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973), showed the limits of the Court's jurisprudence. This refusal to recognize economic rights reflects that deeply embedded assumption that the U.S. Constitution is a document of negative, not positive, rights. As Judge

Richard Poser wrote in *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982), the Constitution "tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order." Chief Justice Rehnquist wrote similarly in *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989), that the Due Process Clause "is phrased as a limitation on the state's power to act, not as a guarantee of certain minimum levels of safety and security." "To sum up," writes one commentator, "the Supreme Court has rejected socio-economic rights claims under both Substantive Due Process and Equal Protection doctrines." Mark S. Kende, "The South African Constitutional Courts' Embrace of Socio-Economic Rights: A Comparative Perspective, *Chapman Law Review* 6 (Spring 2003): 151.

104. The "negative rights-defining aspect of the Supreme Court's judicial process sets it apart from the international human rights trend." Strossen, "Recent U.S. and International Judicial Protection of Individual Rights," 875.

105. Connie de la Vega, "Protecting Economic, Social and Cultural Rights," *Whittier Law Review* 15 (1994): 476.

106. Strossen, 875.

107. Erwin Chemerinsky, "Under the Bridges of Paris: Economic Liberties Should Not Be Just for the Rich," *Chapman Law Review* 6 (Spring 2003): 40.

108. *Lawrence v. Texas*, 539 U.S. 558 (2003).

109. 539 U.S. at 573.

110. 539 U.S. at 572. Chief Justice Burger made this comment in *Bowers v. Hardwick*, 478 U.S. 186 (1986), in which the Supreme Court upheld a Georgia anti-sodomy law similar to the one at issue in *Lawrence*.

111. 539 U.S. at 598.

112. On the use of foreign law in *Lawrence*, see Rex D. Glensy, "Which Countries Count?: Lawrence v. Texas and the Selection of Foreign Persuasive Authority," *Virginia Journal of International Law* 45 (Winter 2005): 358–449.

113. Mark Tushnet, "What is Constitutional about Progressive Constitutionalism?" *Widener Law Symposium Journal* (Spring 1999): 19–20.

114. Michael D. Ramsey, "International Materials and Domestic Rights: Reflections on Atkins and Lawrence," *American Journal of International Law* 98 (January, 2004): 69.

115. Tania Schriwer, "Establishing an Affirmative Governmental Duty to Protect Children's Rights," *University of San Francisco Law Review* 34 (Winter 2000): 9.

116. Kende, "The South African Constitutional Courts' Embrace of Socio-Economic Rights," 160.

117. Peter J. Spiro, "Treaties, International Law, and Constitutional Rights," *Stanford Law Review* 55 (May 2003): 1999.

118. 108th Congress, 2d Session, H. Res. 568, March 17, 2004.

119. Robert H. Bork, *Coercing Virtue: The Worldwide Rule of Judges* (Washington, D.C.: The AEI Press, 2003): 21.

120. Jack Goldsmith, "Should International Human Rights Law Trump US Domestic Law?" *Chicago Journal of International Law* 1 (Spring 2000): 338.

121. Delahunty and Yoo, "Against Foreign Law," 296.

122. Sarah H. Cleveland, "Our International Constitution," *Yale Journal of International Law* 31 (Winter 2006): 124. See also Anne-Marie Slaughter, "A Global Community of Courts," *Harvard International Law Journal* 44 (Winter 2003): 191–219.

123. Gerald L. Neuman, "Human Rights and Constitutional Rights: Harmony and Dissonance," *Stanford Law Review* 55 (May 2003): 1864.

124. See Mark Tushnet, "The Possibilities of Comparative Constitutional Law," *Yale Law Journal* 108 (April 1999): 1225–1309.

125. See http://www.thechicagocouncil.org/UserFiles/File/GlobalViews06Final.pdf

126. See http://www.worldpublicopinion.org/pipa/articles/brunitedstatescanadara/256.php?nid=&id=&pnt=256&lb=brusc. A recent survey found also that a sizeable majority of Americans support greater United States and international involvement in addressing the Darfur situation. See http://www.worldpublicopinion.org/pipa/articles/brunitedstatescanadara/181.php?nid=&id=&pnt=181&lb=bthr

127. See http://www.worldpublicopinion.org/pipa/articles/brunitedstatescanadara/270.php?nid=&id=&pnt=270&lb=brusc

128. "The United States has often encouraged the development of transnational regimes" as a solution to political problems, but there is "no similar perception of failure in the United States and, therefore, no sense of a need to participate in the remedy." Paul W. Kahn, "American Exceptionalism, Popular Sovereignty, and the Rule of Law," in *American Exceptionalism and Human Rights*, ed. Michael Ignatieff (Princeton: Princeton University Press, 2005): 217.

129. The Pew Global Attitudes Project, http://pewglobal.org/reports/display.php?ReportID=167, found that the United States is unique among wealthy nations in its embrace of religion.

FURTHER READING

The most important source is to look to the relevant legal instruments including the Universal Declaration of Human Rights (1948), International Covenant on Civil and Political Rights (1960), and the United Nations Declaration on the Elimination of All Forms of Discrimination Based on Religion and Belief (1981). A historical perspective on the subject of religious freedom and international is found in Daniel Philpott's "Religious Freedom and the Undoing of the Westphalian State," *Michigan Journal of International Law* 25 (Summer, 2004): 981–999, while a helpful analysis of the most significant international document on religious freedom is Derek H. Davis, "The Evolution of Religious Freedom as a Universal Human Right: Examining the Role of the 1981 United Nations Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion and Belief," *Brigham Young Law Review* (2002): 217–236. As former director of the Office of International Religious Freedom, Thomas Farr offers an inside account of the International Religious Freedom Act of 1998 in "The Diplomacy of Religious

Freedom," *First Things* (May 2006): 12–15. There are also a number of scholarly treatments of the history and structure of the IRFA, including Nathan A. Adams, "A Human Rights Imperative: Extending Religious Liberty Beyond the Border," *Cornell International Law Journal* 33, no. 1 (2000): 1–66, and Christy Cutbill McCormick, "Exporting the First Amendment," *Journal of International Legal Studies* 4 (Summer 1998): 283–334. The debate over international law and constitutional interpretation is still developing. For two critical assessments of the practice, consider Robert H. Bork, *Coercing Virtue: The Worldwide Rule of Judges* (Washington, D.C.: The AEI Press, 2003) and Robert J. Delahunty and John Yoo, "Against Foreign Law," *Harvard Journal of Law and Public Policy* 29 (2005): 291–330. For an article defending the use of international sources of constitutional interpretation that draws on historical sources see Sarah H. Cleveland, "Our International Constitution," *Yale Journal of International Law* 31 (Winter 2006): 1–126.

5

The Status of Faith-Based Initiatives in the Later Bush Administration

Douglas L. Koopman

As the two major-party candidates for president in 2000, Al Gore and George W. Bush both promoted a larger role for faith-based groups in the provision of social services funded by the federal government. Democrat Gore had publicly supported faith-based expansion in early 1999, before Republican Bush had done so. As the campaign intensified in late 2000, however, Gore downplayed his faith-based ideas for more populist and partisan appeals, while Bush made the initiatives the centerpiece of his "compassionate conservative" agenda. It was, at least on the surface, a compelling idea for Republicans. Policy wise, it was a logical next step for welfare reform that had increasingly relied on lower levels of government and outside agents to deliver social services. Politically, it helped identify Bush as both religiously sincere and ideologically moderate, a clear advantage in a closely divided election. Even in the tumult of the late election season, faith-based initiatives seemed to be the rare set of issues around which bipartisan consensus could form and legislative progress could be quickly made, whoever was ultimately elected president. But the nastiness of the 2000 election and its Florida aftermath doomed any chances of bipartisanship on much of anything, especially on issues that might touch upon race and religion,

which the faith-based initiatives clearly do. As such, the politics of the faith-based issue and its establishment in the various branches and levels of government have become far more complex.

As it entered its last two years, the Bush administration had advanced its faith-based initiative about as far as it could through Congress and the federal bureaucracy. The legislative record was sparse—strong efforts the first year and sporadic attempts in the next five produced little new law. Small amounts of compassion capital funds were allowed. A few social service program authorizations and reauthorizations for the first time allowed intensely and overtly religious groups to apply for funds in programs that had been closed to them. In the bureaucracy, President Bush's initiatives had a great deal more success. Federal agencies, through newly established faith-based offices within them, conducted massive audits of programs and policies, looking for anti-religious discrimination practices. Audit results set an internal agenda for change and reform. Extensive outreach efforts by the central White House Office of Faith-Based and Community Initiatives (WHOFBCI) and its agency-based affiliates created publicity about the initiative, networking among faith-based groups and between them and federal officials, and braver and more demanding constituencies to which programming officials had to attend. By early 2007, the faith-based initiative was thus firmly entrenched within the federal bureaucracy.[1]

While the changes escaped heavy media attention and congressional involvement, they were not unnoticed by interest groups opposed to the administration's faith-based agenda. Adversaries wanted chances to challenge faith-friendly actions in court, but they needed to wait for the changes to manifest themselves in actual programs and activities. The American legal process is long and complex, and it works in favor of the initiator of the challenged action—in this case the Bush administration. Executive branch staff could revise regulations, promulgate procedures, and commence pro-faith-based outreach and program administration, while opponents had to wait for the new activities to result in real or perceived violations before they could start legal action. With so many faith-based administrative actions undertaken simultaneously, there were many instances where opponents could make legal challenges. Even a large number of cases, however, collectively have little material effect in the short term until their legal journeys end with definitive rulings.

As of early 2007, many faith-based challenges had been filed, but few had been settled.[2] Combined with the legal limbo of individual cases was the changed makeup of the U.S. Supreme Court. New Justices John Roberts and Samuel Alito replaced deceased Chief Justice William Rehnquist and retiring Justice Sandra Day O'Connor. O'Connor was the "swing" vote

on so many religious cases that nearly all legal speculation (and, in fact, much of the legislative and administrative language of the Bush Administration's faith-based proposals) has been based upon the complex and individualized church-state views of Rehnquist Court decisions written or strongly influenced by O'Connor.[3] The views of Roberts and Alito on church-state issues, as on so many others, are largely unknown, although it seems quite possible the changed court will shift toward greater sympathy for religious influences in the public square. And if the new Roberts-led court is inclined to take an additional step and lay out clear and broadly applicable standards, the field of church-state legal precedent could shift quite drastically.[4]

Unsettled legal questions about the faith-based initiatives, combined with questions of their efficacy and political benefit, make it impossible to make confident estimates of their eventual success. The best one can do at this juncture is to provide some context: describe the initiatives as promoted by President Bush, comment on the root of their controversy, delve into some history of the relationship between church and state in providing government-supported social services, and clarify the main legal points of the past that future Supreme Court decisions will have to review and reconsider. The remainder of this article does this by providing some essential background to understanding today's faith-based debate, both in the broad political sense and in the narrower sense of issues within the federal court. The first essential is to understand the multiple initiatives under what really is a "faith-based initiatives" umbrella. The second essential is to see how the faith-based debate connects to a broader "culture war" that some see raging in American society and affecting partisan discourse. It is also critical to have some background in the long history of how religious traditions have interacted with government in providing social services, the third essential. After what is necessarily a brief summary of these first three essentials, this chapter reviews the most important foundational and recent federal court decisions, as well as those that seem certain to arise in the near future. While it is always difficult to predict Supreme Court decisions and the future course of policy, legal and bureaucratic trends both point in the same direction: a larger and more constitutionally-secure role for more types of faith-related groups to partner with government in providing social services.

ESSENTIAL 1: MANY INITIATIVES WITH ONE GOAL

President Bush's faith-based initiative has never been one single, simple idea. It is more accurate to describe his 2000 presidential campaign proposals and early legislative efforts as encompassing a wide set of initiatives clus-

tered around three different areas with one far-reaching goal: to expand the variety of religiously affiliated social services that receive financial help from the federal government in carrying out government objectives.

One priority was an aggressive outreach plan to welcome smaller and community-based social service agencies (which are overwhelmingly connected to churches and religious organizations) to apply for funds to carry out government programs. Many claimed such groups were discriminated against in the application for federal dollars, structuring a bias against religion and reducing the effectiveness of government spending. This first goal of outreach could be done administratively and without much controversy, as it involves little more than welcoming additional groups into an application process that may or may not result in actual government support. The Bush administration has aggressively pursued outreach, with regular regional conferences sponsored by the WHOFBCI and other agency Faith-Based and Community Initiative (FBCI) offices touting the new "faith friendliness" of the federal bureaucracy.

A second priority area was to vastly expand tax incentives, particularly a charitable tax deduction for individuals not itemizing deductions on their tax returns. This new non-itemizers' deduction would potentially direct billions of additional dollars to faith-based organizations. This priority was badly damaged early on in the Bush Administration, partly through its own doing. Whereas the new president had proposed a major non-charitable tax incentive very early in 2001, by June it had been dropped out of the first, and what turned out to be the only, major tax reform proposal to become law. The president's desired tax breaks have, thus, never materialized.

The third priority was to codify in legislation the most faith-friendly interpretation of recently announced Supreme Court decisions on the Constitution's religion clauses, particularly the Establishment Clause. Ideally, these changes should have gone through the legislative process to establish them more firmly in law. But the White House's legislative strategy for these changes, too, failed in 2001 and was essentially abandoned by the end of 2002 as the faith-based initiative generated more opposition in Congress than nearly anyone anticipated. The administration has changed its strategy completely, and through its rulemaking power has quietly and unilaterally implemented its faith-friendly interpretation of these decisions.[5] Legal challenges to these interpretations are legion, but largely unsettled.

For many years these challenges will percolate through the judicial system. No one knows how and when they will be settled. An older stream of cases interpreting the First Amendment religion clauses severely restricted permissible financial interactions between government and religious entities, thereby tending to create a "no involvement" standard between the govern-

ment and religion and close scrutiny of the particular religious entities receiving aid in any given case. But decisions in the late 1990s and since have been increasingly permissive in letting government and religion mix. In its later decisions, the Rehnquist Court seemed to be bordering on a "neutrality" standard in which the federal program in question is scrutinized, rather than the religion, or non-religion, of that program's implementing partner. In short, Establishment Clause interpretation is at the moment very unsettled and awaits new decisions of a significantly changed (and potentially even more changed) Supreme Court.

ESSENTIAL 2: A SMALL PIECE OF THE CULTURE WAR DEBATE

The fate of the faith-based initiatives is not a mere matter of dry legal interpretation, but also a matter of the heart. The public debate about faith-based initiatives has proven highly-charged, emotionally and ideologically. This is so because the initiatives challenge some bedrock assumptions of modern liberal democracy that are rarely re-examined in most political discourse.[6] Modern liberal democracy avers allegiance to making only rational arguments in the public square based on verifiable evidence on which all rational people can agree. Because these assumptions are often implicit rather than explicit, they bear brief mention here. The first assumption is that robust religion is dangerous in the public square. Religion, from this view, is an exclusivist, emotional, irrational means of thinking and arguing that has no place in an American public arena that is rational, and therefore tolerant. In this view, religious faith and religious people are tolerated politically *if* that faith has no public expression that offends persons of other religions or no religion: as such, a fairly cramped definition of toleration underlies the modern liberal public square. Jefferson's "wall of separation" language is used, in this view, to preemptively brand as illegitimate religious arguments in political debates. Because President Bush's faith-based initiatives give greater government sanction for robust and overtly religious people, groups, and reasoning in political debates and government operations, according to this view the initiatives must be opposed.

The second presumption against faith-based initiatives is the view that social services mixed with strong doses of religion are qualitatively inferior to secular social services, an unfair bias in the view of faith-based proponents. According to this second presumption, faith-intensive social services are almost certainly ineffective, unscientific, and unprofessional. Faith-based initiatives must be opposed so that the quality and accountability of social services funded by government does not decline. While little true effective-

ness data has ever been compiled for traditional providers, faith-based opponents argue that the superior effectiveness of faith-intensive programs should be proved first, before they are allowed to compete for federal funds.[7]

These assumptions about dangerousness and effectiveness relate to religious legitimacy in modern American politics—religion's legitimacy in government-sponsored arenas and faith-based social services' legitimacy in seeking government support for helping it meet human needs. Reviewing the underlying philosophical predisposition of many faith-based opponents clarifies these connections. Quite opposite assumptions in faith-based proponents, and their increasing strength in today's politics, complete the picture. While it is beyond the scope of this chapter to address this conflict in detail, to avoid the clash of worldviews behind the key combatants is to miss much of what is at stake. Simply put, the faith-based initiative is connected to the broad and vehement "culture war" that seems to dominate America's elites in the present day.[8]

ESSENTIAL 3: A LONG HISTORY

An historical perspective, the third essential understanding behind today's debate, sets these current controversies in better context.[9] Religious organizations have operated human service programs throughout America's history. Caring for one's neighbor has been seen nearly always and everywhere as a religious act and obligation: American churches and religiously inspired voluntary organizations have always done so. When industrialization, mass immigration, and racial tension created far more complex problems in the late nineteenth century, religious groups responded with more complex and durable organizations to address these needs. These interventions were not neutral across faith traditions; in fact, one part of the fundamentalist/mainline split within Protestantism can be traced to the church's reaction to modernization. Moderate and liberal denominations tended to be more active and ecumenical in their welfare programs, responding to and in some ways reinforcing the "social gospel" movement of the latter nineteenth century that emphasized new themes of Jesus' humanity, morality, and social concern over traditional theological ideas about Jesus. For these more liberal elements, to truly follow and respect Jesus meant to be more active in meeting human needs and to de-emphasize Jesus' divinity and even the importance of religious belief. In reaction, more theologically traditional faiths put relatively more emphasis on doctrinal issues than ever, even in their social programs that were often explicit tools for evangelism and conversion to particular faith ideas.

But church activity alone, or nearly alone, was a losing battle, even when fundamentalist and mainline efforts are considered in total. In the early and

mid-twentieth century, industrialization and economic depression increased the frequency and intensity of requests *from* religious organizations *to* government for help in human service tasks too large and complex to be addressed solely by private efforts. One hundred years ago, joint government-religious efforts to meet human needs would be described by observers as *government* entering the sphere of *religious* responsibility.

Whereas local and state governments moved into the field early on, the federal government did not formally get involved in welfare programs until the Great Depression of the 1930s. The 1935 Social Security Act established the federal Aid to Dependent Children program, which gave states matching federal funds to "assist, broaden and supervise existing mothers' aid programs." The middle decades of the twentieth century saw a marked expansion of government-funded social welfare programs, with thousands of workers and billions of dollars devoted to the cause. As government assistance grew, religious efforts were by no means reduced, although it might have seemed that way from historical records. The "new thing" was government, not religion, and it was the "new" that received official comment and, a few decades later, seemed the *status quo*.

The late 1950s brought the Civil Rights movement; the early 1960s, its maturation. The nation could not avoid knowing of severe poverty in the South, Appalachia, and industrial cities everywhere. Pressure built to bring relatively recent government social services to a broader and higher level, from the New Deal to the Great Society. President Johnson in his 1964 State of the Union address declared an "unconditional war on poverty." New federal social service programs such as Job Corps, Head Start, and Medicaid followed.

A constantly improving economic climate and growing spending by these and other federal programs reduced the poverty rate significantly throughout the remainder of the 1960s, and kept it fairly level through the mid-1970s. Much was accomplished beyond reducing the incidence of poverty; social problems among some target populations, especially the elderly, declined. Religious groups and government were often partners, formally and informally, in these Great Society efforts. But because the focus remained on the growing federal role, the longstanding role of churches and other religious organizations was largely overlooked in the literature and in public debates.

THE FUNDAMENTALIST/MAINLINE SPLIT IN INTERACTING WITH GOVERNMENT

Differences among religious groups in their interactions with the growing government were becoming more apparent. While the two camps both had

extensive social services networks before the split and continued them afterward, views about collaborating with government diverged along the same lines.

Those religious organizations that did partner with government were mostly of the modernist stripe; those that did not were mostly more conservative. The politics of most of the modernist willing partners were liberal and their theology ecumenical and humanitarian. Politically, such groups were willing to be junior partners to the government in providing services supported by government dollars. Theologically, their ecumenism made them more willing to downplay the religious content of their programs to meet concerns of government administrators about sectarianism and coercion. They established non-sectarian and even non-religious governing boards, applied for and received 501(c)3 tax-exempt status, partnered with secular non-profits and all levels of government, and became more sophisticated organizationally and more directly involved politically. By the late twentieth century, many mainline Protestant, Catholic, Jewish, and ecumenical groups were long established, had decades of experience dealing with government programs, and, for better or worse, shared with the government itself whatever reputation social services had in the mind of voters.

Meanwhile, theologically conservative and evangelical groups continued to provide services that mixed social services with religious messages. Many of them became joint church efforts or para-church organizations and generally did not seek government funds. Thus, they did not arrange their management and staff to meet the expectations of government funders, look for employees with professional credentials, or separate the marks of faith from the acts of social service. These groups tended to be smaller, more independent from each other, and organizationally part of a church rather than "spun off" into separate entities. In a few cases, these intensely and overtly religious groups might have received government agency support. Public officials would sometimes ignore the religious content or affiliations of programs as long as social services were provided to targeted groups. But, generally, the conservatives operated smaller social service programs, independent of government support. Neither side much bothered the other, and certainly not in Washington, D.C.

1970s DISCONTENT WITH GOVERNMENT

Just as Great Society programs became established in the early 1970s, they became threatened by political and economic tensions. The energy crisis and Lyndon Johnson's dual wars on poverty and in Vietnam stalled the post-WWII economic boom, sharply limiting the natural rise in federal

revenues that were partially spent on growing anti-poverty programs. High-paying manufacturing jobs started to be threatened from the rebuilt economies of Japan and Western Europe. As the peak events of the Civil Rights movement lost their immediate force, there was a growing indifference to the rights and social situation of minorities. Stories of waste in government social service programs accumulated, eroding public support. The progress against poverty and other negative social indicators had stalled, if not reversed, by the late 1970s.

In this new environment, there arose three distinct but related criticisms of federally supported social services, each of which came to fruition in arguments for President Bush's faith-based and community initiatives. First, some claimed that federal spending on social services was simply too high, given tight federal revenues and the unique obligations of the central government for national defense and international affairs. They argued that the federal government could simply not afford to fund social services; state and local governments and the nongovernmental sector would have to carry a larger burden. Second, critics charged that the federally directed War on Poverty was excessively detailed and restrictive. National control, through excessive regulation over budgets and credentialing (rather than performance), they said, stifled the adaptability, wisdom, and grassroots participation that locally-run programs provided. They argued that the federal government should pull back to release the energies of others. Third, it became common to argue that newly flat social indicators showed that the root cause of poverty was more moral than economic. Spending more money, at least in the same places with the same programs, simply would not do any good; deeper behavioral and attitudinal changes by the poor and needy were required.

1980s: STARTING THREE WAVES OF CHANGE

These criticisms had their effects on federal social service policy in the last quarter of the twentieth century. Change came in three successive waves, each with a slightly different emphasis. The first wave, under the Reagan administration in the early 1980s, was mostly a simple reduction in the federal share of social service spending. Domestic spending by the federal government did not really fall but more accurately leveled off, but the federal share of total welfare spending did decline. Whereas no additional aid to specifically religious service providers—direct or indirect—was urged, faith-based organizations were often touted as effective service providers that could take up any slack in services due to government cuts with private funds. In effect, in this first wave of change, intense and overt reli-

gious social service providers were touted as an alternative to, not a new partner with, government efforts.

The next wave, in the mid-1980s, emphasized increased state and local flexibility in social services. The federal government began to solicit from states and grant to them waivers of administrative rules so that they and their subdivisions could experiment and innovate. This federal deregulation of social services greatly increased the incidence of state and local governments contracting with and/or purchasing services from private, mostly non-profit, agencies. Devolution to states and localities meant these lower levels of government took management responsibility for social welfare, while private organizations were the real deliverers of social services. The private groups operated as a sort of government-by-proxy and were often required by state and local governments to abide by laws and regulations—including religion-related laws and regulations—as if they were direct government entities, or agents.

Today's faith-based debate is really the third wave of change, which began rather inauspiciously with the 1996 welfare reform law. That law ended the drive for real cuts in welfare funding; at the same time, it continued the logic of devolution and outsourcing in the second wave. Little noticed at the time, charitable choice language in the 1996 law prohibited the government from discriminating against religious providers in making contracting arrangements for the welfare programs reauthorized under this particular law. Charitable choice declared that it is constitutional to provide direct government support to at least the non-religious elements of social service programs provided by even quite intensely and vocally religious providers, including individual churches with service programs. It passed through largely unnoticed because of the much larger controversies in the new law, chief of which was President Clinton's expressed willingness to position himself and his party as more socially conservative and fiscally responsible.

President George W. Bush's outreach to faith-based and community providers aims to expand the number of potential providers that bid for government-funded social service contracts. Regulatory and statutory changes aim to open as many federally-funded programs as possible to bidding by faith-based groups. Partly after the example of innovative states and partly through its own faith-friendly perspective, the Bush administration wants the potential marketplace of providers to be less dominated by large government-directed, secular, and nominally religious providers, and more open to smaller, community-based, and more openly religious providers.

Initiative supporters claim that what they want is "a level playing field" on which all providers compete, and that the constitution allows for such a field. Opponents attack the potential disruption and dangerous competi-

tion these changes would bring and bring in constitutional arguments to keep the market small. While the Bush administration has promised no additional program funds in a more competitive market, it has argued that more people can be served, and that a broader provider marketplace will lead to more effective and efficient social services at any given spending level.

Philosophically, faith-based initiatives are the last of three reform waves and the logical conclusion to two quite different ideas, both of which are dominant in today's Republican Party. The first idea is at its root religious—a desire for a more secure role for a particular kind of faith, a conservative Protestant evangelical faith that during most of the twentieth century sought separation from government and society but now seeks their formal acknowledgement. The second idea is at its root economic—the push for a freer and more open market in delivering social service programs supported by the federal government. Pro-faith and pro-market views, similar to the social conservative and economic conservative wings of the Republican Party, worked together in the Bush administration to push through faith-friendly changes in the bureaucracy and set up high stakes challenges in the courts.

ESSENTIAL 4: CONSTITUTIONAL CONSIDERATIONS

Whether the pro-faith and pro-market forces ultimately triumph is dependent, ultimately, upon the federal courts. The First Amendment's Establishment Clause is the reference point for what religious freedom means in the United States. Many people came to the New World to escape religious persecution in their native land, as the newcomers had practiced a faith contrary to that officially established by the state. The Framers placed the Establishment Clause in the Constitution's First Amendment to prevent a repeat occurrence in their new nation. At the very least, the Establishment Clause was intended to prevent the federal government (and, later, through the Incorporation Doctrine, state and local governments) from supporting a particular religion through its laws and subsidies. Until the 1940s, the Establishment Clause had essentially been a dormant piece of the Constitution, at least with respect to state and local governmental action and, because the federal government had not involved itself much in welfare policy before mid-century, for federal policy toward social services as well.

A constitutional defense of the faith-based initiatives was easy to make as the Bush administration started, although the key grounds for the argument were not particularly long standing. Establishment Clause interpretation was moving slowly but clearly in an accommodationist direction for more

than a decade before 2000.[10] Current Establishment Clause reasoning seems to be more favorable toward government/religious sector collaboration today, at least in the realm of government financial aid to religious institutions, which is the core of the initiatives' purpose.[11]

WHAT IS "ESTABLISHMENT" OF RELIGION?

The current scene is a reversal of what now appears to have been a short separationist season for the Court, running roughly from the 1940s to the 1980s. With its 1947 *Everson v. Board of Education* decision, the Supreme Court woke to Establishment Clause questions, usually in the context of public aid to Catholic parochial schools. In this period the Court was relatively stringent in barring the use of public funds to support educational enterprises in religious contexts. In so doing, it presumed religious schools to be "pervasively sectarian" institutions and thus disqualified from public aid because such aid would inevitably promote a particular religious—in most cases Catholic—teaching. The separationist season featured mind-numbing complexity for scholars wanting to decipher the Court's intent. *Everson* put the claim that the Establishment Clause had built a high "wall of separation" between church and state, borrowing a phrase from an 1802 personal letter by Thomas Jefferson to Danbury, Connecticut Baptists. "No establishment" meant to the *Everson* court more than not supporting a particular religion; it barred any state action that even touched upon religion generically. The language seemed overwrought even at the time, as the decision itself allowed a local New Jersey public school system to reimburse to parents the costs of using the public transit system to send their children to school, regardless of whether the school was government- or church-run. While *Everson* was kindly to religion in the facts of the case, its vivid, extra-constitutional, and increasingly anachronistic image of a wall imposed itself on later court decisions and public discussions.

WHAT IS "SEPARATION" OF CHURCH AND STATE?

In a series of rulings after *Everson*, the Court seemed to create two meanings of the term "separation," each of which it applied in different contexts and in apparently inconsistent ways. One meaning is *strict separation*—that law and government should not touch religion in any way. This definition is prevalent in cases, usually involving the education of youth, which prohibited organized prayer in public schools, prayer led by public school teachers or other public officials, and on-campus released-time or after-school

programs for religious activities. At other times, the Court advanced another definition of separation, usually in cases outside of the education of youth, which could better be termed *neutrality* (or, sometimes, *accommodationist*) and whose major effect is to be far more indifferent to slight taints of religion. Neutrality means that it might be constitutional under some situations for religion generally to benefit from a law or government action. Some examples of neutrality rulings include allowing property tax exemptions for churches, or allowing the Bible to be read in public schools as long as it is taught as literature. The Court has invoked neutrality more frequently in recent years that it did early in the separation season. That does not mean, however, its rulings have become more predictable or fit a tight chronological pattern.

The so-called *Lemon* test, derived from the 1971 *Lemon v. Kurtzman* decision, provides a means to examine, if not exactly explain, the Court's key Establishment Clause decisions. In *Lemon*, a majority of the Court held that government involvement in religion might be acceptable provided the program in question met three tests. First, the government must have a *secular purpose*, not a religious one, in whatever program or policy is challenged. Second, the government's program must *neither advance nor inhibit religion*, either a specific religion, or religion in general relative to nonreligion. Third, the operation of the program must not create an *excessive entanglement* between government and religion. If the challenged government program or policy met all three criteria, it was constitutional. If it failed even one prong of the test, a Court strictly adhering to the *Lemon* test would strike it down.

The *Lemon* test is relatively clear, yet the Court's application of the test in later cases is not. Courts rule on particular cases that have particular facts and circumstances. While courts usually take pains to articulate broader principles into which these unique cases supposedly fit, it is sometimes difficult to discern a consistent logic to court decisions in complex areas such as church/state relations. A review of rulings in specific Establishment Clause cases illustrates the point. The Supreme Court has said that Congress can hire chaplains who open with prayer each day it is in session, yet public school teachers cannot begin their classes with prayers or with even a moment of silence if prayer is listed as one of the options for students to spend that quiet time. Public school professionals can come to church-related schools to administer diagnostic hearing and eyesight tests to such students, but if they find a problem they must provide therapy off private school grounds. Children in church-related schools can ride a public school bus to and from their school, but not the same bus on a field trip. A public

school district can lend a religious school its textbooks on U.S. history with a picture of Abraham Lincoln on its cover. It cannot, however, lend the same picture, by itself, to the same religious school.

Observers convinced there is *some* logic to these rulings suggest dividing them into three categories: one, rulings in cases about *vouchers*—government support to individuals who then use the funds on their own to indirectly support religion; two, those that are about *direct* government support for religious institutions; and, three, those that are about supporting clearly religious *activities*.[12]

Vouchers as Mostly Permissible

In the first category, the court has been willing to allow many things that support religion, if such support flows first to individuals who then choose to use those funds for religion-related services. *Everson*, in part, can be read as providing such justification. Most recently, *Zelman v. Simmons-Harris* (2002) reinforced and expanded the permissibility of vouchers. In general, the Court has stated its view that vouchers are to be thought of as grants to parents and children, not to the agencies themselves. Head Start vouchers can be given by parents to churches. Similar logic allows tuition tax credits and federal educational grants and loans for parents who send their children to religious colleges.

Direct Aid as Mostly Impermissible

The second category, direct support for programs operated by religious institutions, has less order. Sometimes the Court has allowed government to directly support religious institutions such as hospitals and religious liberal arts colleges. Other times it has not; for example, it rarely permits the direct support of religious elementary schools. If one forces some logic on these rulings, perhaps it can be stated that, for direct support programs, the younger the beneficiary of a questioned program and the more educational/ideational (as opposed to material/concrete) the assistance, the less likely it was to be allowed. For example, direct support to Christian elementary school instruction is probably not constitutional, but direct support for church-sponsored housing for the elderly probably is.

It seems that there may be two "sliding scales" of beneficiary independence and program content. Younger recipients are more likely to be influenced by religious messages that older persons can filter out, so programs for the young are treated more skeptically than those for adults. Intangible benefits such as education or counseling are more likely to carry religious content than more

tangible benefits such as housing, health care, and clothing; so, as an illustration, schools are treated more skeptically than food banks.

Three recent accommodationist rulings show that these sliding scale government direct aid cases are in jeopardy. The 1988 *Bowen v. Kendrick* decision upheld a federal statute that allowed openly religious service providers to be direct grantees of a program aimed at teen pregnancy. In *Agostini v. Felton* (1997), the Court upheld a program that allowed public employees to provide remedial educational services on-site at religious schools, directly reversing a ruling made only twelve years earlier in *Aguilar* (1985). Finally, in *Mitchell v. Helms* (2000), the Court approved a federal statute that made funding to local educational agencies for library, media, and computer materials equally available to both public and private schools, including schools that were predominantly religious.

Clearly Religious Activities as Clearly Impermissible

In the category of directly supporting expression that is clearly religious, separationist standards seem to be holding more firmly. The Court has in the past rarely been willing to permit government support for clearly and directly religious activities such as posting the Ten Commandments in government buildings, allowing devotional Bible reading in public schools, or printing prayers at government expense. The rare exceptions are when the Court determines that the religious content of the activity in question has been so diluted that it is merely a cultural habit or public convenience.

THE PERVASIVE CONFUSION OF PERVASIVELY SECTARIAN

While vouchers seem acceptable, and direct support of religious activities clearly not, direct aid to religious groups is full of confusion. The third prong of the *Lemon* test, "excessive entanglement," effectively denied many intensely and overtly religious groups access to government funds. At the height of its separationist season, a Court majority would routinely examine closely the nature of the service agency itself in its rulings. If the institution was "pervasively sectarian"—a term the justices often used but never clearly defined—government funding would be denied. The Court reasoned that even if such intensely and vocally religious organizations *could* run a government-funded program in a sufficiently secular manner, the administering government agency would have to monitor the program in question so closely that such oversight would amount to excessive entanglement in religion.

Directly funded faith-based social services are in the thick of the pervasively sectarian confusion because the "faith elements" of these services are so varied. First, "faith-based" can refer to the *location* of the social service, such as a church, a religious school, or an office building owned by a religious organization. Government funds might, it is argued, support a religious location. While a religious location in itself has no effect on program content, the federal government in the past has sometimes prohibited aid on that basis only. Second, "faith-based" can also be tied to a social *agency* so that government funds could subsidize a religious group. Services may be provided by members of a religious order, for example, or by the hired clergy or staff of a local church. Even if the professional staff in contact with clients is chosen independent of religious affiliation, the management or governing board of a service agency may be restricted to members of a particular faith tradition. Some such providers have sometimes been categorically prohibited from receiving government funds. Third, *volunteer* "faith-based" aid can be involved in supporting an otherwise non-religious program. Volunteers assisting an agency may come chiefly or exclusively from faith groups; nuns may volunteer at a government-funded hospice, or church members may tutor in an after-school program for elementary students. Even if no direct government funds go to these volunteers (as they are unpaid), some programs have been deemed ineligible for government support on these grounds. There are simply so many dimensions of faith to consider it is hard to make rulings that seem clearly fair and consistent with precedent.

The Bush administration has brought some, but not perfect, consistency to the question. It has written that federal funds to faith-based groups cannot directly support activities such as prayer, scripture reading, and worship, and that the activities themselves need to be separate in place or time from federally-funded elements. But there remains some ambiguity about intensely religious social service treatments, and whether and to what extent one must or should separate the religious from the non-religious. For many programs eager to apply for federal funds, "faith" is an integral part of treatment. Clients in drug or alcohol recovery programs may be encouraged to make religious commitments to help them change their behavior. Prayer before meals may be required to receive food at a soup kitchen. Memorization of Bible passages about the use of money may be part of a financial management seminar. Only situations of this type, direct mixing of religious messages and social programs, appeared almost certainly unconstitutional to the Rehnquist/O'Connor court, with O'Connor's views holding sway. For some of the Court's members, however, even these programs should, in some circumstances at least, be eligible for direct government funds.

NOT SO FAST; NOT SO SIMPLE

There are other complications in predicting the future judicial approach to faith-based initiatives. First, even the most generous analysis seeking consistency in court rulings has to admit hard-to-defend cases. For example, Head Start, a highly popular federally supported educational program for pre-school age children, may be housed in churches and operated by church members. In this case, it appears that popular acceptance influences legal analysis. Second, actual practice does not always follow constitutional guidelines. There have always been relationships between government agencies and religious providers functioning at variance with court decisions. While some government administrators have unnecessarily prohibited certain organizational arrangements, others have knowingly allowed religious practices in funded programs. And even with good intent to follow legal rulings, the line between what the government may and may not support is not clear, even to personnel in the groups involved.

The three-pronged *Lemon* test guidelines started to become diluted soon after their first articulation. The "primary effect" and "excessive entanglement" prongs have collapsed into one test of whether or not a program served to promote religion. And while the Court continues to cite the language of pervasive sectarianism in determining which religious organizations might qualify for public monies, the principle itself seemed to be eroding as attention shifts to the neutrality of the program and away from the organizational details of its beneficiaries.

The Rehnquist/O'Connor court seemed on the verge of endorsing neutrality as its new starting point for Establishment Clause cases. But for O'Connor's unwillingness to completely give up the *Lemon* language, the full embrace of neutrality might already be here. With her departure from the Court, it may now be at hand.

THE FUTURE: WHAT KEY CASES TELL US ABOUT TOMORROW (MAYBE)

The trend in the Court's establishment thinking is most easily seen in a review of key cases decided after 2000, those already settled, and those, in early 2007, making their way to the top of the federal system.

Decided Cases: *Mitchell, Zelman*, and *Locke*

Mitchell v. Helms *(2000)* In *Mitchell*, the Court upheld a supplementary education program that provided direct aid in the form of educational materials to public and private schools, both religious and non-religious,

and expressly overruled two church-state cases from the 1970s. A plurality opinion of four justices (Kennedy, Scalia, Thomas, and Rehnquist) launched an open attack on the pervasively sectarian standard, characterizing it as "born of bigotry" for its roots in nineteenth-century anti-Catholicism. They called for abandoning the separationist practice of a searching inquiry into aid recipient organizations, and urged only an examination of the law in question. If laws were neutral toward religion and non-religion, that neutrality should be enough to pass constitutional muster.

Court-watchers sympathetic to faith-based programs claimed *Mitchell* heralded the end of pervasive sectarianism. While with *Mitchell*, constitutional jurisprudence continued to shift in favor of faith-based proponents, advocates were mistaken if they thought this meant a future free pass. The plurality in *Mitchell* had been unable to win a decisive fifth vote to bury the pervasively sectarian inquiry or firmly establish neutrality. Justice O'Connor wrote a concurrence, which Justice Breyer joined, that refused to accept facial neutrality of the law as the sole governing principle of aid to religious organizations. O'Connor and Breyer defended a searching inquiry into the nature of the aid and found, in the facts of *Mitchell*, particular types of aid and safeguards against its religious use that in this particular case passed a constitutional test. Thus, even after *Mitchell*, five justices then on the court would still consider public funding of religious organizations according to some standard more demanding than simple neutrality.

An out-of-court settlement in a direct funding case may hint at how much the Bush administration was willing to assume the Rehnquist/O'Connor Court's separation season was over. In May 2005 the Massachusetts ACLU sued the U.S. Department of Health and Human Services (*ACLU v. Leavitt*) over its direct money grants to a Massachusetts nonprofit, the Silver Right Thing (SRT), to fund its sexual abstinence program. The state ACLU claimed the program was too infused with religious content and advocacy, and its financial protections too weak, to be constitutional. Rather than contest this case in court, HHS reached an agreement with the ACLU, terminated its contract with SRT, and issued "safeguard" guidelines for use of its funds. A key element of these safeguards is to assert that religious content of youth sexual abstinence program materials cannot be government funded, partly because of the young age of the program's beneficiaries. By implication, the settlement states HHS's intent that it did not seek to provide direct financial support for the specifically religious elements of such programs, even if they are otherwise constitutional.[13]

Zelman v. Simmons-Harris *(2002)* The constitutionality of indirect government aid to religious providers, such as vouchers, became clearer in the summer of 2002 with the Supreme Court's much anticipated school

voucher decision in *Zelman v. Simmons-Harris*. The case was a challenge to the Ohio Pilot Project Scholarship Program, which provided school tuition vouchers for students in the Cleveland city schools. The vouchers were distributed on the basis of financial need and could be spent at a number of schools. On its face, the program made no distinctions between, nor expressed a preference for or against, public or private schools. However, voucher recipients were limited to participating schools—those willing to accept the vouchers. The law let both public and private institutions accept vouchers. Most public schools refused to participate, and participating schools, and affected students, were overwhelmingly in religious education.

The Court upheld the program 5 to 4. The majority opinion rested squarely upon the principle of neutrality. As long as the voucher program was neutral with respect to religion, the Court said, it was not susceptible to an Establishment Clause challenge. Aid had gone to religious schools only indirectly, through parental choice and only as the result of their independent decisions, thus avoiding the danger of government endorsement of or support for religion. Even though the vast majority of the tuition aid ended up with religious schools, the majority concluded that the parental choice insulated the voucher program from government endorsement or approval. The program was neutral on its face, providing no incentive or encouragement to use vouchers at religious rather than secular schools.

Justice O'Connor added her voice to the four neutrality advocates in *Mitchell*. Her vote hinged on the "primary effect" prong of *Lemon* and the government's avoiding the appearance of religious "endorsement." To her, the absence of governmental endorsement depended on an affirmative answer to two questions: was the aid administered in a neutral fashion without consideration for the religious status of beneficiaries or service providers, and did beneficiaries have a genuine choice among religious and nonreligious organizations? O'Connor determined that the Cleveland voucher program met both of these demands.

Zelman changed the faith-based landscape in ways both general and specific. Most broadly, it showed that the "wall of separation" vision of neutrality—no funding that would aid or support religion—was over for the Rehnquist/O'Connor court. It clearly stated that neutrality is not synonymous with separation but, rather, it is evenhandedness toward things religious and secular. Equal treatment of one religious entity toward other religious entities, and of these toward secular entities, is what is required. The specific implications of *Zelman* for voucher-based social service delivery programs were also clear. If vouchers were okay for schools, they almost certainly would pass this court's tests in other programs. The win for faith-based initiatives advocates was clear. Social service voucher programs that include religious service providers appeared to be constitutional, as long as

the program is appropriately (i.e., neutrally) constructed. If a law is on its face neutral toward religious and secular social service providers, if vouchers are available to program recipients without reference to their religious preferences or beliefs or lack thereof, and if the program offers real choices—religious and non-religious—for beneficiaries, faith-based programs constructed along these lines are constitutionally sound.

No one could be completely confident, of course, that the Court would rule all voucher programs constitutional. Aid to schools has historically raised the highest establishment concerns, since it involves education of youth, the most closely scrutinized category in prior Court decisions. The case for the constitutionality of vouchers in most faith-based social service programs, hence, seems stronger than the question in *Zelman*, and highlighted that the type of aid, direct or indirect, is material to a case.

Locke v. Davey *(2004)* Many federal social service programs are in fact operated by state and local governments. Many states have what are generically called "Blaine Amendments"—constitutional amendments or statutory provisions that have a stricter, more separationist standard between church and state entities than the U.S. Constitution's First Amendment. In the late 1800s, partisanship was in part sectarian, as Republicans were overwhelmingly Protestant. Democrats, on the other hand, were more open to Catholics, partly because working class immigrants of the time originated in predominantly Catholic European nations like Italy and Ireland.

The amendments are named after James G. Blaine, a former Speaker of the U.S. House of Representatives and Republican presidential candidate, who in 1884 ran against Democrat Grover Cleveland and lost. He attributed his loss to overzealous supporters, some of whom accused the Democrats of being the party of "Rum, Romanism, and Rebellion." Blaine lost New York, which Republicans then usually won, and thus lost to Cleveland.[14]

Even though the Blaine amendments instituted by states in the late nineteenth century were partially borne out of the same anti-Catholic sentiment that the Court has associated with the "pervasively sectarian" standard, opponents of faith-based efforts have appealed to Blaine language to slow those programs down.

Locke v. Davey, decided by the Supreme Court in 2004, provided support for the federalism-based arguments of faith-based opponents. Ruling on a Washington state scholarship program that specifically excluded students intending to enter the formal pastorate, a majority of the Court said states could maintain their own policies of church-state separation even if those policies were more separationist than enunciated in the First Amendment.

As such, the many states with Blaine-like language are not automatically and universally required to hold to the First Amendment standards that the Rehnquist/O'Connor Court, or later Supreme Courts, might allow for federal programs. While the *Locke* decision's 7–2 margin implies that the Court's view will hold in the new Roberts/Alito Court, future Blaine-related challenges can be expected.

Pending Cases: *Americans United* and *Freedom from Religion*

Americans United v. Prison Fellowship Ministries *(pending in early 2007)* In February 2003, Americans United for Separation of Church and State took direct aim at a program greatly admired by President Bush: the InnerChange Freedom Initiative of Iowa, a program developed by Prison Fellowship Ministries, a longstanding evangelical ministry devoted to prison reform and prisoner rehabilitation. InnerChange had obtained a contract with the Iowa State Department of Corrections to operate a portion of its Newton correctional facility. The program was a pre-release anti-recidivism program intensively infused with religious content of the Christian variety, including Bible reading and instruction in religious precepts.

Americans United challenged this faith-infused program on several specific points, patterned after the criteria the swing voters on the Rehnquist Court hinted they would use in evaluating Establishment Clause cases. In June 2006, U.S. District Court Judge Robert Pratt issued a detailed opinion in favor of the group's challenge.[15] His declaration against the constitutionality of the program rested on several points. First, the state had artificially structured the contract proposal to ensure that InnerChange would win it, violating the neutrality requirement for constitutional state action. In fact, he said, InnerChange effectively operated as a "state actor" in this program, requiring it to abide by federal and state guidelines on church/state separation. Second, the judge employed the pervasively religious standard (which he applied in a relatively novel way—to a program and not an institution) to find that the program's religious elements were so prevalent and integrated into the whole program that none of it could be supported by the state. Third, he found that the program preferred evangelical Christian inmates as potential participants because of the nature of the InnerChange curriculum and the absence of alternatives that had other-religious, and non-religious, perspectives. Finally, he found that the *per diem* payment plan to InnerChange (instituted mid-stream by the state) did not constitute a voucher-like program of the sort upheld in *Zelman*.

As of early 2007, the case was on appeal to the 8th Circuit Court. Should this case reach the Supreme Court, it provides the opportunity to rewrite and

clarify many of the key issues in Establishment Clause cases, should the Court's majority choose to write an expansive opinion on the issues involved.

Freedom from Religion Foundation *(argued February 2007)* A final key case pending in early 2007 does not deal directly with faith-based programs, but rather with the issue of taxpayer standing in court and whether and to what Establishment Clause challenges should singularly affect the standing issue.

As a general rule, individual taxpayers do not obtain standing in federal court if they seek to challenge federal agency actions, although they may contest acts of Congress. But it is unclear if particular standing claims in essential areas of the Constitution, such as the Establishment Clause, might be special cases where standing is easier to obtain. *Freedom from Religion Foundation (FFRF) v. Hein* (previously *v. Towey* and then *v. Grace*, for the previous WHOFBCI director and acting director) began in 2004 when FFRF complained that a variety of WHOFBCI activities, particularly its regional outreach and networking conferences, supported religion and therefore violated the Establishment Clause. The standing of FFRF, and several joining plaintiffs, to bring the claim rested on their status as taxpayers and the root of their claims in the Establishment Clause.

The federal district court dismissed the case in November 2004 on the grounds that the plaintiffs lacked standing, and did not address the substance of the complaints. On appeal, in January 2006 a panel of judges from the 7th Circuit partially reinstated FFRF's lawsuit in an opinion that supported a very broad view of taxpayer standing. In its ruling, the circuit court explicitly asked the Supreme Court to clarify standing issues related to Establishment Clause cases. The Court did take the case, and heard oral arguments in late February 2007. While a review of the oral arguments hint that granting standing in this case would be a surprising outcome, the Court could decide the issue narrowly or broadly.[16]

HIRING FREEDOM: THE MOUSE THAT ROARED (FOR A WHILE)

In the faith-based congressional debates of 2001, opponents cast about for an issue that might slow advocates' apparently strong legislative momentum. They stumbled upon a winner in raising alarms about the right, and supposed abuse, of government-funded religious organizations to make hiring decisions based on religious belief. Dire warnings of "publicly funded discrimination" proved an effective brake on faith-based bills in the House and Senate.

For religious groups intent on preserving their character, the right to hire individuals whose beliefs are in accordance with their religious identity or mission is critical. It is also, generally speaking, unlimited with regard to religious preferences of employees if a group does not directly receive federal government funds. The Bush initiative recognized the importance of hiring freedom, proposing in its 2001 legislation the same kind of hiring protections in the 1996 charitable choice statute, which specified that religious nonprofits would not have to forfeit their prerogatives to make personnel decisions based on the religious commitments of applicants.

Opponents charged that the protections were a guise for allowing overly zealous religious organizations to practice intolerance through discriminatory hiring practices. The charges gained traction in the media and public, and created a media firestorm like no other aspect of the faith-based proposal, sinking nearly all the faith-based legislative package.

The constitutional merits of the issue were considerably more pedestrian than the public uproar implied. The current state of constitutional doctrine protects religious providers' hiring autonomy as a general rule, with possible exceptions, as has been the case for decades. Churches and other religious groups have long enjoyed exempt status under the Civil Rights Act, which permits them to take religious affiliation or conviction into account in their hiring and personnel decisions. That exception was validated by the Supreme Court, unanimously, in *Corporation of the Presiding Bishop v. Amos* in 1987. The only twist is that the exemption, contained in Title VII of the Civil Rights Act, does not specifically include *publicly funded* faith-based service providers under its protection. Initiative opponents argued that public funding disqualified religious groups from that special status. They claimed that applying the religion-specific hiring exemption to situations involving federal contracts or grants was tantamount to government endorsing discriminatory hiring. Indeed, they employed the neutrality argument usually used by the other side. In this instance, faith-based foes contended it was illogical to treat a religious provider as a neutral dispenser of secular services for funding purposes on the one hand, while simultaneously giving it special allowance to hire religiously compatible workers and employees on the other hand.

Faith-based backers counter that maintaining hiring freedom is both essential and logical in following the Court's rulings. The more new rulings warm to formal neutrality overall as one expression of religious tolerance, the more likely is the formal grant of hiring autonomy to publicly funded religious groups. In addition, backers pointed out that publicly funded *secular* organizations may hire only those applicants who are aligned with their ideological or policy aims, and who can be counted on to carry them out.

All groups should be allowed to retain their ideological identity—religious or non-religious—when they carry out government supported social services. If not, the unequivocal message would be one of government bias against religious providers. *Lown v. Salvation Army,* decided in 2005 by a federal district court in New York, appears to have largely settled this issue in the favor of faith-based friends.[17] *Lown* challenged the Salvation Army's hiring selectivity, as well as the government's funding of the Army's programs and employees. Judge Sidney Stein dismissed the plaintiff's arguments about hiring selectivity: however, he did agree to examine elements of the challenged programs themselves. While hiring freedoms and restrictions remain politically volatile, it seems clear that the federal government can decide, either within a specific federal program or more broadly, whether and to what extent religiously-affiliated program providers may or may not take the religious views of their employees and potential employees into account. While the *Lown* case has not conclusively ended its judicial journey, Judge Stein's ruling is thorough, carefully reasoned, and attentive to all the relevant arguments. The political struggles over this point will continue, but the opinion has probably discouraged potential new litigants seeking to press the point.

CONCLUSION: ON THE VERGE OF . . . WHAT?

Attention only to the congressional controversies over President Bush's faith-based initiatives and how they were reported by the national media misses the most important and, for supporters, most encouraging developments related to the initiative. A dismal legislative record and little active public support for the initiative would, by itself, suggest its failure.

But the quietly built administrative record and the trend of judicial decisions suggest something quite different. By the last half of his second term, President Bush's faith-based initiatives had so settled themselves into administrative procedures at the federal and some state and local governmental levels that they will be hard to dislodge, even if the next president would seem inclined to do so. Judicially, faith-based proponents have enjoyed many advances already. More victories for their side are quite conceivable as key cases face the Supreme Court in 2007 and later. The revised Supreme Court roster under new Chief Justice John Roberts seems almost certainly to be at least as "faith-friendly" as the Rehnquist Court. Few would be surprised at, although some would fear, a series of Court decisions that would more fully embrace an accommodating, neutralist reading of the constitutional interplay between church and state. That would be a critical, if largely silent and incremental, revolution in federal judicial interpretation of the First Amendment religion clauses.

NOTES

1. For a comprehensive treatment of the issue's background and the first two years of the Bush Administration's efforts, see Amy E. Black, Douglas L. Koopman, and David K. Ryden, *Of Little Faith: The Politics of George W. Bush's Faith-Based Initiatives* (Washington, D.C.: Georgetown University Press, 2004). For a brief statement of current status and future prospects, see Stanley Carlson-Thies, "David Kuo's Temptations," October 14, 2006, Center for Public Justice, http://www.cpjustice.org/temptingfaith (accessed March 8, 2007).

2. Ira C. Lupu and Robert W. Tuttle, *The State of the Law 2006: Legal Developments Affecting Government Partnerships with Faith-Based Organizations* (Washington, D.C.: Roundtable on Religion and Social Policy, 2006).

3. Jeffrey Polet and David K. Ryden, "Religion, the Constitution, and Charitable Choice," in *Sanctioning Religion? Politics, Law, and Faith-Based Public Services,* ed. David K. Ryden and Jeffrey Polet (Boulder, CO: Lynne Rienner Publishers, 2005), 9–33.

4. Ira C. Lupu and Robert W. Tuttle, *The State of the Law 2005: Legal Developments Affecting Partnerships Between Government and Faith-Based Organizations* (Washington, D.C.: Roundtable on Religion and Social Policy, 2005), 19.

5. Amy E. Black and Douglas L. Koopman, "The Politics of Faith-Based Initiatives," in *Religion and the Bush Presidency*, ed. Mark J. Rozell and Gleaves Whitney (New York: Palgrave/Macmillan Press, 2007).

6. E. J. Dionne, Jr. and John DiIulio, Jr. "God and the American Experiment: An Introduction," in *What's God Got To Do With The American Experiment?* (Washington, D.C.: Brookings Institution, 2000), 1–13.

7. Recent books that provide evidence of faith-based efficacy in mostly sympathetic terms include Stephen V. Monsma's *Putting Faith in Partnerships: Welfare-to-Work in Four Cities* (Ann Arbor: University of Michigan Press, 2004) and Monsma with J. Christopher Soper, *Faith, Hope and Jobs: Welfare-to-Work in Los Angeles* (Washington, D.C.: Georgetown University Press, 2006). One with a more skeptical view is Sheila Suess Kennedy and Wolfgang Bielefeld, *Charitable Choice at Work: Evaluating Faith-Based Job Programs in the States* (Washington, D.C.: Georgetown University Press, 2006). The Roundtable on Religion and Social Policy, a project by the Rockefeller Institute of Government, State University of New York (with a wealth of Internet resources at http://www.religionandsocialpolicy.org) is probably the most authoritative social science source. In a review of sources it is difficult, however, to avoid the conclusion that seeking complete objectivity on the issue of faith-based efficacy is a fool's errand.

8. "Culture wars" is a term popularized by James Davison Hunter in his 1991 book, *Culture Wars: The Struggle to Define America* (New York: Basic Books). For a recent summary of the debate about how well the term did or does describe public discourse in America, see Hunter and Alan Wolfe, *Is There a Culture War?: A Dialogue on Values And American Public Life* (Washington, D.C.: Brookings Institution, 2006).

9. This portion of the paper is my own interpretation and summary of a variety

of sources, including Stephen V. Monsma, *When Sacred and Secular Mix: Religious Nonprofit Organizations and Public Money* (Lanham, MD: Rowman & Littlefield, 1996), Marvin Olasky, *The Tragedy of American Compassion* (Lanham, MD: Regnery Gateway, 1992), Theda Skocpol, "Religion, Civil Society, and the Social Provision in the U.S.," in *Who Will Provide: The Changing Role of Religion in American Welfare*, ed. Mary Jo Bane, Brent Coffin, and Ronald Thiemann (Boulder, CO: Westview Press, 2000), 21–50, and Robert Wineburg, *A Limited Partnership: The Politics of Religion, Welfare, and Social Service* (New York: Columbia University Press, 2001).

10. See Black, Koopman and Ryden, "Pervasive Confusion: The Federal Courts and Faith-Based Initiatives," in *Of Little Faith: The Politics of George W. Bush's Faith-Based Initiatives.*

11. Polet and Ryden, "Religion, the Constitution, and Charitable Choice."

12. This portion of the chapter is my own interpretation and summary of Carl Esbeck, "Religion and the First Amendment: Some Causes of the Recent Confusion," *William and Mary Law Review* 42:3 (2001), 883–918; Ryden and Polet, *Sanctioning Religion?*; and Mark D. Stern, "Charitable Choice: The Law as it is and May be," in *Can Charitable Choice Work?* ed. Andrew Walsh (Hartford, CT: The Leonard E. Greenberg Center for the Study of Religion in Public Life, 2001), 157–177.

13. Lupu and Tuttle, *State of the Law 2006*, 2–19.

14. Philip Hamburger, *Separation of Church and State* (Cambridge, MA: Harvard University Press, 2004).

15. *Americans United for the Separation of Church and State v. Prison Fellowship Ministries* (S.D. Iowa, 2006), http://www.iasd.uscourts.gov/iasd/opinions.nsf/55fa4cbb8063b06c862568620076059d/f0e6eb32c02 590a786257184006464d5/$FILE/Americans%206–2-06.pdf (accessed March 9, 2007).

16. Anne Faris, *Supreme Court Hears Taxpayer Challenge to Faith-Based Initiative*, Roundtable on Religion and Social Policy, February 28, 2007, http://www.religionandsocialpolicy.org/news/ article.cfm?id=6106 (accessed March 8, 2007), and Linda Greenhouse, "Court Hears Arguments Linking Right to Sue and Spending on Religion," *New York Times*, March 1, 2007 A14.

17. Lupu and Tuttle, *Lown (and others) vs. The Salvation Army, Inc.: Commissioner, New York City Administration for Children's Services (and others)*, Roundtable on Religion and Social Policy, October 11, 2005, http://www.religionandsocialpolicy.org/legal/legal_update_display.cfm?id=38 (accessed March 8, 2007).

FURTHER READING

The faith-based story involves several different dimensions. Understanding it well requires some background in American welfare policy and the relevant constitutional law. One can get a reasonably comprehensive picture of welfare policy, although from very different perspectives, with Robert Wineburg's *A Limited Partnership: The Politics of Religion, Welfare, and Social Service* (New York: Columbia

University Press, 2001), Marvin Olasky's *The Tragedy of American Compassion* (Lanham, MD: Regnery Gateway, 1992), and, in an edited volume, Mary Jo Bane, Brent Coffin, and Ronald Thiemann (eds., *Who Will Provide: The Changing Role of Religion in American Welfare* [Boulder, CO: Westview Press, 2000]). One example where legal issues are addressed broadly is Philip Hamburger's *Separation of Church and State* (Cambridge, MA: Harvard University Press, 2004). Because the Supreme Court cases directly related to the faith-based initiative are of recent vintage and relatively few in number, relevant summaries of the legal issues can be found in more general works, such as David K. Ryden and Jeffrey Polet, eds., *Sanctioning Religion? Politics, Law, and Faith-Based Public Services* (Boulder, CO: Lynne Rienner Publishers, 2005) and in Amy Black, Douglas Koopman and David Ryden, *Of Little Faith: The Politics of George W. Bush's Faith-Based Initiatives* (Washington, D.C.: Georgetown University Press, 2004). The resources of the Roundtable on Religion and Social Policy, a project of the Nelson Rockefeller Institute of Government at the State University of New York, Albany (http://www.religionandsocialpolicy.org), are also invaluable, especially in regard to the legal issues.

6

Political Endorsements by Churches

Mary C. Segers

A perennial issue in church-state relations in the United States is the matter of political endorsements by churches. There are many ways that churches and religious organizations attempt to influence election results, whether by issuing voting instructions from the pulpit, distributing voter guides, inviting political candidates to take the pulpit, addressing issues in such a way that the clergyman's candidate preferences are clear, or by allowing favored political parties access to church directories for purposes of political mobilization. Some of these actions are legally permissible while others are prohibited by federal tax law. Churches cannot, for example, endorse or oppose political candidates for public office, but they can conduct nonpartisan voter registration drives. This chapter examines what is *legally* permissible in church electioneering; it also explores what is *morally* prudent for churches seeking to influence voter choices.

Regardless of what is legally allowable or morally appropriate, these actions by churches raise profound questions about religious freedom, church-state separation, and the relation between religion and politics in a pluralistic society committed to liberal democracy. On one hand, religious groups have a right to contribute to public debate about appropriate public policy. On the other hand, this is a religiously diverse society with a constitutional commitment to church-state separation. The tension between the two religion clauses of the First Amendment is evident here: the Free Exercise

Clause protects the rights of religious citizens to participate in public life, yet the Establishment Clause prohibits the setting up of a state church, government endorsement of a particular religion, or preferential treatment by government of one church over others. In reconciling the rights of clergy and religious believers with these constitutional constraints, the United States has developed norms and practices that define appropriate interventions by churches in the electoral political process.

LEGAL ISSUES AND HISTORICAL BACKGROUND

Since the birth of the federal income tax in 1913, churches have been exempt from taxation. The tax-exempt status of churches is a benefit conferred by the Internal Revenue Service on the condition that churches, temples and mosques do not, among other things, endorse or oppose political candidates. The status of religious organizations was clarified in section 501(c)(3) of the Internal Revenue Code of 1954. This provision of federal tax law applies to religious, social, educational, literary, and charitable nonprofit organizations and exempts them from federal taxation under certain conditions. The benefits of classification as a 501(c)(3) organization include exemption from paying income taxes. Moreover, tax law permits individual donors to deduct contributions to the organization from their income taxes.

However, the benefit of tax-exemption for 501(c)(3) organizations comes at some cost, namely, limitations on the ability of the religious or charitable organization to participate in the political process. There are two principal restrictions. Tax-exempt organizations, including churches, cannot engage in substantial efforts to influence legislation, and they cannot intervene in any political campaign activity.

Lobbying focuses on efforts to influence legislation; the IRS interprets this to include ballot measures such as referenda, initiatives, bond measures, and constitutional amendments. Lobbying also includes politicking for or against confirmation of Supreme Court and other presidential nominations; that is, it applies to appointive offices. IRS regulations stipulate that churches and charities cannot engage in "substantial" lobbying, a term which is vague and undefined. The federal government obviously does not want to confer the benefit of tax-exemption upon an organization whose primary activity is political lobbying for preferred legislation and appointments. At the same time, the government must respect the rights of churches and charities to attempt to influence public policy. In striking a balance, federal tax law stipulates that "churches may engage in lobbying activities only if they do not constitute a substantial part of their total activities, measured by time, effort and expenditure." According to tax lawyers, "the line between what

is substantial and what is insubstantial lies somewhere between 5% and 15% of an organization's total activities."[1] In short, tax-exempt organizations can lobby, but within strict limits.

As for political campaign activities, the ban on church electioneering is more stringent. Section 501(c)(3) prohibits tax-exempt organizations from participating in or intervening in any political campaign on behalf of, or in opposition to, any candidate for public office. This ban applies to *all* section 501(c)(3) organizations, not just churches and religious organizations. It was introduced by Senator Lyndon B. Johnson during Senate floor debate on the 1954 version of the IRS tax code. While there is no legislative history providing a definitive account of why LBJ proposed this amendment to the tax code, the research of several scholars shows that his amendment was directed at right-wing, tax-exempt organizations which supported Dudley T. Dougherty, a conservative Texas Democrat who challenged Johnson's renomination and reelection to the Senate in 1954. As Davidson states, "The provision grew out of the anti-communist frenzy of the 1950s and was directed at right-wing organizations such as Facts Forum and the Committee for Constitutional Government. It was introduced by Lyndon Johnson as part of his effort to end McCarthyism, protect the loyalist wing of the Texas Democratic Party, and win reelection to the Senate in 1954."[2]

When Johnson introduced his amendment preventing all section 501(c)(3) tax-exempt organizations from endorsing political candidates, he was chiefly concerned about right-wing political groups. It is unlikely that religious organizations and churches were his targets. Nevertheless, "the electioneering ban applies to churches because they share the same tax-exempt status as the political groups Johnson was really after—not because of anything having to do with religion or churches per se."[3] Indeed, George Reedy, then Johnson's chief aide, stated that he was "confident that Johnson would never have sought restrictions on religious organizations, but that is only an opinion and I have no evidence."[4]

To summarize, federal tax law merely limits lobbying by churches and religious organizations but strictly prohibits political campaign activity. However, as we shall see, enforcement of the ban on electioneering is uneven. While the IRS has received numerous complaints about churches and charities violating tax law, only one church has lost its tax-exempt status as of this writing.

The IRS has penalized several religious organizations and other nonprofits by applying excise taxes, issuing warnings, and, in some cases, revoking tax-exempt status. In contrast to churches that are formally organized according to a faith tradition with creedal doctrines and an ordained clergy, religious organizations are associations formed for broadly defined religious

purposes. For example, the Christian Coalition, founded in 1989 from the remnants of Pat Robertson's 1988 presidential campaign, is not a church but an advocacy and educational group known for its distribution of voter guides in churches at election time. In 1999, the Christian Coalition was denied tax-exempt status upon a showing that the voter guides were not neutral but rather were biased toward Republican candidates. Similarly, in 1964, the IRS revoked the tax-exempt status of Christian Echoes National Ministry, Inc., a non-profit corporation founded to establish and maintain religious radio and television broadcasts. Christian Echoes lost its tax exemption because "it had directly and indirectly intervened in political campaigns on behalf of candidates for public office."[5]

ENFORCEMENT OF THE BAN ON CHURCH ELECTIONEERING

The resurgence of conservative evangelicals in the United States in the last quarter of the twentieth century has led to increased political activism on the part of many religious groups. The emergence of controversial issues such as abortion, school prayer and gay marriage has also drawn religious groups into the political process. As churches have mobilized to influence public debate and public policy, their activities and strategies have triggered complaints to federal authorities about church electioneering. IRS Commissioner Mark W. Everson stated that after the 2004 elections, the agency received 170 allegations from the public of improper political activity by 501(c)(3) organizations. He said a panel of three IRS career civil servants reviewed the complaints and launched inquiries into 132 organizations, including about 60 churches. Most of these inquiries concluded with warning letters being sent to the non-profit organization; in some cases, organizations were ordered to pay fines.[6] As we shall see, some of these cases are still pending.

Marcus Owens, former director of the IRS division for tax-exempt organizations from 1990 to 2000, who is now a tax attorney in Washington, attributed the increase in complaints of improper political activity by churches and other non-profits to changes within the agency itself. He said that "the IRS is undertaking church examinations on far less compelling facts, on far more borderline cases, than it has historically." In his view, part of the problem is that "neither IRS guidelines nor court cases have made it clear what line a tax-exempt organization cannot cross, short of an explicit call to vote for, or against, a particular candidate or party." He also noted that "the IRS has given mid-level officials the authority to decide whether there is 'reasonable belief' that a church has violated the tax

laws—a decision which used to be made by regional commissioners several rungs higher on the institutional ladder."[7] According to Owens, this relatively recent delegation of audit authority to agents on the front lines is a major reason for the increase in cases (from about 20 letters to churches per year in the 1990s to at least double that amount in 2004, 2005, and 2006).

In February 2006, the IRS said it had noticed a sharp increase in prohibited activities by charities and warned that it planned to reverse the trend. The agency issued a report on its "Political Activity Compliance Initiative," concluding that nearly three-quarters of 82 groups examined, including churches, "engaged in some level of prohibited political activity."[8] In the run-up to the 2006 mid-term elections, IRS Commissioner Mark Everson promised more intense scrutiny and robust enforcement of laws limiting churches and charities from involvement in political campaigns. Both the agency and an independent advocacy group, Americans United for Separation of Church and State, undertook educational efforts in 2006 to explain to clergy and religious groups what is permissible and impermissible participation in the electoral process.[9] A review of the literature indicates that there is much that religious groups can do without violating the federal law prohibiting political endorsements by churches.

The IRS states that intervention in a political campaign is unlawful. Impermissible activities include churches endorsing or opposing political candidates, churches donating money to political parties, clergy endorsements from the pulpit, hosting fundraising events in churches on behalf of political candidates, churches distributing campaign literature, and holding campaign rallies in churches. On the other hand, there are many permissible activities churches and religious organizations can conduct. Issue-based advocacy in churches is absolutely permitted.[10] Churches can conduct nonpartisan voter registration drives (in the interest of helping citizens perform their civic duty of voting in elections). Churches can hold educational forums to discuss issues, inviting all candidates for a position to the church social hall (even if all do not come). This is a permissible form of public education. Churches can transport voters to the polls so long as they do not tell voters whom to vote for. They can engage in other activities to encourage voter turnout. A pastor can stress the importance of voting and preach on the civic duty of being politically engaged. Finally, the IRS guidelines allow churches to publish voter guides as long as they avoid political bias.

Of course, there are gray areas. Fear of crossing the line from legal to illegal activity may make pastors overly cautious. But the IRS insists that enforcing federal law does not infringe on the First Amendment rights of

churches. According to Commissioner Mark Everson, "Freedom of speech and religious liberty are essential elements of our democracy. But the Supreme Court has in essence held that tax exemption is a privilege, not a right, stating 'Congress has not violated [an organization's] First Amendment rights by declining to subsidize its First Amendment activities.'"[11]

Critics argue that houses of worship are being muzzled by the federal government and that churches' rights of free speech and religious liberty are being suppressed. Some members of Congress have introduced legislation to repeal the IRS language. Republican Congressman Walter B. Jones of North Carolina has repeatedly proposed bills to modify or eliminate the federal tax law ban on church electioneering. In the Senate, Republican Senator James Inhofe of Oklahoma introduced the Religious Freedom Act of 2006 to protect the free speech rights of churches.[12]

However, public opinion polls have consistently shown strong opposition to pulpit-based politicking. There is general recognition that allowing churches and clergy to endorse political candidates would have a very divisive effect within a congregation. This in turn could jeopardize a pastor's job, especially in congregations that choose their pastors. Others contend that issuing voting instructions from the pulpit simply is not part of the job description for church ministry (leadership); seminaries do not prepare clergy for this. Still others recognize the importance of maintaining church independence and autonomy, of not letting a house of worship become a cog in some candidate's political machine.

POLITICAL ENDORSEMENTS BY CHURCHES: TWO CASES

Two examples of IRS investigation of church politicking illustrate the complexity of compliance with federal tax law banning political endorsements by 501(c)(3) organizations. The case of the Church at Pierce Creek, near Binghamton, New York, is the only case thus far in which the IRS has revoked the tax-exempt status of a church solely because of its partisan politicking. Pierce Creek illustrates a relatively clear violation of the law. The case of All Saints Church in Pasadena, California—still pending—is an example of an unclear, ambiguous, and therefore contested violation of federal tax law. Federal privacy rules make it all but impossible to determine how IRS cases are resolved. We know about the Church at Pierce Creek from federal court records. We know about All Saints Church because the church has released on its website most of the records of its correspondence with the IRS.

The Church at Pierce Creek was a Christian church operated by Branch

Ministries, Inc., whose senior pastor was Daniel J. Little. Located in Vestal, New York, outside Binghamton, the church requested and received from the IRS a letter recognizing its tax-exempt status in 1983. On October 30, 1992, four days before the presidential election, the church placed full-page advertisements in *USA Today* and the *Washington Times*. Designed as an open letter to the Christian community, each ad bore the headline "Christians Beware: Do Not Put the Economy Ahead of the Ten Commandments." Each asserted that Arkansas Governor Bill Clinton's positions concerning abortion, homosexuality, and the distribution of condoms to teenagers in schools violated biblical precepts. The ads included biblical citations against such practices, and then asked: "How then can we vote for Bill Clinton?" The following appeared, in tiny type, at the bottom of each advertisement:

> This advertisement was co-sponsored by the Church at Pierce Creek, Daniel J. Little, Senior Pastor, and by churches and concerned Christians nationwide. Tax-deductible donations for this advertisement gladly accepted. Make donations to: The Church at Pierce Creek. [mailing address].[13]

The ads did not go unnoticed. The next day a front-page article in the *New York Times* mentioned the ads; a later column by Anthony Lewis stated that the sponsors of the ad had almost certainly violated federal tax law.[14] The ads also came to the attention of the Regional Commissioner of the IRS, who notified the church on November 20, 1992, that he had authorized a church tax inquiry based on "a reasonable belief . . . that you may not be tax-exempt or that you may be liable for tax" due to political activities and expenditures. The church denied that it had engaged in any prohibited activity and declined to provide information requested by the IRS. Following two later unproductive meetings, the IRS revoked the church's tax-exempt status on January 19, 1995, citing the newspaper advertisements as prohibited intervention in a political campaign.

Pastor Little and the Church at Pierce Creek then sued in federal court, a decision that had the effect of suspending revocation of the church's tax-exemption until the district court reached its ruling. Attorneys for the church argued that the IRS had exceeded its statutory authority in revoking the tax-exemption, that the revocation violated its free speech and free exercise rights under the First Amendment and the Religious Freedom Restoration Act of 1993, and that the IRS had engaged in selective prosecution in violation of the Equal Protection Clause of the Fifth Amendment. Pointing to some 65 instances where Democratic candidates spoke in or campaigned at other churches, they noted that the IRS had not penalized those churches—proof, they argued, that the IRS selectively enforced the ban on intervention in a political campaign.

However, most of the 65 examples cited were substantially different from the case of the Church at Pierce Creek; they involved candidates giving speeches or churches sponsoring political debates or forums—all permissible activities under federal tax law. Government attorneys defended the IRS action regarding the Church, arguing that its anti-Clinton advertisements were an "egregious violation" of the campaign ban.[15] The IRS decided to revoke the church's tax-exempt status, they contended, because the church had run a partisan print advertisement in two national newspapers, that was fully attributable to the church, that opposed the election of a candidate, and that solicited tax-deductible donations to defray the cost of the advertisement.[16]

The district court judge ultimately accepted this argument, noting that the action taken by the Church at Pierce Creek was unique and that the IRS was justified in revoking the tax-exempt status of the church:

> In the circumstances presented here—where a tax-exempt church bought an advertisement that stated its opposition to a particular candidate for public office, attributed the advertisement to the church and solicited tax-deductible contributions for the advertisement—the IRS was justified in revoking the tax-exempt status of the church . . . In the absence of any showing that any other churches engaged in similar conduct and did not have their tax-exempt status revoked, plaintiffs have failed to establish discriminatory effect.[17]

Upon appeal, the Circuit Court of Appeals for the District of Columbia upheld the district court ruling. A unanimous three-judge panel held that the IRS acted within its statutory authority, that its revocation of tax-exempt status did not restrict the church's religious freedom, and that the government had not "violated the church's First Amendment rights by declining to subsidize its First Amendment activities." At the same time, Judge James Buckley, writing for the court, minimized the potentially negative tax consequences of the appeals court's ruling, noting that revocation was not permanent, that it did not necessarily make the church liable for the payment of taxes, and that it affected principally the tax-deductibility of donor contributions. Stating that the revocation was "likely to be more symbolic than substantial," Judge Buckley wrote, "As the IRS confirmed at oral argument, if the Church does not intervene in future political campaigns, it may hold itself out as a 501(c)(3) [tax-exempt] organization and receive all the benefits of that status . . . Contributions will remain tax-deductible as long as donors are able to establish that the Church meets the requirements" of the tax code.[18]

While the case of the Church at Pierce Creek presents a fairly clear violation of federal tax law banning interventions in political campaigns, the

case of All Saints Church in Pasadena illustrates a more ambiguous claim of such a violation. At issue here is whether a sermon given two days before the 2004 presidential election crossed the borderline between permissible preaching and impermissible endorsement of, or opposition to, a political candidate. This case is pending as of this writing. Moreover, All Saints Church has vigorously contested the IRS's allegation that it has violated the ban on church electioneering.[19]

The sermon in question, titled "If Jesus Debated Senator Kerry and President Bush," was given on October 31, 2004, by Rev. George Regas, guest preacher and former rector of All Saints Episcopal Church, which describes itself as a peace and justice church. Regas's sermon contained an explicit disclaimer, "I don't intend to tell you how to vote." He acknowledged that "good people of profound faith will be for either George Bush or John Kerry for reasons deeply rooted in their faith." At the same time, Regas felt obliged to preach about the connection between Christian values and public policy on the eve of an election: "I want to say as clearly as I can how I see Jesus impacting your vote and mine."

Regas addressed several issues: ending war and violence, and eliminating poverty. He imagined Jesus would say to Bush and Kerry: "War is itself the most extreme form of terrorism." He reminded members of the congregation that "the killing of innocent people to achieve some desired goal is morally repudiated by anyone claiming to follow [Jesus] as their savior and guide." He said that Jesus would confront both Senator Kerry and President Bush, saying, "The sin at the heart of this war against Iraq is your belief that an American life is of more value than an Iraqi life. That an American child is more precious than an Iraqi baby." He imagined Jesus addressing President Bush: "Mr. President, your doctrine of preemptive war is a failed doctrine. Forcibly changing the regime of an enemy that posed no imminent threat has led to disaster."

On the issue of poverty, Rev. Regas imagined that, "if Jesus debated President Bush and Senator Kerry, he would say to them: 'Why is so little mentioned about the poor?'" Jesus would say to Bush and Kerry: "Poverty is a central issue in this political campaign." Rev. Regas suggested that poverty is not a partisan issue but a religious issue. And he defined abortion as an issue of poverty: "Economic policy and abortion are not separate issues; they form one moral imperative." The former rector concluded his sermon with the following admonition: "When you go into the voting booth on Tuesday, take with you all that you know about Jesus, the peacemaker. Take all that Jesus means to you. Then vote your deepest values. Amen."

The IRS was alerted to this sermon by an article published in the *Los Angeles Times* the next day (November 1, 2004) titled "The Race for the

White House: Pulpits Ring with Election Messages."[20] The article described how six congregations across the country stressed the importance of the presidential election in their Sunday services, yet noted that "most church officials stopped short of endorsing President Bush or Senator John F. Kerry, mindful that such activism could endanger their congregation's tax-exempt status." The list of six congregations included All Saints Church in Pasadena, described as "a liberal Episcopal congregation of 3,500 members." Rev. Regas's sermon was characterized as "a searing indictment of the Bush administration's policies in Iraq." On June 9, 2005, the IRS sent a letter to All Saints Church initiating a church tax inquiry based on concerns raised by the *Los Angeles Times* newspaper article.

All Saints Church promptly hired Marcus Owens, a Washington tax attorney and former head of the IRS tax-exempt section, to represent the church in its correspondence with the agency. In an October 2005 letter to the IRS, Owens stated the church's position. Noting that Rev. Regas was a guest preacher, Owens wrote that "the Church does not believe the law requires it to preview or edit every guest's remarks—much less mandate that a preacher's sermons may not discuss moral values during the congregation's time of worship. It seems ludicrous to suggest that a pastor cannot preach about the value of promoting peace simply because the nation happens to be at war during an election season."

In November 2005, Senior Pastor Rev. Edwin Bacon informed the congregation of the IRS charge of campaign intervention resulting from Rev. Regas's sermon, and summarized the Church's initial response:

> It is important for everyone to understand that the IRS's concerns are not supported by the facts. George Regas's sermon upheld the core values of this church as a Peace Church. We have been a self-identified Peace Church since a resolution was identified by the Vestry in 1987. The sermon in question explicitly stated, "I don't intend to tell you how to vote." We at All Saints, of course, will continue from a nonpartisan perspective to teach and proclaim with vigor the core values of Christianity as we stand in the prophetic tradition of Jesus the peacemaker. This is our responsibility as followers of Christ and as Americans who claim our freedom of speech and freedom of religion.

All Saints Church held several conference phone calls with the IRS in an effort to resolve the case. In its correspondence, the church questioned the agency's compliance with certain procedural safeguards in the IRS Code designed to protect churches against unnecessary audits. Owens, lead counsel for All Saints, noted that the IRS's initial inquiry "seemed to place more emphasis on a journalist's description of the Rev. George Regas's guest sermon than it did on analysis of the actual text of the sermon." The Church

also challenged the IRS's view that the sermon constituted *implicit* intervention in the 2004 presidential election when the Rev. Regas *explicitly* stated at the outset of his sermon that he was not advising anyone how to vote. Throughout the controversy, All Saints Church emphasized its commitment to a longstanding policy of nonpartisanship in elections and compliance with the IRS rules against church intervention in political campaigns. Moreover, the church denied any wrongdoing in this case. When an IRS audit team offered the church a settlement in the fall of 2005, the church declined the offer. According to Owens, "They said if there was a confession of wrongdoing, they would not proceed to the exam stage. They would be willing not to revoke tax-exempt status if the church admitted intervening in an election."[21] But Rev. Edwin Bacon, current rector of the church, refused the offer "on the grounds that All Saints has done nothing wrong. Furthermore, over the years we have consistently worked within the IRS regulations—regulations we consider to be healthy for our democracy and which we believe protect the precious principles of freedom of speech and freedom of religion."[22]

All Saints clearly mounted a very aggressive campaign against the IRS charge that the church intervened in the 2004 presidential election. They hired expert counsel, challenged the IRS on procedural grounds, refused the offer of a settlement, and in 2006 refused to comply with two IRS summonses in order to force the matter into federal court (where they can challenge the IRS's right to issue the summonses). They also mobilized national support by publishing case documents on their website and by appearing on national media interview shows to publicize the case.[23] Despite the liberal character of All Saints, the Church received support from religious groups across the political spectrum, from the National Council of Churches to the National Association of Evangelicals.[24]

This case raises very important issues in the general area of religion and politics and in the particular area of federal prohibitions of interventions by churches and non-profits in political campaigns. In general, the federal ban on church electioneering does not prevent church organizations from addressing the moral aspects of public policy issues. But the All Saints controversy does raise issues of context and timing. A key question is: when, in the eyes of the IRS, does issue advocacy cross over into candidate support or opposition? This is admittedly a gray area where the IRS Commissioner must evaluate facts and circumstances in trying to separate issue advocacy from candidate endorsement. An examination of the church's position, based on the documents posted on the website, is instructive about both the difficulties of the IRS's prohibition of intervention in political campaigns and the deeper church-state issues at stake in this controversy.

All Saints Church has cited its long history, tradition and reputation for liberal social activism. During the Second World War, its rector spoke out against the internment of Japanese Americans. The Rev. George Regas, who headed the church for 28 years before retiring in 1995, was well known for opposing the Vietnam War, championing women clergy and supporting gays in the church. Appealing to the Biblical prophetic tradition, the church stated that it must bring the perspectives of the Christian faith to bear in addressing moral aspects of public policies. As the Rev. Edwin Bacon, the current rector, noted, "Our faith mandates that we speak out against unjust or inhumane policies. Christians and the Christian churches cannot remain neutral or silent in the face of injustice."

At the same time, church leaders have insisted that while All Saints is a social action church, it is not a politically partisan church. All Saints agrees with the IRS prohibition on church intervention in political campaigns and has a long-standing policy opposing partisan endorsements of candidates for public office. As Rev. Bacon wrote, "We have always been mindful of the IRS regulations against campaign intervention, respect those regulations, take steps to ensure compliance and have always been in compliance. We believe that All Saints has not engaged in campaign intervention on behalf of any particular candidate or party—not in October 2004 or at any other time."[25]

Furthermore, All Saints Church argued that the IRS actions in this case implicate First Amendment principles of religious freedom and freedom of speech and threaten core values and practices of the congregation. Owens explained that the Church "takes pride in a long history of active involvement in the community and a steadfast and theologically-based commitment to alleviating poverty and promoting equality, social justice and peace."[26] Church leaders defended the right and duty of the church to comment on public issues from a theological and moral perspective. They worried that the actions of the IRS in this case would have a potentially chilling impact on protected First Amendment rights.

The standard IRS response to this argument is to say that rights-talk is irrelevant because tax exemptions are not rights but benefits, conditional upon accepting the burdens of restricting involvement in partisan politics. But All Saints officials challenged this characterization of their case. As Rev. Bacon stated, "All Saints is energetically resisting the IRS's interpretation of the IRS regulations. The IRS is arguing that they can investigate a church based on a field officer's *subjective* determination that a preacher's sermon *implicitly* opposes or endorses candidates, regardless of the *explicit* statements of the preacher. This means that any sermon that states a church's core values, when proclaimed during an election season, can be subjectively

deemed to be campaign intervention. If this IRS interpretation stands, that means that a preacher cannot speak boldly about the core values of his or her faith community without fear of governmental recrimination."[27] Hence the conclusion that perhaps the government's position has a potentially repressive effect on protected speech.

Finally, All Saints Church challenged directly the IRS's interpretation of its 501(c)(3) prohibition of intervention in political campaigns. Church officials questioned the meaning of the term *political.* Church leaders use the term broadly to mean how we apply values to public life, whereas the IRS tends to define the term narrowly to refer to campaigns and elections for public office. According to Rev. Bacon, "Faith in action is called politics. Spirituality without action is fruitless and social action without spirituality is heartless. We are boldly political without being partisan."[28] This distinction between political and partisan is a central element in the overall argument of All Saints Church. It clarifies their argument and their challenge to the IRS. As Bacon stated:

> No church should be at risk of losing its tax-exempt status because its clergy express a congregation's core moral and theological values. There is a huge distinction to be made between political and partisan. Moral values form the foundation for much public political discourse and action. They can be presented in a non-partisan way. That distinction is threatened by the IRS position. Preaching that the war in Iraq is immoral and that poverty in America must be reduced are not partisan positions—they are core moral beliefs at All Saints. We, in fact, have no argument with the tax law as it stands, and we take great pains not to trespass over a wise boundary into partisan campaign intervention.[29]

MORAL ISSUES IN CHURCH ELECTIONEERING

The cases of All Saints Church and the Church at Pierce Creek are reminders that churches have constitutional rights to contribute to public debate and to address the moral dimensions of public policies, and that clergy have rights as private individuals to participate in the political process (they do not give up their civil rights at ordination). At the same time, church leaders must be careful in their public witness not to violate federal law banning electioneering by non-profits. These are the *legal* realities churches face in American public life. But churches, temples, and mosques face serious *moral* issues as well. These concern permissible, prudent conduct by churches and clergy as they seek to contribute to public debate on a variety of issues. Beyond legal restrictions on church politicking, it is necessary to consider moral dilemmas that arise for church leaders and congregants in cases where:

1. Church leaders criticize a political candidate for not being religiously orthodox, thereby implying that the candidate is unfit for public office. This might be considered indirect political endorsement.
2. Church leaders criticize a candidate for refusing to translate the church's moral teaching into public policy (on, for example, contraception, abortion, gay marriage, or stem-cell research). This raises basic questions about the relation between law and morals—between religious belief, public morality, and public policy.
3. Church officials announce that it would be "sinful" to vote for a candidate. This is tantamount to issuing voting instructions from the pulpit for doctrinal or religious reasons. (It is different from a clergyman stating simply that he favors or opposes candidate X in an election). As we shall see, these cases are not that uncommon in American politics. They raise moral questions about what it is right for clergy to do, rather than legal questions about what churches may do while retaining their tax-exemption.

To some extent, these actions by church leaders concern internal matters—issues of belief, conformity or nonconformity to doctrine, membership criteria and policies. Pastors may, for example, discipline or sanction church members for beliefs or practices regarded as false, wrong, or inappropriate. However, when a church member is simultaneously a candidate for public office, internal sanctions may have external effects. They may color the perception of a candidate by other citizens who are not church members. In effect, sanctions for religious reasons may be an indirect way that church officials can politically endorse or oppose a candidate for public office.

Churches and Identity Politics

Direct political endorsement by a clergyman is illustrated by the conduct of former Congressman Floyd Flake who, in February 2000, as pastor of a New York City church, invited Al Gore to speak to his congregation. Pointing to Gore, Rev. Flake said, "I don't do endorsements from across the pulpit because I never know who's out there watching the types of laws governing separation of church and state. But I will say to you this morning and you read it well: This should be the next president of the United States." Predictably, the IRS investigated, Flake conceded he had broken the law, and signed an agreement not to do it again.[30]

But clergy sometimes engage in what might be called indirect political endorsement. That is, church leaders criticize the religious orthodoxy of candidates who are church members, thereby implying that such candidates are untrustworthy, unreliable, and unfit for public office. Such negative

criticism of, and implied opposition to, political candidates occurred in the 1984 vice-presidential campaign of Geraldine Ferraro and, most recently, in the 2004 presidential campaign of John Kerry. In both cases, church authorities suggested that these candidates were not authentically Catholic because their views on abortion policy did not accord with the policy views of church leaders. By challenging directly the religious orthodoxy of a candidate, church leaders implied indirectly that the candidate was generally unreliable, unreasonable, inconsistent, and morally suspect. There are other instances of church officials employing litmus tests of religious orthodoxy to influence elections, but these two cases are perhaps the most egregious examples of indirect political intervention by churches.

In the United States, politicians usually want to be seen by voters as loyal church-goers partly because this helps to confer legitimacy on their campaigns. Awareness of this gives church leaders some leverage over candidates who are also church members. For example, during the 2004 elections, former Senate majority leader Tom Daschle was told privately by his bishop in South Dakota to remove the word "Catholic" from his campaign literature because of his pro-choice position on abortion. From the perspective of his church, Daschle's unorthodox views on abortion policy called into question his ability to present himself publicly as a Catholic.[31] The treatment of Senator Daschle was mild, however, when compared with church officials' actions during the Ferraro and Kerry campaigns.

In 1984, Walter Mondale, Democratic candidate for president, made history by selecting as his vice-presidential running mate Geraldine Ferraro, the first woman ever to run on a major party ticket for high national office in the United States. While most Americans celebrated this important "first" in American politics, the leaders of Ferraro's church did not. In contrast to fellow citizens who welcomed this historic advance towards genuine political democracy, prominent Catholic bishops reacted to Ferraro's nomination with a concerted effort to undermine her candidacy because of her position regarding abortion policy.

Ferraro, a Democrat and a Catholic, was a three-term Congresswoman from New York who, though personally opposed to abortion, supported a woman's legal right to choose. While Ferraro accepted her church's teaching that abortion was wrong, she did not believe that she had a moral duty as a lawmaker to translate her church's teaching into civil law. She cited her experience as a prosecutor of rape and child abuse cases in the Queens County District Attorney's office in the mid-1970s, an experience which educated her to an awareness of the complexity of the abortion issue and bred in her a reluctance to use the coercive sanction of the law to exact from non-Catholics adherence to the demands of the church's moral theology.[32]

Ferraro was subjected to a barrage of attacks by Catholic bishops who questioned whether Catholic politicians could separate their personal convictions from their public stance on abortion. New York Archbishop John O'Connor charged Ferraro with misrepresenting church teaching on abortion. Insisting that he would never tell anyone to vote "for her or against her," O'Connor told reporters, "The only thing I know about her is that she has given the world to understand that Catholic teaching is divided on the subject of abortion. Geraldine Ferraro doesn't have a problem with me. If she has a problem, it's with the Pope."[33]

Such a direct attack by a Catholic bishop upon a candidate for high public office is exceptional in American politics. It seemed to signal a real effort to discredit Ferraro in the eyes of Catholic voters as a disobedient churchwoman, presuming to defy church leadership. Other bishops chimed in. Cardinal John Krol of Philadelphia sent a message to all parishes of his archdiocese, stating publicly that "every Catholic is obliged in conscience to oppose abortion both as a personal decision and as a policy in society."[34] After organizers invited Ferraro to lead Philadelphia's Columbus Day parade, Krol threatened to pull out all the Catholic schools and bands if Ferraro marched. She withdrew, thereby allowing Philadelphia parade organizers to avoid a confrontation with Krol.[35]

In New York, O'Connor refused to invite Ferraro to the important Al Smith Dinner, an annual archdiocesan fund-raising event and nonpartisan banquet that Mondale could not attend. Bishops from Hartford, Buffalo, Scranton, Boston, Stockton (California), and from the New England states made statements critical of Ferraro and sought out photo opportunities with the Republican candidates, Ronald Reagan and George H.W. Bush. Departing from their professed role of being nonpartisan regarding the presidential election, church leaders continued to question Ferraro's orthodoxy and fidelity to church teaching. The implication was clear. If she was not a good Catholic, it was unlikely that she would be a good vice-president.

Twenty years later, the 2004 campaign of John Kerry, Democratic nominee for president, triggered an even more determined effort by Catholic clergy to undermine a political candidate by questioning his Catholic identity. Some Roman Catholic bishops declared that it was sinful to vote for Senator John Kerry because he was "pro-abortion." Other bishops announced that Kerry would be denied Holy Communion if he set foot in their dioceses, implying that he was not really Catholic because of his pro-choice stance on abortion policy. The ensuing debate about the use of religious sanctions against political candidates came to be known as "the Communion Wars."

Kerry's policy positions on three issues prioritized by conservative bishops—abortion, stem cell research, and gay marriage—differed from the policy views recommended by church leaders. Kerry, a life-long Catholic, supported legal abortion as well as federal funding for abortion. He voted against the ban on "partial birth" abortion because it did not allow for abortion when the life and/or health of the woman was endangered. He said he would appoint only judges who support abortion rights to the U.S. Supreme Court. On same-sex marriage, Kerry said he did not favor gay marriage, but opposed a federal constitutional amendment banning it and said individual states should decide. He supported civil unions and said he would, if elected, ban job discrimination against gays and also would extend hate-crime protections to gays and lesbians. On embryonic stem cell research, Kerry supported federal funding of such research while providing strict ethical guidelines to prevent abuse.[36]

Kerry questioned the wisdom of simply translating Catholic doctrine into public policy in a religiously diverse society. At the same time, Kerry made an effort to explain his Catholicism to voters during the presidential debates. He emphasized how important his faith was during his service in Vietnam and insisted that his Catholic faith "affects everything I do and choose." He described Catholic values—a vision of the common good, a sense of interdependence and solidarity, respect for individual rights and duties, the obligation to love one's neighbor, the idea that "faith without works is dead." While saying that he could not simply translate specific tenets of Catholic doctrine into public law, he tried to convey how a Catholic worldview and sense of values could and would inform his conduct as president.

Unbeknownst to Kerry, however, the pro-life movement, led by the American Life League, announced in January 2003 a new campaign to draw attention to Catholic politicians who support abortion rights. The League targeted 12 Catholic office holders for defeat, including Tom Daschle, Barbara Mikulski, Ted Kennedy, Christopher Dodd, Tom Harkin, Susan Collins, Patty Murray, John Kerry, Nancy Pelosi, and others.[37] For the next 20 months, the American Life League, together with other pro-life groups, pressured the American bishops to penalize Catholic politicians who made policy judgments at odds with those of their church leaders. This lobbying effort apparently convinced a handful of American bishops to announce they would sanction nonconforming Catholics by denying sacraments to such politicians and by warning voters that it would be sinful to vote for such candidates (arguably, a thinly disguised form of political intervention in an election).

In January 2004, Bishop Raymond Burke ordered priests of the La Crosse,

Wisconsin, diocese to deny Communion to state and federal lawmakers (including Democratic Congressman David Obey) who openly support "procured abortion or euthanasia." Burke said sanctions were necessary "in order that the faithful in the diocese not be scandalized, thinking that it is acceptable for a devout Catholic to also be pro-abortion."[38] In February 2004, Burke, who had since become archbishop of St. Louis, admonished Senator Kerry not to take Communion if he attended Mass there. In May 2004, Bishop Michael Sheridan of Colorado Springs went further, writing in a pastoral letter that Catholic politicians who support abortion rights, stem-cell research, homosexual marriage and/or euthanasia—as well as the voters who back them—could not receive Communion until they have "confessed in the sacrament of Penance." In other words, voting for John Kerry was sinful.[39]

By late spring of 2004, the public statements of a minority—some 15 bishops out of 300 American prelates—made it appear that the Catholic Church in the United States backed the Republican candidate for president. Not surprisingly, Catholic lawmakers protested the actions of these bishops. On May 10, 2004, forty-eight Catholic members of the House of Representatives, including about a dozen pro-life Democrats, sent a strongly worded letter to Cardinal Theodore McCarrick of Washington, stating that denying sacraments to an individual on the basis of a voting record "would be counter-productive and would bring great harm to the church." Furthermore, they emphasized, "We do not believe that it is the obligation of legislators to prohibit all conduct which we may, as a matter of personal morality, believe is wrong. Likewise, as Catholics, we do not believe it is our role to legislate the teachings of the Catholic church . . . Because we represent all of our constituents, we must, at times, separate our public actions from our personal beliefs."[40]

It would be an understatement to say that these events triggered intense controversy among Catholic clergy and laity (as well as non-Catholics) over the role of Catholics in American public life. The debate went on through most of the 2004 election season. Public opinion polls showed widespread disapproval of the bishops' actions among Catholics, with 72 percent of Catholics saying that denying Communion to lawmakers who support abortion rights was inappropriate.[41] The bishops themselves were deeply divided over the wisdom of sanctioning Catholic politicians. Prelates in New Orleans, St. Louis, Newark, Denver, and Camden favored sanctions, while the archbishops of Chicago, Los Angeles, New York, and Washington opposed Communion bans. Cardinal McCarrick summarized the objections to sanctions: "We should not tell people how to vote or sanction

voters. This is contrary to our teaching, may be a violation of civil law and is often counterproductive." As for the practice of denying Communion to Catholic politicians, McCarrick noted "significant concern . . . that the sacred nature of the Eucharist could be trivialized and might be turned into a partisan political battleground." He urged renewed efforts at dialogue and persuasion rather than penalties. He concluded by saying the bishops needed to be "political but not partisan" as they exercised their teaching, pastoral, and leadership roles in the church.[42]

Others argued that sanctions were tried in the past and did not work. Barring pro-choice Catholic politicians from speaking engagements in Catholic institutions and banning them from receiving Holy Communion were measures tried in the late 1980s and early 1990s that did little to reduce the incidence of abortion.[43] Moreover, in sanctioning Catholic lawmakers, conservative bishops were adopting a tactic that was coercive rather than persuasive; such a tactic was wholly inappropriate in a presidential election campaign. It was also counter-productive and self-defeating. As one commentator noted, "The imposition of sacramental penalties reinforces the notion of abortion as a religious issue, a sectarian Catholic issue, rather than a human rights and bioethical issue; this will only confirm the views of those who accuse the pro-life movement of imposing specifically religious tenets upon the American people."[44]

But the most telling criticism of this church practice of sanctioning politicians had to do with its obvious partisanship. The bishops were selective in applying sanctions. During the 2004 Republican National Convention, for example, three pro-choice politicians were featured speakers: New York Governor George Pataki, California Governor Arnold Schwarzenegger, and former New York City Mayor Rudolph Giuliani. Nothing was said by any bishop about these pro-choice Catholics. Yet Senator Kerry was singled out by some bishops and threatened with denial of the Eucharist because of his policy views. He was running for president; they (the three Republicans) were not. Undoubtedly, the possibility of a pro-choice Catholic president was alarming to the American Catholic hierarchy. Indirect political endorsement was a solution to their problem. While they could not oppose Kerry directly, they could challenge his Catholicity and thereby cast suspicion on his fitness for the White House.

The partisanship was there for all to see. Because of the action of a handful of bishops, the official church appeared to be taking sides in a nationwide presidential election. The bishops themselves, in their quadrennial election-year statement, "Faithful Citizenship," acknowledged the need to be:

- Principled, but not ideological.
- Political, but not partisan.
- Clear, but also civil.
- Engaged, but not used.

But the actions of a few bishops, in the intensely polarized, red-state-blue-state climate of the 2004 presidential election, appeared to be endorsing a Republican over a Democrat. Such partisanship by church leaders in a presidential election is inappropriate. As one Catholic editor wrote, "If the fear that had to be dispelled in 1960 when John Kennedy ran for president was that the pope would somehow dictate U.S. policy, the fear I have in the wake of the 2004 race is that the church, at least in the public's perception, will be so aligned with one party that it will be severely compromised."[45]

Political Endorsements by Churches: Conflating Law and Morals

The controversy in the 1984 and 2004 presidential campaigns illustrates a second major dilemma that arises frequently in discussions of political endorsements by churches, namely the relation between law and morals. The 48 Catholic congressional representatives who challenged their church leaders during the 2004 election alluded to this distinction between legality and morality in their statement that it is not "the obligation of legislators to prohibit all conduct which we may, as a matter of personal morality, believe is wrong." These lawmakers were on firm ground.

Both American legal tradition and Catholic jurisprudence recognize that, while law and morality are related, they are not coterminous. Not every sin needs be made a crime. Prudence is necessary, which means looking to the possible consequences of banning abortion or any other behavior one regards as immoral. Public officeholders have a duty to estimate, as best they can, the consequences of, for example, reinstating restrictive abortion law. Policymakers must calculate the *efficacy* of restrictive laws (whether citizens will obey them), the *enforceability* of such laws (whether police will enforce them selectively, uniformly, or not at all), and the *effects* of such laws (whether, on balance, the negative effects of reinstating restrictive laws will outweigh the positive benefits). Thus, even if a popular consensus develops in favor of restrictive abortion laws, lawmakers (Catholic and non-Catholic alike) are still obliged to judge whether the proposed policy will make sound law.

But the conservative bishops ignored the moral duties politicians have to make sound law and public policy. Instead they sanctioned lawmakers

whose policy views did not reflect the bishops' political judgments. They conflated legality and morality by, for example, insisting that the distinction between being pro-choice and pro-abortion was meaningless.

Traditional legal and political theory recognizes that there are limits to the law as a method of social control. Lawmakers must consider whether the measures they enact will achieve their intended effect or result in a situation far worse than the original problem the law was supposed to remedy. Driving abortion underground by re-criminalizing it, for example, is not necessarily what pro-life citizens and lawmakers intend, but it may be an unintended consequence of passing such restrictive laws. These questions of sound lawmaking assume even greater significance in a pluralistic, religiously diverse society, such as the United States, which is constitutionally committed to religious freedom and church-state separation. American lawmakers must function in this context. Congressman David Obey (D-WI), one of three Catholic politicians denied Communion by Bishop Burke, emphasized this fact in his public response to Burke's sanction, saying that Burke's actions bordered on the unconstitutional:

> Bishop Burke has a right to instruct me on matters of faith and morals in my private life and—like any other citizen—to try by persuasion, not dictation, to affect my vote on any public matter. But when he attempts to use his ecclesiastical position to dictate to American public officials how the power of law should be brought to bear against Americans who do not necessarily share our religious beliefs, on abortion or any other public issue, he crosses the line into unacceptable territory. The U.S. Constitution, which I have taken a sacred oath to defend, is designed to protect American citizens from just such authoritarian demands.[46]

In suggesting that Bishop Burke exceeded the limits of his episcopal authority, Representative Obey defended the constitutional right and duty of lawmakers to make sound public policy. His criticism of the bishop for overstepping church-state boundaries implied that church leaders should respect the expertise legislators and policymakers have in governmental affairs.

Political Endorsements by Churches: Issuing Voting Instructions

Finally, several examples from the 2004 presidential election campaign illustrate another dilemma regarding churches and American politics, namely, church leaders using sermons and statements to issue voting instructions. On at least two occasions, church officials announced or implied that it would be sinful to vote for a particular candidate. Bishop Michael Sheridan of Colorado Springs stated that Catholic politicians who support

abortion rights, stem-cell research, and gay marriage—and the voters who support them—must first go to confession before receiving Communion. Why? Because voting for politicians like Kerry and Ferraro was sinful. There was no nuance to Sheridan's position, no suggestion that there might be other reasons to vote for a candidate like Kerry, reasons having to do with a comparison of the two major-party candidates' views on issues of economic justice, poverty, healthcare, war and peace, and government accountability.

The Reverend Chan Chandler, a young minister who led a Baptist congregation of about 100 people in Waynesville, North Carolina, from 2002 to 2005, was another clergyman whose actions implied that he thought voting for a particular candidate such as John Kerry was sinful. In May 2005, Chandler was forced to resign from his congregation for asking members to "repent or resign" if they had voted for Kerry in the 2004 race.[47] During his tenure as pastor, Chandler set out to make his congregation politically active and endorsed President Bush from the pulpit during the 2004 campaign. He also announced that anyone who planned to vote for Senator Kerry stood for abortion and homosexuality and could either "repent or resign." Nine members said they were expelled from the church. According to one commentator,

> Pastor Chandler insisted he had been within his rights to deny those folks membership—and he was correct up to a point. Pastors have the right to set the parameters for church membership. But many members of Chandler's congregation decided they did not care for Chandler's decision to link church membership to political affiliation. Many left the church. Among them were several Republicans. They had not voted for Kerry but could not tolerate a pastor who refused to respect political differences. Eventually, Chandler had to resign from the pastorate. Chandler had obviously made his political views known, but at what cost? His church was splintered, and he lost his job.[48]

When clergy announce from the pulpit or through a pastoral letter that it would be "sinful" to vote for candidate X (thereby opposing candidate X and implicitly endorsing candidate Y), they are engaging in yet another form of indirect political endorsement. For Rev. Chandler and Bishop Sheridan, the act of voting was a civic decision which they felt competent to evaluate in religious terms ["sinful," "repent," "confess in the Sacrament of Penance"]. This seems misplaced, improper and inappropriate. In effect, they made a category mistake, using inappropriate reasoning and language to evaluate public policies and political choices.

In a liberal democracy, it is improper for clergy to tell congregants how to vote. It is also arrogant. As Lynn notes, "It's insulting for any religious

leader to assume that his congregants are too stupid to know what to do unless taken by the hand and led into the voting booth."[49] Such condescension or paternalism also runs counter to the egalitarian assumptions underlying democratic government. As Rousseau noted, equal citizenship is essential to political participation in a democratic republic.

Yet, as our examples indicate, issuing voting instructions is often done by clergy despite IRS strictures against political endorsements. Clergy are, after all, in positions of authority within congregations, and the temptation to abuse that authority is always present. Factors such as ecclesiology and conceptions of ministry may heighten the probability of overstepping boundaries. For example, if a church is hierarchically structured—organized in top-down fashion with local clergy appointed by bishops rather than selected by congregations—there may be little pressure from parishioners for what might be called "democratic accountability." If clerics see themselves as teachers who have privileged access to revealed truth, they may come to think of themselves as having expertise in other (non-religious) areas and as competent to tell folks in the pews how to vote. Similarly, if bishops define themselves as teachers of doctrine (as they do in the Roman Catholic tradition), they may feel that they have a pastoral duty to guide parishioners at the ballot box.

Assumptions like these underlay Bishop Burke's defense of his denial of Communion to pro-choice politicians. He said sanctions were necessary "in order that the faithful in the diocese not be scandalized, thinking that it is acceptable for a devout Catholic to also be pro-abortion." Bishops and pastors may feel they must protect their flock of sheep from being led astray and that this necessitates issuing voting instructions. But such paternalistic conceptions of church polity and church ministry are not easily squared with democratic citizenship. Bishops and clergy may have teaching authority within their churches, but in secular society they and their congregants are citizen equals and no longer involved in a hierarchical relationship.

This is not to belittle the religious authority of bishops or to suggest that pastors should not address public policy issues from a faith-based moral perspective. But in a liberal democracy, church leaders and parishioners must be clear about what is appropriate when making voting decisions. This is especially true within hierarchically structured churches such as the Roman Catholic Church. Catholics regard their bishops and priests as officially appointed teachers of religious doctrine and accord their judgments a certain degree of respect and deference. Problems arise, however, when bishops and clergy use the pulpit to suggest which *political* judgments citizens should make. While lay Catholics owe their religious leaders respectful consideration, they do not and cannot, as citizens in a democracy, abdicate

their responsibility to make their own prudent political judgments about candidates and issues. Clergy who ignore these political realities act to undermine principles of democratic governance and civic participation. In using the privileges and trappings of religious authority to influence political decision-making, clergy fail to show proper respect for the political autonomy of their parishioners, who are, after all, their political equals in a liberal democracy.

CONCLUSION

The issue of political endorsements by churches is a complex matter that raises fundamental questions about religious freedom and church-state relations in the United States. IRS rules against church interventions in political campaigns fall under the larger category of government regulation of political lobbying and electioneering by tax-exempt non-profit organizations. Although there has been an increase in alleged violations of IRS restrictions on church electioneering in the 2000 and 2004 presidential elections, only one church to date has lost its tax-exempt status solely because of its partisan politicking. Other churches have been warned about illegal activity, and a few have been fined. Challenges to the federal tax law such as the All Saints Church case will continue, given the increased involvement of churches and religious organizations in American politics and society.

While churches risk losing their tax-exempt status by intervening in political campaigns, there are many issue-advocacy and voter-education activities they can conduct legally during an election season. However, there are some types of election-related activities, such as electioneering, which are questionable from a moral perspective. These forms of indirect political endorsement include challenging the religious orthodoxy of a candidate, thereby implying unfitness for public office; oversimplifying public policy issues by conflating legality and morality; and telling congregants it is sinful to vote for a particular candidate. In a religiously diverse society committed constitutionally to religious liberty and church-state separation, it seems imprudent and inappropriate for churches to engage in such borderline activities that leave them open to accusations that they are meddling in politics and breaching the wall of separation.[50]

In defense of religious organizations, it should be noted that churches, like All Saints Church in Pasadena, distinguish between being political and being partisan and claim they can legitimately address contemporary issues of politics and policy. So it seems proper to restate the moral-political arguments for and against church politicking. First, churches play a prophetic role in American society, calling attention to evil and injustice and urging

citizens and governments to remedy wrongs and inequities. Church leaders have a right and duty to fulfill this prophetic calling. The American tradition of religious liberty and the constitutional provisions of the First Amendment protect this prophetic witness of the churches. More importantly, God trumps Caesar, that is, fidelity to God takes precedence over allegiance to country. So churches have little choice in the matter and must "speak truth to power." As Rev. Bacon states, "Our faith mandates that we oppose injustice."[51]

Second, church autonomy is an important value in a liberal society. Churches cannot play a prophetic role if they are inordinately dependent upon and beholden to the state, the culture, and the larger society. They must be counter-cultural at the same time that they work to remedy injustice and build up civil society. To preserve church autonomy, religious leaders insist upon their right, as church officials, to define doctrine, interpret and apply church teaching, set the parameters of church membership, govern their congregations and lead their congregants. Churches are voluntary societies in Lockean liberal theory and should, within limits, be free from intrusive government regulation.

However, as this chapter illustrates, churches can occasionally intrude upon the rights of citizens to participate in the political process and to live freely in society. If churches stress freedom for religion to flourish, separationists struggle to defend government from religious dominance and citizens from occasional clerical coercion. Separationists are vigilant about church intervention ("meddling") in politics because they are aware of a history of sectarian strife in European and colonial American history, and because the United States today is a pluralistic society committed to religious freedom and non-establishment. They therefore caution against excessive lobbying and electioneering by churches. Their warnings include the following: First, such activities can be terribly divisive of congregations and religious communities; they can encourage bitter hatred rather than brotherly love. Second, such activities are misplaced; they focus on the wrong issue, on the religious identity/orthodoxy of candidates instead of their public policy views and leadership potential. They come close to violating the constitutional provision against religious tests for public office. Third, the political interventions of church leaders are sometimes imprudent and unwise. It is very difficult to translate church teachings into public law without careful attention to policy consequences. Clergy would be wise to avoid the kind of reductionism that comes from conflating law and morals on controversial issues. Fourth, attempts by church leaders to issue voting instructions can undermine democratic citizenship. Bishops and pastors can and should proclaim church teaching, but they must leave ballot box deci-

sions to the political judgments of informed citizens. Sanctioning congregants for their political judgments is inappropriate in a democratic society. Clergy must recognize and respect the fact that citizens can in good faith disagree with the political judgments of church leaders.

It is easy to say that a balance must be struck between religious freedom and the rights of churches on the one hand and the claims of democracy on the other. Obviously, churches need not be democratic in their internal structure; theological ideas about church polity and ecclesiology vary widely, as evidenced by the existence in the United States of hierarchically structured bodies such as Mormonism and Roman Catholicism. But in the United States, these churches operate in a political democracy with an egalitarian ethos. The challenge is to negotiate perhaps inevitable tensions between authoritative religions and a democratic society.

What can churches do to avoid IRS scrutiny and the moral pitfalls outlined here? First, they can be prophetic in calling attention to social injustice; secular society will always need their prophetic witness. They can contribute a moral dimension to public discourse and address moral aspects of public policy. They can clearly proclaim values and moral principles while leaving to citizens the difficult task of applying those principles to particular cases. Secondly, they can continue to build up civil society through the many educational and social assistance programs they already conduct. Finally, with respect to political campaigns, churches can contribute thoughtful analyses of major issues—on the dignity of human life, the need to help our neighbors, the duty of stewardship of creation, the necessity of devising policies that will make society more just. Proclaiming fundamental values on these and other issues will keep our churches and clergy busy enough.

NOTES

1. Office of General Counsel, United States Conference of Catholic Bishops, "2007 Political Activity Guidelines for Catholic Organizations," January 15, 2007, 3, http://www.usccb.org/ogc/guidelines.shtml. Americans United for Separation of Church and State is one of the few educational and advocacy organizations that lost its tax-exempt status because of excessive lobbying.

2. James D. Davidson, "Why Churches Cannot Endorse or Oppose Political Candidates," *Review of Religious Research* 40, no. 1 (September 1998): 16. See also Deirdre Dessingue Halloran and Kevin M. Kearney, "Federal Tax Code Restrictions on Church Political Activity," 38 *Catholic Lawyer* 105 (1998). Accessed on January 3, 2007 at http://web.lexis-nexis.com.proxy.libraries.rutgers.edu/universe/document. See also Patrick L. Daniel, "More Honored in the Breach: A Historical Perspective of the Permeable IRS Prohibition on Campaigning by Churches," 42

Boston College Law Review 733 (2001). Accessed on January 2, 2007 at http://web.lexis-nexis.com/universe/document.

3. Davidson, "Why Churches Cannot Endorse or Oppose Political Candidates," 17.

4. Halloran and Kearney, 106.

5. See *Christian Echoes National Ministry, Inc. v. United States* 470 F.2d 849 (10th Cir., 1964). As for the Christian Coalition, see Thomas B. Edsall and Hanna Rosin, "IRS Denies Christian Coalition Tax-Exempt Status," *Washington Post*, June 11, 1999, A4. In 1999 the Christian Coalition countersued the IRS. In 2005 a settlement was reached that secured the Coalition's status as a 501(c)(4) lobbying and educational institution. See Alan Cooperman and Thomas B. Edsall, "Christian Coalition Shrinks as Debt Grows," *Washington Post,* April 10, 2006, A01. Finally, in 1993, the IRS revoked the tax-exempt status of Jerry Falwell's organization, the "Old Time Gospel Hour," for two years because it used its personnel and assets to raise money for a political action committee. At that time, Falwell's organization also paid $50,000 in taxes and agreed to change its organizational structure to prevent any further violations. See Halloran and Kearney, "Federal Tax Code Restrictions on Church Political Activity," 38 *Catholic Lawyer* 105 (1998). These examples should clarify the difference between a church and a religious organization.

6. Alan Cooperman, "IRS Reviews Church's Status," *Washington Post*, November 19, 2005, A3.

7. Ibid. See also the comments of Owens in Patricia Ward Biederman and Jason Felch, "Antiwar Sermon Brings IRS Warning," *Los Angeles Times*, November 7, 2005. Marcus Owens is the attorney representing All Saints Church in Pasadena, which is under investigation by the IRS for violating the law against intervening in political campaigns and elections. This case is nationally known because the church is contesting the charge. The above newspaper materials are available at the Church's website, www.allsaints-pas.org.

8. Rob Boston, "Churches, Politics and the IRS," *Church & State*, 59, no. 8 (September 2006), 6. See also Laurie Goodstein, "IRS Eyes Religious Groups as More Enter Election Fray," *New York Times,* September 18, 2006, A20; Gillian Flaccus, Associated Press, "IRS Church Probe May Reverberate in Political Season," *The Star-Ledger,* September 21, 2006, 10; Stephanie Strom, "Anti-Abortion Group Loses Tax Exemption," *New York Times,* September 15, 2006, A16. [*The Star-Ledger*, based in Newark, is the leading major newspaper in New Jersey.]

9. Rob Boston, "Project Fair Play," *Church & State*, 59, no. 8 (September 2006), 11–12.

10. However, the IRS cautions that an issue advocacy communication may constitute intervention in a political campaign through the use of code words, such as "conservative," "liberal," "pro-life," "pro-choice," "anti-choice," "anti-family," "Republican," "anti-environment," or "Democrat," coupled with a discussion of a candidacy or election, even if no candidate is specifically named. Labeling candidates and thereby indicating approval or disapproval of a candidate should be

avoided. See Office of General Counsel, United States Conference of Catholic Bishops, *2007 Political Activity Guidelines for Catholic Organizations*, January 15, 2007, 8. See also Halloran and Kearney, "Federal Tax Code Restrictions on Church Political Activity," 3–4.

11. Everson's remarks are cited in Rob Boston, "Churches, Politics and the IRS."

12. In the 109th Congress, both of these bills died with the end of the Congress in January 2007 (they were not reported out to the floor for a vote).

13. This description is taken from the three federal court rulings in this case: *Branch Ministries v. Richardson,* 970 F.Supp. 11 (D.D.C. 1997); *Branch Ministries v. Rossotti*, 40 F.Supp. 2d 15 (D.D.C. 1999); and *Branch Ministries v. Rossotti*, 211 F.2d 137 (D.C. Cir. 2000); 341 U.S. App. D.C. 166 (2000). Branch Ministries, Inc., operated the Church at Pierce Creek. The ad is also described in Barry Lynn, *Piety & Politics: The Right-Wing Assault on Religious Freedom* (New York: Harmony Books, 2006), pp. 148–149. Lynn suggests that the case was "carefully choreographed" by Religious Right activists as a test case challenging the law banning partisan endorsements. He bases this supposition on the fact that the Church at Pierce Creek was the congregational home of Randall Terry, founder of Operation Rescue, an anti-abortion organization, and also on the fact that the Church at Pierce Creek was defended in later court proceedings by the American Center for Law and Justice, a litigational interest group founded by Pat Robertson.

14. Peter Applebome, "Religious Right Intensifies Campaign for Bush," *New York Times*, October 31,1992, A1; Anthony Lewis, "Tax Exempt Politics?," *New York Times*, December 1, 1992, A15.

15. *Branch Ministries Inc. v. Richardson*, 970 F.Supp.11 (D.D.C. 1997).

16. Ibid., 40 F.Supp.2d 15 (D.D.C. 1999).

17. Ibid., 40 F.Supp.2d 15 (D.D.C. 1999).

18. Ibid., 211 F.3d 137 (D.C. Cir., 2000). Judge Buckley added that the Church could create a political action committee through another entity, a 501(c)(4) organization separately incorporated. "Such organizations are exempt from taxation; but unlike their section 501(c)(3) counterparts, contributions to them [by donors] are not deductible. Although a section 501(c)(4) organization is also subject to the ban on intervening in political campaigns, it may form a political action committee that would be free to participate in political campaigns." Such a separately funded PAC fund could receive contributions and make expenditures in a political campaign. While he held this out as an "alternative means of political communication for the Church," Judge Buckley stressed that the Church could not use its tax-free dollars to fund such a PAC. See *Branch Ministries v. Rossotti*, 211 F.3d 137 (D.C. Cir. (2000). Jay Sekulow, chief counsel for the American Center for Law and Justice, which represented the Church, expressed disappointment at the appeals court's decision, but was "encouraged that this court appears to provide a blueprint for churches to express their beliefs in a political context." See Jeremy Leaming, "Federal Appeals Panel Upholds IRS Decision to Strip Church of Tax-Exempt Status," *The Freedom Forum Online*, May 15, 2000, http://www.firstamendmentcenter.org/news.aspx?id-7169. Noteworthy in this case were the *amicus curiae* briefs

filed at the appeals court level. The Family Research Council and Landmark Legal Foundation supported Branch Ministries while Americans United for Separation of Church and State and People for the American Way filed briefs in support of the Internal Revenue Service.

19. A virtually complete record of the correspondence between the IRS and All Saints Church, plus the original sermon and related documents, is accessible on the church's website: www.allsaints-pas.org

20. Josh Getlin, "The Race for the White House: Pulpits Ring with Election Messages," *Los Angeles Times,* November 1, 2004.

21. Patricia Ward Biederman and Jason Felch, "Antiwar Sermon Brings IRS Warning," *Los Angeles Times,* November 7, 2005.

22. Rev. J. Edwin Bacon, Jr., Rector, All Saints Church, "The IRS Goes to Church," a sermon preached at All Saints Church, Pasadena, California, November 13, 2005. Accessible at www.allsaints-pas.org.

23. Media interviews included Rev. Ed Bacon's appearances on the *Lehrer Newshour* on PBS, February 3, 2006; National Public Radio's *All Things Considered*, December 16, 2005; and National Public Radio's *Weekend America*, March 4, 2006. Editorials supporting All Saints Church have appeared in the following newspapers: *New York Times*, November 22, 2005; *Chicago Sun-Times*, November 22, 2005; *Washington Times*, November 14, 2005; *Miami Herald*, November 11, 2005; *Dallas Morning News*, November 11, 2005; *Seattle Times*, December 2, 2005; *Pasadena Star News*, December 2, 2005; *St. Louis Post-Dispatch*, November 9, 2005; and *The Christian Century*, November 29, 2005.

24. Alan Cooperman, "IRS Reviews Church's Status," *Washington Post*, November 19, 2005, A03. See also Jason Felch and Patricia Ward Biederman, "Conservatives Also Irked by IRS Probe of Churches," *Los Angeles Times,* November 8, 2005, www.latimes.com/newes/local/la-me-irs8nov08.

25. Rector Ed Bacon and Senior Warden Bob Long, "Where We Are With the IRS: A Special Update for the Parish," appended to the *2006 Annual Report of All Saints Church*, October 8, 2006. See www.allsaints-pas.org.

26. Letter to IRS from Marcus Owens, October 11, 2005, 2.

27. Rev. Edwin Bacon, "The IRS Goes to Church," Sermon at All Saints Church, November 13, 2005, 2.

28. Ibid.

29. "All Saints Rector Thanks [Congressman] Schiff for Letter to IRS and Treasury," Press Release, November 16, 2005.

30. This example is from Barry W. Lynn, *Piety and Politics* (New York: Harmony Books, 2006), 155–156.

31. Bishop Robert Carlson of Sioux Falls, South Dakota, instructed Daschle to remove from his Congressional biography and campaign documents all references to his being Catholic. Briefs, "In Catholic Circles," *Conscience* (Summer 2003), 9.

32. Geraldine A. Ferraro with Linda Bird Francke, *Ferraro: My Story* (New York: Bantam Books, 1985), 215–218.

33. *New York Times,* September 9, 1984, p. 34. See also Mary C. Segers, "Fer-

raro, the Bishops, and the 1984 Election," in *Shaping New Vision: Gender and Values in American Culture*, ed. C.W. Atkinson, C.H. Buchanan, and M.R. Miles (Ann Arbor: UMI Research Press, 1987), 143–167. [The Harvard Women's Studies in Religion Series.]

34. Cardinal John Krol, "Protecting God's Precious Gift," A Message to be Read at All Parishes of the Archdiocese of Philadelphia, on Respect Life Sunday, October 7, 1984; reprinted in ed. Daughters of St. Paul, *Life, A Gift of God: U.S. Catholic Leaders Speak Out on Life Issues* (Boston: Daughters of St. Paul, St. Paul Editions, 1985), 53.

35. Ferraro, *Ferraro: My Story*, 231–232.

36. On these three issues prioritized by conservative Catholic bishops during the 2004 campaign, Kerry's policy position differed from that recommended by his church. The Catholic Church opposes abortion as the unjustified destruction of innocent human life and favors restricting abortion rights, if not completely delegalizing the practice. The church strongly opposes same-sex marriage as well as civil unions—while also opposing discrimination against gays and lesbians. The church supports adult stem cell research but opposes embryonic stem cell research because it involves the destruction of human life (living human embryos).

37. Joe Feuerherd, "Public Life, Public Dissent," *National Catholic Reporter* 39, no. 29 (23 May 2003), 3.

38. NCR Staff, "Bishop Denies Communion to Politicians Who Support Abortion and Euthanasia," *National Catholic Reporter* 40, no. 12 (23 January 2003), 5.

39. Bishop Michael G. Sheridan, "A Pastoral Letter to the Catholic Faithful of the Diocese of Colorado Springs on the Duties of Catholic Politicians and Voters," EWTN News Feature, May 14, 2004, www.EWTN.com. Accessible on http://www.freerepublic.com/focus/f-religion/1135851/posts. See also Associated Press, "Group Asks IRS to Revoke Catholic Diocese's Tax Exemption," May 28, 2004, http://www.firstamendmentcenter.org/news.aspx?id=13441&printer-friendsly=y

40. *New York Times,* May 20, 2004, A1. See also Andrew Walsh, "Kerry Eucharistes," *Religion in the News*, Vol. 7, No. 2 (Summer 2004), 4.

41. The PEW Research Center for the People and the Press, "Religion and the Presidential Vote," December 6, 2004. See http://people-press.org/commentary/display.php3?AnalysisID=103. A *Time* magazine poll of Catholic voters in May 2004 found that 75 percent disapproved of bishops using bans to discipline Catholic pro-choice politicians.

42. Jerry Filteau, "Cardinal McCarrick: No Simple Answers on Bishop-Politician Relations," *Catholic News Service*, June 23, 2004.

43. A noteworthy example of the use of church sanctions occurred in 1989. On November 15, three weeks before a special run-off election for the California State Senate, Bishop Leo Maher of San Diego prohibited Catholic State Assemblywoman Lucy Killea, a contender for a Senate seat that would tip the balance to a pro-choice majority, from receiving Holy Communion because of her pro-choice position on abortion. In the December 5 election, Killea defeated favored Republican opponent Carol Bentley, thereby shifting the California Senate to a pro-choice majority.

Bentley attributed her stunning defeat to Maher's intervention in the political process. She claimed the bishop's action made Killea an "international celebrity and martyr." *New York Times,* December 6, 1989, A12. See also Catholics For a Free Choice, "Episodes in Abortion Politics," in *Everything You Always Wanted to Know About the Catholic Vote* (Washington, D.C.: CFFC, 1996), 20.

44. Robert W. McElroy, "Prudence and Eucharistic Sanctions," *America* 1982, no. 3 (January 31, 2005), 8–10.

45. Tom Roberts, Editor's Note: "A Few Bishops Seduced by Politics," *National Catholic Reporter* 40, no. 43 (8 October 2004), 2. "Faithful Citizenship" is the quadrennial report discussing the issues of each presidential election issued by the United States Conference of Catholic Bishops.

46. Joe Feuerherd, "Rep. Obey Unlikely Target of Church Discipline," *National Catholic Reporter* 40, no. 15 (13 February 2004), 3.

47. "Church Shaken By Remarks," *New York Times,* May 16 2005, A1, A19. See also Associated Press, "N.C. Church Split Highlights Divide Over Pulpit Politics," May 19, 2005. Available at www.firstamendmentcenter.org/news.aspx?id=15283.

48. Barry Lynn, *Piety & Politics* (New York: Harmony Books, 2006), 161–162.

49. Ibid., 162.

50. It should be noted that the examples of inappropriate, imprudent political intervention described here all seem to involve church partisanship on the side of the Republican Party or GOP candidates. I have been unable to find examples of blatant church partisanship favoring the Democratic Party. In the context of recent American politics, the following factors may explain why church partisanship has tended to favor the GOP. First, the resurgence of conservative evangelicals led them to become a powerful presence within the Republican Party. By the mid-1990s, they had gained control of at least 30 state GOP party organizations. As a result of this mobilization and political effort, conservative evangelicals have become a major party of the base constituency of the Republican Party. Second, several factors have facilitated entry of Roman Catholics into national politics—from the election of President John F. Kennedy in 1960 to changes in church teaching at the Second Vatican Council to greater church involvement in secular society as a result of Vatican II. In American politics and society, the end of the Cold War and the emergence of "culture wars" over contraception, abortion, and gay marriage have had the effect of mobilizing conservatives among both evangelicals and Catholics. Both of these groups have sought to preserve their religious communities against what they perceive as a morally degenerating culture. As conservatives, they would perhaps inevitably gravitate to the Republican Party. Among American Catholics, however, the political interventions of their bishops in electoral campaigns have deeply divided the Catholic community.

51. The fact that both liberal and conservative religious groups strongly support the Rev. Ed Bacon and All Saints Church in their challenge to the IRS indicates wide agreement among American church leaders about their right and duty to contribute to public debate about policy issues. Where churches differ, of course,

is how they prioritize issues. While All Saints Church tends to stress the importance of poverty and peace, the Church at Pierce Creek emphasizes issues such as abortion and same-sex marriage. This simply confirms what we know—that the American religious landscape is as pluralistic as American society generally (as a whole).

FURTHER READING

Controversies about religion and politics in American society have generated some excellent work on church-state relations, including Robert Miller and Ronald Flowers, *Toward Benevolent Neutrality: Church, State, and the Supreme Court* (Waco, TX: Baylor University Press, 1997) and Stephen V. Monsma and J. Christopher Soper, *The Challenge of Pluralism: Church and State in Five Democracies* (Lanham, MD: Rowman & Littlefield, 1997). Monsma and Soper examine church-state arrangements in five liberal democracies (United States, United Kingdom, Netherlands, Germany and Australia), criticize the model of strict church-state separation in American society, and suggest that Americans might learn from other nations how to promote government neutrality towards religion and genuine religious freedom. Several articles examine the historical roots of the ban on church intervention in political campaigns; these include James D. Davidson, "Why Churches Cannot Endorse or Oppose Political Candidates," *Review of Religious Research,* Vol. 40, No. 1 (September 1998), pp. 16–33; Patrick L. O'Daniel, "More Honored in the Breach: A Historical Perspective of the Permeable IRS Prohibition on Campaigning by Churches," 42 *Boston College Law Review* 733 (July, 2001); and Deirdre Halloran and Kevin Kearney, "Federal Tax Code Restrictions on Church Political Activity," 38 *Catholic Lawyer* 105 (1998). For classic work on churches and taxation, see Dean M. Kelley, *Why Churches Should Not Pay Taxes* (New York: Harper & Row, 1977), and Paul J. Weber and Dennis Gilbert, *Private Churches and Public Money* (Westport, CT: Greenwood Press, 1981). Finally, a useful examination of opposing views about recent religion-and-politics controversies in the United States is the book by Mary C. Segers and Ted G. Jelen, *A Wall of Separation: Debating the Public Role of Religion* (Lanham, MD: Rowman & Littlefield, 1998). This volume also contains relevant historic documents such as the writings of Jefferson and Madison, speeches of John F. Kennedy and Mario M. Cuomo, and pivotal Supreme Court rulings on church-state issues.

7

The Relevance of State Constitutions to Issues of Government and Religion

David K. Ryden

The text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with state establishments. Thus . . . it makes little sense to incorporate the Establishment Clause . . . As a textual matter, [the Establishment Clause] probably prohibits Congress from establishing a national religion. Perhaps more importantly, the Clause made clear that Congress could not interfere with state establishments . . .

—Justice Thomas (concurring in *Elk Grove Unified School District v. Newdow*, 2005)[1]

Justice Thomas's comments in *Newdow* were more than the idle musings of an isolated dissenting judge. Rather, they anticipated what is likely to be a key line of debate in the years ahead in the realm of church/state relations—the applicability of state constitutional religion clauses to church/state issues, and the interplay between state and federal constitutions in this area. Indeed, Justice Thomas's contemplation of a federalism-infused church/state jurisprudence is gaining support, on the Court and off.

This important constitutional development is already evident in several

recent judicial decisions. In *Locke v. Davey* (2004), the U.S. Supreme Court affirmed the state of Washington's decision to exclude from a state scholarship program otherwise qualified candidates who intended to apply the scholarship to pursuing religious or pastoral studies majors in college. While opining that Washington *could* have included such students in the program consistent with the Establishment Clause of the First Amendment, the majority recognized the state's corollary right to exclude people according to its state constitution and the traditions and practices that had arisen under that constitution. Art. I, §11 of Washington's state constitution prohibited public money from being "appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment."[2] The Court, by a 7–2 margin (ironically with Thomas dissenting), found that the specific provision of the state constitution had been authoritatively interpreted as "prohibiting even indirectly funding religious instruction that will prepare students for the ministry . . . "[3]

Thirty-seven states have comparable constitutional amendments that explicitly address religion; they typically are far more precise in barring state support of religion than is the federal Establishment Clause. These "mini-Blaine amendments"—named after senator and presidential candidate James Blaine and his ultimately unsuccessful late nineteenth century efforts to amend the U.S. Constitution—have largely been ignored, in the wake of the incorporation of the Establishment Clause to apply against state and local governments. As a result, federal and state courts alike have tended to rely almost exclusively upon the federal Establishment Clause to resolve conflicts arising out of church/state interaction. Unfortunately, this approach has spawned an Establishment Clause jurisprudence lacking either clarity or coherency.

As criticism of Establishment Clause doctrine has persisted, voices from across the political spectrum have seriously challenged the wisdom and historical accuracy of a uniform all-encompassing church/state law based exclusively on the First Amendment of the U.S. Constitution. This essay explores the growing movement to elevate state law as a formative dimension of church/state law and considers the practical consequences that might flow from an injection of principles of federalism—creating greater space for states to develop independent religion policy based upon state constitutions—into church/state jurisprudence. A confluence of factors—including the ongoing problems with current Establishment Clause jurisprudence, the rise of the faith-based social services initiative, and its spread to states and localities—suggest that the time is ripe for a potentially dramatic shift in church/state constitutional doctrine.

THE TEXTUAL GROUNDS FOR STATE RELIGION POLICY: STATE CONSTITUTIONS

The outlines of a federalism-centered approach to church/state law are already discernible, on a theoretical level if not in practice, in the existing texts of state constitutions. The specific substantive provisions of state constitutions offer distinctive approaches to the regulation of government/religion interaction. A sizeable majority of states' governing documents explicitly address the role of religion relative to government, and they do so in widely varied ways. A cataloguing of state constitutional religion provisions demonstrates their considerable range and diversity:

- Thirty-seven state constitutions contain provisions that preclude public expenditures for the benefit of religiously affiliated organizations.
- Eleven states have general non-Establishment Clauses that largely echo the Establishment Clause of the U.S. Constitution.[4]
- Twenty-seven states have "no preference" provisions that probably would be interpreted as being less stringent than the First Amendment.[5]
- Twenty-nine states have provisions that explicitly prohibit state funding for private and/or parochial schools.
- Ten states specify the kinds of aid that can or cannot be given to religious organizations, distinguishing between direct and indirect forms of aid. These provisions typically disapprove of direct spending on religious organizations but allow indirect aid, such as vouchers.

Finally, a handful of states ignore the church/state relationship altogether.[6]

In other words, the vast majority of states has constitutionally codified their values regarding the appropriate intersection of government and religion but have done so in markedly divergent ways.[7] Church/state interaction is heavily regulated at the state constitutional level, but that regulation varies in ways that fit with or correspond to the particular views and values of individual states. Hence, "some states adhere to a church-state policy of strict separation, others adhere to a position of neutrality, and still others show favoritism toward religion."[8]

THE ESTABLISHMENT CLAUSE AND THE TRUMPING OF FEDERALISM

The rich tapestry of church/state law embodied in the texts of state constitutions has gone virtually unrealized in practice. Instead, state-based

constitutional values have been trumped by a pre-emptive and uniform reliance upon the Establishment Clause of the U.S. Constitution. That plank of the federal constitution had, until the middle of the twentieth century, been largely dormant, receiving little attention from litigants or courts. This period of dormancy ended with the U.S. Supreme Court's 1947 decision in *Everson v. Board of Education*.[9] Since then, the Establishment Clause has governed church/state interaction, not only on the federal level, but at the lower levels of government as well.

The First Amendment by its terms included only the federal government. It was Congress alone that was warned off laws respecting religion. Given this, how has the Establishment Clause become the last word on all church/state interaction across all levels of government? The answer lies in the process of incorporation, a doctrinal tool by which the Supreme Court has applied most of the rights of the Bill of Rights to states and localities via the Fourteenth Amendment and the "due process" and "privileges and immunities" it affords all citizens.

By 1947, the Court already had held a number of First Amendment rights to be incorporated through the Fourteenth Amendment to all governmental entities. Its incorporation of the Establishment Clause in *Everson* was another step in that direction, assuring that the Court's interpretations of that provision would likewise bind the actions of lower levels of government as well as Congress. *Everson* ushered in the modern era of church/state jurisprudence, in which the Court has consistently and actively regulated relations between religious actors and governmental actors from the local to the national level.

Consequently, the constitutional treatment of church/state relations has been identical for all governmental entities. The Supreme Court's interpretations of the Establishment Clause have been relied upon not just by federal judges; state courts have been complicit in yielding the delineation of church/state parameters to Supreme Court precedents and federal court interpretations of those precedent. When faced with church/state disputes, state courts overwhelmingly have fallen back on Supreme Court interpretations of the Establishment Clause rather than carving out an independent religion policy based upon their respective state constitutions. This uniform acceptance of the federal Establishment Clause's applicability to the states has effectively forestalled any reliance upon state constitutions and their textual treatment of religion. Thus has the potential for distinctive state constitutional treatment of religion that exists on paper failed to materialize in fact.

REVISITING THE FRAMING OF THE ESTABLISHMENT CLAUSE: JURISDICTIONAL OR SUBSTANTIVE?

The federalism movement in the context of church/state doctrine is grounded in a strong intellectual challenge to incorporation in light of the text and historical roots of the Establishment Clause. That challenge consists of a twofold attack on the Court's incorporation of the Establishment Clause in *Everson*. The first argument focuses on the original intent underlying the drafting of the Establishment Clause, the second on the questionable wisdom of incorporation in light of that original intent.

There are two competing views of the overriding objectives behind the drafting of the Establishment Clause. One is easily stated, since it has been the dominant principle upon which church/state doctrine has been founded for the past sixty years. It holds that the Establishment Clause reflected a basic commitment to the substantive value of disestablishment. This *substantive* view asserts that the Establishment Clause was meant to shape and govern the very nature and make-up of the relationship between government and religious institutions. It was adopted in *Everson* in 1947 and has been steadfastly adhered to ever since. Consequently, the long line of Establishment Clause cases since *Everson* has revolved around whether particular points of contact or interaction between government and religion are permissible under the First Amendment.

The federalism movement is grounded in an alternative understanding, one that contends that the substantive view is at best woefully incomplete, and at worst patently incorrect. Reflected in the pronouncements of Justice Thomas and advanced by a number of scholars, this *jurisdictional* view holds that the Establishment Clause was less about substantive values than it was about setting parameters for the jurisdictional authority over church/state matters. Justice Thomas, in his concurring opinion in *Newdow*, invoked this jurisdictional interpretation as he summarized the historical objectives of the framers of the Establishment Clause:

> The text and history of the Establishment Clause strongly suggest that it is a federalism provision intended to prevent Congress from interfering with state establishments . . . it protects state establishments from federal interference but does not protect any individual right . . . (*Newdow,* 542 U.S. 1 [2004])

Thomas was relying upon an extensive body of scholarship that has been amassed regarding the intent underlying the Establishment Clause. Historical analyses provide substantial support for the claim that it was in large

part, if not predominantly, a provision concerned with federalism.[10] That is, its aim was to maintain the regulation of church/state affairs as a preserve of the states rather than of the centralized government. This historical argument views the Establishment Clause at its core as a procedural and jurisdictional provision more than a substantive constitutional principle. In contrast to the contemporary substantive understanding of the Establishment Clause, the thrust of the clause was not to separate things religious from those governmental. It imposed no particular constitutional theory of church/state relations on the country, nor did it reflect any value or judgment one way or the other on government/religion interaction.

Rather, the Establishment Clause was "agnostic" on the issue of religious establishment in keeping with the absence of broader consensus across late eighteenth-century America on the overarching subject of church/state separation. The Establishment Clause confronted that lack of consensus by striking the only workable compromise; it procedurally removed the federal government from legislating or regulating the entire affair. Congress was without authority either to disestablish or establish. Instead, the clause left the "unfettered choice between establishment and disestablishment . . . to the states."[11] This "antidisestablishmentarian principle" was meant to prevent "Congress from abolishing state laws that were constitutionally deemed, or judicially deemed, to be religious establishments . . . [and to prevent] Congress from deciding for the nation what state laws excessively favor or disfavor any religion."[12]

Under this jurisdictional scheme, each state reserved the right to settle on whatever forms of religious establishment, if any, that it preferred.[13] By prohibiting Congress from interfering with local religion-related laws, the First Amendment ensured "what the Federalists had said was already implicit in the Constitution: that '[t]here is not a shadow of right in the general government to intermeddle with religion.'"[14]

This interpretation rings true in light of circumstances existing in the states at the time of the framing. State practices regarding religion were widespread and varied, with assorted degrees of toleration and religious establishment.[15] In stark contrast to these wide-ranging state policies, no federal policy on religion existed at all. Understanding the Establishment Clause as a federalism provision coincided with the view of the country as comprised of relatively autonomous states.[16] It made sense that such autonomy would extend to religion policy, especially since it was virtually absent on a nationwide scale.

The jurisdictional reading of the Establishment Clause also meshes with the understanding of the Bill of Rights as a whole, the overall purpose of which was to serve the dual goals of protecting personal rights *and* restrict-

ing federal power.[17] As Daniel Dreisbach asserts in his historical study of Jefferson's "wall of separation" metaphor, the enactment of the Bill of Rights served two objectives. One was to ensure that the federal government would not encroach upon the civil religious liberties of individuals, the second to protect states against the federal government's possible usurpation of states' jurisdiction over civil and religious liberties.[18]

Dreisbach's analysis suggests that Jefferson's "wall of separation" metaphor has miscast the First Amendment as primarily about church-state relations instead of church-federal relations.[19] The overall thrust of the Bill of Rights was to harness and constrain the power of the federal government. Added to the Constitution at the behest of anti-federalists, it limited the power and reach of the central government, not only in its application against individuals but also against states. While various amendments undeniably carved out substantive rights for protection, the Bill of Rights was a blend of substantive and structural, with the structural aimed at preserving states rights from a potentially domineering federal government.[20]

This duality was exemplified in the religion clauses. On one hand, the Free Exercise Clause safeguarded the individual right to religious freedom; on the other hand, the Establishment Clause restricted federal power to interfere with or subvert state action regarding that right.[21] From this vantage point, the two religion clauses do not exist in tension with each other; rather they fit together logically and coherently. Thus does the jurisdictional understanding of the Establishment Clause fit neatly with the specific text of the First Amendment and with the overarching theory of the Bill of Rights as a whole.[22]

In the end, the jurisdictional interpretation of the Establishment Clause is premised on principles of limited government and federalism. Congress was limited to its enumerated powers, which did not include religion policy. As such, it lacked authority over the subject of religion, which consequently was reserved as a matter of state and local policy.[23] From this perspective, the top-down, uniform church/state jurisprudence of the past sixty years is a historical aberration. At the very least, the Establishment Clause has a significant federalism dimension or component aimed at protecting states from federal meddling in the realm of religion.[24]

The original intent behind the Establishment Clause does not end the current debate over the authority of states to develop distinctive religion policies apart from federal constitutional law. If the post–Civil War Fourteenth Amendment was enacted with a specific intent to apply principles of separation to the states, that would override the jurisdictional intent underlying the Establishment Clause. One must then evaluate the propriety of the *Everson* Court's decision to incorporate the Establishment Clause.

WHY IT MATTERS: THE ILLOGIC OF ESTABLISHMENT CLAUSE INCORPORATION

The thrust of incorporation was to extend federal policies over states. To the extent the original clause was jurisdictional in part or in whole, it was intended to insulate states (and by extension existing state religion policies) from an overly intrusive federal government. And if the jurisdictional objective was to safeguard states' control from federal pre-eminence, that seemingly would render the Establishment Clause more resistant to or immune from incorporation. With respect to religion, incorporation would push uniform, nationwide disestablishment principles upon states in a manner directly contrary to the underlying jurisdictional nature of the Establishment Clause.

Understanding the Establishment Clause as a reflection of federalism raises the burden of proof for those arguing for full-scale incorporation via the Fourteenth Amendment. The Establishment Clause understood as a states rights provision renders it by its very nature resistant to incorporation, if not manifestly incorporation-proof, absent some compelling definitive evidence to the contrary. Hence incorporation presents a logical problem. How can the Court incorporate against the states a provision that the historical evidence indicates was designed at least in part to protect the states? If the Establishment Clause was intended to bar the federal government from interfering with state authority in the realm of religion, incorporation of that provision against the states turns it on its head. Incorporation achieves precisely the opposite result of that which was intended, eliminating state authority that the First Amendment was designed to ensure.[25]

Justice Thomas cited this contradiction in his *Newdow* opinion—"an incorporated Establishment Clause prohibits exactly what the Establishment Clause protected—state practices that pertain to 'an establishment of religion.'" Thus does it make "little sense to incorporate the Establishment Clause."[26] As Akhil Amar puts it, "to apply the [establishment] clause against a state government is precisely to eliminate its right to choose whether to establish a religion—a right explicitly confirmed by the Establishment Clause itself!"[27] It is impossible, therefore, for the Establishment Clause to be incorporated without "eviscerating its raison d'etre," namely its original federalist purpose.[28] The practical result of an incorporated Establishment Clause has been the reverse of what was intended. By nationalizing the legal jurisprudence regulating church/state relations, incorporation "[suspended] the federalism concerns implicit in the Religion Clauses."[29]

Opponents of incorporation also raise an ancillary objection; that the jurisdictional aims of the Establishment Clause differ from the usual justifi-

cation for incorporation. Incorporation by way of the Fourteenth Amendment typically is rooted in the protection of individuals from deprivations of liberty. Incorporation was designed to promote and preserve fundamental dimensions of liberty. Thus the incorporation of free speech and press, religious exercise, and other individual liberty interests.

But the Establishment Clause was not an expression of individual liberty, but rather "a structural limit upon federal power and a reservation of authority to the states."[30] It lacked the explicit language of the expressive rights clauses (speech, press, petition, assembly, religious exercise) of the First Amendment, which on their face are purely, simply, and undeniably about rights. The Establishment Clause instead invokes bland, ambiguous language about laws "respecting the establishment of religion."[31] Again, the Establishment Clause seen as a jurisdictional provision presents fundamental problems for incorporation. It does not involve a liberty akin to those core liberties in the Bill of Rights at which Fourteenth Amendment incorporation was aimed. It lacks the compelling basis for incorporation that exists in other instances.

THE COURT, INCORPORATION, AND *EVERSON*

Nevertheless, incorporation still would be appropriate if there were evidence that the Fourteenth Amendment was intended to encompass the Establishment Clause. The original historical foundation for the Establishment Clause is relevant to the question of incorporation, but it is not irrefutable. The framers of the Fourteenth Amendment could have intended specifically to include disestablishment within the meaning of "due process" or "privileges and immunities."[32] If so, the Fourteenth Amendment would supersede the earlier intent of the Establishment Clause. But incorporation of the Establishment Clause should have required explicit, convincing proof that the framers of the Fourteenth Amendment so intended.[33]

Unfortunately, Justice Black's *Everson* opinion failed to come close to meeting that burden. *Everson* achieved incorporation largely by judicial sleight of hand, thus assuring that it would be the object of scholarly disparagement, if not outright derision, for decades to come. The decision to incorporate was made in an offhanded fashion, as if it were a given. Justice Black made virtually no effort to discern a historical or textual rational for incorporation; he simply asserted that "The First Amendment, as made applicable to the states by the Fourteenth, commands that a state 'shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . '" As Harvard law professor Mary Ann Glendon noted, it was striking "how little intellectual effort the Court devoted . . . to the

enormously complex issues created by the effort to make the establishment language of the First Amendment binding on the states."[34]

Black and the other justices in *Everson* accepted without reflection or independent justification that the incorporation of other First Amendment rights warranted incorporation in this case.[35] They did little to anchor the incorporation decision in the text, framers' intent, or history of either the First or the Fourteenth Amendments. This cursory treatment of incorporation of the Establishment Clause to the states was "unreflective" and "deeply unsettling," demonstrating a "willful ahistoricity" on the part of the Court.[36]

Nor has much come to light since *Everson* that would suggest the Court might have been able to justify incorporation, had it been interested in doing so. On one hand, it seems likely that the framers of the Fourteenth Amendment had lost interest in preserving religious "establishments" in the states. Most states had voluntarily disestablished by the time of the passage of the Fourteenth Amendment. But this is not the same as concluding that the drafters of the amendment intended to go further and end all state involvement with religion. A majority of the states continued to practice governmental accommodation of religion in one form or another.[37] In sum, the historical evidence strongly supports the conclusion that "whatever else the Framers of the Fourteenth Amendment may have intended, they did not intend to incorporate the Establishment Clause."[38]

A RETURN TO FEDERALISM IN CHURCH/STATE JURISPRUDENCE: WHY NOW?

The movement to reshape church/state doctrine in the mold of federalism seems finally to have acquired sufficient momentum to actually impact the law. Critiques of a uniform, one-dimensional law centered on the federal Establishment Clause are by no means new. The incorporation of the Establishment Clause in *Everson* launched a steady drumbeat of criticism. In 1954, Joseph Snee published a thorough and highly critical historical analysis of *Everson*.[39] Since then, attacks have surfaced intermittently—questioning the historical basis for the decision to incorporate, criticizing the logic of that decision, and generally panning the overall incoherency of a top-down church/state jurisprudence. The weight of the commentary clearly has been on the side of those who viewed incorporation as a mistake; yet the frequent challenges gained little traction in actually influencing or altering church/state constitutional doctrine.

Given the persuasiveness of these arguments, it is striking how universally unsuccessful and immaterial to actual constitutional practice they proved to

be. The criticisms of incorporation, coming in fits and spurts, never quite disappeared for good, nor did they ever quite find a friendly reception among judges who might actually work to make a change in the law.

So what is behind the most recent push for a melding of federalism and faith? And why is it resonating after decades of falling upon deaf ears? One reason is simply the weight and breadth of the scholarly critiques of the incorporation of the Establishment Clause. A growing number of critics of Establishment Clause jurisprudence are offering increasingly sophisticated and rigorous arguments attacking the basic unitary premise upon which the past sixty years of church/state law has rested.[40] These are not merely accommodationists seeking justification for a more religion-friendly constitution. Rather, they include highly reputable constitutional scholars, some of whom are neutral or even skeptics on the broader question of church/state interaction.

Moreover, it certainly has bolstered the critics of Establishment Clause incorporation to find a sympathetic ear on the Court itself. Justice Thomas has repeatedly criticized *Everson* and called for a church/state jurisprudence that would allow for differences at the state level. Thomas's opinions seem to have energized those who seek to soften or scale back the role of the Establishment Clause in state-level issues.

Likewise, recent changes in the personnel on the Court raise the possibility that a federalism-based shift in church/state jurisprudence is no longer merely an abstract proposition. Unless the Supreme Court is amenable to revisiting its sixty-year history of jurisprudence under a fully incorporated Establishment Clause, the intellectual arguments, no matter how strong, are unlikely to carry much weight. Although counting Supreme Court votes is always a tenuous exercise, the Court may now be inhabited by a critical mass (i.e., a majority) of justices open to more fundamental change in church/state jurisprudence. The Court has been closely divided in recent years on church/state issues, with most of the important cases being decided by a vote of either 5–4 (*Van Orden v. Perry* [2005]; *McCreary County v. ACLU* [2005]; *Zelman v. Simmons-Harris* [2002]) or 6–3 (*Good News Club v. Milford Central School* [2001]; *Santa Fe Independent School Dist. v. Doe* [2000]; *Mitchell v. Helms* [2000]).[41]

The cleavages on the Court were especially apparent in the *Mitchell v. Helms* case, when a plurality of four justices stated their willingness to abandon the (in)famous and much maligned *Lemon* test in favor of a standard of strict neutrality. That collective stance was readily understood to be more accepting of government/religious interaction than *Lemon* would allow. Yet a fifth vote in favor of that looser standard proved elusive, at least until now. The substitution of Justice Sam Alito for the ever-cautious, restrained,

and noncommittal O'Connor could place a majority of justices in the accommodationist camp, though only time will tell. Whether that translates into anything more than tinkering with current church/state doctrine likewise will have to await the arrival of more cases on the Court's docket.

Meanwhile, others have favored a federalism-based approach to church/state relations for quite different reasons and in pursuit of quite different ends. Those urging the need to look to state constitutions to resolve church/state conflicts are not solely on the right. Those ultimately seeking a more separationist church/state jurisprudence have witnessed a Supreme Court that in recent decades has grown increasingly sympathetic to the accommodation of religious activities by government. From their vantage point, state constitutions may be the last hope for barring the government doors (and coffers) from intrusion by religious enterprises and interlopers.

In particular, the much-awaited voucher decision in *Zelman v. Harris* (2004) was thoroughly disheartening to strict separationists. The Court's imprimatur on vouchers and other indirect forms of governmental support for religious institutions was the culmination of a series of decisions that gradually but inexorably loosened the constraints on church/state interaction. *Zelman* confirmed the general unreliability of the Supreme Court on matters of church/state separation, elevating the importance of state constitutions as the final barrier against more extensive involvement by government in the matters of the church, and vice versa. In the wake of *Zelman*, strict separationists embraced state mini-Blaine amendments as a constitutional firewall against greater church/state interaction.

Clearly various proponents of distinctive state religion policies under state constitutions have radically divergent views of the church/state law that might arise from the application of state constitutional law. But the fact that conservatives and liberals alike are willing to look to state provisions as determinative has paved the way for what was once purely theoretical to now be practicably possible.

FAITH-BASED SOCIAL SERVICE POLICY AND FEDERALISM-BASED LAW

Finally, and perhaps most significantly, a natural vehicle has arrived which could transport church/state law into a new federalism-based phase. That vehicle is the policy of government-subsidized, faith-based social service delivery that has flourished in the past half-dozen years or so. The faith-based initiative has elevated questions about the intent of the Establishment Clause and its incorporation from the merely academic realm into

that of actual constitutional practice, with potentially far reaching implications.

As a signature piece of the incoming Bush administration's domestic agenda in 2001, the faith-based initiative was conceived of primarily as a federal policy. When faith-based legislative proposals in Congress sputtered and died, the Bush administration moved to an administrative strategy to implement faith-based social service policies through the federal bureaucracy. But, while the policy was initially implemented on the federal level, that is no longer the case. It has by now spread across state and local governments throughout the country; today the faith-based initiative is driving "an expansion of church-state collaborations at the state and local level that deviate from a unitary 'one-size fits all' model."[42] As such, the policy might well necessitate a reconstituted church/state jurisprudence that mirrors the diversity of the policy itself.

In the past five years, faith-based social service policy has mushroomed into a pervasive, far-reaching, multifaceted endeavor. It now encompasses virtually every imaginable social service that government provides and has been implemented in richly diverse and widely varied forms and settings. Government-based social services that are delivered via religiously identified organizations range from correctional and prison programs to drug and substance abuse treatments, from adoption and family services to job training and mentoring for the difficult-to-employ. They include marriage support counseling and after-school mentoring, housing and short-term shelter assistance, emergency food and soup kitchens, and virtually every other form of aid imaginable.

In short, the stamp of federalism is imprinted all over this policy. Though the Bush administration was the driving force impelling the faith-based initiative forward, the mushrooming policy now functions at all levels of government. The degree to which faith-based policy has seeped down to, and been absorbed by, states and localities is remarkable. Consider the following benchmarks of federalism in this context:[43]

- *State legislation*. Between 2003 and 2005, twenty-seven states passed legislation that impacted in some way partnerships between state governments and faith-based organizations (FBOs). Of these twenty-seven, only one state adopted a more restrictive approach to church/state interaction. In the other twenty-six, the legislation minimally acknowledged, and usually enhanced, the delivery of social services by FBOs.[44]
- *State administrative action*. Similarly, twenty-eight states took significant administrative action on faith-based matters between 2003 and 2005. These included, among other things, (1) establishing faith-based offices, councils, or liaisons, (2) hosting summits, expos, or other events with a faith-based focus, and (3) an-

nouncing coordinated efforts with faith-based actors to attack certain problems (the aftermath of Hurricane Katrina, for example).[45]

- *Pre-existing faith-based activity*. The above figures may actually understate the degree of the faith-based activity at the state level. A number of states took no new action in the past few years, legislatively or administratively, because "longstanding relationships between state agencies and faith-based organizations and service providers" already existed.[46]
- *State liaisons*. By 2005, at least 32 states had a designated individual or office that bore the official responsibility of serving as liaison to the faith community in that particular state.[47] Many mid-sized and large cities also created similar offices or liaisons at the municipal level to better connect with the faith-based sector of those communities.

These statistics are only the tip of the federalism iceberg that is the faith-based policy. As of December 2006, thirty-three governors had formal strategies for expanding the involvement of FBOs across the range of social services.[48] Eleven states in the past several years provided capacity-building or start-up grants to assist FBOs as novice service providers.[49] An equal number have changed their procedures for soliciting grant proposals to make them friendlier to FBOs. A number of states have modified their contract processes to encourage smaller, neighborhood-oriented service providers (including FBOs) to participate. Many states have encouraged contractors to sub-contract with religiously affiliated providers as well.

These figures capture a central emphasis of the faith-based initiative: the devolution of church/state policy down to lower levels of government. Faith-based policy increasingly bears the hallmarks of federalism, reflecting in administration and substance the diversity of the range of jurisdictions where it can be found. This is so significant because the faith-based initiative may inevitably drive a jurisprudence that acknowledges and allows for the vast differences in implementation that exist in the policy across, and even within, the states.

Both the increase in church/state interaction in the wake of faith-based initiatives and the diverse forms that it has taken heighten the constitutional stakes. I have suggested elsewhere that government/religious sector social service collaboration is likely to be the decisive battlefield upon which the legal and constitutional battles over church/state relations will be waged in the coming years.[50] The faith-based initiative already has triggered extensive litigation over various aspects of government/religious sector partnerships.[51] Most of those lawsuits involve state-administered programs rather than the federal faith-based initiative.

Faith-based social service policy is sure to continue to generate substantial legal conflict over the acceptable interplay between religion and govern-

ment. As the legal disputes over faith-based programs raise questions over an increasingly broad range of policy particulars, the search for a consistent, comprehensible, and lucid church/state doctrine will be more daunting and formidable than ever. It seems a misplaced hope, in light of past problems, that a single, uniform top-down standard would be minimally sufficient to answer the array of legal conflicts sure to arise. If history is any guide, the constitutional demands of the faith-based policy will overwhelm federal courts opting to rely solely upon the First Amendment of the U.S. Constitution.

The nature and breadth of faith-based policy and its implementation point toward a federalist constitutional regulatory approach. The more faith-based policy embodies the elements of federalism in its enactment and administration, the more compelling is the case for legal and constitutional regulations that parallel that federalism. If faith-based policy is a thoroughly federalized policy, so too perhaps should be the mode of regulating the policy constitutionally. As such, the ever-expanding arena of faith-based social service delivery provides a natural policy environment within which to carry forward the evolution of church/state law to reflect a federally diverse constitutional regime.

THE POLICY APPEAL OF A DECENTRALIZING CHURCH/STATE DOCTRINE

The status quo might be acceptable if the doctrinal efforts in the church/state area were even modestly satisfactory. But the utter confusion and incoherency that has characterized the Supreme Court's Establishment Clause jurisprudence lend credence to the federalism-based critiques. What other doctrine area has been on the receiving end of more criticism and second-guessing than Establishment Clause jurisprudence? The Court's approach—largely detached from the governing text and its underlying aims—has yielded an undeniable mess. Nor is it likely to get better. The burgeoning church/state conflict that has been stirred up by the faith-based initiative is sure to prove even more challenging to the Court.

The Court's futile striving after a uniform stance on church/state issues has had deleterious consequences, both on the national psyche and on the caliber of constitutional jurisprudence. The quest for a single doctrinal standard in the absence of broader consensus as to the relationship between religion and politics has at various times left those on all sides feeling aggrieved and dissatisfied. The separationist line characterizing the 1960s and 1970s produced a sense that the very religiosity of a highly religious country was under attack from the law of the Constitution. Policies shielding gov-

ernment from the undue influence of religion felt like outright discrimination against religious people, a frustration rather than an embodiment of the popular will.[52] That sentiment has persisted even as the Court has grown more accommodationist. Meanwhile the Court's accommodationist turn has left strict separationists feeling threatened by a seeming loss of governmental neutrality toward things religious. Hence widespread dissatisfaction with church/state jurisprudence exists across the ideological spectrum.

Herein lies one of the main policy appeals of federalism, namely to accommodate "as many religious perspectives as possible without offending the rights of the majority."[53] While some commentators continue to promote a commitment to legal uniformity,[54] such uniformity is misplaced in the realm of church and state. The differing views on religion and politics may mean that anything close to consensus is beyond reach. Positions are too polarized, and the respective positions held with too much fervor, to coalesce or cohere around a single standard or approach.[55]

The perpetual discontent with church-state law suggests the need to return to core principles of constitutionalism grounded in constitutional rules, structures, and arrangements that are generally reflective of the will and character of the people being governed. Federalism makes room for differences across states and regions that persist even in contemporary America. States and regions of the country vary both in their religiosity and in the citizenry's comfort level with religion as a public influence. In some areas, there exists a deep desire to tap into heavily religious communities for the public good. In other areas, there may be great reluctance to do so. Those differences in religious identity and values support giving states greater latitude to determine for themselves strategies for navigating church/state strictures. Principled constitutionalism favors a doctrinal approach that respects and reflects those divergent values of the citizenry.

The deeply ingrained preference for constitutional uniformity in this context is misplaced. A one-size-suits-all regulatory approach to interaction between religious and governmental entities is an ill fit for the reality of America's highly diverse and multi-faceted religiosity. Constitutionalism properly understood as self-expression and self-rule demands a church/state jurisprudence that is attuned to the rich variations in religious identity and form in America.

Decentralized decision making on church/state issues also acknowledges that lower level governments are better equipped to discern and respond to the citizenry and to adapt their laws to conform to local conditions and preferences.[56] As decision-making moves closer to the people, it should increase the numbers of people who are satisfied with policy outcomes.[57] Put

another way, the differences in religious character that defined America at the outset (and which compelled inclusion of the original federalist-motivated Establishment Clause) continue, albeit to a lesser extent. Those religious differences between people, states, and regions in turn warrant different treatment legally.

Here the philosophical advantages of federalism—as more reflective of where Americans are across the spectrum of church/state positions—converge with practical considerations regarding the clarity (or lack thereof) in the constitutional law. The appeal of a uniform nation-wide doctrine on church/state relations falls away in view of the Court's inability to arrive at a doctrine that is even minimally consistent or comprehensible.[58] It has struggled mightily to divine a reasonably coherent or logical Establishment Clause jurisprudence. People's trust in the law has been undermined as their ability to discern or understand it has been thoroughly undercut by the hair-splitting, logic defying work of the Court.[59] These failures are sufficient in themselves to warrant a recalibration of the modes of resolving church/state issues back toward the original meaning of the Constitution. The woes of church/state jurisprudence will not be cured by any specific theory or understanding of church/state policy. Rather the answer lies in "the same concept of federalism advocated by the Constitution's framers."[60]

Other textbook objectives underlying the federalist arrangement likewise apply. One such aim is to free up states and localities to serve as *laboratories of policy innovation and experimentation*. Certainly this applies in the church/state context and the faith-based initiative. On a policy level, states ought to be free to engage (or not to engage) the religious nonprofit sector and local churches in ways that are deemed most appropriate and effective for those particular states and communities. For example, in some rural areas the only providers of a particular service are religiously affiliated; that reality might compel some loosening of legal constraints. Heavily churched or deeply religious communities might integrate religious organizations in providing public services differently and to a greater extent than might other communities.

In the current debate over faith-based initiatives, many of the claims of peril to religious liberty on the one hand, and the assurances proffered on the other, are educated guesses at best and hyperbolic speculation at worst. On one hand, faith-based service providers' claims of greater effectiveness and efficiency are largely untested. Conversely, warnings of the possible dangers of excessive church/state cooperation are similarly speculative. Federalism would facilitate the testing of both sets of claims in the realm of practical politics and actual programs rather than in the abstract or at the

hypothetical level. It makes sense to test the policy effectiveness of various faith-based practices at lower levels, and to do so with an eye on the impact on religious freedoms as well.

Finally, a federalist approach would have the added benefit of *isolating legal questions and conflicts*, unlike what has occurred with a uniform body of church/state law handed down from above.[61] Resolving legal challenges at the lower level would alleviate the pressure for a uniform standard that would answer all questions and conflicts. State legislatures and courts would not have to "produce decisions for the entire country and instead [could] concentrate their attention on a much more precise policy goal."[62] They would not face the daunting task of setting definitive constitutional parameters for all questions arising related to the faith-based initiative. The reach of a particular decision would extend only to that state. Thus would judges and legislators be better able to balance competing considerations in ways that best fit their residents.

A NEW CHURCH/STATE DYNAMIC: MODIFIED INCORPORATION

As previously noted, the scholarly objections to incorporation of the Establishment Clause have had little discernible impact on the constitutional practice surrounding church/state relations. One likely reason is the fear that softening the doctrine of incorporation would radically alter church/state relations in practice and threaten basic religious liberties. But is that fear justified? Would shrinking incorporation of the Establishment Clause dramatically change the nature of the relationship between religion and government in America? The answers to these questions may dictate whether calls to decentralize church/state boundaries are heeded amid the flurry of legal challenges stemming from faith-based public policy. It is worth attempting, therefore, to sketch what the future might look like under a devolved church/state law.

Though the crystal ball is cloudy, it is fairly safe to conclude that modifying the incorporation doctrine probably would not cause the full scale erosion of church/state separation that some fear and others desire. Religious liberty would continue to be preserved apart from the Establishment Clause—through state constitutions, the Free Exercise Clause, and the reality of religious pluralism in America.[63] It would unlikely trigger an era of widespread melding of religion and governance. Nevertheless, questions remain, the answers to which would shape the future of a de-incorporated Establishment Clause.

First, it is important to note that the freedom of religious exercise would continue to apply against all levels of government. Unlike the Establishment Clause, free exercise is a fundamental individual liberty within the "privileges and immunities" of the Fourteenth Amendment. It therefore would remain fully incorporated. While states might be freer under the pertinent state constitutional provision to seek more active engagement of the religious community or religious actors, protection of religious liberties would continue through the ongoing application of the Free Exercise Clause.[64] Free exercise considerations would have a significant impact on the details of church-state interactions, either prohibiting such efforts or at least ensuring that structural precautions were in place to protect religious liberty.[65]

This would likely result in what are now Establishment Clause cases being reframed as challenges to religious liberty under the free exercise provision. Ultimately the Court would be better positioned to "properly limit its rulings to issues which directly impact free exercise rights but do not diminish the state's authority to resolve the complex situational problems regarding church/state relations."[66]

Second, the degree of change that might be wrought by altering the incorporation doctrine would depend on how it was achieved. The boldest approach would be to overturn *Everson*, freeing states from any substantive constraints under from the Establishment Clause. This alternative would simply undo incorporation. But while various legal commentators have argued for this,[67] no member of the Supreme Court has done so. It is highly unlikely that the Court would take such a dramatic step.

Rather, the Court would be more inclined to modify or loosen incorporation, adopting a more deferential posture when state programs involving religion are at issue, thus allowing states latitude to carve out distinct religion policies of their own.[68] This more modest approach would allow for a two-track constitutional analysis of church/state issues. Review of federal action would continue under current doctrine. Meanwhile federal courts would continue to examine church/state issues stemming from state laws, policies, and programs pursuant to a different, and presumably looser, standard in doing so. Invoking this approach, Justice Thomas has avoided calling for an abandonment of incorporation, but rather contemplates differing Establishment Clause standards for the states.[69] State action should, therefore, be evaluated "on different terms than similar action by the Federal Government" with states at freedom "to experiment with involvement [in religion] . . . " States can "pass laws that include or touch on religious matters . . . " so long as they do not impinge upon free exercise rights or any other individual religious liberty interest.[70] Federal courts would remain the

primary arbiters of church/state disputes but would be more intentional in balancing the demands of the First Amendment with the "federalism prerogatives of States."[71]

Under this scenario, the applicable law would vary depending on whether the program under consideration was federal or state in its origin and administration. Federal programs presumably would be decided by current Establishment Clause doctrine; state programs would not necessarily be free of legal regulation. Rather, the muting of the Establishment Clause in causes arising out of state-level programs would be accompanied by a corresponding turn to state constitutions to fill the legal void. Instead of ignoring their own constitutions in favor of reliance upon the federal Establishment Clause and federal court interpretations, state courts would look to their state's constitutional language and their own independent analysis and interpretation of that language.

Thus would religious liberty and non-establishment clauses contained in state constitutions "take on a life of their own instead of merely mimicking federal standards . . . "[72] State constitutions would matter again, as would the specific regional and state characters and cultures from which they sprang. States would adhere to restrictions, or act in the absence of them, in light of their specific values, historical development, and judicial character.

Modifying incorporation would not mean the deregulation of church-state relations. It almost surely would not open the flood gates for religious accommodation. Indeed, it might actually result in tighter restrictions on religious sector/governmental interaction. As courts turn to state constitutions to determine the necessary safeguards respecting religious accommodation, the shift would cut both in accommodationist and separationist directions, depending on the substance of the applicable state constitutional measure. It would produce stricter separation or laxer constraints, depending on the particular state constitutional approach. Many states would proscribe much of what is now proscribed by the incorporated Establishment Clause, and more.[73] Many state constitutions would present significant obstacles to the interaction by states with religion and religious actors. Those state constitutions often exceed the barriers imposed by the U.S. Constitution.[74] Given the number of states that explicitly address the funding of religious organizations, de-incorporation could result in an increase in the sum total of separation from the current state of the law.[75]

Reliance upon independent state constitutional analysis would be much more likely to yield a relatively coherent, more comprehensible body of constitutional jurisprudence in matters of church and state. State constitutional provisions are distinct in form and substance from the U.S. Constitution, addressing religion in far greater detail than their federal counterpart.

The ambiguity of the Establishment Clause would be replaced by provisions that address the legality of religion relative to government in detailed, explicit, and precise fashion. The application of state constitutions would be more straightforward, free of the obscure haze of federal law that clouds the realm of church/state relations.

State constitutions also are more easily and frequently changed. On the federal level, we are locked into an ambiguous Establishment Clause, immune to popular change, of which the courts have made a complete muddle. In contrast, the greater ease with which state constitutions can be amended means the legal relationship between religion and government can be navigated in ways which reflect the contemporary sentiments of the state and communities within the state. The role of religion in the public sphere would be returned to the arena of democratic processes rather than judicial mandate.

STATE CONSTITUTIONS: A "ONE WAY RATCHET" OR A DOUBLE-EDGED SWORD?

Both separationists and accommodationists who support a greater role for state constitutions would implement that change in ways that would push church/state jurisprudence more consistently in their respective directions. Those desiring a stricter separation between church and state do so via the "one-way ratchet" argument. They assert that the benefits of a loosened Establishment Clause would work only in a separationist direction. That is, state constitutions could be invoked only to strengthen disestablishment and individual religious liberties, and not to ease restrictions on government/religious interaction.

The First Amendment as incorporated through the Fourteenth has traditionally been understood as a floor or minimum level of protection against religious interaction with government at the state level. Under this approach, states are at liberty to impose regulations on church/state relations that are stricter than those necessitated by the Establishment Clause. But states cannot go in the opposite direction and allow greater engagement between government and religion than that permitted by the Establishment Clause. This view treats the U.S. Constitution as a threshold, creating a minimal set of limitations on the degree of church-state interaction.[76] With an increasingly accommodationist Supreme Court, separationists have fallen back on this one-way ratchet interpretation in hopes of gaining the benefits of more restrictive state constitutions without enduring the opposite effect in those instances where state constitutions are more permissive.[77]

Those on the other side contend that states should be free to diverge

from federal interpretations of the Establishment Clause in either direction. Modified incorporation would subordinate the First Amendment in all cases where the states would apply their own religion clauses to states laws, policies, or programs. States with particularized language barring public revenues or assistance to religious institutions would rely on that language to bar a proposal to directly aid a parochial school or other FBO. Conversely, those states with more accommodating language or without any prohibitions on church/state relations altogether could allow greater interaction. The freedom to diverge from the Supreme Court's interpretation of the Establishment Clause would work in both ways, depending on the language of state constitutions.

CHALLENGES TO THE ENFORCEABILITY OF BLAINE AMENDMENTS

Meanwhile, on the accommodationist side, advocates stand ready to challenge the widespread use of state constitutional amendments as a barrier to church/state interaction. Decentralized church/state law will undoubtedly elevate state "mini-Blaine" amendments to a position of critical importance. The extent to which government actors pursue partnerships with religious social service providers will depend in no small part on the language and enforceability of the applicable state constitutional provisions. If taken literally, the constitutional amendments in many states would almost certainly preclude public money from going to private religious institutions, whether for education or social services. While the language and text vary widely from state to state, they typically are much stricter and more precise than the First Amendment in banning the dissemination of state funds to religious organizations or for religious purposes. If upheld, these amendments would likely stop the voucher movement (or any state-funded faith-based social service program for that matter) in its tracks.

The legality of these state mini-Blaine amendments may not be as clear as their language might otherwise seem to indicate. Proponents of vouchers and collaboration between government and the religious sector in other contexts have launched legal attacks based on allegations that state constitutions were amended primarily as a product of deep seated anti-Catholic animus that was commonplace in the late 1800s and early 1900s. As such, they should be unenforceable. A pro-voucher legal advocacy group has already brought lawsuits in a handful of states to test their constitutions, either to resolve them in a manner consistent with *Zelman* or to create sufficient conflicts in the law that the Supreme Court's intervention will be required. Challenges to the relevant state constitutional clauses were raised

in the *Locke v. Davey* case, as well as a Florida case in which that state's voucher program was overthrown.[78] In neither case did the court address or consider the legal force of the respective state constitutional provisions. Hence this remains an open question.

Nevertheless, faith-based proponents remain eager to litigate what they consider to be vulnerable provisions, notwithstanding the clarity of the language barring aid to sectarian groups. Given the wide degree of divergence in the language of state constitutional religion clauses and the history behind their enactment, it is impossible to generalize on the likely legal outcome of legal challenges to them. Of particular interest will be the extent to which the Supreme Court will consider the historical motives behind state funding limitations. It is possible, but by no means certain, that courts might find anti-Catholic impetus for the enactment of state mini-Blaine amendments to be a discriminatory and hence unconstitutional barrier to funding of religious organizations.[79] This could have a dramatic impact on church/state relations as a matter of state religion policy.

CONCLUSION

The Supreme Court's decision in *Locke v. Davey* (2004) provides a preview of what a decentralized church/state jurisprudence might look like. The Court in *Locke* considered a Washington state scholarship program, under the terms of which recipients were precluded from applying their scholarship funds to certain college majors relating to theology or religion. Davey was granted a scholarship but had it revoked when he opted for a pastoral studies major. The Supreme Court rejected Davey's free exercise claim against the state. In doing so, it noted that while it would have been permissible under the federal Establishment Clause to include Davey and theological majors in the scholarship program, the U.S. Constitution did not *require* that the state include such religious uses for the funds. The Court emphasized the autonomy and authority of the state to make that choice, relying upon the Washington state constitutional provision banning public aid for religious instruction. That provision gave the state latitude to decide whom to include or exclude from the program. Moreover, the Court found it significant that Washington had developed a coherent and discernible body of law in its own right on the subject of religion.[80] In short, *Locke v. Davey* was grounded in principles of federalism and the autonomy of states to shape their own distinctive religion policy. "*Locke*, sounding in federalism, is thus entirely about the scope of state discretion in the zone between the First Amendment's religion clauses: that is, religion-specific actions which those clauses permit but do not require."[81]

The result in *Locke* struck a middle ground. On one hand, the decision was separationist in result, but without giving explicit support to the "one way ratchet" view. Instead, the decision reinforced "the constitutional legitimacy of state-level norms concerning the relationship between religion and the state."[82] But the Court also gave no indication that Washington State's provision was somehow suspect, though explicit challenges were raised before the Court.

The Court has thus far kept its cards close to its vest. *Locke v. Davey* anticipates a judicial mindset that is deferential to the impact of a state constitution and the traditions under that constitution, even if they diverge from the U.S. Constitution and the Establishment Clause. As faith-based policy continues to mushroom at the state and local level, and as it generates litigation along the way, the Court will have ample opportunity to reshape its church/state jurisprudence in ways faithful to the federalist arrangement. In the end, this can only hold out promise for an improved and principled constitutional approach to navigating the problematic relationship between religion and politics across America.

NOTES

1. *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004).

2. *Wash. Const.* Art. 1 § 11.

3. *Locke v. Davey,* 540 U.S. 712 (2004).

4. Fritz Mechthild, "Religion in a Federal System: Diversity Versus Uniformity," 38 *Kan. L. Rev.*, 39–79, 43 (1989).

5. See Mechthild, 44.

6. See also Mark Ragan and David J. Wright, *The Policy Environment for Faith-Based Social Services in the United States: What has Changed Since 2002? Results of a 50-State Study*, The Roundtable on Religion and Social Welfare Policy (2005), Appendix A. This report is available online at http://www.religionandsocialpolicy.org/docs/policy/State_Scan_2005_report.pdf.

7. See Alan G. Tarr. "Church and State in the States," 64 *Washington Law Review* 73–110 (1989) at 95–100 for a more detailed accounting of states' treatment of religious establishment. A sampling of state constitutions reflects their diversity. For example, California bars using public money for "the support of any sectarian or denominational school." *Cal. Const.* Art. 9, § 8. Michigan bars "tuition vouchers" from going to "nonpublic schools" where religious instruction takes place. *Mich. Const.* Art. 8, § 2. Other states bar public funds going to "the institutions of any religious sect or denomination," which would seemingly include social service agencies. *N.H. Const.* Art. 83; *Oreg. Const.* Art. 1, §5. Some states disallow public funds for "any charitable or benevolent purposes" or for "any denominational or sectarian institution or association." *Colo. Const.* Art. 5, § 34; *Pa. Const.* Art. 3, § 29. The Indiana constitution flatly states that "no money shall be drawn

from the treasury for the benefit of any religious . . . institution." *Ind. Const.* Art. 1, § 6. Florida's law echoes the federal constitution in barring laws "respecting the establishment of religion . . . " *Fla. Const.* Art. 1, § 3.

8. See Mechthild, 55. Nor are state constitutions limited to the "establishment" side of the religion coin; many of them have specific provisions protecting religious liberties as well, often doing so with much greater detail and clarity than the First Amendment of the U.S. Constitution (Tarr, 77–78).

9. *Everson v. Board of Education*, 330 U.S. 1 (1947)

10. Space constraints allow only the briefest encapsulating of the case against Establishment Clause incorporation. For a more extensive explication of the basis for the criticisms, see generally James J. Knicely, "'First Principles' and the Mismanagement of the 'Wall of Separation': Too Late in the Day for a Cure?" 52 *Drake Law Review* 171, 174 (2004); Daniel L. Dreisbach, *Thomas Jefferson and the Wall of Separation Between Church and State* (2002); Akhil Reed Amar, "Some Notes on the Establishment Clause," 2 *Roger Williams University Law Review* 1–14 (1996); Steven D. Smith, *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom* (New York: Oxford University Press, 1995); William K. Lietzau. "Rediscovering the Establishment Clause: Federalism and the Rollback of Incorporation," 39 *DePaul Law Review* 1191–1234 (1990); Fritz Mechthild, "Religion in a Federal System: Diversity Versus Uniformity," 38 *Kansas Law Review* 39–79 (1989); Michael Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* (Washington, D.C.: American Enterprise Institute for Public Policy Research, 1978); Phillip B. Kurland, "The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court," 24 *Villanova Law Review* 3, 14 (1978); Mark DeWolf Howe, *The Garden and the Wilderness: Religion and Government in American Constitutional History* (Chicago: University of Chicago Press, 1965); Joseph Snee, "Religious Disestablishment and the Fourteenth Amendment," *University of Washington Law Quarterly* (1954).

11. See Amar, "Some Notes," 11–12. See also Lietzau at 1200; "[T]he issue was properly left to the state and local governments and that the federal government should therefore have no legislative authority in the area."

12. Jed Rubenfeld, "Did the Fourteenth Amendment Repeal the First?," 96 *Michigan Law Review* 2140–2145, 2145 (1998). Rubenfeld states that "[d]espite the Fourteenth Amendment, states must and may deal in all sorts of ways with religion, favoring some religious traditions or disfavoring them, so long as they neither establish nor prohibit free exercise" (Rubenfeld, 2145).

13. See Lietzau, 1200.

14. See Rubenfeld, at 2143, citing Madison.

15. Ira Lupu and Robert Tuttle, "Federalism and Faith," 56 *Emory Law Journal* 19–105, 27 (2006).

16. See Lupu and Tuttle, "Federalism and Faith," 28.

17. See Lietzau, 1199.

18. See Dreisbach, 61.

19. See Knicely, 198.

20. See generally Akhil Reed Amar. "The Bill of Rights as a Constitution," 100 *Yale Law Journal* 1131, 1202–1208 (1991).

21. See Lietzau, 1199.

22. See Knicely, 195. The question remains whether the Establishment Clause was exclusively a structural or procedural provision aimed at protecting states' prerogatives. Some have acknowledged that thrust while contending that the Establishment Clause also reflected a substantive judgment in opposition to church/state interaction (See Steven K. Green, "Reconciling the Free Exercise and Establishment Clauses: Federalism and the Establishment Clause: A Reassessment." 38 *Creighton Law Review* 761 ([2005]). I intentionally avoid this question, both as beyond the reach of this limited essay and because it ought not to affect my analysis.

23. See Lupu and Tuttle, "Federalism and Faith," at 30, citing Smith.

24. See Lupu and Tuttle, "Federalism and Faith" 32.

25. Note, "Rethinking the Incorporation of the Establishment Clause: A Federalist View," 105 *Harvard Law Review* 1700, 1709 (1992).

26. See Note 1 for full citation. As Justice Stewart aptly put it in his dissent in *Abington Township v. Schempp* 374 U.S. 223 (1963), "it is not without irony that a constitutional provision evidently designed to leave the states free to go their own way should now have become a restriction upon their autonomy" (374 U.S. 223), Stewart, J. dissenting). For other instances of judicial statements on disincorporation, see Lietzau, 1215.

27. See Amar, "Some Notes," 3.

28. See Note, "Rethinking the Incorporation of the Establishment Clause," 1709. If the Establishment Clause both restricts federal power and specifically protects a popular prerogative in the states, then "it is logically impossible to turn such a protection on its head and make it a prohibition" (Porth, William C., and Robert P. George, "Trimming the Ivy: A Bicentennial Re-examination of the Establishment Clause," 90 *West Virginia Law Review* 109, 136–139, 139 1987).

29. See Elliott.

30. See Note, "Rethinking," 1710.

31. See Amar, "Some Notes," 11–12.

32. See Amar "Some Notes," 12.

33. See Rubenfeld, 2143.

34. Mary Ann Glendon, Comment in *Antonin Scalia, A Matter of Interpretation*, Amy Gutmann, ed. (1997).

35. *Everson* followed on the heels of the incorporation of other key First Amendment rights—speech rights in *Gitlow v. New York*, 268 U.S. 652 (1925), press in *Near v. Minnesota,* 283 U.S. 697 (1931), assembly in *DeJonge v. Oregon,* 299 U.S. 353 (1937), and religious exercise in *Cantwell v. Connecticut,* 310 U.S. 296 (1940).

36. Lupu and Tuttle, "Federalism and Faith," 39, 42.

37. Elliott.

38. *See* Knicely, 209–210, citations omitted. Amar, "The Bill Of Rights," at 1256. Amar cites extensive evidence from various members of Congress surrounding the passage of the Fourteenth Amendment that they understood the Bill of

Rights to represent "privileges and immunities of citizens" that could not be abridged by states. This would by implication seem to leave out of incorporation those provisions that were clearly not privileges held by citizens, but instead were meant to preserve certain distinct realms to the states free of the federal government, such as matters of establishment.

39. See generally, Snee (1954).

40. See Note 11 for examples of such criticisms.

41. *Van Orden v. Perry*, 545 U.S. 677 (2005); *McCreary County v. ACLU*, 545 U.S. 844 (2005); *Zelman v. Simmons-Harris* 536 U.S. 639 (2002); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001); *Santa Fe Independent School Dist. v. Doe*, 530 U.S. 290 (2000); *Mitchell v. Helms*, 530 U.S. 793 (2000).

42. See Green, 107.

43. Most of these figures are taken from Ragan and Wright's *The Policy Environment for Faith-Based Social Services in the United States: What has Changed Since 2002? Results of a 50-State Study* (2005). This study was conducted at the behest of The Roundtable on Religion and Social Welfare Policy.

44. See Ragan and Wright, 7.

45. Ibid., 9–10.

46. Ibid., 10.

47. Ibid., 11.

48. Claire Hughes and Anne Farris, *Feds Hope to Inspire States to Advance Faith-Based Efforts*, The Roundtable on Religion & Social Welfare Policy (December 2006).

49. See Ragan and Wright, 18.

50. David K. Ryden and Jeffrey Polet, *Sanctioning Religion? Politics, Law, and Faith-Based Public Services* (Boulder, CO: Lynne Rienner Publishers, 2005).

51. See Ryden and Polet, 181–82; see also The Roundtable on Religion & Social Welfare Policy at http://www.religionandsocialpolicy.org/legal/. The Roundtable, sponsored by Pew Charitable Trusts, is a clearinghouse of faith-based policy and has a resources page on legal developments which tracks the latest in lawsuits and litigation.

52. See Lietzau, 1225.

53. See Lietzau, 1226.

54. See Tarr, 109.

55. One scholar contends that this realization was behind the Framers' federalist approach to church/state issues in the first place. "The framers . . . realized that in an area where passionately held values varied so radically, only local government could effectively handle the delicate policy questions that were implicated" (Lietzau, 1215–1216).

56. See Elliot.

57. See Lietzau, 1231.

58. See Tarr, 109.

59. See Knicely, 213.

60. See Lietzau, 1226.

61. See Knicely, 213.
62. See Elliott.
63. See Note, "Rethinking," 1717.
64. *Zelman,* J. Thomas, concurring.
65. "Presumably, if similarly situated organizations, religious and secular, were granted access to state aid, the more recently developed standards for neutrality and voluntary choice, and the absence of any imprimatur of state approval giving a particular religion favored or unequal status, would apply so long as there were no independently established Free Exercise or Equal Protection Clause violations" (Knicely, 220–21).
66. See Lietzau, 1233.
67. One illustrative voice argues that the federalist thrust of the Establishment Clause simply cannot be reconciled with its incorporation; hence we ought to directly acknowledge that they are "flatly inconsistent" and move to "selectively deincorporate" the Establishment Clause (Note: "Rethinking," 1712). In another law review note, Christopher Elliott similarly asserts that we ought to concede that the "history of the Establishment Clause is uniformly capricious with the Clause's incorporation and deincorporate it."
68. See Lupu and Tuttle, "Federalism and Faith," 51.
69. See Knicely, 207.
70. *Zelman*, at 678–79, 681, J. Thomas, concurring.
71. Ibid.
72. See Knicely, 222.
73. Ibid.
74. See Knicely, 223.
75. See Knicely, 224.
76. See Tarr, 80; see generally Mechthild, 1989.
77. See "Note: Beyond the Establishment Clause," 1985.
78. *Bush v. Holmes*, no. SC04–2323, Fla. S. Ct. (2005).
79. See Ryden and Polet, 182–184.
80. See Lupu and Tuttle, "Federalism and Faith," 78.
81. Ibid., 60.
82. Ira Lupu, and Robert Tuttle, *State of the Law 2005*. The Roundtable on Religion & Social Welfare Policy, 2005, at 92.

FURTHER READING

Joseph Snee offered the first systematic critique of Establishment Clause incorporation in "Religious Disestablishment and the Fourteenth Amendment," *University of Washington Law Quarterly* (1954). Akhil Reed Amar has posited one of the most convincing contemporary criticisms of the development of church/state jurisprudence in "Some Notes on the Establishment Clause," 2 *Roger Williams University Law Review* 1 (1996). Daniel Dreisbach's *Thomas Jefferson and the Wall of Separation Between Church and State* (2002) is an in-depth book-length analysis of the histori-

cal grounds for church/state relations and the distorting effect of the "wall of separation" metaphor. Professors Ira Lupu and Robert Tuttle offer a measured nonpartisan perspective on the bases for decentralizing religion policy in "Federalism and Faith," 56 *Emory Law Journal* 19 (2006). Professor Steven K. Green is one of the most stalwart defenders of Establishment Clause incorporation; for a representative work, see "Reconciling the Free Exercise and Establishment Clauses: Federalism and the Establishment Clause: A Reassessment," 38 *Creighton Law Review* 761 (2005). For an exhaustive source of information, legal and otherwise, on the faith-based initiative, see The Roundtable on Religion & Social Welfare Policy, Legal Resources Page, at http://www.religionandsocialpolicy.org/legal/. For an in-depth examination of how the faith-based initiative is playing out constitutionally, see David Ryden and Jeffrey Polet's *Sanctioning Religion? Politics, Law, and Faith-Based Public Services* (Boulder, CO: Lynne Rienner Publishers, 2005). Alan Tarr's "Church and State in the States," 64 *Washington Law Review* 73, 110 (1989) provides a useful summary of the treatment of religion in state constitutions and the possible implications.

8

The Limits of Free Exercise in America

Timothy J. Barnett

The limits of religious liberty in the United States are seen in an American ethos that blends a cultural heritage with a constitutional history. While the ideal of religious liberty has been esteemed in the nation across time and geography, the constitutional protection of religious liberty was not uniform at the nation's start, religious liberty being understood as the prerogative of the states since the colonial era. This dispersion of religious autonomy among the states was retained when the new union became federalized under the Constitution. Likewise, when the nation's Bill of Rights was ratified in 1791, religious liberty was constitutionally formalized as a state right and put outside the federal government's reach. Congress was restrained from making laws "respecting an establishment of religion or prohibiting the free exercise thereof," while the various states remained at liberty within the framework of their respective constitutions to shape the particulars of religious liberty in accordance with the democratic will of state majorities. Nevertheless, most Americans then and now view the basics of religious liberty—freedom of religious conscience and belief, religious speech, and religious assembly—as inalienable rights and essential aspects of human dignity and democratic legitimacy.

Since the 1930s, the increasing religious diversity in the United States has contributed to the realization that the lawful restraint of some religiously motivated actions is a necessary aspect of modern life in a large

democratic republic. While religious belief can be protected with relative ease, religiously motivated conduct can be quite difficult to protect in some public contexts, especially where competing private claims or compelling governmental interests are at stake. When religious expression enters the public square, it is frequently constrained at the margins by statutory law so as to accommodate the core components of religious liberty for all—the exercise of conflicting liberties refereed by government so as to maintain public order and uphold the rule of law.

Modern religious diversity has produced a variety of conflicting views of what constitutes religion and the free exercise of religion. With this growing conflict in mind, this chapter will explore one of the most significant unsolved problems of free exercise jurisprudence—the identification and implementation of suitable means of protecting the free exercise of individuals and interests for whom community-level religious establishment (or quasi-establishment) is an essential aspect of free exercise. Many religious people believe they cannot experience their religion fully without living in the context of a community where participants voluntarily compromise their opportunities for individualism so that they can more fully experience a religiously informed way of life. This matter of constitutional justice is the overarching dilemma in the work that follows.

THE COMPETITION AMONG "RIGHTS"

In the current era, governmental constraint of religiously motivated conduct arises as a reflection of government's efforts to sustain a free market for religious activity or uphold the goal of governmental neutrality between religions. However, since the federal government began the process of incorporating the Fourteenth Amendment (through the Due Process Clause) against the First Amendment in the 1930s and 1940s, governmental constraint of the free exercise of religion operates to protect other constructed categories of rights against the possible incursions of religion. The essential rights categories that have been constructed include the rights of commerce, privacy, speech, freedom of choice, due process, and the equal protection of the laws. Equally important is a category of rights that the U.S. Supreme Court has constructed on behalf of government; namely, the right of government to pursue what it sees as its compelling interests. Hence, while religious liberty may be viewed by some traditional observers as a category of rights deserving preferential treatment based upon American history—the First Amendment singling out religion in its opening statement—the reality of American politics and constitutional jurisprudence is that many

interests have become compelling to the national government in the context of politics.

The current era is one in which religiously motivated conduct traditionally associated with the agenda of a Christian majority is increasingly constrained by reason of other categories of rights now protected on behalf of competing interests. This has led some observers to speak of a "culture war," some bidding with nostalgia for a return of Christendom while others hope to bid farewell to even the cultural vestiges of establishment religion.[1] But this is less than half of the picture. When the national scene is viewed through a different lens, observers come to strikingly different conclusions. In some instances, the conclusion is that the federal government is increasingly accommodating religion, especially conservative Christianity. From this perspective secular interests are not only forced to subsidize religion that they disagree with but are also required to give way to it in the public sphere as a tacitly preferred governmental interest. Thus, there is considerable controversy over the limits of free exercise—a controversy rooted in theology, history, political theory, constitutional law, and the politics of power.

THE EARLY YEARS

During the American colonial era the statutory limits of free exercise in the colonies were, in part, reflections of English traditions reworked for application in new world societies. These traditional perspectives became combined with emerging ideas about human nature, religion, and the purposes and limits of civil government. While the early American colonies were organized under the auspices of European government, operationally they took the form of close-knit communities. The general understanding of rights and liberties in this context assumed that a set of greater rights came from God (explained, in part, by Nature) while sets of lesser rights were within the developmental province of human governments. The excitement of the times was that communities were choosing and cultivating their own governmental forms—what history recalls as the new advent of American democracy.[2]

Community-based rights and liberties in the American colonial era showed variation across the colonies. In a few colonies a mildly libertarian outlook produced forms of government in which many rights and natural liberties were reserved to individuals. But the larger number of colonies leaned toward communitarianism—a view of responsible liberty in which individuals delegate some portion of their liberties to the management of the commu-

nity, the idea being to facilitate the development of a desired cultural environment. Massachusetts and Connecticut were prime examples of the communitarian approach while the Rhode Island of Roger Williams illustrated the more progressive or somewhat libertarian approach.[3]

By the time that Virginia's James Madison penned his famous *Memorial and Remonstrance against Religious Assessments* (1785), Roger Williams's model of religious individualism was in the first rank of theories of religious association and obligation. Yet, to some communitarians, the Williams model raised the specter of moral weakness combining with specious reasoning to produce injuries for individuals and communities alike. On the other hand, proponents of libertarian approaches to religion discounted the early colonial era belief that semi-closed religious communities possess the advantage of institutional experience and learning without which some individuals will make serious mistakes to their own harm and the harm of their neighbors. Indeed, progressive thinking during the era held that traditional religious communities offered the prospect of ignorance and malpractice that could not well survive open market conditions.[4]

The debate over the open and classically liberal community versus the relatively closed or Puritan-style community diverts attention from a more important free exercise issue: by what means do communities acquire their governmental prerogatives? Do communities 'capture' individuals and dictate their rights? Conversely, can 'free' individuals subordinate many choices to democratically composed communities? Do individuals have a right by Nature to release their rights by contract or covenant to the primacy of a community until they leave the community? These questions are centrally important to how governments and courts differentiate between religious establishment and the free exercise of religion.

The colonial record portrays much of what modern jurisprudence considers "religious establishment" as simply "free exercise" in the minds of individuals who understood themselves as retaining the natural right to subordinate individuals' rights to the judgment of a community. For example, the *Massachusetts Body of Liberties* (December 1641) contains many declarations of prohibited conduct as well as statements of rights, yet the package was viewed in those times as constituting liberty.[5] In colonial Massachusetts, many citizens found the prohibitions to facilitate a religious milieu where they were buffered from frequent exposure to various passions, pursuits, and pleasures they wished to avoid. As legal scholar Thomas Curry explains, "Congregationalists . . . claimed also that theirs was a truly mild and equitable system, hardly to be called an establishment, as John Adams noted. The Massachusetts Constitution of 1780 did not refer to the public system

supportive of religion as an establishment of religion, nor did the law that eventually dismantled it make any reference to disestablishment."[6]

When the ideas of democracy, federalism and community are combined, the results can be likened to pursuing self-realization by living life on a chain of free islands. If one selects an uninhabited island, individualism is maximized but at the cost of the interesting choices and opportunities that come from being a member of a community. If one takes one's boat to a nearby-inhabited island, a different experience awaits: individual choices may be lightly or heavily constrained by the aggregate will of the democratic majority. Just because an individual chooses to live on a community-styled island where the options for individuality are few does not mean that self-realization is dampened, for in choosing and remaining on a particular island, one exercises individuality.

Throughout American history, the foregoing concept has been grasped readily by communitarians while remaining obscure to many libertarians, their lack of appreciation for the concept perhaps reflecting that they would not freely choose a constrained environment for themselves. While the modern U.S. Supreme Court cannot be fairly described as libertarian, it too has struggled to make room for free exercise that chooses some form of establishment as the outcome of its exercise. Indeed, this quandary continues to baffle the Court and tangle its decisions. Happily for the Constitution's framers, they avoided this quagmire by applying the First Amendment only to the national government. Hence, the states were free from any need to invent justifications for one form of neutrality over another, as the states were originally under no federal compunction of neutrality by which to determine the limits of free exercise.

The idea of community-level establishment as an expression of individualistic free exercise is nicely illustrated with classical music. If an individual wishes to worship the Supreme Being by means of a symphonic or orchestral performance—a musical *community* of wind, string and percussion instruments—government would be acting against that individual's free exercise if government were to make unlawful the organization of musical groups that achieve their ends through particular rules, norms, and disciplines that limit the musical autonomy of individual members. Individuals committed to playing nothing but solos or duets might feel sorry for members of highly disciplined orchestras, but this is a matter of taste, not liberty. In music, liberty, self-expression, and the discovery of joy are achievable in various ways, including the liberty of making music more profound by giving up the right to musical improvisation while in the midst of a musical community.

The message of the musical analogy can be seen in Thomas J. Curry's argument that to "posit that in 1789 the inhabitants of the New England states saw the church-state system in that region as a new kind of establishment is to misread the historical record."[7] The record lends itself more readily to the conclusion that many congregationalists saw as free exercise what modern Americans see as establishment. Again, music illustrates the point: people who have played in large orchestras know that great feats in orchestral music are dependent upon adequate authority for leaders, standards of excellence for participants, expectations of rigorous preparation, means of performance evaluation, protocols for disciplining or dismissing unproductive or failing members, crowd control, and a sense of community cohesion. Perhaps individuals experience merely limited aspects of certain religions in libertarian contexts where everyone marches to his own inner drummer.

The oddity is that much of what passes for regular American life would not exist if the U.S. Supreme Court aimed at disestablishment outside of religion. Business corporations, whether private or public, for-profit or not-for-profit, are organized with hierarchy, bureaucracy, specialization, and protocols of operation that in some cases create fairly inflexible expectations of performance and limitations on the free exercise of choice for employees. People with high-paying and low-paying jobs learn to show up on time, attend to their assigned work, submit to established authority, and work within an organized system. The same considerations apply to the operations of government, whether local, state, or national. While there are some business entities that are organized along the lines of creative anarchy and rampant individualism, the usual expectation of workers is that a good amount of autonomy is traded temporarily in exchange for the right to receive income from the organization.

Arguably, if the U.S. Supreme Court attempted to lay upon business the feats of disestablishment it laid upon the states in the latter half of the twentieth century, much of business would be in ruins. But the evolution of American culture allowed no such benefit of the doubt for religion. The nature of religious establishment at the state level was too encompassing. Furthermore, religion was vulnerable to expressing its agenda through monopoly. Indeed, had religious establishments been limited to the county, ward or precinct level—with every state federally mandated by the U.S. Constitution to maintain two-thirds of its local government jurisdictions completely free from establishment—disestablishment may never have gained the cultural momentum that moved the Court to find its free exercise trajectory. The intriguing aspect of this scenario is that establishment variations of religious free exercise would have received the opportunity to

compete with other systems of choice. Ultimately, though, religion is itself to blame for its loss of power. Repeatedly, religious establishments and quasi-establishments were insufficiently adaptive, failing to offer people the higher dimensions of life and fulfillment that people seek when weighing the cost of reduced choice against the attractions of a community-shaped way of life. Indeed, modern gated communities have succeeded in attracting residents where traditional religious communities failed.

The disenfranchisement in the 1940s of state-level establishments of minor consequence coupled with the creation of national standards of free exercise enhanced some forms of religious liberty while necessitating the further decline of communitarian forms of free exercise. There are fewer constraints on religious liberty for most members of the majority and for religious minorities than there were fifty or one hundred years ago. But for communitarians spread across many diverse sects as well as for Americans desirous of seeing public, non-sectarian religion well maintained in the public square, the limits of free exercise are more noticeably felt and the wall of separation between church and state more institutionalized and buttressed between the cracks. How this came about is best revealed in the U.S. Supreme Court's jurisprudence.

THE NATIONALIZATION OF RELIGIOUS LAW

The idea of nationally-protected religious rights began developing as an outgrowth of constitutional innovation. For some, like James Madison, reason alone could support federally mandated disestablishment of religion at the state level, universal rights of conscience, and unfettered free exercise. Most Americans, however, were not so sanguine about elevating the federal government to define the operation of religious liberty across the whole land.

The prospect of a national Bill of Rights became the catalyst for political and theological debate over how the federal government should best go about protecting America's religious ethos and the operations of religion within the states. Many anti-federalists did not want a uniform national protection of religious rights. They were satisfied that the budding nation's best interests were served by merely protecting the prerogatives of the states in matters of religious liberties, regardless of whether states favored free exercise, plural establishment, or some other variation of establishment. Federalists, too, were divided on the question, some wondering if a string of problems in the state of Virginia over religion might spread to other states in the absence of federal protections against religious enthusiasts grasping the levers of the state.

Virginia was at the tail end of a protracted struggle between establishment interests battling for a state subsidy of religion that would have disproportionately benefited the Church of England and disestablishment advocates who wanted no state subsidy for any religion. This state-level struggle prompted Thomas Jefferson in 1779 to draft *The Virginia Act for Establishing Religious Freedom,* which was approved by the Virginia General Assembly in 1786.[8] While Jefferson's efforts in this document were primarily aimed against state coercion of financial contributions for the support of religion, the debate took place under the cloud of Virginia's much earlier experience with "Dale's Laws"—a set of English statutory laws used in early colonial Virginia that provided severe punishments for a broad array of moral failings and religious lapses.[9] Indeed, Virginia's early legal system made colonial Puritanism look like an escape to liberty (a claim made by early colonists in New England).

The religious conflict within Virginia weighed heavily on James Madison's mind, as evidenced in his 1785 *Remonstrance.* Furthermore, the dangers he associated with the unchecked passions of factions are described in numerous places in his contributions to the Federalist Papers. Thus, it is no surprise that Madison leaned to the federalist side at the time the U.S. Constitution was framed, his anti-federalist inclinations largely in hibernation until he served as vice president during the Thomas Jefferson presidency.

During the debates of the First Constitutional Convention, Madison did not favor a bill of rights, for he believed the structure and philosophy of the new constitution was a bill of rights in itself. However, when it became apparent that the Constitution would not receive sufficient support from constitutional delegates without the pledge of a bill of rights, he adjusted his position on the matter. Thereafter, he took the initiative to compose a positive statement of national religious rights in the Bill of Rights he proposed to the first federal Congress—his selection of rights reflecting his disquietude with establishment religion.[10] Congress, though, had other ideas, politely acknowledging Madison's concepts while moving on to contemplate a raft of proposals and revised drafts that eventually were reduced to a formula for state autonomy: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[11] Congress's choice of how to best protect religious liberty was ratified by the young nation as part of the First Amendment and alongside nine other rights declarations in the Bill of Rights. The result was a national situation much like the colonial system in regard to diversity of controls. The limits of free exercise were retained as the due product of state-level democracy,

which in turn was allowed to reflect cultural traditions, the religious heritage of local areas, and regionally dominant ideas about civil society.

Underlying the constitutional declaration of religious rights, the Bible operated on the cultural level as a unifying document that made the states' management of religious matters look comparatively orderly. Indeed, even the U.S. Supreme Court found itself turning to the Bible for symbolic, historical, and substantive reasons from its early years until the 1930s.[12] Thus, while the First Amendment did not nationalize the limits of free exercise at its outset, it did create the beginnings of a civil religion with the implied doctrine that if federal government should stay out of religion, states should do so as well.

Exactly one hundred years after the ink dried on Thomas Jefferson's initial draft of *The Virginia Act for Establishing Religious Freedom,* the U.S. Supreme Court would decide its first case in which it would significantly alter the covenant relationship between the federal government and the people concerning the power of the government to make laws respecting religion. The bridge that allowed the Court to cross that Mosaic divide in *Reynolds v. the United States* (1879) was the emerging national visibility in the 1850s of an uncommon marital arrangement sufficiently disconcerting to enough Americans that Congress could label it "barbaric."[13] The cause of insult to the moral sensibilities of the nation's regular churchgoers was Mormon polygamy in the Utah Territory, carried on under the banner of prophetic revelation and divine mandate. In hindsight, a conduct more socially hazardous but considerably less stirring to the imagination may not have induced the high court to discover a free exercise dichotomy between beliefs and conduct until well into the twentieth century.

Following the U.S. Congress' disquietude arising from information about the growth of polygamy in the Utah Territory, the U.S. Congress created the Morrill Anti-Bigamy Act, which President Abraham Lincoln signed into law on July 8, 1862. The Act aimed at reducing the prospects for the union of church and state in the Utah territory by limiting the value of property that a church could own (excess property forfeited to the United States) and by banning bigamous marriage. The Act made bigamy punishable by imprisonment not exceeding five years and by fines up to $500. Furthermore, the Act annulled all actions of the Legislative Assembly of the Territory of Utah pertaining to spiritual marriage as well as polygamous marriage for the life now lived. Congressional action against marriage in the life to come as well as the here and now suggests that Congress was so moved by public outcry and its own moral sentiments that it forgot its place as an institution addressing temporal issues. But this is the historical pattern for

lawmaking where religion is the alleged perpetrator of hazards or the purported victim of perceived threats.

The Morrill Act had about the same initial effect in the Utah Territory as did the Fifteenth Amendment (1870) upon African American voting in the South: little changed. Estimates are that the percentage of the families practicing polygamy in the Southern Utah city of St. George grew from 30 to 40 percent between 1870 and 1880. While such a level of polygamy was considerably higher in St. George than in many Mormon settlements, the observation is telling, not just about early Mormon culture but the federal government's ability to make a difference.[14]

Underfunded, the Morrill Act was little more than a shot across the bow of the Mormon ship, at least in its early application. A few years later, however, the patience of the U.S. government did expire when the Utah Territorial Legislature (essentially a Mormon institution due to its members' obligations to the Mormon Church) ruffled the feathers of the House Judiciary Committee in 1867 by asking Congress to repeal the Morrill Act. As explained by historian Jessie L. Embry, "Instead of doing that, the House Judiciary Committee asked why the law was not being enforced, and the Cullom Bill, an attempt to strengthen the Morrill Act was introduced. Although it did not pass, most of its provisions later became law."[15]

In the seven years following the Cullom attempt, several anti-polygamy bills were introduced in the U.S. Congress, none of them passing until 1874, when the Poland Act found success. This act of Congress limited the power of probate courts, empowered federal district courts in matters of civil and criminal jurisdiction, and made the Territorial Marshal a federal office. The effect was to put all cases involving polygamy into the federal courts where presidentially-appointed judges could prevent state-level courts from making end-runs around federal laws.

Confronted with the prospect that the Morrill Act could not be enforced in the Utah Territory, the Mormon Church decided to challenge the constitutionality of the Morrill Act and related laws. The church's strategy was to have George Reynolds, the private secretary to the church's president, Brigham Young, voluntarily stand trial for bigamy under section 5352 of the Revised Statutes of the United States.[16] Not surprisingly, the territorial district court's decision went against Reynolds, the court burdening him with a $500 fine and sentencing him to two years of imprisonment and hard labor. Reynolds appealed the lower court's decision to the Supreme Court of the Utah Territory, which upheld the lower court. Consequently, Reynolds appealed to the U.S. Supreme Court, the case reaching the high court in 1879, shortly after the death of the Mormon church's president, Brigham Young (1801–1877). *Reynolds v. United States* was destined to

become a landmark decision for both federalism and the free exercise of religion.[17]

In *Reynolds*, a unanimous court upheld the Morrill Act (sect. 5352 of the Revised Statutes), declaring that laws are made "for the government of actions, and while they cannot interfere with mere religious belief and opinion, they may with practices."[18] After dealing with the procedural issues of the appeal, the Court focused on the substance of Reynolds's defense, namely, his claimed duty (and the duty of all male members of the Mormon church, circumstances permitting) to practice polygamy. Reynolds argued that this duty was enjoined by several of the sect's holy books, that there was precedence in the Holy Bible, and that the Almighty God had commanded the practice of polygamy in a revelation given to Joseph Smith, the founder and prophet of the church. While clearly skeptical, the Court acknowledged Reynolds's claim that were he not to practice polygamy, his refusal "would be damnation in the life to come." The Court also noted Reynolds's claim that bigamy had been duly sanctioned by the church pursuant to the doctrines of the church.[19] Still, the Court resisted.

Chief Justice Waite responded to Reynolds's position by noting that the issue was not the power of Congress to prescribe criminal laws in the Territories but the guilt of one who knowingly violates a properly enacted law on the justification that his religion causes him to believe the law is wrong. Waite acknowledged that the First Amendment to the Constitution "expressly forbids" Congress to pass any law for the Territories that prohibits the free exercise of religion. He then said, "The question to be determined is, whether the law now under consideration comes within this prohibition." He added that the "precise point of the inquiry is, what is the religious freedom which has been guaranteed . . . "[20] In this way, Waite focused this landmark case squarely on the question of the limits of free exercise, establishing precedence for marking the leeway of the Court's discretion in such matters.

The *Reynolds* decision suggested that in the absence of any definition of religion in the U.S. Constitution, the Waite Court could define the limits of religious exercise as subtly as judicial and cultural conditions allowed. It said as much in its decision. The Court's understanding of religion relative to civil society gave it the power to separate religious belief from religiously-motivated conduct, giving the former primary protection and only secondary and subjective protection to the latter.[21] The Court accomplished this work out of will as much as wit, owing to the fact that in the U.S. Supreme Court's first case involving the Free Exercise Clause—*Permoli v. First Municipality of New Orleans* (1845)—the Court upheld the original understanding of the First Amendment without the slightest concession. An ex-

cerpt from the case drives the point: "The Constitution makes no provision for protecting the citizens of the respective states in their religious liberties; that is left to the state constitutions and laws; nor is there any inhibition imposed by the Constitution of the United States in this respect to the states."[22]

The decision of the Waite Court was no different, in essence, from the work of state governments, except that state governments were not prohibited from making laws on religion while the national government was under that prohibition in the First Amendment. If there was bias or preference in the way a state court defined religion, the consequences were largely limited to that state's physical jurisdiction. The application of federalism put the state's decision into a marketplace environment where people could vote with their feet and move on if they disagreed with the state court. When, however, the U.S. Supreme Court defined religion in contradistinction to Mormon religious beliefs, there was no place left for Mormons to go short of emigrating out of the country. Without much delay the Mormon Church bent to the Court's will, helped by the realization that there was more at stake in building a Deseret kingdom than polygamy. Nevertheless, although Mormon leadership declared an amended position under coercive duress, many Mormons felt the Court could not overturn their prophets' earlier revelations. Little did they know that the Waite Court's decision would become a landmark.

As Carol Weisbrod observes, "Reynolds was never overruled and was sometimes reinforced" by the Court's logic. In *Minersville School District v. Gobitis* (1940), Justice Frankfurter declared that individuals have not been relieved "from obedience to a general law not aimed at the promotion or restriction of religious beliefs." And in *Smith* (1990), Justice Scalia in writing for the court majority claimed *Reynolds* as the first case employing the principles he asserted. Nevertheless, Weisbrod claims that *Reynolds* is most frequently recalled in the current era as an "example of persecution of a religious group by the federal government."[23] Perhaps the Court's awareness of that perspective explains, in part, the Burger Court's reluctance a century after *Reynolds* to dictate terms of community life to the Amish in Wisconsin.[24]

TWENTIETH-CENTURY PROTECTIONS AND LIMITS FOR FREE EXERCISE

While the Supreme Court's unanimous decision in *Reynolds* demonstrated the power of the Court to limit free exercise within a federal territory, the Court accomplished its purpose by focusing upon the dangers of

polygamy to the public good rather than by exploring the issue of states rights. At the time of *Reynolds*, the Court knew full well that an 1833 landmark case on federalism, *Barron v. Baltimore*, had secured states' rights quite thoroughly from any constraints flowing from a liberal reading of the Bill of Rights. Indeed *Barron v. Baltimore* would continue to exert controlling precedence in the matter of states' rights for decades after *Reynolds*, delaying application of the Fourteenth Amendment to the First Amendment's religion clauses until well into the twentieth century.[25]

In 1938 the federal government gained a toehold in limiting the rights of states to manage religious affairs when Justice Cardozo declared for the Court majority in *Palko v. Connecticut* that some parts of the Fourteenth Amendment could be applied through the Due Process Clause to the First Amendment. While the case concerned first-degree murder and the question of double jeopardy under the Fifth Amendment, Cardozo used the framework of the case to open the door to the Court's oversight of free exercise, remarking as follows:

> [T]he due process clause of the Fourteenth Amendment may make it unlawful for a state to abridge by its statutes the freedom of speech which the First Amendment safeguards against encroachment by Congress . . . or the free exercise of religion . . . or the right of peaceable assembly . . . In these and other situations immunities that are valid as against the federal government . . . have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid against the states.[26]

Justice Cardozo went on to state in his opinion for an eight judge majority that the "line of division may seem to be wavering and broken if there is a hasty catalogue of the cases" but that reflection and analysis would resolve the questions by giving light to "a rationalizing principle." While the principle is not self-evident as claimed—Cardozo stating that the enlargement of liberty by latter-day judgments had included "liberty of the mind as well as liberty of action" (a seeming reversal of the belief-conduct dichotomy in *Reynolds*)—the Cardozo logic was sufficient to move the Court further toward the nationalization of free exercise shortly thereafter in *Cantwell v. Connecticut* (1940), a case that concerned the constitutional right of Jehovah's Witnesses to proselytize as they saw fit.

The Cantwell case resulted from the arrest of Newton Cantwell and his two sons in New Haven, Connecticut, for using a record player on a street in a highly Catholic section of the city to play a Jehovah's Witness record that castigated many religions, especially Catholicism. When the Cantwells' actions produced an outcry by passersby, local police arrested them. The Cantwells were tried and convicted for soliciting without a license, inciting

a breach of the peace, and three other counts. After the Connecticut Supreme Court upheld the lower court decision, the U.S. Supreme Court heard the case on the Cantwells' appeal, deciding unanimously to invalidate the Cantwells' convictions on the grounds of free exercise.[27]

Writing for a unanimous court in *Cantwell,* Justice Owen J. Roberts returned to the dichotomy between belief and conduct, reiterating the holding from *Reynolds:* "We hold that the statute, as constructed and applied to the appellants, deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment . . . [T]he Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute, but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."[28]

While Roberts acknowledged that government must be scrupulous in upholding vital freedoms, he also wrote that the "fundamental concept of liberty embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment." He further declared that the Fourteenth Amendment "has rendered the legislatures of the states as incompetent as Congress to enact such laws."[29] Thus, while the Court maintained a belief-conduct dichotomy in some matters, it deemed the proselytizing efforts of the Witnesses an integral part of their religious practice and a legitimate activity protected by free speech in the Bill of Rights as well as the Free Exercise Clause in the First Amendment.[30] Eventually, the Court would simplify that jurisprudence by moving away from the Free Exercise Clause as a protection for religious recruitment, founding the right instead upon free speech.

Cantwell supplied the Court with justification for moving toward a wider federal authority over religion. A few years later in *Everson v. Board of Education* (1947), Justice Hugo Black was able to seize upon the Court's evolving thinking about the Fourteenth Amendment to dramatically expand the Court's reach. In writing for the majority, Black accomplished this feat with such stealth that even his associates were unsure of the ramifications.

In *Everson*, the Court majority incorporated the Fourteenth Amendment against the Establishment Clause, thus mandating that states build a wall of separation between church and state.[31] Justice Black baffled his associates by matching aggressive arguments on behalf of an impregnable wall between church and state with his justification of upholding New Jersey's subsidized busing of children to private religious schools. In writing for the dissenters, Justice Robert Jackson said that "the undertones of the opinion, advocating complete and uncompromising separation of Church from

State, seem utterly discordant with its conclusion yielding support to their commingling in educational matters."[32]

In evaluating Black's opinion in *Everson,* legal scholar Philip Hamburger asserts that Black knew exactly what he was doing—a conclusion that Black's separationist-oriented supporters reached in a tardy fashion after lambasting him for being disloyal to the wall of separation doctrine while lauding it.[33] In reality, Justice Black employed a strategy similar to the one used by Chief Justice John Marshall in *Marbury v. Madison* (1803) in which Marshall chose to lose the immediate battle with Thomas Jefferson, James Madison, and the anti-federalists so that he could acquire strategic cover in allowing the federalists to empower the U.S. Supreme Court with judicial review. The fact that John Marshall found it necessary to sacrifice the judicial appointments of a few members of his political party was a small price to pay for a permanent victory.[34] For Justice Hugo Black it was much the same: by upholding a comparatively inconsequential form of governmental assistance in New Jersey for bused students, he was able to gain strategic political cover for a much stronger principle of church and state separation. Working surreptitiously and yet for ends that he held in high regard, Black converted an incremental decision into a landmark opinion.

Justice Black's shrewdness was reinforced a few years later when the circumstances of *McCollum v. Board of Education* (1948) made it evident that the Court would need the support of minority religious groups—Baptists, Seventh-Day Adventists, Jews and Jehovah's Witnesses—just as James Madison needed the support of the dissenting Baptists in Virginia to win his seat in the first Congress under the new Constitution.[35] Indeed, in regard to the Baptists, the history of the movement is a running account of advocacy against state-level establishments so as to increase Baptists' religious opportunities.[36] With the Baptists, as explained by James T. Baker, freedom "permeated every cell of their being: freedom of religious choice (volunteerism), freedom of conscience (the priesthood of all believers), and freedom of all churches and sects from clerical or political dictation (the separation of church and state)."[37] But Baker also illustrates a conundrum for Baptists that their free exercise advocacy created:

> Since 1791 Baptists have had to deal with the implications of their achievement. If the state cannot control religion, can a religious group accept gifts from the state in the form of tax exemptions . . . If church and state are separate . . . should religion try to influence political deliberations when they are perceived to be dealing with moral issues? In places where Baptists are an effective majority or plurality of the population, should they try to impose their will on what might be seen as a dissident, irresponsible, or immoral minority?[38]

While religious groups like the Baptists won rulings from the U.S. Supreme Court that facilitated a wider exercise of some types of religious liberty, their success in the courts weakened the ability of state and local authorities to prescribe moral standards and community norms associated with traditional Christian beliefs. Thus, in the same time frame that selected elements of religious liberty were receiving judicial reinforcement, the Court was backing away from its traditional view of the United States as a Christian nation—a view it had promulgated in various decisions through 1931.[39] Indeed, with as few as 25,000 Catholics in the United States in 1785 the nation seemed as Protestant as it did Christian, the then existent Protestant sense of morality being imprinted on state laws.[40] But the justices who decided *Everson* in 1947 saw that the old religious order was fading fast. It would take less than forty years from *Everson* before a Court Justice, William Brennan, would criticize the very idea of America as a Christian nation.[41]

While the high court no longer considers America a Christian nation, it does in some instances note that Americans are a religious people. One legal scholar, John Witte, has gone as far as saying the nation has "the soul of a sanctuary"—a suggestion of abundant religious sincerity flowing out of religious diversity.[42] The strong religious element in American culture has contributed to U.S. Supreme Court jurisprudence where the doctrine of measured accommodation for religion in public affairs has been preserved alongside concepts of walled separation. The result is a hybrid system that serves competing interests.

THE CHALLENGE OF DEFINING CONSTITUTIONALLY PROTECTED RELIGION

The ability of the high court to advance an evolutionary jurisprudence on the religion clauses following *Cantwell* and *Everson* was aided by the constitution's omission of any definition of the nature of religion protected by the First Amendment. Indeed, little in the civil religion of the United States has provided suitable aid in defining what elements of religion are constitutionally shielded. As legal scholar Bette Novit Evans explains, the words of the First Amendment mask a difficult dilemma, namely, how to "recognize a religion and to distinguish legitimate religious claims from spurious ones." The crisis according to Evans is that "every effort to make such distinction infuses the Constitution with some particular notion of a legitimate religion or religious practice, and that is precisely what the First Amendment should forbid."[43]

The meaning of the term "religion" has become supple enough in the

last fifty years to allow the Court to work around the increasingly idiosyncratic nature of its cases. But flexibility has left the Court with the problem of neutral discretion and stable definition. Religious dissenters and nontraditional religious sects seem best aided by a broad definition of religion, especially when they try to secure constitutional protection for their religious beliefs or religiously motivated conduct. Conversely, as pointed out by Evans, "definitions broad enough to include educational, social service, and patriotic activities would leave many ordinary governmental functions vulnerable to the charge of violating the Establishment Clause."[44] This second perspective advocates a narrow definition of religion to prevent large swaths of American life from becoming walled off to religion.

The problem for the U.S. Supreme Court is that it is pulled toward a broad definition of religion by some of its reasonable objectives while being tugged toward a narrow definition by other considerations. Since a compromise definition satisfies neither of the Court's expediencies, the Court is tempted to provide no formal definition of religion so as to allow itself more maneuvering room. This inability of the Court to find an overarching definition for constitutionally protected religion strikes many observers as contributing to piecemeal rules for deciding cases under the First Amendment's religion clauses.

While the Court's line of reasoning from *Cantwell* to today demonstrates a great deal of intellectual labor, learned observers see a mixed result. One political scientist, Kenneth Wald, describes the Court's Establishment Clause work as a "tangled jurisprudence."[45] He argues that in many instances the Court's attempts to advance the free exercise rights of one litigant will gut the Establishment Clause protection supposedly enjoyed by another.[46] Another legal scholar, Steven Smith, states that a general theory of religious liberty is a "foreordained failure" because every theory is rooted in an imperfect conception of religion.[47]

Other voices concur. Thomas J. Curry claims that of all the clauses in the Bill of Rights, none generates more controversy among scholars today than the religion clauses.[48] Richard Collin Mangrum surveys the landscape of religious-based statutory and judicial exemptions, then states that under present establishment reasoning "the courts are left with the conundrum that religious exemptions may be required by the Free Exercise Clause even as they may be prohibited by the Establishment Clause."[49] To protect one clause under the ascendent jurisprudence the Court must do damage to the other clause. Mangrum also points out that the "status of religious-based statutory and judicial exemptions remain a perplexing constitutional issue," and the Court's work is irreconcilable with any principled analysis.[50]

Thomas Schweitzer states that there is likely no area of American consti-

tutional law "as confused and inconsistent as the jurisprudence of the First Amendment's Establishment Clause," spawned by the Court's remodeling work in *Everson*.[51] Michael W. McConnell argues that the Court's majority opinion in *Sherbert* (1963) produced an expansionist reading for both of the religion clauses, making them "mutually contradictory."[52] McConnell goes on to explain that the conflict between the religion clauses became the central theme of case law and scholarly criticism for more than two decades following *Sherbert.*"[53] Constitutional law scholars Lee Epstein and Thomas G. Walker label the Court's jurisprudence on both religion clauses as "unstable."[54]

Justification for these evaluations abounds in the post-*Everson* period. However, an effort to understand free exercise cannot focus solely upon so-called free exercise litigation because disestablishment cases oftentimes involve elements of free exercise.[55] The conundrum is that one person's idea of establishment is another's idea of free exercise. Seemingly aware of this, the framers of the U.S. Constitution laid no rule of universal application at the national level except that the federal government should stay out of the regulatory enterprise and let every state come up with its own—and necessarily biased—version of free exercise.

FORWARD FROM *EVERSON*

The Court's *Everson* decision made it evident that the nation's long march from confederation toward a hybrid federal-unitary governmental system was advancing briskly. Daniel O. Conkle explains that though *Everson* created a wall between church and state, "this wall of separation did not forbid neutral governmental programs that included religious as well as secular beneficiaries."[56] Neutrality, imperfections and all, was thus on its way to becoming a national jurisprudential principle in partial substitution for federalism of religion—the latter growing obsolete because it advertised, rather than concealed, its preferential nature.

One year after *Everson*, the Court had the chance to reinforce the neutrality rule it expounded in Everson, doing so quite forcefully in *McCollum v. Board of Education* (1948). The *McCollum* case involved a public school's religious education release time program where privately paid religious teachers (provided by an ecumenical religious council) offered on-premise religious classes for interested students. Uninterested students simply stayed in their classrooms and continued with their normal work. The Court saw this program as providing special treatment for the children of religiously motivated parents who requested their children's involvement. Hence, the

Court declared the program as "squarely under the ban of the First Amendment" that it had established in *Everson*.

The *McCollum* decision was a controversial 6–3 ruling that spawned efforts on the part of religious communities to find release time programs that would meet the Court's emerging standard of constitutionality. Four years after *McCollum* the Court revisited the release time issue in *Zorach v. Clauson* (1952) by evaluating a release time program where the religious classes were held at nearby religious centers instead of being convened on public school premises. Justice William O. Douglas intoned for the 6–3 Vinson Court: "We are a religious people whose institutions presuppose a Supreme Being."[57] Douglas continued, stating that when "the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions."[58] Thus, Douglas formalized a principle of accommodation by which neutrality could be administered in light of the religious character of the society when justified by the circumstances of the moment. Furthermore, in a harbinger of what was to come, he observed that the Court saw the line between acceptable accommodation and the unacceptable promotion of religion by government as an incremental problem of degree. The Vinson Court's core position in *Zorach* has never been explicitly overruled, the principle of accommodation continuing to find new supporters in the courts, academia, and the broader culture.[59]

In 1963, the U.S. Supreme Court articulated a view in *Sherbert v. Verner* that would stand for nearly three decades as the most important case in the Court's Free Exercise Clause jurisprudence.[60] In *Sherbert,* the Court developed the doctrine that a law or governmental practice that burdens or impedes the exercise of religion is legitimate only if demonstrably necessary to achieve a compelling governmental purpose. The consequence of this doctrine is that government is obligated to provide exemptions or some type of accommodation in situations where it can be shown that the governmental purpose is not compelling.[61] The doctrine creates new problems because exemptions or accommodations when granted may make it appear that government is giving one group preferential treatment over another, thus ensnaring the government with the Court's mandate of disestablishment.

Less than a decade after *Sherbert* the Court heard *Wisconsin v. Yoder* (1972), a case centered around the Amish way of life. While the Court largely upheld its compelling interest doctrine from *Sherbert,* this would be the last time the Burger Court would rule in favor of a free exercise claim apart from matters such as unemployment benefits.[62] In *Yoder* the Court held that "only those interests of the highest order and those not otherwise

served can overbalance legitimate claims to the free exercise of religion."[63] Yet the Court made an effort to distinguish the uniqueness of the Amish way of life, suggesting the Court's declining interest in providing religion exemptions in the face of growing criticism that exemptions operated more or less as infringements of the Establishment Clause. Still, it would take until 1990 when the Court rolled back the *Sherbert* doctrine for the Court's thinking to become evident regarding how best to reconcile the two religion clauses.

One case that is remarkable in respect to free exercise and yet is generally considered under disestablishment doctrine is *Lemon v. Kurtzman* (1971). In *Lemon* the Court introduced a far-reaching three-pronged test to determine the constitutionality of government actions that reach religion. The first prong of the *Lemon* test involved the inquiry of whether a federal or state statue demonstrates a secular purpose. If the veiled purpose of a statute is to provide a benefit to religion, the act is unconstitutional. The second prong of *Lemon* seeks to identify the primary effects of legislation to see whether religion is advanced or inhibited— another exercise without bright lines. Finally, *Lemon*'s third test aims at finding any type of connection between state and church that might be judged an excessive governmental entanglement with religion. Here jurists are asked to exercise their discretion in regard to the ideas of "excess" and "entanglement"—an undertaking facilitative of judicial activism.[64]

For legal scholars, *Lemon* denoted the Court's resolve to operationalize the principles of disestablishment. As applied, *Lemon* served to make it harder for church and state to find cooperative enterprise at the local level, reducing the prospects for communitarian brands of free exercise. Nevertheless, the Court did not use *Lemon* as aggressively as some supposed it would, demonstrating in *Widmar v. Vincent* (1981) a continuing attachment for accommodation.

At issue in *Widmar* was the question of whether the state could allow people to use public facilities, such as schools, for secular purposes but not for religious ones. *Widmar* demonstrated, as Sanford Levinson notes, that "religious speech cannot, in the name of protecting against an establishment of religion, be selected out by the state for worse treatment than secular speech when the state generally makes its facilities available for public use."[65] While the Supreme Court chose not to reach the free exercise claim of the *Widmar* litigants but to decide the case upon the basis of precedents regarding the regulation of free speech, the Court's stance clearly indicated that some aspects of free exercise would not be significantly altered by the Court's doctrines of disestablishment.[66]

In the case of *United States v. Lee* (1982), the Court reasoned that not all burdens on religion are unconstitutional. As Bette Novit Evans explains, the litigant Lee claimed that "compulsory participation in the Social Security system interfered with his free exercise rights." But the Court held that the "state may justify a limitation on religious liberty by showing that it is essential to accomplish an overriding governmental interest." Chief Justice Burger declared that if Lee chose to enter into commercial activity, he had the obligation to abide by the scheme of taxation established by government.[67]

Justice John Paul Stevens wrote a concurring opinion in *United States v. Lee* that proved significant, signaling what the Court would do in later cases to deal with the increasing tensions within its jurisprudence. Stevens questioned the wisdom of a compelling state interest standard that essentially reversed the traditional burden of proof and required government to justify laws that litigants claimed to burden free exercise. Stevens pointed out that if the Court had granted an exemption to Lee, the Court would have placed the government in a position of having to regularly evaluate the relative merits of various religious claims. This situation troubled him, suggesting a stance incongruent with the Court's view that the Establishment Clause prohibits government from discriminating between religions so as to possibly provide some religions an advantage over others.[68] Stevens' thinking on the matter was a harbinger of a reorientation of Court thinking that would gradually lead the Court toward new doctrines less likely to raise the need for exemptions.

The important religious liberty cases following *Everson* tend to support Steven D. Smith's contention that no general principle of religion clause jurisprudence is possible in the post-*Everson* era. Agreeing with Steven Smith, Kenneth Wald writes that the Court split the two religion clauses into "mutually-exclusive categories" and then developed "a unique approach in each domain." Consequently, the *"Lemon* and *Sherbert* standards, as well as their more recent replacements, provide no real principles" to guide judges. Attempting to illustrate the point, Wald advances a hypothetical situation that looks like a case the Court heard in 1992, namely *Lee v. Weisman.* Wald suggests that if one student is allowed the free exercise of leading prayer at a public school graduation ceremony, the student's free exercise will infringe on another student's disestablishment liberty to escape religious pressure at the commencement ceremony.[69]

The Rehnquist Court decided to take a bold step in dealing with these conflicts in its highly controversial 1990 decision *Employment Division, Department of Human Resources of Oregon v. Smith.* Legal scholar Bette Novit

Evans observes that while *Sherbert* (1963) and *Yoder* (1972) characterized "the dominant understanding of the free exercise of religion" for a couple of decades, *Smith* came to characterize the emerging jurisprudence of the conservative Supreme Court as the 1990s began. In the *Smith* case, a 6-to-3 Court majority took the view that a state law forbidding the use of peyote rightly constrained Native American religionists from using the controlled substance for religious rituals. The Court's position on the state law allowed it to uphold the denial of unemployment compensation benefits to two Native Americans who had been dismissed from their jobs for peyote use. As Evans points out, "a five-member majority (Justice Sandra Day O'Connor concurred on other grounds) rejected the need to justify burdens on religious exercise by compelling state interest, and it ruled that religious exemptions to generally applicable laws are not constitutionally required."[70]

Smith is intriguing because it allowed government at all levels more latitude in church and state matters without trespassing on the Establishment Clause. However, something had to be sacrificed to accomplish this feat, evident in the waves of criticism from lawyers on the ideological Left and Right in the months following the decision. *Smith's* most considerable effect was to make it more difficult for citizens to litigate on the basis of claims that their free exercise rights had been infringed. While *Smith* was not a good business outcome for those practicing free exercise law, it did serve notice that the Court majority felt the subjectivity in granting exemptions as well as the potential entanglement with the Establishment Clause constituted more serious problems than a narrowing of opportunities for litigation based upon the constitutional free exercise guarantee.

Justice Antonin Scalia wrote the majority's opinion in *Smith* and experienced a public reaction not dissimilar from what Justice Hugo Black endured a half-century earlier in *Everson.* Referring to the public opinion climate that followed his *Everson* decision, Black quipped in reference to King Pyrrhus, "One more victory and I am undone."[71] Indeed, the savvy embedded in Black's decision would not be recognized by his supporters for some time, the same holding true for Scalia in *Smith.* While *Smith* seemed to undercut the prospects of free exercise for "religious practices that are not widely engaged in," as acknowledged by Scalia, the decision strengthened the prospect that major sects, like Roman Catholicism, could pursue their agendas with less need to continually defend against small sects' claims that their free exercise would be impinged. Thus, *Smith* had the effect of reducing litigation in the federal courts based upon controversy over the limits of free exercise. Also, it moved the high court's jurisprudence away from its *Sherbert* era deference to the free exercise of religious dissenters and non-

conformists over religions more democratically popular at the state level. Scholar Bette Novit Evans explains:

> According to Justice Antonin Scalia, the Free Exercise Clause is breached when laws specifically target religious practice for unfavorable treatment. Generally applicable laws, neutral in intent, do not in this view raise First Amendment problems. This requirement is met simply by a formal neutrality; it requires only that a law be religion-blind and not on its face discriminate against religion; it does not require religious-based exemptions . . . Moreover, the Smith majority ruled that the Free Exercise Clause does not require that laws burdening religious exercise be justified by a compelling state interest . . . Thus, when the majority rejected this standard, it made a significant reversal in constitutional policy about an issue neither raised nor argued by the litigants.[72]

Three years after *Smith,* Congress countered with legislation demanded by various religious interests and numerous constitutional scholars. Late in 1993 Congress enacted the Religious Freedom Restoration Act (RFRA), aimed at restoring the compelling state interest test and limiting government's ability to restrict a person's free exercise of religion only in instances where government uses the least restrictive means of furthering the compelling interest.[73] The Supreme Court, however, did not yield its position as articulated in *Smith* when the RFRA's constitutionality was raised to the Court's attention in *City of Boerne v. P.F. Flores, Archbishiop of San Antonio, and the United States* (1997). In *City of Boerne* the high court ruled the RFRA unconstitutional on the grounds of separation of powers, the Congress not having the right to dictate to the Supreme Court its standards of jurisprudence even when both chambers of Congress were nearly unanimous in their voting.[74] *City of Boerne* ensured that *Smith* would continue to exert controlling precedence. Nevertheless, the jurisprudential landscape remains challenging as complicated by the fact that *Lemon* and other major cases not fully congruent with *Smith* have not been directly overruled.[75]

Shortly after deciding *Smith,* the Rehnquist Court tested its new doctrine in *Church of the Lukumi Bablu Aye, Inc. and Ernesto Pichardo v. City of Hialeah* (1993). The controversy involved the ritual sacrifice of animals for the Yoba religion. Using a strict judicial scrutiny standard, the Court found that the southern Florida City of Hialeah attempted to impede the Yoba adherents' free exercise of religion by creating city ordinances that were neither neutral with regard to religion nor of general application. The Court found evidence of tacit governmental hostility in the way the ordinances effectively singled out the religion. In the Court's view, the city's ordinances did not advance interests of the highest order nor were the ordinances nar-

rowly tailored in pursuit of those interests. Furthermore, the Court observed that the ordinances did not advance legitimate and compelling governmental interests, resurrecting the applicability of *Sherbert* in the shadow of *Smith*.[76]

The Court's methodology in the case suggests a continuing effort to find definitions, tests, and doctrines by which to address the variables in free exercise cases. But organizing the Court's analytical instruments into intuitive categories is not easy. One legal scholar, Douglas Laycock, presents a useful model. Laycock sorts the Court's interpretative solutions on free exercise (as perceived by scholars) into four groups.

The first category is formal neutrality—an approach that says free exercise exemptions are forbidden. The category is founded on the idea that exemptions imply Court preference or perhaps the inadequacy of a jurisprudential system that requires adjustments to produce suitable results. The category is not, however, in much play because the two problems it seeks to avoid are less disruptive of Court interests than the prospect of fewer tools by which to fit justice to unusual cases.[77]

The second attempted solution is that exemptions are permitted but not required (permissive formal neutrality). This solution purportedly describes the Court's thinking until *Sherbert* (1963); it continues to explain the Court's approach in matters of traditional religious privilege. One example is the exemption of sacramental wine from state liquor laws.

The third attempted solution allows that exemptions that are required for matters of conscience—an approach evident in the years between *Sherbert* and Scalia's opinion in *Smith.* Support for this view is found in James Madison's argument that duties to God supercede duties to civil society. Most accommodationists go at least this far in urging exemptions for cases in which conscience might be infringed without them.

Finally, a fourth and more aggressive solution advocates exemptions for religious autonomy as well as conscience. The ideal of religious autonomy includes the notion that regulation that burdens religion discourages religion—a problem for the Free Exercise Clause. Nevertheless, numerous skeptics remain concerned that too much autonomy for religious organizations—exemption from taxation, zoning, employment, and other types of laws—gives these organizations a license to misuse the public trust.[78]

While Laycock's system has the attraction of intuitive progression along an axis of free exercise, the effort also illustrates the difficulty of categorizing theories, doctrines, rules, tests, precedents and idiosyncratic solutions in the context of undulating boundaries and variable definitions of religion. It is of little surprise, then, that many scholars find no clear way forward, generating a pessimistic expectation of the Court's jurisprudential future on the religion

clauses. But there exists as much cause for optimism, since no other nation on earth has preserved as much religious liberty as has the United States while providing paths of political recourse for dissatisfied participants.

CULTURE AND THE LIMITS OF FREE EXERCISE

In the 1981 case of *Badoni v. Higginson,* the Supreme Court refused to give the Navajos a special accommodation in using a sacred Native American site. The controversy concerned the Rainbow Bridge—one of the world's greatest natural rock arches that had become increasingly accessible to tourists through the filling of Lake Powell on Utah's border with Arizona. The Navajos claimed a right of free exercise. The Court, conversely, focused on the Establishment Clause, claiming, in essence, that if it were to grant the Navajos an exemption for preferential use of the site (which had become a National Monument), it would be guilty of giving the equivalent of affirmative action to one religion.[79] The Court welcomed Navajos to continue using the site for religious purposes but not to the exclusion of tourism as regulated by the National Parks Service.

Cases like *Badoni v. Higginson* are suspect to some observers who believe that culture plays an outsized role in how the Court understands free exercise.[80] Edwin B. Firmage writes that the Mormon polygamy cases "reflect a refusal on the part of the federal judiciary, the Congress, and the executive branch to allow for a radically different vision of American society to coexist in a nation colored by the concept of traditional Protestant Christianity."[81] Melody Kapilialoha MacKenzie and Catherine Kau argue much the same thing with regard to peculiar aspects of Polynesian religion, stating that the "distinctiveness of Native Hawaiian religion—so different from traditional Judeo-Christian doctrines—makes it especially vulnerable and renders doubtful its continued protection under the Free Exercise Clause."[82] Joan Mahoney argues that laws concerning personal morality in the United States have been rooted far more in religious beliefs and norms than in any type of objective assessment of the secular purposes of the law—an argument increasingly in vogue on the political left.[83] Mahoney reinforces her argument by citing a comment by Justice John Paul Stevens in *Thornburgh v. American College of Obstetricians and Gynecologists* (1986), Stevens asserting that laws restricting abortion have no secular purpose but are instead moored to religious philosophies.

In essence, the Stevens and Mahoney argument is that people's lifestyle choices—abortion and gay marriage included—are impinged by the way religious belief seeps into the culture. As dominant religious beliefs transmit convictions about appropriate personal morality into society, these religious

judgments can become secularized as in the form of culture; as such, they may escape censure under the Court's disestablishment rules. Since any establishment potentially limits someone's free exercise, culturally embedded religion serves to narrow the conduct side of religious free exercise for individuals whose religion is accepting of all behaviors entered into by consenting adults. This idea is no new innovation since part of the rationale of voluntary disestablishment in the states during the nation's formative years was predicated on the belief that the cultural dimensions of religion would remain evident in the designs of state law, creating an environment friendly to Christianity's ends without the need of state-supported churches.

One way to explore the question of culture's impact upon religion clause jurisprudence is to contemplate how the Court's understanding of the word "religion" has changed as American culture has evolved. During the nineteenth century, the Court understood religion as including a strong theistic element; that is, belief in a Supreme Being. The thinking reflected the religious culture and history of the United States as well as world history in general. As culture changed, the Court found it convenient to drop this theistic standard in its 1961 *Torcaso v. Watkins* decision. In that case it held that government cannot "aid those religions based on a belief in the existence of God as against those religions founded on different beliefs."[84]

Evidently, the Court was concerned that to prefer theistic religions over non-theistic religions would be paramount to creating an establishment on behalf of preferred religions over non-preferred religions. This type of thinking led to the Court's work in *United States v. Seeger* (1965), where it cited theologian Paul Tillich's work as cause to broaden its understanding of religion. Tillich's definition of religion allowed for almost anything that might concern "the depths of your life, of the source of your being, of your ultimate concern, of what you take most seriously without any reservation."[85] Maneuvering from Tillich, the Court suggested that it could accept as a religion a sincere belief that "occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God . . . " Just seven years later in another conscientious objector case, the Court expanded the boundaries of religion even further, at least in regard to conscientious objection to military service.[86]

These examples suggest that although the Court did not allow in *Seeger* an exemption from combat duty under the Selective Service Act for objections that were merely "political, sociological, or philosophical," the Court has broadened the idea of religion greatly where it has served the Court's purposes or needs. The protection of non-theistic religion—sincere beliefs that occupy a place in one's life parallel to personal occupation with a belief in God—opens the door to the protection of self-defined religion that

might include as its elements the right to abortion, self-cloning, homosexual marriage, polygamy, ritual drug use, animal sacrifices, and many other such things; granted, theistic religion can produce the same result.

Justice Scalia's opinion in *Smith* suggests a concern about the prospect of anarchy for the Court's religion clause jurisprudence if the meaning of religion is overly broadened. Scalia wrote, "We have never held that an individual's religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct the state is free to regulate." Scalia further cited *Reynolds* in arguing that a claim of religion ought not to give people liberty to become a law unto themselves.[87]

A related way to think about the intersection of religion with culture involves the notion of de facto religion—a term coined by Mark De Wolfe Howe in his 1965 book, *The Garden in the Wilderness*. Howe thought that the social reality of the United States demanded that religious interests be advanced by culture, quite notably by public language (e.g., "In God We Trust" on coins), the naming of cities (e.g., St. Paul), and the origination of religious holidays (e.g., Thanksgiving).[88] But there is more to de facto religion than symbolism: The American version of religious freedom is largely deferential to traditional religious norms. These background norms include moralistic assumptions regarding suitable behavior and the punishment of crime, many of the assumptions reflecting traditions such as ancient Israel's Mosaic code. As William Marshall explains, this de facto religion is "too much a part of the public culture to be excised," any such attempts potentially harming the fabric of society.[89]

The U.S. Supreme Court has long recognized the situation with de facto religion and has taken several paths in addressing the symbolic side of it. In *Marsh v. Chambers* (1983), the Court created an *ad hoc* exception for legislative prayer, recognizing that this type of religious activity was *non-coercive and embedded* in the character of the nation. In other instances, the Court has allowed religious practices that are *adequately secularized*—such as the placement of a Christian nativity scene into a broader context. In this situation a context of competing religious and non-religious symbols marginalizes any advantage for the de facto religion. A lesser frequently used third approach is to apply a *de minimus* scrutiny to the challenged action, the Court simply averting its gaze and claiming no serious constitutional concern. The Court could, as William Marshall points out, create a class of minor cultural establishments that are protected from strict scrutiny as an alternative means of accommodating de facto establishment of cultural religion.[90]

While the U.S. Supreme Court has not shown evidence of considering de facto cultural religion as a limit upon the free exercise of those who are

unhappy with it, neither has it done much with plausible arguments on the opposite side of the ledger. For example, Michael McConnell notes that in early times, "[e]ach of the state constitutions first defined the scope of the free exercise right in terms of the conscience of the individual believer and the actions that flow from that conscience." McConnell then notes that none of the state constitutional provisions confined their protections to mere beliefs and opinions, their design suggesting the intention of countering any sentiment that religious conduct was unprotected. McConnell thus claims that free exercise has always extended to some forms of conduct, even if the scope of the protected conduct is vague.[91]

If America's de facto religion is not only symbolic but inescapably moralistic and preoccupied with the conduct of individuals and good of the community, the mere protection of conscience, beliefs, and formal religious practice is not suitably protective of the core of traditional American religion. A case can be made that to deny pious people with traditional religion the political wherewithal to experience the social and cultural aspects of their religious framework unduly limits the essence of their free exercise. The plausibility of creating local pockets of federalism to facilitate such ends, while protecting states from religious coercion or the loss of religious pluralism, could imply that some structural innovation is in order.

The foregoing logic is not dissimilar to that offered by Jewish scholar Amitai Etzioni when he states that to object to the moral voice of the community is "to oppose the social glue that helps hold the moral order together." He continues:

> Relying on internalized values and consciences—expecting people to do what is right completely on their own—asks too much of individuals and disregards their social moorings and the important role that communities have in sustaining moral commitments. In effect, those who are so adamantly opposed to statism must recognize that communities require some ways of making their needs felt . . . [92]

If Etzioni's argument were refused a place on the table alongside others, it would be tantamount to elevating non-traditional religion as the de facto religion of the state. Indeed, this line of thought suggests that the Rehnquist Court's work in *Smith* may have been pragmatic in allowing a larger role in the political process in deciding some of the limits of free exercise of religion. That said, the political process is not always orderly or constructive of prudent outcomes. Indeed, the national political process in the late-nineteenth century might have produced a result far less hospitable to religion and to the interests of modern accommodationists had it not been for thirty-five holdouts in the U.S. Senate.

In the 1870s, the United States experienced a violent eruption of Nativism, a reactionary expression of hyper-Protestantism triggered by surging Catholic immigration and fears of power loss among traditional Americans. Reacting to the sentiments of the Protestant majority, the U.S. Congress, President Grant, both political parties and much of the nation prepared to alter the religion clauses of the First Amendment as a means of undercutting any prospect of the Catholic Church gaining political power through the operations of federalism or its private school system. The proposed corrective was widely heralded as the Blaine Amendment, named for its congressional sponsor, James G. Blaine of Maine.[93]

An aggressive endeavor, the Blaine Amendment would have impeded the growing power of Catholicism in America by laying a truly imposing wall of separation between church and state at every level of government. The proposed amendment read, "No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof."[94] The replacement of the word "Congress" with the words "No State" simply anticipated what the Supreme Court would do seven decades later. But the amendment continued at some length, prohibiting state funds from ever being under the control of any religious sect or denomination, or even being divided between them (a potential blow to neutral accommodation).

In 1876, the proposed amendment passed the U.S. House of Representatives in overwhelming fashion but fell two votes short of the necessary two-thirds margin in the Senate. Had the Blaine Amendment passed and been ratified by three-fourths of the states, this emotionally charged adjustment would have become the nation's Sixteenth Amendment. As things worked out, the Eighteenth Amendment became the means by which the nation established its ill-advised policy of Prohibition. If the Blaine Amendment would have passed the Senate and been ratified in the states, the nation may have found itself later recanting that work of prejudiced religious passion just as it found it necessary to recant what it thought was prudence when it ratified Prohibition. The tumultuous episode serves as a reminder that good law tends to arise from reflection, understanding and judicious dialogue, the prospect for these advantages seldom as good as at the Founding.

CONCLUSION

The Supreme Court's meandering route between accommodation and separation has served the nation fairly well, protecting religious liberty for far more people and under more diverse conditions than many people would have thought possible. As the Court's history shows, religion cannot

be adequately protected without the interplay of separation and accommodation—the construction of a modest wall and the preservation of prudently situated breaches in it. Of course, metaphors overly simplify the enormous challenges the Court faces in interfacing a nationalized Free Exercise Clause with a nationalized Establishment Clause.

Arguably, one of the most important tasks awaiting the Court is to find suitable ways of providing free exercise for individuals and sects for whom community-level religious establishment is an essential aspect of their free exercise. This particular challenge may require the nation's premier court to acknowledge more fully that for many religious people, religiously motivated conduct is not easily separated from religious belief. Scholars seem increasingly aware that this is a matter of constitutional justice and a concern that deserves greater scrutiny.

Knowledgeable Supreme Court observers disagree as to whether religion is being incrementally removed from the public realm or gradually reaccommodated. Both effects likely exist as the Court's work is played out on different fronts. Then, too, one's idea of what constitutes religion markedly influences perceived gains or losses for free exercise. Nevertheless, a mixed evaluation of what is transpiring in the Court's religion clause jurisprudence may suggest a happy difficulty in finding any political system with better prospects for managing enormous religious diversity. While there are other imaginable cultural conditions that might make it possible for the U.S. Supreme Court to construct a religion clause jurisprudence with better coherence, liberals, moderates, and conservatives have reason to hope that the evolving limits of free exercise will be hospitable to quality religion, civic virtue, and good government.

NOTES

1. Thomas J. Curry, *Farewell to Christendom: The Future State of Church and State in America* (New York: Oxford University Press, 2006). Curry believes the First Amendment put an end to Christendom (i.e., state-supported religion), the national government possessing almost no constitutional competency in matters of religion.

2. Stephen L. Carter, *The Dissent of the Governed: A Meditation on Law, Religion, and Loyalty* (Cambridge, MA: Harvard University Press, 1998), 61–66. Carter believes that a religious community can provide the benefit of organizing political resistance.

3. Gerard V. Bradley, *Church-State Relationships in America* (Westport, CT: Greenwood Press, 1987), 27.

4. Franklyn S. Haiman, *Religious Expression and the American Constitution* (East Lansing, MI: Michigan State University Press, 2003), 141.

5. Donald S. Lutz, ed., *Colonial Origins of the American Constitution: A Documentary History* (Indianapolis: Liberty Fund, 1998).

6. Thomas J. Curry, "Establishment Clause: Background and Adoption" in *Religion and American Law: An Encyclopedia*, ed. Paul Finkelman (New York: Garland Publishing, Inc., 2000), 165.

7. Ibid.

8. Jefferson's Act is variously named, another common title being the "Virginia Statute for Religious Liberty."

9. Stewart Davenport, "'Dale's Laws,'" in *Religion and American Law*, 119–120.

10. Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* (New York: Oxford University Press, 1986), 198–199.

11. The quoted phrase is the opening statement of the Bill of Rights.

12. Patrick M. O'Neil, "Bible in American Law," in *Religion and American Law*, 30–34.

13. Jessie L. Embry, "Polygamy," in *Utah History Encyclopedia*, ed. Allan Kent Powell (Salt Lake City: University of Utah Press, 1994), 428–430.

14. Ibid.

15. Ibid.

16. The Revised Statutes of the United States preceded the United States Code as a means of organizing the acts of Congress.

17. *Reynolds v. United States,* 98 U.S. 145 (1879).

18. Embry, 428–430.

19. *Reynolds v. United States,* 98 U.S. 145 (1879).

20. Ibid.

21. Haiman, 93.

22. Michael McConnell, "*Permoli v. First Municipality of New Orleans,* 44 U.S. (3 How.) 589 (1845)," in *Religion and American Law*, 358.

23. Carol Weisbrod, "*Reynolds v. United States,* 98 U.S. (8 Otto) 145 (1879)," in *Religion and American Law*, 420–421.

24. See *Wisconsin v. Yoder,* 406 U.S. 205 (1972).

25. Michael Kent Curtis, "*Barron v. Baltimore,* 7 Pet. (32 U.S.) 243 (1833)," in *Religion and American Law*, 25–27.

26. *Palko v. Connecticut*, 302 U.S. 319 (1937).

27. Melvin I. Urofsky, "*Cantwell v. Connecticut*, 310 U.S. 296 (1940)," in *Religion and American Law*, 65–66.

28. *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

29. Urofsky, "*Cantwell v. Connecticut*," 65–67.

30. Renee C. Redman, "Jehovah's Witnesses" in *Religion and American Law*, 245. According to Redman, the Witnesses have been involved with at least thirty-seven plenary decisions involving the First Amendment.

31. Tony Freyer, "*Everson v. Board of Education,* 330 U.S. 1 (1947)," in *Religion and American Law*, 173–175.

32. Philip Hamburger, *Separation of Church and State* (Cambridge, MA: Harvard

University Press, 2002), 461. Hamburger quotes U.S. Supreme Court Justice Robert Jackson.

33. Ibid., 461–470.

34. Thomas Dye, *Politics in America*, 6th ed. (Upper Saddle River, NJ: Pearson Education, 2005), 459.

35. John M. Mecklin, *The Story of American Dissent* (Port Washington, NY: Kennikat Press, 1970, repr.), 310.

36. Catherine Cookson, *Regulating Religion: The Courts and the Free Exercise Clause* (New York: Oxford University Press, 2001), 80–94.

37. James T. Baker, "Baptists in Early America and the Separation of Church and State," in *Religion and American Law*, 20–25.

38. Ibid., 24.

39. Davison M. Douglas, "'Christian Nation' As a Concept in Supreme Court Jurisprudence," in *Religion and American Law*, 74–75.

40. Ibid.

41. Ibid.

42. John Witte, Jr., *Religion and the American Constitutional Experiment*, 2nd ed. (Boulder, CO: Westview Press, 2005), xvi.

43. Bette Novit Evans, "Definitions of Religion in Constitutional Law," in *Religion and American Law*, 122.

44. Ibid., 123.

45. Kenneth D. Wald, *Religion and Politics in the United States*, 4th ed. (Lanham, MD: Rowman & Littlefield, 2003), 108.

46. Ibid., 112.

47. Steven D. Smith, *Foreordained Failure: The Question for a Constitutional Principle of Religious Freedom* (New York: Oxford University Press, 1995).

48. Curry, "Establishment Clause," 162.

49. Richard Collin Mangrum, "Establishments of Religion Created through Free Exercise Exemptions," in *Religion and American Law*, 169–172.

50. Mangrum, 172.

51. Thomas A. Schweitzer, "Public Aid to Parochial Education," in *Religion and American Law*, 382.

52. Michael McConnell, "*Sherbert v. Verner,* 374 U.S. 398 (1963)," in *Religion and American Law*, 459.

53. Ibid., 457.

54. Lee Epstein and Thomas G. Walker, *Constitutional Law for a Changing America: Rights, Liberties and Justice*, 5th edition (Washington, D.C.: CQ Press, 2004), 145, 213.

55. Robert S. Alley, ed., *The Constitution and Religion: Leading Supreme Court Cases on Church and State* (New York: Prometheus Books, 1999), 11. Alley's selection of free exercise cases is quite similar to mine starting with *Reynolds* and moving through *City of Boerne*.

56. Daniel O. Conkle, "*Zorach v. Clauson,* 343 U.S. 306 (1952)," in *Religion and American Law*, 576.

57. Ibid., 576.

58. Ibid., 578.

59. See Michael J. Perry, *Under God? Religious Faith and Liberal Democracy* (New York: Cambridge University Press, 2003), ix. Justice Douglas was joined in his opinion by Chief Justice Fred Vinson and Justices Reed, Burton, Clark, and Minton. Separate dissenting opinions were provided by Black, Frankfurter, and Jackson.

60. Michael McConnell, "*Sherbert*," 456–457.

61. Ibid., "*Sherbert*," 457.

62. Walter F. Pratt, Jr., "*Wisconsin v. Yoder,* 406 U.S. 205 (1972)," in *Religion and American Law*, 561.

63. Bette Novit Evans, "*Employment Division, Department of Human Resources of Oregon v. Smith,* 494 U.S. 872 (1990)," in *Religion and American Law*, 148.

64. Phillip Presby and Donald G. Nieman, "*Lemon v. Kurtzman,* 403 U.S. 602 (1971), 411 U.S. 192 (1973)," in *Religion and American Law*, 275–280.

65. Sanford Levinson, "*Widmar v. Vincent,* 454 U.S. 263 (1981)," in *Religion and American Law*, 556.

66. Ibid., 556–557.

67. Bette Novit Evans, "*United States v. Lee,* 455 U.S. 252 (1982)," in *Religion and American Law*, 547–548.

68. Ibid., 548.

69. Wald, 111–112.

70. Evans, "Employment Division," 147.

71. Hamburger, 462.

72. Evans, "Employment Division," 147.

73. Evans, "Employment Division," 151.

74. Melissa Day, "*City of Boerne v. P.F. Flores, Archbishop of San Antonio, and the United States,* 521 U.S. 507 (1997)," in *Religion and American Law*, 83–84.

75. Presby and Nieman, 279. Also, Evans, "Employment Division," 151.

76. Richard B. Saphire, "*Church of the Lukumi Babalu Aye, Inc. And Ernesto Pichardo v. City of Hialeah,* 508 U.S. 520 (1993)," in *Religion and American Law*, 77–80.

77. Douglas Laycock, "Theories of Interpretation: Free Exercise Clause and Establishment Clause," in *Religion and American Law*, 516–526.

78. Douglas Laycock, "Theories of Interpretation," 516–526.

79. Stephen K. Schutte, "*Badoni v. Higginson,* 638 F. 2d 172 (10th Cir. 1980), cert. Denied, 452 U.S. 954 (1981)," in *Religion and American Law*, 17–18.

80. See Philip Schaff, *Church and State in the United States* (New York: Arno Press, 1972), 37. Schaff argues that the limitations of religious liberty depend upon "the course of public opinion."

81. Edwin B. Firmage, "Mormon Free Exercise in the Nineteenth-Century America," in *Religion and American Law*, 324.

82. Melody Kapilialoha MacKenzie and Catherine Kau, "Hawaiian Native Religion and American Law," in *Religion and American Law*, 221.

83. Joan Mahoney, "Privacy Rights and Religious Influences," in *Religion and American Law*, 378–379.

84. Evans, "Definitions," 124.

85. Ibid., 127. Evans quotes theologian Paul Tillich.

86. Ibid., 128.

87. Ibid., "Employment Division," 148.

88. William Marshall, "De Facto Establishment of Religion," in *Religion and American Law,* 120.

89. Ibid., 121.

90. Ibid., 120–122.

91. Michael McConnell, "Free Exercise Clause in Historical Perspective: The 'New' American Philosophy of Religious Pluralism," in *Religion and American Law*, 194.

92. Amitai Etzioni, ed. *The Essential Communitarian Reader* (Lanham, MD: Rowman & Littlefield, 1998), 43.

93. Ibid., 296–299; 321–328.

94. See Richard Aynes, "Blaine Amendment," in *Religion and American Law*, 39–41.

FURTHER READING

Where does one start to learn more about free exercise in America? One could begin with the *Colonial Origins of the American Constitution: A Documentary History* (Donald L. Lutz, 1998). Lutz's collection of early documents is one of the best for opening up the primary literature on free exercise theory. Next, Robert S. Alley's 1985 book *James Madison on Religious Liberty* provides many writings by the so-called father of the Constitution as well as Alley's insightful commentaries. For a comprehensive yet accessible examination of the legal basis of religious liberty in America it is hard to match the 2005 second edition of *Religion and the American Constitutional Experiment,* by John Witte, Jr., Director of the Center for the Study of Law and Religion at Emory University.

Steven D. Smith's *Foreordained Failure: The Quest for a Constitutional Principle of Religious Freedom* (1995) provides a legally sophisticated examination of the Court's work on the religion clauses. University of Chicago Law Professor Philip Hamburger's 2002 book *Separation of Church and State* is credited with reinvigorating the debate about the importance of public religion in America. Michael J. Perry's 2003 Cambridge University Press book *Under God? Religious Faith and Liberal Democracy* reveals considerations that moved an accomplished separationist scholar to become a mild accommodationist. Finally, Paul Finkelman, editor of *Religion and American Law: An Encyclopedia* (2000) supplies a superb collection of erudite yet readable legal essays on the religion clauses. Arranged alphabetically by topic, the essays provide background information and perspective on the full spectrum of free exercise and disestablishment issues.

Appendix: Selected Cases

The following cases are discussed or referenced by the chapters in this volume. Only precedent-setting decisions or important clarifications are included in this appendix. Though not all the cases here are, strictly speaking, matters of church and state jurisprudence, all have important ramifications for the issues covered in the volume.

Abington Township v. Schempp (1963): A Pennsylvania law required public school students to read at least ten Bible verses and recite the Lord's Prayer at the beginning of the school day. Concerned parents argued that even with the allowance for exemptions, this practice violated the Establishment and Free Exercise Clauses. The Supreme Court, siding with the parents, declared the practice unconstitutional.

ACLU v. Leavitt (2006): The U.S. Department of Health and Human Services authorized funding for the "Silver Ring Thing," a religiously-based abstinence program. The ACLU charged that this funding violated the Establishment Clause and after an initial suit in 2005, reached a settlement in a 2006 case of the U.S. District Court of Massachusetts, thereby ending the funding.

ACLU v. Rabun County (1982): In this case, argued in the U.S. Court of Appeals, Eleventh Circuit, the ACLU challenged the constitutionality of a large cross erected on an 85-foot platform in the Black Rock Mountain State Park in Georgia. Due to the state-funded upkeep of the cross and the "noneconomic injury" it caused to those non-Christians using the park, the Court decided that the installation of the cross violated all three prongs of the Lemon Test (*Lemon v. Kurtzman*).

Agostini v. Felton (1997): A parochial school teacher challenged an earlier

decision by the Supreme Court regarding whether or not public school teachers could teach secular subjects at parochial schools. The ruling by the U.S. Supreme Court reversed *Aguilar v. Felton* (1985). Not only can public school teachers enter parochial schools without necessarily violating the Establishment Clause, this decision means that not all entanglements of church and state should be assumed unconstitutional.

Aguilar v. Felton (1985): Since the 1960s, New York City had used public monies to pay teachers in parochial schools as a means of combating educational inequality. The Supreme Court found that the monitoring of publicly paid teachers necessary to ensure that they were not promoting religion amounted to excessive entanglement between church and state. The Supreme Court later overturned this ruling in *Agostini v. Felton* (1997).

Americans United for the Separation of Church and State v. Prison Fellowship Ministries (2003): Americans United brought challenge against Iowa corrections officials and Prison Fellowship Ministries, arguing that the Ministries' pre-release program for inmates constituted a violation of the Establishment Clause. A federal judge ruled that the program was completely religious in origin and focus and the prison system provided no secular alternative for non-religious inmates or those of other faiths. The judge ordered the Fellowship to repay all state-granted money. The case is currently under appeal.

Anderson v. Salt Lake City Corp. (1973): This case from the Tenth Circuit of the U.S. Appeals Court questioned the constitutionality of a monument to the Ten Commandments at a Salt Lake City courthouse. The monument also contained various symbols and references to Abrahamic religions and U.S. history. The Court found the monument to be constitutional in its recognition of the religious roots of the nation and further held that an "ecclesiastical background" did not make the monument necessarily religious in character.

Aronow v. United States (1970): In this challenge to the use of the national motto, "In God We Trust" as a violation of the Establishment Clause, the U.S. Court of Appeals for the Ninth Circuit upheld the motto. The Court argued that this motto has only a "patriotic or ceremonial character" and thus does not seek to advance religion or preference a particular religion.

Atkins v. Virginia (2002): The U.S. Supreme Court considered a Virginia case in which a mentally retarded man was found guilty of abduction, armed robbery, and capital murder and sentenced to death. Pointing to the Eighth Amendment, the court determined that such a sentence qualified as "cruel and unusual punishment" due to the man's psychological state. This ruling reflected a growing trend in state legislation to limit the death penalty in this way.

Badoni v. Higginson (1981): A group of Navajo members sued to protect sacred sites threatened by the planned flooding of Lake Powell for downstream water storage and recreational boating. Although affirming Native American claims to the land, federal courts found the state's interest in promoting economic prosperity more compelling than the concerns of the Native American groups.

Bowen v. Kendrick (1988): The Adolescent Family Life Act (AFLA) gave federal funds to service and research organizations that dealt with premarital teenage sexuality, including several religious organizations. Chan Kendrick represented several citizens, clergy, and the American Jewish Congress in claiming this violated the First Amendment's Establishment Clause. The Supreme Court decided against Kendrick by determining that support of religious organizations was not the primary goal of AFLA.

Bowers v. Hardwick (1986): The State of Georgia charged Michael Hardwick with violating a statute against sodomy after he was observed by an officer in the act of consensual homosexual sodomy with an adult in his bedroom. Hardwick appealed by way of questioning the constitutionality of the statute. The Supreme Court found that no constitutional protection for sodomy existed, thus allowing states to outlaw the practice. This case was later overturned by *Lawrence and Garner v. Texas* (2003).

Bush v. Holmes (2004): This ruling by the Florida First District Court of Appeals ruled that the state's Opportunity Scholarship Program (OSP) and school-voucher program as a whole were unconstitutional because they allowed state funding of religious schools. The state of Florida appealed to the State Supreme Court, which struck down the OSP as a violation of the state's Education Clause. It made no determination on the church/state issues involved.

Cantwell v. Connecticut (1940): Jessie Cantwell and his son, both Jehovah's Witnesses, were arrested for failing to obtain a solicitation permit and for disturbing the peace after proselytizing in a Connecticut neighborhood inhabited primarily by Catholics. The Supreme Court found that the arrest violated the Cantwell's First and Fourteenth Amendment rights, as their message did not constitute a threat of bodily harm.

Church of Holy Trinity v. U.S. (1892): In this case, the Church of the Holy Trinity in New York entered into a contract with an English preacher. Though such a contract with a foreign laborer was forbidden under U.S. law, the Church argued that the minister did not qualify as a foreign laborer. The Supreme Court agreed with the Church that the minister did not fall under the category prohibited by this law, thus emphasizing the spirit over the letter of the law.

Church of Lukumi Bablu Aye v. City of Hialeah (1993): As practitioners

of Santeria, the Church of Lukumi Babalu Aye incorporated animal sacrifice into worship. Soon after the Church was established, the local city council in Hialeah County passed ordinances prohibiting the sacrifice or slaughter of animals outside of specific state-licensed activities. The Supreme Court found these ordinances to be unconstitutional because they were enacted specifically to be applied to this church. The statutes thus constituted an undue burden on religious exercise.

City of Boerne v. Flores (1997): Citing the 1993 Religious Freedom Restoration Act (RFRA), Archbishop Flores of San Antonio sued local zoning authorities for limiting his ability to expand his Boerne, Texas church. City authorities cited the historic preservation designation of the site of Flores' church as reason to restrict the expansion. The Supreme Court concluded that through RFRA, Congress had overextended its Fourteenth Amendment powers by making local ordinances subject to federal regulation. Only states may decide how to apply statutes such as RFRA.

Corporation of the Presiding Bishop v. Amos (1987): An individual was fired from a nonprofit facility run by the Church of Jesus Christ of Latter-Day Saints because he was not a member of the Church. He and other individuals brought suit against the Church alleging religious discrimination in violation of Title VII of the Civil Rights Act. The Supreme Court found the policy unconstitutional because the work of the facility and the job in question were secular activities.

County of Allegheny v. ACLU (1989): The ACLU of Greater Pittsburgh challenged the constitutionality of two local-government sponsored holiday displays in Pittsburgh, PA. The first display sat inside the County Courthouse and showed a Christian nativity scene with an explicitly Christian message displayed in front. The second was a large Hanukkah menorah outside the City-County building, placed there by a local Jewish organization. The Supreme Court disallowed the nativity display because of its location and its explicitly Christian message. The Court allowed the menorah because of its setting outside of the government building.

Cutter v. Wilkinson (2005): Ohio prisoners and practitioners of minority religions accused prison officials of violating the Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000 by not allowing them to practice their religion. Prison officials countered by claiming RLUIPA violated the Establishment Clause by advancing religious practice. The Supreme Court unanimously affirmed the constitutionality of RLUIPA in that the act ensured religious freedom for those inmates practicing both majority and minority faiths.

Engel v. Vitale (1962): In an attempt to standardize practice and minimize local conflict, the Board of Regents for the State of New York insti-

tuted a nondenominational and voluntary prayer to be said at the beginning of each school day. The Supreme Court determined that the prayer was unconstitutional despite its nondenominational nature and the allowance for abstention.

Everson v. Board of Education (1947): New Jersey instituted a law allowing for the reimbursement of funds to parents who sent their children to both religious and public schools on public transportation buses. Everson charged that this violated the Establishment Clause by enacting state support of religious schools. The Supreme Court upheld the constitutionality of the law by claiming the reimbursement was available to religious and non-religious individuals alike and did not constitute direct support of religious organizations.

Gilfillan et al. v. City of Philadelphia (1980): In 1979, Pope John Paul II visited the city of Philadelphia and, in preparation, the city spent $200,000 to construct a platform on which the Pope would deliver Mass. A U.S. Appeals Court ruled that this expenditure violated all three requirements of the *Lemon* Test (*Lemon v. Kurtzman*) and thus constituted a violation of the Establishment Cause. The local Archdiocese reimbursed the city for the funds and the Supreme Court denied a hearing of the case.

Good News Club v. Milford Central School (2001): The Good News Club is a Christian organization for preteen children that sought and was denied access to public school facilities for an after-hours program. The Good News Club sued, claiming that their First Amendment rights were being violated. Though earlier decisions favored the school, the Court found that since the school allowed other groups to meet in their facilities, they could not discriminate against a religious club.

Hein v. Freedom From Religion Foundation (2007): The Freedom From Religion Foundation sued the federal government after an executive order was issued by the President to form conferences within executive departments promoting Bush's new Faith-Based Initiative programs. A District Court ruled that the Foundation had no standing to sue as it was not directly affected or harmed by the order. The U.S. Court of Appeals for the Seventh Circuit thought otherwise and allowed for the suit on this Establishment Clause question. The Supreme Court agreed with the District Court in denying the right of citizens to bring suit as taxpayers against the Executive Branch.

Lawrence and Garner v. Texas (2003): After entering John Lawrence's house after a report of a weapons disturbance, Houston police discovered Lawrence and another adult man, Tyron Garner, engaged in a sexual act. They were arrested and charged with deviate sexual intercourse in violation of a Texas law. The Supreme Court argued that the law violated the Due

Process Clause and constituted an inappropriate involvement of government in private affairs, thus overturning *Bowers v. Hardwick* (1986).

Lemon v. Kurtzman (1971): This case was heard with two other cases involving laws in Pennsylvania and Rhode Island that funded teacher salaries and instructional materials for secular subjects taught in non-public schools. The Supreme Court concluded that these policies violated the Establishment Clause and developed the "Lemon Test" for determining whether a law violated the Clause. This test requires that a law must have "a secular legislative purpose," that the law must neither advance nor hinder religion, and that a law cannot lead to "an excessive government entanglement with religion."

Locke v. Davey (2004): In 1999, Washington State established its Promise Scholarship to provide college scholarships to top students. The state limited these funds by disallowing their use for theology programs. Joshua Davey earned a Promise Scholarship but declined the money in order to pursue pastoral ministries at a Christian college. Davey sued claiming a violation of his free exercise of religion. The Supreme Court denied Davey's suit, stating that government has a right to restrict its funding and only support non-religious programs of instruction as a means of avoiding state support of religious activity.

Lown v. Salvation Army (2005): The New York ACLU charged the Salvation Army with religious discrimination due to its restrictions on employees based on religious belief combined with its use of government funds to pay for its social service programs. A New York U.S. Circuit Court judge ruled that the Salvation Army could continue its policy and government funding provided the funds were used for non-religious activities.

Lynch v. Donnelly (1982): Daniel Lynch charged that the annual Pawtucket, Rhode Island, Christmas display in the city's shopping district violated the Establishment Clause by including a nativity scene as well as a Christmas tree, a "Seasons Greetings" banner, and a Santa Clause house. The Supreme Court disagreed and held that this display did not have a specific religious purpose but rather represented the history of the Christmas holiday.

Marbury v. Madison (1803): William Marbury and others sued the government to obtain jobs they were appointed to near the end of John Adams's presidency. Since the appointments were never finalized, Marbury and others were not able to fill their appointed posts. They sued in the Supreme Court, which found in their favor and established the principle of judicial review.

Marsh v. Chambers (1983): Coming out of the Nebraska state legislature, this case focused on the use of public monies to pay chaplains for prayers

offered in the legislature's assemblies. The Court abandoned the requirements set up by the *Lemon* Test (*Lemon v. Kurtzman)* and, relying on the idea that historical customs have their own legitimacy in the public sphere, upheld the chaplaincy program.

McCollum v. BOE (1948): A coalition of Jewish and Christian organizations sponsored a period of voluntary religious instruction to take place during the regular school day and in public school facilities. The Supreme Court found that the use of tax-supported property and the working relationship between public school and church authorities violated the Establishment Clause.

McCreary County v. ACLU (2005): In this case, the ACLU sued three counties in Kentucky for displaying the Ten Commandments in public facilities, including courthouses and schools. The Supreme Court found that the Kentucky displays did violate the Establishment Clause because it appeared as if the government was endorsing religion.

McDaniel v. Paty (1978): Historically, many states have had prohibitions against ministers serving in various public offices. In 1977, Tennessee law still restricted clergy from some public offices, including their constitutional convention. McDaniel, an ordained minister, sued, claiming the prohibition violated his rights. The Supreme Court agreed, holding that while a prohibition was constitutionally permissible, Tennessee had not shown why it was necessary.

Minersville School District v. Gobitis (1940): The Gobitis children were members of Jehovah's Witnesses who were expelled for not saluting the flag, an act they found to be in conflict with Biblical command. The Supreme Court upheld the mandatory flag salute, arguing that national unity was an important consideration and that attempts to promote it did not automatically violate a citizen's freedom.

Mitchell v. Helms (2000): This case, like others, focuses on the use of public money in sectarian schools. At issue here was the provision of funds for library, computer, and other educational materials. The Supreme Court ruled that the fact that all schools, religious and secular alike, were eligible for such aid means that the government has been neutral in its services and has thus not violated the Establishment Clause.

O'Hair v. Blumenthal (1979): In this case, Madaly Murray O'Hair, then President of the American Atheists, sued the federal government to remove the phrase "In God We Trust" from currency. The U.S. Court of Appeals for the Fifth Circuit ruled against O'Hair, arguing that the motto was secular and served a secular purpose.

Permoli v. First Municipality of New Orleans (1845): Bernard Permoli, a Catholic priest in Louisiana, conducted a funeral service in a New Orleans

church, in violation of an 1827 public health law regulating the transfer and display of bodies in the city. Permoli sued, arguing that his First Amendment rights were being violated. The Supreme Court found that the First Amendment protections did not apply to state laws, and thus left individual states free to regulate religious expression.

Reynolds v. U.S. (1879): George Reynolds, a member of the Church of Jesus Christ of Latter-Day Saints, was charged with bigamy in Utah. Along with certain procedural arguments, Reynolds held that religious duty obligated him to marry more than one woman at a time. The Supreme Court upheld Reynolds' conviction and drew a distinction between what religious people might believe and what they can practice in the public sphere.

Rosenberger v. UVA (1995): University of Virginia student Ronald Rosenberger requested a disbursement from the student activities fund to subsidize the publication of a Christian newspaper. The University refused on the grounds that it could not promote any specific religious viewpoint. The Supreme Court held that the University had acted in such a way as to penalize Rosenberger's speech, and further found that the University's publication policy was neutral toward religious content and did not therefore violate the Establishment Clause. The University, if it subsidizes any paper, must support a student religious publication on the same basis.

Santa Fe Independent School District v. Doe (2000): Two families brought a suit against the Santa Fe Independent School District's practice of allowing an overtly Christian prayer before home football games. While the case was pending, the school district changed the policy from requiring a prayer to permitting one. The Supreme Court held that the new policy violated the Establishment Clause because the prayer took place on school property at an official function, and therefore could appear to endorse religious practice.

Sherbert v. Verner (1963): A member of the Seventh Day Adventist Church was fired from her job for refusing to work on Saturday, which was, for her, the Sabbath. She was denied unemployment compensation by the South Carolina Employment Security Commission. The Court held that the state's attempt to restrict her unemployment compensation violated her rights to the free exercise of her faith.

Stone v. Graham (1980): This case challenged a Kentucky law that required the posting of the Ten Commandments in public school classrooms. The Court found that the law violated the first prong of the *Lemon* Test (*Lemon v. Kurtzman*) since the posting had no secular legislative purpose.

Torcaso v. Watkins (1961): After his appointment as Notary Public in Maryland, Roy Torcaso was denied his commission for refusing to affirm his belief in God. The Supreme Court unanimously found Maryland's re-

quirement that public officials affirm a belief in God as a prerequisite for holding office to violate the First Amendment.

Updegraph v. The Commonwealth of Pennsylvania (1824): Abner Updegraph was found guilty of blasphemy for speaking against the truth of the Bible. The Pennsylvania Supreme Court reversed the jury's conviction based on the technicality that Updegraph's comments were not made in a profane manner. In its decision, the Supreme Court proclaimed Christianity as part of the common law of Pennsylvania and, thus, reasoned that certain instances of blasphemy should be punished.

U.S. v. Lee (1982): In this case, an Amish employer sued for relief from IRS imposed back taxes and penalties leveled against him as a result of his failure to pay Social Security taxes for his employees. Lee argued that his religious beliefs mandated that he not support government relief programs as they imply that the burden for caring for the sick and elderly fell to the public sector instead of the religious community. While the Supreme Court did find that his beliefs were "sincerely held," they maintained that not all burdens on religious expression automatically violate the law and some are, in fact, necessary for proper function of the government. Though Amish could exempt themselves from the Social Security program, they could not avoid the tax.

U.S. v. Seeger (1965): This case concerns the definition of religion as it related to claims for religiously based conscientious objector status. Federal law required that applicants for conscientious objector status be able to affirm a theistic, rather than a political, sociological, or philosophical, understanding of reality. The Supreme Court held that the opinions of the individuals themselves must be taken into account and thus that Congress could not define what was or was not religious in this setting.

Van Orden v. Perry (2005): Van Orden sued the state of Texas in federal court, claiming that a monument to the Ten Commandments on the grounds of the state capitol violated the Establishment Clause. The Supreme Court ruled that the Ten Commandments, though religious in origin, are part of American history and society and could therefore be included in public displays without violating the First Amendment.

Widmar v. Vincent (1981): This case concerned access to university facilities at the University of Missouri at Kansas City. A Christian club that had been allowed to meet in previous years sued when a new policy prompted school officials to deny permission for the club to have access to university facilities. The Supreme Court held that the Establishment Clause did not require school officials to deny access to school facilities on the basis of the religious nature of the club.

Wisconsin v. Yoder (1972): This case revolved around whether or not

Amish families could absent their children from school facilities after a certain age on the basis of religious conviction. The Supreme Court held that public schooling was in direct conflict with the Amish way of life and that the state of Wisconsin could not therefore compel students to attend after the eighth grade.

Zelman v. Simmons-Harris (2002): The Cleveland City School District's voucher plan offered publicly-financed aid for students to attend private, even religiously-sponsored, schools. A group of taxpayers sued, claiming that the voucher plan violated the Establishment Clause in that it provided public money for parochial education. The Supreme Court held that since the plan was part of the state's effort to provide an education for all children, and that since the decision as to where a given child would attend school was not made by school officials, the plan did not violate the First Amendment.

Zorach v. Clauson (1952): New York's policy of allowing release time from public schools for students to attend religious instruction elsewhere was found to be permissible by the Supreme Court. Since school facilities were not being used to promote religious instruction, and since no student was bound by school officials to attend such instruction, the program did not violate the First Amendment.

About the Editors and Contributors

THE EDITORS

ANN W. DUNCAN is a Ph.D. Candidate in American Religious History at the University of Virginia. She received her M.A. in Religious Studies from the University of Virginia in 2005 and her B.A. from Duke University in 2000. Her research, publications, and conference presentations have focused on intersections of religion and politics, American Christianity in wartime, and, more recently, motherhood and American Christianity.

STEVEN L. JONES is Associate Professor of Sociology at Grove City College and is the former associate director of the Center on Religion and Democracy at the University of Virginia. He received his M.T.S. degree from Duke University and holds a Ph.D. from the University of Virginia. A former fellow of the Center for Children, Families, and the Law and the Institute for Advanced Studies in Culture, his main areas of academic interest are political sociology and family, state, and church conflicts. He is currently finishing a book on patriotism and church schooling in America.

THE CONTRIBUTORS

TIMOTHY J. BARNETT holds an M.P.A. degree (1992) from Boise State University and a Ph.D. in political science (1998) from the University of Kansas. Dr. Barnett teaches at Jacksonville State University where his course offerings include religion and politics, legislative politics, the presidency, political parties, and public opinion. He is a former president of the Alabama Political Science Association and has written on the U.S. Congress as well as constitutional federalism, political economy, and First Amendment issues. His research interests include populist economic policy, civic virtue in religion, and sustainable natural resource policy.

RICHARD BOWSER is Associate Professor of Law at the Norman Adrian Wiggins School of Law of Campbell University. He holds a B.A. in Religion from Grove City College, an M.A. in Religion from Westminster Theological Seminary and a J.D. from Campbell University, where he was a member of the Campbell Law Review and an editor of the Religious Freedom Reporter. Before joining the Campbell Law faculty, Professor Bowser practiced law in Washington, D.C., concentrating in the areas of church-state law and tax-exempt organizations. He currently teaches courses in the fields of constitutional law, jurisprudence, and Christian legal thought.

ZACHARY R. CALO is Assistant Professor of Law at the Valparaiso University School of Law. He holds B.A. and M.A. degrees in history from The Johns Hopkins University, a J.D. from the University of Virginia School of Law, and a Ph.D. in American Religious History from the University of Pennsylvania. He has practiced law in Washington, D.C., and served as a Civitas Fellow in Faith and Public Affairs at the Brookings Institution and as a visiting scholar at the Pew Forum on Religion and Public Life. Professor Calo researches widely in the area of law, theology, and ethics, and is currently writing a book on John A. Ryan and the history of American Catholic social thought.

DOUGLAS L. KOOPMAN is Professor of Political Science and William Spoelhof Teacher-Scholar-in-Residence Chair at Calvin College, where he also serves as the program director of the college's Paul B. Henry Institute for the Study of Christianity and Politics, as well as the interim director of the Calvin Center for Social Research. He is the author, co-author, or editor of three books—*Of Little Faith: The Politics of George W. Bush's Faith-Based Initiatives* (2004) with David Ryden of Hope College and Amy Black of Wheaton College; *Serving the Claims of Justice: The Thoughts of Paul B. Henry* (2001); and *Hostile Takeover: The House Republican Party, 1980–1995* (1996). He received his undergraduate degree from Hope College in Hol-

land, Michigan, and his Masters in Theological Studies from Wesley Theological Seminary in Washington, D.C. He also holds a Ph.D. in American politics from The Catholic University of America.

BARBARA A. McGRAW is Professor of Social Ethics, Law, and Public Life at Saint Mary's College of California and an author and speaker on the role of religion in public life, the moral foundations of the American political system, and the politics of pluralism. She holds a Ph.D. in Religion and Social Ethics and a Juris Doctor Degree, both from the University of Southern California, and is a member of the Bar of the Supreme Court of the United States. She is the author of *Rediscovering America's Sacred Ground: Public Religion and Pursuit of the Good in a Pluralistic America* (2003), and the co-editor (with Jo Renee Formicola) of and contributing author for *Taking Religious Pluralism Seriously: Spiritual Politics on America's Sacred Ground* (2005). Earlier in her career, she practiced law with the international law firm Skadden, Arps, Slate, Meagher, and Flom.

ROBIN MUSE is Assistant Professor of Law at the Norman Adrian Wiggins School of Law of Campbell University. She holds a B.A. and an M.A. in Church-State Studies from Baylor University and a J.D. from the Norman Adrian Wiggins School of Law where she was a member of two appellate advocacy teams, a Legal Research and Writing Scholar, and president of the Christian Legal Society. Before joining the faculty at Campbell, Professor Muse served as a law clerk to Judge John M. Tyson of the North Carolina Court of Appeals. Professor Muse currently teaches Legal Research and Legal Writing, Appellate Advocacy and Judicial Writing.

DAVID K. RYDEN is Professor of Political Science at Hope College in Holland, Michigan. He earned a B.A. from Concordia College in 1981, a J.D. from the University of Minnesota Law School in 1985, and a Ph.D. from The Catholic University of America in 1995. Over the past few years, his research has focused on faith-based initiatives and the *Bush v. Gore* Supreme Court decision. His research has resulted in numerous articles and three books, including *Of Little Faith: The Politics of George W. Bush's Faith-Based Initiatives*, *The Constitution in Context,* and *Sanctioning Religion? Politics, Law, and Faith-Based Public Services.*

MARY C. SEGERS is Professor of Political Science at Rutgers University in Newark, New Jersey, where she has served since 1970. She received her B.A. in history from the College of Mount St. Vincent and her Ph.D. in political theory from Columbia University. Professor Segers was a National Endowment for the Humanities Fellow at Princeton University and a Ford Foundation Lecturer in Women's Studies in Religion at Harvard Divinity School. She received the Charles Pine Award for Teaching Excellence at Rutgers-Newark in 1998. She also served as Fulbright Distinguished Chair

in American Studies at the University of Warsaw in Spring 1999. She is the author of nearly 50 scholarly essays and seven books. These volumes include *Piety, Politics and Pluralism: Religion, the Courts, and the 2000 Election* (2002); *A Wall of Separation? Debating the Role of Religion in American Public Life* (1998), which she co-authored with Ted Jelen; *Abortion Politics in American States* (1995) and *The Catholic Church and Abortion Politics: A View From the States* (1992), both co-edited with Timothy Byrnes; *Church Polity and American Politics: Issues in Contemporary Catholicism* (1990); and *Elusive Equality: Liberalism, Affirmative Action, and Social Change in America* (1983), co-authored with James Foster. Her most recent book is *Faith-Based Initiatives and the Bush Administration: The Good, the Bad, and the Ugly* (2003), co-authored with Jo Formicola and Paul Weber.

W. JASON WALLACE is Assistant Professor of History at Samford University in Birmingham, Alabama. He earned his Ph.D. in European and American Religious History from the University of Virginia. Dr. Wallace studies the relationship between religion and politics in the West, and his research interests include the role of religion in American public life.

Index

CHURCH-STATE ISSUES IN AMERICA TODAY

CHURCH-STATE ISSUES IN AMERICA TODAY

Volume 2: Religion, Family, and Education

Edited by
Ann W. Duncan and Steven L. Jones

PRAEGER PERSPECTIVES

PRAEGER

Westport, Connecticut
London

Library of Congress Cataloging-in-Publication Data

Church-state issues in America today / edited by Ann W. Duncan and Steven L. Jones.
p. cm.
Includes bibliographical references and index.
ISBN 978-0-275-99367-2 (set : alk. paper) — ISBN 978-0-275-99368-9 (vol. 1 : alk. paper) — ISBN 978-0-275-99369-6 (vol. 2 : alk. paper) — ISBN 978-0-275-99370-2 (vol. 3 : alk. paper)
1. Church and state—United States. 2. United States—Church history. I. Duncan, Ann W., 1978– II. Jones, Steven L., 1971–
BR516.C4925 2008
322′.10973—dc22 2007030692

British Library Cataloguing in Publication Data is available.

Library of Congress Catalog Card Number: 2007030692
ISBN: 978-0-275-99367-2 (set)
978-0-275-99368-9 (vol. 1)
978-0-275-99369-6 (vol. 2)
978-0-275-99370-2 (vol. 3)

First published in 2008

Praeger Publishers, 88 Post Road West, Westport, CT 06881
An imprint of Greenwood Publishing Group, Inc.
www.praeger.com

Printed in the United States of America

The paper used in this book complies with the Permanent Paper Standard issued by the National Information Standards Organization (Z39.48–1984).

10 9 8 7 6 5 4 3 2 1

Contents

Preface

Ann W. Duncan and Steven L. Jones

In 1925, the U.S. Supreme Court struck down an Oregon law requiring all children to attend public schools. The Court's decision in *Pierce v. Society of Sisters* guaranteed the rights of religious parents to send their children to a school that ratified their own faith commitments. Guaranteeing the right of a religious education did not, however, put an end to the conflicts between churches, families, and the state. Parents, the Court recognized, must prepare their children for what it famously called "additional obligations" beyond the basic literacy required for citizenship. Almost a century later, those additional obligations remain controversial. How does an institution charged with the moral and intellectual formation of the next generation balance the rights of parents and their children to adhere to a religious worldview while at the same time not endorsing any one worldview, religious or secular, at the expense of another? This second volume addresses those intersections of religion and government that concern parental rights, children, and the role of religion and religious observance in the schools. These chapters cover a variety of school settings and a variety of aspects of school life—from student expression to the use of religious language by the school and by private individuals and groups. All of the chapters point to children and education as key points of conflict in debates over the proper relationships between religion and government.

As Gordon Babst describes in his introductory chapter, the relationship between religion, family, and the law has evolved over time and reflects an American understanding of the family and school as the formative influ-

ences in the lives of children. The next three chapters address specific questions about the role of religion in public schools. Jason Edwards surveys the historical and current debate over creationism and evolutionism, highlighting the complex history of controversy over public school curriculum. Lee Canipe discusses the history of the Pledge of Allegiance and some of the issues underlying its current controversial nature—most notably the sometimes conflicting concerns of avoiding coercion in schools and promoting national unity and identity. In a chapter on student religious expression in public schools, William Lester discusses the challenge for school administrators to both maintain religious freedom and free speech and to avoid the establishment of religion in the public schools.

Discussing another free speech issue, Mark Gammon describes the growing concerns about the protection of children from untoward influence in the context of current technological innovations such as the Internet and the implications of these concerns for schools and public libraries. Moving to governmental support for parents choosing to put their children in nonpublic schools, Michael Coulter discusses the origins and history of the school choice movement in the context of school voucher programs, the use of tax credits, and the resulting challenges to the Establishment Clause. The final chapter by J. David Holcomb discusses many of the issues above in the context of higher education. Addressing both religious and non-religious public and private colleges and universities, Holcomb highlights court cases and controversies covering everything from governmental funding to curriculum to school funding of religious groups.

While each of these chapters highlight particular concerns and controversies, each issue and, indeed, each side of each issue—from an atheist opponent to the Pledge of Allegiance to an advocate of creationist curriculum in the public schools—reflect a passionate concern for the shaping of their children and a continued belief that the schools play a vital role in this formation. For this reason, debates over the role of religion in public schools will likely continue well into the future.

1

The Family and Religion

Gordon A. Babst

The family is an apparently universal historical social institution strongly associated with the household, parenting, lineage, inter-generationality, and personal identity. Often regarded as the central institution in any society, its construction and sustainability have been seen as pivotal to the enduring success of any society, and so what is meant by the family entails consulting the entire range of human inquiry, from anthropology to zoology. In this volume, attention is focused on the role of religion in the construction and maintenance of the family and our understanding of it. More specifically, this volume will examine the nexus of religion and the family in contemporary American society, with attention to the changing nature of the family as precipitated by changes in the individuals who are considered to make up a family, such as same-sex-headed households raising children. Here we provide some general historical background, discuss the functions of the family, and then approach the connections between the contemporary family and religion in the light of the individual interests and the social interest wrapped up in the family.

It will become clear that the family refers to either an actual family consisting of the persons related to each other (or said to be related to each other as family), or to a social construction involving religious elements that can be seen ideologically such that, seen in this way, some persons who relate to each other as family are not at all seen to be a genuine family and so may be disregarded, effaced, or stigmatized. It will also become clear that

the family, once tradition-bound and socially-regulated, may evolve into a new site of individual freedom.

The freedom that is to be won, however, will emerge from the resolution of conflicts with supporters of a "traditional pro-family" agenda, a contest that must be engaged because traditional concepts of the family in the West, which have been informed in the main by religious sources, continue to underpin the law and so can be enforced on everyone, regardless of any particular family's fit with the law. In the law, then, is already ensconced a normative vision of the family such that to raise the issue of same-sex marriage, for example, is to engage in conversation with people of different views who have tradition and law on their side, and to implicate church/state issues as well. Likewise, issues such as providing parents with vouchers to use towards the education of their children in private schools, including sectarian ones, not only implicate church/state issues up front but may also intrude on many a family's personal choices that may not promote their or their children's liberty.

In this introductory chapter we will steer clear of specific legal arguments, and focus attention on the general relationship between religion, families, and the law, which subsequent chapters will fill-in with greater detail and analysis. The next section presents some significant perspectives from the history of the institution of the family in the West, focusing attention on understandings that are grounded in Hebrew and Christian biblical texts, Greek and Roman social norms, and modern practice in liberal-democratic societies such as the United States.

HISTORICAL BACKGROUND

The family is present in a number of places in the ancient Hebrew Bible, though it presents no consistent understanding of the family and its passages are far less explicit about the family than they are about sexual relations. While some contemporary commentators tend always to see in it specific, unequivocal meanings, even a literal reading presents a great variety of understandings about the family and its construction. For example, the Old Testament more than once seems to condone incest (e.g., Abraham and Sarah had the same father) and a married spouse having conjugal relations with an outside person for the purpose of conceiving a child, thereby revealing that the family is the site of childbearing, though not necessarily of exclusive monogamy irrespective of children. And for a man to take many wives also features favorably, as befits this definitively patriarchal society.[1]

Humankind is commanded to be fruitful and multiply and also to honor one's parents; hence, a relationship between succeeding generations is im-

plicitly an aspect of the family in this tradition. One might even include the family of man as one understanding that is presented in the Old Testament, alongside understanding tribes as family, and heads of families understanding their extended families as tribes. One might also speculate that the Old Testament presents an alternative understanding of the family of man as split into different tribes based on the moral conduct of some of the descendents of Adam and Eve, an understanding that later contributed to the justification for the enslavement of native Africans in the American South, regarded as the descendants of Ham.[2]

Beyond ancient biblical sources, anthropologists indicate that ancient peoples most likely shared childrearing rather than leaving this in the hands of individuals or couples, and that lineage was determined matrilineally, at least for hunter-gatherer societies prior to the agricultural revolution that prompted people to settle into permanent villages and cities. Suffice it to say that a broader understanding of the family probably obtained among ancient peoples and was reified in their religious beliefs more than popular images or narrow readings of one or another ancient text may suggest. Nonetheless, written records tend to provide clearer descriptions of family life, or at least of the ideals of family life that may have been the prism through which the family was viewed.

The ancient Greek understanding of the family seems less based on religion than on social mores regarding gender roles and socioeconomic status. In Greek philosophical thought, intellectual or civic friendship was elevated above family. The wealthy Greek family in the classical age consisted of a man who lived most of his life in the company of other men, engaged in public affairs or in the military; a wife who had no public life outside of perhaps marketing, and certainly no political or social life outside of her circle of female friends; children; and slaves who did the household chores. The Greek pantheon does not suggest any preferred family structure, nor did its Roman successor. However, the classical Roman family with socioeconomic status considered itself more as part of a noble family dynasty than did the Greek.

Republican and then Imperial Rome was ruled more by male heirs in important families than through a male citizen's individual participation in collective decision-making, as was the case in old democratic Athens. The practice of exchanging wedding rings is said to have originated in Roman times, though then the ring was likely iron and was placed by the husband around the wife's neck, by which she was led from her birth family to her new family residence, a symbolic yet unambiguous indication of the husband's power over her. In Roman times the family meant everyone in the household or *familia*, whatsoever kin and servants happened to be included

in the residence. This understanding continued into medieval Europe, though a winnowing of the extended family gradually occurred. Again, generalizations serve to illustrate but necessarily hide from view a great variety of understandings and practices associated with the family, especially at different levels in complex societies.

The advent of Christianity and the New Testament that chronicled its beginnings and counseled the early Christians was written in an intellectual culture that was Greek, in a region that was under Roman administration, and, of course, expressed continuity with a Jewish heritage even as it broke away from it. It was the view of the family articulated by several early Christian authors that has anchored the predominant tradition in the West ever since, a view that attempts to inscribe some explicit conformity between the practice of the family and religious beliefs in their writings.[3]

The New Testament presents the "Holy Family," consisting of a virgin woman, who is the mother of the Christ child, and her husband, who is not the father. Other women are presented who are presumably sexually active, childless, and husbandless, yet have the potential to be reborn in a new spirit that includes forgiveness for their past transgressions. The Christian New Testament generally is interpreted as establishing a new social order that stands in sharp contrast to its original context, as well as any context the early Christians found themselves in. For example, St. Paul wrote with ardour to persuade early Christians to turn away from their customary sexual behavior, because to break the connection between this most intimate, though often public, aspect of one's life and one's pagan religion was to effect a radical departure from the old and to make possible and facilitate an embrace of the new. Later, St. Augustine of Hippo, whose early life trajectory self-admittedly indulged his sexual appetite and youthful disdain for a more settled family life, upon conversion to Christianity became one of the staunchest advocates for the chaste life or, failing that, monogamy between one man and one woman. After all, the model for conception of a child occurred without sexual intimacy and did not involve the woman's husband, which may have as yet un-mined implications today for the religious acceptability of artificial insemination, surrogate motherhood, and other technological innovations that are transforming our understanding of the family.

While Augustine's restrictive prescriptions for marital bliss did not lend themselves to successful propagation of the species and maintaining an ongoing and expanding community, they nevertheless became central to the Christian vision of both sex and the family, a vision that has survived to this day. The form and nature of family life was connected to salvation, and thus issues of righteousness and transgressions assumed cosmic signifi-

cance and were the concern of the entire society. The model family was not merely one man and one woman married to each other, but this pair in the image of the ideal union between Christ and the Church, reflecting a love that should be emulated by each individual and in which spirit the two persons are brought together in holy matrimony. Any fleshy desires between the married spouses were condemned, as the only purpose of carnal relations was to beget children, the sole and rightly desired outcome that redeemed the sex involved. Augustine's views were echoed by later Christian and non-Christian thinkers in the Western tradition, who had both this early Christian and the still earlier Greek and Roman gendered understandings of the family to consult. The family in the West has been tied to the template of a heterosexual monogamous union in which privilege resides in the husband, while the wife is bonded to domestic affairs, the realm of necessity, and not freedom, as the ancient Greek philosopher Aristotle would say.

The modern social contract tradition, which began in the seventeenth century, was conceived in and meant to apply to a society in which religion had a strong presence, even if conceived of as a civic religion. Arguably, the social contract theorists did not address injustice within the family, leaving it in an emerging zone of privacy and so shielded from the state, the better to carry on its functions. Status within the family continued to determine status and roles in civil society and to curtail the political rights of women, whether or not they were mothers or wives. Hence, women, for example, were expected to be subservient to their husbands, their voice covered by his in any public issue such as property rights and politics, and this was reflected in the law. The heterosexual family unit remained intact under social contract theory, and alternative familial arrangements were socially and legally taboo. Given the simultaneous emergence of the capitalist economy that was premised on independent, individual workers, the male member of the heterosexual family, the husband and father, became a wage earner, while the wife and mother became even more ensconced in the domestic sphere.[4]

Protestant theology supported this division of labor, and it articulated a vision of partnership between the spouses in the service of their community and of their God that sustained them through hard times and helped to explain the blessings of good times. Nonetheless, the division of labor within the family continued to undermine its capacity to promote the freedom of individuals and the authority of a secular sphere that could be free of religious influence. Matrimony's conjugal unity and common household have hidden distinct juridical personalities, an issue of secular inequality that has been less bothersome because of the imprimatur of religion, which,

among other things, sanctified the free reproductive labor of women, making it central to their role in society.

It has been only in the last two centuries that individuals, utilizing and daring to expand the civil liberties available to them, have asserted a right to love whomever they please and to base the decision to marry, for example, on the basis of love, rather than on their or other persons' interests in property, family dynasty, or class. In the nineteenth century, several prominent civil libertarians attempted to raise public awareness of the intolerance of society towards persons whose sexuality, now an aspect of an individual's identity, was different from the norm, and to encourage the burgeoning social science research into human sexuality. These early writers and researchers hoped that in the face of the new, more scientific approach to understanding the social nature of human beings, the older understandings based in religion and popular morality would recede and fade from view.[5] These pioneers further hoped that reform in the law and in people's attitudes towards acceptable familial relations would change in the face of empirical research findings.

However, religious constraints continued to govern as regards the permissibility of whom to love or with whom it is acceptable to form a family unit, such that inter-religious families and mixed-race families remained off-limits, though these constraints slowly fell from favor while plural marriages and non-heterosexual relationships have remained widely censored by mainstream religion unto this day.[6] In the United States, it was not until after mobilization for World War II that many Americans encountered and got to know one another's differences as well as new points of commonality, breaking down the ignorance that racial bias, religious beliefs, and general unfamiliarity had long held in place in the face of individual desires to form bonds with each other across various, often legally-sanctioned, divides.

FUNCTIONS OF THE FAMILY

Given the cursory historical overview presented earlier, the family has been understood in many ways, both within the same general tradition and also in the light of different religious beliefs. One constant appears to be a concern for blood ties, which have been regarded as determinative of any or all of the following: personal identity, family relationships, property rights, socioeconomic status, and political privilege. Religion has served to sanctify and endorse an approach to blood ties that has vested familial power in the father and political decision-making in the male citizenry, thus assuring everyone of the legitimacy of blood ties as understood and administered in

this legally sanctioned way. The stable family provided the institutional structure to raise children, and this ultimate function of the family was reflected in religious doctrine, practice, and belief. Yet as historical research has shown, the nurturing of children does not require the confines of the family and has occurred under the auspices of alternative arrangements.

The functions of the family closely resemble those of marriage, though it provides a larger vehicle in support of the social order and, in turn, a more convenient site for the administration of law and policy over more people than does the institution of marriage. The primary function of the family in the western tradition was that prescribed to it by religion; namely, the begetting of children and their rearing in a religious environment to ensure the continuance of a religious tradition. Non-heterosexual relationships did not signify legitimacy with respect to this function, owing to a strong religious sanction against them and against any sexually deviant practice. Even childless marriages were regarded as abnormal and deficient, given that they did not fulfill the family's function of producing offspring, future workers, soldiers, or citizens. The family has always been over-determined by religious ideology and relationships of social, political, and economic power. Rationales grounded in biological imperative have dovetailed with, but do not overlap, the predominant understanding and function of the family, and they have never provided the justification for any particular family form.

Tying both family and marriage to children would seem to suggest that before having a child, a married couple is not yet a family, and that after any and all children are grown and have left the household, they return to not being a family, or not quite a family. Yet, in all societies there have been children who have no parents for one reason or another, and who nonetheless need parenting. Opening up parenthood to non-biological children has greatly benefited the social welfare, though once this step away from the traditional functional family has been made—such as in the nineteenth-century when the family came to include adopted children—the next step to allowing single persons or same-sex couples to adopt children and so too to be considered families is made more possible. However, these latter moves, which are on the increase in American society today, have been met with swift and stern religious objection.

Initially, political activism stemmed from individuals working from within divergent groups such as the women's movement and the gay and lesbian movement, taking their cues from the Civil Rights movement of the 1960s. These activists argued for greater freedom and privacy rights for women in general and also for sexual minorities. For women, the freedom

sought was based in equality and recognized the inequality confronting many women who chose not to lead their lives in the traditional family setting. For sexual minorities, the freedom sought was also based in equality but was overtly pitched as a sexual liberation from old norms regarding sexual activity and the family structure and so directly challenged traditional normative understandings. Thus there arose in the 1970s a powerful reaction grounded in religious fundamentalism that sought via political means to corral both the women's liberation and gay and lesbian liberation movements, reverse their gains, and return the United States to an earlier era of stable family life and conformity with traditional sexual mores.[7] The very nature and function of the family and the purpose of human sexual powers were being contested very publicly, and many religious believers were challenged to engage with each other and their traditions to come to an understanding of themselves and their apparent political opponents. While many denominations chose to remain true to their traditions, a few broke away from them and, after a process of internal debate, came to affirm alternative family forms and expressions of sexuality, recasting old issues such as sex outside of marriage and gay and lesbian families as opportunities to expand their religious horizons and embrace social change.[8]

On the one hand, single parenthood, especially if by choice, indicates heterosexual activity outside the parameters of marriage, while on the other hand, same-sex parenthood denotes impermissible sexual activity outside the parameters of marriage. New technology that has made it possible to have children without sexual activity challenges both marital and familial norms and has evoked in the minds of some religionists the specter of Frankenstein, of attempting godlike powers. Curiously, the trend of single and married individuals who have relied on technology in order to have children and so form a family has proven to be far less of a morals issue overall than has same-sex marriage or gay parenting. Restricting the analysis to the naturalness of the recourse to technology, however, would seem to warrant the condemnation of unnatural technological intervention no less than putatively unnatural sexual relations between two persons.

The reason for this distinction is because heterosexual couples who resort to technology are thought to do so because of an unfortunate physical failing on their part, not because of a failure to want to conform and meet the traditional expectations of forming a family, while single individuals, by themselves, do not raise the specter of homosexuality, though single motherhood challenges traditional gender roles.[9] Legal recognition of same-sex marriage and acceptance of gay parenting, by contrast, implies new forms of the family, new types of household, and seems to break the link between sexual activity and parenting, lineage, intergenerationality, and identifying

the community as a continuing iteration of a cherished tradition, one that assertions of political power have always secured until individuals were freed from the bonds of tradition to form their own, by their own lights.[10] To allow—and not condemn—this radical experimentation is to threaten how "we" understand "our" values and purpose on this Earth and to displace "our" community as privileged judge of right and wrong, one guided by longstanding religious insights. The family today is a site of contestation, where religious conservative adherents of tradition and their followers confront younger religious believers and many others who would inaugurate new traditions or recall and emphasize different aspects of the old, both sides simultaneously exercising and negotiating their freedom very close to that most cherished place of all, home.

THE CONTEMPORARY FAMILY

The contemporary American family is less defined by religion than it once was, and people are less inclined to accept legal discrimination against alternative family structures than once they were. The factors that have lead to the decline of the traditional understandings of the family and its functions include different family formations involving both heterosexual and non-heterosexual individuals and couples. The notion that the traditional family headed by the father and husband must be maintained because only through the generation of children within this institution can we be assured that the male head of household is heterosexual (and so the privileged positions in the social and political hierarchy will be occupied only by heterosexual males, in keeping with traditional religious understandings) is no longer widely held, though belief in it remains strong. The structure of the family has become more a matter of choice, expressing the liberty of individuals, than a matter of conformity to tradition. This has made possible new performances of family life, some in keeping with tradition, some not. Importantly, the unitary vantage point from which any family is judged as morally worthy, a vantage point overly determined by religion, has lost its hegemony. For example, not allowing a gay person to exercise his or her right to marry the adult individual he or she chooses because of religious tradition is increasingly viewed as illegitimate on the part of the law and the wider community. Still, some statutes from an earlier era will continue to remain on the books until people get around to addressing them and taking action. Hence, though the pace of change has picked up, there is still a back-and-forth articulation of tradition and revision with respect to legal and cultural understandings of the family.

The Law, Religion, and the Family

In the United States the traditional patriarchal family, a unitary arrangement in the law, is no longer the legal norm, though American law has been slower to adapt to twenty-first century practice than has the law in most western European countries.[11] While for the Supreme Court marriage remains a fundamental human right, one originally grounded in a religious view of marriage that was explicitly referenced in its early marriage cases, today divorce, childbearing by single individuals, adoption by gay or lesbian persons, and legal provision for surrogate motherhood—among other contemporary practices—are provided for in the law and increasingly utilized by individuals who are increasingly wont to form and reform their families as per their individual wishes. And these innovations in practice and in the law are reflected at the international level in legal conventions among countries that provide for marriage across a variety of divides, international adoption, divorce, and enforcement of maintenance obligations such as spousal and child support.

Arrival at this contemporary state of affairs with respect to the nexus between religion and the family is built, however, upon a slow but steady diminution in the traditional patriarchal family as the regulative ideal for the law, and so too as its anchor in religion. Oddly enough, just as the patriarchal aspect of the family is receding, the cultural understanding of fathers as parents in their own right and the legal relationship between father and child is arising. This suggests that patriarchy was always less about the practice of fatherhood and more about power and control legitimated by religion. In practice, with respect to the politics of gay and lesbian rights, which tends to be considered a morality issue, a politician's religious affiliation has been found to be an important predictor of his or her vote on any legislation, a backhanded way in which religion has influenced the law, in turn restricting or expanding the public space for experimentation in family forms. Religion also certainly plays a powerful up-front role with respect to anti-gay lobbying, influencing legislators without regard to their own personal religious or secular views.

Religion in the United States historically has conditioned who may marry, whom one may marry, and who may adopt which children. Given that marriage, though a civil contract, requires solemnization, prior to the advent of justices of the peace this meant that to be legitimate a marriage had to occur in front of clergy. The law sanctioned, and religion solemnized, marriages between almost any two adults, no matter how foolish or ill-conceived the marriage. This limited legitimate marriages to the faithful, in the first instance, and then constrained marriages and family formation

within one or a limited number of faith traditions. So too was once the case with adoption of children; adopters without any religious affiliation were seen as morally unfit, a lawful practice that may still remain more as a rule of thumb for some adoption agencies, and children needed to be placed with a family of the same religion. The religious question also came into play in deciding which parent should be awarded custody of a child in case of divorce. From the perspective of religious adherents, these differences may turn on whether religious identify is itself regarded as a choice or as an inheritance and to what extent each side of the question of identity formation regards the other as either tolerable or as a threat.

The law has already eliminated bastard status for non-marital children, which was once a measure of legitimacy and a powerful reminder of the religious wellspring of our understanding of family legitimacy. The church of yesteryear preferred the product of licit sexual activity in a bad marriage to illicit sexual activity, even if neither the sexual activity nor the child were desired by either party. Children born out of wedlock were socially stigmatized, and this was reflected in the law and in the inheritance rights it afforded.[12] The illicit sexual relations that illegitimate children represented were seen to loosen the social fabric, and they also brought stigma and legal consequences on their parents—especially if either were themselves married—by echoing biblical injunctions against fornication and adultery. The changing perception of these once socially deviant practices and the different way the law is treating them by not pursuing individuals and criminalizing such behavior or otherwise disadvantaging any offspring of an illegitimate pairing suggests that there has been a cultural shift in values, and the blame for this is often laid at the doorstep of the sexual liberation movement and the women's movement that achieved national prominence starting in the 1960s.[13]

This slow progression in public opinion and evolution in the law stimulated by the Civil Rights movement, coupled with the greater realm of freedom afforded individuals in their private lives, a domain the law has increasingly protected, may have reached its zenith around the turn of the last century. For example, the Federal Defense of Marriage Act (passed in 1996) and the many subsequent related acts at the state level have sent a clear signal to nontraditional couples and families that they may not be respected in the law or that they will be treated differently or as less than ideal, at a minimum. Responses to such actions that reassert traditional religious understandings in the garb of secular purpose have included affirmations in the law of non-traditional families, especially of same-sex couples, through devices such as civil unions and domestic partnership registries, as well as provisions for the adoption or custody of children by gay

men and lesbians. Most European countries have moved in a different direction at the level of national and European Union policy, with several allowing same-sex marriage, legally sanctioning alternative family forms, and accommodating the growing interests of transgendered people.

Cultural Understandings of the Family

Implicit in the changing legal understanding of the family and the diminution of religious influence over it is the emerging challenge to the law's privileging of married over single individuals, a distinction not found in the U.S. Constitution, though one hitherto palpable throughout American society and law. In the older, traditional understanding of the family, the marital union is more or less a vessel for intergenerational transmission of values—of society's hegemonic norms—rather than a vehicle for the secure reproduction of the species. In discussions of the family and the sexual relations implicit in it, the term *natural* is rarely used as a natural scientist would use it; rather, it is deployed within a cultural framework in which signification and meaning are ascribed to biological or physiological processes. The slippage between "cultural" and "natural" occurs when what is in fact cultural or understood in such valences is attributed to "nature," as if the morally-charged signifiers at issue were as accessible and obvious as the scientist's understanding of human reproduction. Instead, society today understands that no religious or ideological concept of the family is neutral or even suitably neutral by itself to ground the law and be the basis for discrimination in the distribution of political or economic privileges.

Because of the different functions of the family in contemporary lived practice and the diverse cultural understandings of it, many of which are quite free of religious determination, American law is starting to lag behind society in providing distinctions in the law that serve the people in their different relationships that the culture signifies as family. Now, society is challenged with crafting new laws to match the evolving nature of the family and the individuals who are asserting their political rights and civil liberties on the one hand, and, on the other hand, balancing all that against the social role the traditional family has played, a dominating role that continues in some American subcultures such as evangelical Christianity. As has always been the case, society needs to ensure that somehow a steady hand is rearing the future generation and that persons are able to have an intimate life and experience human companionship—historically universal needs whatever the cultural understandings or legal regime.

There is a dance, then, between individual aspirations and the social context within which they find fulfillment, though religious belief is not

carrying the tune or determining the permissibility of this or that form of family. This gradually opening space has made possible greater diversity within traditional family forms, even as it more obviously creates room for diversity in the family form itself. Religions too are struggling with questions of the family, with some becoming more liberal in the process, others staying the same, and still others entrenching their orthodox beliefs and practices. Regardless of the debate among religious adherents, the older privileging of one gender over another and restrictions based on sexual orientation that once characterized social acceptability have been superseded widely enough so as to prevent any reversal in this trajectory, though this does not speak to the near-term outcome of this evolution or to the success of any new family form.

Addressing the new gender and sexual orientation aspects of family has become unavoidable in any case, regardless of whether religious ideology keeps pace, because technology exists to make it possible for practically anyone to form a family with almost anyone else and to extend the family into the wider community, much as it once was. Arguably, technology is having a greater impact on women's ability to form families of choice. Today a child can have several mommies or daddies and can have been both adopted and also the offspring of an original sperm donation carried by a surrogate mother, for example, vastly complicating legal accommodations and religious understandings (even when all the parties involved are heterosexual), thereby providing multiple opportunities for the family to become a new site of freedom. And this freedom is twofold, disentangling "family" from whether anyone has contributed genetic material to it and detaching its members from any socially hegemonic understanding of who is permitted to comprise it.

CONCLUDING OBSERVATIONS

The family and religion have been intertwined throughout recorded human history, making a general theory specific to this relationship difficult. From the Nietzschean perspective, the family stands in the light of religion in much the same way any other social institution does; namely, religion serves to undergird the dominant view of the nuclear family by bestowing upon it the quality of being morally good, which permits rightful enforcement of the reigning ideology upon individual people, once accomplished through assertions of ecclesiastical power and later through state power. Liberalism points in the direction of family being a matter of choice or of accepting a family that is simply the result of choice, provided there is the commitment one expects family members to have to one another, even if

this commitment is not based in religion, which is perhaps the iconic form of commitment in the West.

To the extent, then, that there is occurring a revaluation of family values in the United States today, broadly speaking (and with differences in degree in practice and its reflection in law and policy), the family and religion nexus of yesteryear is definitely fading. And, due to the civil liberties afforded to individuals in western societies and the guiding ideals of equality and liberty, this transformation of the relationship between the family and religion might signal the further privatization of religious belief and the further secularization of society with respect to the reach of political power in support of any religious perspective, or even in favor of a general religious understanding over a non-religious perspective.

NOTES

1. The practice of polygamy was reintroduced by the Mormon Church, prompting a confrontation with the U.S. government that resulted in the Church being escheated of its property and polygamy being outlawed, the latter in the case of *Reynolds v. United States* (98 U.S. 145 [1878]), the first Supreme Court case directly relating to family formation, here intertwined with the beliefs of a new religious minority. Polygamy remains illegal in the United States.

2. Of course, many arguments *against* slavery and the later regime of Jim Crow discrimination against African-Americans during the Civil Rights movement were also couched in biblical language.

3. The chapters in Part One of Kieran Scott and Michael Warren, eds., *Perspectives on Marriage. A Reader, Second Edition* (New York: Oxford University Press, 2001) provide a good entry into early Christian views on marriage and the family.

4. Carole Pateman's *The Sexual Contract* (Stanford: Stanford University Press, 1988) is a political theorist's searching analysis of the patriarchal underpinnings of the social contract tradition and the lesser degree of freedom the classical social contract thinkers accorded to women.

5. Part II, "The Beginnings of a Gay and Lesbian Movement," in *We Are Everywhere: A Historical Sourcebook of Gay and Lesbian Politics*, ed. Mark Blasius and Shane Phelan (New York: Routledge, 1997), provides many of the original voices in this late-nineteenth and early-twentieth century discussion.

6. Indeed, it was not until the 1967 case of *Loving v. Virginia* (388 U.S. 1 [1967]) that the remaining anti-miscegenation laws prohibiting interracial marriage in six southern states were struck down by the Supreme Court.

7. Progress that favors gay or lesbian family formation tends to be less secure than other gains in the law. For example, even once same-sex couples are granted benefits by a state, this may be subject to later popular referendum or opponents' legal strategy, as happened recently in Michigan, where a state court repealed an earlier decision that allowed universities and government agencies to provide do-

mestic partner benefits, as reported by David Eggert, "Michigan Court Rules Gay Partners Can't Get Benefits," *The Orange County Register*, February 3, 2007.

8. Several denominations even recognize same-sex marriages, though one in particular—the American Episcopalian Church—is under siege by its worldwide fellow Episcopalian churches for the stances it has taken on this issue, which its new female prelate has championed.

9. For the first time in the history of the United States, single women, including unmarried, widowed and divorced women, outnumber married women, and comprise 51 percent of the adult female population, a demographic that has social, economic, and political consequences. Helen Fisher argues that this trend represents a return to the state of affairs before the institution of marriage in her op-ed essay "History Loves an Unmarried Woman," *Los Angeles Times*, January 21, 2007.

10. The essays in Part IV, "Family," in *Sex, Preference, and Family: Essays on Law and Nature*, eds. David M. Estlund and Martha C. Nussbaum (New York: Oxford University Press, 1997), address issues such as these.

11. For example, the State of North Dakota only very recently rescinded its law that criminalized unmarried cohabitation, a law that dates to its statehood in 1889 and is similar to those which remain on the books in seven other states. See "Living Together Is No Longer Criminal in North Dakota," *The Orange County Register*, March 2, 2007.

12. The Uniform Parentage Act, amended in 2002, extended the parent and child relationship equally to each child and each parent, regardless of marital status, and the Uniform Probate Code has replaced "bastard" with "non-marital children." See Walter Wadlington and Raymond O'Brien, eds., *Family Law in Perspective* (New York: Foundation Press, 2007), 105–106.

13. Not surprisingly, same-sex parents and adoptive parents have to negotiate the same class, health, education, and other issues that face any family, though often without the support of their religious leaders or their community. See the chapters in Part 2, "Parenthood," in *Queer Families, Queer Politics: Challenging Culture and the State*, ed. Mary Bernstein and Renate Reimann (New York: Columbia University Press, 2001), for illustrations and analyses of these tribulations.

FURTHER READING

These works were consulted in the preparation of this chapter and will be particularly helpful for further study of the issues related to the family and religion. Readers who want more in-depth treatments of the family and religion in historical context and with a focus on the United States will profit from consulting the edited works by Sands, *God Forbid: Religion & Sex in American Public Life,* and by Scott and Warren, *Perspectives on Marriage. A Reader*. The Estlund and Nussbaum edited volume, *Sex, Preference, and Family: Essays on Law and Nature*, and Winfield's *The Just Family* provide philosophical treatments of the family with an emphasis on ethical argument, while Pateman's *The Sexual Contract* remains the classic reference for the lack of inclusion of women and the family into modern liberalism. Blasius

and Phelan's edited volume, *We Are Everywhere: A Historical Sourcebook of Gay and Lesbian Politics*, is invaluable because of the wide variety of sources it contains, all in their original voices, and Bernstein and Reimann's *Queer Families, Queer Politics: Challenging Culture and the State*, and Mason, Skolnick, and Sugarman's *All Our Families: New Policies for a New Century, Second Edition*, will be of interest specifically for their treatments of sexual diversity issues and the family, while Say and Kowaleski's edited work, *Gays, Lesbians & Family Values*, focuses attention specifically on the religious issues and arguments surrounding contemporary non-traditional families. For a discussion of family law, see Krause and Meyer's *Family Law in a Nutshell, Fourth Edition*, and Wadlington and O'Brien's *Family Law in Perspective, Second Edition* and *Family Law Statutes, International Conventions and Uniform Laws*.

2

The Creation-Evolution Debate in the American Public School Classroom[1]

Jason R. Edwards

Amid a chaotic courtroom and after an embarrassing display of ignorance on the witness stand, the now despondent and desperate Fredric March collapses to his death on the courthouse floor while the rushing crowd of moderns barely notices his passing. Thus marks the tragic climax of *Inherit the Wind*.[2] Sadly, it also all too often marks the public's common understanding of the Scopes "Monkey Trial" and even the larger debate over the teaching of origins in the American public school classroom. Far too often, historians, teachers, and lay people alike present the battle over origins in American public schools as a simple contest between benighted bumpkins clinging to fanciful mythology versus progressive, enlightened moderns senselessly having to defend scientific facts. Though simplistic renderings of the passing of ages from superstition to enlightenment serve ideally the purposes of one side, perhaps no debate encapsulates more fundamental issues regarding freedom, religion, government, morality, democracy, America, and human dignity than does the debate over the teaching of origins in America's public schools. Consequently, American citizens deserve and should demand a more nuanced understanding than those typically offered through the popular media and textbook publishers. Black-and-white filming was particularly appropriate for a preachy movie script, but a careful

examination of the historical debate and wrangling over origins teaching provides a vibrant and colorful mosaic infinitely more interesting and valuable. In fact, while the debate continues to be couched in terms of "fundamentalism" opposing "freedom," when one fairly examines the evidence it becomes difficult to identify exactly which side deserves which label.

Sacco and Vanzetti, Leopold and Loeb, Hauptmann, and O.J. all have claims on the title, but the true "trial of the century" was ironically not, like these others, over a felony but a misdemeanor; its ramifications, however, were anything but minor. *Tennessee v. John Scopes*—"The Monkey Trial"—took place over merely ten days in the summer of 1925, but its impact continues to reverberate into the twenty-first century. The case remains significant today because it remains the focal point for the teaching of origins in American public schools. In turn, that debate will forever be crucial because it speaks to a variety of momentous moral and Constitutional issues such as parental rights, local authority, and freedom of religion. It is not atypical to find laments that the "evolution debate" continues into the twenty-first century over eighty years after *Scopes*, but the reality is that this debate actually has a far longer history, one that spans thousands of years. By examining fairly and anew the full history of the origins debate, one discovers that regardless of one's beliefs concerning the earth's origin, the use of the government to enforce any belief systems through the school—the true definition of "Progressivism" in the United States—rightly looms ominous to all lovers of liberty.

THE HISTORICAL AND PHILOSOPHICAL DEBATES

It is hard to escape the ancient Greeks in any great philosophical argument, and this debate proves no exception. Fifth- and fourth-century Athens found Plato and Aristotle defending the divine origins of man against the materialist claims of Democritus and Heraclitus. As the ancients knew and moderns should appreciate, the answers to questions over man's origins carry ramifications and determinations regarding all of life's metaphysical, epistemological, and axiological questions.

Though enormous in consequence, the significance of origins is rather straightforward. If one believes that God created mankind (particularly if He did so in His image), man has purpose and meaning. In addition, man could only truly understand himself through grasping and accepting his relation to his Creator. Likewise, man would be beholden to God's laws and commands, which thereby provide a moral universe of consequence for man's existence, decisions, and actions. On the other hand, if man is a result of a great cosmic accident, a higher purpose and meaning beyond

survival becomes elusive. Likewise, if man is rendered a beast, truly justifying any moral system beyond survival of the fittest becomes nigh impossible. Finally, if man is ultimately a result of the playing out of accidental and arbitrary physical laws and chemical processes, not only does the universe cease to be a moral stage, but each man's actions become best understood not as the result of freedom and choice but material determinism. A world bereft of true freedom and moral consequence, one devoid of objective beauty and morality, a world unknowable but through easily tricked senses, is the one that spiritual leaders from Plato to William Jennings Bryan have resisted accepting.

Besides the broad philosophical ramifications, the argument over origins also has more specific, but no less significant, constitutional implications for the United States. In a nation that embraces "freedom," the proper place for authority is always contested. In this instance, the right of parents to rear their children in the way that they see fit has come into conflict with the right of teachers to instruct these same children according to their conscience and expertise. Intellectual and academic freedom has historically been celebrated and protected in the United States; however, so has the right of citizens to pass laws that reflect their beliefs and values. When teachers are hired by parent-citizens and paid through the tax dollars of those same parent-citizens, the expectation has always been that the school and its employees are answerable to the society they serve. While freedom of speech extends to instructors in their private lives, few would argue that this freedom would remain as robust within schoolhouse walls. In fact, the very reason teachers cannot proselytize their religions in the classroom is the same reason it can reasonably be questioned whether only one explanation for man's origins can lawfully be instated. Indeed, as was noted above, the answer to origins determines one's metaphysics, epistemology, and axiology; in other words, it establishes one's religion and thereby appears outside the Constitutional purview of the state. Finally, in the midst of this clash of parental, state, and academic freedoms stands the individual student who also arguably has the right to a sound education, albeit one that liberates rather than indoctrinates. Which education best captures that heralded goal, however, remains highly contested.

The common hurdle to understanding the origins debate philosophically and particularly constitutionally is to get bogged down in whether one personally believes in macroevolution.[3] While the truth of Darwin's claims is no doubt of utmost importance, it can distract from an understanding of the full legal debate and a healthy respect for the opposing side. Certainly there exists a *prima facie* assumption that the "truth" should be taught in American schools; however, the reality is that all sides are equally convinced

they are the sole possessors of the truth, and so neither will ever back down. To avoid this significant hurdle, one should put aside personal allegiances and fairly examine the history of this debate. Through focusing on the political and educational history of the conflict rather than the epistemological merits of Darwinists and their opponents, one can better understand the constitutional particulars in this specific interaction between the church and the state as well as perhaps understand the difficulty of church-state relationships generally. Ultimately, one discovers that freedom is fundamental to Americans but terribly difficult to create *ex nihilo*, and its maintenance is thwarted as freedom's definition constantly evolves.

THE AMERICAN SCHOOLING DEBATES

To examine the American origins debate one must start, of course, at the beginning—the founding of American public schools. To understand that event one should first consider that "progressives," of whatever beliefs or era, historically look to schools to create the idealized societies they envision. The United States provides an ideal example of this generalized rule. Religious progressives desiring to create a "shining city on a hill" began arriving on northern American shores in 1620 and quickly established both elementary and higher educational institutions.[4] In the early-nineteenth century, progressives in Massachusetts specifically and New England generally continued efforts to mold the future by developing the "common school."[5] Significant to the history of church-state relations, it should be noted that these institutions so vehemently endorsed Protestant beliefs that Catholic citizens revolted from the system and established their own parochial school system that thrives into the twenty-first century.

As the nineteenth century progressed and the North subdued the South in the Civil War, progressives imposed their Northern model of common schooling on their conquered neighbors. Then, heading into the twentieth century and the official "Progressive Era," forced government schooling expanded from the elementary years to the teen years in the form of newly founded high schools throughout the United States.[6] However, when this pattern of governmental intrusion into the lives of its citizens combined with a scientific theory that threatened the deepest religious beliefs of a citizenry, a showdown was inevitable.

The offending theory actually arrived in Western consciousness in 1859 when Charles Darwin published *On the Origin of Species by Means of Natural Selection, or the Preservation of Favoured Races in the Struggle for Life* and quite simply started a revolution.[7] It is difficult to overstate Darwin's impact in the field of science, but as has been alluded to earlier, his revolution spread

throughout essentially all fields of human thought. Though the concept of evolution was not original to Darwin and his specific arguments have been modified throughout the years, Darwin's thesis that the variety of life was a result of blind natural selection rather than divine design ushered in a new era. As Darwin promoter Michael Shermer states:

> *We live in the age of Darwin* [emphasis Shermer's]. Arguably the most culturally jarring theory in history, the theory of natural selection gave rise to the Darwinian revolution that changed both science and culture in ways immeasurable. On the scientific level, the static creationist model of species as fixed types was replaced with a fluid evolutionary model of species as ever-changing entities. The repercussions of this finding were, and are, astounding. The theory of top-down intelligent design of all life by or through a supernatural power was replaced with the theory of bottom-up natural design through natural forces. The anthropocentric view of humans as special creations placed by a divine hand above all others was replaced with the view of humans as just another animal species. The view of life and the cosmos as having a direction and purpose from above was replaced with the view of the world as the product of the necessitating laws of nature and the contingent events of history. The view that human nature is infinitely malleable and primarily good was replaced with a view of human nature in which we are finitely restricted by our genes and are both good and evil.[8]

In other words, Darwinism is a complete philosophical and societal revolution; it is an idea that wages total war against others and allows for no quarter or compromise.

When faced with unconditional surrender demands, any army or faith will do three things: attempt to take the high ground, bring up the artillery, and fight to the last man. Both sides in the origins debate have done just that in America. Both claim to be defending truth, justice, and the American way; both seek the help of the government because the government controls the big guns; and each continues to fight through victory and defeat decade after decade.

Though widely accepted in scientific circles today, Darwin was not embraced by all scientists in his own time. Sir John Herschel famously described Darwinism as "the law of higgledy-piggledy" and Darwin's former geology professor at Cambridge told Darwin that when he read *Origins* he "laughed till his sides ached."[9] In the United States, Darwin's most notable opponent was none other than Harvard's world-renowned zoologist and geologist, Louis Agassiz. Nevertheless Darwin, who was personally not inclined to public debate, had no shortage of vocal supporters. "Darwin's Bulldog," Thomas Huxley, vehemently defended Darwin in England and helped spread his word throughout Europe, while in America the United

States' greatest botanist, Harvard's Asa Gray, ably supported Darwin's theories. As the nineteenth century succumbed to the twentieth, Darwin's ideas gained increasing cachet, but had these arguments remained behind the ivy-covered walls of academia, it is unlikely that any great court trials would have resulted. However, what is believed and then taught in higher education classrooms inevitably trickles down into the secondary and elementary ones.[10] And when those elementary and secondary classrooms are filled through governmental fiat and paid for by tax dollars, an explosive legal battle becomes inevitable.

By 1920, the combustible combination of a revolutionary meta-narrative and government-enforced schooling provoked a citizen uprising. Though often misunderstood as solely a Southern movement, the effort to ban the teaching of Darwinism in American public school classrooms enjoyed broad support. In fact, legislation opposing the teaching of evolution was proposed in New York, Kentucky, and Minnesota before the first anti-evolution legislation was passed in Oklahoma.[11] Ultimately, forty-five bills in over twenty states were voted on throughout the 1920s, but the Oklahoma state legislature in 1923 established the first anti-evolution law by prohibiting state distribution of textbooks that included Darwinian teachings.[12]

While states debated the governing of their schools, the most widely adopted textbook (in the very recently formed field of biology[13]) in schools across the country was George W. Hunter's *A Civic Biology*.[14] In it, Hunter endorsed Darwinism, and so in 1925, when a twenty-four-year-old general science teacher and part-time football coach in Dayton, Tennessee, agreed to claim he had taught evolution by using Hunter's textbook for a test review while substituting for a colleague, the trial of the twentieth century was nigh.

FUNDAMENTAL PROGRESSIVISM

Due to common misperceptions, it is important to revisit the history of progressivism in the United States before discussing the specifics of the trial. All too often, the 1920s are understood as a battleground between progressive modern forces taking on traditional fundamentalists who bitterly fought a rear-guard action against enlightenment and perhaps time itself. This common perception is simply wrong. Anti-evolution laws, just like the misunderstood Prohibition Amendment before it, fit perfectly within the penumbra of typical progressive politics. Progressives (both generally and specifically tied to the American Progressive Era) seek to create an ideal society through governmental fiat and action. So, at the beginning of the twentieth century, the thinking followed that if men are falling into vice at

the saloon and workers are inefficient because they are hung-over, the state should use its power to ban alcohol.[15] If the distribution of wealth grows offensive to sensibilities, use the power of the government to cap the income of the wealthy through taxation.[16] If the ruling elite, traditional deference, and political machines thwart democratic ideals, use the power of the government to provide for the direct election of Senators and award the franchise to women.[17]

Time and again, the first decades of the twentieth century witnessed attempts by progressives to determine the future through the retooling and extension of government authority. No less than four amendments to the Constitution were passed in this short timeframe and progressives backed each one. In fact, arguably the greatest individual champion for each of these amendments was none other than the Great Commoner himself, the three-time Democratic presidential candidate and President Wilson's Secretary of State, William Jennings Bryan. And Bryan was now ready to bring progressivism to the American classroom.

"Fundamentalism" had arisen in the first decades of the twentieth century and Bryan had become one of its brightest lights. Bryan was arguably the most important leader of both Fundamentalism and Progressivism and hardly thought of the two as contradictory. The Fundamentalists acquired their name through the publication of a series of pamphlets published from 1905 to 1915 which outlined "fundamental" tenets of the Christian faith in order to fend off the rise of German modernist and social gospel theologies (or heresies as the Fundamentalists considered them). Interestingly though, even some of these first pamphlets accepted the possibility of a theistic evolution and Bryan himself was not a literal six day creationist (which would actually cause him great problems on the witness stand). In fact, Bryan connected his historic progressive fights against the "malefactors of great wealth" to his opposition to Darwinism as he witnessed capitalists time and again justify their economic success and behavior as merely a result of "survival of the fittest."

It is also commonly assumed that Bryan advocated the teaching of the Genesis account in public schools; on the contrary, his acceptance that the doctrine of a separation of church and state prohibited the teaching of a particular religious tradition in the public school led to his new crusade. To Bryan, while the Bible could not be officially endorsed in public schools, it should also not be attacked. Likewise, the government could not establish another religion by teaching evolution. Bryan sought freedom and fairness by removing the contentious origins debate from public school classrooms altogether. Barring that, he felt freedom and fairness demanded both sides be taught. As he had done for all his decades before, Bryan lent his consid-

erable popularity and sonorous voice to the progressive ideal of constructing an ideal democracy where the common people would rule through the creation of appropriate laws guaranteeing protection by and from the government. Anti-evolution laws were simply the next battle in his life-long progressive crusade.

Though Bryan had sounded the clarion call for anti-evolution legislation, he was not even aware of the Oklahoma statute when it first passed. Tennessee, on the other hand, had sought both Bryan's help and advice with their legislation. Bryan always advocated leaving origins studies out of the schoolroom in order to protect the rights of the people, and he never advocated making teachers who taught evolution criminals. The Tennessee legislature was more aggressive than Bryan, though, and in 1925 passed the Butler Act, which banned the teaching of evolution in Tennessee schoolrooms and made violation of the act a misdemeanor punishable by a $100–$500 fine. When Tennessee Governor Austin Peay signed the bill into law, he likely thought the law would serve as an advisory but would not be strictly enforced.[18] Governor Peay focused too much on the actual debate and consequently underestimated both a recently established New York organization seeking any opportunity to "progress to a new social order" and the entrepreneurial spirit of Dayton, Tennessee, town leaders, who upon finding an advertisement in the *Chattanooga Daily Times* by the American Civil Liberties Union (ACLU) saw an opportunity to put Dayton, Tennessee, "on the map."

The ACLU's fame (or infamy, depending upon one's perspective) had skyrocketed by 1925. Formed as the Civil Liberties Bureau during the First World War to defend the rights of Americans opposed to the war, the ACLU subsequently had expanded its focus to defending civil rights generally, but particularly in the realm of free speech. Comprised primarily of Eastern social activists and liberal lawyers, the ACLU's membership had generally supported Bryan's progressive crusading in the past but departed from Bryan's current understanding of freedom and progressivism in the origins debate.

Concerning the specifics of origins teachings, the first position statement by the ACLU ironically delineated that the "attempts to maintain a uniform orthodox opinion among teachers should be opposed" and that the "attempts of education authorities to inject into public schools and colleges instruction propaganda in the interest of any particular theory of society to the exclusion of others should be opposed."[19] Twenty-first century advocates of Intelligent Design of course embrace these statements by the ACLU, but in its historical context the ACLU meant to protect the free speech of evolutionists.

The ACLU considered the banning of evolutionary theory in school an ignorant act that smacked of an intrusion of fundamentalist religious belief and consequently a violation of the First Amendment's Establishment Clause. Therefore, the ACLU actively sought a case that would allow it to challenge not just the Tennessee law, but through appeals, the constitutionality of all anti-evolution laws in the United States. The ACLU understood early on that by using the judicial system and the growing power of the Supreme Court, it could eliminate the ability of legislatures across the country to legislate the wishes of the unwashed masses. When at the behest of Dayton town leaders John T. Scopes called, the ACLU seemingly had found its case.

By July 1925, the stage was set. Dayton's fathers would have their publicity stunt as Scopes obediently confessed to teaching evolution and the legal system charged and tried him.[20] The ACLU would have its test case and was eager to strike a blow for modern science and academic freedom. The Fundamentalists would also have their opportunity to publicize and gather further support for their effort to protect the rights of citizens and defend their faith. The press, too, now not limited to print but armed with the wireless radio and even newsreel, would have its true "trial of the century" to draw the nation's eyes to its daily wares. And so with the parties gathered all around, two giants strode onto this cacophonous media stage to duel. On the one side, none other than "the attorney for the damned"[21] Clarence Darrow strode out, eager to strike a blow for individual liberty and to topple "the idol of all Morondom."[22] Across the aisle, William Jennings Bryan, the man most responsible for both the legislative and religious revolutions of the three decades prior to then, prepared to strike another blow for "the faith of our fathers" and majority rule. With so much at stake and the anticipation so high, perhaps all parties were destined to be disappointed.

THE TRIAL OF THE CENTURY

The specific unfolding details of the trial are worth knowing, and fortunately the definitive account of the trial has been recorded. In 1997 Edward J. Larson published *Summer for the Gods: The Scopes Trial and America's Continuing Debate over Science and Religion* and promptly won the Pulitzer Prize for History.[23] This essay relies on Larson's retelling but need not reproduce it in detail. For the purpose of examining the interaction between church and state, it is sufficient to note that the prosecution in the Scopes trial had an "open and shut" case. The elected legislature of Tennessee had passed a statute prohibiting the teaching of evolution in the public school

classroom, and John T. Scopes had confessed to breaking this law. As long as the trial stuck to these plain facts, they really could not lose. Wisely, the prosecution team recognized this situation and so planned and agreed that this straightforward explication of the basic facts would be their approach; they stuck to this plan except for one fatal (and famous) exception. Though Darrow and his defensive team were in Dayton officially to defend Scopes, their true mission was to put the anti-evolution Butler Act on trial. To do this, Darrow sought to parade before the jury a series of expert witnesses that would testify both to the truth of evolution and, contrary to his own beliefs, evolution's compatibility with the Scriptures. The prosecution objected to these witnesses on the sound legal ground that they could not speak to the facts of the case (whether or not the law had been broken) and the judge agreed. So, though Darrow fumed at the exclusion, his witnesses were barred from the court.

Before the defense rested, Darrow made a surprising move, calling William Jennings Bryan to the stand as an expert on the Bible. The prosecution team encouraged Bryan to refuse and the judge told Bryan he would support the refusal, but Bryan was eager for a showdown. Though this decision to take the stand by Bryan is considered a momentous blunder, he knew he was largely already trapped. Though well aware that Darrow would try to embarrass him on the witness stand, Bryan also knew that if he refused the challenge, H.L. Mencken and the rest of the hostile press would have a field day labeling him a coward embarrassed by his own fundamentalist beliefs. So he agreed to take the stand only after securing the right to then question Darrow and his ACLU team as well. Bryan felt this to be a valuable trade-off because if Darrow and the ACLU took the stand, he could expose their hostility to Christianity and consequently undermine their credibility. Though agreed to and promised, Bryan would never get his chance.

Though one of the most gifted orators in American history and trained as a lawyer, William Jennings Bryan simply proved to be overmatched by Darrow's trial courtroom acumen. Darrow pounded Bryan with questions regarding miraculous events recorded in the Bible, and though the prosecution offered up multiple objections, Bryan always responded that if "Darrow wants to attack the Bible . . . I will answer." Consequently, the judge allowed the blistering interrogation to continue. While Bryan initially scored some witty verbal retorts to Darrow's pointed questioning, his eventual admission that portions of the Bible where rhetorical and called for interpretation and that even the word "day" in Genesis might stand for an "age" meant Darrow had Bryan just where he wanted him. By the end, the

"expert" on the Bible appeared confused about its teachings and offered an interpretation of the book that complied neither with strict literal interpretations nor with modernist theology. Even more damaging, Bryan had appeared to embrace an anti-intellectual approach to theology that has haunted Fundamentalism specifically and perhaps Christianity and religion generally ever since. He certainly provided grist for Mencken and others hostile to religion in the public square to mill.

Though Darrow's questioning of Bryan remains key to this historic event as the element most celebrated in the press of that day and the textbooks and movies of today, it actually had no role in the outcome of the trial. The judge had allowed the questioning to take place due to Bryan's agreement, but he had not let the jury be present for it because, like the expert testimony on evolution, the information to be gleaned from an "expert" testimonial on the Bible was not germane to the case. As such, the jury never heard or witnessed the famous exchange.

Apparently weary of sidebar theatrics, the judge reneged on Bryan's promised interrogation of Darrow. Disappointments continued to pile up for Bryan, for when the time came for closing arguments, Darrow directed the jury to declare Scopes guilty and thereby denied Bryan the opportunity to deliver his long prepared pro-Christian and anti-evolution oration. Consequently, after meeting for just seconds in the hallway, the jury returned from "deliberation" to pronounce Scopes guilty and the judge assessed a $100 fine—a fine Bryan had already offered to pay. And so the trial of the century was officially over, ending not with a bang, but with a whimper.

Despite its anticlimactic end, the reverberations of the trial have long continued. Though often portrayed in historic accounts as despondent and heart-broken, biographers have countered that if so, Bryan showed no signs of it.[24] He immediately traveled to Chattanooga and Winchester, Tennessee, to continue the anti-evolution crusade and returned to Dayton five days after the trial's end to give a speech but died in his sleep. The defense team immediately prepared for an appeal to the Tennessee Supreme Court which was heard in January of 1927. Again, the ACLU's ultimate goal was to have the conviction upheld so that it could then appeal the decision and challenge the constitutionality of the law in the U.S. Supreme Court. Its plans were thwarted though when the Tennessee High Court overturned the decision on a technicality (the judge, rather than the jury, had determined the fine) and then directed the Attorney General not to prosecute any more Butler Act cases. As such, clear victory could not be declared by either side. The Butler Act, as well as several other state statutes prohibiting the teaching of evolution, remained on the books for decades, but the nega-

tive media attention that engulfed Tennessee as a result of the trial guaranteed that the broadly supported Fundamentalist effort to outlaw evolution in schools essentially ended.

Death would not take Darrow until 1938, but G.K. Chesterton would best him in a public debate over religion and evolution at New York City's Mecca Temple in 1931.[25] Thankfully for Darrow, no transcript of that equally lopsided debate exists, nor were any dramatizations created.[26] Finally, John T. Scopes, the person who the trial was officially about but who seemingly could not have played a less important role, returned to teaching and lived out his life in general obscurity, unable or unwilling to capitalize on his fame due to his lack of knowledge regarding evolution and his admittance after the trial that he never really had broken the law. Used by outsiders, however willingly for their own gain and not his, Scopes, until his death in 1970, seemingly became the stereotypical man without a country, for he was a traitor to his own people and a largely discarded tool by his "defenders."

Before completely abandoning the Scopes Trial, it is worth exploring perhaps the most significant church-state legal issue raised by the Butler Act and the subsequent fight over teaching evolution in schools. Bryan was aware of this issue but never effectively raised it, and Darrow assumedly wanted to avoid it, for it demonstrated a hypocritical element to his stance. One year before the Scopes Trial, Darrow defended the infamous murderers Nathan Leopold and Richard Loeb. In an attempt to avoid the death penalty for the killers, the material determinist Darrow had argued that the blame for the murder of the fourteen-year-old Bobby Franks lay not with his killers Leopold and Loeb but on a society that had provided Leopold and Loeb access to the teachings of Friedrich Nietzsche. According to Darrow's mostly successful argument, society had to take into account the likely results (rather than just the truth or falsehood) of teachings it allowed in schools and even libraries. Contrastingly, one year later, in the Scopes Trial, Darrow argued that intellectual freedom for teachers must be protected and that if something was most likely true it should not be banned from public school instruction, even to young children, regardless of its consequences.[27] Bryan, as well as state legislatures that considered banning the teaching of evolution, had indeed focused attention on the logical consequences of teaching evolution to the young as the primary reason why it could and should be banned from the public school classroom. However, arguments over "truth"—not "consequences"—dominated the proceedings.

Knowing that schools create society makes a simplified understanding of the Scopes Trial, or a taking up of sides in evolution debates solely on one's position regarding the truth of macroevolution, inappropriate. Public school

instruction is not simply about teaching the "truth," if for no other reason than all truth cannot be covered, so selection is inherently part of the process. Furthermore, public schools create a "public" by what is selected to teach. Therefore, the Constitution guarantees that all citizens—religious and secular—have a right to participate in determining what kind of society they wish to build and protect.

Progressives of both the religious and secular orders are always on the forefront of trying to determine educational content, because they are the most focused on the formation of their ideal society. Consequently, progressives often attempt to exclude others from the decision-making process by declaring opponents' views illegal. In the first quarter of the twentieth century, religious progressives known as Fundamentalists attempted to use legislatures to legislate their beliefs at the expense of others and enjoyed limited success. In the second half of the twentieth century, secular progressives, typically known as secular-humanists (who also had written out their fundamentals in manifestos), attempted to legislate their beliefs through the American court system; unlike their earlier religious cousins, they won an almost complete victory.[28]

THE ESTABLISHMENT OF SECULAR PROGRESSIVISM

After the 1920s, the country seemingly embraced what historian Edward Larsen described as a "thirty-year truce" in the war over origins teachings.[29] After the Scopes Trial, a wide variety of states had anti-evolution legislation introduced, but only two southern states, Mississippi and Arkansas, actually passed statutes. However, though evolutionists faced little legislative opposition, textbook publishers had no desire to lose sales due to publishing unpopular scientific theories, so they generally avoided putting evolution into their works.[30] As such, religious progressives won a *de facto* victory but not a *de jure* one. Secular progressives had made strides *de jure* but not *de facto*. In effect, political power returned to the people where local school boards could make their own decisions regarding what would be taught in their schools. This very American-styled democratic peace was shattered ironically by the nation that Fundamentalists considered the champion of atheistic secular humanism—the Soviet Union.

In 1957, the Soviet Union launched Sputnik and officially surpassed the United States technologically. In the brief span of twelve years, the United States had gone from the only true technological superpower to a seemingly distant second. As in all times of American crisis, the federal government once again took on broad power to stem the national emergency. So, like Lincoln in the Civil War or Franklin Roosevelt facing the Great Depression

and a worldwide Fascist threat, President Eisenhower joined hands with Congress to fight the Cold War, and American schools would be considered the first line of defense. In 1958, the National Defense Education Act was passed, forever altering science education in the United States. Though the focus of the bill was flooding graduate study and universities with research funds for applied science, the ramifications trickled down quickly to secondary schools as well. Local opinions, interests, and rule seemed *passé* in a national emergency, and so the nation embraced scientific authority, which embraced evolution. A vast reworking of teaching was being dictated to the nation:

> These reforms included the biological sciences, especially after the National Science Foundation began funding the Biological Science Curriculum Study (BSCS) in 1959. Like its counterpart for physics, the BSCS set about rewriting high-school textbooks, and the leading biologists serving on the Study (which included Hermann Muller) boldly embraced evolution. The appearance of the BSCS texts in the early sixties shattered the thirty-year truce in legal activities enveloping the anti-evolution issue.[31]

With this tide rising, the secular progressives were determined to take it at the flood. Fear had provided them with their chance to use the power of the national government to rework American education, the nation's long-standing church-state relations, and consequently the nation itself.

Though easily forgotten in the twenty-first century, to understand the revolution that occurred in the 1960s in church-state relations it must be remembered that the Supreme Court's interpretation of the Establishment Clause was quite literally turned on its head in the second half of the twentieth century. No court in the 1920s would have seriously considered the notion that an anti-evolution law violated the Constitutional injunction against establishing religion. The clause's original intent was to prohibit an American state church as understood by the Founders through their experience with the Church of England. Indeed, states were not only free to but did establish official state churches supported by public tax dollars. Though that practice disappeared in the first half of the nineteenth century, the Supreme Court did not seriously alter its understanding of the Establishment Clause until the Northern states established through the power of the sword the indivisibility of the nation and the supremacy of the national government over the states. With the forced passage of the Fourteenth Amendment, the states were now limited by the Bill of Rights and could not deprive "any person of life, liberty, or property, without due process of law."[32] Even so, it was not until 1947 that the Supreme Court first considered using the Establishment Clause to restrict state authority even when

the state was not trying to establish an official church. The court "incorporated" the First Amendment's Establishment Clause only by reinterpreting the clause to mean aiding religion generally rather than establishing a particular denomination.

In *Everson v. Board of Education of Ewing Township*, the Court considered whether a New Jersey law that reimbursed parents whose children attended parochial schools for the cost of bus transportation to and from school unconstitutionally established religion. Ultimately, the Court decided that this law was constitutional because the First Amendment requires the state to be neutral towards religion and not its adversary. The Court found (5–4) that this law did just that by providing assistance to parents to get their children, regardless of their religion, safely and expeditiously to and from accredited schools. Though technically a victory for the church, this decision nevertheless established a foundation for the removal of religion from the public square. Through his majority opinion, Justice Hugo Black set the precedent that the religion clauses of the First Amendment were now applicable to the states through the Fourteenth Amendment, and his conclusion that this particular law did not breach "a wall between church and state" established a new standard by which church-state relations would henceforth be judged.[33]

Using *Everson* as their legal foundation, a new generation of radical secular progressives rose up in the 1960s to remake American society through judicial fiat. Scoring a series of dramatic victories, these progressives used the Supreme Court to remove religion from the public square. Their targets typically centered on the American public school. In 1962, the *Engel v. Vitale* decision declared that prayer in the public school system, even if voluntary and non-denominational, was unconstitutional.[34] A year later the Court found in *School District of Abington Township, Pennsylvania v. Schempp*, that recitations of the Lord's Prayer or beginning a school day with a reading from the Bible was a breach in the separation of church and state and even potentially "psychologically harmful to the child."[35] The *Schempp* case established the even more religiously proscriptive position that "to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[36]

With a new strict standard in place, the removal of religion from the classroom has continued unabated from the 1960s forward. Selecting just a few from many examples, in *Wallace v. Jaffree* (1985) the court struck down as a violation of the Establishment Clause an Alabama law that required a "moment of silence" at the beginning of each school day.[37] In *Lee v. Weisman* (1992) the court outlawed clergy-led prayer at public school gradua-

tion ceremonies,[38] and in 2000 the Court ruled that student-led, student-initiated prayer at football games violated the First and Fourteenth Amendments in *Santa Fe Independent School District v. Doe*.[39] Ironically, the crucial *Schempp* decision stated that "the State may not establish a 'religion of secularism'"—Bryan's exact position—but their decision seemed to do just that.[40]

In the second half of the twentieth century, few areas proved more fruitful to scientific fundamentalists than the long-standing origins debate. The legal trends of the day almost assured victory if the progressives challenged anti-evolution laws while the social tumult stemming from civil rights and war protests ushered in more and more political radicalism. Even "conservatives" had impetus to rework the teaching of science in American public schools due to the Cold War and the perceived need to "catch-up" with the Russians.

In 1968, the Supreme Court Chief Justice Earl Warren and his Court in a fascinating bit of historical irony would decide another momentous case tied to Little Rock Arkansas' Central High School.[41] In 1965, Susan Epperson, a first-year biology teacher at Central High, agreed to the Arkansas Education Association's request to stand as the plaintiff in a lawsuit against Arkansas' anti-evolution statute. The legal counsel for Epperson argued this was a simple case of First Amendment freedom; a science teacher had a right and duty to teach evolution since it was the dominant and most widely accepted scientific theory of origins. In contrast to the Scopes Trial, it was the state that wished to widen the parameters and parade a host of experts before the court to demonstrate the reasonableness of the statute by putting evolution on trial. However, as with the Scopes Trial, the judge essentially disallowed outside expert testimony in an effort to focus the case on the law itself and ruled that the law was unconstitutional.[42]

The Warren Court heard the case on appeal after the Arkansas Supreme Court reversed the initial *Epperson* ruling in 1967, declaring that the law was "a valid exercise of the state's power to specify the curriculum in its public schools."[43] The Warren Court certainly appeared predisposed to ruling on behalf of evolution, though finding Constitutional reasons for doing so was problematic. The justices almost all agreed the law must be unconstitutional but they really could not agree why.[44] Ultimately, the court declared the Arkansas statute in place since the 1920s banning the teaching of evolution in the public schools an unconstitutional violation of the Establishment Clause. With one stroke of the pen all remaining anti-evolution laws, including Tennessee's famous Butler Act, were apparently null and void. Scientific fundamentalism, at least in the crucial field of origins, had seemingly been established by the state.

Though the heady days of banning evolution had passed for the creationists, one avenue seemingly remained open. The *Epperson* decision endorsed neutrality, not hostility, to religion, and so demanding equal time for conflicting views on origins in the classroom appeared to be a constitutionally legitimate option. Indeed, Bryan's endorsement of banning evolution had been motivated by equal treatment (both Genesis and Darwinism would be banned) not exclusivity. With the Court's ruling that states could not bar Darwin from passing beneath the schoolhouse door, seemingly the author of Genesis would be equally welcome. Reality proved otherwise.

Creationists faced daunting opposition from the courts that early on simply refused to hear their cases that had accused the state of establishing secularism in public schools. In 1971, the Supreme Court continued to build the wall between church and state ever higher by setting up a three-pronged test for Establishment Clause cases. In Chief Justice Warren Burger's majority opinion in *Lemon v. Kurtzman*, the "Lemon Test" was born. Under the *Lemon* Test, to not violate the Establishment Clause a law had to: (1) have a secular legislative purpose, (2) have its primary effect be one that neither advances or inhibits religion, and (3) not foster an excessive entanglement with religion.[45] The first requirement dated to 1963's *Abington v. Schempp* while the second was established in 1968's *Board of Education v. Allen*.[46] The third element was new and added a particularly difficult hurdle for creationists. Though the Lemon Test remains in the twenty-first century a crucial element to Establishment Clause cases, it has been criticized by both the political Left and Right as unworkably vague and unfailingly capricious in application. Nevertheless, it both exemplified and served as a significant barrier for creation science, much less religious epistemology, in the American public school classroom.

SCIENTIFIC FUNDAMENTALISM SECURES POWER

Especially when considering the legal history of the Establishment Clause in the later twentieth century and before one becomes too embroiled in it or easily passes over the names of court cases, it is important to carefully note the beliefs of the general populace and the ruling elite as well the constant sparring over control of language. The common mistake made when examining Supreme Court cases is to simply equate "creationism" with religion and "evolution" with science. While obviously these terms do have undeniable correlation, treating them as synonyms can irreparably cloud the important church-state issues at stake. Though it has already been established that one's beliefs regarding origins will undoubtedly affect, if not determine, one's worldview, philosophy, and religion, it is reasonable

to question whether the Establishment Clause should be considered in a state or school's decision regarding what to teach in science class. It is only by the assumption that belief in creationism can stem solely from an *a priori* allegiance to a religious text that courts would argue teaching it in a public school equated with establishing a religion. By the end of the twentieth century, creationists would insist that concluding that the world was designed, not only can be but is a conclusion derived purely through the scientific method. If this argument is generally acknowledged, the banning of any origins theories other than the materialistic one fundamental to secular-humanism would seemingly violate the neutrality required by the U.S. Constitution.

Quickly reviewing the twentieth-century history of the origins conflict in regards to language should make clear how an arguably inappropriate equation of creationism and religion was established. At the beginning of the twentieth century, the general populace did not widely accept the theory of evolution and reasonably assumed its adoption would cause a civic decline. Having been embraced in higher academia for the better part of a century, by the last few decades of the twentieth century evolution had broadly filtered down into the general public and no longer seemed such a dire threat to essential moral and civic virtues. Since the anti-evolution efforts had been spearheaded by the religious progressives known as Fundamentalists who proudly defined all of their philosophy as stemming from divine revelation in the Holy Scriptures, it became easy for the courts and public to equate belief in creation with a literal interpretation and faith in the book of Genesis. Consequently, when "creationism" is used by adherents and foes alike as simply another word for Fundamentalist Christianity, there is little doubt that the modern era's court system would ban it from schools as a violation of the Establishment Clause. The history of the 1970s and forward then becomes one where creationists must demonstrate the legitimacy of concluding that the world was created by relying on the scientific method, while secular progressives have striven to prove that the identification, recognition, and conclusion of design not only falls outside the purview of science but stems solely from religion.

Creationists honed their scientific arguments during the 1970s and refined their legal approach to focus on America's natural inclination for "equal time." Though no major victories were won in the court system, limited victories had been won in state legislatures such as California, Kentucky, Texas, Indiana, and Tennessee, where either creationism was increasingly recognized as science or, more commonly, legislatures dictated that evolution had to be taught as a theory and not as a fact. In addition, the publicity generated by these state actions likely encouraged many school

districts nationwide to adopt their own particular policies for providing an even-handed and citizenry-sensitive approach to origins teaching.

With the election of Ronald Reagan in 1980, creationists had reason to hope for even more. The fortieth president was elected on a platform that in regards to education called for the elimination of the newly created Department of Education as a Cabinet-level post, the support of tax credits for tuition paid to private schools, as well as a return of prayer to the public school classroom. All three of these elements likely encouraged creation scientists. Returning educational authority from the federal government back to local officials would bode well since "equal time" enjoyed widespread public support. Tax credits would indicate that the extremely high wall of separation exemplified by the *Lemon* Test's "entanglement" verbiage might not remain. And, of course, the removal of prayer, which like rulings regarding origins teaching had been easy for the Supreme Court to declare but much harder to enforce, if removed, would lend credence to the idea that the government did not need to root out any vestige of religion from the public school.

In the area of education, Reagan promised much more than he could deliver. Likewise, a decade that began with such promise ended in utter defeat for creationists. Before the defeat, though, came victory. In 1981, Arkansas easily passed a law that required schools that taught evolution to also teach creationism. If origins were to be taught at all, both theories were to be treated as theories, with the best evidence of each side presented. Louisiana passed similar legislation that same year, which was particularly significant because even though Louisiana was also southern and so at first glance fell into regional stereotypes, it more importantly was urban. Much more than regional, the origins debate has tended to divide along rural and urban lines, but in Louisiana urban and rural parishes joined hands in approving "equal time" legislation.

The ACLU wasted little time in challenging creationism's latest legislative victories. The Reverend Bill McLean was the lead plaintiff in the grievance filed against the Arkansas law in Little Rock's federal district court. Judge William R. Overton presided over the case but seemed predisposed to strike the law, and the professionalized "small-print" lawyer-style that had emerged over the course of the twentieth century caused what the media tried to dub "Scopes II" to be a "box-office" failure. After two weeks of argument, Judge Overton ruled on January 5, 1982, against the Arkansas statute. Judge Overton equated creation science with religion rather than science and so considered its appearance in public school a violation of the Establishment Clause.

Louisiana's equal-time law was more skillfully and neutrally constructed

than Arkansas' law, and so the ACLU knew that a victorious challenge of this law might lead to final victory and the complete banishment of creation science and religious epistemology from the public school science classroom, regardless of popular sentiment. It took literally years of legal wrangling (mostly victories for opponents of the "equal time" law), but the law's legitimacy would eventually be determined by the U.S. Supreme Court when the Court heard the case in December of 1987.

Before the Court, the state argued that lower courts had inappropriately and arbitrarily defined creation science as religious belief rather than actual science.[47] The state had compiled reams of evidence to prove that creation science was indeed science and therefore deserved a hearing in the public classroom to serve the secular purpose of academic freedom and fairness. The opposition presented the court with a multitude of statements primarily culled from scientific organizations that stated creation science was not science and that creationism had no place in the public school classroom. The court rendered its decision six months later in four different written opinions reflecting very different interpretations of creation science. In any event, the majority decision in *Edwards v. Aguillard* struck down the law as an unconstitutional violation of the Establishment Clause by tying creation science to Fundamentalism and ergo an establishment of religion.[48] The decade that had begun so promisingly for the creationists ended in nearly complete defeat.

The key element to understanding the origins debate in the 1990s lies once again in an understanding of progressive politics. Progressives of whatever political or religious stripe always attempt to impose their beliefs through the power of the government. Typically such efforts have two main prongs of attack: (1) mandate the teaching of one's beliefs; and (2) outlaw the teaching of all competing beliefs. As has just been seen, by the end of the 1980s, the Supreme Court effectively outlawed creation science from the public school classroom, thereby achieving one-half of any progressive's dream. The 1990s would largely witness the completion of the first goal: the instilling of one's beliefs through legal fiat.

In 1988, the Republican progressive George Bush ran for president in a campaign that declared he would be the "education president." His initiative was *America 2000*, a standards-based federal education plan designed for adoption throughout the United States. This plan was renamed *Goals 2000* when Democratic progressive Bill Clinton became president in 1992. Capitalizing on the nation's remaining concern over its failing educational system as documented in the famous 1983 Congressional report, *A Nation at Risk,* both progressive Republicans and Democrats looked to the government to remake American schools in their officially prescribed image.[49]

Such a governmental effort made the evolutionists' dream of once and for all establishing evolution in American public schools an imminent possibility as the government looked to the vehemently evolutionist National Academy of Science to recommend the standards for science.

The evolutionists' opportunity was almost lost when the entire *Goals 2000* project was nearly aborted after the history standards were released in 1994 and caused a political firestorm over the controversial inclusions and exclusions on the list. In fact, opposition to *Goals 2000* helped sweep the Republican Party into control of both the House and Senate—something that had not happened since the midterm elections of 1952. As a result, the teeth of *Goals 2000* were largely removed as states would be given the right to establish their own specific standards using federal government ones as a guideline rather than a mandate with funding tied to compliance. With their autonomy largely maintained, the states set out to devise their own standards. By 2000 every state but Iowa had science teaching standards in place and these standards would frequently be enforced through accountability testing. While not a federal mandate, this standardization process, as such processes essentially always do, proved a victory for the progressives—in this case evolutionary ones, as the vast majority of standards endorsed evolution. With the dawn of 2000, the evolutionary progressives' victory was essentially complete: their beliefs were required and tested throughout the United States while their opponents' ideas had been outlawed.

THE INTELLIGENT DESIGN REVOLT

Representing either survival of the fittest or the power of myth, in the twenty-first century the anti-evolution phoenix arose yet again from the ashes of defeat. From the publication in 1978 of "Freedom of Religion and Science Instruction in Public Schools" in the *Yale Law Journal* to his closing arguments in the 1987 *Edwards v. Aguillard* Supreme Court case, Wendell Bird had led the anti-evolution fight in the United States.[50] However, with the publication of *Darwin on Trial* in 1991 by University of California Law Professor Phillip E. Johnson, the anti-evolution torch passed to a new group, and the strategies used to oppose evolution changed rather radically.[51]

Creationism's association with Fundamentalism had ultimately doomed it and Henry Bird to defeat due to the Court's modern Establishment Clause stance. In fact, Phillip Johnson lamented that in both the public's and the government's eyes the debate had come to be defined as an either-or choice between faith and science. To Johnson, the problem was science's

strict adherence to the philosophy of materialism, which disallowed supernatural scientific explanations by linguistic fiat.

To Johnson it was regrettable that previous opponents of naturalism had too often tied the broad idea of creationism to specific Genesis accounts such as the six-day creation and the flood. Johnson argued, in contrast, that a more accurate understanding of creationism generally would more effectively counter materialism. Johnson's efforts did not revolve around establishing a particular faith, but uniting people of faith and non-faith who recognized that materialist assumptions and explanations did not always adequately explicate natural phenomena.[52]

Johnson's far broader understanding of origins held much less chance of being accused of establishing a religion because a wide variety of religions and non-religions fell under this general distrust of pure naturalism. Likewise, the scientific appeal was far greater because it was not motivated *a priori* to the defense of particular religious beliefs; in fact, the position rested on scientific observation and evidence, as well as a healthy amount of mathematical and probability theory, to induce that the world had to be designed. Simply understood, scientists—not theologians—argued that random chance cannot account for the "irreducible complexity" found in things as immense as the universe itself to things as small as microscopic bacterial flagellum. Johnson's call for an inclusive and scientifically based opposition to evolutionary theory became known as "Intelligent Design," and it has continued the debate against evolution from the 1990s into the twentieth century.

Johnson has been joined by a substantial number of scientists and mathematicians, the leading lights being Michael Behe and William Dembski.[53] As scientists, these Intelligent Design advocates maintain that science itself is best served when all evidence is evaluated and theories remain open to questioning, particularly when new evidence is discovered. The position maintained by the Intelligent Design movement—and it is an attractive position for many Americans—is to "teach the controversy." In other words, Intelligent Designers maintain that evolution does have a rightful place in the curriculum, but as a scientific theory rather than a fact. Evolution continues to have many "holes" in its account that scientists cannot explain and assertions that scientists cannot prove. Consequently, it makes sense—particularly in a science class—to examine all the evidence and let students draw their own conclusions. In fact, the Intelligent Designers argue that their scientific discoveries should lead to nothing less than a revolution in science, for they will change how science is pursued by opening up the door once again to supernatural explanations of events when the material

evidence suggests that a supernatural conclusion makes the most scientific sense.

The basic tenets of the Intelligent Design movement enjoy wide public support, as Americans overwhelming reject the tenets of materialist evolutionists, but after finally establishing full control over the American public school classroom, the evolutionists obviously have no plans to willingly relinquish their power or make room for others.[54] The fight rages on to determine if they will have to. Thus far, results have been mixed at best for the Intelligent Designers. A major victory was achieved in 2005, when the Kansas Board of Education voted to allow local school boards to include criticisms of Darwinian theories if they so choose and adopted science standards that allowed for supernatural explanations.[55] However, in 2006, Cobb County, Georgia, backed down from its decision to require the placing of stickers on biology textbooks that reminded students that macroevolution was an unproven theory.[56] And, in 2005, Intelligent Design suffered a stinging defeat due to creation scientists borrowing the "intelligent design" moniker for their *Of Pandas and People* textbook. In *Kitzmiller et al. v. Dover Area School District*, U.S. District Court Judge John E. Jones III ruled that the school board of Dover, Pennsylvania's decision to have ninth-grade biology teachers note that Darwinism is a theory and to make books that document problems in evolutionary theory available to students who had an interest in the subject was a violation of the Constitution's Establishment Clause.[57] The Dover School Board's use of the creationist *Of Pandas and People* textbook, whose authors had simply gone through and replaced the word "creation" with "intelligent design," led the judge to equate Intelligent Design with creation science, thereby making the Establishment Clause decision predictable.

FINDING ABSOLUTES IN AN ENDLESSLY EVOLVING DEBATE

Going forward, the debate shows no real sign of disappearing. On the one hand, evolution advocates have an almost unassailable position as a result of three key pillars of strength. The scientific community's allegiance to Darwinism and materialism remains almost airtight despite Intelligent Design advocates' efforts to obtain a place at the table. The ACLU and a host of other civic and legal organizations jealously guard America's school house doors, ever vigilant to keep out those who would question evolutionary dogma. And, from the very beginning, the evolutionists have enjoyed the powerful support of the media. Though perhaps primarily attracted to

conflict and controversy, and while at times irritating to evolutionists who do not want their opponents granted any legitimacy through airtime, the media has been an invaluable ally in the evolutionists' efforts to gain control of the schools and mark creationism beyond the intellectual pale. One only has to consider the likelihood of a postmodern-day Mencken rising up to make a mockery of evolutionists or the media creating a show trial on behalf of creationists to recognize the crucial role the media plays in establishing evolutionism.

Despite nearly a century of legal defeats, opponents of evolution nevertheless remain strong enough to fight for the foreseeable future. In fact, though facing formidable odds, there remain a variety of reasons why opponents of materialistic evolution have reason to hope. Though evolution has been taught in American schools now for decades, the vast majority of Americans still rejects its primary tenets and continues to believe in some form of creationism. This both attests to the effectiveness of churches and independent educational organizations in propagating their ideas and gives hope for legal change because in a democracy, the laws tend to eventually represent majority opinion. Interestingly, though evolutionists have historically tried to label adherence to creationism as merely an American (or even a sectional) oddity, the "shrinking" world should allow a "broad-tent" Intelligent Design approach to flourish as Islam, Judaism, and many Eastern faiths also reject evolutionary materialism.

Within the American legal system, evolution currently controls the high ground, but new appointments to the Supreme Court make new interpretations of law a continual threat. Furthermore, the more often evolutionary champions such as Richard Dawkins, Daniel Dennett, and others announce that evolutionary theory necessarily leads to atheism, the more likely it becomes that the Supreme Court will rule the teaching of evolution a violation of the Establishment Clause, as it did creationism.[58]

Finally, though facing an uphill battle within the scientific community, the research being done by the Intelligent Designers demands attention and has garnered a great deal of it from the popular press; and, since it is still in its relative infancy, if Intelligent Design can successfully build on its research it could conceivably become a force with which to be reckoned within the scientific community. Even failing that, though, Intelligent Design's endorsement of "teaching the controversy" will almost assuredly resonate with the American populace because it embraces fair play, respects citizens' beliefs, and avoids the natural rankling that occurs whenever beliefs are dictated to Americans.

Since 1620, religious progressives have attempted to use American schools to establish their beliefs in the succeeding generations. These reli-

gious progressives have had different beliefs and have gone by a myriad of names including Puritan, Unitarian, Progressive, Fundamentalist, and Secular-Humanist, but their goals are always the same: use the power of the government to establish their beliefs, their faith, their "shining city on a hill." To progressives of all stripes, separation of church and state tends to mean that their beliefs are true and therefore rightly established by the government while all contrasting beliefs result from a false religion and are therefore banned from the public square by Constitutional decree.

The debate over origins is perhaps best understood as one of the most important battlegrounds in the far broader war for true liberty. Unless one rejects logic altogether, the answers one gives to origins questions will determine one's answers to essentially every other metaphysical, epistemological, and axiological question. Consequently, to suggest that teaching answers regarding origins is not establishing a religion is disingenuous at best. As G.K. Chesterton wrote, "anybody who really understands that question will know that it always has been and always will be a religious question . . . "[59]

Recognizing the true nature of the origins debate in American public schools leads to one final conclusion, and it is the essential debate in church-state relations. However, this answer is not determined but is a difficult choice of personal application. Does one embrace religious progressivism and fight for the establishment of one's faith, or does one defend religious freedom by keeping church and state separate by allowing others the freedom to think and believe as they choose, shining city be damned? The authors of *Inherit the Wind* recognized the value of the Scopes Trial in serving as a metaphor for an abusive use of government power and actually wrote the play to criticize not Fundamentalism but the McCarthy hearings;[60] the Scopes Trial and the debate over origins teachings can remain a potent tool for understanding freedom, but only if one demands the story be seen in Technicolor, not black-and-white.

NOTES

1. I would like to thank Grove City College's The Center for Vision and Values for their support of this project. Without their generous assistance, this research and project could not have been undertaken.

2. *Inherit the Wind*, VHS, dir. Stanley Kramer (1960; Santa Monica, CA: MGM/UA Home Video, 1996).

3. It is appropriate to keep in mind that no debate exists over the existence of "microevolution"—the process within which species adjust to their environment. The debates always revolve around "macroevolution," which argues that all of life has a common ancestor (species can evolve into other species) and there is a material/natural explanation for the initial creation of matter and the world.

4. The first college formed in the colonies was Harvard in 1636. The first compulsory school law in the colonies was passed in Massachusetts in 1642 and the famous "Old Deluder Satan Act" was passed in Massachusetts in 1647.

5. Horace Mann, the "father of the common school," began his twelve year run as Secretary of the Massachusetts School Board in 1837.

6. The Federal Commission of Education did not record national high school enrollment figures in 1880. In 1890, 202,963 pupils, representing 3.8 percent of the 14–17 age group were enrolled. This statistic doubled every decade during the rest of the Progressive period, jumping to 519,251 pupils in 1900, to 915,085 pupils in 1910, and to 1,851,968 pupils in 1920. The number of public high schools also increased dramatically, rising from 2,526 schools in 1890, to 6,005 schools in 1900, to 10,213 schools in 1910, and to 14,326 schools in 1920. This information was collected and presented by Edward J. Larson, but he notes that the rise in high school attendance cannot be attributed to compulsory attendance laws because these were not effectively enforced until 1920. See *Trial and Error* (New York: Oxford University Press, 2003), 26, 220.

7. Charles Darwin, *On the Origin of Species by Means of Natural Selection, or the Preservation of Favoured Races in the Struggle for Life* (Birmingham, AL: Gryphon Editions, 1987).

8. Michael Shermer, *Why Darwin Matters* (New York: Henry Holt and Company, 2006), xxii.

9. Robert B. Downs, *Books that Changed the World*, rev. ed. (New York: Signet Classics, 2004), 284.

10. This "trickle-down" effect is almost always first seen in textbooks that are commonly written by college professors. This first wave is followed closely by new generations of teachers educated at the university. The history of Darwinism's spread is no exception. Edward Larson writes that by "the turn of the century, evolution had clearly supplanted creationism in high-school textbooks . . . To the extent that textual content was an indication of teaching, public high schools were teaching evolution decades before the anti-evolution crusade, with the presentation seeming to grow more dogmatically Darwinian over time. A review of teaching journals, policies, and manuals reinforces this conclusion." *Trial and Error*, 22, 23.

11. Larson, *Trial and Error*, 48.

12. Ibid., 7.

13. It was only around the turn of the century that high school botany, zoology, and historical zoology began to be combined into the single course of biology. The first high school biology textbook appeared in 1907. Larson, *Trial and Error*, 21.

14. Ibid.

15. The Eighteenth Amendment to the Constitution banning the production and sale of alcoholic beverages was ratified in 1919.

16. The Sixteenth Amendment to the Constitution making income tax legal was ratified in 1913. It originally was only applied to the top one percent of income earners in the nation.

17. The Seventeenth Amendment to the Constitution was ratified in 1913 and

provided for the direct election of Senators. The Nineteenth Amendment to the Constitution was ratified in 1920 and guaranteed women's right to vote.

18. Larson, *Trial and Error*, 57.

19. Ibid., 59.

20. It is probably worth noting to counter popular mythology that John T. Scopes was never jailed and never faced jail time. Everything was arranged in the summer through friendly handshakes at a local soda fountain.

21. Clarence S. Darrow, *Attorney for the Damned*, ed. Arthur Weinberg (New York: Simon and Schuster, 1957).

22. Clarence S. Darrow, *The Story of My Life* (New York: C. Scribner's Sons, 1932), 249.

23. Edward J. Larson, *Summer for the Gods: The Scopes Trial and America's Continuing Debate over Science and Religion* (Cambridge, MA: Harvard University Press, 1997).

24. Ibid., 197.

25. William K. Kilpatrick, "The Wild Man: Why Gorillas Don't Build Libraries But Men Do," *Touchstone* (September 2006), 21–23.

26. A poll was taken of the audience which numbered well over 3,000 after the debate regarding who "won," with Chesterton garnering votes at over a two-to-one clip. American Chesterton Society, "Chesterton Quotemeister," http://www.chesterton.org/qmeister2/darrowdebate.htm (accessed February 9, 2007).

27. For a brilliant and more detailed analysis of this flip-flop in Darrow's rhetorical argument, see Richard Weaver's *The Ethics of Rhetoric* (Davis, CA: Hermagoras Press, 1985), 27–54.

28. American Humanist Association, "Humanist Manifesto I," http://www.americanhumanist.org/about/manifesto1.html (accessed February 9, 2007); American Humanist Association, "Humanist Manifesto II," http://www.americanhumanist.org/about/manifesto2.html (accessed February 9, 2007); American Humanist Association, "Humanist Manifesto III," http://www.americanhumanist.org/3/HumandItsAspirations.htm (accessed February 9, 2007).

29. Larson, *Trial and Error*, 81.

30. Edward Larson cites evidence compiled among others by Maynard Shipley in 1930 that found "70 percent of public high schools omitted teaching evolution" due to its omission in textbooks. Likewise, Larson cites Gerad Skoog's quantitative analysis of texts published between 1930 and 1959, which "found only about 3 percent of the words in texts . . . dealt with evolutionary topics, compared with over 8 percent in texts published during the sixties after evolution generally returned to the classroom." *Trial and Error*, 85–87.

31. Ibid., 91.

32. The Constitution of the United States, Amendment 14, Section 1.

33. Hugo Black famously borrowed the "wall" language from a letter Thomas Jefferson wrote while he was president to the Danbury Baptists assuring them that their religious freedom would be protected.

34. *Engel v. Vitale*, 370 U.S. 421 (1962).

35. *School District of Abington Township, Pennsylvania v. Schempp*, 374 U.S. 203, 209 (1963).

36. Ibid., 222.

37. *Wallace v. Jaffree*, 472 U.S. 38 (1985).

38. *Lee v. Weisman*, 505 U.S. 577 (1992).

39. *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000).

40. *School District of Abington Township, Pennsylvania v. Schempp*, 225.

41. Little Rock Arkansas' Central High was of course the location for the famous federal-state showdown stemming from the Warren Court's momentous *Brown v. Board of Education of Topeka, Kansas* decision in 1954. When the Governor and citizens of Arkansas resisted the integration of the "Little Rock Nine" in 1957, President Dwight Eisenhower sent in the 101st Airborne to occupy the school and enforce the federal court's ruling.

42. For an outstanding and detailed recording and analysis of the entire *Epperson* case history, including a rather disturbing account of the disingenuous writing of the Court's opinion by Justice Abe Fortas, see Chapter Four of Edward Larson's *Trial and Error*, 93–124.

43. Larson, *Trial and Error*, 107.

44. Ibid., 113.

45. *Lemon v. Kurtzman* declared unconstitutional both a Rhode Island law and a Pennsylvania law that allowed the state to support salaries of teachers of secular subjects in parochial and private schools.

46. *School District of Abington Township, Pennsylvania v. Schempp*; *Board of Education v. Allen*, 392 U.S. 236 (1968).

47. The state was trying to have the Supreme Court order a lower federal court to have a full hearing on the case that they previously had refused to do, striking down the law without trial.

48. *Edwards v. Aguillard*, 482 U.S. 578 (1987).

49. National Commission on Excellence in Education, *A Nation at Risk: The Imperative for Educational Reform* (Washington, D.C.: U.S. Government Printing Office, 1983).

50. Wendell Bird, "Freedom of Religion and Science Instruction in Public Schools," *The Yale Law Journal* 87, no. 3 (January 1978): 515–570.

51. Phillip Johnson, *Darwin on Trial* (Downers Grove: InterVarsity Press, 1993).

52. Ibid.

53. Michael J. Behe, *Darwin's Black Box: The Biochemical Challenge to Evolution* (New York: Free Press, 1996).; William A. Dembski, *The Design Inference: Eliminating Chance through Small Probabilities (Cambridge Studies in Probability, Induction and Decision Theory)* (Cambridge: Cambridge University Press, 2006).

54. 2006 Gallup polls for instance suggest that 13 percent of the American public believes in pure materialistic evolution while 82 percent believe man was created by God. Gallup Organization, "Evolution, Creationism, Intelligent Design," http://www.galluppoll.com/content/?ci=21814&pg=1 (accessed February 9, 2007).

55. Jodi Wilgoren, "Kansas Board Approves Challenges to Evolution," *New York Times*, November 9, 2005, National Edition.

56. American Civil Liberties Union, "Georgia School Board Drops Defense of Anti-Evolution Stickers," http://www.aclu.org/religion/intelligentdesign/27745prs20061219.html (accessed February 9, 2007).

57. *Kitzmiller et al. v. Dover Area School District*, 400 F.Supp.2d 707 (M.D. Pa. 2005).

58. Richard Dawkins, *The Blind Watchmaker: Why the Evidence of Evolution Reveals a Universe Without Design* (New York: Norton, 1996); Daniel C. Dennett, *Darwin's Dangerous Idea: Evolution and the Meanings of Life* (New York: Simon & Schuster, 1995).

59. G. K. Chesterton, *The Everlasting Man* (San Francisco: Ignatius Press, 1993), 25.

60. *Inherit the Wind* was written by Jerome Lawrence and Robert Edwin Lee and first opened on Broadway in 1955.

FURTHER READING

When trying to understand any issue, one should begin with an historical exploration of the topic. The debate on origins is no different and thankfully contains Pulitzer Prize-winning work. Edward J. Larson has established himself as the foremost historian on the debate and his works can be enjoyed both for the quality of the research and for the quality of the literary presentation. His *Summer for the Gods: The Scopes Trial and America's Continuing Debate over Science and Religion* is the essential book on the Scopes Trial specifically and his *Trial and Error: The American Controversy over Creation and Evolution* is an invaluable retelling of the origins debate generally. Excellent biographies are also available for many key players in the debates, including a recent important biography, *A Godly Hero: The Life of William Jennings Bryan* by Michael Kazin. However, one may prefer to let historical figures speak for themselves, and it is easy to do in this case as Bryan, Scopes, Darrow, and Chesterton all published autobiographies that record their thoughts and feelings regarding the origins debate and their role in it: William Jennings Bryan and Mary Baird Bryan's *The Memoirs of William Jennings Bryan*, John T. Scopes and James Presley's *Center of the Storm: Memoirs of John T. Scopes*, Clarence S. Darrow's *The Story of My Life* and G.K. Chesterton's *The Autobiography of G.K. Chesterton*.

For those seeking to explore more specific arguments from the various sides, an endless parade of sources awaits. Essentially the first chapter of any science textbook will lay out the basic tenets of evolutionism in a dry textbook style, although one not inclined to indicate any debate exists regarding the material. The works of Richard Dawkins, such as *The Blind Watchmaker: Why the Evidence of Evolution Reveals a World Without Design*, provide a combative advocacy of evolution that

will include explanations as to why all evolutionists must be atheists. Agreeing with Dawkins' conclusions about evolution and atheism but not the validity of evolution, Ken Ham is arguably the key spokesman for creation science, producing works such as *The Lie: Evolution*. The book that launched the Intelligent Design movement was Phillip Johnson's *Darwin on Trial*, while Michael Behe's *Darwin's Black Box: The Biochemical Challenge to Evolution* is the most significant scientific work in the Intelligent Design field.

3

Freedom, Commitment, and the Challenges of Pledging of Allegiance in America's Public Schools[1]

Lee Canipe

It is, perhaps, one of the great historical ironies of American culture that the Pledge of Allegiance has become an ongoing source of public controversy. Intended as a patriotic statement of unity and devotion, the pledge—almost from the moment of its composition at the end of the nineteenth century—has instead provided a symbolic battleground for American ideals that are often at odds with one another. The problem with the Pledge of Allegiance, it seems, lies not so much in its *content* (although after 1954, this, too, became problematic) as in how (and where) it has been used. Most states now require their public schools to include the Pledge of Allegiance as part of their daily classroom exercises. Even though the laws in almost all of these states (Delaware is the exception) make explicit provisions for students to opt out of the ritual, the fact that their participation is assumed—if not *expected*—strikes some Americans as implicitly coercive. In a nation which places a high premium on individual freedom, even the *perception* of state-endorsed coercion can be problematic when the freedom in question is the first one mentioned specifically in the Bill of Rights: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."

At the same time, however, Americans have long recognized the precarious nature of their collective identity in a country where citizenship is based not on a shared ethnicity, religion, or even, in some cases, history. Instead, the United States is a nation founded, in Thomas Jefferson's words, on the self-evident truths "that all men are created equal" and are "endowed by their Creator with certain unalienable rights." These truths *may* be self-evident, but they are not necessarily self-perpetuating. They must be constantly taught and re-taught as new generations of Americans are born (or naturalized). It was in this context—the need to communicate and conserve a collective sense of American identity—that the Pledge of Allegiance was written. Indeed, when Americans pledge their allegiance to the flag and to the republic for which it stands, they are, by definition, binding themselves to support the essential American ideals of liberty and justice for all. In a nation founded on something as abstract as self-evident truth, regular recitation of the pledge trains Americans to think of themselves as citizens united by a shared love of country.

America's public schools have traditionally been the place where this citizenship training begins in earnest. Practically speaking, the public education system provides the state with direct access to the vast majority of its youngest citizens (the exceptions, of course, being those children educated either at home or at private academies) who are required by law to attend school during their most formative years. Early in the twentieth century, John Dewey recognized this vital role that free public education plays in transmitting democratic values from one generation to the next. Education, he believed, was a deliberate process that prepared children to function appropriately in society, with one of its primary aims being the cultivation of what he called "civic efficiency, or good citizenship."[2]

Not surprisingly, then, daily classroom exercises—saluting the American flag, reciting the Pledge of Allegiance, even, in some schools, singing patriotic songs—have for years been used to teach young Americans the virtues of patriotism and love of country. These exercises, however, can also be a source of anxiety for those citizens whose religious beliefs—or lack thereof—turn an oath like the Pledge of Allegiance into a crisis of conscience. At what point does the state's need to reinforce a collective identity trump an individual's freedom of conscience? When the pledge's specifically religious dimension—that is, the phrase "under God"—is factored into the equation, determining the proper boundaries between rights and responsibilities becomes even more problematic.

Written as a patriotic oath intended both to teach and encourage love of country, the Pledge of Allegiance has become a cultural battleground upon which contrasting views of freedom and commitment—not to mention

church and state—have clashed repeatedly over the last several decades, with each side claiming that its perspective best reflects the most essential of American ideals. In this instance, at least, both sides *may* be right.

THE PLEDGE IN HISTORICAL CONTEXT

The Pledge of Allegiance was born in 1892 when Francis Bellamy, a Baptist minister from Little Falls, New York, composed a short patriotic oath in honor of the 400th anniversary of Christopher Columbus's arrival in the New World. Bellamy's "oath of allegiance" first appeared in the September 8, 1892, issue of the popular magazine *Youth's Companion*: "I pledge allegiance to my Flag and to the Republic for which it stands; one nation indivisible, with liberty and justice for all."[3] Later that fall—and at Bellamy's request—President Benjamin Harrison publicly declared his support for the new pledge and proclaimed that the flag should "float over every school house in the country, and the exercises be such as shall impress upon our youth the patriotic duties of American citizenship."[4]

Harrison's endorsement of the pledge as a means of both teaching and reinforcing the responsibilities of citizenship reflected the widely held view at the time that the United States' ever-expanding immigrant population posed a threat to the nation's cultural unity. Among the more vocal adherents of this viewpoint was Josiah Strong, a Congregationalist minister whose popular book, *Our Country* (1885), boldly proclaimed the superiority of the Anglo-Saxon race and culture and the urgent need for Protestant missionaries to counterbalance the dangerous, anti-democratic influence of Roman Catholicism around the world. The continuous influx of foreigners into the United States, however, began to cast some uncomfortable doubt into the minds of "native" Americans as to how long the country would remain "theirs."

Indeed, throughout the latter half of the nineteenth century, millions of immigrants, primarily from Central and Eastern Europe, poured into the United States. The trend continued into the early 1900s. In fact, census figures from the first three decades of the twentieth century show that over 18.5 million people left their homelands to begin new lives in America during those years, more than the total for the previous eighty years combined.[5] The sheer, unprecedented number of immigrants—coupled with their wide diversity of national loyalties, languages, cultures, and religious practices—raised fears that the nation's ability to assimilate new arrivals could very easily be overwhelmed. By the end of the nineteenth century, writes cultural historian Merle Curti, alarmed officials at all levels of government had already begun to recognize "the need for a wholesale and

thoroughgoing effort to Americanize the immigrant"—an effort that would focus, primarily, upon the public schools.[6]

In keeping with Harrison's proclamation in support of the pledge, then, thousands of schoolchildren recited Bellamy's oath during Columbus Day flag ceremonies on October 12, 1892. It did not take long for public schools across the nation to make saluting the flag and pledging allegiance part of their regular daily classroom practices. By 1918, a majority of states had passed laws requiring such ceremonies in their schools for the stated purpose of fostering patriotic devotion in the hearts of the nation's youngest—and, in some cases, newest—citizens.[7]

During the 1920s, two revisions to the pledge sought to clarify potential ambiguities in Bellamy's original text. Both were uncontroversial. The first change, made in 1923, replaced the phrase "my Flag" with "the flag of the United States" in order to prevent any lingering confusion in the minds of immigrant children concerning the proper object of their loyalty. Since they were now *Americans*, they would pledge allegiance to the *American* flag—not the flag of their ancestral homes. The second change, made a year later, added the qualifier "of America" to the description of the flag. Both revisions were intended to increase the pledge's effectiveness as an expression of a specifically American communal identity. In June 1942, an act of Congress made Bellamy's composition the "official" pledge of allegiance to the nation's flag.[8]

BECOMING "ONE NATION, UNDER GOD"

The pledge remained unchanged for the next twelve years. During that period, however, international politics and the United States' position in the world changed dramatically, creating new reasons for anxiety in American culture. Though victorious in the effort to defeat fascism—and, significantly, the only industrial power spared the devastation of World War II—the United States soon found itself staring across an ideological divide at the newly resurgent Soviet Union and the specter of "international communism." Soviet dictator Josef Stalin "no longer talked about allied unity," writes historian Ronald Oakley, "but instead warned of the inevitable battle between communism and capitalism."[9] In August 1949, the Russians successfully tested an atomic bomb, breaking the United States' monopoly on the weapon and shattering the American sense of security that came with it. By the end of the year, China had fallen to Mao Zedong and his Communist insurgents, advancing the "Red threat" one step closer to world domination. Sensational revelations about spies in the inner circles of American diplomacy and atomic research only heightened popular fears that

Communists were both attacking the United States from without and subverting it from within.[10] Just as anxiety over the culturally disruptive effects of immigration during the 1890s had prompted public school officials to incorporate flag salutes and the pledge of allegiance into their daily classroom routines, this widespread anxiety over the perceived communist threat led to the insertion of the phrase "under God" into the pledge in 1954.

According to Luke Hart, Supreme Knight of the Knights of Columbus, the idea to include the phrase in the pledge "originated at the Knights of Columbus meetings of Fourth Degree Assemblies in April 1951."[11] Adding "under God" to the pledge, the Catholic fraternal group believed, would acknowledge "the dependence of our Nation and its people upon the Creator of the Universe.[12] The Knights forwarded the resolution to Edmund Radwan, a Republican congressman from upstate New York, who entered it into the *Congressional Record* on March 25, 1953, without comment.

On April 21, 1953—and apparently without knowledge of the New York resolution—Michigan congressman Louis Rabault introduced House Joint Resolution (H. J. Res) 243 proposing that "under God" be added to the Pledge of Allegiance.

"It is my hope," Rabault explained, "that the recitation of the pledge, with this addition, 'under God,' by our schoolchildren will bring to them a deeper understanding of the real meaning of patriotism." Including God in the nation's pledge would send a clear message to the world that unlike communist regimes that denied God's existence, the United States recognized a Supreme Being. Official acknowledgement of God would further distinguish freedom-loving Americans from their atheist adversaries.[13]

Although public support for the change seemed strong in the wake of Rabault's proposal—according to one poll from May 1953, nearly seventy percent of all Americans favored the revision—the "under God" amendment lay dormant in Congress for almost a year.[14] In February 1954, however, the idea of adding God to the pledge gained new momentum. On February 7, George M. Docherty, pastor of the New York Avenue Presbyterian Church in Washington, D.C., lent his vocal support to the "under God" amendment. In a stirring "Lincoln Day" sermon, the pastor called for immediate revision of the pledge. Without "under God," Docherty noted, the Pledge of Allegiance could legitimately be the pledge of any republic, even that of the Soviet Union. God, he believed, is the difference between America and Russia and the Pledge of Allegiance should reflect that. Pointing out that Abraham Lincoln had used "under God" in the Gettysburg Address, the preacher concluded by urging Congress and President Eisenhower, seated with his wife in "Lincoln's Pew," to include the phrase in the pledge.[15]

On February 10, 1954, the "under God" proposal officially resurfaced on Capitol Hill, this time in the Senate, when Homer Ferguson, a Republican from Wisconsin, introduced his own joint resolution to revise the pledge. Again, the inclusion of God was not intended to serve any specific religious purpose. It was, instead, seen as a direct rebuttal of communist ideology and an essential contribution to the national defensive arsenal. "America must be defended by the spiritual values which exist in the hearts of and souls of the American people," said Ferguson. "Our country cannot be defended by ships, planes, and guns alone," he maintained, and the proposed modification of the pledge reflected this reality.[16] That same week, Rabault made his first comments on the pledge issue since the previous April. It is, he told the House of Representatives, "most proper that in our salute to the flag, the patriotic standard around which we rally as Americans, we state the real meaning of that flag. From their earliest childhood our children must know the real meaning of America. Children and Americans of all ages must know that this is one Nation in which 'under God' means 'liberty and justice for all.'"[17]

Over the next several months, other members of the House lent their public support to the effort to amend the pledge. Anticipating possible arguments against the revision, one congressman offered a pre-emptive rebuttal to the claim that invoking God in the pledge undermined the separation of church and state. "The phrase 'under God,'" declared Charles Oakman, a Republican from Michigan, "is inclusive for all religions and has no reference whatever to the establishment of a state church." He also dismissed the argument that the addition of God to the pledge violated freedom of religion. "The right to disbelieve in God is fundamental of a free democracy," he said. "However, there is a vast difference in making a positive affirmation on the existence of God in whom one does not believe, and on the other hand making a pledge of allegiance and loyalty to the flag of a country which in its underlying philosophy recognizes the existence of God."[18]

The potential presence of God in the pledge, then, did not carry any particular religious meaning at all for Oakman. One could believe in God, not believe in God, believe different things about God—it did not matter, for in the end, the pledge was not really about God at all. The pledge, ultimately, was about the flag of the United States of America and the democratic values it symbolized. For all the talk about "godless" communism, Oakman implied that a patriotic atheist could in good conscience pledge allegiance to the flag using the words "under God" because "God" here did not refer to a Supreme Being in the theological sense. "God," instead, represented an icon of democracy that lent transcendent signifi-

cance to the American system of government. Christians, Jews, atheists, and agnostics alike could *all* say "under God" as long as they believed in America. In none of the conversations about the proposed revision did any member of Congress voice reservations—conscientious, theological, or otherwise—about including God in the pledge.

In May 1954, the judiciary committees of both the House and the Senate voted to recommend that their respective chambers approve the insertion of "under God" into the pledge, and in early June, both houses overwhelmingly passed a joint resolution to insert "under God" into the pledge.[19] As expected, President Eisenhower signed the resolution into law at a White House ceremony on Flag Day, June 14, 1954. "From this day forward, the millions of our schoolchildren will daily proclaim . . . the dedication of our nation and our people to the Almighty," Eisenhower said. "To anyone who truly loves America, nothing could be more inspiring than to contemplate this re-dedication of our youth, in each school morning, to our country's true meaning."[20] The pledge has remained unchanged since 1954.

CONSCIENTIOUS OBJECTIONS AND THE JUDICIAL SHIFT FROM *GOBITIS* TO *BARNETTE*

Despite its intended purpose as an instrument of national unity, the Pledge of Allegiance has nevertheless generated a good deal of controversy since its inception in 1892. The earliest reported opposition to the pledge arose in 1918 when the state of Ohio prosecuted a Mennonite because his daughter refused to recite the oath at school.[21] As John Concannon has noted, however, these early clashes "rarely led to direct court tests because most of these religious groups [e.g., the Mennonites, the Jehovah's Witnesses, the Elijah Voice Society, and the Church of God] refused to resort to the court to defend their children from school expulsion."[22] It was not until the late 1930s that public school policies requiring students to recite the pledge came under significant legal scrutiny. On five separate occasions between 1937 and 1939, the Supreme Court refused to hear cases dealing with the pledge and the public schools.[23] Although the particular personalities and circumstances varied from case to case, all ultimately addressed the same fundamental challenge: finding a balance between protecting the integrity of the individual conscience on the one hand and promoting a shared identity for the community on the other. By refusing to act on these cases, the Supreme Court in each instance effectively gave priority to the interests of the community—specifically, the need to educate children in the virtues of good citizenship and patriotism. In dismissing the case of *Leoles v. Landers* (1937), for example, the Court tacitly affirmed that "school

officials acted lawfully in expelling students who refused to salute the flag incident to their duty to instruct children in the study of and devotion to American institutions and ideals."[24]

The Supreme Court's implicit endorsement of communitarian interests at the expense of individual rights became explicit in the spring of 1940 when the justices agreed to hear *Minersville (Penn.) School District v. Gobitis*.[25] The circumstances surrounding the case resembled those of the earlier pledge-related disputes. Twelve-year-old Lillian Gobitis and her ten-year-old brother, William, had been expelled from the Minersville public schools for refusing to salute the American flag and recite the Pledge of Allegiance during their school's daily patriotic ceremony.[26] Raised by parents who were Jehovah's Witnesses, the Gobitis children had been taught to obey the Ten Commandments as found in the Bible, particularly the first—"Thou shalt have no other gods before me" (Exodus 20:3)—and second—"Thou shalt not make unto thee any graven image" (Exodus 20:4). Pledging allegiance to anything or anyone except God and saluting the flag violated both of these commandments and were therefore forbidden by God. Unwilling to disobey God and shirk their religious obligations, the Gobitis children declined to participate in the required school ceremony as a matter of individual conscience. Their parents sued the school district and eventually the case arrived at the Supreme Court.

While recognizing that individual expressions of belief (or disbelief) were protected from interference by the government, the Supreme Court nevertheless decisively upheld the Minersville public school district's policy of expulsion for students who refuse to participate in mandatory patriotic exercises. The rights of an individual's conscience, it seemed, did have limits. Indeed, writing for the majority in the 8–1 decision, Justice Felix Frankfurter framed the issue as a matter of communitarian interest. "When does the constitutional guarantee [of freedom of conscience]," he wrote, "compel exemption from doing what society thinks is necessary for the promotion of some great common end, or from a penalty for conduct which appears dangerous to the general good?"[27]

Operating under the assumption that "national unity is the basis for national security," Frankfurter argued that the need to encourage patriotic loyalty in the hearts of its citizens provided the government with a compelling reason for limiting liberty of conscience.[28] "The ultimate foundation of a free society is the binding tie of cohesive sentiment," he continued, and in the United States, the national flag symbolized that sense of unity. So, could local authorities take appropriate measures such as requiring school children to salute the flag and recite the Pledge of Allegiance in order "to evoke that unifying sentiment without which there can ultimately be no

liberties, civil or religious?"[29] Frankfurter answered his own rhetorical question affirmatively. Some methods of evoking patriotic sentiment, he admitted, "may seem harsh and others no doubt foolish. Surely, however, the end is legitimate."[30] Moreover, he concluded, making individual exceptions to communal civic exercises for reasons of conscience "might introduce elements of difficulty into the school discipline, [and] might cast doubts in the minds of other children which would themselves weaken the effect of the exercise."[31] In other words, when national security depended upon national unity, one bad apple might spoil the whole barrel.

As the lone dissenting vote in the decision, however, Justice Harlan Stone issued a scathing opinion in which he dismissed Frankfurter's equation of national security with national unity. Certainly the Constitution's guarantees of personal liberty are not absolute, he wrote. The selective service system, for example, compels individuals to enter the military whether they want to or not. The compelling interest of national security, Stone observed, justifies such compulsion. "But it is a long step," he continued, "and one which I am unable to take, to the position that government may, as a supposed educational measure and as a means of disciplining the young, compel public affirmations which violate their religious conscience."[32] The state may indeed be convinced that forcing young schoolchildren to recite a pledge of allegiance "will contribute to national unity," Stone conceded, but "there are other ways to teach loyalty and patriotism which are the sources of national unity, than by compelling the pupil to affirm that which he does not believe."[33] The Gobitis children's refusal to say the pledge hardly represented a grave threat to national unity (or national security, for that matter), Stone argued. Even if it did, though, the state's action was problematic:

> The Constitution may well elicit expressions of loyalty to it and to the government which it created, but it does not command such expressions or otherwise give any indication that compulsory expressions of loyalty play any such part in our scheme of government so as to override the constitutional protection of freedom of speech and religion. And while such expressions of loyalty, when voluntarily given, may promote national unity, it is quite another matter to say that their compulsory expression by children in violation of their own and their parents' religious convictions can be regarded as playing so important a part in our national unity as to leave school boards free to exact it despite the constitutional guarantee of freedom of religion.[34]

The *Gobitis* decision struck many Americans as heavy-handed and immediately came under heavy criticism. The editors of over 170 newspapers, for example, sided with Stone in opposing the ruling. "We think the decision

is a violation of American principle," opined the *St. Louis Dispatch*. "If patriotism depends upon such things as this—upon violation of a fundamental right of religious freedom—then it becomes not a noble emotion of love for country, but something to be rammed down our throats by the law."[35] At the same time, Jehovah's Witnesses across the country paid a stiff price for their convictions. Within two weeks of the *Gobitis* decision, the Justice Department had received hundreds of reports describing angry attacks by Americans incensed by the Witnesses' perceived lack of patriotism and apparent disloyalty.[36]

Three years later, the Supreme Court revisited the issue in *West Virginia State Board of Education v. Barnette*. By this time, however, the United States had been plunged into the Second World War and the shadows of fascism—particularly the spectacular Nazi propaganda program in Germany with its mass rallies, swastika flags, and straight-armed salutes to Hitler—cast the arguments over coerced expressions of patriotic devotion in a decidedly different light. Once more, the Jehovah's Witnesses were at the center of controversy over public school policies regarding the flag and the pledge.

Encouraged by the outcome of the *Gobitis* decision, the West Virginia State Board of Education had adopted a policy that added a flag salute and pledge to the daily public school program. Students who refused to participate would be considered insubordinate and subject to appropriate disciplinary measures. A group of Jehovah's Witnesses, again citing scrupulous obedience to the Ten Commandments as a religious obligation, petitioned the federal district court in West Virginia for an injunction to stop enforcement of the law. Several conscientiously objecting students had already been expelled from school—with some even threatened with reform school for juvenile delinquents—and their parents now faced criminal prosecution for encouraging the delinquency of minors.

In an abrupt reversal of both its decision in *Gobitis* and its implicit endorsement of community authority during the late 1930s, a divided Supreme Court ruled 6–3 in favor of the Jehovah's Witnesses claim that mandatory participation in flag ceremonies infringed upon individual rights of conscience. Writing for the majority, Justice Robert H. Jackson argued that, insofar as a compulsory flag salute and pledge required "an affirmation of a belief and an attitude of mind,"[37] the central question raised by the case was whether or not the government had the power "to force an American citizen publicly to profess any statement of belief or to engage in any ceremony of assent."[38] Echoing Stone's *Gobitis* dissent, Jackson firmly concluded that it did not.

With the example of Nazi Germany as a backdrop, Jackson observed

that "those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard."[39] Against Frankfurter's assertion that voluntary participation in public school flag ceremonies would weaken the overall effectiveness of such exercises if some children opted out, Jackson noted that believing "patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds."[40] He then moved to address the central constitutional issue at stake in the case, which, for Jackson, was a matter of individual freedom of thought:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein . . . We think the action of the local authorities [in West Virginia] in compelling the flag salute and pledge transcends constitutional limitation on their power and invades the sphere of intellect and spirit which it is the principle of the First Amendment to our Constitution to reserve from all official control.[41]

The *Barnette* opinion, then, marked the tipping point with regard to the Pledge of Allegiance in the Supreme Court's attempt to negotiate a proper balance between the government's power to shape the collective loyalty of its citizens and the rights of each citizen to believe and behave in keeping with the mandates of individual conscience. Following *Barnette*, the burden of proof would be on the government to demonstrate a compelling interest for requiring citizens to make public oaths or affirmations of belief. Conscience had trumped community, at least at the level of constitutional jurisprudence. Even after *Barnette*, however, the spirit of *Gobitis*—that is, the belief that America's strength lies in its unanimity of will, even if that unanimity must, at times, be coerced—continued (and continues) to shape not only public school policies regarding the Pledge of Allegiance, but political conversations regarding the definition of patriotism as well. Indeed, the fact that as of June 2006 all but seven of the states in the union had laws either requiring or encouraging pledge ceremonies in the public schools certainly reflects this persistent American desire for a cohesive national community, even at the expense of individual liberty.

PLEDGE OR PRAYER?

The 1954 revision of the pledge added a new, quasi-theological dimension to the ongoing conversation about the Pledge of Allegiance's place in the public schools. At first, the invocation of God in the pledge caused

hardly a ripple in the mainstream consciousness. In the relatively homogenous culture that sociologist Will Herberg famously described in 1955 as "Protestant-Catholic-Jew," most Americans at the time simply assumed that their fellow citizens shared a belief in God.[42] The specific content of that belief, however, was less important than the act of believing itself. "Our government makes no sense unless it is founded on a deeply felt religious faith," Eisenhower proclaimed in 1952, "and I don't care what it is."[43] This seemingly benign spiritual ambiguity, observed Herberg, could have negative, unintended consequences. "So thoroughly secularist has American religion become," he wrote, "that the familiar distinction between religion and secularism appears to be losing much of its meaning under present-day conditions" as both sides of the divide share the same basic "values and assumptions defined by the American Way of Life."[44] As long as the cultural lines between religion and secularism remained fuzzy, such vague invocations of God as found in the revised Pledge of Allegiance seemed harmless enough.[45]

All that changed, however, in June 1962, when the Supreme Court declared the practice of government-sponsored prayer in New York's public schools to be an unconstitutional establishment of religion. "It is neither sacrilegious or [sic] antireligious," wrote Justice Hugo Black for the majority in *Engel v. Vitale*, "to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance."[46] Although Black's opinion made clear that the constitutional problem lay not in the practice of prayer itself but, rather, in the fact that the New York State Board of Regents had written the prayer, the Court's ruling effectively signaled the end of officially-recognized prayer in the public schools.[47]

A year later, the Supreme Court struck down a Pennsylvania state law requiring that ten verses from the Bible be read without comment at the beginning of every public school day. The prescribed ceremony also included the Lord's Prayer, the Pledge of Allegiance, and any relevant announcements. Even though the law allowed students to be excused from participating for reasons of conscience, the Court nevertheless considered the practice to be an establishment of religion. By an 8–1 majority, the justices ruled in *Abington (Penn.) School District v. Schempp* (1963) that no state legislature or local school board could require that Bible readings or the Lord's Prayer be a mandatory part of the daily public school program.[48]

In the aftermath of *Engel* and *Abington*, the 1954 addition of "under God" to the pledge suddenly assumed a significance far beyond what Rabault, Ferguson, and the other sponsors of the revision originally envi-

sioned. Indeed, as historian Garry Wills has observed, the combined effect of these two decisions meant that by the early 1960s, the Pledge of Allegiance had become the only place "in almost every school's daily regimen where God [could] still be mentioned."[49] The pledge had, in the minds of some Americans, become a kind of prayer: what had begun as an uncontroversial ideological device now loomed as a potentially divisive point of contention in a culture where the once-blurry distinctions between religion and secularism were slowly growing sharper.

In the nearly forty years following *Engel* and *Abington*, several complaints involving the Pledge of Allegiance made their way into the lower courts. In almost all of them, religion—specifically, the mention of God in the oath—played a central role. Old assumptions that all Americans could in good conscience affirm a belief in a widely shared, elastic concept of God no longer held true. In 1966, the New Jersey Supreme Court heard arguments on behalf of Black Muslim students who refused to participate in the pledge ceremony on the basis of their religious beliefs.[50] During the early 1970s, federal courts in Florida, Maryland, and New York struck down laws requiring all students to stand during the pledge, regardless of their willingness to participate in reciting the oath.[51] The courts' rulings were consistent: as long as non-participating students remained quiet and respectful during the pledge, they could remain seated without penalty by school officials.

Several teachers—again, for reasons of religious conscience—also objected to state laws that required them to *lead* their students in the pledge. In *Russo v. Central School District No. 1* (1972, 1973), a federal appeals court ruled that a teacher who remained silent while her students recited the pledge could neither be forced to join the ceremony nor disciplined by school officials for her refusal.[52] Seven years later, though, the Seventh Circuit Court of Appeals arrived at a different verdict in the case of an Illinois teacher who claimed that her religious beliefs prevented her from participating in the Pledge of Allegiance and other elements in her public school's daily patriotic ceremony. The court concluded that despite her religious scruples, the teacher did not have the freedom to disregard (as she had done) the entire prescribed curriculum for encouraging civic responsibility and national loyalty—a program that included not only the pledge, but patriotic songs and the observance of national holidays as well.[53] In so ruling, the appeals court effectively implied that the Pledge of Allegiance should properly be understood as a statement of patriotic—not religious—conviction. As Wills noted, though, not all Americans shared this assumption.

Among the notable judicial opinions concerning the pledge that emerged in the 1970s was a nonbinding advisory ruling issued by the Supreme Judi-

cial Court of Massachusetts. The state legislature had passed a bill that would require public school teachers to lead their classes in reciting the Pledge of Allegiance at the beginning of each school day. In considering whether or not to sign the bill into law, Massachusetts governor Michael Dukakis asked the court to offer its opinion on the constitutionality of the measure—to state, in other words, how they *would* rule if a case ever arose involving the statute in question. Citing *Barnette* as a precedent, the court advised that such a law would likely be found unconstitutional as a violation of the First Amendment.[54] With the court's advice in mind, Dukakis vetoed the legislation in 1977.

This veto might have faded into obscurity had Dukakis not run for president in 1988. As the Democratic nominee, however, Dukakis quickly discovered the unfortunate political consequences of even *appearing* to oppose the Pledge of Allegiance. Vice President George H. W. Bush, the Republican candidate, used the 1977 veto to portray Dukakis as a dangerous liberal full of contempt for American patriotic values. "Should public school teachers be required to lead our children in the Pledge of Allegiance?" Bush asked rhetorically at the GOP convention. "My opponent says no—but I say yes."[55] Dukakis' meekly indignant response—"I can't imagine a President of the United States who knows a bill is unconstitutional and proceeds to sign it anyway"—failed to deflect the political impact of the charge.[56]

"It's very hard for me to imagine that the Founding Fathers—Samuel Adams, John Adams, John Hancock—would have objected to teachers leading students in the Pledge of Allegiance to the flag of the United States," the vice president told one audience while speaking from a platform adorned with dozens of large American flags.[57] Despite repeated efforts to explain his veto of the Massachusetts pledge bill, Dukakis' nuanced arguments about freedom of conscience and Supreme Court precedents came across as legal hair-splitting compared to Bush's blunt, emotional appeal. "Of course the pledge is taken all the time in Massachusetts," an exasperated Dukakis said. "We take it in ceremonies and everything else. I encourage schoolchildren to say the Pledge of Allegiance."[58] Dukakis' plaintive attempts to justify his veto decision, however, largely failed to sway those voters who feared that his stated concern for civil liberties masked a deeper, more serious threat.

This fear was especially prevalent among conservative, evangelical Christians whose influence in Republican politics had, by 1988, become impossible to ignore. In the years since *Engel* and *Abington*, the pace of secularization in America seemed to have accelerated at a dizzying rate, with public expressions of religious sentiment coming under attack in the name of civil liberty.[59] For these conservative Christians "who are dismayed when Christ-

mas symbols are removed from public places, who fear ever for the mention of God on coins and public buildings," the historian Wills wrote in 1990, "the words in the pledge are a bastion they must rally to defend. Prayer may be forbidden, but one act of homage is still allowed."[60]

Robert Dornan, a Republican congressman from California, effectively reduced the issue to a concise sound bite during a debate in the House of Representatives on the merits of the pledge. The problem, he said, "is there are some people in this country who resent that pledge . . . [because] they resent the word that we see over your head, Mr. Speaker: God."[61] While Democrats accused Dornan, Bush, and other Republicans of creating a false controversy for purely political purposes, their arguments nevertheless struck a responsive popular chord. In the minds of many Americans, then, preventing students from reciting of the Pledge of Allegiance seemed tantamount to excluding God from the public schools once and for all.

THE *NEWDOW* CHALLENGE

Around the same time that the Pledge of Allegiance briefly took center stage in a presidential campaign, a specific legal challenge to the phrase "under God" emerged in Illinois when atheist Rob Sherman filed suit on behalf of his son, a student in the local public schools. The invocation of God, Sherman claimed, represented a form of religious establishment and thus constituted a violation of the First Amendment. His argument, however, failed to persuade the courts. Upholding the district court ruling against Sherman, the Seventh Circuit appeals court observed that like the phrase "In God We Trust," the pledge's invocation of God carried no real religious significance. Rather, the judges asserted, it was simply a ceremonial expression used to convey a sense of ritual solemnity.[62] The theological vacuity of "under God," in other words, enabled it to pass constitutional muster.

The *Sherman* verdict—or, rather, the assumptions behind it—went to the heart of the matter surrounding the Pledge of Allegiance as a quasi-religious statement of belief. How did the invocation of God in the pledge function? As a theological affirmation of faith or a patriotic declaration of American ideals? The original intent behind the 1954 revision, of course, suggested the latter. Free, democratic Americans believed in God; atheistic communists did not. Under what God, though, did the United States exist? The God who Christians believed was revealed in Jesus Christ? The God who established a covenant relationship with the people of Israel? The "Nature's God" to whom Thomas Jefferson referred in the Declaration of Independence? Something else entirely? The precise *theological* nature of the

God invoked in the pledge certainly did not concern the congressmen and senators who proposed and endorsed the change.

In keeping with this ambiguous definition of God, the *Sherman* ruling left it up to individual Americans to supply their own theological interpretations of this "ceremonial expression." Still, for most people, the name of God is not an empty vessel that, depending upon the circumstances, may or may not carry any significance. Certainly this is true for individuals with strong religious convictions. It is also true, however, for individuals of no religious convictions beyond the belief that God does not exist. For atheists like Sherman, the mere invocation of God—with its implication that God, however God might be defined, exists—represented a distinct statement of religious belief, regardless of its alleged neutrality.

On these grounds, Michael Newdow, an atheist in California, mounted the most successful (to date) legal offensive against the practice of having public school students recite the Pledge of Allegiance in its revised form.[63] The phrase "under God," he argued, violated the First Amendment's prohibition against the establishment of religion by giving the government's implicit endorsement to the belief that God exists. In 1998, a judge dismissed Newdow's first attempt to put the pledge on trial—Newdow's daughter, on whose behalf he was acting, was too young for public school and, hence, too young to participate in public school patriotic ceremonies. His appeal two years later was also dismissed. In 2002, however, he won a surprising victory when Judge Alfred T. Goodwin and the Ninth Circuit Court of Appeals ruled that, in light of previous Supreme Court decisions, the phrase "under God" in the pledge did indeed represent an unconstitutional establishment of religion.[64] A revised opinion, issued soon after the original, focused specifically on the precedent set by *Lee v. Weisman* (1992), in which the Supreme Court declared unconstitutional the practice of nonsectarian prayer at public school graduation.

In his majority opinion on *Lee* a decade earlier, Justice Anthony Kennedy had observed that, although attendance at graduation exercises was voluntary, the practice raised serious "concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools."[65] In other words, leaving young students who objected to public prayer with only two options—violate their beliefs or protest the ceremony—placed them in an emotionally and psychologically vulnerable position that was essentially equivalent to the kind of official coercion prohibited by the Establishment Clause. A slim majority (5–4) of the Court agreed with him. Guided primarily by the *Lee* precedent, then, Goodwin reasoned that if a nonsectarian prayer offered *once* at a *voluntary* school event could not pass constitutional muster, then a nonsectarian invocation

of God recited *daily* in classrooms where attendance was *mandatory* could hardly withstand the same scrutiny.

Reaction to the Ninth Circuit's decision was swift and severe. President George W. Bush called it "ridiculous."[66] Televangelist Pat Robertson condemned the ruling as "a senseless act of judicial tyranny."[67] James Dobson, founder of the influential conservative Christian organization Focus on the Family, declared it a "cockamamie edict" and the latest example of "the liberal judiciary running amok in our land." Clearly, he wrote, "these liberal judges must have believed that, in view of all the other successful assaults on religious faith taking place in recent days, it was time to go for broke."[68]

Not all Americans objected to the decision. The northern California chapter of the American Civil Liberties Union (ACLU), for example, hailed the Ninth Circuit Court for "breath[ing] life into the Pledge's stirring ideal of a country 'with liberty and justice for all.' The decision secured liberty for children of minority faiths who have quietly been denied religious freedom for nearly fifty years, when pressured at public school to pledge allegiance to a God they do not worship."[69] Supporters of the ruling, however, formed a distinct minority. A poll taken by *Newsweek* on June 30, 2002, showed that almost ninety percent of the country believed that "under God" should remain in the pledge.[70]

The Elk Grove Unified School District, where Newdow's daughter then attended public school, petitioned the Supreme Court to review the Ninth Circuit's decision. When the justices agreed to hear the case—a milestone in and of itself, marking the first time a legal challenge to "under God" had reached the high court—activists on both sides hoped for an emphatic ruling to settle the question once and for all. Instead, the Court's anticlimactic decision in June of 2004 sidestepped issues of church and state almost entirely. The justices *did* reverse the Ninth Circuit ruling, but they did so on the purely technical ground that Newdow lacked the legal standing to bring a lawsuit on behalf of his daughter.[71] Justice John Paul Stevens wrote the majority opinion, which focused almost exclusively on matters of family law and the definition of standing.

In a concurring opinion, however, Chief Justice William Rehnquist directly addressed the First Amendment questions that Newdow's case had raised. The phrase "under God," he argued, does not automatically convert recitation of the Pledge of Allegiance from a patriotic exercise into a religious one. Instead, he continued, when taking the pledge, "participants promise fidelity to one flag and one nation, not to any particular God, faith, or church."[72] The burden on Newdow, the chief justice wrote, was to demonstrate that the pledge's reference to God "tend[ed] to the establishment of a *religion* in violation of the First Amendment."[73] Insofar as the

Pledge of Allegiance was a *patriotic*—instead of a religious—exercise, Rehnquist doubted that such a successful demonstration was possible.[74]

With the Supreme Court's reversal of the *Newdow* verdict, "under God" survived its most serious challenge yet—but only by a technical knockout. The Court's unwillingness to offer a conclusive ruling (Rehnquist's concurrence—along with those of O'Connor and Thomas— notwithstanding) on the case satisfied few observers on either side of the issue and almost certainly ensured that legal wrangling over God's place in the Pledge of Allegiance would continue into the future.

CONCLUSION

As of June 2006, 43 of the 50 states in the union had statutes either requiring or strongly encouraging public school students to recite the Pledge of Allegiance daily.[75] Wisconsin's law made the pledge mandatory in private schools as well. In the wake of the *Newdow* challenges, several of these state laws have faced legal opposition. Some of these efforts have succeeded. In 2004, for example, the U.S. Third Circuit Court of Appeals struck down Pennsylvania's pledge law as unconstitutional because it required school officials to notify the parents of children who chose not to take the oath. Interestingly, the court ruled that the notification requirement violated the students' right to free *speech*—not their *religious* freedom.[76]

The Pennsylvania decision, however, represents a rare exception to the general trend upholding these laws on the grounds that the pledge should be properly understood as a patriotic ceremony. Echoing Rehnquist, Judge Karen J. Williams of the Fourth Circuit Court of Appeals took this approach in her 2005 opinion in support of Virginia's pledge law. Unlike prayer, she wrote, the Pledge of Allegiance "is not a religious exercise or activity, but a patriotic one." As such, its use in the public schools "does not amount to an establishment of religion."[77] Still, in an increasingly multicultural and multireligious society, the pledge's invocation of God remains problematic—even for jurists who generally support its use in the public schools. While joining Williams in upholding the Virginia law, for example, Judge Diana Gribbon Motz acknowledged that for atheists or for those citizens from a polytheistic religious traditions, "requiring recitation of the Pledge, with its invocation of a monotheistic God, might well be seen as both favoring religion over nonreligion and 'preferring' one religious tradition over another."[78]

Motz's concerns reflect the reality of an American culture that is significantly more diverse today than it was in 1954 when Congress added "under

God" to the Pledge of Allegiance. In those days, sociologist Will Herberg could describe almost the entire American religious spectrum in shorthand: Protestant-Catholic-Jew. Not so in a twenty-first century where new religious movements continue to mushroom across the nation's spiritual landscape. A survey conducted by the City University of New York in 2001, for example, revealed that the fastest growing religion in the United States between 1990 and 2001 was the neo-pagan practice of Wicca, or witchcraft.[79] While the number of self-described witches in America represents but a tiny sliver of the overall population, the spectacular growth of the Wiccan movement (from 8,000 to 134,000 in eleven years) is indicative of a trend toward greater religious diversity that shows no signs of slowing down. In such an environment, public invocations of God in *any* context will likely provoke increasingly more opposition from those Americans who fall outside the traditional boundaries of "Protestant-Catholic-Jew." When the specific context is a public school patriotic exercise, though, the potential for future legal conflict will remain high as long as the Supreme Court declines to rule decisively on the First Amendment status of God in the pledge.

That the Pledge of Allegiance should be a continuing source of public controversy is indeed ironic, given its originally intended purpose as a statement of American unity. Given the famously dichotomous character of what Alexis de Tocqueville described as "Anglo-American civilization," however, perhaps this ongoing tension should not be surprising. The American character, wrote Tocqueville in *Democracy in America*, "is the result (and this should be constantly present to the mind) of two distinct elements, which in other places have been in frequent hostility, but which in America have been admirably incorporated and combined with one another. I allude to the spirit of Religion and the spirit of Liberty."[80]

During the first 62 years of its existence, the Pledge of Allegiance served as a frequent battleground for two understandings of American liberty: an individual citizen's freedom to follow the dictates of conscience and a democratic community's freedom to define itself and its values. Since 1954—and, especially, since the early 1960s—it has also become a bone of contention in the ongoing American struggle between freedom *for* religion and freedom *from* religion. As such, then, it *could* be that the pledge (and the attendant controversy surrounding it) performs a most valuable—if sometimes conflicted—service to the nation's democracy, forcing citizens of different ideological and theological persuasions to discuss once again not only what it means to be an American, but also how best to define an allegiance that is worth pledging.

NOTES

1. Many thanks to Emilee Simmons of the Baptist Joint Committee on Public Affairs for her assistance in providing valuable research materials for this essay.

2. John Dewey, *Democracy and Education: An Introduction to the Philosophy of Education* (New York: Macmillan, 1916; rpr. 1924), 3–4, 140ff.

3. "Under God," *Time*, May 17, 1954, 101. Bellamy's pledge replaced an earlier, decidedly less poetic—but infinitely more exclamatory—ode to the flag written by Col. George T. Balch: "We give our Heads!—and our Hearts!—to God! and our Country! One Country! One Language! One Flag!" See Balch, *A Patriotic Primer for Little Citizens* (Indianapolis: William B. Burford, 1895), 16.

4. *The Youth's Companion* 65 (1892): 457.

5. Sydney Ahlstrom, *A Religious History of the American People* (New Haven, CT: Yale University Press, 1972), 749–750.

6. Merle Curti, *The Roots of American Loyalty* (New York: Columbia University Press, 1946), 185. For an excellent account of how the flag ritual developed in American public schools, see Scot M. Guenter, *The American Flag, 1777–1924: Cultural Shifts from Creation to Codification* (Rutherford, NJ: Fairleigh Dickinson University Press, 1990), 114ff.

7. See Guenter, 132. See also, David Manwaring, *Render Unto Caesar: The Flag-Salute Controversy* (Chicago: University of Chicago Press, 1962), 1–16.

8. *New York Times*, April 22, 1953.

9. Ronald Oakley, *God's Country: America in the Fifties* (New York: Dembner Books, 1986), 5.

10. The most notorious of these revelations dealt with scientists Julius and Ethel Rosenberg, who were executed in 1953 for selling atomic secrets to the Soviets, and the high-profile congressional investigation that led to the conviction on perjury charges of former State Department attaché (and alleged spy) Alger Hiss in 1950. For a good account of how the "Red Scare" manifested itself in American culture, see Richard Fried, *The Russians are Coming! The Russians are Coming! Pageantry and Patriotism in Cold War America* (New York: Oxford University Press, 1998).

11. "Letters," *Newsweek*, June 21, 1954, 2, 6. See also Christopher Kauffman, *Faith and Fraternalism: The History of the Knights of Columbus, 1882–1982* (New York: Harper and Row, 1982), 385.

12. Congress, House, Resolution of the New York Fraternal Congress, entered into the record by Congressman Radwan of New York, 83rd Cong., 1st sess., *Congressional Record* 99, pt. 10 (March 25, 1953): A1494.

13. Congress, House, Congressman Rabault of Michigan introducing H.J. Res. 243 to amend the Pledge of Allegiance, 83rd Cong., 1st sess., *Congressional Record* 99, pt.10 (April 21, 1953): A2063. In February of 1953, FBI director J. Edgar Hoover offered a word of advice to the nation's parents that accurately captured the spirit of the argument: "Since Communists are anti-God, encourage your children to go to church." See William Lee Miller, "Piety Along the Potomac," *Reporter*, August 17, 1954, 28.

14. A Gallup poll released on May 9, 1953, indicated that 69 percent of the American public favored the idea of adding "under God" to the pledge, 21 percent opposed it, and 10 percent had no opinion. See *The Gallup Poll: Public Opinion, 1935–1971, Vol. 2*, 1140.

15. George M. Docherty, "Under God," sermon preached at the New York Avenue Presbyterian Church, Washington, D.C., February 7, 1954. The full text of the sermon can be found on the New York Avenue Presbyterian Church's website at http://www.nyapc.org/congregation/Sermon_Archives/?month=1954–02. Excerpts of Docherty's sermon were entered into the official record of Congress by Rep. Rabault. See Congress, House, Congressman Rabault of Michigan speaking for the Joint Resolution on the Pledge of Allegiance, H.J. Res. 243, 83rd Cong., 2nd sess. *Congressional Record* 100, pt. 2 (February 12, 1954): 1700.

16. Congress, Senate, Senator Ferguson of Wisconsin introducing the Joint Resolution on the Pledge of Allegiance, S.J. Res. 126, 83rd Cong., 2nd sess. *Congressional Record* 100, pt. 2 (February 10, 1954): 1600–01.

17. Congress, House, Congressman Rabault of Michigan speaking for the Joint Resolution on the Pledge of Allegiance, H.J. Res. 243, 83rd Cong., 2nd sess. *Congressional Record* 100, pt. 2 (February 12, 1954): 1700.

18. Congress, House, Congressman Oakman of Michigan speaking for the Joint Resolution on the Pledge of Allegiance, H.J. Res. 371, 83rd Cong., 2nd sess. *Congressional Record* 100, pt. 2 (February 12, 1954): 1697–98.

19. It is interesting to note that the only significant debate about the revision that did occur in Congress revolved around the question of who would get official credit for it. Understandably, both the Republican Ferguson and the Democrat Rabault (and their respective parties) wanted to claim responsibility for the change, and their bickering on the question threatened to undo the bipartisan goodwill that the pledge amendment had generated. In an unusually gracious political move, Ferguson finally endorsed Rabault's bill as the "official" proposal to revise the pledge. For a more detailed account of this episode, see Gerard Kaye and Ferenc Szasz, "Adding 'Under God' to the Pledge of Allegiance," *Encounter* 34 (1973): 52–56.

20. U.S. President, *Public Papers of the Presidents of the United States* (Washington, D.C.: Office of the *Federal Register*, National Archives and Records Service, 1960), Dwight D. Eisenhower, 1954, 141.

21. See *Troyer v. State* 21 Ohio N.P. (n.s.) 121, 124 (1918).

22. John J. Concannon, III, "The Pledge of Allegiance and the First Amendment," *Suffolk University Law Review* 23 (1989): 1022.

23. The cases were *Nicholls v. Mayor of Lynn, Mass.* (1937), *Leoles v. Landers* (1937), *Hering v. New Jersey State Board of Education* (1938), *Johnson v. Town of Deerfield, Mass.* (1939), *Gabrielli v. Knickerbocker* (1939). For a good, concise summary of these cases, see Charles J. Russo, "The Pledge of Allegiance: Patriotic Duty or Unconstitutional Establishment of Religion?," *School Business Affairs* (July/August 2003): 23.

24. Ibid., 23.

25. For an extensive account of this case, see Peter Irons, *The Courage of Their Convictions: Sixteen Americans Who Fought Their Way to the Supreme Court* (New York: Penguin Books, 1990), 15–24.

26. Lillian Gobitis Klose recalls her experience at the center of the flag salute controversy in Irons, 25–35.

27. *Minersville (Penn.) School District v. Gobitis* 310 U.S. 586 (1940), at 593.

28. Ibid. at 595.

29. Ibid. at 597.

30. Ibid. at 598.

31. Ibid. at 600.

32. Ibid. at 603, J. Stone dissenting.

33. Ibid.

34. Ibid. at 605.

35. As cited in Francis Heller, "A Turning Point For Religious Liberty," *Virginia Law Review* 29 (January 1943): 452–453. Not only does Heller list all the major newspapers that raised editorial objections to the *Gobitis* decision, but his article is also a helpful, contemporary look at the Jehovah's Witnesses' legal agitation for religious liberty.

36. Irons, 23. The violence was not entirely vigilante. In some instances, local law enforcement officials participated in the humiliating, disruptive, and sometimes even abusive, harassment of Jehovah's Witnesses.

37. *West Virginia State Board of Education v. Barnette* 319 U.S. 624 (1943), at 633.

38. Ibid. at 634.

39. Ibid. at 641.

40. Ibid. In their concurring opinion, Justices Hugo Black and William O. Douglas flatly dismissed the national security argument that Frankfurter had advanced in *Gobitis*. "Neither our domestic tranquility in peace nor our martial effort in war," they wrote, "depend on compelling little children to participate in a ceremony which ends in nothing for them but a fear of spiritual condemnation." See id. at 644.

41. Ibid. at 642.

42. Herberg's argument that "Protestant," "Catholic," and "Jew" represented three equally valid subheadings under the broad category of "American" certainly reflected the religious homogeneity of the day. While the specific content of the three faiths differed, all affirmed a belief in (more or less) the same God and all served to support the essential democratic assumptions of American culture. See Will Herberg, *Protestant-Catholic-Jew: An Essay in American Religious Sociology* (Chicago: University of Chicago Press, 1955).

43. *New York Times*, December 23, 1952, 16.

44. Herberg, 270–271.

45. Opposition to the invocation of God in the pledge *did* exist in the years following the revision, though on a very small scale. The Freethinkers of America, an atheist organization, petitioned the New York State Commissioner of Education

to drop "under God" from the pledge as recited in New York's public schools. It was, they claimed, a violation of the First Amendment's guarantee of religious freedom. When the case went to trial in 1957, the Freethinkers' request was rejected by the state supreme court. See *Lewis v. Allen* 159 N.Y.S. 2d 807 (1957). The U.S. Supreme Court refused to hear an appeal.

46. *Engel v. Vitale* 370 U.S. 421 (1962), at 435.

47. The prayer composed by New York's State Board of Regents, in the spirit of Eisenhower's comment (above), was deliberately vague and inclusive: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our Country."

48. See *Abington (Penn.) School District v. Schempp* 374 U.S. 203 (1963). For a good, concise summary of the Supreme Court's post-1947 interpretation of the Establishment Clause as it relates to the public education, see John Witte, Jr., *Religion and the American Constitutional Experiment: Essential Rights and Liberties* (Boulder, CO: Westview Press, 2000), 165ff.

49. Garry Wills, *Under God: Religion and American Politics* (New York: Simon and Schuster, 1990), 81.

50. *Holden v. Board of Education, Elizabeth*, 216 A.2d 387 (N.J. 1966).

51. The Florida case was *Banks v. Board of Public Instruction of Dade County*, 314 F. Supp. 285 (S.D. Fla. 1970), *aff'd*, 450 F.2d 1103 (5th Cir. 1971); in Maryland, *State v. Lundquist*, 262 Md. 534, 278 A.2d 263 (1971); and in New York, *Goetz v. Ansell*, 477 F.2d 636 (2nd Cir. 1973).

52. *Russo v. Central School District No. 1*, 469 F.2d 623 (2nd Cir. 1972), *cert. denied*, 411 U.S. 932 (1973).

53. *Palmer v. Board of Education*, 603 F.2d 1271 (7th Cir. 1979), *cert. denied*, 444 U.S. 1026 (1980).

54. *Opinion of the Justices*, 363 N.E.2d 251 (Mass. 1977).

55. "Taking the Pledge," *Time* (September 5, 1988): 14.

56. Ibid. Time and again, Dukakis' measured, "technocratic" responses to emotional campaign issues frustrated his managers and hampered his ability to connect with voters on a personal level. See Jack W. Germond and Jules Witcover, *Whose Broad Stripes and Bright Stars? The Trivial Pursuit of the Presidency 1988* (New York: Warner, 1989), 3ff.

57. Ibid., 15.

58. Ibid.

59. See, for example, *Lynch v. Donnelly* 465 U.S. 668 (1984). In this 5–4 decision, the Supreme Court narrowly upheld a local municipality's practice of placing a nativity scene in a public park during the Christmas season. For many Christians, the very fact that such a seemingly innocuous display of religious devotion—a display that would have caused hardly a ripple of dissent forty years earlier—could end up on trial in the Supreme Court (and survive by such a razor-thin majority) highlighted the seriousness of the apparent threat to traditional values posed by the American Civil Liberties Union (ACLU) and other like-minded organizations.

60. Wills, 81.

61. Congress, House, Congressman Dornan of Michigan, 100th Cong., 2nd sess. *Congressional Record* 134, pt. 2 (September 14, 1988): H7608.

62. *Sherman v. Community Consolidated School District 21 of Wheeling Township*, 980 F.2d 437 (7th Cir.1992), *cert. denied*, 508 U.S. 950 (1993). Cf. Justice Brennan's assertion in 1984 that the reference to God in the pledge could "best be understood . . . as a form of ceremonial deism, protected from Establishment Clause scrutiny chiefly because [it has] lost through rote repetition any significant content." See *Lynch v. Donnelly* 465 U.S. 668 (1984), at 716.

63. For an excellent summary of Newdow's legal challenges, see Richard J. Ellis, *To The Flag: The Unlikely History of the Pledge of Allegiance* (Lawrence, KS: University Press of Kansas, 2005), 142ff.

64. *Newdow v. U.S. Congress* 292 F.3d. 597 (2002).

65. See *Lee v. Weisman* 505 U.S. 577 (1992), at 592. In his original opinion, Goodwin cited three "tests" that had been used by the Supreme Court in previous cases: the three-pronged "Lemon Test" first outlined in *Lemon v. Kurtzman* (1971), the "endorsement" test formulated by Justice Sandra Day O'Connor in *Lynch v. Donnelly* (1984), and the "coercion" test articulated in *Lee v. Weisman* (1992).

66. George W. Bush, quoted by David Kravets, "Federal Appeals Court Rules Pledge of Allegiance Unconstitutional Because of Words 'Under God,"' *Associated Press*, June 26, 2002.

67. Pat Robertson, "Pat Robertson Lambasts Court Ban on Pledge," June 26, 2002, http://www.patrobertson.com/ PressReleases/PledgeOfAllegiance.asp.

68. James Dobson, "One Nation Under —?," August 2002, http://www.focusonthefamily.com/docstudy/newsletters/000000364.cfm.

69. Margaret Crosby, "The Values of the Pledge of Allegiance," *ACLU News* (November/December 2002), http://www.aclunc.org/aclunews/news021126/pledge.html.

70. See "Vast majority in U.S. support 'under God,'" http://archives.cnn.com/2002/US/06/29/poll.pledge/.

71. *Elk Grove Unified School District v. Michael A. Newdow* 542 U.S. 1 (2004).

72. Ibid.

73. Ibid., emphasis added.

74. Two other justices wrote concurring opinions. O'Connor, applying her endorsement test from *Lynch v. Donnelly*, concluded that "under God" represented a form of ceremonial deism (cf. *Sherman*) that did not favor any one specific religion. Thomas, while agreeing with the decision, suggested that the more fundamental problem lay not with the Ninth Circuit's reasoning but rather with the precedent set by *Lee v. Weisman*. The Ninth Circuit, in other words, had correctly applied a flawed legal argument (that is, Kennedy's coercion test).

75. The exceptions were Hawaii, Iowa, Maine, Nebraska, Oregon, Vermont, and Wyoming. For a summary of all 43 state laws and references, see Peyton Cooke's report for the First Amendment Center at http://www.firstamendmentcenter.org/analysis.aspx?id=17035.

76. See *Circle Schools v. Pappert* 381 F.3d 172 (3d. 2004). More and more in

American jurisprudence, First Amendment disputes that once might have been considered under the religious freedom clauses are now treated as free speech cases. See, for example, *Westside Board of Education v. Mergens* 496 U.S. 226 (1990), *Rosenberger v. University of Virginia* 000 U.S. U10270 (1995), and *Capitol Square Review and Advisory Board v. Pinette* 000 U.S. U10267 (1995).

77. See *Myers v. Loudoun County Public Schools* No. 03–1364 (4th Cir. 2005) at 19, 21.

78. Ibid. at 25. In deference to Supreme Court precedent, however, Motz declined to oppose the Virginia law.

79. Barry Kosmin, Egon Mayer, Ariela Keysar, *American Religious Identification Survey 2001* (The Graduate Center of the City University of New York, 2001), 12–13, http://www.gc.cuny.edu/faculty/research_studies/aris.pdf.

80. Alexis de Tocqueville, *Democracy in America*, ed. Richard D. Heffner (New York: Mentor, 1956), 47.

FURTHER READING

On the history of the Pledge of Allegiance, the best place to start is Richard J. Ellis, *To The Flag: The Unlikely History of the Pledge of Allegiance* (Lawrence, KS: University Press of Kansas, 2005). Ellis' book has the advantage of including the *Newdow* cases in its discussion of the pledge. Scot M. Guenter places the pledge in the context of the various flag rituals that have developed in the United States in *The American Flag, 1777–1924: Cultural Shifts from Creation to Codification* (Rutherford, NJ: Farleigh Dickinson University Press, 1990). For a good examination of the pre-"under God" controversies involving the Pledge of Allegiance, see David Manwaring, *Render Unto Caesar: The Flag-Salute Controversy* (Chicago: University of Chicago Press, 1962). Finally, John J. Concannon, III, provides a thorough overview of the various legal challenges to the pledge in his article, "The Pledge of Allegiance and the First Amendment," *Suffolk University Law Review* 23 (1989): 1019–1047.

4

Student Religious Expression within Public Schools

William Lester

The American public school is a quintessentially American experience. Even with the ever larger numbers of students and their parents choosing private schools or home schooling, the vast majority of America's children will attend a public school. This makes the public school a unique place in a community. It is one of the few places where broad cross sections of Americans meet on a regular basis. Thus, public schools provide the focal point for much of a community's interaction. Since children are required by law to receive schooling, this means that America's free public schools will draw virtually all of society's groups into its environs. Practically every group in America has an interest through their children and grandchildren in what goes on in the public school. Further, each one of these groups brings their own norms and values into the schoolhouse. To be sure, the interaction of diverse groups has many advantages for society, but this interaction can also cause tension when diverse values come into conflict.

Few topics elicit a response from people that is more visceral than their children's care and direction in life. When society's groups meet at the public schoolhouse and the debate centers on religious values, it can be quite contentious. In this contentious environment, how can we maintain and nurture respect for diverse religious or nonreligious values? How do we insure that minority viewpoints are not discriminated against in the public school setting? These questions and more become particularly important in

the shared societal space of the public school. Indeed, it is in the public school where many of our children will learn important lessons about how to interact with others and will carry these lessons into adulthood.

SEPARATION OF CHURCH AND STATE: VARYING VIEWPOINTS

The major competing viewpoints regarding issues of church and state are the separationist approach, the perspective of neutrality, and the accomodationist perspective, with each providing an important framework for understanding the debate surrounding student religious expression in public schools.

Those supporting strict church-state separation are often called "separationists" and believe that for religious freedom to be protected, religion must be truly separate from government with no government interaction with religion.[1] Separationists believe that government must not become entangled in religious issues or questions because to do so would tend to prejudice the government toward one group over another with this interaction becoming destructive to both entities. Religion should avoid entanglement with the government in order to keep it from becoming subservient to government interests while the government should avoid entanglement so as not to become captured by any particular religious viewpoint. Separationists would argue that any other position puts both religion and government in jeopardy. They believe that the Free Exercise Clause and the Establishment Clause of the First Amendment were put into place to bar government from favoring religion over non-religion and to bar support or promotion by government of religious beliefs and practices, even if that promotion is religiously generic and supports no specific sectarian group.[2] Particularly troubling to separationists is the perceived vulnerability of America's schoolchildren to government-supported religious messages in the public school system, since the school population is a largely captive audience composed of young impressionable minds.

Yet separationists would agree that America's history is filled with examples of government connection to religion and that these connections continue today. Examples would include but are not limited to government-sponsored chaplains in the military; aid to religious hospitals, religious social service agencies, and religious colleges; references to God on currency and in the Pledge of Allegiance; and the invoking of God's name by government officials during holidays and in public speeches. This places America's history and often current practices squarely in conflict with separationist

thought. The practical result is that the debate about what constitutes acceptable practice can often end up in the courts.[3]

Nonetheless, the American public is generally supportive of the ideal of separation of church and state espoused by separationists but fall off markedly in their support when specific religious practices like school prayer are mentioned.[4] This reveals a level of confusion among the American people regarding issues of government and religion that can often be found in the debates around student religious expression. On the one hand, the American public seemingly supports separation of church and state, but on the other hand, they support various religious practices that involve the state.

Neutrality is another opinion regarding church and state issues that has been espoused over the years and has found some resonance with the Supreme Court. Basically, the neutrality position tries to avoid religion, particularly in court decisions. The goal is neither to promote nor impede religion. However, this does not mean that religion and government cannot have contact as separationists might prefer. Instead, the contact must be incidental to the government's fulfillment of a secular purpose. This contact can be both to the advantage and disadvantage of religion. Basically, the effects on religion are ignored in the equation.[5] The legal foundation for neutrality lies in the Supreme Court's decision in *Lemon v. Kurtzman* (1971), where the Court held that a law does not constitute excessive government entanglement with religion as long as the law's purpose and effect are secular. For example, under the doctrine of neutrality, it is acceptable for government to provide bus service to religious school students for their attendance at their religious school since getting students to their school safely and their basic education serves a secular purpose. Separationists would see this as unconstitutionally aiding religion with state funds. Separationists depart from neutrality by believing that religion should receive no benefit from government even if the benefit is only ancillary to the government's purpose.[6]

The "accomodationists" viewpoint holds that government should be allowed under the First Amendment to have substantial leeway in supporting or promoting religion. They see nothing wrong with the government sponsoring organized prayer, displays of religious symbols on government property, or supporting religious observances for the general public. Government as an instrument of the people, according to accomodationists, should allow the people to express themselves through their governing bodies and in the use of public facilities even if this expression favors one religious group over another religious group.[7] For instance, a government-sponsored

crèche would be appropriate even if it excluded other religions from the display. Accomodationists would have no difficulty with this arrangement.

An important subset of the accomodationist viewpoint is the "non-preferentialist" view. Non-preferentialists believe that the government can support or encourage religious beliefs and practices only if that encouragement does not specifically favor one religious group over another. For example, while non-preferentialists would not want sectarian prayers in a public forum, they could be supportive of non-sectarian prayer. Basically, accomodationists from both groups believe that public expression of religious values is interwoven into the history of America and that government has and should continue to recognize the importance of religion in American society by its actions.[8] To them, government silence on religion is sending a message to America's public schoolchildren that the proper place for religion is in one's private life and not in the nation's public life. To accomodationists, this sends a deeper message that religion cannot legitimately enter public debate on issues before the government because religion is being confined purely to the private realm.[9]

Americans bring all of these diverse positions and more into the debate regarding what is the proper role of religion in America's public schools. Common ground on this issue is often hard to find. Yet, despite the often conflictual positions, we have come to some agreement that public school students do not lose their rights to freedom of religion, freedom of expression, and freedom of association just because they enter the public schoolhouse.[10]

The point of this discussion thus far has been to demonstrate just how rocky the path to compromise is when such divergent viewpoints are involved in fashioning public policy regarding the proper role of religion in public education. Nevertheless, we have been able to arrive at some positions regarding student religious expression, though the legal environment remains fluid. It should be noted that it is a "student's" religious expression that is protected. Government may not mandate religious practice or impose a religious teaching or viewpoint on a captive public school audience. We have largely settled this question. However, the individual student can bring their religious freedoms into the public schoolhouse. Just how far do these individual freedoms reach in the public school setting? Do these individual freedoms also extend to corporate religious activity? The remainder of this chapter will explore student rights to religious expression and the limits to these rights in the American public school.

RELIGIOUS EXPRESSION IN PUBLIC SCHOOLS

The First Amendment

The First Amendment to the U.S. Constitution reads, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances."[11] The First Amendment provides some definition of freedoms and the limits of religious expression in American society. When courts rule on issues regarding freedom of religious expression, they apply the First Amendment. In fact, it is not only the Establishment Clause and the Free Exercise Clause that impact student religious expression, but freedom of speech, freedom of the press, the right to peaceable assembly, and the right to petition government all have important impacts as well. Some cases that have religious issues are decided or have elements of their decisions decided outside of the Establishment Clause and the Free Exercise Clause. For instance, a case like *Lamb's Chapel v. Center Moriches Union Free School District* (1993) has free speech, freedom of association, and freedom to assembly implications that can be used alongside establishment and free exercise arguments. In *Lamb's Chapel*, all of these issues were present and argued in the case, which eventually affirmed in the right of Christian clubs to form at public schools on multiple first amendment grounds.[12]

Another example is provided in public schools when students assemble peaceably and associate with other students on campus for both religious reasons like "See You At The Pole" and for nonreligious gatherings and clubs that students propose and lead on campus. The First Amendment rights to speech, assembly, and association can be used by both religious and nonreligious students in whatever context they find themselves in within the public schools. Freedom of religion can often be defined as coextensive with freedom of speech, freedom of association, and freedom to peaceably assemble when these cases go forward through the court system.

Though the First Amendment provides the basis for how we decide between competing values in the public school setting, it is not an easy task to arrive at what the First Amendment means. All of the societal perspectives regarding church and state mentioned earlier can find aspects of the First Amendment that support their viewpoints and historical precedent that seemingly supports what they believe. With all of these divergent opinions emanating from the courts, scholars, and interest groups about the meaning and application of the First Amendment, it makes for a highly dynamic environment around the issue of student religious expression. Still,

even in this dynamic and at times highly charged environment, the Supreme Court has provided some definition to the application of the First Amendment that can be used in discerning the boundaries.

Before turning explicitly to an examination of student religious expression in the public schools, it is beneficial to look at a brief legal history of public school and religion cases brought before the Supreme Court. Certainly, there were some cases involving religion in public schools like *West Virginia State Board Of Education v. Barnette* (1943), *McCollum v. Board of Education District 71* (1948), and *Tudor v. Board of Education of Rutherford* (1953) that predate *Engel v. Vitale* (1962). The *Barnette* case is discussed later in this chapter when the topic turns to optional attendance during classes where students and/or their parents find the subject matter to be religiously objectionable. However, in *McCollum* the Supreme Court struck down religious instruction in public schools, and in *Tudor* the Supreme Court let stand a lower court ruling against the distribution of Bibles by outside groups like the Gideons. Still, the *Engel* decision in 1962 marked the beginning of challenges to many longstanding religious practices in America's public schools and is often an accepted line of demarcation for cases that now come before the Supreme Court dealing with student religious expression, whereas the previous cases dealt with government-sponsored and compulsory religious activities.[13]

The issue of prayer introduced in *Engel* deals very forcefully with religious expression in the form of prayer. In a sense, *Engel* begins this genre of cases that delve into private and noncompulsory religious expression since prayer at the school in question was not compulsory as the previous cases had been. So, beginning with *Engel v. Vitale* (1962), which is a case in which the Board of Education of New Hyde Park, New York, had adopted a prayer written by the New York State Board of Regents, the U.S. Supreme Court began to examine these religious issues in public schools. The State Board was becoming increasingly concerned about the moral decline of schoolchildren and felt that a nonsectarian prayer would aid in the moral and spiritual training of the children. The New Hyde Park Board of Education required the recitation of the prayer at the beginning of each school day with a student allowed to "opt out" with written parental permission. Some of the district's parents filed suit on behalf of themselves and their children stating that this was clearly a breach of the Establishment Clause since the state wrote and mandated the prayer. Under their position, the fact that it was an attempt at being nonsectarian prayer was irrelevant. The Supreme Court agreed that the school board had violated the Establishment Clause by even engaging in the practice of writing the prayer.[14]

The very next year, the Supreme Court agreed to hear *Abington Township*

v. Schempp (1963) with the Supreme Court combining two cases from Maryland and Pennsylvania. Basically, both states required reading from the Bible without commentary often followed by a recitation of the Lord's Prayer. As in *Engel*, students could be excused with parental permission. The Supreme Court ruled once more that this was a violation of the Establishment Clause since the reading and recitation was required by state law. The Court ruled that the violation occurred with the enactment of the legislation. Therefore, whether or not a student could voluntarily remove themselves from the exercise was moot since the legislation itself was unconstitutional.[15]

These two decisions have been upheld over the years and it now seems to be settled that government may not require religious observance even if a student can opt out of the requirement. Indeed, the legislation itself was considered a violation of the Establishment Clause. So the state or its representatives or employees may not use government to lead or to mandate religious activities.

These decisions along with others have led to confusion about what can and cannot be done vis-à-vis religion in the public schools. Some state officials and administrators have misread these opinions and others to mean that students and student groups cannot use their free exercise and free speech rights in the public school domain. This has led to cases where religious expression has been denied even when it is not emanating from the government, but rather from the individual. This has happened even though these decisions went to pains to state that individual students, teachers, and administrators still had these free exercise rights as individuals.[16] With the issue of overt government sponsorship largely settled, it now fell to the Supreme Court to decide what levels of free exercise rights can be afforded individuals and groups within the public school system. However, cases dealing with a student's First Amendment rights under the Free Speech Clause merit attention since these cases have an impact on student expression generally and hence on religious expression specifically.

Tinker v. Des Moines Independent Community School District (1969), though not overtly a case dealing with a student's right to religious expression, does deal generically with a student's right to expression in the public school environment. This obviously is important to any type of student speech, be it religious or not, under the First Amendment's Free Speech Clause. The case dealt with three students who decided to wear black armbands to their public school in protest of the Vietnam War. The school district suspended the students because they were in violation of a policy barring armbands that was passed by the board right before the students actually wore the armbands.[17]

The parents of the students filed suit in U.S. District Court claiming that this violated their children's free speech rights. The U.S. District Court ruled in favor of the school district. The U.S. Court of Appeals tied on the matter and the case was taken up by the U.S. Supreme Court. The Court ruled that the First Amendment applies to public schools. This was an important extension of the First Amendment to citizens that were not considered full adults. This raised the bar that school administrators must now meet in order to deny first amendment rights to public school students. Though the rights are not exactly the same for minors, the older students become, the more adult-like the rights conferred become. Therefore, administrators would have to demonstrate a constitutionally valid reason to abridge a student's right to free expression. Specifically, in this case, the wearing of the armbands did not cause disruption in the school's primary educational function and could actually be seen as furthering the basic function of teaching the students to be active and involved citizens.[18]

It should be noted that this decision did not endorse unbridled free speech in the public schools. Expression can be curtailed if it is disruptive to the primary purpose of the public school, which is to provide education in a safe and nondisruptive environment. Now, the question as to what constitutes "disruptive" behavior is open to wide interpretation. For instance, in Tinker, it was only three students who donned armbands in protest. What if it had been hundreds of students? Would that then constitute disruptive behavior? The justices seemed content to stay with the specifics of the case in *Tinker*. Indeed, it is this lack of definition that plagues this question of just what constitutes disruption.

Public school administrators have to make these decisions in a very fluid environment. The best one can do in this fluid environment is to understand that the threshold for disruption is higher among secondary students, and that it is important to examine Court decisions for clues about what constitutes a disruptive environment.[19] Certainly, a student's free expression rights, especially when combined with free exercise rights, presents administrators with a very high threshold for establishing whether or not a certain form of expression is disruptive.

An example of limits to free expression for public school students can be found in *Bethel School District v. Fraser* (1986), where a student was suspended from school and barred from speaking at his graduation ceremony due to a speech he had given nominating a classmate for Associated Student Body Vice President. His speech was filled with sexual innuendo and was deemed by the school to be a violation of the school's prohibition of obscene language. The Supreme Court ruled that the school's actions did not violate the First Amendment because the school has an obligation to insure

a nondisruptive environment.[20] Another case dealing with limits to student expression, *Hazelwood v. Kuhlmeier* (1988) dealt with public school students and their rights to freedom of the press. In this case, the Supreme Court ruled that a student newspaper could be censored by administrators if it had not been established as forum for student opinion and if it was a school-sponsored newspaper. Still, the administrators do not have carte blanche to censor anything they like; they must demonstrate that censoring the newspaper serves a legitimate educational purpose.[21]

These three decisions, though not directly dealing with rights to student religious expression, provide another approach that can be used to argue for these rights: free speech rights under the First Amendment being extended to public school students. *Tinker* makes it apparent that public school students do not jettison their free speech rights at the schoolhouse door. Yet these free speech rights are certainly more limited than they would be if the student were an adult in the public square. The Supreme Court's limit is that the free expression must not be disruptive to the general purpose of the public school. This is seen in the limits put on *Tinker* by the *Bethel* and *Hazelwood* decisions. Still, the impact of *Tinker* is important to public school religious expression cases. The question now becomes whether or not the student's religious expression is disruptive to the school mission, which is fundamentally the education of all students in a disciplined and nondisruptive environment.

The Equal Access Act (1984)

In 1984, the "Equal Access Act" was passed by the U.S. Congress with overwhelming majorities in both chambers. The Act allows student-led non-curricular clubs to form on a secondary public school campus provided the school allows even one other student-led non-curricular club to form on campus. The Equal Access Act generally prohibits public schools from discriminating against any student group based on the religious, political, philosophical, or other content of their group's speech. The Act requires equal access and privileges for student groups if the school possesses three characteristics. First, the school must be a public secondary school. Second, the school has to be receiving federal funding. Third, the school must have a "limited open forum," meaning that it allows non-curricular student groups to meet on school property during non-instructional time or at a time set by school officials before or after classroom instructional time. For instance, a model-building club or a political club led by students, if allowed on campus, would mean that other student-led groups have the right to form. There could not be discrimination against one group as long as

another is allowed to form and operate. Further, equal access to facilities must be provided. The only way that a public school can deny access to a student-led group is if it denies access to all non-curricular groups.[22]

The background to the development of the Equal Access Act is instructive. Various lower court decisions in the 1970s and 1980s had led some school district administrators to a strict interpretation of the Establishment Clause to such an effect that they denied students any organized religious activity on campus.[23] Some administrators even interpreted various court decisions to mean that no religious expression was allowed in a public school even if it was an individual's private expression. There are anecdotal accounts of students being denied their right to pray over their food at lunch or being told that they cannot even discuss religion or even mention the name of God while on public school property.[24] Even if these accounts show no systemic effort to deny religious rights to students, the perception among many in the early 1980s was that Christian activity was being singled out as constitutionally impermissible in the public square and particularly in public schools.

While not a public school case, *Widmar v. Vincent* (1981) provided a case at the college level where a Christian group was denied access to university facilities by the University of Missouri at Kansas City because the university felt to allow access would violate the Establishment Clause. Yet the university allowed a myriad of other groups to use the facilities. A student religious group brought suit against the university on the grounds that their First Amendment rights to free exercise of religion and free speech were being violated by the university. The Supreme Court ruled that the university had to allow access to the religious group on an equal footing with all other groups. This was not considered a violation of the Establishment Clause because providing a forum to all groups does not necessarily mean that the university endorses any particular group. The purpose of free expression serves an overall secular purpose and any benefit that a religious group attains from this policy is purely incidental since the policy is applied to all groups.[25]

The *Widmar* decision certainly encouraged those believing that public school students had been similarly discriminated against. Led by conservative Christian groups and others, pressure was put on the Congress to pass legislation supporting the rights of public school students to form groups on campus and for the schools not to discriminate against these groups vis-à-vis other groups in granting equal access to campus facilities. In 1984, as discussed earlier, the Congress responded to this pressure by passing the Equal Access Act, guaranteeing secondary public school students the right to form groups and to access public school facilities as long as the group

was engaging in lawful behavior or not causing disruption of the school's primary function.

After the Equal Access Act was passed, there was a large increase in the number of Christian student-led organizations operating on public secondary school campuses. One source put the number of Christian clubs in operation on public school campuses at about 100 in 1980 and around 15,000 in 1995.[26] As the Equal Access Act went into effect, it was almost inevitable that there would be challenges in the courts given the different positions taken on the Establishment Clause and the Free Exercise Clause. The challenge to the Equal Access Act came in *Westside Community Schools v. Mergens* (1990). A public secondary school in Nebraska had not allowed students to form a Christian Club despite allowing other "limited open forums" to exist within the school. The school district disallowed the club by denying the club a school district staff member for club oversight, which was required under the Equal Access Act. The students countered that this was a violation of the Act by singling them out due to their religious foundations. The Supreme Court ruled in a solid 8–1 majority that the school district had violated the Equal Access Act and that the school district must provide access and a club sponsor.[27] Thus, the constitutionality of the Act had been firmly upheld.

Another case, which did not make it to the Supreme Court, further underscored how entrenched the Equal Access Act has become in public secondary schools. *Prince v. Jacoby* (2002) dealt with a two-tier system set up by the Bethel School District in Washington State. One class of organization received benefits like access to the public address system, purchase of supplies by the school district, use of school vehicles for field trips, and a free page in the school yearbook. The other class of organization, while allowed to organize, did not get access to these benefits. Religious organizations were placed into the disadvantaged class of organizations. A student seeking to start a Christian club called "World Changers" filed to become a recognized club in the school. The club was placed into the disadvantaged category. A suit was brought against the school district in federal district court, where the students lost. However, upon appeal to the U.S. Ninth Circuit Court of Appeals, the lower court ruling was overturned as a violation of the student's rights under the Equal Access Act and the First Amendment's Free Speech Clause. The Supreme Court subsequently refused to hear an appeal of the case, thus providing more support for the Equal Access Act.[28]

The First Amendment provides boundaries for the debate about what the proper limits of religious expression should be in the public school. The meaning of the First Amendment and the proper limits of the boundaries

it sets are vociferously debated by a variety of societal groups interested in the public schools. Even with this ongoing debate, there has been some direction provided through decisions of the Supreme Court and legislation about what can and cannot be done in public schools. Agreement seems to have been reached that public elected officials, public employees, and outside groups may not use the public school as a forum for their own particular religious beliefs.

Conversely, neither is a public school to be a religion-free zone. Students do not check their religious rights and liberties at the schoolhouse door. The First Amendment provides secondary-level public school students with rights that cannot be abridged haphazardly by school administrators. Still, these public school students do not have the same level of constitutional rights that adults enjoy. These First Amendment rights can be limited if the exercising of these rights interferes with the school's primary function, which is the education of its students. However, educators must tread lightly, for how can educators teach a student about the importance of free expression and thought and then not afford the student at least a measure of freedom?

Going back to the *Tinker* decision, Justice Abraham Fortas wrote, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[29] Further, Fortas states, "In our system state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students."[30] Additionally, the decision states, "we do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom."[31] Basically, the question becomes, "How can we develop true citizens in a deliberative democratic republic if we do not allow students to engage in free debate and expression in the very public schools where these values are held up as important to democratic governance?"

The Court has come down firmly on the side of allowing a large measure of free expression to secondary public school students because such activity is important to developing active and engaged citizens. With this bent toward developing engaged citizens in place, we have ostensibly chosen to err on the side of student-led free expression in public schools. Legislation like the Equal Access Act was enacted to make sure that students and student-led groups are not discriminated against in the use of school facilities due to their activity being religious in nature. Religious expression is protected by the First Amendment and extends to public school students. Congress and the Supreme Court have come down on the side of free expression and free religious expression where possible. The bar for silencing expression

generally and religious expression particularly has been set high. The next section deals with how a public school administrator can navigate the difficult terrain between allowing students to use their rights to religious expression and at the same time provide a welcoming and safe environment for all students.

U.S. DEPARTMENT OF EDUCATION GUIDELINES REGARDING PUBLIC SCHOOL PRAYER

As is often the case in public administration, departments and agencies must implement guidelines in order to communicate policy and procedure. The development and dissemination of guidelines are often needed to make operational sense of a confusing environment.[32] Hence, the U.S. Department of Education has released guidelines in order to help the public school administrator make sense of what can and cannot be permitted in the controversial area of school prayer and related types of religious expression. The issuance of these guidelines, it was hoped, would aid in sound decision making regarding the topic by providing administrators with the most accurate and up-to-date information. The introduction to the guidelines states,

> Section 9524 of the Elementary and Secondary Education Act ("ESEA") of 1965, as amended by the No Child Left Behind Act of 2001, requires the Secretary to issue guidance on constitutionally protected prayer in public elementary and secondary schools. In addition, Section 9524 requires that, as a condition of receiving ESEA funds, a local educational agency ("LEA") must certify in writing to its State educational agency ("SEA") that it has no policy that prevents, or otherwise denies participation in, constitutionally protected prayer in public schools as set forth in this guidance.
>
> The purpose of this guidance is to provide SEAs, LEAs, and the public with information on the current state of the law concerning constitutionally protected prayer in the public schools, and thus to clarify the extent to which prayer in public schools is legally protected. This guidance also sets forth the responsibilities of SEAs and LEAs with respect to Section 9524 of the ESEA. As required by the Act, this guidance has been jointly approved by the Office of the General Counsel in the Department of Education and the Office of Legal Counsel in the Department of Justice as reflecting the current state of the law. It will be made available on the Internet through the Department of Education's web site (www.ed.gov). The guidance will be updated on a biennial basis, beginning in September 2004, and provided to SEAs, LEAs, and the public.[33]

This introduction to the guidelines clearly states that funding from the federal government is at stake if constitutionally protected prayer is not

guaranteed by a school district. Further, it states that the guidelines will be regularly updated in order to reflect current law. The guidelines communicate very forcefully that some prayer by students is protected and that the federal government will attempt to help school administrators navigate the law with the issuance of these guidelines.

The opening section of the guidelines deals with how a school district can certify that they are in compliance with the law regarding constitutionally acceptable prayer in public schools. The section entitled "Overview of Governing Constitutional Principles" is a brief lesson to administrators on pertinent Supreme Court decisions. The opening paragraph of this section states, "The relationship between religion and government in the United States is governed by the First Amendment to the Constitution, which both prevents the government from establishing religion and protects privately initiated religious expression and activities from government interference and discrimination."[34] This gives the administrator the initial understanding that establishment is forbidden, but also that individuals have religious rights that government must respect if privately initiated. Thus, in the guidelines, public school administrators are introduced to the very real tension between establishment and free exercise.

The guidelines then go on to explain several Supreme Court decisions and their impact on the school prayer issue. First is *Everson v. Board of Education* (1947), which states that government must be neutral in its treatment of religion without showing either favoritism or hostility toward religion. The guide goes on to explain that the First Amendment means that government may not sponsor religion or religious activities, but it must protect privately initiated religious activity since both the Free Exercise Clause and Free Speech Clause protect it. Administrators are told succinctly that "teachers and other public school officials may not lead their classes in prayer, devotional readings from the Bible or other religious activities. Nor may school officials attempt to compel students to participate in prayer or other religious activities."[35] Likewise, the guidelines go on to state that public school officials may not decide to interject prayer into a public school event. This would be considered a favoring of religious speech over secular speech as ruled in *Lee v. Weisman* (1992) and *Santa Fe Independent School District v. Doe* (2000). The guidelines then go on to state,

> Although the Constitution forbids public school officials from directing or favoring prayer, students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," and the Supreme Court has made clear that "private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." Moreover,

not all religious speech that takes place in the public schools or at school-sponsored events is governmental speech. For example, "nothing in the Constitution . . . prohibits any public school student from voluntarily praying at any time before, during, or after the school day," and students may pray with fellow students during the school day on the same terms and conditions that they may engage in other conversation or speech. Likewise, local school authorities possess substantial discretion to impose rules of order and pedagogical restrictions on student activities, but they may not structure or administer such rules to discriminate against student prayer or religious speech. For instance, where schools permit student expression on the basis of genuinely neutral criteria and students retain primary control over the content of their expression, the speech of students who choose to express themselves through religious means such as prayer is not attributable to the state and therefore may not be restricted because of its religious content. Student remarks are not attributable to the state simply because they are delivered in a public setting or to a public audience. As the Supreme Court has explained: "The proposition that schools do not endorse everything they fail to censor is not complicated," and the Constitution mandates neutrality rather than hostility toward privately initiated religious expression.[36]

This extensive passage from the guidelines demonstrates that the current judicial understanding as espoused by the Supreme Court is that students do possess rights to prayer within the public schoolhouse as long as the exercise of these rights is not demonstrably interfering with the school's primary purpose of providing an education to all students. A public school administrator receiving these guidelines would understand that there is a zone of religious expression that is protected by the U.S. Constitution as pronounced by the Supreme Court and delineated in the U.S. Department of Education guidelines.

Even though the guidelines have been very useful in aiding public school administrators through the constitutional jurisprudence around the issue of school prayer, the guidelines go even further by offering a section dealing with the different contexts in which school prayer may take place and what constitutes a proper action on the part of the public school officials. First, the topic of "Prayer During Noninstructional Time" is tackled. Basically, students have the right to pray, pray with other students and study religious materials collectively, read their Bibles or other scriptures, and say grace over meals. As long as the activity is taking place during noninstructional time and is not causing material disruption of educational activities, it is permitted. It goes on to state that while the school may curtail student activity generally to maintain order, it cannot single out religious activity for this kind of treatment.[37]

In the section "Organized Prayer Groups and Activities," it states that

students maintain their right to association and may organize religious activities in the same fashion that other non-curricular groups are allowed to organize. Further, in keeping with the Equal Access Act, public schools may not deny access to school facilities or resources unless these facilities and resources are denied to all groups whether the groups are religious or not.[38] Events like "See You At The Pole," where millions of public school students gather around their school's flag pole before classes begin in order to pray,[39] serves as an example of a constitutionally protected practice. Since the event is student-led and organized, it is a case of students using their rights to free exercise, freedom of expression, and freedom of association under the Constitution.

The next section of the guide deals with teachers, administrators, and other school employees and what they may or may not do in the public school context. Basically, they may not act in their official capacity as a representative of the school in any matter that promotes or denigrates religion. However, teachers may participate in religious observances when the overall context makes it clear that they are not doing so as representatives of the school. Teachers may also engage in religious discussions, prayer, and Bible study or other religious studies in the same way that they would be allowed to if the activity were nonreligious. This applies if the activity takes place during their off times like lunch, before or after school, or in a break room. Also, baccalaureate services are specifically mentioned in the guidelines. Teachers may participate in them as private citizens.[40]

However, it should be reiterated that teachers, administrators, and other school officials may not participate with students in religious activities while on school grounds or at school activities as long as they are representing the school in any capacity, which usually means while on the job. However, this does not preclude school district personnel from participation in a private religious use of a school facility like a baccalaureate service as long as they are not there representing the public school district. School district personnel do possess private rights to religious expression.

Moments of silence are next mentioned in the guidelines. School officials may not encourage or discourage prayer during these times. They may enforce the time as being silent, but they may not suggest prayer as something that should or should not be engaged in by the students.[41] This is an example where the school is not mandating a specific activity to take place during this time, it is up to the individual student to use this time of silence as they see fit. If a student chooses to silently pray, that is their right under the Constitution.[42] Teachers during the moment of silence would be necessarily engaged in the enforcement of the policy, but nothing precludes a teacher from praying silently during this time while attending to his or her duties.

Accommodation of prayer during instructional time is the subject of the next section in the guidelines released by the U.S. Department of Education. Schools have discretion about whether or not to dismiss students for off-campus religious observances on the same level as dismissing students for off-campus secular purposes. The school, however, must not treat requests for absences for religious purposes any differently from requests for absences for nonreligious purposes. The request can neither be favored nor disfavored because it is religious in nature. For example, if a school allows absences for special trips with parents for nonreligious purposes, they must also accommodate religious requests for absences. The guidelines specifically mention the possible need for a Muslim student to leave during Ramadan. The school must provide equality in deciding whether or not to grant absences between religious and nonreligious purposes. On that basis, the request for a religiously based absence in order to pray, or for any other religious reason, cannot be denied on its face.[43]

There has been some confusion as to whether or not a public school student can bring religious discussion or religious themes into an assignment or classroom discussion. The guidelines from the Department of Education state that a student can do so if it is germane to the assignment.[44] The threshold for allowing this is quite low because many assignments could conceivably have a religious element. Still, a student cannot interject his or her view on creationism into a history assignment like the Battle of Stalingrad. A teacher could rule this use of free expression out-of-bounds and disruptive. However, a religious viewpoint pertaining to war could be relevant to such a discussion.

In oral assignments, paintings, and performances where the student is given discretion about what to present, religious viewpoints and information cannot be censored purely because of its religious content. However, this does not give a student the right to conduct a religious service as their presentation to a captive public school audience. Still, a public school student has the right to introduce a religious viewpoint into assignments and this cannot be discriminated against.[45]

At its "street-level" assessment, the classroom teacher is the arbiter of what constitutes acceptable religious discussion within the classroom and whether or not this discussion constitutes classroom disruption. A student would have to appeal a teacher's adverse decision regarding religious expression be it in a discussion or an assignment to an administrator. An adverse decision at the local administrative level can often be appealed to a state-level education administrator. Beyond these appeals, as can be seen in the various court cases, the American court system is available for a redress of grievances regarding a student's First Amendment rights.

Certainly, with the many thousands of classrooms and the many thousands of teachers, the standards can vary from classroom to classroom. When the various situations exist within their own unique circumstances, this makes variance even more likely. Hence, consistency can be a problem. The environment that public school teachers and administrators exist in is very fluid and requires close attention to legal advice and court decisions. The courts are at times the last place to go in a quest to achieve some form of consistency across local and state boundaries in issues of student religious expression.

An area that has been quite contentious is a student's right to religious expression as it pertains to student assemblies and extracurricular events. The guidelines given by the Department of Education provide the school administrator with some guidance in this area as well. First, student speakers may not be selected in a way that favors or disfavors religious speech. The process must be neutral. The student's right to free expression, whether religious or not, cannot be abridged by the school district if the student is given primary responsibility for the content of their speech. However, where the public school maintains substantial control over the content being delivered, prayer or other religious speech cannot be undertaken, or it would constitute government endorsement of the speech. A school can publicize disclaimers clarifying that the student's speech is her or his own and not the school's.[46]

Santa Fe Independent School District v. Doe (2000) involved all of the issues above. The Sante Fe Independent School District in Texas had been allowing student-initiated and student-led prayer before public high school football games for quite some time. An elected student chaplain was selected to give the prayer. However, a suit was brought in federal court on behalf of students who objected to the practice of praying at the football games. In response to the suit, and while the litigation was proceeding, the school district refined its procedures for allowing the prayer by holding two different student elections linked to the question of whether or not to pray at the high school football games.[47]

The first election allowed the students to decide whether or not to pray before the football games. When the outcome of this balloting showed that the majority of students wanted there to be prayer, a second election was held to choose a student representative to deliver the prayer. The school district felt that by allowing the students to decide, they were adequately removing themselves from the issue. The Supreme Court disagreed.[48]

Writing for the majority, Associate Justice John Paul Stevens said, "The delivery of such a message—over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encour-

ages public prayer—is not properly characterized as 'private' speech."[49] The majority was not persuaded that the student expression was private in nature given the school district's control over the election process and content of the speech being given by the student. Therefore, it is apparent that the process for choosing a speaker must be completely neutral and that the context of the delivered speech matters greatly. If the neutrality of the process is established, religious expression is granted only when it is obviously the student's privately formulated speech.

A related issue handled by the guide is student prayer at graduation exercises. The rules regarding graduation prayer are quite similar to that governing student assemblies and extracurricular events. First, the school may not require or organize prayer at graduation ceremonies. Second, any student or invited speaker must be chosen using truly neutral and impartial criteria for speaker selection. It cannot be tilted toward favoring or disfavoring religious speech. Further, it must be apparent that the speaker is in control of their own remarks and that they cannot be attributed to the school. Like the student assembly and extracurricular section of the guide, schools may make a disclaimer in which they disavow sponsorship of the speaker's expression.[50] This basically creates a free expression zone around the speech being delivered. The expression can be religious, antireligious, and/or offensive to many. This issue, like the issue of student assemblies and extracurricular activities, is difficult to navigate. Still, the basic doctrine is one of school neutrality and even-handedness throughout the process of choosing a speaker and then allowing the speaker to have free expression rights without prior censorship.

Much of the confusion around this issue stems from *Lee v. Weisman* (1992) in which the Supreme Court determined whether or not an invited rabbi could offer a prayer at graduation. In a tight 5–4 decision, the Supreme Court ruled that a guest invited for the purpose of delivering a prayer is at its very core favoring religion over nonreligion. Therefore, the basic action of the school district violated the Establishment Clause.[51] Part of the confusion comes from the mistaken view that this means all graduation prayer is banned. While the issue can be difficult and a school administrator caught in the crossfire may want to outright ban the practice, prayer at graduation can be done legally. The *Lee* decision does not ban all prayer. What is being banned is prayer that is endorsed by the government in the public school ceremony. Free speech being exercised by a speaker chosen in a neutral process, whether the speaker is a student or outside invitee, cannot be abridged if the speaker is given primary control over their own expressive content. Thus, the speaker may pray or not. Conversely, the speaker may also criticize the school or make a political statement. The bottom-line is

that the speech cannot be vetted by the school and the selection process must be neutral in regards to the choice of speaker. Religion cannot be a criterion for selection or exclusion. Certainly, this opens a Pandora's Box for a school administrator, but it is mistaken to state that graduation prayer is a banned practice.

The last area handled in the "U.S. Department of Education Guidelines Regarding Public School Prayer" addresses baccalaureate ceremonies. Very directly, it is stated, "School officials may not mandate or organize religious ceremonies."[52] Therefore, organization and execution of a baccalaureate service by a public school is constitutionally impermissible. However, if a school allows other outside community groups to use school facilities, it must also allow religious groups to use the facilities. A private community group requesting the use of school facilities for a baccalaureate service should receive the same consideration as all other community groups and cannot be favored or disfavored in the process. Hence, a private baccalaureate service can be held on school property and students may engage in religious speech while at the service.

These guidelines published by the U.S. Department of Education have provided public school administrators with a valuable resource for discerning what actions to take in permitting or not permitting student religious expression. While the guidelines are not exhaustive, they do provide public school administrators with a solid nucleus of information for navigating through these often difficult decisions while dealing with all of the different societal groups that have a stake or position in these issues. It should be noted that these are "guidelines" and that there is much controversy and litigation that continues to surround these issues. The guidelines are subject to change and/or reinterpretation. Still, these guidelines provide public school officials with an invaluable resource as they attempt to make decisions that respect all involved parties and that line up with current constitutional principles.

COMMON SOURCES OF CONFLICT AND CONFUSION

While the guidelines provided by the U.S. Department of Education give public school administrators guidance on issues surrounding prayer and religious expression, there are multiple areas of conflict that an administrator must recognize. Many of these are not covered in the guidelines. The issue of religious clothing or jewelry can be a subject of contention. This issue goes back to *Tinker v. Des Moines Independent School District* (1969), which was discussed earlier, where it was ruled that public school students have a right to free expression that is connected to peaceful and nondisrup-

tive expression. In *Tinker*, the students were engaging in symbolic expression by the wearing of black armbands to protest the Vietnam War. *Tinker* also extends to symbolic religious expression. Therefore, as long as the article of clothing or jewelry does not cause a disturbance to the primary purpose of the public school, its wearing cannot be considered a violation of any school policy. Further, a school administrator cannot deny the right to wear such clothing just because it might make people uncomfortable or clash with others' viewpoints. As long as the message of the clothing is not deemed to be vulgar or causing disruption, it can be worn.[53] *Tinker* is the operative standard when it comes to student religious expression through clothing or jewelry.

This should not be taken to mean that a school cannot have a dress code. It simply means that there is a certain level of free expression rights accorded to public school students. Speech of a political or religious nature is a form of expression that—even when symbolic as in *Tinker*—is highly protected. However, this cannot be equated with a student having a right to wear sagging pants that expose underwear or to have a right to any bizarre or vulgar fashion that comes to the mind of the student. Numerous court cases have been able to parse between protected expression and unprotected expression and have given public schools some latitude in this regard. The National School Boards Association has published an article that helps public school administrators with this issue. They end the article with some guidelines for public school students' rights related to clothing and/or jewelry.

1. *Protect Students' Religious Expression*. Dress codes must accommodate students whose legitimate religious beliefs require or encourage certain types of dress or accessories.

2. *Protect Students' Rights of Expression.* Dress codes must not interfere with students' rights to make political or philosophical statements about the world, as long as that expression does not cause a substantial disruption of or a material interference with school activities, or interfere with the school district's educational mission.

3. *React to Actual, Not Perceived Threats.* Before banning specific items of apparel because of gang activity or other violence, the school district must have evidence to support such a ban.

4. *Consistent and Reasonable Application Is the Key.* The school district must be sure that there is reasonableness and consistency in the application of a student dress code. A student dress code that is applied in a manner that holds different groups of students to different standards will not be upheld by the courts.[54]

So, public school officials must be very circumspect when it comes to the issue of public school students' rights to free expression in their clothing

and jewelry. Also, it should be noted that religious expression is a particularly important and highly protected form of this expression.

OPTING OUT OF ASSIGNMENTS AND ACTIVITIES

Another area rife with conflict and confusion in the debate surrounding religious rights of public school students is the question about whether or not a student can "opt out" when certain subjects are brought up in the school's curriculum. Basically, the right to "opt out" would allow students to avoid participation when certain controversial subjects come up. The right to "opt out" on religious grounds would be based upon the student's and the parent's religious conviction. This is an area that is at best confusing with many different voices contributing to the debate. First, unless the student is an eighteen-year-old or older high school student, the right to "opt out" does not rest with the student. It is the student's parents or official guardians that possess this right. Even with some level of confusion surrounding this issue, there are some things that are known about the right to "opt out." According to the "Protection of Pupil Rights Amendment" (PPRA) passed in 1998, parents have the right to inspect materials that will be used in any U.S. Department of Education-funded survey of their children and to subsequently exempt their children from participation in the survey. There is also a requirement that parents be notified and that written permission be obtained before a student participates in any survey, analysis, or evaluation.[55]

In 2002, the PPRA was amended (Tiahrt Amendment) as part of the "No Child Left Behind Act" to include parental rights to inspection of survey, analysis, and evaluation instruments that are not U.S. Department of Education funded and to make decision about their student's participation or nonparticipation based upon their findings. Further, the Tiahrt Amendment allows the parents of students to access any curriculum that their children may encounter while in a public school.[56] Based upon the parent's findings after examining the curriculum, they may choose to opt their children out of the activity or lesson by communicating their desire to the school administrators. While the law covers more than religious reasons for opting out, it certainly allows for religious objections in making this determination.

In fact, there existed and still exists a right independent of PPRA for parents to opt their children out of school activities on religious grounds. For instance, *West Virginia State Board of Education v. Barnette* (1943) found that an ordinance requiring the salute of the American flag by the children of Jehovah's Witnesses was an unconstitutional restraint due to the Free

Exercise Clause. On religious grounds, these children were allowed to "opt out" of this activity because it clashed with their religious practices as Jehovah's Witnesses. As it relates to the Amish community in *Wisconsin v. Yoder* (1972), it was found that the state's desire to educate children could not override the Amish community's deeply held religious belief that education should not go past the eighth grade. This allowed the Amish to "opt out" of the compulsory attendance laws.[57] Parents have had a right to challenge the public schools on religious grounds in the education of their children for many years.

Yet, while the PPRA as amended provides parents with a right to inspection and to opt their children out of numerous public school functions, services, and curricular activities, it does have its limits. This is where the confusion lies. For instance, it is not a violation under PPRA or under any past court decision for a student merely to be exposed to what some would consider to be offensive ideas, as was found in *Mozert v. Hawkins City Board of Education* (1987) U.S. Court of Appeals, Sixth Circuit. In *Mozert*, students were required to read from a series of readers that many parents in the school district objected to on religious grounds. The parents involved in the suit stated that much of the required reading violated their own religious values.[58]

Originally, the school district provided a way for the children to "opt out" of the assignment and receive an alternative assignment. However, this option was withdrawn and the children were then required to read the material. The parents then filed suit in federal court claiming that their free exercise rights were being violated.[59]

Ultimately, the U.S. Court of Appeals, Sixth Circuit found that the student's mere exposure to material is not grounds for establishing a violation of free exercise rights. Fundamentally, the public school is not liable for a violation of the free exercise clause because part of the task of a school is to provide exposure to different sets of ideas and experiences. Hence, the public school was merely performing its duty by requiring a certain level of exposure. Merely requiring interaction with a variety of viewpoints and experiences was found not to be the same as endorsement of the viewpoints and experiences.[60] For example, this line of reasoning from *Mozert* could be used to allow public schools to expose students to literature from different religions and political viewpoints during their public education years without having to provide a cafeteria approach to assignments that allow students and their parents to "opt out" at every objection. However, it is obvious under PPRA that parents have the right to examine material used within the public school. Should they find something objectionable, they may request that their child be opted out of the lesson or other activity.

Does this mean that the public school administrator must grant the request? This is where there seems to be conflict between PPRA and *Mozert*. PPRA helps to insure the right for parents to request an "opt out" for their children. The key word is "request." *Mozert* states that the request is not necessarily automatic. In this issue, it is very important for public school administrators, teachers, parents, and students to communicate about these matters should they surface and to deal with them as openly and as early as possible. While the public school administrator has discretion in making the decision as to the disposition of a request to "opt out," the PPRA and various court decisions other than *Mozert* give parents and students some legal grounds for their request.

Certainly, *Zorach v. Clauson* (1952) is relevant to the discussion of the right to "opt out" of public school functions. The Supreme Court ruled in *Zorach* that students could receive "released time" from their public schools to receive religious instruction off of the public school campus.[61] Though this is not the same as opting out of a particular assignment in a particular class, it does set the stage for the basic idea of students leaving the public school for religious reasons. Hence, the idea of "opting out" has a long constitutional history dating back over fifty years. To avoid litigation for all parties involved, an understanding needs to be reached in this area of student and parental religious rights. This will require parents, students, teachers, and administrators to sit down and to attempt to reach an understanding that is both respectful to free exercise rights and to the public school's charge to produce well-informed and critical thinkers.

THE PUBLIC SCHOOL ADMINISTRATOR'S CHALLENGES

The public school administrator deals with numerous challenges when it comes to questions of religion within the public school environment. The public school serves as a major crossroads for many of the nation's ideas and ideals. Various societal viewpoints—and often clashing viewpoints—meet at the schoolhouse door. Indeed, it is more than just a clash of ideas and ideals that take place at the schoolhouse door; rather, these ideas and ideals actually enter the schoolhouse in the form of America's children who come from and represent the varied groups in American society. Is it any wonder that when religion in public schools is brought up, it evokes intense passion and debate? After all, we are talking about our children and a place (the public school) that will deeply impact who they are and who they will become.

As stated earlier in this chapter, much has been settled about free exercise and establishment in the public schools. Basically (and succinctly), we have

come to the conclusion through the courts and legislation that the public schools cannot coerce their captive student audiences to engage in religious activity or to sponsor religious activity. This could change with future legislation, amendments, and/or court decisions. However, for now, it seems to be where we have settled as a people. The public school administrator needs to respect and be cognizant of these decisions made by legislators and the courts. Constitutional literacy is a must for the public school administrator when dealing with these issues.

Nonetheless, there remains confusion about where the lines are drawn when it comes to religious expression. While people and groups outside of a public school may not use the public school to push their religious agendas, the Supreme Court has ruled that public schools are also not religion-free zones. Students, who are required to attend school under compulsory education laws, may enter the public school with their constitutional rights intact. Granted, minor students do not have equivalent constitutional rights to adults, but they do retain a large measure of these rights as explained by the Supreme Court in various decisions. This large measure of constitutional protection certainly applies to student rights to religious expression as well. Students may pray, organize with others for religious expression, and operate within the public school environment alongside every other group or person as long as they do so without disruption to school order or discipline. Religious students cannot be discriminated against because their speech is religious or because their groups are religious. Anyone objecting to their speech or groups, including public school administrators, must exercise toleration.

A difficulty arises for public school administrators when diverse student groups come into conflict while operating as a proxy for outside forces within the school system. For instance, a group of students (often but not always acting at the behest of adults from beyond the schoolhouse gates) may not like that a Christian school group actively evangelizes classmates during non-instructional time. They may find the viewpoints of the Christian group offensive. However, the Christian student group's right to existence and to expression is not defined by the opinions of others. Likewise, under these rules of engagement within public schools, non-Christian religious groups can form as well and attempt to exercise persuasion. Student religious-based and student secular groups all possess this right to association and free expression. Fundamental issues of free exercise, free expression, and freedom of association must be respected as these public school students become adults who we expect to function as literate and active citizens in a democratic republic. In *Keyishian v. Board of Regents* (1967), Justice William J. Brennan writes that "the classroom is peculiarly the 'mar-

ketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'"[62] This statement by Justice Brennan sums up the importance of allowing students to have robust free exercise and free speech rights on the public school campus.

With the public schools providing a forum for much of a community's interaction, these issues of student religious expression and freedom of association have deeper meanings that extend beyond the schoolhouse gate. Indeed, the policies implemented and the decisions arrived at in the courts can be used by different societal groups in order to make their points about the exclusion or integration of religious practice and dialogue in the larger public forum. Where are boundaries drawn between one person's free exercise rights in the public sphere and another person's right to be free from coercion? Is there a right to be free from coercion in a public space? Can government ever accommodate religious practice as separationists would espouse—do government and religion need to be wholly separate? Though many of these groups have antipathy for each other on the public stage, this cannot be done in the nation's public schools.

The compulsory nature of American public school attendance means that all of these groups and individuals meet in the public school environment. Majority and minority groups and the individuals that make up these groups all have constitutional protection in the public school. In some ways, it is a microcosm of the larger society. And how appropriate it is that learning to live together and even how to disagree takes place within the public school setting. These are certainly skills necessary to the functioning of a healthy democratic republic. A dialogue that excludes religious expression from its environment would miss important parts of our society. Hence, the law and the courts have come down on the side of allowing a great deal of student religious expression. This expression aids in teaching and fostering civil discourse.

Yet it is the fluid environment of the courts that bring a good deal of ambiguity to these issues. Many of the decisions that have been handed down by the courts, and particularly by the Supreme Court, could change as the Court itself changes membership. Also, there remains real ambiguity like that found between the *Mozert* decision and PPRA, which was discussed earlier. One of the public school administrator's primary tasks related to student religious expression is to stay abreast of the legislative changes and current court decisions regarding these matters and to not show favoritism to any particular group. Even with the ever-present ambiguity surrounding this issue, it seems to have lessened somewhat over the

years. In some ways, we seem to have adopted the old saying "Let a thousand flowers bloom" when it comes to student religious expression within the American public school system.

NOTES

1. For a solid overview of the separationist perspective see Leo Pfeffer, *Religion, State, and the Burger Court* (Buffalo, NY: Prometheus, 1984).

2. Kent Greenwalt, *Does God Belong In Public Schools* (Princeton, NJ: Princeton University Press, 2004), 8.

3. Robert Booth Fowler, Allen D. Hertzke, Laura R. Olson, and Kevin R. Den Dulk, *Religion and Politics in America*, 3rd ed. (Boulder, CO: Westview Press, 2004), 239.

4. Ibid., 208.

5. Paul J. Weber, "Neutrality and First Amendment Interpretation," in *Equal Separation: Understanding the Religious Clauses of the First Amendment*, ed. Paul J. Weber (Westport, CT: Greenwood, 1990), 9.

6. Fowler et al., *Religion and Politics in America*, 209.

7. Jesse H. Choper, "A Century of Religious Freedom" *California Law Review* 88, 6 (2000), 1736.

8. See for example Burt Rieff, "Conflicting Rights and Religious Liberty: The School-Prayer Controversy in Alabama, 1962–1985," *Alabama Review*, July (2001).

9. See for example Clarke Cochran, *Religion In Public and Private Life* (New York: Routledge, 1990).

10. Ibid., 81–88.

11. *U.S. Constitution*. Amendment 1.

12. Jesse H. Choper, Richard H. Fallon, Jr., Yale Kamisar, and Steven H. Shiffrin, *Constitutional Law: Cases & Comments, 10th edition* (St. Paul, MN: Thomson/West, 2006), 896, 1072, 1099–1100, 1129.

13. Ronald B. Flowers, *That Godless Court* (Louisville, KY: Westminster John Knox Press, 2007), 103.

14. Ibid.

15. Ibid., 106.

16. Ibid., 106–107.

17. Choper et al., *Constitutional Law: Cases & Comments*, 939–944.

18. Ibid.

19. Abigail Thernstrom, "Courting Disorder in the Schools," *Public Interest* 136, Summer (1999), 21–24.

20. Choper et al., *Constitutional Law: Cases & Comments*, 581, 945.

21. Ibid., 944–948.

22. Charles C. Haynes and Oliver Thomas, *Finding Common Ground: A Guide to Religious Liberty in Public Schools* (Nashville, TN: First Amendment Center, 2002), 118–124.

23. "Overcoming Opposition to Student Religious Clubs in Public Schools," http://www.religioustolerance.org/chr_club.htm (accessed January 15, 2007).

24. David Limbaugh, *Persecution: How Liberals Are Waging War Against Christianity* (Washington, D.C.: Regnery Publishing, 2003), ix.

25. Choper et al., *Constitutional Law: Cases & Comments*, 1098, 1129.

26. "Overcoming Opposition to Student Religious Clubs in Public Schools," http://www.religioustolerance.org/chr_club.htm (accessed January 15, 2007).

27. Choper et al., *Constitutional Law: Cases & Comments*, 1097–1099.

28. See for example Benjamin Dowling-Sendor, "A Question of Equality," *American School Board* 190, no. 2, (February 2003), 46–51.

29. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

30. Ibid.

31. Ibid.

32. David H. Rosenbloom and Robert S. Kravchuk, *Public Administration: Understanding Management, Politics, and Law in the Public Sector* (New York: McGraw-Hill, 2005), 316.

33. U.S. Department of Education, "Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools," http://www.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html (accessed January 17, 2007).

34. Ibid.

35. Ibid.

36. Ibid.

37. Ibid.

38. Ibid.

39. "syatp '06 // Be still. Know God," http://www.syatp.com/media/journalists/pressrel/index.html (accessed January 18, 2007).

40. U.S. Department of Education, "Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools," http://www.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html (accessed January 18, 2007).

41. Ibid.

42. *Bown v. Gwinnett County School District*, 112 F.3d 1464, 1469 (11th Cir.1997).

43. U.S. Department of Education, "Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools," http://www.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html (accessed January 18, 2007).

44. Ibid.

45. U.S. Department of Education, "Religion In The Public Schools: A Joint Statement Of Current Law," http://www.ed.gov/Speeches/04–1995/prayer.html#5 (accessed January 20, 2007).

46. U.S. Department of Education, "Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools," http://www.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html (accessed January 17, 2007).

47. Choper et al., *Constitutional Law: Cases & Comments*, 1125–1127.

48. Ibid.

49. *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000).

50. U.S. Department of Education, "Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools," http://www.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html (accessed January 18, 2007).

51. Choper et al., *Constitutional Law: Cases & Comments*, 1121–1124.

52. Ibid.

53. Michael J. Julka, Shana R. Lewis, and Richard F. Verstegen, "Student Dress Codes," *Inquiry & Analysis*, May 2004, http://www.nsba.org/site/doc_cosa.asp?TRACKID=&DID=33494&CID=164 (accessed January 18, 2007).

54. Ibid.

55. "Pupils Rights Law Allows Parents to Opt Students Out of Surveys," *Health and Health Care in Schools*, May 2003, http://www.healthinschools.org/ejournal/2003/may03_2.htm (accessed January 19, 2007).

56. Ibid.

57. Choper et al., *Constitutional Law: Cases & Comments*, 1133–1134, 1140, 1173.

58. *Mozert v. Hawkins County Board of Education*, 827 F.2d 1058 (6th Cir. 1987).

59. Ibid.

60. Ibid.

61. Choper et al., *Constitutional Law: Cases & Comments*, 1090–1092.

62. *Keyishian v. Board of Regents*, 385 U.S. 589 (1967).

FURTHER READING

Kent Greenwalt's *Does God Belong In Public Schools* (Princeton University Press, 2004) provides a solid overview of U.S. Supreme Court decisions regarding religion in public schools. Additionally, it dispels the idea that religion is banned from public schools altogether. Robert Booth Fowler, Allen D. Hertzke, Laura R. Olson, and Kevin R. Den Dulk in *Religion and Politics In America*, 3rd edition (Westview Press, 2004) present the historical and sociological context necessary to have a firm understanding of the larger societal forces operating on religion within the public school. Further, the authors provide material that deal specifically with the issue of student religious expression. *Equal Separation: Understanding the Religious Clauses of the First Amendment* (Greenwood Press, 1990) edited by Paul J. Weber brings some of the foremost scholars together, including himself, to examine the religion clauses of the First Amendment. This work exposes the reader to the ambiguity that often surrounds the jurisprudence on this issue. A fine overview of the basic issues surrounding religious expression in the public and private sphere is provided in Clarke Cochran's *Religion In Public and Private Life* (Routledge, 1990). Ronald B. Flowers' *That Godless Court* (Westminster John Knox Press, 2007) gives a good historical overview of the issues dealt with by the Supreme Court related to the religion clauses of the First Amendment.

5

Free Speech and the Protection of Children

Mark Edward Gammon

The First Amendment is a familiar battleground for issues of church and state, one where a long history of disagreement about the meaning and scope of the Establishment and Free Exercise Clauses has held the public's attention. When it comes to issues of free speech, religious groups typically have pushed to maintain a distinctly religious voice in the public square, especially legislatures and education. Generally, this agenda has led churches to push for broader free speech rights in light of the free exercise clause; however, developments in technology, coupled with a general loosening of public standards of decency, have lent a new urgency to the question of when it is appropriate to curtail speech, especially in the interest of protecting children from overtly sexual or violent cultural products.

The question of how and why to restrict free speech has come to the public's attention recently due to the easy availability of violent and pornographic materials on the Internet. Congress and state legislatures have recognized a need to shield children from exposure to obscene material, but all involved recognize the difficulty of regulating Internet content without inappropriately curtailing free speech. Christian political organizations have been among the most active in pushing for this legislation, making obscenity restrictions a complicated field for the encounter of church and state. This issue is fraught with complex questions about moral development, the

legal status of children, distinctions among different types of speech, and community standards of decency.

This issue is particularly complicated because it requires an exploration of the murky area of civil society between legal issues on the one side and theological and moral questions on the other. Obscenity is a subjective term, and in order to regulate it, one must define it and clarify the grounds on which it should be restricted. The courts have wrestled with this problem for decades, but its task is complicated by the relationship between religious commitment and sexual morality. The state has struggled to determine its responsibilities in this regard as the church has exerted political pressure to legislate particular moral norms. The church's legal justification relies on the concept of harm, which itself is a subjective notion with both moral and spiritual dimensions, and community standards, a concept in continual flux thanks to cultural and technological change.

What follows is an exploration of the many dimensions of this problem. The legal history of obscenity shows how the courts have struggled to understand the state's responsibilities in both defining and controlling obscene material. The contemporary debate has coalesced around the issue of Internet pornography, which complicates the question of how "community standards" can be used as a guideline. The theological side of the issue centers on the question of harm—namely, the degree to which the church's understanding of moral development in sexual matters can be justified objectively apart from its religious foundation. Here, one must ask questions about the relationship among religious faith, culture, and state power when it comes to children's moral development.

A LEGAL HISTORY OF OBSCENITY

Before the middle of the twentieth century, obscene material was limited largely to the underground and restrictions on such material could depend on cultural disapproval and the mostly uncontested common law tradition for support. At least as far back as ninth-century Carolingian Europe, government has recognized the need to suppress certain types of "blasphemous" speech, which could include sexually explicit material.[1] Even as the Western legal tradition became increasingly secular in the wake of the Enlightenment, the condemnation of sexually explicit material detached from its religious moorings and restrictions survived based on cultural standards of common decency.

This practice was reaffirmed in the English common law tradition by *Regina v. Hicklin* (1868). The "Bookseller's Row" on Holywell Street in London was the subject of an exposé in *The Daily Telegraph* in which it

was revealed to the wider public that dozens of shops sold erotic novels, prints, and even prostitution catalogs. Concerned that the area was attracting both sexual thrill-seekers and curiously impressionable onlookers, Parliament passed the Obscene Publications Act in 1857, though there was considerable debate in the House of Commons as to the definition of obscenity. The test case dealt with the publication of an anti-Catholic pamphlet titled *The Confessional Unmasked: Shewing the Depravity of the Romanish Priesthood, the Iniquity of the Confessional, and the Questions Put to Females in Confession.* The author Henry Scott expressed outrage at the types of lewd conversations likely to be held between priests and young women in the confessional, though somewhat ironically, the pamphlet itself was deemed pornographic. This case directly tied obscenity restrictions to the potential for such material to "deprave and corrupt those whose minds are open to such immoral influences," meaning the relevant passages could be declared objectively obscene when considered out of context. With this case, a standard for punishable obscenity was established.[2]

The broader rights of speech guaranteed by the U.S. Constitution were not seriously tested with regard to obscenity until *Roth v. United States* (1957), which tested the so-called "Comstock Law." Although the United States had become increasingly pluralistic, the legacy of the moral hegemony of earlier periods assured general agreement about standards of decency. There were always people who sought to push the boundaries of etiquette, but the legal relationship between free-speech guarantees and obscenity took some time to coalesce. Immigration introduced more moral and religious pluralism, but western expansion pushed many "disreputable" endeavors to the frontier. In the middle of the nineteenth century, federal customs officials had been charged with the responsibility to confiscate sexually explicit pictures, but the statutes were not expanded and substantively enforced until the 1870s with the deputizing of Anthony Comstock as a special agent for the U.S. Postal Service.

Comstock (1844–1915), the son of a well-to-do Connecticut farmer, was a Civil War veteran who settled in New York City. There he saw the effects of rapid industrialization on urban life, as horrid working conditions fostered the growth of tenements, slums, taverns, and brothels. He became an active worker in the YMCA, one of the organizations that sought to combat unhealthy social conditions—including moral conditions—as part of the early stages of the Social Gospel movement. Comstock founded the New York Society for the Suppression of Vice and proved to be an able moral crusader, adept at political maneuvering. Though he had many enemies, he managed to convince Congress to support his cause with legislation.

The Comstock Law of 1873 prohibited the use of the mail to disseminate "obscene, lewd, or lascivious" materials, including pamphlets dealing with contraception and abortion.[3] The courts batted the issue around for the next eighty years, with some jurists questioning whether the underlying logic of *Regina v. Hicklin* meant that such restrictions applied only to children. Eventually, the courts relaxed standards even for children, having to admit that materials intended for sex education could be appropriate[4] and that sexuality had a legitimate place in literature as long as the intention of the work was not to create libidinous impulses.

The latter point was established by the famous outcry over James Joyce's *Ulysses*. In 1920, a magazine serialized an excerpt from the novel, including a portion dealing with the main character masturbating. The New York Society for the Suppression of Vice took action and in 1921 got the magazine declared obscene, effectively banning the novel's publication in the United States. Random House decided to test the issue by importing the French edition and arranging to have it seized by customs; in 1933, the district court ruled that the novel's sexual content served its larger literary purposes, and therefore was not pornographic.[5] Still, while the *definition* of obscenity was at issue, the larger question of the legal status of obscene material was not yet seriously questioned in the courts.

Ultimately, the constitutionality of the Comstock Law was tested by Samuel Roth, who had been convicted for publishing a magazine of erotica. The *Roth* case (1957) tested the limits of First Amendment guarantees for speech, with the court determining that obscenity did not have constitutional protection. The decision was reaffirmed by *Jacobellis v. Ohio* (1964), in which the manager of a movie theater had been convicted for showing a pornographic film. In the majority opinion, Justice Brennan cited *Roth,* with unprotected material being determined by questioning "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."[6] In *Jacobellis,* the Court clarified that the "contemporary community standards" in question were not those of the local legislative jurisdiction, but those of the nation considered as a whole. As to how these vague phrases were to be applied, Justice Stewart, in a concurring opinion, concluded that such restrictions could apply only to "hard-core pornography," which he famously defined by stating, "I know it when I see it."[7]

Jacobellis moved the issue from printed material to film, essentially broadening the *Roth* test in response to a different type of media environment. The Court later determined that the making and possessing of obscene material were constitutionally protected, even if viewing such material may lead to "antisocial conduct."[8] The issue then became a question about the

public dissemination of obscene material, and as time went on, legislatures therefore softened restrictions on printed matter, which could be viewed in the privacy of the home. Public showings of pornographic films were another matter, and the Court revisited *Jacobellis* in a pair of 1973 cases.

With the legal definition of obscenity based on the *Roth* test hopelessly vague, the members of the Court found themselves reviewing pornographic films almost weekly to determine whether they were constitutionally protected, though Justices Black and Douglas, believing all such films protected, refused to weigh in.[9] Justice Stewart apparently having seen enough, the Court refined the obscenity test in *Miller v. California* (1973):

> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, *Roth, supra,* at 489, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. If a state obscenity law is thus limited, First Amendment values are adequately protected by ultimate independent appellate review of constitutional claims when necessary.[10]

The new *Miller* test got its first application in a decision issued the same day, *Paris Adult Theatre I v. Slaton* (1973). Here the Court addressed the question of whether sexually explicit material should be restricted in the first place. Deciding that the social-scientific evidence was inconclusive, Chief Justice Burger lamely deferred to Justice Cardozo's statement that "all laws in Western civilization are 'guided by a robust common sense.'" Here, reasoning based on common law precedent gave way to the flimsy assertion that this is the way things have always been:

> The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex. Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data.[11]

In a telling dissent, Justice Brennan, with Justices Stewart and Marshall joining in, seemed to give up on the issue, questioning the very idea of legal restrictions on obscenity:

> Our experience since *Roth* requires us not only to abandon the effort to pick out obscene materials on a case-by-case basis, but also to reconsider a fundamental

postulate of *Roth*: that there exists a definable class of sexually oriented expression that may be suppressed by the Federal and State Governments. Assuming that such a class of expression does in fact exist, I am forced to conclude that the concept of 'obscenity' cannot be defined with sufficient specificity and clarity to provide fair notice to persons who create and distribute sexually oriented materials, to prevent substantial erosion of protected speech as a byproduct of the attempt to suppress unprotected speech, and to avoid very costly institutional harms.[12]

Brennan recognized that the obscenity test, even as refined by *Miller,* remained hopelessly vague. While the precedent stayed on the books, cultural changes coupled with legal uncertainty narrowed the judicial understanding of obscenity subject to controls. By the 1980s, the question was not *whether* pornographic films could be shown publicly, but *where* they could be shown—that is, it came down to a zoning question.[13]

WHICH COMMUNITY'S STANDARDS?

The legal language used to define obscenity repeatedly turns on the idea of "community standards," raising the question of what exactly this vague phrase means. Each person is simultaneously a member of several communities, each with its own set of ethical standards. Market trends and state-sponsored education complicate this picture considerably, for if every local community has more or less the same set of shops, restaurants, media outlets, and educational priorities, the moral relevance of local community identity is severely mitigated.

Legally speaking, the Court decided in *Jacobellis* that community standards meant the *national* community.[14] However, as restrictions on obscene material loosened in the wake of ongoing confusion about just what that national standard should be, the issue was relegated to zoning cases; morally and legally speaking, this development essentially returns the authority to local governments.

Relying on the principle of subsidiarity seems appropriate given the state's morally pluralistic character in a liberal polity, but local governments have their own problems in zoning decisions of this sort. Here the locality must make a moral distinction, something that is considerably more complicated constitutionally than making the distinction between commercial and residential zones. There is a clear problem with allowing only certain *kinds* of commercial establishments within a defined area, though there is certainly precedent in the prevalence of liquor boards. The courts have generally accepted the idea of "secondary effects" as legal justification for such

restrictions—that is, certain types of commercial establishments could devalue other businesses. In the past, localities could, if nothing else, rely on the "shame factor" to relegate adult bookstores and theaters to the outskirts. Even if zoning laws could not keep the establishment out of the center of town, owners had to take patrons' fears of being seen entering or leaving into consideration when choosing a location. In general, both legal and cultural factors created a situation where patrons would have to seek out the store.

Technological and cultural developments have interdependently worked to alter this situation, however. More and more, the seedy adult bookstore on the edge of town has been supplanted by the clean, well-lit sex boutique in commercial centers, as both a factor in and a response to the mainstreaming of pornography and so-called marital aids. It is difficult to appeal to "community standards" to restrict minors' access to such material when mothers are introducing their daughters to sex toys as part of normal adolescent sex education.

Proponents of obscenity restrictions are wise to focus on the Internet as an important agent of change. It brings sexually explicit material into the home quickly, conveniently, and oftentimes unintentionally. This method of delivery removes the shame factor entirely from the picture—one can view or purchase such material relatively anonymously. In this way, the Internet mitigates the importance of community standards of morality, at least when we consider community in terms of locality. The Internet is arguably a community itself, with its own standards of morality and etiquette. It also is a home to thousands of subsets—virtual communities fostering connections among groups dedicated to sexual fetishes, fundamentalist Christianity, and everything in between. While one could argue that the Internet is a factor in the collapse of community and the radical individualization of American culture, there is no doubt that these virtual communities have an impact on identity formation and moral education.[15]

Again, the state's interest is a complicated question. While the state has some stake in the cultivation of national identity and in relegating obscenity matters to localities, the courts have suggested that the state's role is limited to enabling local communities to self-define—a legal conundrum stirred up over and over in religious cases, from public education to the displays of holiday crèches on public property. In entering the discussion about community standards, the church is caught between the Scylla of demanding its own free speech rights and the Charybdis of relying on state power to restrict the rights of others in accordance with Christian standards of decency.

PROTECTING CHILDREN FROM OBSCENITY

While the right to produce, own, and disseminate obscene material has broadened in scope, the Court has nonetheless recognized a key limit on this right—reasonable precautions can be taken to restrict the access to such material by minors. The *Hicklin* test referenced the need to protect "those whose minds were open to such immoral influences," which in its particular context likely included women and so-called "weak-minded" adult men in addition to children. Both changes in attitudes toward women and technological developments in media have shifted the focus to those more clearly developmentally vulnerable. That is, the speech rights of adults may be limited in order to protect children.

This limit on free speech is assumed in many of the obscenity cases prior to *Ginsburg v. New York* (1968), in which the owner of a shop, who had been convicted for selling "girlie" magazines to a sixteen-year-old boy, appealed, thus forcing the Court to distinguish between the First Amendment rights of children and adults when it comes to access to certain types of material. In *Ginsburg,* the Court determined that the state could apply a flexible standard of obscenity and further restrict the access of children to materials that should be available to adults.

The Court's reasoning hinged on two key ideas, which on examination do not appear to be readily compatible. First, the primary responsibility for the well-being of children falls to parents, and to a lesser degree to teachers and others charged with the care and rearing of children, who "are entitled to the support of laws designed to aid discharge of that responsibility." At the same time, the state has an independent interest in the well-being of children, and though sexually explicit material may or may not be harmful to the "ethical and moral development of our youth," the legislature could reasonably assume that it is, even in the absence of proof.[16] Note that according to the first argument, there is nothing to prevent parents from purchasing obscene material and giving it to their children should they choose to do so. The second argument, however, suggests that the state may have the right to impinge on parents' rights to expose their children to what they see fit. While the state historically has been content to act as *parens patriae* (literally "parent of his or her country") as a last resort, this right could theoretically be asserted in the absolute, as with Plato's guardians in *The Republic.*[17]

The constitutionality of broadcast decency standards for radio and television also turned on the problem of potential harm to children, as determined in *Federal Communications Commission v. Pacifica Foundation* (1978). At 2:00 p.m., a New York radio station broadcast a recording of George

Carlin's routine about "filthy words" banned from the public airwaves. A parent complained to the FCC that he had heard the recording while driving with his young son. The FCC notified Pacifica Foundation, the owner of the station, that it was within the Commission's rights to sanction or fine for such broadcasts, though no fine was issued at the time. Upon being challenged to clarify its standards, the FCC claimed that it did not seek to ban the use of such language from the airwaves entirely, but only to restrict it to hours when children were much less likely to be listening.

In its decision, the Burger Court backed away from *Roth,* stating, "the fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas." Nevertheless, the Court recognized the new challenges presented by broadcast media, which are uniquely present in the home, where a person's right to be left alone trumps an "intruder's" right to be heard. To a large degree, this restriction is justified because broadcast media are "uniquely accessible" to children, and in the case in question, "Pacifica's broadcast could have enlarged a child's vocabulary in an instant." While other media, such as magazines, can be controlled without restrictions at the source, broadcast media are unique and are thus subject to tighter controls. The Court was careful to note the narrowness of its finding, suggesting that different forms of media may require examination to determine appropriate restrictions. Recognizing that obscenity is largely a question of appropriateness to the particular audience and setting, the Court nonetheless concluded, "We simply hold that when the Commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene."[18]

The Internet, of course, offers the proverbial pig a new doorway. Over the course of the last three decades, the FCC and the traditional broadcast media have reached a more-or-less stable understanding about standards, although Janet Jackson's infamous "wardrobe malfunction" during the halftime of the Super Bowl in 2004 has prompted the FCC to begin fining with renewed vigilance. The Internet presents a new challenge, however, insofar as this medium has so far resisted attempts to restrict it. Internet content is delivered in such a way that it cannot be restricted to appropriate times of day, and the fact that children's technological aptitude often is superior to that of their parents make filters and locks moderately effective at best. Congress has moved to address the problem, but with limited success.

The Communications Decency Act (CDA) (1996) was a bipartisan effort

by Congress to address the problem that new technologies, including the Internet and cable television, presented in protecting children from harmful material. The American Civil Liberties Union (ACLU) challenged the constitutionality of the legislation, objecting in particular to the following language:

> Whoever (1) in interstate or foreign communications knowingly (A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or (B) uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs, regardless of whether the user of such service placed the call or initiated the communication; or (2) knowingly permits any telecommunications facility under such person's control to be used for an activity prohibited by paragraph (1) with the intent that it be used for such activity, shall be fined under title 18, United States Code, or imprisoned not more than two years, or both.[19]

The Supreme Court unanimously decided that this language was far too broad and struck down the CDA, with Chief Justice Rehnquist joining Justice O'Connor in a concurring decision, dissenting only in part and in essence proposing the restriction of some Internet content to "adult zones," a solution which, depending on the details of implementation, may be constitutional.[20] The board of the Internet Corporation for Assigned Names and Numbers, which regulates domain names, recently voted 9–5 to reject a proposed "xxx" domain, in part due to concerns about its being called upon to regulate content.[21]

Congress tried again with the Child Online Protection Act (COPA) (1998), stating that "the protection of the physical and psychological well-being of minors by shielding them from materials that are harmful to them is a compelling governmental interest." The COPA was narrower than the CDA, applying only to commercial materials, but its scope included not only obscenity, but also "any material harmful to minors," with the specifying definitions doing little to rule out "soft-core" sexual content. Ultimately, what constituted harmful material was left up to "community standards."[22] The ACLU challenged the law, getting a preliminary injunction to prevent enforcement. The Supreme Court reviewed the law in *Ashcroft v. ACLU* (2004), finding only that the reliance on community standards as a measure did not itself render the act unconstitutional. The Court sent the case back to the Third Circuit for further review, however, suspecting that the act's language was too broad, as in the CDA.[23] The circuit court in

Philadelphia heard arguments in October and November 2006, and on March 22, 2007, Judge Lowell Reed agreed that the act was too broad and made the injunction against enforcement permanent; Reed also noted that filters and parental controls were both more effective and more constitutionally acceptable.[24]

Congress tried a third time, though with considerably narrower scope, by passing the Children's Internet Protection Act (CIPA) (2000). With CIPA, the federal government acted to limit minors' access to "harmful" sexual material on computers located in libraries and schools. Libraries and schools were ordered to install software filters on all computers accessible to minors or lose all federal funding. The American Library Association challenged the law, arguing that such filters were too blunt an instrument, unacceptably limiting access to legitimate information related to health care, sexuality, and public policy. In *U.S. v. American Library Association* (2003), the Supreme Court upheld the law, though in the grand scheme of things, this measure is largely symbolic.[25]

As seen above, the legal restrictions on obscene material are generally justified by concern about the well-being of children. Christians and other religious persons, however, must ask what kind of danger children are in. What, exactly, is the risk in children being exposed to certain cultural products? Are the government's interests in restricting free speech consonant with the church's? How are we to understand "well-being" absent a particular community's definition of health and welfare? Religious organizations have weighed in on the latest round of legal wrangling, namely those cases having to do with the Internet, generally endorsing the legislative language that sets the obscenity measure according to community standards. Beyond satisfying the religious constituency, however, it is unclear precisely what the state's interests are and if, theologically speaking, they are shared by the church.

HARM: PSYCHOLOGICAL, MORAL, AND SPIRITUAL

When Congress' attempts to regulate access to obscene material on the Internet have been challenged in the courts, religious organizations have weighed in to support the legislation. For instance, *Ashcroft v. ACLU* (2004) saw the Court entertaining *amicus* briefs in support of the COPA from the Family Research Council, which is affiliated with James Dobson's evangelical "family values" organization, Focus on the Family; Morality in Media, an interfaith anti-obscenity group founded by the late Rev. Morton A. Hill, a Jesuit priest; and the American Center for Law and Justice, the First Amendment law center affiliated with Pat Robertson's Regent University.

Unlike the progressive Protestant activism of the early Social Gospel over a century ago, the mainstream liberal Christian denominations have been relatively silent about obscenity questions. Non-Christian religious groups also have not visibly entered the debate; worries about the dangers of Christian cultural establishment likely override any shared concerns about exposure to sexually explicit material. In recent years, evangelical Protestant and some conservative Catholic groups have led the political and legal charge to regulate sexually explicit media. These groups unanimously supported the COPA's use of "community standards" as a measure for obscenity, though none directly addressed the question of whether the Christian community's standards necessarily reflected those of the nation at large. Insofar as regulation depends upon protecting children, a key church-state question is to what degree some objective understanding of harm can hold up outside of a specifically theological worldview.

The interested groups support broad definitions of "harm" and "well-being," but they typically have not distinguished among psychological, moral, and spiritual understandings of the terms. The *amicus* brief filed by the American Center for Law and Justice (ACLJ) in support of the COPA is a useful case in point.[26] The brief references several psychological and sociological studies describing a link between pornography and "harm" to children, though the scope of researchers is limited. Some studies suggest that pornography is a danger for its addictive potential, which results in desensitization to the material and eventually modeling what is viewed.[27] One study, in which male subjects were exposed to "hardcore non-violent adult pornography" over the course of six weeks, concluded that such exposure led subjects to:

- develop an increased callousness toward women;
- trivialize rape as a criminal offense;
- develop distorted perceptions about sexuality;
- develop an appetite for more deviant, bizarre, or violent types of pornography;
- devalue the importance of monogamy; and
- view non-monogamous relationships as normal and natural behavior.[28]

Another study of child molesters and rapists suggested that as many as one third of those studied claimed to have been incited to commit an offense by viewing pornography.[29] Some research suggests that exposure to pornography during childhood is connected to the likelihood of sexually transmitted disease, unplanned pregnancy, and sexual addiction later in life.[30]

These studies suggest that pornography serves as a form of destructive sex education, but Judith Levine, Marjorie Heins, and other civil libertarian

social activists have argued that they are not without methodological problems. Importantly, links do not imply causation, and the long-term studies here are limited insofar as they study those already affected, thus inviting the chicken-or-egg question: do sexual deviants like pornography, or does pornography create sexual deviants? Also, there is reason to believe that sexual identity is a product of a complex web of influences, including family life, education, and involvement in various types of communities. This is to say that even prolonged exposure to pornography is certainly one form of sex education among many, and though it has addictive potential, it cannot clearly be identified as a *primary* cause of sexual deviance.[31] Millions view pornography every day, but comparatively few commit acts of sexual assault as a result.

Also, beyond acts in which there is a clear victim such as sexual assault or child molestation, deviance is in the eye of the beholder; as with legal definitions of obscenity, the subjective nature of the claims are legally problematic. Not all of the behaviors noted above are recognized as disordered, even by many Christians. While monogamy is a generally recognized norm, and "bizarre" sexual activities are, by definition, unusual, absent a clear community standard, it is hard to say what contributes to overall well-being, sexually speaking. Until recently, homosexuality was a recognized psychological disorder, but it has been increasingly normalized to the point that even many churches are divided about its acceptability. While many would identify bondage and sado-masochism as "bizarre" behavior, there is little doubt that many otherwise "normal" monogamous married couples indulge in such practices now and then. It is telling that while the legislation in question has focused on *sexual* material, the intellectual debate about media effects on moral development has tended to focus more on the effects of media *violence,* where questions of right and wrong are much easier to address objectively. In other words, the widespread disagreement over sexual norms makes legislation controversial absent a clear, compelling state interest.

This disagreement may be why liberal Protestants have not been visibly active in obscenity issues, circumscribing sexual morality as a "private" matter, even as Catholics and evangelicals have argued for its public relevance. Those Christians who have supported restrictive legislation do not all think the same way about their endeavors, but generally speaking there are a couple of essential ecclesiological ideas in play. Some think of the church as an interest group—in this case, a group of people coming together to assert their right not to be exposed to certain things. Also involved are parents' expectations that the state will take reasonable measures to assist in fulfilling certain types of parental responsibilities. This is indirectly an

educational issue, and just as the state provides schools, parents can expect that it will act to regulate potentially harmful educational influences, as discussed further below.

Slightly more complex, both legally and theologically, is the belief that the Christian tradition is the bearer of an objective moral truth that is publicly relevant, even separated from its moorings in faith. Since John Courtney Murray provided Catholicism with the theoretical resources to rethink its position in a secular democracy, American Catholics have relied on the natural law tradition to argue for universally relevant moral truths that can be advocated in the public square with nondoctrinal arguments. While Protestants do not tend to embrace natural law reasoning as often, they may nonetheless see Christian sexual ethics as a kind of moral wisdom relevant to family and community stability. In this regard, it is a cultural power that the state should value and support within certain limits.

The spiritual questions surrounding sexual morality, therefore, can be said to have public import, and as a spiritual question, sexual habituation has long been a concern for the Christian tradition. While the gospels have very little to say about sexual norms directly, Paul does display concern with sexual immorality. In the Corinthian correspondence, Paul addresses several issues facing the nascent church, and his responses at once show a pragmatic flexibility and a keen concern that sexuality is a phenomenon with the peculiar power to destabilize a community (1 Cor. 5–7). Paul clearly prefers celibacy above even marriage, but he knows that very few are recipients of such a gift (1 Cor. 7:1–6). Therefore, he sees the value of channeling and disciplining sexual appetites with marriage. Here, as with other issues, Paul does not produce a rule-based ethic; he instead approaches sexual ethics with an eye toward the edification of community. Implicit in this approach is the recognition that satisfaction of sexual desires is not, theologically speaking, a right, and that those desires have a power, perhaps unique, to turn one away from God, to the detriment of the relationships with one's brothers and sisters in the church. In his letter to the Romans, Paul recognizes certain sexual appetites as themselves the consequence of idolatry, the disordered desires that result from worshiping some aspect of creation rather than the Creator (Romans 1:18–32).

Augustine schematizes this insight from Paul, recognizing sexuality as a lesser good, though one that Augustine himself struggles mightily with, to the point that it prolongs the "birth pangs" of his conversion, and he famously prays, "Grant me chastity and continence, but not yet."[32] Oddly, it never seems to occur to Augustine upon his conversion to marry his son's mother, to whom he seems to have been faithful as a concubine for over ten years. As with Paul, Augustine recognizes celibacy as the highest calling

of a Christian, with marriage a lesser good through which God transforms the evil of lust through procreation, friendship, and the sacramental bond.[33] Ultimately Augustine appears unable to reconcile a deep spiritual commitment to God with sexual pleasure; "original sin" is to a large extent the taint of sexual desire passed on to every person. Sexual immorality, therefore, can be said to hinder the development of harmoniously functioning community unless disciplined and sublimated to a higher good.

While this is not the place for an elaborate history of Christian sexual ethics, a review of these two foundational thinkers provides a useful baseline from which to address the contemporary American church's interest in restricting access to obscene material. Of course, relatively few contemporary American Christians point directly to Augustine as an authority for sexual ethics; nonetheless, his formulation of the tradition was tremendously influential, and his concerns and language continue to be the lenses through which we view the New Testament. Protestant Christians expressly rely on the biblical texts, particularly Paul, as an authority on sexual matters, and Augustine's influence cannot be ignored, even in contemporary critical scholarship.

Catholic sexual ethics rely on scripture, but they are more expressly grounded in natural law. The most important statement has been *Humanae Vitae,* Pope Paul VI's 1968 encyclical, which identifies two inseparable purposes for human sexuality—procreation and unitive intimacy. By centering on procreation, the Magisterium ties sexual expression to marriage and argues that disciplined, monogamous sexuality is key to full human flourishing. The Catholic position also ties sexual ethics to social stability, arguing that governing authorities should act to support the strength of the family unit. Such support includes the restriction of pornography, which inhibits proper habituation to virtuous sexual practices.[34]

Whatever one may think of its particular conclusions, the Christian tradition makes a connection between the sexual and political, and Augustine's influence on the later scholastics and established Christianity shows his importance to the very concept of public regulation of sexuality. So when the church enters the public sphere to advocate for a particular vision of well-being, it brings together sexual morality, state power, and religious devotion in a potent amalgamation—one that at times makes it difficult to discern exactly whose interests are being served.

STATE, CHURCH, AND PARENTAL INTERESTS

The contemporary American Christian agenda regarding "family values," typically understood, finds support in the classical Christian theological tra-

dition, albeit ambiguously. Paul and Augustine privilege celibacy over marriage, and both view marriage as an arrangement for the control of lust. Whether premarital sex is expressly forbidden by following this logic is open to debate. Sexual norms certainly were prescribed by the medieval church, which used natural law to complement the biblical asceticism of the ancient tradition; while the Protestant traditions largely rejected scholastic theology, its sexual norms remained influential even as their natural law foundations were dismissed.

Nonetheless, the tradition does not speak as unanimously about sexuality and the family as is often presumed by many American Christians. Prior to the Victorian period, the Anglo-American norm was a progressive commitment in stages, often featuring sexual consummation at a "betrothal" stage before marriage.[35] The recognized norm for family life—"the nuclear mother-father team in intact first marriages"—is relatively new, even as it is changing rapidly in response to economic and cultural forces.[36] It is worth considering to what degree the norm itself was the product of non-religious influences, and to what degree Christians' evolving moral standards surrounding sexuality and family life are the product of "colonization" by state and market forces.[37]

Therefore, for Christians and other interested religious persons, "traditional" sexual and family values demand evaluation in their own right in advance of deciding how the widespread availability of obscene material may serve to degrade those values. Certainly much of the confusion and disagreement in the church over issues of sexual morality originate in the tradition's failure to articulate a coherent theological understanding of physical pleasure. Sexuality has remained inextricably bound to procreation—a connection better supported by natural law than by the New Testament—and Christians have failed to make sense of purely erotic pleasures.[38] Despite a recent evangelical emphasis on sexual satisfaction in marriage, there is reason to believe that the church's longtime stigmatization of sexuality is itself a factor in the cultivation of sexual disorders and the transmission of sexually transmitted diseases. Some have argued that the church's failure to educate its children adequately about sexuality means other influences, including illicit and pornographic material, are left to fill the vacuum. As noted above, pornography is at most one source of sexual education among many; from a theological point of view, its detrimental influences may be exacerbated by the church's failure to marshal its own disciplinary resources in support of a spiritually healthy appreciation of the erotic.

From the "church" side of the church-state issue, therefore, there is a key ecclesiological question that involves layers of complexity. Whether Christi-

ans can use their political influence to harness state power in support of an essentially spiritual matter is a theological question as much as a legal one. Some Christians argue that it is up to the tradition to make its way in the marketplace of ideas, suggesting that using state power in this way taints the spiritual enterprise. If there is a Christian understanding of moral harm that holds up objectively in the public sphere, however, the church could be offering a public service to civil society by encouraging media restrictions. The state's interest may be more indirect. The Christian vision of sexual and family morality could ultimately promote social stability, to the state's benefit. However, it may be that the state's responsibility here is to protect free exercise of religion—if free exercise can be said to include the religious person's right not to see certain types of cultural products or to protect his or her children from exposure to the same. Even the free-exercise case for protecting children hinges on making a theological case against pornography.

Insofar as the issue of restricting access to obscene material is a matter of protecting children, the question is how such material may impede the cultivation of Christian character. Speaking generally, it is in the church's interest to educate children to be members of the body of Christ, participants in the holy community of God. Following Paul, the community is edified to the degree that its members embody the way of the cross, which is mutual self-sacrifice. The question, then, is what pornography may teach contrary to this end. There are three obvious conflicts.

First, pornography reinforces an assumption common to contemporary American society, namely that there is a right to sexual satisfaction. Disagreements over homosexuality often turn on just this question—whether the "natural" existence of a desire implies the right to pursue its fulfillment. Recognizing the power of consumptive desire, pornography contributes to the commodification of sexuality, reducing to a product what should be, theologically speaking, a gift subject to stewardship. This transformation is the logic of the market, but it is problematic for the edification of the Christian community, which relies on the sublimation of desire to sacrifice. The pursuit of sexual satisfaction in this way reinforces selfishness and jealousy in members of the community, and children learn that their identities as consumers are prior to their spiritual commitments.

Related to the first issue are the problematic implications for the status of women. The commodification, objectification, and degradation of women, which is common in pornography, if sometimes only implicitly, is unacceptable to Christians across the theological spectrum. One could argue that detaching sexuality from personal identity, male or female, is to do

violence to the integrity of the creature, but given the historical oppression of women, pornography is even more threatening to their status, both as persons worthy of virtue and respect and as sexual beings.

Finally, pornography also encourages viewers to detach sexual activity from its moral consequences. Sex carries with it a relational vulnerability that implies responsibility for both the body and the spirit of one's partner. Although the tradition has not done much to integrate the idea of nonprocreative erotic pleasure, it is wise to have recognized that the possibility of creating children remains the most serious potential moral consequence of sexual activity. To this end, the recent evangelical campaigns promoting sexual satisfaction within marriage serve to strengthen families and thus support the welfare of children. While absolute rules about premarital sex may or may not be integral to discipleship, the habitual detachment of sexual activity from interpersonal commitment, as modeled by pornography, certainly is not countenanced by the church.

Taking these issues into consideration, the church still must consider what exactly is the state's interest in supplementing the church's internal disciplinary resources by limiting the promulgation of certain types of cultural products. Do church and state seek to create the same kind of person? How does children's exposure to certain types of cultural materials bear on this question? Here an important observation requires us to shift the terms of the debate: while both legislation and the political muscle of the church have been focused on sexually explicit material, the academic debate surrounding the potential harm to children focuses on violence.

One certainly could argue that the state has a legitimate interest in promoting a certain vision of sexual morality and that its ends comport well with the church's in some ways. Still, while the promotion of stable families and the control of the spread of disease are in the interest of the state, the demands of a free market economy encourage liberal divorce laws, two-career families, and the sexualization of the entertainment and advertising industries. It could be argued that the state's disproportionate interest in sex over violence reflects the church's priorities, if not the New Testament's, but it is worth wondering if this is an area where Christian ethics has been colonized by state interests.

In discussing the conflict between free speech and the protection of children, the academic argument shifts away from pornography to the effects of media violence on child development, despite the fact that the legislative history of the issue and its attendant religious support clearly focus on sexual material. Even the media outlets that have successfully avoided state regulation by adopting voluntary ratings and control systems tend to take sexual content more seriously than violence. The best known—and argu-

ably most successful—of these systems, the Motion Picture Association of America's voluntary ratings system, includes violence as a factor, but is much more restrictive toward sexual content.[39]

When legislatures *have* moved to restrict minors' access to media depicting violence, the courts have held that unlike sexual obscenity, violent expression *is* protected by the First Amendment. The legal definition of obscenity encompasses only sexually explicit material, while attempted legislation with almost exactly the same standards of judgment about violence has been struck down. Missouri's 1993 law restricting violent movie rentals to minors appealed to "contemporary community standards" as a measure, and it restricted violent material lacking "serious literary, artistic, political, or scientific value."[40] The courts overturned the law, however, expressly disagreeing with Missouri's attempt to connect violence with previous legal restrictions on obscenity: "Obscenity, however, encompasses only expression that 'depicts or describes sexual conduct.' Material that contains violence but not depictions or descriptions of sexual conduct cannot be obscene."[41] While First Amendment protection of violent speech is not absolute,[42] there are certainly fewer restrictions, meaning easier access for children.[43]

This situation is all the more astounding given that there is far more evidence to suggest media violence is harmful to children than there is suggesting pornography is harmful. While many of these studies only show short-term connections, several have attempted to overcome the logistical obstacles to make a long-term connection between media violence viewed by children and aggressive or criminal behavior in late adolescence and adulthood.[44] Longitudinal studies on the issue are particularly difficult to construct, however, leading some to challenge the methodologies of the most influential studies and describe their claims of proven harm to children as "bogus."[45] Nonetheless, there are many more studies and many more connections, however tenuous, suggesting violent material is objectively harmful to children, yet such material receives constitutional protections not afforded to sexual expression.

Even if the long-term harmful effects of violent media cannot be definitively demonstrated, the church does have something at stake in the normalization of violence. For most of its history, Christianity has not embraced pacifism, though even at the height of religious establishment, the church put a check on violent power, including that of the state. To some degree, however, the legacy of the Reformation is the division of the self into public and private spheres, and while the church may be free to hold sway in the latter, the state has set the terms of participation in the former. Caesar holds his office by virtue of the sword, and the only true "public"

is a sphere where an institutional body claims a monopoly on the legitimate use of violence.[46] The peace prescribed by the Gospel is therefore only a private peace, one enabled and protected by the threat of violence standing behind public order.

Normalized violence, in other words, speaks to the privatization of religious identity. For the church, what is at stake is not so much the potential that the child viewing violent films or playing first-person shooter games will show notable short-term aggressiveness, or even eventual sociopathic tendencies as an adult; rather, the church's concern is the way violent media serve as a form of moral education. The Hollywood action hero often teaches the child that violence is the answer to any of a number of dilemmas, a moral lesson that stands in striking contrast to the New Testament.[47]

This issue of course stirs up broader ecclesiological concerns about Christian participation in governance and the church's attempting to influence or co-opt state power for moral ends, but perhaps the theological danger here is subtler. It could be that the state has allowed the media restrictions in question because it has some stake in normalizing some broadly drawn picture of sexual well-being, but it also could be that the state has allowed the church a degree of power in defining and controlling sexually explicit media to prevent Christians from turning their gaze on the state's stake in perpetuating the connection between moral authority and violent power. A child habituated to killing aliens in *Halo* is of more potential use to the state than a child who models Jesus' apparent pacifism.

This disproportionate concern with sex over violence casts doubt on the suggestion that the state's role in obscenity restrictions is really limited to supporting parents in their freedom to raise children as they see fit. In some sense, it is the state's mission in a liberal polity to *inhibit* the parents' rights in this regard. While the purveyors of sexually explicit or violent media products may not have absolute First Amendment rights to distribute, children may have "developmental" rights to view some material. While the political reality is that very few politicians would openly challenge parental rights to raise children in a particular moral or religious way, it is certainly an open legal question to what degree children have a say in their own moral and religious growth. This is to say that as far as the state is concerned, parents' rights to raise their children may be only "rights-in-trust"—children's own rights legally entrusted to another agent who is ultimately subject to review by the state.[48] The legal history of the matter centers on the producers' rights to create and distribute the material, but comparatively little attention has been paid to whether children have a right to view it. Therefore, the state's mandate is unclear, as it must weigh its

involvement with respect to the parent's right to raise a child a certain way, the child's right to have a say in what kind of adult he or she will become, and the state's interest in self-perpetuating its authority to decide. The church's legal status is dependent upon its persuasive power over these other entities, and as such it faces the danger of being morally colonized by any of them.

CONCLUSIONS

The church of course is a community with its own standards, though its identity with regard to sexual mores and its relationship with the state are both highly contentious matters. Using the state apparatus to shield children from exposure to sexually explicit material is a complex issue in part because sexual morality is itself a divisive issue for the church. The internal ecclesiological tensions wrought by the lingering effects of religious establishment, however unofficial in the American context, deepen the complexity further still. Both sexual morality and the relation of the church to the state have to account for the ambiguity of the New Testament witness, especially the problem of how a collection of writings produced from a position of political weakness translates to a contemporary democratic polity.

Culturally speaking, disestablishment is not a complete process in America, and it likely never will be. This is especially true now in the midst of an American evangelical revival, which like other revivals tends to identify the church closely with American national identity. If America is a "Christian nation," as many would like to think of it, then it is easier to direct the resources of the state to aid in the cultivation of Christian character. When it comes to children, it may be reasonable for the church to ask the state to regulate certain types of material. What should be clear, however, is that there is a price to be paid in doing so, and the state may be more willing to aid the church in some areas than others, perhaps in part to preserve its own interests.

The recent defeat of the Child Online Protection Act certainly will not be the end of the issue. The mainstreaming of pornography in American culture continues, helped along by technological developments, and the largely libertarian ethos of the Internet is coming under increasing scrutiny by advocates of "common decency" in public discourse. America's appetite for sex and violence is matched by its need to protect the welfare of its children, and both church and state strive to determine their role in shaping the future of American culture.

NOTES

1. Thomas P. Oakley, "The Cooperation of Mediaeval Penance and Secular Law," *Speculum* 7, no. 4 (1932): 515–24; Floyd Seyward Lear, "Blasphemy in the *Lex Romana Curiensis*," *Speculum* 6:3 (1931): 445–59.

2. *Regina v. Hicklin,* 3 Queens Bench 360, 362 (1868).

3. *An Act for the Suppression of Trade in, and Circulation of, Obscene Literature and Articles of Immoral Use,* c. 258, §2, 17 Stat. 598, 599 (1873).

4. *United States v. Dennett,* 39 F.2d 564, 568 (2d Cir. 1930).

5. *United States v. One Book Called "Ulysses,"* 5 F. Supp. 182, 183–185 (S.D.N.Y. 1933), affirmed, *United States v. One Book Entitled Ulysses by James Joyce,* 72 F.2d 705 (2d Cir. 1934).

6. *Roth v. United States,* 354 U.S. 476, 487 (1957).

7. *Jacobellis v. Ohio,* 378 U.S. 184, 192–195, 197 (1964).

8. *Stanley v. Georgia,* 394 U.S. 557, 566–568 (1969).

9. Bob Woodward and Scott Armstrong, *The Brethren* (New York: Simon & Schuster, 1979), 193–200.

10. *Miller v. California,* 413 U.S. 15, 24–25 (1973).

11. *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 57–63 (1973); citing *Steward Machine Co. v. Davis,* 301 U.S. 548, 590 (1937).

12. *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 103 (1973).

13. *City of Renton v. Playtime Theatres,* 475 U.S. 41 (1986).

14. *Jacobellis v. Ohio,* 378 U.S. 184, 192–95 (1964).

15. Robert D. Putnam, *Bowling Alone: The Collapse and Revival of American Community* (New York: Simon & Schuster, 2000), 148–180.

16. *Ginsburg v. New York,* 390 U.S. 629, 639–643 (1968).

17. David Archard, "Free Speech and Children's Interests," *Chicago-Kent Law Review* 79, no. 1 (2004): 83–102.

18. *FCC v. Pacifica Foundation,* 438 U.S. 726, 746–751 (1978).

19. *Communications Act of 1996*, 110 Stat. 133, 47 U.S.C.A. (Supp. 1997).

20. *Reno v. ACLU,* 521 U.S. 844 (1997).

21. Matt Moore, "Construction on Online Back Alley Halted," http://www.boston.com/business/articles/2007/03/30/icann_set_to_vote_on_xxx_domain/.

22. 47 U.S.C. 231.

23. *Ashcroft v. ACLU,* 542 U.S. 656 (2004).

24. *ACLU v. Gonzalez,* F3d. (2007).

25. *U.S. v. American Library Association,* 539 U.S. 194 (2003).

26. Following references to the brief may be found at www.aclj.org/Cases.

27. Victor B. Cline, "The Effects of Pornography on Behaviour," http://www.c-a-s-e.net/The%20Effects%20of%20Porn.htm.

28. D. Zillman and J. Bryant, "Pornography's Impact on Sexual Satisfaction," *Journal of Applied Sociology* 18, no. 5 (1988): 438–453; D. Zillman and J. Bryant, "Effect of Prolonged Consumption of Pornography on Family Values," *Journal of Family Issues* 9, no. 4 (1988): 518–544.

29. W. L. Marshall, "The Use of Sexually Explicit Stimuli by Rapists, Child Molesters, and Nonoffenders," *The Journal of Sex Research* 25, no. 2 (May 1988): 267–288.

30. Donna Rice Hughes, "How Pornography Harms Children," available at www.protectkids.com/effects/harms.htm.

31. For a controversial treatment of the issue, see Judith Levine, *Harmful to Minors: The Perils of Protecting Children from Sex* (Minneapolis, MN: University of Minnesota Press, 2002); also Marjorie Heins, *Not In Front of the Children: "Indecency," Censorship, and the Innocence of Youth* (New York: Hill and Wang, 2001), 243–253.

32. Augustine, *Confessions,* trans. Henry Chadwick (New York: Oxford University Press, 1991), 145.

33. Augustine, *St. Augustine on Marriage and Sexuality,* ed. Elizabeth Clark (Washington, D.C.: The Catholic University of America Press, 1996), 45–55.

34. Paul VI, *Humanae Vitae* (1968), http://www.papalencyclicals.net/Paul06/p6humana.htm. For a more recent Catholic warning of the dangers of pornography, see Bishop Robert W. Finn's pastoral letter *Blessed Are The Pure In Heart* (2007), http://www.catholicculture.org/docs/doc_view.cfm?recnum=7438.

35. Adrian Thatcher, "When Does Christian Marriage Begin? Before or after the Wedding?" *The Witness* 83, no. 4 (April 2000): 20–22.

36. Don S. Browning and Carol Browning, "The Church and the Family Crisis: A New Love Ethic," *Christian Century* 108 (August 7–14, 1991): 746–749.

37. Don S. Browning, *Christian Ethics and the Moral Psychologies* (Grand Rapids, MI: Eerdmans, 2006), 222–225; see also Alan Wolfe, *Whose Keeper? Social Science and Moral Obligation* (Berkeley: University of California Press, 1989).

38. Mark D. Jordan, *The Invention of Sodomy in Christian Theology* (Chicago: University of Chicago Press, 1997), 166–176.

39. Kirby Dick, Director, *This Film Is Not Yet Rated* (2006).

40. *Mo. Rev. Stat.* § 573.090 (2003).

41. *Video Software Dealers Ass'n v. Webster,* 773 F. Supp. 1275 (W.D. Mo. 1991), *aff'd* 968 F.2d 684 (8th Cir. 1992).

42. Gloria Tristani, "On Children and Television: Keynote Address, Annenberg Public Policy Center's 5th Annual Conference on Children & Media, Washington, D.C., June 26, 2000," http://www.fcc.gov/Speeches/Tristani/2000/spgt009.html.

43. See also Jessalyn Hershinger, "State Restrictions on Violent Expression," *Vanderbilt Law Review* 46, no. 2 (1993): 473; Kevin W. Saunders, *Violence as Obscenity: Limiting the Media's First Amendment Protection* (Durham, NC: Duke University Press, 1996).

44. Amitai Etzioni, "On Protecting Children from Speech," *Chicago-Kent Law Review* 79, no. 1 (2004): 34–39.

45. Marjorie Heins, "On Protecting Children—From Censorship," *Chicago-Kent Law Review* 79, no. 1 (2004): 239–249.

46. William T. Cavanaugh, "'A Fire Strong Enough to Consume the House': The Wars of Religion and the Rise of the State," *Modern Theology* 11, no. 4 (October 1995): 397–420.

47. Richard B. Hays, *The Moral Vision of the New Testament: Community, Cross, New Creation* (San Francisco: Harper San Francisco, 1996), 317–346.

48. See Joel Feinberg, "The Child's Right to an Open Future," in *Whose Child?: Children's Rights, Parental Authority, and State Power,* ed. William Aiken and Hugh La Follette (Totowa, NJ: Rowman & Littlefield, 1980); see also Archard (2004).

FURTHER READING

The legal and social issues surrounding obscenity restrictions are debated in the *Chicago-Kent Law Review* 79:1 (2004) in a symposium somewhat inaccurately named "Do Children Have the Same First Amendment Rights as Adults?" Guest editor Amitai Etzioni makes a communitarian proposal for restrictions, and a number of scholars respond in an effort to tease out the various legal and philosophical issues at play, including the legal status of children as compared to adults. The symposium is somewhat limited to the Internet questions, and it is notably lacking an explicitly religious voice. One of the participants is Marjorie Heins, director of the Free Expression Policy Project at the National Coalition Against Censorship. Heins' book, *Not In Front of the Children: "Indecency," Censorship, and the Innocence of Youth* (New York: Hill and Wang, 2001), is an argument against restrictions. Heins includes a legal history and a thorough review of the sociological and psychological studies used by those who have wished to regulate speech in the interest of protecting children. Judith Levine's *Harmful to Minors: The Perils of Protecting Children from Sex* (Minneapolis, MN: University of Minnesota Press, 2002) is a controversial argument about the need to recognize the realities of children's sexuality; she suggests that the Christian Right promulgates fear and misinformation in an effort to force its morality on others through state power. The opposite point of view is ably presented by the Family Research Council (www.frc.org) in a number of pamphlets and position papers. The relevant Supreme Court cases have been collected in *Obscenity and Pornography Decisions of the United States Supreme Court* (San Diego: Excellent Books, 2000). For an in-depth examination of moral education and state power as related to theological concerns, see Don S. Browning, *Christian Ethics and Moral Psychologies* (Grand Rapids, MI: Eerdmans, 2006).

6

School Vouchers in America

Michael Coulter

In recent decades, some religious leaders, economists, activists, and politicians—mostly associated with the conservative movement—have promoted the idea that parents should be given some financial assistance in placing their children in the school—public or private—of their choice. Often, the assistance advocated is a voucher given to parents that could be redeemed at a school of their choosing. Some advocates urge that vouchers should be made available for all children while others only promote the idea in areas with troubled public school districts or limit vouchers to those of modest means. Some suggest that the assistance to parents should take the form of a tax credit. That is, parents would get some reduction of their tax liability (either state or federal) because they have paid private school tuition. There have only been a few school voucher programs and a few tuition tax credit programs enacted in the United States, and in comparison to the total number of students they have affected only a small portion of school-age children. However, as a political and social issue, vouchers have been greatly significant in the past few decades, generating controversial court decisions and political battles in legislatures as well as mobilizing interest groups and voters concerning the issue.

There are several issues involved in the school choice debate. Some proponents of school choice argue that the current system of delivering education, in which most students attend the government school to which they are assigned because of their residence, leads to schools functioning like a monopoly. There is little competition between schools and therefore little

incentive to provide quality service. The central premise of this argument is that competition will lead to greater quality. Other school choice proponents argue that religious parents should be able to choose schools for their children that reflect and reinforce the religious beliefs of their children rather than sending their children to public schools that have come to be regarded as, at least in some instances, hostile to religion. Both sets of proponents assert that choice programs should permit parents to choose private schools, and in the United States the vast majority of private schools are either operated by a church or by those with strong religious commitments. Because choice proponents want vouchers or tax credits to assist those choosing religious schools, this has generated opposition to school choice on the grounds that aid to private religious schools would violate the First Amendment's Establishment Clause because the state would be supporting religious organizations. Rather than focusing on economic theory or the impact of choice on academic performance, this essay will focus on the intersection of the school choice debate and church-state issues. Instead of interpreting vouchers as a violation of the Establishment Clause, as many legal observers would have reasonably anticipated, the U.S. Supreme Court and some state courts have accepted vouchers and tax credits as being consistent with constitutional precepts separating church and state. The debate over the practicality of school vouchers continues because powerful interests argue that it is not a good use of public money or that choice programs will harm public schools.

BACKGROUND

Elementary and secondary public education in the United States developed around "common schools" that were largely supported with local tax revenues. These schools, as they evolved in the nineteenth century, were largely supportive of the Protestant culture of which they were a part.[1] During the latter half of that same century, American Catholics developed an extensive parochial school system that educated many Catholics. Other groups with strong identities such as Jews, Lutherans, and Dutch Calvinists also developed systems of private education, although these systems were often limited to particular areas and educated fewer children than those in Catholic schools. These schools were strongly supported by their sponsoring religious organizations, and adherents of those religious groups were strongly encouraged to enroll their children in those schools. While there were many private schools—both religious and non-religious—most children in the United States were educated in public schools.

There was intermittent pressure in the late-nineteenth and early-twentieth centuries for state support of religiously-affiliated schools, because during this same time period there was increasing financial support for public education. In response to the possibility of public support for religious schools, there was a movement to enact legal provisions, generally known as "Blaine Amendments," prohibiting public funds for sectarian schools. These were named after Maine politician James G. Blaine, who as Speaker of the House proposed in 1875 an amendment that would have prohibited any federal funds from going to sectarian schools.[2] The proposed amendment passed the House of Representatives 180–7, but it failed in the Senate. States then considered their own Blaine Amendments and 37 states have since incorporated some form of the provision into their state constitution.[3] At that time, the Blaine Amendments were directed against attempts for the direct support of religious schools; these amendments became important in the later political battles over school voucher programs.

The US Supreme Court addressed the constitutionality of prohibiting religious schools altogether in *Pierce v. Society of Sisters* (1925) when it overturned a 1922 Oregon law that required all 8- to 16-year-olds to attend a public school. This decision thus established the right of non-public schools to exist. The Supreme Court later entered the fray over support of private religious schools in its *Everson v. Board of Education* (1947) case. In this case the Supreme Court determined that reimbursing parents who paid for transportation for their children who were attending Catholic schools was constitutional. The Court stated that "the First Amendment has erected a wall of separation between church and state . . . that wall must be high and impregnable . . . [but] New Jersey has not breached it here." The court compares this support of parents to the general protection provided to the citizens by policemen and firemen. During the first half of the twentieth century, any attempt to assist parents who have chosen private schools was usually in some form of direct government assistance to the school or provisions of services, such as busing, to parents. Vouchers were not part of the political debate.

Vouchers first were promoted not by someone operating private religious schools, but by an economist. Milton Friedman, a professor at the University of Chicago from 1946 to 1976 and a recipient of the Nobel Memorial Prize in Economics in 1976, suggested the development of voucher programs in his 1955 essay, "The Role of Government in Education."[4] According to Friedman, a voucher system "would bring a healthy increase in the variety of educational institutions available and in competition among them."[5] There is little evidence that the argument attracted much attention

at the time. Friedman republished with only slight revision the 1955 piece in his 1962 work, *Capitalism and Freedom*. This work was widely read and discussed at the time in publications associated with the conservative and libertarian movements, such as the *National Review*.

In 1957, Virgil Blum, S.J., a professor of political science at Marquette University, began promoting vouchers when he founded Citizens for Educational Freedom. He is the first to initiate a public campaign for vouchers. He published *Freedom of Choice in Education* in 1958, wherein he argues on both religious and civil liberty grounds that parents should have assistance in choosing schools for their children. In 1973, Blum founded the Catholic League for Religious and Civil Rights, and until the time of his death in 1990 that organization actively promoted vouchers.

During the 1960s, the U.S. Supreme Court made some important decisions affecting public schools which, while not directly regarding school vouchers or tax credits, are important for the emerging voucher movement. In *Engel v. Vitale* (1962) and in *Abington v. Schempp* (1963), the U.S. Supreme Court ruled, respectively, that compulsory Bible reading and prayers led by teachers were violations of the First Amendment's Establishment Clause. Some critics of these decisions directed political activism towards re-establishing prayer and other forms of religious expression in public schools. Other conservative Protestants—many of whom could be characterized as members of the New Right—began establishing new networks of private religious schools, so that their children would have an education that is integrated with religious belief.[6] Some supporters of these new religious schools joined Catholics in supporting vouchers.

In the 1970s vouchers developed a growing following. The White House's Office of Economic Opportunity sponsored a voucher program (which did not include sectarian schools) for a brief period beginning in 1970. In 1972, New York established the Elementary and Secondary Education Opportunity Program. This provided per-pupil grants to private schools that primarily served low-income populations, and it provided a partial tuition reimbursement to low-income parents who sent their children to those schools. In *Committee for Public Education v. Nyquist* (1973), the U.S. Supreme Court struck down this New York law as violating the First Amendment's Establishment Clause. In 1972, some California parents filed suit against the State of California for not having a voucher program. They claimed that the lack of such a program constituted a violation of free exercise and equal protection rights. This suit was rejected by the Ninth Circuit Court of Appeals. Michigan voters placed a voucher initiative on the ballot in 1978. California placed a voucher question on the ballot in both 1980 and 1982. All three of those ballot questions failed, however.

Senators Robert Packwood (R-Oregon) and Daniel Patrick Moynihan (D-New York) introduced a tuition tax credit bill in 1977 at the urging of Blum and other Catholic leaders, but it failed to become law.

REAGAN'S ADVOCACY OF SCHOOL CHOICE

In his 1980 campaign for the presidency, Ronald Reagan expressed support for vouchers and tuition tax credits, positions he continued to endorse, and even legislate, while in office. Reagan supported vouchers because it was important to both religious conservatives and to economists, two groups that were an important part of the Reagan coalition. According to *Congressional Quarterly*, Reagan pushed for voucher and tax credit measures in each Congress from 1981 to 1986. In 1983 he gave the most attention to vouchers and tax credits with several public statements in support of them. On March 12, 1983, Reagan devoted his weekly radio address to improving education, touting a forthcoming "education package" that contained several proposals. Reagan endorsed tax credits, which would have allowed a reduction in tax liability for those who paid local school taxes and who paid for private school tuition. He then added: "Second, we're proposing a voucher system to help parents of disadvantaged children."[7] The program would have allowed parents in poorer school districts to make use of federal funds sent to their district to pay for tuition at private schools in their area. On April 7 of that year, Reagan offered brief remarks at a meeting of the National Catholic Educational Association where he spoke of the voucher proposal for disadvantaged parents. He added that "if anyone realizes the need for free parental choice, it is the Catholic community."[8] On April 26, 1983, upon receiving the report, *A Nation At Risk*, which was produced by the National Commission on Excellence in Education in 1983, Reagan reiterated his call for vouchers and tuition tax credits so that parents would have choices; he also believed that competition would lead to improvement in schools.[9] In another radio address just a few days later, April 30, 1983, Reagan once again repeated his call for vouchers and tax credits.

For what were likely both policy and political reasons, he strongly supported means to enable parents to send their children to non-public schools. In no public comment does Reagan seek to explain how programs that would have supported students attending private religious schools were not a violation of Establishment Clause, even though others, such as Americans United for Separation of Church and State, asserted such programs to be violation of the Constitution. The proposals were not passed out of Congress during Reagan's time in office.[10]

Tax credits and vouchers remained important for the Republican coalition as those issues were included as part of the Republican platform throughout the 1980s and 1990s. For example, in the 1984 Republican Platform, it is stated: "We offer hope, not despair; more opportunities for education through vouchers and tuition tax relief." The 1988 Platform statement also strongly supports vouchers, saying that "choice and competition in education foster quality and protect consumers' rights" and that "states should consider enacting voucher systems or other means of encouraging competition among public schools."

THE MILWAUKEE PARENTAL CHOICE PROGRAM (MPCP)

While vouchers had been proposed at the state level during the 1970s and 1980s, both in legislatures and before voters in the form of initiatives, no program had been enacted during that time. Wisconsin became the first to do so with the enactment of the Milwaukee Parental Choice Program in 1989. As first established by the Wisconsin legislature, the program permitted those attending Milwaukee Public Schools (MPS) to attend another public school or a private non-sectarian school. Eligible students, who could comprise no more than one percent of the total students in the MPS, had to be members of families whose household income was less than 1.75 times the federal poverty level. The program was framed as means of helping poorer families rather than helping religious families choose religious schools. As first enacted, students could choose to attend only a non-sectarian private school. When a student chose to attend a private school, the school received the per-student state aid that would have otherwise gone to the MPS. Participating schools had to accept this amount as the total tuition charge for each student. During the 1990–1991 school year, 334 students participated in the program, attending eleven non-sectarian private schools. In 1993, the cap was increased to 1.5 percent of the total students in the MPS. In 1995–1996 nearly 1,600 students participated, attending seventeen schools. There were a number of legal challenges to the program during these years, including one arguing that the exclusion of sectarian private schools was a violation of the Equal Protection Clause of the Fourteenth Amendment, but these challenges had no impact on the law.

In 1995, as part of the budget bill, the MPCP was significantly revised by the Wisconsin General Assembly. The most important change was that sectarian schools could participate in the program and the cap on participation was raised to fifteen percent of the students in the MPS. Furthermore, the State Superintendent had previously conducted investigations of participating private schools, and this supervisory role was limited in the 1995

revision of the law. There was also a change in the mechanism of payment to private schools. Under the amended law, payments from the state to the private schools would be sent to the private school, but issued in the name of the parent(s) or guardian of the child attending that school. Those checks would be "restrictively endorsed" to the school, which meant that parents had to sign them over to the school. This method of payment was devised so that funds would not go directly to the school from the state treasury. Finally, the amount paid to private schools would be the lesser of the per-pupil grant or the per-student cost at the private school. For example, in 2006–2007 eligible students could receive up to $6,501 dollars to spend at a participating school. These changes led to a dramatic expansion of this program. In 2006–2007, over 17,000 students chose to make use of the program, and they attended 124 different schools.[11]

When the law was changed to allow students to attend private sectarian schools, there were new legal challenges to the program. On January 15, 1997, Dane County (the county that includes Milwaukee) Circuit Court Judge Paul Higginbotham ruled that the newly revised MPCP was unconstitutional because it violated a provision of the Wisconsin Constitution which states that no "money shall be drawn from the treasury for the benefit of religious societies or religious or theological seminaries."[12] Higginbotham further argued that the schools which were operated by religious organizations and participated in the MPCP were an integral part of the religious mission of those churches. Supporting those schools would be supporting those churches. Higginbotham maintained that the religious organizations, not the students, would be the primary beneficiaries of the program. Moreover, even though the checks for tuition were written out to the parents, Higginbotham ruled that this still constituted direct aid to private religious schools.

Higginbotham's decision was affirmed by a Wisconsin appellate court in a 2–1 decision later in 1997. The Wisconsin Court of Appeals ruled that the MPCP violated the Wisconsin "Blaine Amendment" cited in Higginbotham's decision, but they did not issue as part of their ruling a determination of whether the MPCP was a violation of the U.S. Constitution's First Amendment. The dissenting judge in this case, Pat Roggensack, argued that the program violated neither the state for the U.S. Constitution with respect to church-state grounds.

The state of Wisconsin, as then led by pro-voucher Governor Tommy Thompson, appealed the decision to the Wisconsin Supreme Court. This court case attracted significant attention as a major voucher program hung in the balance. Arguing the case were some of the most vocal opponents and supporters of school voucher programs. The legal team defending the

MPCP included Kenneth Starr of the Washington law firm of Kirkland and Ellis and Clint Bolick of the Institute for Justice, a Washington, D.C., public interest law firm that has devoted significant resources to defending voucher programs. The legal team challenging the statute included counsel from the American Civil Liberties Union and Americans United for the Separation of Church and State. There were several *amicus curiae* (friend of the court) briefs submitted as attempts to influence the determination of the Wisconsin Supreme Court justices. For example, People for the American Way, a liberal advocacy group submitted a brief arguing that the MPCP was unconstitutional. There were several briefs submitted in favor of the program from groups such as the National Association of Evangelicals, the Christian Legal Society, Liberty Counsel, Focus on the Family, the Lutheran Church (Missouri Synod), and the Ethics and Religious Liberty Commission of the Southern Baptist Convention.

The Court ruled 4–2 in *Jackson v. Benson* (one justice did not participate in the decision) to uphold the MPCP. The majority opinion was aware of the many arguments for and against vouchers, but Justice Donald Steinmetz, who was elected to the Wisconsin Supreme Court in 1980 and again in 1990, asserted that the Court would focus only on constitutional issues. The majority opinion first addresses whether the MPCP violates the Establishment Clause. Applying the three-pronged constitutionality test established in the U.S. Supreme Court's decision in *Lemon v. Kurtzman* (1971), the high court in Wisconsin ruled that the MPCP has a secular purpose, namely improved educational performance, satisfying the first of *Lemon's* requirements.

Another prong of the *Lemon* Test regards whether a law has a primary effect of advancing religion. There have been some post-*Lemon* cases in which the U.S. Supreme Court has ruled that programs which distribute educational assistance to a wide range of parents and to both sectarian and non-sectarian schools are not seen as primarily advancing religion. Following these cases, the Wisconsin Supreme Court characterized the MPCP as having "neutral, secular criteria that neither favor nor disfavor religion" for those who can participate. The majority opinion states that parents have many options under this program, including other public schools and nonsectarian private schools. Here the opinion cites the *Everson* opinion when Justice Hugo Black states that "a policeman protects a Catholic, but not because he is a Catholic . . . [and] the fireman protects the church-school, but not because it is a church-school." The majority further states that money only reaches a school "as a result of the numerous private choices of the individual parents of school-age children." The majority opinion cites as significant the process whereby the voucher payments are made out in

the names of the parents and must be signed over to the school of choice. The Wisconsin Supreme Court held that the process of funding is "not some type of 'sham' to funnel public funds to sectarian private schools."

The final part of the *Lemon* Test concerns excessive entanglement of the state with religion. Excessive entanglement includes not only involvement in decision-making, but even close supervision of religious organizations that is likely to the change the behavior of those organizations. The Wisconsin Supreme Court ruled that there is not excessive entanglement because the reporting and auditing requirements of participating schools are minimal. The health and safety requirements for participating schools do not constitute excessive entanglement as they already exist for private schools in Wisconsin. The Court then ruled that the MPCP was consistent with the federal *Lemon* Test.

The Court then addressed whether the MPCP was a violation of the state constitution, which was at the heart of Higginbotham's ruling. The opinion states that the "no money from the treasury" clause, cited above, should be understood in a manner similar to the U.S. Constitution's Establishment Clause. In this sense, the majority asserted that previous Wisconsin Supreme Court rulings on its Establishment Clause did not erect a greater wall of separation than that found in the U.S. Constitution. The opinion then asked whether the MPCP primarily benefits religious institutions. The majority found "that the Supreme Court's primary effect test, focusing on the neutrality and indirection of state aid, is well-reasoned." The majority also found that there have been previous programs in Wisconsin where some educational assistance helped those at private sectarian educational institutions and that those have been accepted as constitutional. In sum, the MPCP's primary effect was not advancing a particular religion.

The Wisconsin Supreme Court considered some other constitutional issues—such as whether the clause calling for uniform public education was violated, whether the bill serves a public purpose which is not a specific passage of the constitution but rather a doctrine utilized by the Court, and whether the MPCP violates the Equal Protection Clause of the Fourteenth Amendment. None of these measures relates to church-state issues and on none of these grounds was the MPCP in violation of the state or federal constitutions.

At this point, *Jackson v. Benson* was the most important court decision in favor of a voucher program. Those who lost this case immediately appealed to the U.S. Supreme Court. On November 9, 1998, the U.S. Supreme Court announced that they would not hear an appeal of the case. This meant that only three or fewer of justices of the Supreme Court wanted to grant a Writ of Certiorari to those challenging the case.

THE OHIO PILOT PROJECT SCHOLARSHIP PROGRAM

After the MPCP was started and while it was being litigated, Ohio started a voucher program that would result in a significant U.S. Supreme Court decision. On June 28, 1995, the Ohio General Assembly adopted the Ohio Pilot Project Scholarship Program as part of a biennial budget bill for fiscal years 1996 and 1997. This program established a voucher program in any district under the direct management and supervision of the State Superintendent of Public Instruction due to mismanagement at the local level. In Ohio at that the time (and since), only one district has been subject to this law: the Cleveland Public School District, which was so designated because of an order by the United States District Court for Northern Ohio on March 5, 1995.

The Cleveland voucher program offered scholarships to anyone living in the district, regardless of income, but it gave preference to those whose income was 200 percent or less of the poverty level. That is, if those below twice the poverty level filled all available spots at participating private schools, there would be no scholarships for those families above twice the poverty level. The total number of scholarships offered was based on the specific amount appropriated for the program. It was estimated at the time that 60 percent of students in the Cleveland school system lived in a household that earned less than twice the poverty rate. At its inception, the program capped tuition charges at $2,500—the state of Ohio would offer a voucher to parents for 90 percent of that amount ($2,250) for low-income families and would pay 75 percent ($1,875) for other families. When a guardian chose a non-public school, the scholarship checks were to be made payable to the families choosing the voucher, but it would be mailed to the school. Students could attend a public school in a neighboring district if any bordering districts were willing to accept students, and in those cases the check would be made out to the school receiving the student. Since the inception of the program, no neighboring public school was willing to take students from Cleveland. Many students participated in the tutoring programs funded by the legislation, but the controversial element was not the options for public schools or the tutoring program (both of which were never legally challenged). It was, most certainly, the program of scholarships to private schools.

There were two challenges to the legislation in the Ohio court system in January 1996. Those cases were consolidated and the case became known as *Simmons-Harris v. Goff* (Simmons-Harris was a parent of a child in the Cleveland Public School System and John Goff was the Superintendent of Public Instruction for the State of Ohio). Those challenging the law asked

a local court for summary judgment (a trial without extensive testimony because it was assumed that the outcome would be appealed, regardless of who prevailed). Next an intermediary appellate court in Ohio heard the case and declared the program to be unconstitutional, asserting that the program violated the Establishment Clause of the First Amendment and the Establishment Clause of the Ohio Constitution, as well as two sections of the Ohio Constitution that relate to schools (a funding clause and the uniformity clause). That appellate court held that the statute did not violate the state's constitutional clause requiring "a thorough and efficient system of public education" and Ohio Constitution's clause requiring legislation to be about a single subject.

The case was appealed to the Ohio Supreme Court, which heard the case in September 1998 and issued a ruling on May 27, 1999. This case, like the Wisconsin case heard the year before, attracted national attention, and lawyers specializing in school choice argued the case on behalf of the parties to the case. The case also attracted several significant *amicus curiae* briefs from groups either advocating or opposing school choice. The Ohio Supreme Court almost completely reversed the holding of the appellate court. It upheld the law as being in conformity with state and federal constitutional law, except for the state provision directing that legislation concern a single subject.

The Court's majority opinion devoted much attention to the question of whether this program constituted a violation of the Establishment Clause of the First Amendment. Like the Wisconsin Supreme Court, the Ohio Supreme Court used the three-prong test from *Lemon*. Concerning the purpose of the program, the court quickly agreed that it had a recognizable secular purpose. The Court considered whether the law would have the effect advancing or inhibiting religion. Here the Ohio Court rejected the notion than any money assisting the educational function of a religious organization would be ipso facto invalid. The Ohio Supreme Court relied primarily on two cases, *Agostini v. Felton* (1997) and *Zobrest v. Catalina Foothills School District* (1993), both of which concerned special services being provided to students at private schools and which held that such a provision of services did not violate the Establishment Clause. In both of these cases, the U.S. Supreme Court held that the because the services were distributed in a neutral fashion—that is, without respect to a religious organization—aid in and of itself cannot be said to be advancing religion as such, even though the ability to receive specialized services might encourage more students to attend private sectarian schools.

The Court was troubled by a provision in the law that gave priority among those attending a private sectarian school to the members of the

sponsoring religious organization. Since public money was involved, this seemed to give members of religious groups a privileged position and thus to violate the principle of neutral distribution of a public good. The court ruled, however, that the section of the statute giving priority to the members of the church or religious group operating a school could be struck and the remainder of the program could remain in tact. Finally, they addressed the final prong of the *Lemon* Test: excessive entanglement. They held that the program did not violate this element of the text because the requirements for registering for the program were "not onerous and failure to comply is punished by no more than a revocation of the school's registration in the school voucher program."[13]

The Ohio Supreme Court then addressed whether the statute violated the Establishment Clause of the Ohio Constitution, which states that "no person shall be compelled to attend, erect, or support any place of worship, or maintain any form or worship, against his consent; and no preferences shall be given, by law to any religious society; nor shall any interference with the rights of conscience be permitted" (Section 7, Article I). The Court then said that there is no lengthy jurisprudence from the Ohio Supreme Court on the meaning of those Constitutional passages, and so they should apply the *Lemon–Agostini* framework to those passages. They conclude that there is no violation of the state's "Establishment Clause."

There is another passage in the Ohio Constitution regarding the state and religious education, which is the Blaine Amendment language. It states that "no religious or other sect, or sects, shall ever have any exclusive right to, or control of, any part of the school funds of this state" (Section 2, Article VI). The Court stated that "no money flows directly from the state to a sectarian school and no money can reach a sectarian school based solely on the efforts of the state." Because the money did not go directly to the school, the voucher program withstood constitutional scrutiny.

The Court also ruled on constitutional provisions which do not relate to church-state issues, such as the constitutional requirement for a "thorough and efficient system" of funding schools and the requirement that schools operate uniformly throughout the state. They recognized that the program operates only in Cleveland, but could exist in other districts if those districts were put under the control of State Superintendent. There was one remaining issue to be considered by the Court, which was the constitutional requirement that bills should have a single subject. In this decision, the Court ruled that the Ohio General Assembly violated the constitutional provision in Section 15, Article 2, that every piece of legislation must have a single subject. On this basis, the Court struck down the law.

But this was not the end of the voucher program in Ohio. The Ohio

General Assembly in June 1999 passed legislation in re-enacting the voucher program in substantially the same form as it was originally passed. Simmons-Harris and others challenged the law again, but this time in Federal court, rather than state court. On December 20, 1999—after a period of legal wrangling—the U.S. District Court for the Northern District of Ohio ruled that the program violated the Establishment Clause. The State of Ohio immediately appealed that decision. The appeal was argued before the Sixth District Court of Appeals on June 20, 2000. That court rendered a 2–1 decision on December 11, 2000, thereby affirming the decision of the U.S. District Court that the Ohio Pilot Project Scholarship Program violated the Establishment Clause of the First Amendment. It did not consider other merits (or demerits) of voucher programs.

The Court of Appeals, too, considered the *Lemon* Test and gave special attention to *Committee for Public Education v. Nyquist* (1973), a case involving a New York law that provided for partial tuition reimbursement for low-income parents whose children attended private schools. The decision gave significant attention to the fact that 85 percent of the children receiving some form of assistance were attending a sectarian private school. The Court of Appeals reviewed other cases involving aid, either direct or indirect to private religious schools, but came back to *Nyquist* as being essential. The Court of Appeals said that "we find that *Nyquist* governs our result" and that "the program at hand is a tuition grant program for low-income parents whose children attend private school parallel to the tuition reimbursement program found impermissible in *Nyquist*." The Court of Appeals said that there was no way to guarantee that the funds would only be used for "secular, neutral, and non-ideological purposes." The Court of Appeals considered it significant that 96 percent of the students using the voucher for a private school attended sectarian schools. The Court of Appeals further stated that the program as it was constructed discouraged non-sectarian private schools, which generally charged more than sectarian schools, as well as neighboring public school districts from participating because those districts would receive only $2,250 for each student that they enrolled—an amount significantly less than the amount public schools in suburban districts spent per student. The program, the Court held, would only be a true program of choice if there were many choices, rather than just choices among religious schools.

The dissenting judge, James Ryan, argued that the statute was "essentially different" than the New York statute considered in *Nyquist* because that statute gave direct and indirect aid to schools. The New York law, Ryan asserted, was intended to help financially impoverished schools, while the Cleveland voucher program was intended to help parents and children. Fur-

thermore, Ryan argued that recent U.S. Supreme Court jurisprudence permitted some benefits to go to private sectarian schools as a result of parental choices.

The State of Ohio then appealed the U.S. Court of Appeals decision to the U.S. Supreme Court. When the Supreme Court is considering whether to hear a case (grant "certiorari"), interested parties can submit briefs to encourage the Supreme Court to take or not take the case. Twenty-two parties submitted briefs asking the Supreme Court to hear the case and uphold the statute. Among those petitioners included those who had advocated vouchers as a means of improving educational quality. There were also several religious organizations that filed briefs indicating that in their understanding such a program did not violate the Establishment Clause. Among these groups were the Christian Legal Society, the Beckett Fund for Religious Liberty, and the United States Conference of Catholic Bishops.[14] Regarding the latter group, the USCCB did not call for direct funding of Catholics schools or even a broad program of vouchers. Instead, the USCCB brief asserts that the Ohio program is constitutional when one considers the recent jurisprudence of the Supreme Court.

The Court agreed to hear the case during its 2001–2002 term and issued its ruling in *Zelman v. Simmons-Harris* on June 27, 2002. The Supreme Court in a 5–4 decision upheld the program, holding that the program and the vouchers are not automatically a violation of the Establishment Clause. Chief Justice Rehnquist issued the opinion of the Court and was joined by Justices Antonin Scalia, Sandra Day O'Connor, Clarence Thomas, and Anthony Kennedy. Rehnquist gave greater attention to the failing status of the school district than did the appeals court. He cited an Ohio state auditor's report that said that the district was experiencing a "crisis that is perhaps unprecedented in the history of American education." Rehnquist also cited a state report that the district did not meet performance standards and that it had extremely high drop-out rates. He also noted the availability of "community" schools (often called "charter schools" in other states) and the availability of magnet schools within the Cleveland district.

In the majority opinion, Rehnquist asserted that there is no doubt that the program had a secular purpose. The more difficult issue, according to Rehnquist, was whether the program advanced religion. Because the program depended on the choices of parents, Rehnquist wrote for the majority that "it [is] irrelevant to the constitutional inquiry that the vast majority of beneficiaries were parents of children in religious schools." During the 1999–2000 school year, there were nearly 4,000 children who received vouchers, and 96 percent of those students attended sectarian schools, which comprised 46 of the 56 private schools that agreed to take students.

(During the 2006–2007 school year there were nearly 6,000 students using a voucher to attend a private school.) Rehnquist later referred to the program as one of "true private choice." Therefore, the program cannot be seen as a means by which the state was advancing religion. Rehnquist suggested that the case was not a break with previous cases but rather was "in keeping with an unbroken line of decisions rejecting challenges to similar programs."

The decision in this case may not lead to many new voucher programs because public opinion may not support such programs, and, even if it did, powerful groups such as teacher unions will likely continue to oppose such programs. However, one of the main objections to vouchers—that they would always constitute a violation of the First Amendment's Establishment Clause—is no longer a significant hurdle for voucher proponents. While the U.S. Supreme Court could revisit this issue—perhaps in a slightly different program—it is unlikely, at least in the near term, that the court would see a similar program as a violation of the Establishment Clause.

STATEWIDE VOUCHER PROGRAMS

While the two most prominent vouchers programs have been the Milwaukee and Cleveland programs, there been some other vouchers programs implemented at the state level. These programs have likely been adopted in the states described below because of strong gubernatorial support, strong support from legislative leaders, or some combination of the two. These programs have not led to significant court cases where religion clauses have been crucial to the outcome. This has largely been the case because the voucher programs were either challenged on other grounds or the voucher programs were approved after *Zelman*.

There have been three states that have enacted statewide voucher programs. Florida, with the strong support of Governor Jeb Bush, enacted in 1999 the Opportunity Scholarhip Program as part of the A+ Educational Plan. As the program was established, students could receive vouchers to attend another public school or a private school if the public school where they lived received a failing grade by not meeting state standards in two out of four years. The program led to only a small number of students attending private schools with a voucher. In 1999–2000, only 56 students attended a private school through the program. In 2005–2006, that number rose to 734 students. For the 2005–2006 school year, 56 private schools accepted students, and most of those schools (63 percent) were sectarian.[15] The private school option was struck down as unconstitutional by the Florida Supreme Court in a 5–2 decision on January 5, 2006, not because the

program violated the state or federal Establishment Clauses, or even a Blaine Amendment clause, although a state appellate court did rule that the program violated a "no-aid" to private schools clause (Article I, Section 3). Rather, the Florida Supreme Court ruled that the program violated a clause requiring a uniform system of public education which guarantees all Florida students a "uniform, efficient, safe, secure and high quality system of public education" (Article IX, Section 5).

On April 16, 2003, the Colorado legislature, with the strong support of Governor Bill Owens, enacted the Colorado Opportunity Contract Pilot Program. This program would have allowed students from low-performing schools with a significant number of students from low-income families to attend a participating private school. In the first year of operation, only one percent of students in the targeted school districts were permitted to obtain a voucher. By the fifth year of the program, as many as 20,000 students could have sought a voucher. In the first year of the program, students in eleven districts would have been eligible for a voucher. The program was short-lived, as the Colorado Supreme Court struck down the program on June 28, 2004, because it violated a state constitutional provision regarding school finance.[16] The Colorado Supreme Court did not rule on whether the program violated the Blaine Amendment language or the 'compelled support of religion clause' of the Colorado Constitution. Because the Colorado and Florida Supreme Courts ruled on state constitutional provisions, these cases cannot be appealed to the U.S. Supreme Court.

Ohio also established a statewide voucher program in July 2005. During the spring of 2006, Ohio's EdChoice program enrolled about 2,600 students in private schools. Under the legislation, up to 14,000 students who attended schools that have been graded by the Ohio Department of Education (ODE) as being either in academic emergency or on academic watch could receive scholarships to attend private schools. If more than 14,000 students apply, priority is given to families at or below 200 percent of the poverty level.

Students in kindergarten through eighth grade can receive vouchers for up to $4,250, while high school students can receive up to $5,000—though if a school charges less than those amounts, the state will pay only the tuition amount. Schools cannot charge families at or below 200 percent of the poverty level more than $4,250 for K–8 students, or more than $5,000 for high school students. Once a student receives a scholarship, he will have priority for a scholarship in future years. The participating student will continue to be eligible, even if the public school he or she previously attended is no longer on the academic watch or academic emergency lists. By the summer of 2006, approximately 300 private schools had chosen

to participate—including Catholic schools, Protestant and Jewish religious schools, and nonreligious schools.[17]

Two other states, Maine and Vermont, have also attempted to enact voucher programs, both of which have resulted in litigation. The social circumstances in these two cases were unique in that both Maine and Vermont practice 'tuitioning,' which occurs when a local school district that is too sparsely populated to operate a high school pays for tuition at another public or private school. According to the Institute for Justice, both Vermont and Maine had paid tuition for students at private religious schools for a long period of time beginning in the late-nineteenth century. Vermont stopped paying for tuition at private religious schools in 1961 and Maine stopped doing so in 1980 after the state Attorney General issued an advisory opinion to the state Department of Education. The Maine legislature ratified that decision with law in 1982. Families in both Maine and Vermont challenged the statute as being a violation of the Free Exercise Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. In 1999, the Vermont Supreme Court upheld the prohibition on paying for tuition at religious schools, because to do so would violate the "compelled support" clause of the Vermont Constitution. The Maine case made it to the Maine Supreme Judicial Court, which ruled on April 26, 2006, that the Maine statute was constitutional. The case was appealed to the U.S. Supreme Court, which declined to hear an appeal of the case.

TAX CREDITS INSTEAD OF VOUCHERS

Tuition tax credits have been promoted and enacted in a few states to support students attending religious elementary and secondary schools. The same groups who have supported vouchers have also supported tax credits as a means of helping parents send their children to private schools. It is likely these tax credit programs have been adopted as an alternative to a voucher program and that this alternative route has been chosen because of insufficient political support for vouchers or concern about a voucher program being challenged in court. Some tax credit programs have directly supported parents or guardians who pay for private education. Some states, beginning in the late 1990s, have enacted programs that give a credit to qualifying taxpayers who contribute to a non-profit organization that provides scholarships to those attending private schools.

Minnesota made an education tax credit available in 1998. The tax credit does not cover private school tuition per se, but it does pay for education-related expenses at public or private schools. The credit is limited to $1,000 per student and $2,000 per family. The credit is means tested, so it only

applies to those at lower income levels. Expenses that qualify for the tax credit include tutoring, fees for after school programs, non-religious academic books, and software used for educational expenses. Minnesota has also had a tax deduction for private school tuition since 1955. The tax deduction only reduces the amount of taxable income. The tuition tax deduction was challenged as being a violation of the First Amendment's Establishment Clause. The U.S. Supreme Court in *Mueller v. Allen* (1983) ruled that the tax deduction had a secular purpose and did not create excessive church-state entanglement.

In 1998, the amount that could be deducted from taxable income increased to $1,625 from $650 for K–6th grade students and to $2,500 from $1,000 for 7th–12th grade students. Parents can deduct private school tuition, tuition for college courses taken to satisfy high school requirements, tutoring by a qualified person, nonreligious books purchased for instruction, as well as fees that were used to pay for transportation and educational software.[18]

Illinois enacted the Educational Expenses Tax Credit in 1999. It became effective in 2000. The law permits parents to claim a non-refundable credit of up to $500 per family for tuition, books, and lab fees at any public, private nonreligious, or private religious school. The credit covers 25 percent of educational expenses after $250, up to $2,250. The law was challenged in Illinois state courts, but it was upheld.

Arizona enacted the School Tuition Organization Tax Credit education tax credit. The law provides for a dollar-for-dollar credit for contributions of up to $200 per household for donations to public schools for extracurricular activities and up to $500 for donations to school tuition organizations (STOs) that provide scholarships to students who wish to attend private schools. The STOs must distribute nearly all of their revenue in the form of tuition scholarships. There is no state-mandated income test for those receiving scholarships. In 1999, STOs in Arizona awarded 3,800 scholarships, with an average award of $637. On September 29, 1997, the Arizona Education Association, the Arizona School Boards Association, the Arizona Federation of Teachers, and the ACLU filed a lawsuit challenging the tax credit program as a violation of both the U.S. and Arizona Constitutions' Establishment Clauses.

On January 26, 1999, the Arizona Supreme Court in *Kotterman v. Killian* upheld the tuition tax credit law in a 3–2 ruling. The decision cited the Wisconsin Supreme Court's ruling on the Milwaukee choice program (*Jackson v. Benson*) and the U.S. Supreme Court's ruling in *Mueller v. Allen* (1983), which upheld tax deductions for school expenses. In *Mueller v. Allen*, the Court ruled that the tax deductions have a secular purpose, that they do not have a primary effect of advancing religion, and that they do

not create excessive church-state entanglement, thus satisfying the *Lemon* Test. The Arizona Supreme Court held that private schools are "at best only incidental beneficiaries" and that the "primary beneficiaries of this credit are taxpayers who contribute, parents who might otherwise be deprived of an opportunity to make meaningful decisions about their children's educations and the children themselves."

The Arizona Supreme Court also agreed with the respondent's assertions that the legislature enacted the tuition tax credit law to improve academic achievement and increase parental choice. The Court held that the tax credit funds are not public funds at all and therefore cannot be public funds in aid of religious schools, nor is the statutory language a "Blaine Amendment." This is especially important, because if Arizona's language was a Blaine Amendment, the Court held that they would be "hard pressed to divorce the amendment's language from the insidious discriminatory intent that prompted it."[19] In February 2000, a group of Arizona taxpayers filed a federal court challenge to the Arizona School Tuition Organization Tax Credit, but in 2005 a federal district court in Arizona ruled that the program was constitutional.

In 2001, Pennsylvania adopted an education tax credit program similar to the Arizona program. The legislation came after several attempts by Governor Thomas Ridge to have the legislature enact a voucher program in the 1990s. In Pennsylvania, corporations (but not individuals) would be eligible for a 75 percent tax credit (i.e., a 75 cent reduction in taxes owed for each dollar contributed) for a donation given within a single year to an organization that gives scholarships to students attending a private school or for a donation given to a public school improvement organization. A two-year financial pledge to a scholarship or school improvement organization would make the corporation eligible for a 90 percent tax credit. The legislation placed a cap on total tax credits given to corporations. Corporations within the state could get credits for donations of up to $200,000 annually, and the total for all corporations was capped at $20 million. In 2003 these caps were increased to $26.7 million for scholarship organizations. According to the Reach Foundation, corporate contributions have reached the level of caps in every year of the program and they estimate that as many as 20,000 children have been assisted in attending a private school through this program.[20] This tax credit program has not faced serious legal challenge in either state or federal courts.

CONCLUSION

The desire for public assistance for those attending or wishing to attend private schools has led to much public controversy and many court chal-

lenges, most of which have concerned constitutional doctrines regarding church-state relations. The U.S. Supreme Court addressed these issues in a momentous, and to some surprising decision in *Zelman v. Simmons-Harris* in 2002, wherein they ruled that the voucher program did not violate the Establishment Clause. Several state supreme courts—for example, in Wisconsin, Ohio, Arizona, and Maine—have also considered school choice issues and in doing so considered both state and federal provisions regarding church-state relations. The state court decisions have been mixed with some states permitting school choice programs, while others have rejected attempts at vouchers. In some states, when vouchers proponents were thwarted in their attempts to establish a voucher program, those same proponents have promoted tax credit programs to assist those seeking to attend private schools. Even though court cases have permitted some voucher programs, it is likely that the battle over voucher and other school choice programs will remain intense—although the public dispute will generally focus on the use of vouchers as a means of improving education, rather than on church-state issues.

NOTES

1. R. Freeman Wells and Lawrence A Cremin, *A History of Education in American Culture* (New York: Holt, Rinehart and Winston, 1961), 376–377.

2. See http://www.blaineamendments.org/Intro/whatis.html.

3. Kyle Duncan, "Secularism's Laws: State Blaine Amendments and Religious Persecution," *Fordham Law Review* 72 (December 2003): 493.

4. *Economics and the Public Interest*, ed. Robert A. Solo (New Brunswick, NJ: Rutgers University Press, 1955).

5. Milton Friedman, "The Role of Government in Education," reprinted at www.schoolchoices.org/roo/fried1.htm (accessed April 4, 2007).

6. James Carper, "The Christian Day School," in *Religious Schooling in America*, ed. James C. Carper and Thomas C. Hunt (Birmingham, AL: Religious Education Press, 1984), 110–129.

7. Ronald Reagan, "Radio Address to the Nation on Education," http://www.reagan.utexas.edu/archives/speeches/1983/31283a.htm (accessed April 4, 2007).

8. Ronald Reagan, "Remarks to Members of the National Catholic Educational Association," http://www.reagan.utexas.edu/archives/speeches/1983/40783b.htm (accessed April 4, 2007).

9. Ronald Reagan, "Remarks on Receiving the Final Report of the National Commission on Excellence in Education," in John Woolley and Gerhard Peters, The American Presidency Project [online], Santa Barbara, CA: University of California (hosted), Gerhard Peters (database). http://www.presidency.ucsb.edu/ws/?pid=41239.

10. In 1982, the Senate Finance Committee reported the tax credit legislation

to the full Senate, which never took action on the measure, and the measure died when the Senate adjourned. See "Tuition Tax Credit, 1982 Legislative Chonology" and "Tuition Tax Credit, 1983 Legislative Chronology." CQ Electronic Library, CQ Congress and the Nation Online Edition, catn81–0011175583. Originally published in *Congress and the Nation, 1981–1984*, vol. 6 (Washington, D.C.: CQ Press, 1985).

11. See http://schoolchoicewi.org/k12/detail.cfm?id=4 and Supreme Court of WI opinion.

12. The decision is printed in its entirety at http://ffrf.org/fttoday/1997/jan_feb97/higginbotham.html.

13. *Simmons-Harris v. Goff*, Ohio Supreme Court, http://www.sconet.state.oh.us/rod/newpdf/0/1999/1999-Ohio-77.pdf.

14. These briefs are collected at http://www.ij.org/schoolchoice/ohio_ussc/OH-USSC-amicus.html.

15. See http://www.floridaschoolchoice.org/Information/OSP/files/Fast_Facts_OSP.pdf.

16. *Owens v. Colorado Congress of Parents*, http://www.courts.state.co.us/supct/opinions2003/03SA364.doc.

17. Michael Coulter, "Thousands Use Ohio EdChoice Vouchers," *School Reform News* (September 1, 2006). http://www.heartland.org/Article.cfm?artId=19610.

18. For information on education tax credits, see http://www.heritage.org/Research/Education/SchoolChoice/schoolchoice.cfm#map.

19. *Kotterman v. Killian* 193 Ariz. 273, 972 P.2d 606 (Ariz. 1999). http://lw.bna.com/lw/19990209/970412.htm.

20. Information about the Pennsylvania tax credit can be found at http://www.paschoolchoice.org/reach/cwp/view.asp?a=1367&Q=568487&reachNav=.

FURTHER READING

To examine the intersection of school choice and church/state issues, one should examine relevant Supreme Court decisions. The Institute for Justice has collected on its website—www.ij.org—court decisions, both state and federal, related to school choice cases. For example, regarding the Cleveland school choice program, one can find all the relevant state and federal court decisions. There are also copies of articles and press releases related to the cases. This site also has copies of *amicus curiae* briefs filed in support of the Cleveland school voucher program for the *Zelman v. Simmons-Harris* cause. Another useful website is that of the Americans United for the Separation of Church and State, a group which opposes vouchers, in part because they understand such programs to constitute an improper establishment of religion. This site (www.au.org) has discussions of relevant court cases as well as a lengthy analysis of the *Zelman* case. The Beckett Fund for Religious Liberty sponsors a website (www.blaineamendments.org) that provides text of state Blaine Amendment provisions and citations, summaries, and in some cases the full text of scholarly articles examining Blaine Amendment provision.

For other sources on school choice, one should consider Milton Friedman's argument for vouchers that is found in *Capitalism and Freedom*, which was originally published in 1962 but remains in print. Two recent works have examined several dimensions of the school choice debate. For an activist's account in defense of school vouchers as well as a description of the campaign for school choice in California, see *School Choice: Why You Need It—How You Get It* (Cato Institute, 1994) by David Harmer. In *School Choice: The Struggle for the Soul of America's Schools* (Yale University Press, 1995), Peter Cookson is largely critical of most school choice programs and proposals, arguing that they would lead to increased social stratification, but he does offer a 'managed' choice proposal.

The Future of the School Choice, ed. Paul Peterson (Hoover Institution Press, 2003) contains ten essays by legal scholars, political scientists, and education policy analysts that examine the *Zelman v. Simmons-Harris* ruling on both legal and philosophical grounds. There are five essays that consider the policy implications for the ruling as it regards all forms of school choice, including charter schools, tax credits, and school vouchers. Peterson, along with Bryan C. Hassel, also edited *Learning from School Choice* (Brookings Institution Press, 1998), which contains essays examining some early choice programs. A product of the National Working Commission on Choice in K–12 Education, *Getting Choice Right: Ensuring Equity and Efficiency in Education Policy* (Brookings Institution Press, 2005) contains ten essays examining questions related to school choice programs. A couple of the essays examine economic questions related to school choice, while others review existing research regarding the social impact of school choice.

7

Religion and Higher Education

J. David Holcomb

Educational institutions have proven to be fertile ground for church-state controversy. Indeed, some of the most significant church-state disputes in the history of the United States have involved either the role of religion in public educational institutions or public financial support for religious schools. Many of the famous controversies over school prayer, Bible clubs, and vouchers have taken place at the elementary and secondary levels. Nonetheless, colleges and universities continue to provide the context for significant church-state conflicts as well. For instance, a recent decision by the president of the College of William and Mary to remove a bronze cross from the historic Wren Chapel because it was deemed "unwelcoming" to non-Christians led to a firestorm of controversy. One prominent donor withdrew a twelve million dollar pledge in protest while more than seventeen thousand people signed a petition calling for the college to reverse its policy. Upon the recommendation of a committee made up of students, alumni, and faculty, the president restored the cross, but in a glass case with citations noting the historic relationship of the college to the Anglican Church. While the controversy was resolved without litigation, the debate illustrates the tensions over religion at taxpayer-supported public universities.[1]

Another conflict recently emerged at the University of Missouri, where a Christian fraternity sought an exemption from the university's nondiscrimination policy that prohibited discrimination based upon religion. The "Brothers Under Christ" or BYX fraternity required that pledges confess a

relationship with Jesus Christ. In ultimately granting an exemption to BYX, the University of Missouri was forced to wrestle with several seemingly conflicting constitutional values. BYX claimed freedom of association and free exercise of religion rights, while the university not only had nondiscrimination goals it sought to advance but also feared violating the separation of church and state if it were to provide recognition, access, and potentially funding to a distinctly religious organization. In the end, the university determined the free exercise and association rights of the fraternity outweighed the university's nondiscrimination and Establishment Clause concerns.[2]

The university's constitutional instincts on this issue were well-founded, as the tradition of the U.S. Supreme Court has been to allow for greater accommodation of religious groups, exercises, and instruction at public, tax-supported universities than at public elementary and secondary schools. Generally, the Court has reasoned that college students are less impressionable than their elementary and secondary school counterparts. Furthermore, other constitutional scholars have argued that colleges and universities are more insulated from violations of the separation of church and state, as attendance is voluntary, principles of academic freedom and critical inquiry tend to characterize their atmospheres, and the size and diversity of the student bodies mitigate against religious indoctrination or endorsement.[3] Moreover, the Court has determined that free speech principles apply broadly to college and university settings. Public colleges and universities that create open forums by allowing various student organizations to meet and express their viewpoints on campus are prohibited by the free speech clause from discriminating against student religious groups' use of their facilities and even the funding of their publications. This is true despite concerns they may be aiding them in advancing a religious message.

These same distinctions between public college and elementary/secondary schools have also been used to allow for greater aid from the state to private religious colleges and universities. Thus, state and federal financial aid may be used by college students to attend a religiously affiliated university, while vouchers remain a highly contested issue at the elementary and secondary school level. Even more direct forms of aid, such as construction grants and loans, can be received by church-related colleges as long as they are not used for religious purposes. With aid, however, has come government regulation of private colleges and universities. A steady stream of litigation has resulted from attempts by religiously affiliated colleges to retain their autonomy in light of challenges to their religion-based discriminatory policies in hiring or treatment of student organizations.

Considering that most of the oldest colleges and universities founded in America were directed under the auspices of religious groups, it is not surprising that the place of religion in higher education has provided the context for some of the key controversies over the meaning of religious freedom and the separation of church and state. Whether settling disputes concerning public financing and government regulation of religious colleges or the accommodation of religious groups and practices in public universities, the U.S. Supreme Court has been forced to grapple with the meaning and application of the First Amendment's religion clauses. As the following discussion suggests, issues of funding, accommodation, and regulation will continue to appear on the courts' First Amendment agenda.

RELIGION AND HIGHER EDUCATION IN HISTORICAL CONTEXT

The first colleges founded in colonial America were sponsored by the Protestant-established churches of the day. Harvard (1636) and Yale (1701) were founded by the Puritan Congregationalists, and the College of William and Mary (1693) was formed under the guidance of the Anglican Church in Virginia. Although under the control of the established churches of their colonies, these colleges had a broader educational mission than the training of future ministers. Both church and state were to be served by these institutions as they endeavored to prepare future colonial leaders "disciplined by knowledge and learning."[4]

By the early eighteenth century, the growing pluralism and religious divisions fostered by the Great Awakening led to the creation of colleges that were to serve the new and disenfranchised religious voices of the day. For instance, Princeton was established by New Light Presbyterians that sought an institution of higher education more accepting of the theology and practice of the Great Awakening.[5] No matter what their origin, however, colonial colleges and universities were seen as crucial enterprises demanding sacrificial financial support. According to one study, as much as 65 percent of private college funds came from public tax support during the colonial era. Other state benefits included tax exemptions, gifts of lands and buildings, as well as exemptions from public duties for students and faculty.[6] As the eighteenth century progressed, however, a greater variety of relationships emerged between the colleges and their churches. The state-church college formula under which Harvard was birthed gave way to emphases on diversity and toleration.[7]

As with elementary and secondary education, the provision for higher

education remained a state issue after the adoption of the U.S. Constitution. As a result, many of the colonial patterns of education, with the requisite religious influences, remained into the early national period. Yet the ideological emphases of the Revolutionary and Early National eras facilitated new developments in both private and public education. Several states established nondenominational institutions, such as the University of North Carolina (1789), South Carolina College (1801), and Thomas Jefferson's University of Virginia (1819). Jefferson's opposition to established churches and "narrow sectarianism" certainly informed his plans for the University of Virginia. He nonetheless accommodated religious worship on campus and provided resources for the study of Christianity. He even encouraged the creation of theological schools near the university campus.[8] Generally, though, the University of Virginia became an elite regional institution aimed at educating the sons of wealthy southern planters.[9]

The primary story of higher education in America during the first half of the nineteenth century was the rapid growth of church-related colleges. These often fledgling schools littered the western landscape as the growing evangelical denominations such as the Methodists and Baptists joined the more established denominations in creating institutions of higher education. Consequently, these institutions were often more sectarian and dependent upon local churches for financial support. The insecurity of these colleges was witnessed by the fact that they were "small in enrollments, lean in operations, and poor in endowment."[10]

The proliferation of small denominational schools did not satisfy the quest for more democratic and comprehensive experiments in higher education. Spurred in part by the Morrill Act of 1862, a resurgence of state-supported universities took place after the Civil War. The Morrill "Land Grant" Act provided a state an allotment of western lands based upon its congressional representation. The proceeds from the sale of these lands were to go to higher education programs in the "useful arts," such as agriculture, mining, and military instruction.[11] The relationship of religion to the growing land grant and other state-funded institutions became a complex if not paradoxical one. The second half of the nineteenth century witnessed what has been called the "high water mark of church-state separation," exemplified in part through the passage of state constitutional amendments banning public funding of religious activities and institutions. These so-called "Blaine Amendments" often prohibited both direct and indirect support for religious educational institutions.[12] Yet at the same time, many of the state universities reflected the pan-Protestant ethos of the day. As George Marsden has observed, most of the state colleges and universities had required

chapel and church attendance policies, and faculty were given the liberty to express their Christian perspectives in the classrooms.[13]

While state universities were often located in smaller towns and rural areas that maintained a distinctly Protestant ethos, many of the urban universities that sprang up during the late-nineteenth and early-twentieth centuries were Catholic. This was a natural development, as much of the new immigration from the period was Catholic and tended to settle in urban areas. Eventually, an extensive network of Catholic higher educational institutions would be created around the country. And in the future, these institutions would serve as the battlegrounds of church-state disputes over state aid to and regulation of religiously affiliated colleges and universities.[14]

The last several decades of the nineteenth century also witnessed the emergence of private universities funded by wealthy industrialists. Stanford, Chicago, Johns Hopkins, and Vanderbilt were each either launched or enhanced through gifts by major benefactors. Each embraced over time the emphasis on the German educational approach of the primacy of research rooted in science within a context of academic freedom. Several of these philanthropic progeny were church-related, but their administrations and governing bodies saw little conflict between their denominational ties and quests to embrace the latest in more secular and scientific approaches to knowledge. As John Thelin has argued, "'Science' as it was invoked in American institutions—government, business, and education—was less a value system at odds with religion than an organizational ethos that prized order and efficiency."[15] Thus, the growth of public universities and well-funded private institutions had a significant impact of democratizing education. Yet it also contributed to the diminishing role of religion in higher education. According to Stephen Haynes, "both the liberal arts ideal and the influence of denominational colleges was eroded" due to the emphases on science, democratization, and the marginalization of clerical influences.[16]

The general growth in higher education at the turn of the century was in the direction of the comprehensive state university. The shift of emphasis away from denominational and other private liberal arts colleges to more comprehensive universities was driven by the growing emphases upon science, research, and academic specialization. This development was furthered by the creation of philanthropic foundations that would become major players in the shaping of higher education. These included the Rockefeller Foundation, the General Education Board, and the Carnegie Foundation for the Advancement of Teaching. The financial power these foundations possessed was used to move higher education in the direction of greater standardization, as well as "coherence and efficiency." The pursuit of these

goals would have a profound impact upon the role of religion in university life. Colleges that sought to participate in the Carnegie Foundation's pension plan, for example, had to standardize their admissions requirements and remove from their undergraduate curriculum any sectarian teachings or emphases.[17] Chapel witnessed a steady decline at both state and some denominational colleges. As a result, religious practices lost their centrality in the life of many institutions.[18] With the seeming secularization of both public universities and some prominent church-related institutions, some people began to question the future of church-related colleges. They persisted, however, and have remained a key element of the American higher education landscape—today they comprise approximately one-third of the institutions of higher education in America.

The post–World War II era would present new challenges and a number of legal controversies involving religion and higher education, however. Key to these developments was the significant increase in the federal government's role in higher education. As colleges grew in number and size, so did their programs and curricula, creating a costly venture for leaders in higher education. And in post–World War II America, the government understood the wide expansion and availability of higher education to be crucial for the development of a workforce in an increasingly technological and competitive world. A number of government programs aimed at making college education affordable for the masses were initiated. Perhaps the most famous of these was the Serviceman's Readjustment Act, more commonly known as the G.I. Bill. This 1944 bill provided financial aid to former soldiers and allowed them the freedom to attend the college or university of their choice. Other congressional funding plans followed that provided more direct forms of aid to higher educational institutions. The 1963 Higher Education Facilities Act provided tax funds for the construction of various buildings on public and private school campuses. And the Elementary and Secondary Education Act of 1965 allowed for grants to colleges and universities to aid in the training of teachers, although no funds could go toward religious education.

Greater federal regulation of higher education naturally followed the funding. The Civil Rights Act of 1964 and the 1972 Education Amendments banned, among other things, discrimination in higher education based upon race, gender, and national origin. Since religiously affiliated colleges and universities were frequently the beneficiaries of both federal and state student aid and other forms of more direct aid, controversies naturally followed over the constitutionality of taxpayer support for religious institutions and whether they should enjoy constitutional immunity from governmental regulations.[19]

AID TO RELIGIOUSLY AFFILIATED HIGHER EDUCATION

With the second half of the twentieth century witnessing a dramatic growth in the level of both federal and state financial aid for college students, the government has become, through Pell Grants, Supplemental Educational Opportunity Grants, and various loan programs, the largest source of financial aid and, with the rising costs of higher education, an absolutely essential source of funding for most colleges, including religiously affiliated colleges and universities. As new forms of public support become available to institutions of higher education, however, church-state disputes have arisen.

In determining violations of the Establishment Clause of the First Amendment, the U.S. Supreme Court has traditionally made a clear distinction between the constitutionality of aid to elementary and secondary schools and aid to colleges and universities. The Court has been more willing to allow aid to flow from the federal government to religious colleges and universities than to elementary and secondary schools because college students are perceived to be "less susceptible" to indoctrination, college courses tend to be less sectarian, and academic freedom prevails more readily at the collegiate level.[20] Stephen Monsma has argued that the Court's greater willingness to uphold aid to church-related colleges and universities than to elementary and secondary schools is rooted in two fundamental legal principles. First, the Court has found that the sacred and secular aspects of religiously-based colleges are more separable and distinct than in elementary and secondary schools. Second, the Court has concluded that church-related elementary and secondary schools are more likely to be "pervasively sectarian" than their higher education counterparts.[21] Moreover, federally-funded student financial aid used at church-related colleges and universities has never been successfully challenged as a violation of the Establishment Clause.[22] While federal aid to students attending religiously affiliated colleges has not faced a serious constitutional challenge, other forms of more direct aid, such as federal- or state-funded construction grants or loans, have led to numerous court challenges over their permissibility.[23]

The Pervasively Sectarian Test

The key test the U.S. Supreme Court has used to determine violations of the Establishment Clause in aid cases has been called the pervasively sectarian test. When weighing the constitutional implications of an aid program, the Court has frequently attempted to determine if these institutions

"are not so pervasively religious that their secular activities cannot be separated from their sectarian ones."[24] The issue of religious indoctrination permeating the atmosphere of educational institutions goes back at least to the landmark case of *Lemon v. Kurtzman* in 1971.[25] Here the U.S. Supreme Court struck down a Pennsylvania statute that provided the "purchasing" of secular educational services from nonprofit elementary and secondary schools, including religiously affiliated schools. Essentially, the state paid parochial schools for the costs of teachers' salaries, textbooks, and instructional materials for teaching secular subjects. The decision in *Lemon* codified the controversial tripartite "Lemon Test" the Court would subsequently use in Establishment Clause cases. According to the *Lemon* Test, for a statute to satisfy constitutional muster, it must have a secular purpose, a primary effect that neither advances nor inhibits religion, and may not foster an excessive entanglement between church and state. In holding the statute unconstitutional, the Court determined that the religious nature of the school would make it difficult if not impossible to ensure that state aid would not be going to support religious instruction or indoctrination. The "Handbook of School Regulations" governing one of the schools in question stated that "religious formation is not confined to formal courses; nor is it restricted to a single subject."[26] "We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her own faith and operated to inculcate its tenets," the Court concluded, "will inevitably experience great difficulty in remaining religiously neutral."[27] The Court further held that to ensure tax funds were not going to subsidize religious instruction, "a comprehensive, discriminating, and continuing state surveillance" would result. This ongoing surveillance would lead to unconstitutional excessive entanglement between church and state.[28]

In subsequent cases involving church-related elementary and secondary schools, the Court held that the provision of instructional materials, auxiliary services, and the retaining of public school teachers to assist in secular educational instruction on a part-time basis was unconstitutional. In *Meek v. Pittenger*, for example, the Court struck down several forms of direct aid because of the sectarian nature of the school.[29] Church governance, required religious exercises, and religious preference in hiring and admissions were key factors in the Court's assessment of the sectarian nature of the schools.[30] Since religion permeated the atmosphere of these institutions, a "symbolic link between religion and government" would result, leading to the unconstitutional advancement of religion.[31] Due to the pervasively sectarian nature of the schools, then, most any form of direct aid would run afoul of the Establishment Clause, despite attempts to utilize only secular aid for secular instruction.

Lemon and subsequent cases provided the contours of the pervasively sectarian test. Yet it was more fully developed in several higher education decisions of the 1970s. In the 1971 case of *Tilton v. Richardson*, the U.S. Supreme Court upheld the constitutionality of federal grants used for the construction or renovation of buildings at four church-related colleges in Connecticut.[32] At issue was Title I of the Higher Education Facilities Act of 1963 that provided federal grants for construction of college facilities as long as the funded buildings were not used for sectarian instruction or worship. Moreover, a twenty-year period had to elapse before the building could be used for religious purposes.

Those challenging the constitutionality of the act established a "composite profile" of the "typical sectarian" institution. Key characteristics included religious restrictions on hiring and admissions, compulsory attendance at religious exercises, obedience to church doctrine, and continual propagation of the faith. Noting the church sponsorship of the college and the fact that doctrine was taught in some of the classes at the university in question, the opponents of the funding argued that the Title I funds had the primary effect of advancing religion.[33]

The Supreme Court disagreed, holding that the statute in question did not have a primary effect of advancing religion because it barred the religious instruction, worship, or symbols in the buildings funded by federal grants. The Court rejected the contention that religion "so permeated" the educational environment of the church-related college that one could not distinguish between the secular and religious education provided.[34] This was particularly true since "the schools were characterized by an atmosphere of academic freedom" where faculty taught according to the "academic requirements intrinsic in the subject matter."[35] Since the construction grants were to be used to build libraries, a language laboratory, and a science building, the Court further concluded that "there is no evidence that religion seeps into the use of those facilities."[36]

Despite its ruling in *Lemon*, the Court in *Tilton* drew a constitutional distinction between church-related colleges and their elementary and secondary counterparts. In particular, the Court argued that college students were less impressionable and subject to religious indoctrination. In addition, the Catholic colleges in question admitted non-Catholic students, hired non-Catholic faculty, and taught religious courses other than those of the Catholic religion. Fundamentally, the Court determined that the religious schools that received the funds did not have religious indoctrination as a substantial purpose or activity. "In short," the court asserted, "the evidence shows institutions with admittedly religious functions but whose predominant higher education mission is to provide their students with a secular education."[37]

The threat of excessive entanglement was further diminished by the "nonideological character of the aid." Unlike the instructional subsidies in *Lemon*, the aid in *Tilton* was a "one-time, single-purpose construction grant" that mitigated the need for an ongoing or continual oversight by the government.[38] At the same time, the Court struck down the twenty-year time limit for the restricted use of the facilities, finding that the possible future use of the buildings for religious purposes could lead to the impermissible advancement of religion.

In his dissenting opinion, Justice William O. Douglas challenged the majority's arguments that distinguished *Tilton* from *Lemon*. For Douglas, the grants represented a direct subsidy from the state to a religious institution contrary to the no-aid principle established in the landmark Establishment Clause case *Everson v. Board of Education*.[39] Douglas further rejected the distinctions the majority sought to make between church-related higher and lower educational institutions. Significantly, Douglas argued that at church-related schools religious and secular teaching are "enmeshed" and that they are "unitary institutions with subtle blending of sectarian and secular instruction." Consequently, continual surveillance by the state would necessarily result.[40]

Two years after *Tilton*, the Court upheld the South Carolina Educational Facilities Act, which authorized tax-exempt revenue bonds to be issued to assist in the financing of college facilities. While the act did not exclude religiously affiliated institutions, it expressly prohibited the use of bond financed facilities for sectarian purposes. At the center of the legal dispute was the Baptist College at Charleston, which had requested nearly 2 million dollars for a variety of capital projects. Basing its decision on the majority opinion in the *Tilton* case, the U.S. Supreme Court upheld the Baptist College's use of the bonds. Despite the close denominational control of the college, the Court determined that the school was not pervasively sectarian due to the fact non-Baptists served on the faculty and that there was not a religious requirement for admission to the school. The Baptist College at Charleston was comparable to the Catholic colleges in *Tilton* leading the Court to decide that "there is no basis to conclude that the College's operations are oriented significantly towards sectarian rather than secular education."[41]

The Court's most extensive effort at defining a pervasively sectarian institution came in the 1976 case of *Roemer v. Board of Public Works*.[42] Here, the State of Maryland authorized payments of non-categorical grants to qualifying institutions of higher education provided the money was not used for sectarian purposes. In addition, institutions that exclusively awarded theological degrees were not eligible to receive funds through the

program. Administrators at the recipient schools were required to file annual reports attesting to the secular use of the funds. After five church-related institutions of higher education received approximately $525,000 from the program, a group of Maryland taxpayers challenged the constitutionality of the Maryland program stating that the limited regulation of the non-stipulated funds violated the Establishment Clause of the First Amendment.[43]

Justice Harry Blackmun wrote the plurality opinion of the Court upholding the Maryland program. "To answer the question whether an institution is so 'pervasively sectarian' that it may not receive direct state aid of any kind," Blackmun opined, "it is necessary to paint a general picture of the institution, composed of many elements." The key elements on which the plurality relied in determining that the Catholic colleges in question were not pervasively sectarian were: a) the colleges enjoyed a significant amount of institutional autonomy from the Catholic church; b) religious indoctrination was not a primary purpose of any of the institutions because attendance at religious exercises was not required; c) while mandatory religion and theology courses were taught by Roman Catholic clergy, they were supplementary to a broader liberal arts curriculum that was governed by the canons of academic freedom; d) classroom prayers were practiced in only a small percentage of classes and were not officially sanctioned; e) faculty hiring decisions outside of the religion department were not made on a religious basis, nor were student admissions religiously discriminatory. As a result, Blackmun concluded that the religious functions of the school could be sufficiently distinguished from the secular ones. In fact, the schools claimed on their own behalf that spiritual concerns were merely a "secondary objective."[44]

Admitting that the question of excessive entanglement between church and state was a difficult one in this case, particularly since the aid was less restricted than in *Tilton*, the Court nevertheless concluded that the nature of the institutions receiving the aid minimized the need for ongoing and pervasive surveillance from the state. Relying on the District Court's findings, the plurality asserted that the colleges in question performed "essentially secular educational functions." As a result, "there is no danger, or at least only a substantially reduced danger, that an ostensibly secular activity—the study of biology, the learning of a foreign language, an athletic event—will actually be infused with religious content or significance."[45]

The second-half of the twentieth century witnessed many colleges and universities loosening their denominational ties or changing their missions in part to receive such funding and/or to avoid costly litigation, despite the Court's unwillingness to strike down most forms of aid. According to Kent

Weeks, "The secularization of mainline colleges and restructuring of organizational and governance systems by Catholic universities during the last thirty years of the twentieth century created a more favorable climate for public funds and diminished the likelihood of a successful constitutional attack on these institutions' receipt of public benefits."[46] Even Jerry Falwell's Liberty University made policy adjustments in light of its desire to receive $60,000,000 in tax-exempt municipal bonds to refinance its debts. A legal challenge was raised to its request, due to the pervasively sectarian nature of the school. Consequently, Liberty eliminated chapel requirements, diluted the references to its religious mission in university publications, relaxed religious requirements for admissions, and eliminated some of the required religion courses from its curriculum.[47]

The Neutrality Test

While many colleges and universities have loosened their religious ties to avoid constitutional conflicts, the Court in the last two decades has moved toward a more accommodationist approach to aid cases. The *Lemon* Test, particularly its excessive entanglement prong that proved to be a key barrier regarding state aid to religious institutions in the past, has largely been replaced by what has been called a neutrality or equal treatment test. The neutrality test essentially holds that public funding of religious institutions is constitutionally satisfactory as long as "neutral criteria" are used in determining eligibility for the aid. For instance, in *Witters v. Washington Department of Services for the Blind*, the Court ruled that a visually impaired person could not be denied a state vocational rehabilitation grant because he was studying at a Bible college with the ultimate goal of serving in the ministry. Utilizing the neutrality theory, the Court held that "any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of individuals."[48]

Following the trend of these higher education cases, the Court has utilized the neutrality test to allow direct aid at the elementary and secondary level as well. For instance, in *Agostini v. Felton*,[49] the Court specifically overturned its 1985 decisions in *Aguilar v. Felton* and *Grand Rapids v. Ball*. In upholding the provision of part-time public education teachers and other instructional aid to parochial schools, the Court concluded that "we have departed from the rule relied on in Ball that all government aid that directly aids the educational function of religious schools is invalid."[50]

Perhaps the most significant blow to the pervasively sectarian test and *Lemon* Test came in the 2000 decision in *Mitchell v. Helms*.[51] Here the

Court upheld a federally-funded aid program in which state and local agencies purchased educational materials and equipment for public and private elementary and secondary (including religious) schools. While the vote of the Court was 6–3, there was no majority opinion as Justice Sandra Day O'Connor wrote a separate concurring opinion joined by Justice Stephen Breyer. Nonetheless, the plurality opinion emphasized the "neutrality-of-aid" doctrine in addressing whether governmental aid to religious schools necessarily leads to religious indoctrination attributable to the state. At the same time, the plurality attacked the pervasively sectarian test and called for its abandonment by the Court. Since the "religious nature of the recipient should not matter to the constitutional analysis," the pervasively sectarian test led to the "offensive . . . trolling through a person's or institution's religious beliefs." Moreover, the plurality asserted that the pervasively sectarian test conflicted with other decisions that banned discrimination in the distribution of public benefits based upon religious status or sincerity." Consequently, the Court concluded that "nothing in the Establishment Clause requires the exclusion of pervasively sectarian schools from otherwise permissible aid programs . . . This doctrine, born of bigotry, should be buried now."[52]

Justices O'Connor and Breyer concurred in the holding of the Court but were not willing to accept that neutrality alone was sufficient to satisfy Establishment Clause concerns in aid cases. Rather, neutrality was one of several factors that the Court should consider, as was the ability to divert funds to religious purposes. While O'Connor avoided calling for the burial of the pervasively sectarian test, she too admitted that its presumption of religious inculcation or indoctrination in religious schools had become problematic for Establishment Clause cases. Instead, O'Connor said the emphasis should be on whether aid has been actually diverted to religious purposes leading to the unconstitutional advancement of religion.[53]

Locke v. Davey and State Constitutional Prohibitions

Mitchell v. Helms essentially overturned several prior cases that had ruled as unconstitutional aid to parochial schools. If under the neutrality theory even more forms of direct aid to elementary and secondary church-related schools were being upheld, then surely the death knell had been sounded for the pervasively sectarian test at the collegiate level. Yet, as the recent decision in *Locke v. Davey*[54] suggests, religious schools may find their state constitutions more prohibitive of funds than the current U.S. Supreme Court's interpretation of the Establishment Clause. The *Locke v. Davey* case involved a Washington State scholarship program that was established to

assist academically gifted students with higher education expenses. The regulations of the scholarship program, however, prohibited funds to be used toward the obtaining of a "devotional theology" degree. This was stipulated in light of the Washington State constitution's prohibition of even indirect funding of religious instruction. Joshua Davey, a student at the Assembly of God-related Northwest College, was awarded a "Promise Scholarship," but was subsequently told he could not use it to pursue a degree in pastoral ministries. While not disputing that the pastoral ministries degree was "devotional," Davey filed suit arguing that it violated his free exercise rights since the law was not facially neutral with regard to religion.

Writing for a six-member majority, Chief Justice Rehnquist rejected Davey's claim that his free exercise rights were violated. According to Rehnquist, the case involved a "play in the joints" between the two religion clauses in that it "concerns a state action that is permitted by the Establishment Clause but not required by the Free Exercise Clause." Affirming the Court's previous decisions upholding indirect aid to religious institutions, particularly when the "link between government funds and religious training is broken by the private choice of recipients," Rehnquist conceded that Washington could allow scholarship funds to go to the study of devotional theology. However, he concluded that the Free Exercise Clause did not require the state to do so in light of its own constitutional prohibitions.[55]

Locke v. Davey offers a mixed bag for aid to religiously affiliated higher education. On the one hand, a state may very well restrict the type of aid, both direct and indirect, that goes to religious institutions. On the other hand, the decision affirms that indirect aid may go to pervasively sectarian colleges. According to the majority, Northwest College was clearly a pervasively sectarian school. Yet, theoretically, Davey could have used the Promise Scholarship there if he had chosen a course of study other than pastoral ministries. Although Washington's constitution would no doubt prohibit more direct forms of aid, such as was in question in *Tilton* and *Roemer*, the Court's current philosophy suggests that such aid would not be prohibited under the Establishment Clause of the First Amendment.

Indicative of this interpretation was a U.S. Fourth Circuit decision in 2001 involving the Seventh-Day Adventist-affiliated Columbia Union College in Maryland. Columbia Union had been denied a grant from the state's Sellinger Program, which provided public aid to accredited private colleges in the state as long as the money was not used for sectarian purposes. Despite the fact that several Roman Catholic schools had received funds, Columbia Union's request was denied, as the Maryland Higher Education

Commission determined that the school was pervasively sectarian. Columbia Union filed suit challenging the Commission's decision. The Fourth Circuit ruled in favor of Columbia Union, arguing that the school was not pervasively sectarian. It further declared that since the aid was dispersed based upon neutral criteria, "the government risks discriminating against a class of citizens solely because of faith" if it were to deny the aid to Columbia Union.[56]

The appellate court's decision in the Columbia Union case is a detailed analysis of the pervasively sectarian test as it has been applied in higher education cases. According to the decision, Columbia Union was first denied Sellinger Funds in 1990, then was denied funding again in 1992 despite the fact that it satisfied the six criteria laid out by the state for eligibility.[57] In 1995, Columbia Union requested reconsideration in light of the U.S. Supreme Court's greater emphasis on neutrality in aid cases. Nonetheless, the Commission determined that Columbia Union's "nature and practices" had not changed substantially and denied the funds again in 1996. Columbia Union's initial legal challenge was a losing effort in the District Court, but the Fourth Circuit remanded the case in order for the pervasively sectarian nature of the college to be investigated further.[58]

After holding a bench trial and reviewing thousands of pages of evidence, the District Court ruled that Columbia Union was not pervasively sectarian. Relying upon the *Roemer* precedent, the court looked to four key criteria in determining the religious nature of the college. First, while mandatory worship was a practice at the college, the policy only applied to a minority of the students. Second, in reviewing course syllabi, catalogs, and other documents, the court determined that the primary purpose of the curriculum was not religious indoctrination. Third, while a preference was given to Seventh-day Adventists in admissions and hiring, this factor alone did not rise to the level of making Columbia Union a pervasively sectarian institution. Fourth, the denominational control over the governance of the institution did not meet the pervasively sectarian threshold.[59]

In affirming the district court's findings, the Fourth Circuit reasserted the fact that the U.S. Supreme Court had never found a college to be pervasively sectarian. In looking back at the *Tilton*, *Roemer*, and *Hunt* cases, the court suggested that the colleges in question were similar in many ways to Columbia Union. In *Tilton* and *Roemer*, for example, the Catholic Colleges revealed a preference for Catholics in hiring and admission, there were certain religious restrictions on the curriculum, and there were required theology classes. Likewise, in *Hunt*, the South Carolina Baptist Convention closely governed the institution, and the "advancement of a particular reli-

gion" was a purpose of the Baptist College at Charleston. Thus, the court concluded that "looking at all the evidence, we fail to see any disqualifying differences between Columbia Union and the colleges in *Roemer*, *Hunt* and *Tilton*."[60]

Despite this assessment of the pervasively sectarian test, the circuit court concluded that Columbia Union was entitled to the Sellinger funds without having to consider the pervasively sectarian nature of the school. Utilizing the secular purpose and primary effect portions of the *Lemon* Test, the court ruled that the secular purpose of the Sellinger program is clear and that the neutral criteria used in distributing the aid avoided any unconstitutional advancement of religion. Further arguments for constitutionality included the safeguards used to insure funds were not being diverted for religious purposes and that the funds were going to institutions of higher education rather than to secondary schools. Thus, the court concluded that "Columbia Union's receipt of Sellinger funds is not only consistent with the 'neutrality plus' formula of Justice O'Connor's concurrence, it is a stronger case than *Mitchell* due to the fact that Columbia Union is a college."[61]

The Future of Aid to Religiously Affiliated Higher Education

The trends on the Court seemingly bode well for proponents of religious colleges and universities that seek government funding for their institutions. With the pervasively sectarian test virtually laid to rest and at least a plurality of the nation's highest court accepting the direct funding of religious institutions (provided the aid was based upon neutral criteria), it would seem that a church-related college could enhance its religious distinctiveness while receiving grants, loans, and other forms of public aid. The rationale for this development is that now religious institutions will be treated equally with their secular counterparts and, with barriers to public aid removed, will be able to flourish economically without having to marginalize their religious identities or practices.

The emergence of the neutrality test notwithstanding, a number of the justices on the U.S. Supreme Court remain opposed to direct funding of religious activities as inconsistent with the fundamental principles of the Establishment Clause. Some have raised objections that a neutral aid program may allow for the diverting of funds for religious purposes. Moreover, as new and increasing funds find their way into the hands of church-related colleges and universities, conflicts over the accompanying federal regulations will follow.

GOVERNMENT REGULATION OF RELIGIOUSLY AFFILIATED COLLEGES AND UNIVERSITIES

Governmental regulation of private institutions has thus become an increasingly contentious issue in church-state relations. Religiously affiliated schools are subject to a wide array of regulations regarding employment, facilities, and finances. Disputes often arise, then, over what exemptions there might be for religious institutions from these government regulations based upon free exercise rights and the desire to minimize entanglements between church and state.

Employment and Discrimination

One of the primary sources of disputes has been in the area of employment and discrimination. Here the competing goals of ending discrimination and protecting the freedom and autonomy of religious institutions have come into conflict. Moreover, these disputes illustrate the consequences of accepting even indirect forms of government aid.[62] While the Civil Rights Act of 1964 banned discrimination based upon religion in hiring in both public and private facilities, Title VII of that same act allowed for exemptions for religious institutions. According to section 702 of Title VII, religious preference in hiring can be made if the institution is a religious "corporation, association, educational institution, or society." Section 703(e)(2) allows for religious preference in hiring in higher educational institutions that are religiously affiliated. Further, section 703(e)(1) permits employers to discriminate on the basis of religion, as well as gender and national origin, if it is "a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[63]

Several federal and U.S. Supreme Court decisions have addressed the contours of these exemptions, particularly as they relate to employees that fulfill more secular functions at religious institutions. For instance, in the 1987 case of *Church of Jesus Christ of Latter-day Saints v. Amos*, Section 702 of the Title VII was challenged as a violation of the Establishment Clause if it allowed religious employers to discriminate on religious bases for nonreligious employees. At issue was the dismissal of an employee of a nonprofit gymnasium owned and operated by The Church of Jesus Christ of Latter-day Saints. A sixteen-year employee of the gym was dismissed because he failed to qualify for a "temple recommend." He challenged his dismissal by arguing that the Section 702 exemption that the Mormon

Church was claiming violated the Establishment Clause. In applying the *Lemon* Test, the U.S. Supreme Court essentially ruled that the exemptions allowed for religious corporations under Section 702 could be applied to all employees. It first determined that the required secular purpose of the law was satisfied because it would "alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions."[64] Neither did the broad reading of the statute's exemptions result in the advancement or inhibition of religion. "A law is not unconstitutional simply because it *allows* churches to advance religion . . . For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the government *itself* has advanced religion through its own activities and influence," the Court concluded. Neither did the statute lead to an unconstitutional excessive entanglement between the religious institution and the state. Rather, "the status effectuates a more complete separation between the two."[65]

While the *Amos* case did not involve a college or university, its ruling reaffirmed what several federal appellate courts had concluded in employment discrimination cases at church-related colleges. *Prime v. Loyola University of Chicago*, for example, involved a challenge to Loyola University's practice of reserving a significant number of its faculty positions in its philosophy department for Jesuit priests. Emphasizing the bona fide occupational qualification of Section 703, the Seventh Circuit Court of Appeals allowed for the preference given Jesuits due to the longstanding relationship of the order to the school and the need to maintain that presence for the ongoing traditions and character of the school.[66] Similarly, the Seventh Circuit Court ruled in *Maguire v. Marquette University* that theology departments be given "broad latitude" in making preferential hiring practices.[67]

One exception to this trend came in 1993, when the Ninth Circuit Court ruled that the ownership, affiliation, purpose, and makeup of a private secondary school did not allow it Section 702 exemptions from religious discrimination in hiring despite the fact that the will establishing the school called for the hiring of only Protestants to the faculty and staff. Here the court ruled that the benefactor's provision was not enough to insulate the school from nondiscrimination laws. Rather, the court concluded that outside of the provisions in the will, the school's primary purpose was to provide education in secular subjects. Since there was no distinct relationship with a church, the school had failed to fulfill section 703's requirement that it be "owned, supported, controlled, or managed by a particular religion." Some commentators have suggested that this narrow reading of the religious exemptions statutes could have profound implications for religious higher education. If a school were to be required to provide evidence that

it is "primarily religious" or that its relationship to a church or religious body is "clear and unmistakable," it may find itself open to more discrimination suits or challenges to its receipt of government aid.[68]

While the preceding cases have suggested that federal courts typically interpret the Title VII exemptions quite broadly in allowing for religious discrimination in hiring, another contentious area of litigation involves whether religious exemptions enable discrimination in the areas of gender or race. Two Baptist institutions provided the context of two Fifth Circuit Court decisions seeking to draw parameters around the ability of the government to monitor and regulate religious institutions' hiring practices. In *EEOC v. Mississippi College*,[69] the Fifth Circuit Court reversed a federal district court decision that upheld the school's refusal to turn over information regarding hiring practices to the EEOC, claiming that it would lead to an excessive entanglement between church and state and would violate the free exercise of the college to prefer Baptists for its faculty positions. The EEOC's investigation was instigated by a complaint filed by a part-time Presbyterian female faculty member who was passed over for a full-time faculty position that was given to a Baptist male. Her gender discrimination complaint further argued that Mississippi College had a history of discrimination. The Circuit Court held that if Mississippi College did indeed base its decision fundamentally upon the fact that the male candidate was of the preferred denomination, then it was covered by Title VII exemptions. However, the court affirmed the right of the EEOC to investigate charges of sexual and racial discrimination at church-related colleges and universities. That Title VII did not completely exempt such schools from EEOC jurisdiction was held in contradiction to the broad claim of Mississippi College that "the employment relationship between a church-related school and its faculty is not within the purview of Title VII." After claiming that the state had a "compelling interest in eradicating discrimination in all forms," the court concluded that "creating an exemption from the statutory enactment greater than that provided by section 702 would seriously undermine the means chosen by Congress to combat discrimination and is not constitutionally required."[70]

In *EEOC v. Southwestern Baptist Theological Seminary*,[71] the Seminary refused to submit an EEOC-6 form that provided data on race, sex, and national origin, as well as compensation and tenure of employees. The basis for the institution's refusal was that as a seminary, it was a "wholly religious" institution and thus was entitled to the same autonomy from regulation that a church enjoys. The circuit court agreed in part, ruling that the seminary had the essential status of a church and that any employee in a teaching or supervisory position had ministerial status. However, the court

ruled that support personnel did not have the status of ministers and, as a result, the seminary would have to provide EEOC reports on those staff.[72]

As the preceding discussion reveals, Title VII exemptions provide religiously affiliated colleges and universities substantial freedom to practice religious preference in their hiring. And in part due to the fact that the Court has been unwilling to declare a school to be "pervasively sectarian," the ability of such schools to receive indirect student financial aid has not been compromised. Yet as the *Mississippi College* and *Southwestern Baptist Seminary* cases affirmed, religiously affiliated institutions are not completely immune, under Title VII guidelines, from EEOC jurisdiction. Nevertheless, courts have generally given religious institutions broad deference in claiming religiously based exemptions from government regulation in the area of employment.

Tax Exemption and Discrimination

The highly publicized case of *Bob Jones University v. United States* (1983) illustrates how the taxing power of government can be used to advance public policy goals such as nondiscrimination. While tax exemption for church property was affirmed by the U.S. Supreme Court in its 1970 decision of *Walz v. Tax Commission*,[73] subsequent controversies have arisen over the tax exemption for other religious institutions. Bob Jones University, a fundamentalist Christian school in South Carolina, had long asserted that the scriptures prohibited interracial dating and marriage. As a result, prior to 1971, the school did not accept blacks and for five subsequent years would only accept married African-Americans. Nevertheless, the school maintained a policy of no interracial dating or marriage upon punishment of being expelled.[74]

In 1976, IRS officials revoked the tax-exempt status of Bob Jones University due to its racially discriminatory policies. The university sued, seeking to recover its tax-exempt status, arguing that their policies were rooted in a deep and sincere religious belief and thus protected under the First Amendment. Integral to the debate over Bob Jones's tax-exempt status was a controversy over whether the IRS tax code section 501(c)(3), governing nonprofit organizations, embraced the common law concept of charity. If so, the institution in question could not engage in activities contrary to settled public policy. With only Justice Rehnquist dissenting, the U.S. Supreme Court ruled that the 501(c)(3) code did embrace the charity concept and thus Bob Jones's policies were contradictory to the requirement that "charitable exemptions are justified on the basis that the exempt entity con-

fers a public benefit."[75] As a result, "the institution's purpose must not be so at odds with the common community conscience as to undermine any public benefit that might otherwise be conferred." The Court further rejected the free exercise claim of Bob Jones by contending that the government had an overriding state interest in eradicating racial discrimination. The Court thus concluded that the "governmental interest substantially outweighs whatever burden denied of tax benefits places on petitioners' exercise of their religious beliefs."[76]

As the previous discussion reveals, employment and discrimination issues represent a unique challenge, as the government seeks to respect the autonomy and freedom of religious institutions while at the same time furthering both public policy and the constitutional protections of equality and fairness. Indeed, some critics of the *Bob Jones* decision argue it could have a "devastating impact on educational institutions." Despite the compelling interest of the state to rid society of racial discrimination, its regulatory power through tax policies could either jeopardize the financial survival of some religious institutions or force them to alter their fundamental teachings.[77]

One of the newest and most emotionally charged areas of the law involves discrimination based upon sexual orientation. While the national debate rages, several states and local communities have passed laws aimed at protecting homosexuals from discrimination. In 1987, the Circuit Court of the District of Columbia was faced with determining whether D.C.'s Human Rights Act, which prohibited educational institutions from discrimination based upon sexual orientation, could be used to force Roman Catholic Georgetown University to recognize gay and lesbian student groups on its campus. While the groups enjoyed endorsement of the student body, they had not received formal university recognition that would provide them potential funding as well as access to campus mail services. Georgetown justified it refusal to recognize the groups by claiming that such an endorsement would conflict with Catholic teachings concerning homosexuality.[78]

Seven separate opinions were penned by a D.C. Court that skirted the fundamental constitutional issues by separating endorsement from the provision of funding and other resources. While contending that the university did not violate the statute by refusing recognition of the groups, it did run afoul of its intent by not allowing the groups equal access to benefits. The court further concluded that any burden upon the university's religious freedom by providing benefits to these organizations was overridden by the District of Columbia's compelling interest to eliminate discrimination based upon sexual orientation.[79]

ACCOMMODATION OF RELIGION IN PUBLIC UNIVERSITIES

While issues related to the funding and regulation of religiously affiliated higher educational institutions have generated significant First Amendment litigation, public colleges and universities have faced their own controversies over the role of religion on their campuses. In a number of cases, the U.S. Supreme Court has made a distinction between the permissibility of religious exercises at public elementary and secondary schools and public colleges and universities. And while university directed worship and proselytizing are prohibited in either context, state universities have been less reticent about offering courses in religious studies and even housing religious studies departments and programs. Ironically, during the twentieth century, when the last vestiges of the old Protestant ethos public institutions were becoming extinct, a number of schools began establishing departments and even schools of religion. Little headway was made when challenging these programs due to the fact that they embraced a more comparative approach to the study of religion. Plus, the U.S. Supreme Court had made explicit in *Abington v. Schempp* that the academic study of religion at all levels of public education was fully appropriate if not desirous. Justice Tom Clark, in his majority opinion in *Schempp*, declared:

> It might well be said that one's education is not complete without a study of comparative religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.[80]

Use of Facilities

While instruction in religious studies has avoided any serious church-state challenge, other controversies have emerged over the use of public university facilities and student fees for religious exercises and programs. In 1981, the U.S. Supreme Court addressed the issue of whether the University of Missouri at Kansas City could forbid a Christian Bible study group called Cornerstone from using university facilities. The policy established by the university's Board of Curators held that as a public taxpayer-supported university, it was compelled to prohibit the use of campus facilities "for purposes of religious worship or teaching" by the Establishment Clause of the First Amendment. In bringing suit, the students countered that they

had been discriminated against and that their free exercise and free speech rights had been violated.[81]

While the district court upheld the policy on Establishment Clause grounds, the court of appeals reversed, arguing that establishment concerns did not present a compelling enough interest to justify "a content based discrimination against religious speech." A majority of the U.S. Supreme Court agreed, concluding in *Widmar v. Vincent* that since the university had created an "open forum" for student groups, it could not engage in content-based discrimination of speech. In setting aside the Establishment Clause objections, the majority determined that the incidental benefits religion would receive from an open forum policy would not lead to its having the primary effect of advancing religion.[82]

The *Widmar* decision drew a great deal of attention from constitutional scholars—and church-state experts particularly—due to the fact that the Court utilized free speech public forum analyses to settle what was also a free exercise dispute. While the lopsided Supreme Court vote suggested a clear precedent, some commentators shared Justice White's concern of the implications of the Court's rationale. In his dissenting opinion, White warned that treating "religious worship *qua* speech . . . the Religion Clauses would be emptied of any independent meaning in circumstances in which religious practice took the form of speech."[83] Despite White's concerns, *Widmar* provided a constitutional rationale for allowing student-led religious clubs to meet at public secondary schools as well. With the passage of the Equal Access Act in 1984 and its constitutionality being upheld in the case of *Board of Education v. Mergens*, public secondary schools are prohibited from discriminating against student groups meeting in campus facilities based upon the religious, political, or philosophical content of their speech.[84]

Funding of Student Publications

Conflict between the Free Speech and Establishment Clauses would characterize another recent dispute over the funding of a religious newspaper at the University of Virginia. The University refused to use revenues from mandatory student fees to pay for the printing of an evangelical Christian student newspaper called *Wide Awake*. The university policy, challenged by a group of students as a violation of their free speech rights, prohibited the use of such funds for a publication that "primarily promotes or manifests a particular belief in or about a deity or an ultimate reality." In contrast, the students argued that since the university funded other student

activities and publications, it had created a "limited open forum" and thus could not engage in viewpoint discrimination.[85]

The key question in *Rosenberger v. University of Virginia* (1995) was whether the Establishment Clause required the university to discriminate against religious publications. A narrowly divided U.S. Supreme Court ruled that it did not. Justice Anthony Kennedy, in writing for a 5–4 majority, argued that much like in *Widmar*, the university had created an open forum and in doing so could not engage in viewpoint discrimination. For Kennedy, if the funding had been distributed on a neutral basis, then the Establishment Clause concerns could be set aside. In other words, the policy was established to create an open forum "for speech and to support various student enterprises." Since the publication requested funding as a student journal, and not on the basis of its religious viewpoint, then the Court concluded that the principle of neutrality should prevail. "We have held that the guarantee of neutrality is respected, not offended," the Court asserted, "when the government extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse."[86] Kennedy further warned that by allowing the denial of funding, the Court would put state officials in a position of having to determine what constituted a legitimate religious message. Kennedy also argued that the direct payment from the university to a third party printer further insulated the university from Establishment Clause concerns.[87]

A lengthy dissent was penned by Justice David Souter declaring in part that "the Court today, for the first time, approves direct funding of core religious activities by an arm of the state."[88] In particular, Souter took issue with the Court's neutrality theory that removed any consideration of the effects of the policy. For Souter, the mandatory student fee was the equivalent of a tax that would, in this instance, go toward the publication of an evangelical and proselytizing publication. For the Establishment Clause to have much meaning, according to Souter, the effects of the law should trump the mere evenhandedness required by free speech guidelines.[89]

CONCLUSION

The *Rosenberger* decision was a victory for advocates of greater accommodation of religious practices in public universities and for those claiming the Court's past adherence to a strict no-aid or separationist approach to the Establishment Clause had led to the marginalization of religion in American public life. In contrast, critics of the decision bemoaned what they perceived to be a further watering down of the separationist principle

underlying the Establishment Clause they deemed essential to the preservation of religious liberty. While a majority of the current U.S. Supreme Court has embraced the neutrality or equal treatment approach, leading many to see the opportunity for even greater partnerships between government and religion, not all religious practices at publicly-funded universities will be justified even under a less strict reading of the Establishment Clause. The *Mellen v. Bunting*[90] decision by the Fourth Circuit Court illustrates that even some longstanding religious practices are just too difficult to reconcile with the religion clauses of the First Amendment. Even though other circuit courts had upheld commencement prayers at state colleges and universities, the court found Virginia Military Institute's practice of daily mealtime prayers to be coercive and thus violative of the Establishment Clause.

In the area of aid to religiously affiliated colleges and universities, the recent *Locke v. Davey* decision revealed that state constitutions may have stricter barriers to aid than what the prevailing interpretation of the First Amendment allows. The relationship of aid to religious colleges and government regulation will no doubt continue to be a thorny area of the law as well. There certainly will be increased legal challenges due to the fact that aid has become more available to religious institutions (through the demise of the pervasively sectarian test and *Lemon* Test), while these same institutions are allowed to discriminate based upon religion in their hiring practices. One commentator has argued that this view of the Establishment Clause leads to "'equal' opportunities for funding on the one hand while providing for 'unequal' rights to discriminate and 'unequal' immunity from regulation on the other."[91] This apparent inconsistency has led others to conclude that religiously affiliated colleges and universities are "not out of the woods yet" with regard to church-state challenges to their funding and employment practices.[92] And as the *Gay Rights Coalition of the Georgetown University Law Center* case reveals, state and local antidiscrimination statutes may place a greater burden upon religious colleges and universities than do federal laws, particularly in the areas of gender or sexual orientation.

The past decade has witnessed a renewed interest in the study of religion and spirituality. Moreover, there has been growth in religiously-oriented student clubs and organizations on public university campuses. At the same time, some church-related institutions have sought to reinvigorate their religious identities by encouraging the "integration of faith and learning" in the classroom. In light of these trends, it may be safely assumed that religion and higher education will remain a key battleground over competing interpretations of religious freedom and the separation of church and state.

NOTES

1. Fredrick Kunkle, "Cross Returns to Chapel—But Not on the Alter," *Washington Post*, March 7, 2007.

2. Tim Townsend, "In Constitutional Clash, Christian Fraternity Wins Big," *St. Louis Post-Dispatch*, February 19, 2007.

3. David Fellman, "Religion, the State, and the Public University," in ed. James E. Wood, Jr., *Religion, the State, and Education* (Waco, TX: J.M. Dawson Institute of Church-State Studies, 1984), 79–80.

4. Frederick Rudolph, *The American College and University: A History* (New York: Knopf, 1962), 7.

5. John R. Thelin, *A History of American Higher Education* (Baltimore: Johns Hopkins University Press, 2004), 29.

6. F. King Alexander, "Issues in Higher Education: The Decline and Fall of the Wall of Separation Between Church and State and Its Consequences for the Funding of Public and Private Institutions of Higher Education," *Florida Journal of Law and Public Policy* 10 (Fall 1998), 107.

7. Rudolph, *The American College*, 16.

8. Anson Phelps Stokes and Leo Pfeffer, *Church and State in the United States* (New York: Harper and Row, 1964), 54.

9. Thelin, *A History of American Higher Education*, 51–52.

10. Thelin, *A History of American Higher Education*, 61; Stephen Haynes, "A Review of Research on Church-Related Higher Education" in *Professing in the Postmodern Academy: Faculty and the Future of the Church-Related College* (Waco, TX: Baylor University Press, 2002), 2–3.

11. Thelin, *A History of American Higher Education*, 76.

12. Fernand N. Dutile and Edward M. Gaffney, Jr., *State and Campus: State Regulation of Religiously-Affiliated Higher Education* (South Bend, IN: University of Notre Dame Press, 1984), 13.

13. George M. Marsden, *The Soul of the American University* (New York: Oxford University Press, 1994), 3.

14. Thelin, *A History of American Higher Education*, 141–142.

15. Ibid., 114.

16. Haynes, "A Review of Research," 3.

17. Thelin, *A History of Higher Education*, 146; Haynes, "A Review of Research," 4.

18. Thelin, *A History of Higher Education*, 148.

19. See Edward M. Gaffney, Jr. and Philip R. Moots, *Government and Campus: Federal Regulation of Religiously-Affiliated Higher Education* (Notre Dame, IN: University of Notre Dame Press, 1982).

20. Much of the material in this section is drawn from a previously published article; J. David Holcomb, "Financing Faith and Learning: Assessing the Constitutional Implications of Integrating Faith and Learning at the Church-Related College," *Journal of Church and State* 48 (Autumn 2006): 831–850.

21. Stephen V. Monsma, *When Sacred and Secular Mix: Religious Nonprofit Organizations and Public Money* (Lanham, MD: Rowman & Littlefield, 1996), 35–40.

22. Dutile and Gaffney, *State and Campus,* 11.

23. See also the Court's 2004 decision in *Locke* v. *Davey* 540 U.S. 712 upholding a Washington State constitutional ban on using a state-funded scholarship toward the obtaining of a degree in "devotional theology."

24. *Roemer v. Board of Public Works,* 426 U.S. 736 (1976) at 755.

25. *Lemon v. Kurtzman,* 403 U.S. 602 (1971).

26. 403 U.S. 602 at 618.

27. Ibid.

28. Ibid. at 619–20. The excessive entanglement prong became a particularly stiff barrier to aid. According to the *Lemon* majority decision, even if the sacred and secular functions of the aid could be separated, the state would still have to engage in continuous surveillance of the institution to ensure that no funds went to support religious indoctrination. See Monsma, *When Sacred and Secular Mix*, 32.

29. "The very purpose of many of those schools is to provide an integrated secular and religious education; the teaching process is, to a large extent devoted to the inculcation of religious values and belief. Substantial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian school enterprise as a whole." 421 U.S. 349 (1975) at 366.

30. See *Aguilar v. Felton,* 473 U.S. 402 (1985) at 412.

31. Monsma, *When Sacred and Secular Mix*, 33.

32. The schools and facilities in question included Sacred Heart University (library); Annhurst College (music, drama, and arts building); Fairfield University (library and science building); Albertus Magnus College (language laboratory); see *Tilton v. Richardson,* 403 U.S. 672 (1971) at 690.

33. 403 U.S. 672 at 682.

34. Ibid. at 680.

35. Ibid. at 681.

36. Ibid.

37. Ibid. at 687.

38. Ibid. at 688.

39. *Everson v. Board of Education*, 330 U.S. 1 (1947).

40. 403 U.S. 672 at 693–94.

41. *Hunt v. McNair,* 413 U.S. 734 (1973) at 744.

42. *Roemer v. Board of Public Works*, 426 U.S. 736 (1976).

43. Ibid. at 742–44.

44. Ibid. at 755–59.

45. Ibid. at 762–64.

46. Kent Weeks, "State and Local Issues," in *The Future of Religious Colleges*, ed. Paul J. Dovre (Grand Rapids, MI: William B. Eerdmans Publishing Company, 2002), 333.

47. Ralph Mawdsley, "Government Aid and Regulation of Religious Colleges

and Universities," in *Religious Higher Education in the United States: A Source Book*, ed. Thomas C. Hunt and James C. Carper (New York: Garland, 1996), 6–7.

48. *Witters v. Washington Department of Services for the Blind,* 474 U.S. 481 (1986) at 487.

49. *Agostini v. Felton*, 521 U.S. 203 (1997).

50. Ibid. at 225.

51. *Mitchell v. Helms,* 530 U.S. 793 (2000).

52. Ibid. at 810–19.

53. Ibid. at 840–841; the neutrality theory was advanced even more clearly two years later in the decision of *Zelman v. Simmons-Harris* 536 U.S. 639 (2002). Here the Court upheld a Cleveland educational voucher program arguing that it offered assistance to a broad class of individuals without respect to religion and that both religious and non-religious schools could participate.

54. *Locke v. Davey,* 540 U.S. 712 (2004).

55. Ibid. at 712–15.

56. *Columbia Union College v. John J. Oliver*, 254 F. 3d 496 (2001) at 510.

57. The state required that: (1) The college must be a non-profit college or university established in the state of Maryland prior to July 1, 1970. (2) The institution must be approved by the Maryland Higher Education Commission. (3) The institution must be accredited. (4) The institution must have awarded the associate of arts or baccalaureate degrees to at least one graduating class. (5) The college must maintain one or more programs leading to such degrees other than seminarian or theological programs. (6) The institution must submit each new program or major modification of an existing program to the Commission for its approval; Ibid. at 499.

58. Ibid.

59. Ibid. at 508.

60. Ibid. at 510.

61. Ibid. at 507.

62. In the case of *Grove City College v. Bell*, 465 U.S. 555 (1984), the Court ruled that indirect federal tax support of religious colleges through student financial aid can subject the institution to federal anti-discrimination laws.

63. Kent M. Weeks and Derek Davis, eds., *Legal Deskbook for Adminstrators of Independent Colleges and Universities* 2nd ed. (Waco, TX: Baylor University, 1999), ix–3; William A. Kaplin and Barbara A. Lee, *The Law of Higher Education* 3rd ed. (San Francisco: Jossey-Bass Publishers, 1995), 726–727.

64. *Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327 (1987) at 331–335.

65. Ibid. at 336–38.

66. *Prime v. Loyola University of Chicago*, 803 F.2d 351 (7th Cir. 1986); Weeks and Davis, *Legal Deskbook*, ix–4; Kaplin and Lee, *The Law of Higher Education*, 727.

67. *Maguire v. Marquette University*, 814 F.2d 1213 (7th Cir. 1987).

68. *EEOC v. Kamehameha Schools/Bishop Estate,* 990 F.2d 458 (9th Cir. 1993); Weeks and Davis, *Legal Deskbook*, ix, 5–6.

69. *EEOC v. Mississippi College*, 626 F.2d 477 (5th Cir. 1980).
70. Kaplin and Lee, *The Law of Higher Education*, 729–730.
71. 651 F.2d 277 (5th Cir. 1981).
72. According to the court, Title VII exemptions only applied to "traditionally ecclesiastical or ministerial" positions, such as the president, dean of the chapel, academic deans, and other administrators that would supervise faculty; Kaplin and Lee, *The Law of Higher Education*, 731.
73. *Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970).
74. *Bob Jones University v. United States* (1983), 461 U.S. 574 at 580.
75. Ibid. at 591.
76. Ibid. at 604.
77. Mawdsley, "Government Aid and Regulation," 21.
78. *Gay Rights Coalition of Georgetown University Law Center v. Georgetown University*, 536 U.S. A.2d. 1 (D.C. 1987); Weeks, "State and Local Issues," 346–348; Kaplin and Lee, *The Law of Higher Education*, 519–520.
79. Ibid.
80. "Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment." *Abington Township School Board v. Schempp*, 374 U.S. 203 (1963) at 225.
81. *Widmar v. Vincent,* 454 U.S. 263 (1981).
82. Ibid. at 267.
83. Ibid. at 284.
84. *Board of Education v. Mergens,* 496 U.S. 226 (1990).
85. *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995), 822–830.
86. Ibid. at 839.
87. Ibid. at 844.
88. Ibid. at 863.
89. Ibid. at 895–899.
90. *Mellen v. Bunting*, 327 F. 3d 355 (2003).
91. Alan Brownstein, "Constitutional Questions About Charitable Choice," in *Welfare Reform and Faith-Based Organizations*, eds. Derek Davis and Barry Hankins (Waco, TX: J.M. Dawson Institute of Church-State Studies, 1999), 246.
92. Naomi Schaefer, "Vulnerable Under God," 1.

FURTHER READING

For a history and analysis of church-state issues related to the funding of higher education, see F. King Alexander, "Issues in Higher Education: The Decline and Fall of the Wall of Separation Between Church and State and Its Consequences for the Funding of Public and Private Institutions of Higher Education," *Florida Journal of Law and Public Policy* 10 (Fall 1998). Derek H. Davis' "The Supreme Court as Moral Physician: *Mitchell v. Helms* and the Constitutional Revolution to

Reduce Restrictions on Governmental Aid to Religion," 43 *Journal of Church and State* (Spring 2001): 213–31 provides a critical analysis of the neutrality test and its implications for the funding of private religious institutions. Paul J. Dovre, ed., *The Future of Religious Colleges* (Grand Rapids, MI: William B. Eerdmans Publishing Company, 2002) is a wide ranging collection of essays addressing a number of contemporary issues facing religious colleges. See especially Kent Weeks' essay entitled "State and Local Issues," in which he provides a helpful overview and analysis of state and local legal considerations of religious colleges and universities. Although a bit dated, both Fernand N. Dutile and Edward M. Gaffney, Jr., *State and Campus: State Regulation of Religiously-Affiliated Higher Education* (South Bend, IN: University of Notre Dame Press, 1984) and Edward M. Gaffney, Jr., and Philip R. Moots, *Government and Campus: Federal Regulation of Religiously-Affiliated Higher Education* (Notre Dame, IN: University of Notre Dame Press, 1982) remain very helpful studies of both state and federal regulation of religiously affiliated higher education. State constitutional provisions, employment, student discipline, taxation, and many other issues are assessed in these substantive volumes. A standard education law text, William A. Kaplin and Barbara A. Lee's *The Law of Higher Education: A Comprehensive Guide to Legal Implications of Administrative Decision-Making*, 3rd ed. (San Francisco: Jossey-Bass, 1995) provides excellent summaries and analysis of many key decisions involving religion and higher education. A much discussed and debated work, George M. Marsden's *The Soul of the American University: From Protestant Establishment to Established Nonbelief* (New York: Oxford University Press, 1994) provides a history of the particularly Protestant influence on higher education that lasted until the twentieth century. Marsden argues that traditional religious beliefs belong again on college campuses alongside other perspectives such as feminism and multicultural studies. In her short essay, "Vulnerable Under God: Could Religious Colleges Be the Next Institutions Under Legal Attack?" *The American Enterprise* (September 2002), Naomi Shaeffer suggests that while the trends on the U.S. Supreme Court bode well for advocates of more public aid to religious colleges and universities, greater legal challenges may exist in the future, especially as some religious schools are seeking to strengthen their religious identities. For an extended analysis of these issues, see J. David Holcomb, "Financing Faith and Learning: Assessing the Constitutional Implications of Integrating Faith and Learning at the Church-Related College," *Journal of Church and State* 48 (Autumn 2006): 831–850.

Appendix: Selected Cases

The following cases are discussed or referenced by the chapters in this volume. Only precedent setting decisions or important clarifications are included in this appendix. Though not all the cases here are, strictly speaking, matters of church and state jurisprudence, all have important ramifications for the issues covered in the volume.

Abington Township v. Schempp (1963): The town of Abington, Pennsylvania, required public school students to recite ten verses from the Bible every day, followed by the Lord's prayer. Though students could be exempted with a note from parents, the Supreme Court disallowed this practice because it violated both the Free Exercise Clause and the Establishment Clause of the First Amendment.

Agostini v. Felton (1997): A parochial school teacher challenged an earlier decision by the Supreme Court regarding whether or not public school teachers could teach secular subjects at parochial schools. In *Agostini*, the Supreme Court reversed *Aguilar v. Felton* (1985). Not only can public school teachers enter parochial schools without necessarily violating the Establishment Clause, this decision means that not all entanglements of church and state should be assumed unconstitutional.

Aguilar v. Felton (1985): Since the 1960s, New York City had used public monies to pay teachers in parochial schools as a means of combating educational inequality. The Supreme Court found that the monitoring of publicly paid teachers that was necessary to ensure that they were not promoting religion amounted to excessive entanglement between church and state. The Supreme Court later overturned this ruling in *Agostini v. Felton* (1997).

Bethel School District No. 403 v. Fraser (1986): High school student Matthew Fraser was suspended for using lewd language at a school assembly as part of a nominating speech for an elected position. Fraser contended that this suspension violated his First Amendment rights to free speech. The Supreme Court determined that public schools have the right to restrict speech that contradicts "fundamental values of public school education."

Board of Education v. Allen (1968): The New York Education Law required the state to provide textbooks for both secular and parochial school children in grades seven through twelve. Several New York school boards challenged this law as unconstitutional under the First and Fourteenth Amendments. The Supreme Court cited the *Everson v. Board of Education* (1947) decision in finding this law to be constitutional. The state provided only secular textbooks on loan, without any religious interest and provided them equally to all schools.

Bob Jones University v. United States (1983): The IRS revoked the tax-exempt status of Bob Jones University due to its policy against interracial dating and marriage and of the Goldsboro Christian School due to its policy of admitting only Caucasian students, causing the schools to claim a violation of its religious liberty. The Supreme Court sided with the IRS, arguing that the schools' policies inhibited the government interest in ending racial discrimination and therefore did not fit the requirements for tax-exempt status. Thus, the court determined that some restrictions on religious liberty are constitutional.

BOE of Westside Community Schools v. Mergens (1990): The Nebraska Westside School District prohibited students from forming a Christian Club with a faculty sponsor at their high school. While the school district thought such a club would violate the Establishment Clause, the students charged the school with violating the Equal Access Act. The Supreme Court allowed the students to form their Christian Club, using the *Lemon* Test (*Lemon v. Kurtzman*) to determine the constitutionality of the Equal Access Act.

Brown v. Board of Education (1954): Addressing five separate cases and just under 200 plaintiffs from five states, this case addressed the constitutionality of racial segregation, particularly in public school settings. The Supreme Court found that despite best efforts at separate but equal schooling for different races, inequality persisted, thus having a negative effect on minority children. This decision effectively ended all state-sponsored racial segregation.

Committee for Public Education v. Nyquist (1973): In an attempt to avoid overcrowding in public schools, New York State passed a law allowing supplemental grants or tax-deductions to parents who sent their children to

non-public schools. The Committee for Public Education and Religious Liberty filed suit, claiming this law constituted a violation of the Establishment Clause. The Supreme Court ruled that though the law had a secular purpose, it did have a primary effect of supporting religion since the actual beneficiaries of the funds were the private schools, not the parents.

Corporation of the Presiding Bishop v. Amos (1987): An individual was fired from a nonprofit facility run by the Church of Jesus Christ of Latter-day Saints because he was not a member of the Church. He and other individuals brought suit against the church, alleging religious discrimination in violation of Title VII of the Civil Rights Act. The Supreme Court found the policy unconstitutional because both the work of the facility and the job in question were secular activities.

Edwards v. Aguillard (1987): The State of Louisiana's "Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act" mandated that any public school teaching either creation science or evolution science must give equal time to the other as well. The Supreme Court found this law unconstitutional on all three parts of the test developed in 1971's *Lemon v. Kurtzman*. There was no clear secular purpose, the law was meant to advance a religious viewpoint, and it mandated inappropriate entanglement between religion and government by using government funds for a religious purpose.

Elk Grove Unified School District v. Newdow (2004): Michael Newdow sued the Elk Grove Unified School District on behalf of his daughter, who as a public school student was required to either recite or listen to the Pledge of Allegiance. According to Newdow, the inclusion of the phrase "under God" in the Pledge violated the Establishment Clause of the First Amendment. The Supreme Court did not decide on the constitutionality of this case due to the fact that as a divorced father without custody of his daughter, Newdow did not have proper standing to represent his daughter in the case.

Engel v. Vitale (1962): In an attempt to standardize practice and minimize local conflict, the Board of Regents for the State of New York instituted a nondenominational and voluntary prayer to be said at the beginning of each school day. The Supreme Court determined that the prayer was unconstitutional despite its nondenominational nature and the allowance for abstention.

Epperson v. Arkansas (1968): Public school teacher Epperson sued the State of Arkansas for prohibiting public schools from teaching human evolution. Epperson claimed this regulation both violated the Establishment Clause and limited her right to free speech. The Supreme Court concurred that this constituted an establishment of religion in its origination with a

particular religious group and its objectionable nature to other religious and nonreligious individuals.

Everson v. Board of Education (1947): New Jersey instituted a law allowing for the reimbursement of funds to parents who sent their children to both religious and public schools on public transportation buses. Everson charged that this violated the Establishment Clause by enacting state support of religious schools. The Supreme Court upheld the constitutionality of the law by claiming the reimbursement was available to religious and non-religious individuals alike and did not constitute direct support of religious organizations.

Grand Rapids School District v. Ball (1985): The Grand Rapids School District offered two classes in leased private school classrooms. The first class was held during regular school hours and was taught by a public school teacher and the second was held after school by teachers otherwise employed by religious schools. Taxpayers sued, claiming a violation of the Establishment Clause, and the Supreme Court agreed that this program had the effect of supporting religion.

Grove City College v. Bell (1984): In an attempt to maintain particular standards without governmental regulations, Grove City College refused all state and federal funding. However, many of its students received Basic Educational Opportunity Grants (BEOG) through the Department of Education (DOE). The DOE claimed the College should be subject to government requirements such as Title IX if it accepted these funds. The Supreme Court determined that funding students amounted to funding an institution, thus, if the College accepted the BEOG funds, it must be held to the Title IX anti-discrimination standards.

Jacobellis v. Ohio (1964): The State of Ohio banned showings of a French film, *Les Amants*, due to obscenity. Nico Jacobellis, a theater owner, was convicted and fined for showing the movie. The Supreme Court overturned the conviction for varying reasons, concluding the movie was not obscene. The most famous opinion came from Justice Potter Stewart, who argued for the Constitutional protection of everything but "hard-core pornography" and defined pornography by concluding, "I know it when I see it."

Keyishian v. Board of Regents (1967): Faculty members of the State University of New York were threatened with termination for refusal to affirm a loyalty oath to the United States. The Supreme Court ruled that New York's requirement of a loyalty oath was a violation of the rights of political expression and that the university had failed to prove that faculty members had been actively trying to overthrow the government.

Kitzmiller v. Dover Area School District (2005): In 2004, the Dover Area

School Board in Pennsylvania authorized the teaching of intelligent design as part of the regular curriculum. A group of parents sued the district, arguing that this amounted to a violation of the Establishment Clause. After a bench trial, a U.S. District Court judge ruled against the school board, which had, by then, changed membership. No appeal was filed, thus the ruling against the teaching of intelligent design in Dover area schools stands.

Lamb's Chapel v. Center Moriches School District (1993): School officials refused permission for a church group to use their facilities after hours for a film series and discussion group because of religious content. The Supreme Court ruled against school officials on the grounds that they were discriminating against a religious group and that allowing use of the facilities did not amount to an establishment of religion.

Lee v. Weisman (1992): A Providence, Rhode Island, middle school principal, Robert E. Lee, invited a rabbi to speak and offer a prayer at the school's graduation. A father of a graduating student, Daniel Weisman, moved to prohibit this speech or the inviting of clergy to speak at any public school events. The Supreme Court held that Lee's invitation to the rabbi constituted a violation of the Establishment Clause because the ceremony amounted to state-sponsored and state-organized religious practice.

Lemon v. Kurtzman (1971): This case was heard with two other cases involving laws in Pennsylvania and Rhode Island that funded teacher salaries and instructional materials for secular subjects taught in non-public schools. The Supreme Court concluded that these policies violated the Establishment Clause and through this case developed the "Lemon Test" for determining whether a law violated the clause. This test requires that (1) the law must have "a secular legislative purpose," (2) the law must neither advance nor hinder religion, and (3) the law cannot lead to "an excessive government entanglement with religion."

Leoles v. Landers (1937): A Georgia school expelled students for refusing to recite the Pledge of Allegiance. A state court affirmed this policy, and this decision was appealed to the Supreme Court. Following its precedent in *Nicholls v. Mayor of Lynn* (1937), the Supreme Court affirmed the duty of schools to educate children in American ideals and traditions.

Locke v. Davey (2004): In 1999, Washington State established its Promise Scholarship to provide college scholarships to top students. The State limited these funds by disallowing their use for theology programs. Joshua Davey earned a Promise Scholarship but declined the money in order to pursue pastoral ministries at a Christian college. Davey sued, claiming a violation of his free exercise of religion. The Supreme Court denied Davey's

suit, stating that government has a right to restrict its funding and only support non-religious programs of instruction as a means of avoiding state support of religious activity.

Loving v. Virginia (1967): The State of Virginia sentenced an interracial couple to jail for violating miscegenation laws. The Supreme Court ruled unanimously that the laws were unconstitutional and "odious" to a free people.

Lynch v. Donnelly (1982): Daniel Lynch charged that the annual Pawtucket, Rhode Island, Christmas display in the city's shopping district violated the Establishment Clause by including a nativity scene as well as a Christmas tree, a "Seasons Greetings" banner, and a Santa Clause house. The Supreme Court disagreed and held that this display did not have a specific religious purpose but rather represented the history of the Christmas holiday.

McCollum v. BOE (1948): A coalition of Jewish and Christian organizations sponsored a period of voluntary religious instruction to take place during the regular school day. The Supreme Court found that the use of tax-supported property and the working relationship between public school and church authorities violated the Establishment Clause.

Meek v. Pittenger (1975): This case found that textbooks could be loaned to students in non-public schools as part of a program to make textbooks available to all students. Other forms of aid, such as counseling, testing, and related services were found to further the aims of the parochial schools, which as "pervasively sectarian" institutions were not eligible for state support.

Minersville School District v. Gobitis (1940): The Gobitis children were members of Jehovah's Witnesses who were expelled for not saluting the flag, an act they found to be in conflict with Biblical command. The Supreme Court upheld the mandatory flag salute, arguing that national unity was an important consideration and that attempts to promote it did not automatically violate a citizen's freedom.

Mitchell v. Helms (2000): This case, like others, focuses on the use of public money in sectarian schools. At issue here was the provision of funds for library, computer, and other educational materials. The Supreme Court ruled that the fact that all schools, religious and secular alike, were eligible for such aid means that the government has been neutral in its services and has thus not violated the Establishment Clause.

Mueller v. Allen (1983): Minnesota law allowed parents to write off certain expenses pertaining to their children's schooling, regardless of what type of school, religious or public, their children attended. Applying the test from the *Lemon* case (*Lemon v. Kurtzman*), the Supreme Court ruled

that this practice was permitted by the Constitution. Of particular importance was the idea that the benefits were available to all parents, and thus that the law was neutral with respect to religion.

Pierce v. Society of Sisters (1925): This landmark case established the right of church groups to build and maintain their own schools in the face of public education. The State of Oregon had passed a law in 1922 requiring all students to attend public institutions, but the Supreme Court found that "additional obligations" beyond national citizenship could not be denied and were best served by guaranteeing the possibility of parochial institutions.

Prince v. Jacoby (2002): Washington school officials refused to allow a student-led Bible study group equal privileges with other student groups. The Ninth Circuit found that the school district had violated student rights, and the Supreme Court declined to review the case. Thus, equal access must be given to religious groups in public schools.

Reynolds v. U.S. (1879): George Reynolds, a member of the Church of Jesus Christ of Latter-Day Saints, was charged with bigamy in Utah. Along with certain procedural arguments, Reynolds held that religious duty obligated him to marry more than one woman at a time. The Supreme Court upheld Reynolds' conviction and drew a distinction between what religious people might believe and what they can practice in the public sphere.

Roemer v. Maryland Public Works Board (1976): The State of Maryland offered monetary grants to private colleges and universities that did not exclusively offer theological or ministerial degrees. A suit was brought by taxpayers, claiming that the program violated the Establishment Clause since public money was going to sectarian schools. The Supreme Court found that grants to religious institutions were permissible and that religious institutions were eligible for public money as long as the funds were used for specifically religious purposes.

Rosenberger v. UVA (1995): University of Virginia student Ronald Rosenberger requested a disbursement from the student activities fund to subsidize the publication of a Christian newspaper. The university refused on the grounds that it could not promote any specific religious viewpoint. The Supreme Court held that the University had acted in such a way as to penalize Rosenberger's speech, and it further found that the university's publication policy was neutral toward religious content and did not therefore violate the Establishment Clause.

Santa Fe Independent School District v. Doe (2000): Two families brought a suit against the Santa Fe Independent School District's practice of allowing an overtly Christian prayer before home football games. While the case was pending, the school district changed the policy from requiring a prayer

to permitting one. The Supreme Court held that the new policy violated the Establishment Clause because the prayer took place on school property at an official function and therefore could appear to endorse religious practice.

Tennessee v. John Scopes (1925): This is the famous case dramatized in the movie *Inherit the Wind*. John Scopes was a high school teacher convicted of violating Tennessee law for teaching about evolution in the classroom. Though the prosecution won the trial, Scopes' accusers were portrayed as backwoods fundamentalists out of step with modern thinking.

Tilton v. Richardson (1971): Federal law provided for grants to be given to church-sponsored colleges and universities for the construction of facilities that were not used to advance religion, but it also provided a sunset clause to the effect that twenty years after construction, the building could be used for any purchase. The Supreme Court struck down the twenty-year limitation, arguing that the buildings were indistinguishable from other facilities and did not require excessive monitoring.

Tinker v. Des Moines Independent Community School District (1969): Three public school students were suspended for refusing to remove black armbands in protest of the Vietnam War. The Supreme Court ruled that although schools could impose certain restrictions on speech, school officials had not shown that the particulars of this case were destructive of legitimate school functions.

United States v. American Library Association (2003): Congress required public libraries to install filtering software on all public computer stations in libraries that receive federal funding. The American Library Association sued, claiming that the act required them to violate the Free Speech rights of their patrons. The Supreme Court ruled that the act did not violate the Constitution and thus that Congress could make certain requirements as a precondition for receiving federal funds.

Van Orden v. Perry (2005): Van Orden sued the state of Texas in federal court, claiming that a monument to the Ten Commandments on the grounds of the state capitol violated the Establishment Clause. The Supreme Court ruled that the Ten Commandments, though religious in origin, are part of American history and society and could therefore be included in public displays without violating the First Amendment.

Wallace v. Jaffree (1985): An Alabama law authorizing teachers to conduct prayers and other religious activities during the school day was found to violate the First Amendment. Religious services could serve no secular purpose, thus violating the *Lemon* Test (*Lemon v. Kurtzman*). Additionally, the law violated Alabama's responsibility to maintain neutrality towards religious groups.

Walz v. Tax Commission (1970): This case challenged tax exemptions for churches in New York. The plaintiff held that his own responsibility for paying taxes was essentially a subsidy for churches that did not have to pay property taxes and thus was a form of state aid to religious institutions. The Supreme Court held that the government could maintain a position of benevolent neutrality towards churches and religious institutions without violating the First Amendment and thus that tax exemptions were not unconstitutional.

West Virginia State Board of Education v. Barnette (1943): This case overturned the *Gobitis* decision, just three years old at the time, as the Supreme Court ruled that mandatory salutes to the flag were unconstitutional.

Westside Community Schools v. Mergens (1990): School officials denied permission for the formation of a Christian club in local schools. A group of students sued, claiming that their rights to equal access to public facilities had been violated. The Supreme Court held that since there were other non-curricular clubs recognized by the school, they could not deny another club on the basis of their religious content.

Widmar v. Vincent (1981): This case concerned access to university facilities at the University of Missouri at Kansas City. A Christian club that had been allowed to meet in previous years was sued when a new policy prompted school officials to deny permission for the club to have access to university facilities. The Supreme Court held that the Establishment Clause did not require school officials to deny access to school facilities on the basis of the religious nature of the club.

Wisconsin v. Yoder (1972): This case revolved around whether or not Amish families could absent their children from school facilities after a certain age on the basis of religious conviction. The Supreme Court held that public schooling was in direct conflict with the Amish way of life and that the state of Wisconsin could not therefore compel students to attend after the eighth grade.

*Witters v. Washington Department Services for the Blind (*1986): Witters, who suffered from a degenerative eye condition, sued to receive support from the state for his education to become a minister. Such aid would have been available to him if he had pursued a secular vocation, thus refusing him aid amounted to religious discrimination. The Supreme Court found that since the money was paid to him and not directly to the school it was not a violation of the Establishment Clause.

Zelman v. Simmons-Harris (2002): The Cleveland City School District's voucher plan offered publicly-financed aid for students to attend private, even religiously-sponsored, schools. A group of taxpayers sued, claiming that the voucher plan violated the Establishment Clause in that it provided

public money for parochial education. The Supreme Court held that since the plan was part of the state's effort to provide an education for all children, and since the decision as to where a given child would attend school was not made by school officials, the plan did not violate the First Amendment.

Zobrest v. Catalina Foothills School District (1993): The parents of a deaf student attending a Catholic school sought to have the local school district provide an interpreter for their son even though he was enrolled in a private institution. When the school district refused, district and appeals courts both found that an interpreter would act in such a way as to promote the child's religious development and would therefore be a violation of the First Amendment. The Supreme Court ruled that the Establishment Clause did not prohibit the school district from providing an interpreter, since the decision to attend the private school was made by the family, not school or state officials.

About the Editors and Contributors

THE EDITORS

ANN W. DUNCAN is a Ph.D. Candidate in American Religious History at the University of Virginia. She received her M.A. in Religious Studies from the University of Virginia in 2005 and her B.A. from Duke University in 2000. Her research, publications, and conference presentations have focused on intersections of religion and politics, American Christianity in wartime, and, more recently, motherhood and American Christianity.

STEVEN L. JONES is Associate Professor of Sociology at Grove City College and is the former associate director of the Center on Religion and Democracy at the University of Virginia. He received his M.T.S. degree from Duke University and holds a Ph.D. from the University of Virginia. A former fellow of the Center for Children, Families, and the Law and the Institute for Advanced Studies in Culture, his main areas of academic interest are political sociology and family, state, and church conflicts. He is currently finishing a book on patriotism and church schooling in America.

THE CONTRIBUTORS

GORDON A. BABST, Ph.D., is Associate Professor of Political Science at Chapman University, where he teaches political philosophy and re-

searches church-state issues in the context of liberal-democratic theory and practice. He is working on his second book, *Religious Rivals to American Freedoms*, which takes a critical look at political and legal deference to religion and religious belief.

LEE CANIPE holds an M.A. from the University of Virginia, a Master of Divinity from Duke University, and a Ph.D. from Baylor University. He is pastor of the Murfreesboro Baptist Church in Murfreesboro, North Carolina, and also teaches in the Department of Religion and Philosophy at Chowan University. His research interests include Baptist history and the intersections between Christian faith and American culture. His articles have appeared in *American Baptist Quarterly*, *Baptist History and Heritage*, *Baptist Quarterly* (UK), and the *Journal of Church and State*.

MICHAEL COULTER, Ph.D., is Professor of Political Science at Grove City College. He is a co-editor of the *Encyclopedia of Catholic Social Thought, Social Science, and Social Policy* (Scarecrow Press). He has contributed to, among others, *Perspectives on Political Science*, the *Journal of Markets and Morality*, the *Christian Scholar's Review*, the *Encyclopedia of American Religion and Politics,* and the *Encyclopedia of the Supreme Court*.

JASON R. EDWARDS received his Ph.D. in the History and Philosophy of Education from the University of Kentucky in 2003. He currently serves as Assistant Professor of History and Education at Grove City College. A Salvatori Fellow for the Intercollegiate Studies Institute, Edwards's research interests center on Agrarian philosophy in Western Civilization. He has published numerous entries for volumes on higher education and military history and is a regular contributor to *The Center for Vision and Values*.

MARK EDWARD GAMMON is Assistant Professor of Religion at Simpson College in Indianola, IA. He previously served as a research associate at the Institute for Communitarian Policy Studies at the George Washington University in Washington, D.C., where he worked on a number of public policy issues dealing with the relationship between individual rights and community responsibilities. He earned a Doctorate in Theological Ethics from Boston College.

J. DAVID HOLCOMB is Associate Professor of History and Political Science at the University of Mary Hardin-Baylor in Belton, Texas. He received the A.B. in History and Philosophy from William Jewell College and the M.A. and Ph.D. in Church-State Studies from Baylor University. He teaches courses in constitutional law, political theory, and church-state relations. His publications have appeared in the *Journal of Church and State*, *Baptist History and Heritage*, and the *Encyclopedia of American Religion and Politics*.

WILLIAM LESTER is Assistant Professor in the Department of Political Science and Public Administration at Jacksonville State University. He is a Civitas Scholar through The Center for Public Justice. His research interests include religion and politics, public organizational theory, ethics, and leadership studies.

Index

CHURCH-STATE ISSUES IN AMERICA TODAY

CHURCH-STATE ISSUES IN AMERICA TODAY

Volume 3: Religious Convictions and Practices in Public Life

Edited by
Ann W. Duncan and Steven L. Jones

PRAEGER PERSPECTIVES

PRAEGER

Westport, Connecticut
London

Library of Congress Cataloging-in-Publication Data

Church-state issues in America today / edited by Ann W. Duncan and Steven L. Jones.
p. cm.
Includes bibliographical references and index.
ISBN 978-0-275-99367-2 (set : alk. paper) — ISBN 978-0-275-99368-9 (vol. 1 : alk. paper) — ISBN 978-0-275-99369-6 (vol. 2 : alk. paper) — ISBN 978-0-275-99370-2 (vol. 3 : alk. paper)
1. Church and state—United States. 2. United States—Church history. I. Duncan, Ann W., 1978– II. Jones, Steven L., 1971–
BR516.C4925 2008
322′.10973—dc22 2007030692

British Library Cataloguing in Publication Data is available.

Library of Congress Catalog Card Number: 2007030692
ISBN: 978-0-275-99367-2 (set)
978-0-275-99368-9 (vol. 1)
978-0-275-99369-6 (vol. 2)
978-0-275-99370-2 (vol. 3)

First published in 2008

Praeger Publishers, 88 Post Road West, Westport, CT 06881
An imprint of Greenwood Publishing Group, Inc.
www.praeger.com

Printed in the United States of America

The paper used in this book complies with the Permanent Paper Standard issued by the National Information Standards Organization (Z39.48–1984).

10 9 8 7 6 5 4 3 2 1

Contents

Preface

Ann W. Duncan and Steven L. Jones

Congress shall make no law respecting the establishment of religion, or restricting the free exercise thereof.

—The Bill of Rights

Sixteen words. That all it took for the framers of the Constitution to fundamentally alter the social order by separating church and state. No one commenting on their arrangement has managed to be so concise. In the face of two centuries of argument and untold numbers of books and articles exploring every facet of church and state, it is worth remembering that the founders likely thought they were solving a problem, not starting one. To be sure, they knew that Americans would continue to struggle with the relationship between sacred and secular power, but from the Enlightenment on there was a sense that separating these two forces would promote both authentic religion and good government.

The authors of the following chapters cover a number of issues seemingly unrelated to one another. The scarlet thread connecting them all, though, is the fact that even under the formal conditions of separation, religious conviction is a major motivation for political action. In a society that empowers citizens to affect public policy, this fact alone means that issues that

on the surface seem unrelated to church and state are often battlegrounds between competing factions, some of which are heavily influenced by religion. When it comes to political action and voting, one person's act of faithfulness is another's instance of religious coercion, and both think they are protected by the Constitution. On the other side, state action in this realm can end up impacting the religious practices of citizens. State action can, knowingly or unknowingly, prevent the free exercise of one religion in the name of the greater good. Zoning laws, for instance, can be experienced by believers as an infringement on their freedom of religion. Conceived of in this fashion, church and state jurisprudence impacts everything from opposing war to the environment, from stem cell research to immigration.

In the first chapter, Francis Beckwith takes up abortion, arguably the most volatile issue in American life. Though the Supreme Court's decision in *Roe v. Wade* does not address the separation of church and state, Beckwith shows how the questions raised by abortion, questions like the origins of life, the nature of human beings, and our obligations to those that cannot protect themselves, are inseparable from religion. The debate over gay marriage, addressed by Katherine Stenger in Chapter 2, is also heavily influenced by religious belief. Aside from a thorough review of current laws, Stenger shows how activists on both sides of this timely issue find guidance, justification, and solace in their religious communities.

In the movie classic *Sergeant York*, Gary Cooper played a World War I hero troubled by the conflicting demands of religious conviction and patriotism. In the real world, this tension has been played out by thousands of conscientious objectors, people whose religious faith requires their refusal to participate in war. In Chapter 3, Chad Wayner and Jim Childress explore this very real conflict and show how difficult it can be for a free society to accommodate religious conviction, particularly in times of national emergency. Eric Matthews and Erin O'Brien, in Chapter 4, take up the cutting edge issue of stem cell research. They show how religious conviction and participation are uniquely powerful in shaping public support or opposition for stem cell research. Given the impassioned opposition to every announcement regarding stem cell research and the almost unlimited hope stem cells inspire among some portions of the medical community, professionals, and patients, religious communities may be the make or break players in this debate.

In Chapter 5 Samuel Stanton takes up an issue that seems be coming to the front burner even as I write this sentence, namely, the practice of sanctuary. Illegal immigration has become a hot topic in America, likely to come up in conversations about health care, race, economics, and even homeland security. Stanton traces the history of sanctuary, both as a theo-

logical ideal and legal issue, showing how it poses serious political problems, but also remarkable ministry opportunities, for certain segments of the Christian community in America. Alan Ray, in Chapter 6, focuses on the religious practices of America's only non-immigrant population, Native Americans. Noting the differences in the way Native Americans and Europeans conceptualize religion in the first place, Ray shows how the religious activities of Native Americans have been constrained by social and economic development.

Nadra Hashim takes up the growing evangelical environmental movement in America in Chapter 7. In her wide-ranging essay, Hashim shows how this alliance may break new ground in the relationship between science and religion while at the same time capitalize on and threaten the influence of evangelicalism in American political life. In Chapter 8, Courtney Campbell analyzes some of the most emotionally wrenching issues in church-state jurisprudence as he takes up the rights of families in various religious groups to determine medical care for their sick members. Religious belief can both require extraordinary measures to save lives, even over the advice of medical professionals, and motivate the refusal or suspension of treatment if it violates church doctrine. Given that lives are very often at stake, there are no easy calls in this arena.

1

The History and Controversies of the Abortion Debate

Francis J. Beckwith

Abortion is perhaps the most volatile issue on which the interests and principles embraced by both church and state intersect and sometimes conflict. Consider the following proposed definition of abortion:

> Abortion is the procured or spontaneous premature termination of pregnancy that results in the expulsion and/or death of an unborn human being. Unlike spontaneous abortion (or miscarriage), procured abortion is *intended* to terminate a pregnancy.

This definition raises moral and political questions that are addressed explicitly or implicitly by virtually every religious tradition: What is the nature of human beings? Who is and who is not a member of the moral community of persons? What is the extent of my moral obligations to others, and is the fetus (or unborn child) an "other?" Do the special obligations that parents have to their children include a requirement that a pregnant woman carry her unborn child to term?

Governments, in their laws, practices, and traditions, answer identical or similar questions explicitly or implicitly. For example, in the United States of America, the U.S. Supreme Court has held that an unborn human being is not protected under any provision or amendment of the U.S. Constitution. This tells us what the Court understands the Constitution to mean by persons and the extent to which the community may extend its laws to

protect the unborn. Thus, the moral and legal permissibility of abortion depends on the nature of the unborn, the mother's bodily rights, and/or how the law ought to address controversial matters of life and death that are also addressed by virtually every religious tradition.

Although some believe that the U.S. Supreme Court has settled the issue of abortion, it is not likely to go away soon. It continues to be the focus of attention whenever the President of the United States appoints someone to the federal bench, as the occupants of the federal bench, especially the Supreme Court, may determine whether abortion will remain a constitutional right. The two major parties are generally divided on the issue, with the Democratic Party being largely supportive of abortion rights and the Republican Party primarily opposed, with notable exceptions in each party. Despite little success in the courts, anti-abortion advocates have managed to pass legislation that either bans, or places restrictions on, abortion. In early 2006, the South Dakota legislature passed a law that would have banned virtually every abortion in that state, though it was eventually overturned by a statewide referendum in the November 2006 election.[1] The U.S. Congress has tried to limit abortion in a variety of ways, including the successful passage in 2003 of a federal ban on so-called "partial-birth abortion." Although the Supreme Court held in *Stenberg v. Carhart* (2000)[2] that Nebraska's prohibition of this procedure is unconstitutional, the federal ban was upheld in *Gonzales v. Carhart* (2007).[3]

Other issues in bioethics, such as embryonic stem cell research and human cloning, raise the same sorts of questions that have been raised about abortion—that is, what is the nature of human beings? Are embryos fully-fledged moral subjects with rights?—and so on. For this reason, resolutions of these issues seem contingent on how American society resolves the issue of abortion. Because the prospect of this is bleak, all of these controversies are here to stay for the foreseeable future.

In order to understand the nature of this controversy in light of broader church-state issues, we will first cover the state's view on abortion. This will be followed by an overview of the different ways in which both secular and religious thinkers have attempted to answer the question of the humanity of the unborn and the obligations and rights of the pregnant woman, questions that have traditionally been answered by religious bodies, including churches. In this chapter's final section, we will examine the case offered by some thinkers who conclude that a pro-life position on abortion, if it were to become law, would violate the separation of church and state because it would place into law a religious view of human nature and obstruct the religious free exercise rights of those who disagree with that view.

ABORTION AND CURRENT LAW

Prior to the mid-1960s in the United States, every state prohibited abortion with differing exceptions including rape, incest, life of the mother, and severe fetal deformity. During the 1960s and early 1970s, some states, including Colorado, New York, and California, began to liberalize their abortion laws, allowing for greater discretion on the part of physicians and patients. These changes were the result of decades of academic and political advocacy calling for differing degrees of decriminalization of abortion. Nevertheless, the abortion rights movement was making its case state by state, with no real prospect of finding a right to abortion in the Constitution that would instantly decriminalize abortion with all the protection that comes along with any fundamental right. For that, the movement needed a principle of law to which they could appeal. But since it was widely believed that local concerns on issues of health and morals were under the legislative power of the states rather than the federal government (including the federal courts), there was no such principle readily available, at least until 1965. It was in that year that the Supreme Court issued its landmark opinion, *Griswold v. Connecticut*.[4]

In that case, the Court ruled as unconstitutional a Connecticut statute that forbade the use of, sale of, and/or the assisting in the use of contraceptive devices. Justice William O. Douglas, who penned the Court's plurality opinion, concluded that the right of privacy grounds this judgment, for the wrongness of this statute lies in its broad scope: it includes the private judgments and activities of couples within the sanctuary of marriage. This right of privacy, according to Douglas, can be gleaned not from a literal reading of the words found in the Bill of Rights but from "penumbras" that stand behind these words, and these penumbras are "formed by emanations from those guarantees that help give them life and substance."[5] What the Court seems concerned about is that Connecticut, through its anti-contraception statute, interfered with the sanctity of marriage and the couple's judgments about intimate matters, including reproduction.[6] In his concurring opinion, Justice Arthur J. Goldberg understood the plurality's rejection of the Connecticut statute as firmly grounded in this notion of marital sanctity.[7]

In the 1972 case *Eisenstadt v. Baird*, the Court ruled that a Massachusetts statute violated the Equal Protection Clause because it provided, in its laws regarding the distribution of contraceptive devices, "dissimilar treatment for married and unmarried persons who are similarly situated."[8] In the words of Justice Brennan, author of the majority opinion:

If under *Griswold* the distribution of contraceptives to married persons cannot be prohibited, a ban on distribution to unmarried persons would be equally impermissible. It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision to bear or beget a child.[9]

It seems that at this point in the historical trajectory of the right of privacy, one could reasonably infer that reproductive liberty was moving in a libertarian direction. Consequently, based on the right of privacy found in *Griswold* and *Eisenstadt* as well as other decisions,[10] in 1973, in the case of *Roe v. Wade*, the Court established a right to abortion.

Roe v. Wade

The case of *Roe v. Wade* (1973) concerned Jane Roe (a.k.a. Norma McCorvey), a resident of Texas, who claimed to have become pregnant as a result of a gang rape (which was found later to be a false charge years after the Court had issued its opinion).[11] According to Texas law at the time (essentially unchanged since 1856), a woman may procure an abortion only if it is necessary to save her life. Because Roe's pregnancy was not life-threatening, she sued the state of Texas. In 1970, the unmarried Roe filed a class action suit in federal district court in Dallas. The federal court ruled that the Texas law was unconstitutionally vague and overbroad and infringed on a woman's right to reproductive freedom. The state of Texas appealed to the U.S. Supreme Court. After the case was argued twice before the Court, it issued *Roe v. Wade* on January 22, 1973, holding that the Texas law was unconstitutional, and that not only must all states including Texas permit abortions in cases of rape but in all other cases as well.

In *Roe*, Justice Harry Blackmun, who authored the Court's opinion, distinguished between different stages of pregnancy. He ruled that aside from procedural guidelines to ensure maternal health, a state has no right to restrict abortion in the first six months of pregnancy. Writes Blackmun:

A state criminal abortion statute of the current Texas type, that excepts from criminality only a *life-saving* procedure on behalf of the mother without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.

(a) For the stage prior to approximately the end of the first trimester, the abor-

tion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.[12]

Thus a woman could have an abortion during the first six months of pregnancy for *any* reason she deems fit. Restrictions in the second trimester should be merely regulatory in order to protect the pregnant woman's health. In the last trimester (after fetal viability, the time at which the unborn can live outside the womb) the state has a right, although not an obligation, to restrict abortions to only those cases in which the mother's life or health is jeopardized, because after viability, according to Blackmun, the state's interest in prenatal life becomes compelling. *Roe*, therefore, does not prevent a state from having unrestricted abortion for the entire nine months of pregnancy if it so chooses.

Nevertheless, the Court explains that it would be a mistake to think of the right to abortion as absolute.[13] For the Court maintained that it took into consideration the legitimate state interests of both the health of the pregnant woman and the prenatal life she carries. Thus, reproductive liberty, according to this reading of *Roe*, should be seen as a limited freedom established within the nexus of three parties: the pregnant woman, the unborn, and the state. The woman's liberty trumps both the value of the unborn and the interests of the state except when the unborn reaches viability (and an abortion is unnecessary to preserve the life or health of the pregnant woman) and/or when the state has a compelling state interest in regulating abortion before and after viability in order to make sure that the procedure is performed in accordance with accepted medical standards. Even though this is a fair reading of Roe's reasoning, it seems to me that the premises put in place by Justice Blackmun have not resulted in the sensible balance of interests he claimed his opinion had reached. Rather, it has, in practice, resulted in abortion on demand.

For the Supreme Court so broadly defined health in *Roe*'s companion decision, *Doe v. Bolton* (1973), that for all intents and purposes *Roe* allows for abortion on demand. In *Bolton*, the court ruled that health must be taken in its broadest possible medical context, and must be defined "in light of all factors—physical, emotional, psychological, familial, and the woman's

age—relevant to the well being of the patient. All these factors relate to health."[14] Because all pregnancies have consequences for a woman's emotional and family situation, the court's health provision has the practical effect of legalizing abortion up until the time of birth if a woman can convince a physician that she needs the abortion to preserve her emotional health. This is why in 1983 the U.S. Senate Judiciary Committee, after much critical evaluation of the current law in light of the Court's opinions, confirmed this interpretation when it concluded that "no significant legal barriers of any kind whatsoever exist today in the United States for a woman to obtain an abortion for any reason during any stage of her pregnancy."[15]

The Reasoning of *Roe v. Wade*

Because, as we have already noted, the Court had already established a constitutional right to contraceptive use by married couples (*Griswold*) and then by single people (*Eisenstadt*) based on the right of privacy, it would seem that abortion, because it is a means of birth control, would be protectable under this right of privacy. However, in order to make this move, there were at least two legal impediments that the Court had to eliminate:

1. Starting in the nineteenth century, anti-abortion laws had been on the books in virtually every U.S. state and territory for the primary reason of protecting the unborn from unjust killing; and
2. The unborn is constitutionally a person protectable under the Fourteenth Amendment.

Concerning the first obstacle, if, as Justice Douglas asserts in *Griswold*, the "right of privacy [is] older than the Bill of Rights—older than our political parties, older than our school system,"[16] then the Court must account for the proliferation of anti-abortion laws, whose constitutionality were not seriously challenged until the late 1960s, in a legal regime whose legislators and citizens passed these laws with apparently no inclination to believe that they were inconsistent with a right of privacy "older than the Bill of Rights." As for the second impediment, the Court had to show that the unborn is not a person under the Fourteenth Amendment in order to justify abortion. After all, unlike contraception, in which all the adult participants in the sexual act consent to its use, a successful abortion entails the killing of a third party, a living organism, the unborn, who has already come into being.[17] Thus, if the Court had good reasons to reject these two jurisprudential challenges, then it could establish a right to abortion as a species of the right of privacy.

The second impediment was met head on. The Court pointed out that Texas failed to present any textual or case law reasons to believe that the unborn is a person under the Fourteenth Amendment.[18] In addition, Texas' argument that the unborn is in fact a person because its status as a human being is established by the well-know facts of fetal development was rejected by the Court as well. It did so on the grounds that experts, including physicians, philosophers, and theologians, cannot agree on when human life begins.[19]

The first impediment was confronted by appealing to historical evidence. Justice Blackmun agreed with opponents of abortion rights that anti-abortion laws have been on the books in the United States for quite some time. However, according to Blackmun, the purpose of these laws, almost all of which were passed in the nineteenth century, was not to protect prenatal life, but rather, to protect the pregnant woman from a dangerous medical procedure.[20] Blackmun also argues that prior to the passage of these statutes, under the common law, abortion was permissible prior to quickening and was at most a misdemeanor after quickening.[21] (Quickening refers to the "first recognizable movement of the fetus *in utero*, appearing usually from the 16th to the 18th week of pregnancy."[22]) So, because abortion is now a relatively safe procedure, there is no longer a reason for prohibiting it.[23] Consequently, given the right of privacy, and given the abortion liberty that had appeared within common law, there is a constitutional right to abortion.

The history of abortion figures prominently in the Court's opinion in *Roe*.[24] Justice Blackmun, in 23 pages, takes the reader on an historical excursion through ancient attitudes (including the Greeks and Romans), the Hippocratic Oath, the common law, the English statutory law, the American law, and the positions of the American Medical Association (AMA), the American Public Health Association (APHA), and the American Bar Association (ABA). The purpose for this history is clear: if abortion's prohibition is only recent, and primarily for the purpose of protecting the pregnant woman from dangerous surgery, then the Court would not be creating a new right out of whole cloth if it affirms a right to abortion. However, only the history of common law is relevant to assessing the constitutionality of this right, because, as Blackmun himself admits, "it was not until after the War Between the States that legislation began generally to *replace* the common law,"[25] even though, as Joseph W. Dellapenna points out, Justice Blackmun's historical chronology is "simply wrong," for twenty-six of thirty-six states had already banned abortion by the time the Civil War had ended.[26] Nevertheless, when statutes did not address a criminal wrong, common law was the authoritative resource from which juries, judges, and

justices found the principles from which, and by which, they issued judgments.

However, since 1973 the overwhelming consensus of scholarship has shown that the Court's history, especially its interpretation of common law, is almost entirely mistaken. Justice Blackmun's history (excluding his discussion of contemporary professional groups) is so flawed that it has inspired the production of scores of scholarly works that are nearly unanimous in concluding that Justice Blackmun's history is not trustworthy.[27]

After *Roe*

From 1973 to 1989 the Supreme Court struck down every state attempt to restrict an adult woman's access to abortion.[28] The U.S. Congress tried, and failed, to pass a Human Life Bill (1981) in order to protect the unborn by means of ordinary legislation, and later it failed to pass a Human Life Amendment (1983) to the U.S. Constitution. Although the Court upheld Congress' ban on federal funding of abortion except to save the life of the mother,[29] it never wavered on *Roe*. Given these political and legal realities, abortion opponents put their hopes in the Supreme Court appointees of two pro-life presidents, Ronald Reagan (1981–1989) and George H. W. Bush (1989–1993), to help overturn *Roe*. Between Reagan and Bush, they would appoint five justices to the Court (Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, Clarence Thomas, David Souter) who, abortion opponents mistakenly thought, all shared the judicial philosophies of the presidents who appointed them. Ironically, it would be three of those justices—O'Connor, Kennedy, and Souter—who would author the Court's opinion in *Casey v. Planned Parenthood* (1992) and uphold *Roe*. And two of them—O'Connor and Souter—would go even further, joining three of their brethren in *Stenberg v. Carhart* (2000) in holding that Nebraska's partial-birth abortion ban was unconstituitonal.

Nevertheless, three years before *Casey*, the Court seemed to be moving toward a rejection of *Roe*. Many abortion opponents read *Webster v. Reproductive Health Services* (1989)[30] as a sign that the Court was preparing to dismantle the regime of *Roe*. In *Webster* the Court reversed a lower-court decision and upheld several provisions of a Missouri statute that would not have survived constitutional muster in earlier days. First, the Court upheld the statute's preamble, which states that "'[t]he life of each human being begins at conception,' and that '[u]nborn children have protectable interests in life, health, and well-being.'"[31] Furthermore, it requires that under Missouri's laws the unborn should be treated as full persons who possess "all rights, privileges, immunities available to other persons, citizens, and resi-

dents of the state,"[32] contingent upon the U.S. Constitution and prior Supreme Court opinions. Because these precedents would include *Roe*, the statute poses no threat to the abortion liberty.

Second, the *Webster* Court upheld the portion of the Missouri statute that forbade the use of government facilities, funds, and employees in performing and counseling for abortions except if the procedure is necessary to save the life of the mother.

Third, the Court upheld the statute's provision that mandates that "[b]efore a physician performs an abortion on a woman he has reason to believe is carrying an unborn child of twenty or more weeks gestational age, the physician shall first determine if the unborn child is viable by using and exercising that degree of care, skill, and proficiency commonly exercised by the ordinarily skillful, careful, and prudent physician engaged in similar practice under the same or similar conditions."[33] In order to properly assess the unborn's viability, the statute requires that the physician employ procedures as are necessary and enter the findings of these procedures in the mother's medical record.[34] In passing this statute, Missouri's legislature took seriously *Roe*'s viability marker—that at the time of viability the state has a compelling interest in protecting unborn life. This is why the Court, in *Webster*, correctly concluded that "[t]he Missouri testing requirement here is reasonably designed to ensure that abortions are not performed where the fetus is viable—an end which all concede is legitimate—and that is sufficient to sustain its constitutionality."[35]

Webster, however, modified *Roe* in at least two significant ways: it rejected both *Roe*'s trimester breakdown as well as its claim that the state's interest in prenatal life becomes compelling only at viability:

> [T]he rigid *Roe* framework is hardly consistent with the notion of a Constitution cast in general terms, as ours is, and usually speaking in general principles, as ours does. The key elements of the *Roe* framework—trimesters and viability—are not found in the text of the Constitution or in any place else one would expect to find a constitutional principle.[36]

According to the Court, "we do not see why the State's interest in protecting potential human life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability."[37] Although *Webster* chipped away at *Roe*, it did not overturn it.

In *Planned Parenthood v. Casey* (1992), the Court was asked to consider the constitutionality of five provisions of the Pennsylvania Abortion Control Act of 1982, which the state amended in 1988 and 1989.[38] The Court

upheld as constitutional four of the five provisions, rejecting the third one (which required spousal notification for an abortion) based on what it calls the *undue burden* standard, which the Court defined in the following way: "A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[39] The undue burden standard is, according to most observers, a departure from *Roe* and its progeny, which required that any state restrictions on abortion be subject to strict scrutiny. That is, in order to be valid, any restrictions on access to abortion must be essential to meeting a compelling state interest. For example, laws that forbid yelling "fire" in a crowded theater pass strict scrutiny and thus do not violate the First Amendment right to freedom of expression. The *Casey* Court, nevertheless, claimed to be more consistent with the spirit and letter of *Roe* than the interpretations and applications of *Roe*'s principles in subsequent Court opinions.[40] But the *Casey* Court, by subscribing to the undue burden standard, held that a state may restrict abortion by passing laws that may not withstand strict scrutiny but nevertheless do not result in an undue burden for the pregnant woman. For example, the Court upheld as constitutional two provisions in the Pennsylvania statute—a 24-hour waiting-period requirement and an informed-consent requirement (that is, the woman must be provided the facts of fetal development, risks of abortion and childbirth, and information about abortion alternatives)—that would have most likely not met constitutional muster with the Court's pre-*Webster* composition.[41]

Although the *Casey* Court upheld *Roe* as a precedent, the plurality opinion, authored by three Reagan-Bush appointees—O'Connor, Kennedy, and Souter—rejected two aspects of *Roe:* (1) its requirement that restrictions be subject to strict scrutiny; and (2) its trimester framework (which *Webster* had already discarded). The trimester framework, according to the Court, was too rigid as well as unnecessary to protect a woman's right to abortion.[42] However, the *Casey* Court reaffirmed viability as the time at which the state has a compelling interest in protecting prenatal life.

Casey upheld *Roe* on the basis of *stare decisis* for which the Court provided two reasons: (1) the reliance interest,[43] and (2) the Court's legitimacy and the public's respect for it. Concerning the first, the Court argued that because the nation's citizens had planned and arranged their lives with the abortion right in mind, that is, because they have relied on this right, it would be wrong for the Court to jettison it.[44] And secondly, if the Court were to overturn *Roe*, it would suffer a loss of respect in the public's eye and perhaps chip away at its own legitimacy, even if rejecting *Roe* would in

fact correct an error in constitutional jurisprudence.[45] The Court, nevertheless, in its opening comments in *Casey* speaks of abortion as a liberty grounded in the Due Process Clause of the Fourteenth Amendment, an extension of the right of privacy cases mentioned above.[46]

Beginning in 1996, then-President Bill Clinton vetoed several bills passed by the U.S. Congress to prohibit what pro-life activists call "partial-birth abortion."[47] Also known as "D & X" (for dilation and extraction) abortion, this procedure is performed in some late-term abortions. Using ultrasound, the doctor grips the fetus' legs with forceps. The fetus is then pulled out through the birth canal and delivered with the exception of its head. While the head is in the womb the doctor penetrates the live fetus' skull with scissors, opens the scissors to enlarge the hole, and then inserts a catheter. The fetus's brain is vacuumed out, resulting in the skull's collapse. The doctor then completes the womb's evacuation by removing the dead fetus.

Although none of the congressional bills became law, 30 states, including Nebraska, passed similar laws that prohibited D & X abortions. However, in *Stenberg v. Carhart* (2000), the Supreme Court, in a 5–4 decision, struck down Nebraska's ban on partial-birth abortions on two grounds:

1. The law lacked an exception for the preservation of the mother's health, which *Casey* required of any restrictions on abortion.
2. Nebraska's ban imposed an undue burden on a woman's fundamental right to have an abortion.

Although Nebraska's statute had a "life of the mother" exception, the Court pointed out that *Casey* requires an exception for *both* the life and *health* of the mother if a state wants to prohibit post-viability abortions.[48] But Nebraska did not limit its ban to only D & X abortions performed after viability. Its ban applied throughout pregnancy. So, according to the Court, unless Nebraska can show that its ban does not increase a woman's health risk, it is unconstitutional: "The State fails to demonstrate that banning D & X without a health exception may not create significant health risks for women, because the record shows that significant medical authority supports the proposition that in some circumstances D & X would be the safest procedure."[49] But, as Justice Kennedy points out in his dissent, "The most to be said for the D & X is it may present an unquantified lower risk of complication for a particular patient but that other proven safe procedures remain available even for this patient."[50] But the relative risk between procedures, if in fact D & X is in some cases relatively safer,[51] cannot justify overturning the law if the increased risk is statistically negligi-

ble and if the State, as the Court asserted in *Casey*[52] and *Webster*,[53] has an interest in prenatal life throughout pregnancy which becomes compelling enough after viability to prohibit abortion except in cases when the life or the health of the mother are in danger.

The Court's second reason for rejecting Nebraska's law is that the ban on D & X imposed an undue burden on a woman's fundamental right to have an abortion. The type of abortion performed in 95 percent of the cases between the 12th and 20th weeks of pregnancy—that is, "D & E" abortion (dilation and evacuation)[54]—is similar to D & X abortion. So, the Court reasoned, if a ban on D & X abortions is legally permissible, then so is a ban on D & E abortions. But that would imperil the right to abortion. Hence Nebraska's ban imposes an undue burden on the pregnant woman and thus violates the standard laid down in *Casey*. But, as both Justice Thomas and Justice Kennedy point out in their separate dissents,[55] by reading Nebraska's law in this way, the Court abandoned its long standing doctrine of statutory construction, that statutes should be read in a way that is consistent with the Constitution if such a reading is plausible. Moreover, Justice Thomas, in a blistering dissent, argues in graphic detail[56] that D & X and D & E procedures are dissimilar enough that it is "highly doubtful that" Nebraska's D & X ban "could be applied to ordinary D & E."[57]

In 2003, President George W. Bush signed into law a federal partial-birth abortion ban[58] that contains both a more circumspect definition of D & X abortion as well as a life of the mother exception.[59] It was immediately challenged in federal court by abortion-choice groups.[60] Nevertheless, on April 18, 2007, in *Gonzales v. Carhart* (2007), the Supreme Court upheld the federal statute.

PHILOSOPHY, RELIGION, AND HUMAN NATURE

Most advocates in the abortion debate, in their more candid moments, will admit that the deep divisions between citizens on this issue are the result of how these citizens answer the most fundamental questions of human existence to which religious traditions have traditionally offered answers. These answers include the nature of human persons and the extent to which human persons have obligations to one another and whether familial obligations—including what, if anything, we owe our children and our parents—ought to be reflected in our laws. This is why philosophers, theologians, and other scholars, in order to support their various views on abortion, have focused on two areas: (1) the nature of human persons, and (2) the extent of a human person's bodily autonomy.

The Nature of Human Persons

Virtually no one disputes that individual human life begins at conception, the *successful* result of the process of fertilization at which the male sperm and the female ovum unite.[61] That is, fertilization is a process, taking between twenty-four to thirty-six hours that culminates in conception. Where there is disagreement is over this question: when during this entity's development does it become immoral to take its life without justification? Or put differently, when does this entity require state protection?

Those who maintain that the unborn—during some, all, or most of its gestation—is not entitled to legal protection by the state argue that it lacks a property that, if present, would make it a *person* (or a subject of moral concern). This is an example of the accidental-essential division employed by some metaphysicians when they discuss, defend, or critique a particular philosophical anthropology. J.P. Moreland illustrates: "If something (say Socrates) has an accidental property (e.g., being white), then that thing can lose the property and still exist. For example, Socrates could turn brown and still exist and be Socrates. Essential properties constitute the nature or essence of a thing; and by referring to essential properties, one answers in the most basic way this question: What kind of thing is *x*?"[62] So, for example, if one states that the unborn is not a moral subject until it is viable, then one is claiming that viability is an essential property of human persons.

Thinkers offer a variety of metaphysical views on the nature of human beings and personhood. Some argue that personhood does not arrive until brain waves are detected (40 to 43 days after conception).[63] Others, such as Mary Anne Warren,[64] define a person as a being who can do certain things, such as have consciousness, solve complex problems, have a self-concept, and engage in sophisticated communication, which would put the arrival of personhood *after birth*. Presenting views similar to Warren's, Michael Tooley[65] and Peter Singer[66] argue that not only is abortion permissible, but so is infanticide, for they maintain that the newborn (for some months after birth) is not a person and thus is not entitled to the protections we accord beings who have such a status. David Boonin takes a more conservative abortion-choice position, maintaining that the unborn does not become a subject of moral rights until the arising of organized cortical brain activity (25 to 32 weeks after conception).[67] Still others, such as L.W. Sumner,[68] take a moderate position and argue that human personhood does not arrive until the fetus is sentient and has the ability to feel and sense as a conscious being. This, according to Sumner, occurs possibly as early as the middle weeks of the second trimester of pregnancy and definitely by the end of that trimester.

There are also theologically-argued variations on these positions. They are, in my judgment, as much based on metaphysical considerations as the secular theories. However, they either rely on or add premises that appeal to Scripture, religious tradition, or theological reasoning. For instance, theologian Beverley Harrison denies the personhood of both the infant as well as the post-viable fetus:

> An infant is a biologically discrete entity, an individual human being—though not a full person. In the first half of pregnancy, a fetus could not be considered this . . . There is no analogue between a conceptus and a human being except certain protoplasm—the former is human tissue but not human life . . . In regard to infanticide, one has to weigh the moral concerns carefully. It is wise for the community to discourage infanticide and would be unwise to make abortion illegal . . . Infanticide is not a great wrong. I do not want to be construed as condemning women who, under certain circumstances, quietly put their infants to death.[69]

Theologian and ethicist Joseph Fletcher, who maintains that his ethical views are within the Christian tradition,[70] presents criteria of personhood that exclude infants.[71] The Religious Coalition for Reproductive Choice (RCRC) affirms that "the common belief is that life begins at birth, when the baby begins to breathe on his/her own and is not dependent on oxygen from the mother. Therefore, Jewish and biblical tradition defined a human being with the word 'nephesh'—the breathing one . . . Biblically, a human being is one who breathes."[72] Christian ethicist John Swomley agrees, arguing that "the Bible's clear answer is that human life begins at birth, with the first breath. In *Gen*. 2:7, God 'breathed into his nostrils the breath of life and man became a living being' (in some translations, 'a living soul')."[73]

As one might guess, those who believe that full personhood begins at conception have developed and defended highly sophisticated arguments for their position.[74] These arguments, like those of their adversaries, are put forth to defend a particular metaphysical view of human persons. The following is a brief example of the sort of philosophical anthropology defended by some of these abortion opponents.

According to this view, each kind of living organism or *substance*, including the human being, maintains identity through change and possesses a nature or essence that makes certain activities and functions possible. "A substance's *inner nature*," (emphasis in original) writes Moreland "is its ordered structural unity of ultimate capacities. A substance cannot change in its ultimate capacities; that is, it cannot lose its ultimate nature and continue to exist."[75] Consider the following illustration.

A domestic feline, because it has a particular nature, has the ultimate capacity to develop the ability to purr. It may die as a kitten and never

develop that ability. Regardless, it is *still* a feline as long as it exists, because it possesses a particular nature, even if it never acquires certain functions that by nature it has the capacity to develop. In contrast, a frog is not said to lack something if it cannot purr, for it is by nature not the sort of being that can have the ability to purr. A feline that lacks the ability to purr *is still a feline* because of its nature. A human being who lacks the ability to think rationally (either because she is too young or she suffers from a disability) *is still a human person* because of her nature. Consequently, a human being's lack makes sense *if and only if* she is an actual human person.

Second, the feline remains the same particular feline over time from the moment it comes into existence. Suppose you buy this feline as a kitten and name him "Cartman." When you first bring him home, you notice that he is tiny in comparison to his parents and lacks their mental and physical abilities. But over time Cartman develops these abilities, learns a number of things his parents never learned, sheds his hair, has his claws removed, becomes ten times larger than he was as a kitten, and undergoes significant development of his cellular structure, brain and cerebral cortex. Yet, this grown-up Cartman is identical to the kitten Cartman, even though he has gone through significant physical changes. Why? The reason is because living organisms, substances, maintain identity through change.

Another way to put it is to say that organisms, including human beings, are ontologically prior to their parts,[76] which means that the organism as a whole maintains absolute identity through time while it grows, develops, and undergoes numerous changes, largely as a result of the organism's nature that directs and informs these changes and their limits. The organs and parts of the organism, and their role in actualizing the intrinsic, basic capacities of the whole, acquire their purpose and function *because* of their roles in maintaining, sustaining, and perfecting the *being as a whole*. This is in contrast to a thing that is not ontologically prior to its parts, like an automobile, cruise ship, or computer. Just as a sporting event (for example, a basketball game, a tennis match) does not subsist through time as a unified whole, neither will an automobile, ship, or computer.[77] It is, rather, in the words of Moreland, "a sum of each temporal (and spatial) part . . . " Called *mereological essentialism* (from the Greek "meros" for "part"), it "means that the parts of a thing are essential to it as a whole; if the object gains or loses parts, it is a different object."[78] Organisms, however, are different, for they may lose and gain parts, and yet remain the same thing over time.

Thus, if you are an intrinsically valuable human person now, then you were an intrinsically valuable human person at *every moment in your past*, including when you were in your mother's womb, for you are identical to

yourself throughout the changes you undergo from the moment you come into existence. But if this were not the case, that it is only one's present ability to exercise certain human functions, such as rationality, awareness of one's interests, and consciousness, that makes one a person, then it is not the organism that is intrinsically valuable, but merely one's states or functions. "It would follow" from this, writes Patrick Lee, "that the basic moral rule would be simply to maximize valuable states or functions." For example, "[i]t would not be morally wrong to kill a child, no matter what age, if doing so enabled one to have two children in the future, and thus to bring it about that there were two vehicles of intrinsic value rather than one. On the contrary, we are aware that persons themselves, which are things enduring through time, are intrinsically valuable."[79]

Among the ways that some thinkers reply to this argument is to advance a case that there is no substantial self that remains the same through all the accidental changes the human being undergoes; that is, there is no absolute identity between any stages in the existence of a human being. Proponents of this view maintain that personal identity consists of a series of experiences that does not require an underlying substance that has these experiences. My "personhood" is merely a string of psychological experiences connected by memory, beliefs, and/or character as well as causal, bodily, and temporal continuity. And because this continuity does not extend to the fetal stages of existence, and perhaps not even to infancy, the unborn and perhaps the newborn are not persons.[80] Some call this the *no-subject* view.[81] Baptist theologian Paul Simmons seems to be embracing this metaphysical perspective as well: "No one can deny that there is a continuum from fertilization to birth, maturity, and adulthood, but not every stage on the continuum has the same value or constitutes the same entity."[82] An implication of this view is that even when a human being becomes a "person" she is literally not the same entity she was ten years ago or even one second ago. That is, she does not maintain absolute identity through change. This view has been subject to trenchant, and I believe convincing, philosophical criticism.[83]

A commitment to materialism provides many thinkers with a motivation for maintaining the no-subject view. The dominant metaphysical view of intellectuals in the West, materialism maintains that all that exists is the physical world and that non-physical things like God, angels, natures, substances, and souls do not actually exist and/or cannot be the object of knowledge. As materialist Paul Churchland writes: "The important point about the standard evolutionary story is that the human species and all of its features are the wholly physical outcome of a purely physical process . . . If this is the correct account of our origins, then there seems neither

need, nor room, to fit any nonphysical substances or properties into our theoretical account of ourselves. We are creatures of matter. And we should learn to live with that fact."[84]

Another sort of response to the substance view is to agree with the prolifer that one's adult self is identical to one's prenatal self, that it is in fact the same substance that remains identical to itself through time, but that intrinsic value is an *accidental*, rather than an *essential*, *property* possessed by human beings as long as they exist.[85] What this means is that you are materially identical to your prenatal self, but that a property you acquire late in your gestation or soon after your birth—for example, sentience, self-consciousness—imparts to you intrinsic vale. So, just as a leaf turns from green to brown in Autumn yet remains the same leaf, you turn from non-person to person, although you remain the same human being. This view is the most dominant one in the literature.

Thus, regardless of what position one may hold on abortion, it depends on a philosophical anthropology that is grounded in some metaphysical perspective. So, for example, if one is a materialist like Churchland, one will likely develop a philosophical anthropology that excludes non-physical properties and substances. Or if one ties the achievement of personhood to the acquisition and development of certain physical properties,[86] one would seem to be accepting the view that the human person is merely a physical system, denying that a human being is a substance ontologically prior to its parts. Or if one argues, like many abortion opponents do, that the human being is a substance that maintains absolute identity through change as long as it exists, then an ordinary adult human being is the same substance that was in her mother's womb from conception, and thus, that unborn entity, who later became the adult, was a person as well. Thus, no position on abortion is without metaphysical presuppositions, regardless of whether those presuppositions are consciously recognized or affirmed by its advocates.

The Extent of a Person's Bodily Rights

Some abortion-choice advocates do not see the status of the unborn as the decisive factor in whether or not abortion is morally or legally justified. They argue that a pregnant woman's removal of the unborn from her body, even though it is foreseeable that it will result in the unborn's death, is no more immoral than an ordinary person's refusal to donate his kidney to another in need of one, even though this refusal will probably result in the death of the prospective recipient. The most important and influential argument of this sort was offered in 1971 by philosopher Judith Jarvis Thomson.[87] Although others, including David Boonin[88] and Eileen McDo-

nagh,[89] have defended revised versions of it, Thomson's case is worth considering for our present purposes. For it is an argument that relies heavily on notions of personal autonomy and individual rights that many religious citizens consider fatal to communitarian understandings of child-bearing and child-rearing that are congenial to their religious traditions. Even though the federal courts and popular pro-choice advocates have not explicitly defended Thomson's argument, much of their rhetoric seems to support an understanding of bodily rights and autonomy consistent with Thomson's position. This will become apparent as we examine the argument.

Thomson's Violinist Argument Thomson writes that it is "of great interest to ask what happens if, for the sake of argument, we allow the premise [that the fetus is a person]. How, precisely, are we supposed to get from there to the conclusion that abortion is morally impermissible?"[90] Thomson's argument, therefore, poses a special difficulty for the pro-life advocate. She grants, for the sake of argument, the pro-lifer's most important premise—the unborn is a subject of moral rights—but nevertheless concludes that abortion is morally permissible. In a sense, her query, at the level of principle, is uncontroversial, for she is simply asking whether it follows from the fact that a living being is intrinsically valuable that it is *never* permissible to kill that being or to act in a way that results in its death. After all, many abortion opponents would answer "no." For many of them argue that one can consistently maintain that all human beings are persons and thus have a *prima facie* right to life, while at the same time holding that there may be some cases in which killing human beings is justified, such as in the cases of just war or self-defense.

Thomson argues that even if the unborn is a person with a right to life, it does not follow that a pregnant woman is morally required to use her bodily organs to sustain the unborn's life. In order to make her case, Thomson offers a story that accentuates what she believes are the relevant principles that support her argument:

> You wake up in the morning and find yourself back to back in bed with an unconscious violinist. A famous unconscious violinist. He has been found to have a fatal kidney ailment, and the Society of Music Lovers has canvassed all the available medical records and found that you alone have the right blood type to help. They have therefore kidnapped you, and last night the violinist's circulatory system was plugged into yours, so that your kidneys can be used to extract poisons from his blood as well as your own. The director of the hospital now tells you, "Look we're sorry the Society of Music Lovers did this to you—we would never have permitted it if we had known. But still, they did it, and the violinist now is plugged into you. To unplug you would be to kill him. But never mind, it's only for nine

months. By then he will have recovered from his ailment, and can safely be unplugged from you." Is it morally incumbent on you to accede to this situation? No doubt it would be very nice of you if you did, a great kindness. But do you *have* to accede to it? What if it were not nine months, but nine years? Or still longer? What if the director of the hospital says, "Tough luck, I agree, but you've now got to stay in bed, with the violinist plugged into you, for the rest of your life. Because remember this. All persons have a right to life, and violinists are persons. Granted you have a right to decide what happens in and to your body, but a person's right to life outweighs your right to decide what happens in and to your body. So you cannot ever be unplugged from him." I imagine that you would regard this as outrageous . . . [91]

Thomson concludes she is "only arguing that having a right to life does not guarantee having either a right to be given the use of or a right to be allowed continued use of another person's body—even if one needs it for life itself."[92] That is, the unborn does not have a right to life so strong that it outweighs the pregnant woman's right to personal bodily autonomy. Thomson anticipates several objections to her argument, and in the process of responding to them further clarifies her case.

According to Thomson, the pregnant woman consented to sex, but not to the pregnancy that followed if she did not intend to have children. Just as opening my window for the pleasure of fresh air does not entitle a burglar to my belongings even though while opening the window it was foreseeable that a burglar may crawl through the window wanting to steal from me, engaging in sex for pleasure does not entitle the fetus to the pregnant woman's body even though while engaging in sex it was foreseeable that an unborn human being needing the pregnant woman's body for its survival may result.[93]

Responses to Thomson's Argument There is no scarcity of responses to Thomson's argument in the literature.[94] David Boonin presents and critiques sixteen of them, some of which have several variations including counterarguments to rebuttals.[95] However, there is a case against Thomson's argument that combines what are sometimes called the responsibility objection and the parental obligation objection.

Thomson's case seems to depend on the notion that moral obligations must be voluntarily and explicitly accepted in order to have moral, and thus legal, force. But that does not seem correct in some cases. For instance, we do not consider explicit consent to be a necessary condition when we justly ascribe blame and attribute responsibility to a person whose actions resulted in consequences that he did not explicitly intend to bring about. Take, for example, the following tale. Imagine a man and a woman engage in consen-

sual intercourse that results in pregnancy. The couple did not intend this result, for they were careful in their carnal indulgence, employing several of the most efficient and safest forms of birth control. And yet, conception occurred. Rather than exercising her legal right to abort, the woman, who had never fancied herself as a mother, chooses to bring the child to term, for she has not been able to suppress the maternal instincts that welled up inside her from the moment her physician informed her that she was pregnant. The father, however, does not share the mother's excitement. In fact, he loathes the idea of being anyone's father. He wants neither the title nor the responsibility. Soon after the child's birth, the mother seeks from the father financial support for the child that he sired. He rejects her request. She hires an attorney and begins legal action against the father, asking the court to garnish the father's wages until his child is 18 years old. There is no doubt that the father was careful and precautionary in his sexual activity with his child's mother, and he had indicated by both his contraceptive actions and his words that he did not want to become a father. Yet, the child support laws virtually everywhere offer a different moral understanding of this man's responsibility, one that does not put a premium on autonomy, choice, or explicit intention. These laws assert that the father is obligated to provide financial support for his child for no other reason than the one reason he and Thomson would consider not morally relevant: he is the child's father,[96] a status that carries with it a responsibility and obligation because the intercourse in which the father engaged was a consensual act that is naturally ordered toward bringing needy human beings into existence. These laws are grounded in deep moral intuitions that seem *prima facie* correct—intuitions that ground our notion that parents have a natural, pre-political obligation to care for their child even if the child's existence was not the result of a conscious plan to bring the child into being. Our intuitions about parental obligation to children, and society's obligation to its vulnerable immature members, seem to be more well-grounded intuitions than the autonomy to which Thomson appeals.

It would be a mistake, however, to conclude that such parental obligations are based merely on *biology*, for it would follow from this that sperm-donors are morally obligated to care for children sired by their donated seed. Rather, as I have already noted, the father's responsibility for his offspring stems from the fact that he consensually engaged in an act, sexual intercourse, that is naturally ordered to result in reproduction if the sex organs of the participants are functioning properly. This is not an unusual way to frame moral obligations, for we do so even in cases where a particular result is merely foreseeable and not naturally ordered. For example, we hold drunken people whose driving results in manslaughter responsible for

their actions, even if they did not *intend* to kill someone prior to becoming intoxicated. Such special obligations, although not *directly* undertaken *voluntarily*, are necessary in any civilized culture in order to preserve the rights of the vulnerable, the weak, and the young. This is why the burglar illustration I borrowed from Thomson fails. As Patrick Lee points out: "[T]he woman's action does not cause the burglar to be in the house but only removes an obstacle; the burglar himself is the primary agent responsible for his being in the house. In the voluntary pregnancy case, however, the baby does not cause his or her presence in the mother's womb; rather, the mother and the father do."[97]

Most people, abortion-choice opponent and supporter alike, agree that in ordinary circumstances, a born child has a natural moral claim upon her parents to care for her, regardless of whether her parents "wanted" her. As Michael Levin points out, "All child-support laws make the parental body an indirect resource for the child. If the father is a construction worker, the state will intervene unless some of his calories he extends lifting equipment go to providing food for his children."[98]

But this means that if Thomson's argument works—that a pregnant woman is not responsible for her unborn fetus in cases of consensual sex—then the moral grounds of our child support laws vanishes. For this would mean that deadbeat dads who may claim to only have consented to sex but not fatherhood would not be morally obligated to pay child support. But since we know that deadbeat dads should pay child support regardless of whether they intended for their partners to become pregnant, then the pregnant woman is obligated to remedy her child's neediness regardless of whether she intended to become pregnant when she consented to sex. Thus, Thomson's case fails.[99]

Boonin offers an argument in reply to the child support objection. He asks us to assume that there is a moral obligation for a deadbeat dad to pay child support (even though Boonin does not believe that there really is such a moral obligation). But even if this is the case, argues Boonin, because a woman has a unique and greater physical burden during pregnancy than a man or woman has to his or her child postnatally, the woman lacks during pregnancy the moral obligation to assist her child that she and the child's father have after birth. Moreover, if we would not require a man to undergo a physical experience similar to pregnancy against his will, then we cannot require a woman to remain pregnant against her will. Boonin employs several analogies, comparing the mother's apparent obligation to her unborn fetus to forced organ donation or temporary use of another's body, which is illegal, and immoral, even if parents are the ones whose bodies are used to help their children.[100]

Some do not find these analogies convincing. For they seem to turn on an account of human beings and procreation for which Boonin does not provide any support—namely, that it is *not rational* to believe that sex is an act whose intelligible point is to bring a needy human being into existence and place it in a congenial environment, the woman's body, whose physical design is ordered toward the caring, sheltering, and nurturing of the fetus. After all, an involuntary organ donor or lender (even if she is the recipient's parent) is typically *not responsible* for the neediness of the organ recipient, and the donor's body is *not* intrinsically ordered toward the donation of organs for a specific person who by nature needs those organs as the woman's body is intrinsically ordered toward the care of her fetus.

Nevertheless, Boonin is correct that there are burdens that attend the condition of pregnancy that cannot be shared with the male parent, for they are unique to the female of the human species. But it is not clear how the difference in parental burdens between the sexes justifies abortion. It seems to me that the correct comparison is between the burdens to be borne by the fetus or its mother (assuming, as Thomson does, that the unborn fetus is a person with a right to life), not between the father and the mother, if the decision to abort the fetus hangs in the balance. For if we were to think of the burden of an ordinary pregnancy as a harm exclusively borne by the woman, as no doubt Boonin does, and compare it to the harm of death borne exclusively by the unborn fetus if it is aborted, "the harm avoided by the woman seeking the abortion," writes Lee, "is not comparable with the death caused to the child aborted. (Recall that burden need only involve nine months of pregnancy; the woman can put the child up for adoption)."[101]

If this response succeeds, then Thomson's violinist illustration does not apply in cases of ordinary consensual sexual intercourse. However, as some have argued, it does apply in cases in which pregnancy results from rape. After all, the above case against the violinist argument relies on moral intuitions about one's responsibility for the foreseeable and/or naturally ordered results of one's *consensual* actions. Rape is not a case of consensual sex. Thus, although Thomson herself does not advance this argument from rape,[102] her argument does seem to apply in cases of rape. Some, however, argue that it does not.[103]

ABORTION, CHURCH, AND STATE

As noted above, because the abortion debate raises many of the same questions that have been answered by virtually every religious tradition, religious groups and their members have been in the forefront of supporting

or opposing abortion rights. For example, the Roman Catholic Church as well as most theologically conservative Protestants and Jews (though by no means all) oppose abortion rights. On the other hand, most theologically liberal Protestants and Jews (though by no means all) support a woman's right to choose (with various limitations in the case of some religious bodies). Minority religious groups hold a variety of views, including strong pro-life and strong abortion-rights positions. Thus, it should come as no surprise that some scholars have examined the issue of abortion from the perspective of America's traditions of religious liberty and church-state separation. However, because this approach has been critically applied almost exclusively to religious opponents of abortion-choice, that application will also be our focus. One can only speculate as to why devout pro-choice citizens have not undergone the same scrutiny of their religious motives as have their pro-life counterparts. A reason for this may be that the theological reasons offered by pro-choice citizens—such as appeals to God-given personal liberty and autonomy[104]—nearly always support conclusions that align with the views of secular citizens.

Some thinkers have argued that the framework of *Roe v. Wade* is best justified by the Religion Clauses of the First Amendment and/or what they believe are the philosophical principles that gave rise to our contemporary understanding of these clauses. Among those who hold, or appear to hold, such views are the theologian Paul Simmons[105] and the philosophers Judith Jarvis Thomson[106] and Ronald Dworkin.[107] Although the Supreme Court in its holdings does not explicitly ground the right to abortion in the Religion Clauses, some of its reasoning seems to suggest that the abortion debate is mired in an intractable dispute of conflicting visions of the human person that are religious in quality and that the best way to resolve this debate is to retain the right to abortion. For example, as the plurality in Planned *Parenthood v. Casey* writes,

> Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education . . . These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion by the State.[108]

The First Amendment and Abortion

Simmons suggests that the Supreme Court should "examine abortion as an issue of religious liberty and First Amendment guarantees."[109] For, ac-

cording to Simmons, the position of abortion opponents—namely, that the fetus is a full-fledged human person from conception—is the result of "speculative metaphysics," indeed, "religious reasoning," and for that reason, ought not to be part of public policy, because if it were it would amount to one religious position being foisted upon those who do not agree with it. This would violate the Establishment Clause, the portion of the U.S. Constitution's First Amendment that asserts that government may not establish a religion.[110] It would also violate the Free Exercise Clause of the First Amendment, for to allow such a public policy would be inconsistent with the Court's obligation "to protect the free exercise of the woman's conscientious (i.e., religious) judgment."[111]

In reply to Simmons,[112] it has been argued that no matter what position the government takes on abortion, it must rely, whether explicitly or implicitly, on some view of the human person that is tied to a metaphysical position that answers precisely the same sort of question that the "religious" positions to which Simmons alludes try to answer. Because these so-called "religious positions," as we saw above, are often defended by arguments that are public (or secular) in their quality and do not rely on appeals to Holy Scripture or religious authority, it is not precisely clear why a public argument that is informed by a citizen's religious belief violates the Constitution while a contrary public argument that is informed by a citizen's secular belief does not.

In terms of constitutional law, the Supreme Court has never suggested or held that with respect to the issue of abortion a citizen's religious motive is relevant to assessing the constitutionality of the citizen's policy proposal. However, Justice John Paul Stevens has argued that the pro-life *position*, rather than the pro-lifer's motive, is religious and thus unconstitutional.[113] But this view seems exclusively held by Justice Stevens. The Court, however, has employed a "religious motive" test to statutes concerning public school prayer[114] and the teaching of creationism in public schools.[115] But in these cases, the activities on which the laws focused seem distinctly religious, unlike the pro-life position on abortion, which is embraced by citizens from a variety of religious traditions and secular philosophies. Examples of the latter include Nat Hentoff (civil libertarian atheist),[116] Doris Gordon (atheist and president of Libertarians for Life),[117] and Joseph W. Dellapenna (law professor and self-described "lapsed Unitarian").[118]

CONCLUSION

Abortion is a political, moral, religious, and legal issue that will not soon go away. Because the issues that percolate beneath it are connected to the

deeply held beliefs of the nation's citizens, many of whom are seriously religious, abortion is an issue on which the different answers to the great questions of human existence intersect. This is why virtually every legal or scholarly attempt to resolve the issue has either offered a defense of a particular philosophical or religious view of the human person or bodily rights (as we saw in section II) or attempted to procedurally avoid or exclude some of those views from legal or political consideration (as we saw in sections I and III). Regardless of which tactic is taken, each establishes the fact that the great questions of human existence, the questions to which religious traditions provide answers, loom large in the abortion debate.

It seems then that the abortion debate cannot be politically and legally resolved by merely appealing to apparently neutral principles of political and legal philosophy that are uncontroversial. After all, to say that a woman should have the right to choose to terminate her pregnancy without public justification is tantamount to denying the abortion opponent's position that the unborn are human persons who by nature are worthy of protection by the state. And to affirm that the unborn are human persons that ought to be protected by the state is tantamount to denying the abortion-choice position that a woman has a fundamental right to terminate her pregnancy, because such a termination would result, in most cases, in an unjustified homicide. Abortion is an intractable moral, legal, and social issue that will be with us quite some time.

NOTES

Parts of this chapter are adapted from portions of my book, *Defending Life: A Moral and Legal Case Against Abortion Choice* (New York: Cambridge University Press, 2007).

1. "South Dakota Abortion Ban Rejected," *USA Today*, Nov. 8, 2006, available at http://www.usatoday.com/news/politicselections/vote2006/SD/2006–11-08-abortion-ban_x.htm.

2. *Stenberg v. Carhart,* 120 S. Ct. 2597 (2000).

3. *Gonzales v. Carhart*, 550 U.S. ____ (2007).

4. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

5. Ibid., 486.

6. "We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch on economic problems, business affairs, and social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation." Id. at 482.

7. In his concurrence, Justice Arthur J. Goldberg stated:

> The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected . . . The fact that no particular of the Constitution explicitly forbids the State from disrupting the traditional relation of the family—a relation as old and as fundamental as our entire civilization—surely does not show that Government was meant to have the power to do so (Ibid., 494–06 [J. Goldberg, concurring]).

8. *Eisenstadt v. Baird*, 405 U.S. 438, 454 (1972).

9. Ibid., 453.

10. "This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy" (*Roe v. Wade*, 410 U.S 113, 153 [1973]).

11. Abortion-choice advocate and Harvard law professor Laurence Tribe writes: "A decade and a half after the Court handed down its decision in *Roe v. Wade*, McCorvey explained, with embarrassment, that she had not been raped after all; she made up the story to hide the fact she had gotten 'in trouble' in the more usual way" (Laurence Tribe, *Abortion: The Clash of Absolutes* [New York: W. W. Norton, 1990], 10).

12. *Roe*, 410 U.S., 164–165.

13. As the Court writes elsewhere in *Roe*: "The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some *amici* that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (vaccination); *Buck v. Bell,* 274 U.S. 200 (1927) (sterilization)." (Ibid., 154)

14. *Doe v. Bolton*, 410 U.S. 179, 192 (1973).

15. Report, Committee on the Judiciary, U.S. Senate, on Senate Resolution 3, 98th Congress, 98–149, June 7, 1983. 6. See also, Report on the Human Life Bill—S. 158; Committee on the Judiciary, United States Senate, December 1981, 5.

16. Ibid.

17. As Justice Blackmun writes in *Roe*: "The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the uterus . . . The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education . . . As we have intimated above, it is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, become significantly involved. The woman's privacy is no longer sole and any

right of privacy she possesses must be measured accordingly" (*Roe*, 410 U.S., 159) (citations omitted).

18. *Roe*, 410 U.S., 157. Interestingly enough, there was one federal court case, *Steinberg v. Brown*, 321 F. Supp. 741 (ND Ohio 1970), that Texas did not cite that in fact held that the unborn is a Fourteenth Amendment person. The *Roe* Court did cite that case, but in another context. See *Roe*, 410 U.S., 155 (citing *Steinberg*, 321 F. Supp. as well as other cases in which courts have sustained anti-abortion statutes).

19. *Roe*, 410 U.S., 160.

20. Justice Blackmun writes: "[I]t has been argued that a State's real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that places her life in serious jeopardy" (Ibid., 149).

21. Ibid., 132–136. Justice Blackmun writes: "It is thus apparent that at common law, at the time of the adoption of the Constitution, and throughout the major portion of the nineteenth century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today. At least with respect to the early stage of pregnancy, and very possibly without such a limitation, the opportunity to make this choice was present in this country well into the nineteenth century" (Ibid., 140–141).

22. Ibid., 132 (footnote omitted).

23. "Mortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low or as lower than the rates of normal childbirth. Consequently, any interest of the State in protecting the woman from an inherently dangerous procedure, except when it would be equally dangerous for her to forgo it, has largely disappeared" (*Roe*, 410 U.S., 149).

24. *Roe*, 410 U.S., 129–151.

25. Ibid., 139. (emphasis added)

26. Dellapenna, "The History of Abortion," 389.

27. Among these many works are the following: Joseph W. Dellapenna, *Dispelling the Myths of Abortion History* (Durham, NC: Carolina Academic Press, 2006); James S. Witherspoon, "Reexaming *Roe*: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment," *St. Mary's Law Journal* 17 (1985); Krason, *Abortion*, 134–157; Dennis J. Horan and Thomas J. Balch, "*Roe v. Wade*: No Justification in History, Law, or Logic," *The Abortion Controversy 25 Years After* Roe v. Wade: *A Reader*, 2nd ed., ed. Louis P. Pojman and Francis J. Beckwith (Belmont, CA: Wadsworth); Joseph W. Dellapenna, "Abortion and the Law: Blackmun's Distortion of the Historical Record," in *Abortion and the Constitution*; Joseph W. Dellapenna, "The History of Abortion: Technology, Morality and Law," *University of Pittsburgh Law Review* 40 (1979); Martin Arbagi, "*Roe* and the Hypocratic Oath," in *Abortion and the Constitution*; Harold O. J. Brown, "What the Supreme Court Didn't Know: Ancient and Early Christian Views on Abortion," *Human Life Review*

1, no. 2 (Spring 1975); Robert M. Byrn, "An American Tragedy: The Supreme Court on Abortion," *Fordham Law Review* 41 (1973); John R. Connery, S. J., "The Ancients and the Medievels on Abortion: The Consensus the Court Ignored," in *Abortion and the Constitution*; John Gorby, "The 'Right' to an Abortion, the Scope of Fourteenth Amendment 'Personhood' and the Supreme Court's Birth Requirement," *Southern Illinois Law Review* (1979); Janet LaRue, "Abortion: Justice Harry A. Blackmun and the *Roe v. Wade* Decision," *Simon Greenleaf Law Review: A Scholarly Forum of Opinion Interrelating Law, Theology & Human Rights* 2 (1982–83); Marvin Olasky, *Abortion Rites: A Social History of Abortion in America* (Wheaton, IL: Crossway, 1992); and Robert Sauer, "Attitudes to Abortion in America, 1800–1973," *Population Studies* 28 (1974).

28. See, for example, *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52 (1976) (held as unconstitutional parental and spousal consent requirements as well as a state ban on saline [or salt poisoning] abortions, a procedure that literally burns the skin of the unborn); *Colautti vs. Franklin*, 439 U.S. 379, 387 (1979) (state may not define viability or enjoin physicians to prove the fetus is viable in order to require that they have a duty to preserve the life of the fetus if a pregnancy termination is performed; "viability" is whatever the physician judges it is in a particular pregnancy); *Akron v. Akron Center for Reproductive Health, Inc.* 462 U.S. 416 (1983) (held as unconstitutional: informed consent requirement, 24-hour waiting period, parental consent requirement, compulsory hospitalization for second trimester abortions, and humane and sanitary disposal of fetal remains); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986) (struck down as unconstitutional a Pennsylvania statute that (a) required informed consent of abortion's possible risks to the woman, (b) required that the pregnant woman be informed of agencies that would help her if she brought child to term, (c) required that the abortion provider report certain statistics about their patients to the state, and (d) required that a second physician be present at abortion when fetal viability is possible).

29. See *Harris v. McRae*, 448 U.S. 297 (1980).

30. *Webster v. Reproductive Health Services,* 492 U.S. 490 (1989).

31. Ibid., 504, quoting from Mo. Rev. Stat. §§ 1.205.1(1), (2) (1986) (parenthetical insertions are the Court's).

32. Ibid., 504, quoting from Mo. Rev. Stat. §§ 1.205.2 (1986) (footnote ommitted).

33. Ibid., 513, quoting from Mo. Rev. Stat. § 188.029 (1986).

34. Mo. Rev. Stat. § 188.029 (1986), as found in ibid.

35. *Webster*, 492 U.S. 520. "No abortion of a viable unborn child shall be performed unless necessary to preserve the life or health of the woman" (Mo. Rev. Stat. § 188.030 [1986]).

36. *Webster*, 492 U.S. 519

37. Ibid.

38. *Casey*, 505 U.S., 844.

39. Ibid., 877.

40. "Yet it must be remembered that *Roe v. Wade* speaks with clarity in establishing not only the woman's liberty but also the State's 'important and legitimate interest in potential life.' . . . That portion of the decision in *Roe* has been given too little acknowledgment and implementation by the Court in its subsequent cases. Those cases decided that any regulation touching upon the abortion decision must survive strict scrutiny, to be sustained only if drawn in narrow terms to further a compelling state interest . . . Not all of the cases decided under that formulation can be reconciled with the holding in *Roe* itself that the State has legitimate interests in the health of the woman and in protecting the potential life within her. In resolving this tension, we choose to rely upon *Roe*, as against the later cases" (Ibid., 871).

41. The Court in fact explicitly overrules *Akron*, 462 U.S. and *Thornburgh*, 476 U.S.: "To the extent *Akron I* and *Thornburgh* find a constitutional violation when the government requires, as it does here, the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus, those cases go too far, are inconsistent with *Roe*'s acknowledgment of an important interest in potential life, and are overruled" (*Casey*, 505 U.S. 882).

42. Ibid., 872.

43. The "reliance interest" is a term of art from contract law that refers to "the interest a nonbreaching party has in recovering costs stemming from that party's reliance on the performance of the contract" (*Black's Law Dictionary*, ed. Bryan A. Garner, 7th ed. [St. Paul, MN: West Group, 1999], 816). The Court took this term from contract of law and applied it to the public's apparent reliance on the right to abortion and the personal and economic benefits that right supposedly entails. Consequently, according to the Court, if it had overturned *Roe*, it would have "breached" its social contract with the public, which would have suffered personal and economic costs as a result.

44. "[F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail"(*Casey*, 505 U.S. 869).

45. "A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if there was error, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law" (*Casey*, 505 U.S. 869).

46. *Casey*, 505 U.S. 844–853.

47. See "Partial Birth Abortion," Center for Reproductive Rights Home Page, available at http://www.crlp.org/hill_pba.html.

48. Ibid., citing *Casey,* 505 U.S. 879.

49. Ibid., 2610.

50. Ibid., 2628 (J. Kennedy, dissenting).

51. As Justice Kennedy points out in his dissent, there is impressive medical opinion that D & X abortion is not any less risky and may in some cases increase the risk to a woman's health. See Ibid., 2626–2631 (J. Kennedy, dissenting).

52. *Webster*, 492 U.S. 519.

53. *Casey*, 505 U.S. 871. The Court writes: "Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage [a woman] to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of state assistance if the mother chooses to raise the child herself" (Ibid., 872) (insertion mine).

54. Ibid., 2606.

55. "Were there any doubt remaining the statute could apply to a D & E procedure, that doubt is no ground for invalidating the statute. Rather, we are bound to first consider whether a construction of that statute is fairly possible that would avoid the constitutional question" (Ibid., 2644, citing *Erznoznick v. Jacksonville*, 422 U.S. 205, 216 [1975] and *Frisby v. Schultz*, 487 U.S. 474, 482 [1988]) [J. Thomas, dissenting]). See also, Ibid., 2631 (J. Kennedy, dissenting).

56. Ibid., 2640–2643 (J. Thomas, dissenting).

57. Ibid., 2640.

58. USCS § 1531 (2003).

59. This is what the 2003 federal law asserts: "This subsection does not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself" (18 USCS § 1531 [2003][a]).

60. Robert B. Bluey, "Lawsuits Challenge Partial-Birth Abortion Ban," CNSNews.com (October 31, 2003), available at http://www.cnsnews.com/Culture/archive/200310/CUL20031031c.html.

61. Michael Buratovich, a developmental biologist (Ph.D., University of California, Irvine), points out, in private email correspondence, that because of chromosonal abnormalities, an ovum may undergo complete fertilization but fail conception. Buratovich refers to a work by S. Munne, "Preimplantation Genetic Diagnosis of Numerical and Structural Chromosone Abnormalities," *Reprod Biomed Online* 4, no. 2 (March–April, 2002): 183–196. Hence, that is the reason why conception is defined as the result of a fertlization process that is *successful*.

62. J.P. Moreland, *Body and Soul: Human Nature and the Crisis in Ethics*, ed. J.P. Moreland and Scott B. Rae (Downers Grove, IL: InterVarsity, 2000), 52.

63. See Baruch Brody, *Abortion and the Sanctity of Human Life: A Philosophical View* (Cambridge, MA: MIT Press, 1975).

64. See Mary Anne Warren, "On the Moral and Legal Status of Abortion," in *The Problem of Abortion*, 2nd ed., ed. Joel Feinberg (Belmont, CA: Wadsworth, 1984).

65. See Michael Tooley, "In Defense of Abortion and Infanticide," in *The Abortion Controversy 25 Years After* Roe v. Wade, 2nd ed., ed. Louis Pojman and Francis

J. Beckwith (Belmont, CA: Wadsworth, 1998); and Michael Tooley, *Abortion and Infanticide* (New York: Oxford, 1983).

66. See Peter Singer, "Sanctity of Life or Quality of Life?," *Pediatrics* 73 (July 1973); Helga Kuhse and Peter Singer, *Should the Baby Live?: The Problem of Handicapped Infants* (New York: Oxford, 1985); and Peter Singer, *Rethinking Life and Death: The Collapse of Traditional Ethics* (New York: St. Martin's Press, 1994).

67. David Boonin, *A Defense of Abortion* (New York: Cambridge University Press, 2002), 115–128.

68. See L.W. Sumner, *Abortion and Moral Theory* (Princeton, NJ: Princeton University Press, 1981).

69. Cited in *Policy Review* (32 [Spring 1985]: 14–15) in answer to the question posed to a number of partisans (including Harrison) on the issue of abortion, "Is there a moral difference between feticide and infanticide?"

70. See, for example, Fletcher's comments in Joseph Fletcher and John Warwick Montgomery, *Situation Ethics: Is It Sometimes Right to Do Wrong?* (Minneapolis: Bethany House, 1972).

71. See Joseph Fletcher, "Indicators of Humanhood: A Tentative Profile of Man," *Hastings Center Report* 2 (1972); and Joseph Fletcher, "Four Indicators of Humanhood: The Enquiry Matures," *Hastings Center Report* 4 (1974).

72. "Words of Choice: Countering Anti-Choice Rhetoric," available at www.rcrc.org/pubs/words.html.

73. John Swomley, "When Does Life Begin?," Section 2 of the essay "Abortion: A Christian Ethical Perspective" at www.rcrc.org/religion/es8/section2.html.

74. See, for example, Chapter 6 of this present volume as well as Robert P. George, "Public Reason and Political Conflict: Abortion and Homosexuality," *Yale Law Journal* 106 (1997); Robert E. Joyce, "Personhood and the Conception Event," *New Scholasticism* 52 (1978); Gregory P. Koukl, *Precious Unborn Human Persons* (San Pedro, CA: Stand to Reason, 1999); Lee, *Abortion and Unborn Human Life*; Moreland and Rae, *Body and Soul*; Dianne Nutwell Irving, "Scientific and Philosophical Expertise," *Linacre Quarterly* (Feb. 1993); Patrick Lee and Robert P. George, "The Wrong of Abortion," in *Contemporary Debates in Applied Ethics*, eds. Andrew I. Cohen and Christopher Wellman (New York: Blackwell Publishers, 2005); Patrick Lee, "The Pro-Life Argument from Substantial Identity," *Bioethics* 18, no. 3 (2004); A.A. Howsepian, "Who or What Are We?," *Review of Metaphysics* 45 (March 1992); Schwarz, *The Moral Question of Abortion*.

75. J.P. Moreland, "Humanness, Personhood, and the Right to Die," *Faith and Philosophy* 12, no. 1 (January 1995): 101.

76. J.P. Moreland, *Body & Soul*, 206.

77. Ibid., 178.

78. Ibid.

79. Lee, *Abortion and Unborn Human Life*, 55.

80. See, for example, Peter McInerny, "Does a Fetus Already Have a Future-Like-Ours?," *The Journal of Philosophy* 87 (1990); and Derek Parfit, *Reasons and Persons* (Oxford: Oxford University Press, 1984).

81. This is a name coined by Lee in *Abortion and Unborn Human Life*, 37.

82. Paul D. Simmons, "Religious Liberty and the Abortion Debate," *Journal of Church and State* 32 (Summer 1990): 572.

83. See, for example, Moreland and Rae, *Body and Soul*; and Lee, *Abortion and Unborn Human Life*, Chapters 1 and 2.

84. Paul Churchland, *Matter and Consciousness* (Cambridge, MA: M.I.T. Press, 1984), 12.

85. See, for example, Boonin, *A Defense of Abortion*, Ch. 2, and Dean Stretton, "The Argument from Intrinsic Value: A Critique," *Bioethics* (2000): 228–239.

86. Paul Simmons, for example, writes that prior to viability "the fetus simply is not sufficiently developed to speak meaningfully of it as an independent being deserving and requiring the full protection of the law, i.e. a person. The notion of viability correlates biological maturation with personal identity in a way that can be recognized and accepted by reasonable people." (Paul D. Simmons, "Religious Liberty and Abortion Policy: *Casey* as 'Catch-22'," *Journal of Church and State* [Winter 2000]: 71). He writes in an earlier article, "Viability, by definition, deals with that stage of gestation at which the fetus has a developed neo-cortex and physiological maturation sufficient to survive outside the womb. Biological maturation is correlated with personal identity that can be recognized and accepted by reasonable people" (Simmons, "Religious Liberty and the Abortion Debate," 573).

87. Judith Jarvis Thomson, "A Defense of Abortion," in *The Problem of Abortion*, 2nd ed., ed. Joel Feinberg (Belmont, CA: Wadsworth, 1984), 173–187. This article was originally published in *Philosophy and Public Affairs* 1 (1971), 47–66. References to Thomson's article in this chapter are to the former piece.

88. David Boonin, *A Defense of Abortion* (New York: Cambridge University Press, 2002), 133–281.

89. Eileen McDonagh, *Breaking the Abortion Deadlock: From Choice to Consent* (New York: Oxford University Press, 1996).

90. Thomson, "A Defense of Abortion," 174.

91. Ibid., 174–175.

92. Ibid., 180.

93. Thomson writes: "If the room is stuffy, and I therefore open a window to air it, and a burglar climbs in, it would be absurd to say, 'Ah, now he can stay, she's given him a right to use her house—for she is partially responsible for his presence there, having voluntarily done what enabled him to get in, in full knowledge that there are such things as burglars, and that burglars burgle" (Ibid., 182).

94. See, for example, Keith Pavlischek, "Abortion Logic and Paternal Responsibility: One More Look at Judith Thomson's 'Defense of Abortion,'" *Public Affairs Quarterly* 7, no. 4 (October 1993); Francis J. Beckwith, "Personal Bodily Rights, Abortion, and Unplugging the Violinist," *International Philosophical Quarterly* 32 (1992); Lee, *Abortion and Unborn Human Life*, Chapter 4; and John T. Wilcox, "Nature as Demonic in Thomson's Defense of Abortion," *The New Scholasticism* 63 (Autumn 1989).

95. David Boonin, *A Defense of Abortion* (New York: Cambridge University Press, 2002): 133–281.

96. See "State and Local IV-D Agencies on the Web" (June 15, 2006), Office of Child Support Enforcement, Administration for Children and Families, U.S. Department of Health & Human Services, available at http://www.acf.hhs.gov/programs/cse/extinf.htm.

97. Lee, *Abortion and Unborn Human Life*, 119.

98. Michael Levin, review of *Life in the Balance* by Robert Wennberg, *Constitutional Commentary* 3 (Summer 1986): 511.

99. See Pavlischek, "Abortion Logic and Paternal Responsibility"; and Keith Pavlischek, "Abortion Logic and Paternal Responsibility: One More Look at Judith Thomson's 'Defense of Abortion' and a Critique of David Boonin-Vail's Defense of It," in *The Abortion Controversy*. The latter is a revised version of the former.

100. Boonin, *A Defense of Abortion*, 249–254.

101. Lee, *Abortion and Unborn Human Life*, 118.

102. "Surely the question of whether you have a right to life at all, or how much of it you have, shouldn't turn on the question of whether or not you are the product of rape" (Thomson, "A Defense of Abortion," 175).

103. See Beckwith, *Defending Life*, Chapter 7; and Lee, *Abortion and Unborn Human Life*, 120–124.

104. See, for example, Virginia Ramey Mollenkott, "Reproductive Choice: Basic to Justice for Women," *Christian Scholar's Review* 17 (March 1988); Simmons, "Religious Liberty and the Abortion Debate"; and Simmons, "Religious Liberty and Abortion Policy."

105. See Simmons, "Religious Liberty and Abortion Policy."

106. Judith Jarvis Thomson, "Abortion: Whose Right?," *Boston Review* 20, no. 3 (Summer 1995). Thomson's essay is available at http://bostonreview.mit.edu/BR20.3/thomson.html. All references to Thomson's piece in this chapter are from the online version.

107. Ronald Dworkin, *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom* (New York: Vintage Books, 1993), 148–178.

108. *Casey*, 505 U.S. at 851 (citations omitted).

109. Simmons, "Religious Liberty and Abortion Policy," 88.

110. Although the original purpose of the Establishment Clause of the First Amendment was to restrain Congress ("*Congress* shall make no law respecting an establishment of religion . . . "), the Supreme Court has incorporated the First Amendment through the Fourteenth Amendment and now applies the former to the states as well. See *Everson v. Board of Education*, 330 U.S. 1 (1947) (Justices unanimously agreed that the Establishment Clause applies to the states through the Fourteenth Amendment).

111. Simmons, "Religious Liberty and Abortion Policy," 88.

112. See Beckwith, *Defending Life*, Chapter 3.

113. Justice John Paul Stevens offers the following analysis of a Missouri statute

that placed restrictions on abortion and included a preamble that asserted that human life begins at conception:

> Indeed, I am persuaded that the absence of any secular purpose for the legislative declarations that life begins at conception and that conception occurs at fertilization makes the relevant portion of the preamble invalid under the Establishment Clause of the First Amendment to the Federal Constitution. This conclusion does not, and could not, rest on the fact that the statement happens to coincide with the tenets of certain religions . . . or on the fact that the legislators who voted to enact it may have been motivated by religious considerations. . . . Rather, it rests on the fact that the preamble, an unequivocal endorsement of a religious tenet of some but by no means all Christian faiths, serves no identifiable secular purpose. That fact alone compels a conclusion that the statute violates the Establishment Clause . . . As a secular matter, there is an obvious difference between the state interest in protecting the freshly fertilized egg and the state interest in protecting a 9-month-gestated, fully sentient fetus on the eve of birth. There can be no interest in protecting the newly fertilized egg from physical pain or mental anguish, because the capacity for such suffering does not yet exist; respecting a developed fetus, however, that interest is valid.

(*Webster v. Reproductive Health Services*, 492 U.S. 490, 566–567, 569 (1989)) (J. Stevens, concurring in part and dissenting in part) (citations and footnotes omitted).

114. *Wallace v. Jaffree*, 472 U.S. 38 (1985).

115. *Edwards v. Aguillard,* 482 U.S. 578 (1987). For a critique of the "religious motive" test, see Francis J. Beckwith, "The Court of Disbelief: The Constitution's Article VI Religious Test Prohibition and the Judiciary's Religious Motive Analysis," *Hastings Constitutional Law Quarterly* 33, nos. 2 & 3 (Winter and Spring 2006): 337–60.

116. Nat Hentoff, "Pro-Choice Bigots: A View From the Pro-Life Left," *The New Republic* 207, no. 23 (November 20, 1992): 21, 24–25.

117. Doris Gordon, "A Libertarian Atheist Answers 'Pro-Choice Catholics,'" (January 2003), available at http://www.l4l.org/library/cathchoi.html.

118. Dellapenna, *Dispelling the Myths of Abortion History*. Professor Dellapenna describes himself as a "lapsed Unitarian" on page ix of this book.

FURTHER READING

David Boonin's *A Defense of Abortion* (New York: Cambridge University Press, 2002) is the most comprehensive and rigorously argued philosophical defense of the pro-choice position in print. The esteemed legal philosopher, Ronald Dworkin, is the author of *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom* (New York: Vintage Books, 1993). Although not a strong work of philosophy, it is a powerful legal brief for the preservation of abortion rights. I

have authored an extended defense of the pro-life position on abortion, covering moral, legal, and political arguments: *Defending Life: A Moral and Legal Case Against Abortion Choice* (New York: Cambridge University Press, 2007). Philosopher and Evangelical Christian Robert N. Wennberg defends a moderate pro-choice position on abortion in *Life in the Balance: Exploring the Abortion Controversy* (Grand Rapids: Eerdmans Publishing Company, 1985). In addition to addressing philosophical issues, Wennberg critically engages many of the pro-life biblical arguments. Another theologically rich book is by Nigel M. De S. Cameron and Pamela F. Sims, *Abortion: The Crisis in Morals and Medicine* (Leicester, UK: InterVarsity Press, 1986). Like Wennberg's work, this book addresses both philosophical and theological arguments, though it defends a conservative pro-life perspective. Because the history of abortion was an essential aspect of the reasoning of *Roe v. Wade*, two books, with differing perspectives, are worth consulting: James C. Mohr, *Abortion in America* (New York: Oxford University Press, 1978); and Joseph W. Dellapenna, *Dispelling the Myths of Abortion History* (Durham, NC: Carolina Academic Press, 2006). There are several good anthologies on the issue of abortion, most of which include important legal cases as well as a variety of influential arguments in the history of the contemporary debate. Two of the most recent anthologies are Robert M. Baird and Stuart Rosenbaum, eds., *The Ethics of Abortion: Pro-Life v. Pro-Choice*, 3rd ed. (Amherst, MA: Prometheus Books, 2001) and Louis P. Pojman and Francis J. Beckwith, eds., *The Abortion Controversy 25 Years After* Roe v. Wade: *A Reader*, 2nd ed. (Belmont, CA: Wadsworth, 1998).

2

Religiously Motivated Political Action and Same-Sex Marriage

Katherine Stenger

On November 7, 2006, Arizona voters rejected Proposition 107 by a vote of 52 to 48 percent. That voters would reject a measure on the ballot is nothing extraordinary, but this proposition represented a dramatic departure from an established pattern in the national debate over same-sex marriage. Breaking the trend of votes in 27 other states, Arizona became the first state thus far to defeat a constitutional amendment to define marriage to be between those of the opposite sex. While the active groups were in all respects identical to the groups mobilized in other states, the opponents of Proposition 107 succeeded in shifting the debate away from the dominant frames of morality, family values, and the protection of marriage advanced by groups across the country and toward a frame that benefited their side. The winning argument centered not on the importance of civil rights for gays and lesbians or on equality, but rather on the economic impact the measure would have on *heterosexual* couples living in state-sanctioned domestic partnerships or civil unions.[1] Despite attempts to mobilize opponents of same-sex marriage by the Center for Arizona Policy (a designated "Family Policy Council" affiliated with the conservative Christian organization Focus on the Family), Protect Marriage Arizona (a group

funded by a number of groups with religious ties), and the local Catholic bishops, the measure failed to garner the needed support.

The Arizona case illustrates two key factors in the national debate over same-sex marriage highlighted in this chapter: the role of organized groups and the importance of rhetorical framing strategies. Groups reflecting a religious perspective represent a major portion of the active groups in the debate over same-sex marriage and, with the exception of the Arizona case, have dominated the terms of the debate—what scholars call the "framing" of the issue. More generally, religious beliefs and values help drive individual public opinion, compounding the effects of religion on the policymaking process.

The debate over same-sex marriage is complicated by the fact that it is not confined to a single policymaking venue. Instead, local, state, and federal venues have all played host to the policy debate. The national debate over same-sex marriage began in earnest in 1991 when three same-sex couples in Hawaii sued for the right to marry. The years that followed witnessed a flurry of laws and state constitutional amendments denying same-sex marriage benefits and protecting states from recognizing same-sex marriage licenses issued by other states.

One of the most consistent trends in the public debate over same-sex marriage is the media portrayal of the debate as one between a secular left and a largely Christian right. This storyline is driven by a powerful "culture wars" thesis that seemed to be confirmed by the 2004 and 2006 elections when cultural conservatives helped 19 states ratify constitutional amendments to restrict same-sex marriage.[2] A central theme of this chapter, however, is that this narrative oversimplifies the state of religious thinking on the issue. While conservative religious groups are visible and powerful in the policy debate, they are not the only religious groups with a message on the subject of same-sex marriage.

The first section of this chapter provides a brief discussion of the ways in which religious values may impact public policymaking, a summary of the development of debates over homosexuality within religious traditions, and a framework to help conceptualize the ways in which religious groups relate to the debate over same-sex marriage. The second section provides an overview of the policy debate stretching from the legal action in Hawaii in 1991 to the present. The final section focuses more explicitly on the ways in which religious groups participated in the debate as it occurred through the media, using a content analysis of newspaper coverage of the federal debate over same-sex marriage and press releases issued by religious groups.

CONNECTIONS BETWEEN RELIGION, HOMOSEXUALITY, AND POLITICS

Religion and Policymaking

Religious values impact public policy-making at two levels: individual decision-making and group mobilization. While research finds that the American public has become more favorable toward same-sex relationships, much entrenched opposition to these relationships is rooted in religious beliefs.[3] Religious orthodoxy (the extent to which religious faith is an important part of a person's life) and religious tradition, in particular, affect individual-level public opinion.[4] Surveys consistently find a link between religious beliefs and public opinion on homosexuality, gay rights, and same-sex marriage.[5] In general, those with high levels of religious orthodoxy are more likely to oppose homosexuality and same-sex marriage.[6] As Laura Olson, Wendy Cadge, and James Harrison conclude, religion "has a powerful effect on attitudes toward same-sex unions."[7] However, members of certain religious traditions and denominations are more open to homosexuality and same-sex marriage. In particular, non-Christians are more likely to support same-sex marriage, and among Protestants, mainline Protestants are the most open to same-sex marriage.

Scholars find distinct voting patterns among citizens from different religious traditions and with different levels of religious orthodoxy.[8] These patterns do not mean that religious values are the only factors that influence how individual citizens feel about issues or how elected officials vote, but religious values do carry an important weight in political decision-making, especially for members of certain religious traditions and the religiously orthodox. For example, immediately following the 2004 presidential elections, pundits pointed to the impact of ballot initiatives banning same-sex marriage on voter turnout and vote choice. Analyses of election results and polling data suggest that the impact was not as strong as the pundits originally claimed.[9] However, the issue did help mobilize voters in several key swing states such as Ohio and Michigan.[10] Furthermore, many voters saw a clear link between their position on the issue of same-sex marriage and their preferred political candidates.[11]

Religious groups have a long tradition of involvement in the political process.[12] Some organized groups represent single religious denominations, while others are organized around particular issues and represent members from a variety of religious traditions or denominations. These groups are particularly significant because they are involved in every stage of the policy process, from influencing when and where issues are brought to the public

agenda (sponsoring statewide ballot initiatives, for example) to mobilizing voter turnout (in support of a candidate or a ballot measure), and from the direct lobbying of elected officials (including campaign donations and independent advertising expenditures) to participation in the legal process (through the sponsoring of legal challenges or filing *amicus curiae* briefs).

At the state and federal level, religious groups have had major influence over a variety of public policies, including those pertaining to gay rights and same-sex marriage.[13] Religious groups fought an attempt by President Bill Clinton to eliminate barriers for gays and lesbians in the military and successfully lobbied for passage of the Defense of Marriage Act.[14] Law professor Didi Herman argues that "antigay measures in the United States are, at their heart, orthodox Christian measures."[15] While this statement may oversimplify the beliefs of orthodox Christians, it reflects the observation that religious groups are influential players in public policymaking. Finally, religious groups also actively seek to influence judicial decisions. The American Center for Law and Justice, American Family Association Law Center, and The Rutherford Institute are among the religiously-motivated organizations that actively pursue legal strategies to complement the legislative strategies of other religious groups.

Many political observers lump these groups together as part of the "Christian Right." While they certainly share policy goals and many connections exist among them, there is also a great deal of decentralization. Religious groups that have led the drive for passage of state defense of marriage acts and constitutional amendments are not monolithic or strategically unified, but they are a part of a semi-structured coalition of conservative religious groups operating at the state level across the country. A handful of national groups such as Focus on the Family (Family Policy Councils), the Christian Coalition, the Catholic Church, and the Church of Jesus Christ of Latter-Day Saints, which have access to politically conservative religious congregations, provide financial and strategic resources as well as fertile ground for recruitment and mobilization. Religious groups that support same-sex marriage do not have such strong organizational networks or the same level of access to religious congregations from which to draw support.

The Contextual Basis of Religious Voices in the Same-Sex Marriage Debate

The impact of religious values in the debate over same-sex marriage is nested within both a theological discussion of homosexuality and a long-standing political struggle by conservative religious traditions to resist secular changes in society. An understanding of these considerations is useful in

illuminating the diversity of viewpoints held by those of religious faith and in understanding the motivations of those groups who most actively oppose same-sex marriage rights.

The role of religious groups in the debate over same-sex marriage is tied to a much broader debate over homosexuality within the church.[16] Three issues particularly dominate this discussion: ministry to gays and lesbians, the ordination of gays and lesbians, and the blessing of gay and lesbian relationships. Theological positions concerning homosexuality range from the view that homosexuality is a sin to the belief that sexual orientation is an inherent God-given characteristic. At the most conservative end of the continuum are groups that consider homosexuality to be a sin, such as the Southern Baptist Convention, Orthodox Judaism, the Roman Catholic Church, and many conservative nondenominational churches.[17] Other groups, such as the Reformed Church in America, the Salvation Army, and the Mennonite Brethren Churches emphasize the importance of encouraging gay and lesbian congregants to live in celibacy. Still other groups, such as the Moravian Church, Disciples of Christ, the Evangelical Lutheran Church in America, the Society of Friends (Quaker), the Episcopal Church, and Reform Judaism welcome the participation of gay and lesbian members. A religious community's view of homosexuality has important political repercussions. Political opposition to same-sex marriage is primarily rooted in the belief that homosexuality is a choice and that the choice to pursue a same-sex relationship violates religious teachings.

Views regarding the ordination of gay and lesbian ministers and the blessing of gay and lesbian relationships flow from a religious group's perspective on the nature of homosexuality and factor into a religious group's position on the issue of same-sex marriage. Debates over ordination and same-sex blessings have been particularly heated in mainline Protestant denominations as well as in the Jewish tradition. The United Church of Christ, the Episcopal Church, the Evangelical Lutheran Church in America,[18] the Unitarian Universalist Church, and the Union of American Hebrew Congregations (Reform Judaism) are among the prominent religious groups that ordain gay and lesbian clergy. In December 2006, the highest legal body in Conservative Judaism also announced a decision to allow the ordination of gay rabbis.

The Metropolitan Community Church was the first national religious denomination to offer blessings of same-sex marriages beginning in 1968. Unitarian Universalists approved same-sex union services in 1984 followed by the Reconstructionist Jewish Rabbinical Association in 1996 and the United Church of Christ in 2005. Some Quaker, Episcopal, and Conservative Jewish congregations offer same-sex marriage ceremonies, based on the

prerogative of local leaders. In addition to these formal declarations of support for the blessing of same-sex unions, local religious leaders in a host of religious denominations and traditions have endorsed or held ceremonies for same-sex couples.[19]

The role of religious groups in the debate over same-sex marriage is also rooted in a much broader debate over personal morality and the proper role of the government in maintaining a "traditional" model of the family. The latter half of the twentieth century witnessed more women entering the workforce (altering the traditional division of labor within the nuclear family), the liberalization of divorce law (increasing the divorce rate), the emergence of a sexual revolution (including fewer social prohibitions on premarital sex), and the legalization of abortion. Coupled with public debates over the role of religious values in schools and other public places (teaching creationism, school prayer, public displays of crèches, etc.), these changes in society spawned the growth of groups based on the preservation of traditional society.[20] Theologian Jack Rogers points out that most of the opposition to same-sex marriage comes from religious groups—the Catholic and Mormon churches, in particular—that do not ordain women as clergy and that advocate traditional gender roles within the family. Thus, he concludes, the battle over same-sex marriage is simply an extension of the battle to retain male headship and female subjection in the family structure.[21]

The political movement known as "the Christian Right" arose in the late 1970s and centered on the "moral decay" typified by the movement of women into the workforce and the liberalization of sexual mores.[22] It is impossible to fully grasp the motivation of the religious groups opposing same-sex marriage without an acknowledgement of the extent to which these groups perceive same-sex marriage as a direct threat to the traditional family structure. Though religious conservatives are often mocked for advocating a "slippery slope" argument to justify their opposition to same-sex marriage, from their perspective, the dramatic changes in the family structure over the last fifty years are evidence of just that. Same-sex marriage is simply the latest front in a much longer war over the interpretation of the Bible, the proper role of religion in American government, and the structure of the family. As George Chauncey concludes, many opponents of gay marriage view it as "both the ultimate sign of gay equality and the final blow to their traditional ideal of marriage . . . "[23] Thus, argue Clyde Wilcox, Linda Merolla, and David Beer, "many members of the Christian Right regarded the same-sex marriage issue as the defining battle in the culture wars—more important than other gay rights issues and even more immediately critical than abortion."[24]

A Framework for Religious Involvement in the Same-Sex Marriage Debate

With the influence of religious beliefs at both the individual and group level in mind and a fuller understanding of the complex relationship between religious beliefs and sexual orientation, we can categorize the various actors involved in the debate over same-sex marriage who are motivated by religious beliefs. One of the central claims of this chapter is that the Christian Right, while incredibly powerful in this debate, does not encompass all of the viewpoints of the religious community.

This framework, presented in Table 2.1, helps identify the diversity of opinion by highlighting two important dimensions involved in politics: one's position on same-sex marriage and level of involvement in the debate. Some religious groups articulate clear support for government recognition of same-sex marriage while others oppose such action. Some religious groups take an active approach in defense of their position while others refrain from direct political or public action. This framework, then, allows us to identify both the active leaders and the groups that have the potential to be mobilized on either side of the debate.

While the categories represent four levels of belief and activity, the groups mentioned in each category are not necessarily fixed. The groups in quadrants A and B, Active Supporters and Active Opponents, are unlikely to change because of the fundamental belief structures underlying their position on this issue. However, the groups mentioned in quadrants C and D, Passive Supporters and Passive Opponents, have the potential to be mobilized through both political and theological means and pulled or pushed into another category. For example, Active Opponents have successfully used ballot initiatives and constitutional amendments to mobilize the large portion of the population who oppose same-sex marriage but are not active participants in the debate. Theoretically, Passive Opponents could also be turned into Passive Supporters given the right conditions, such as a reframing of the issue or a new and convincing theological interpretation.

To this point, Active Opponents have dominated most of the debate over same-sex marriage. In states across the country, they have successfully mobilized Passive Opponents, and in some cases even Passive Supporters, to support their cause. Active Supporters have maintained a steady presence in the debates at both the national and state levels, but they have neither received the same media attention nor achieved the same level of policy success as have Active Opponents.

Table 2.1 Typology of Religious Group Positions and Activity Levels

	Supports Same-Sex Marriage	Opposes Same-Sex Marriage
Active Involvement	*A—Active Supporters* Leading religious groups in the movement to provide legal recognition to same-sex couples and/or to oppose legislation that would deny benefits or recognition to such couples. *Organized interest groups such as the Religious Coalition for the Freedom to Marry, Dignity USA (Catholic), Soulforce and the Interfaith Alliance.* *Denominations and religious traditions such as the Metropolitan Community Churches, United Church of Christ, Society of Friends (Quaker), Unitarian Universalist.* *Groups within denominations and religious traditions such as Affirmation (United Methodist), More Light Presbyterians (PCUSA), Integrity (Episcopal).*	*B—Active Opponents* Leading religious groups in the movement to deny benefits or legal recognition to same-sex couples. *Organized interest groups such as Focus on the Family, the Christian Coalition, Family Research Council, Concerned Women for America, and the Traditional Values Coalition.* *Denominations and religious traditions such as the Roman Catholic Church, the Church of Jesus Christ of Latter-day Saints (Mormon), the Southern Baptist Convention, and many nondenominational evangelical Protestant congregations.*
Passive Involvement	*C—Passive Supporters* Religious groups that support some degree of legal recognition of same-sex couples or oppose legislation that would deny benefits or recognition to such couples but are not actively involved in the political movement. *Denominations and religious traditions such as The Presbyterian Church (USA), Disciples of Christ, the Episcopal Church, Reform Judaism, and Conservative Judaism*	*D—Passive Opponents* Religious groups that oppose legal recognition of same-sex couples but are not actively involved in the political movement. *Denominations and religious traditions such as the United Methodist Church*

RELIGIOUS GROUPS AND THE DEBATE OVER SAME-SEX MARRIAGE

Several features of American government, such as the division of powers between the states and the national government and the separation of powers between the three branches of government, create a multiplicity of venues for decision-making on the topic of same-sex marriage. There are seven primary venues in which same-sex policymaking occurs in the United States—local governments, state legislatures, state courts, state constitutional amendments, Congress, federal courts, and federal constitutional amendments—and the debate over same-sex marriage has spanned all of these venues. A complete history of the same-sex marriage policy debate would require more space than this chapter allows; this section focuses in on several key moments in the policy debate with a particular emphasis on the role of religiously motivated groups and individuals in the process.

Hawaii

Same-sex marriage as a topic of national political debate began in 1991, when one gay and two lesbian couples in Honolulu, Hawaii, sued the state for the right to marry. Similar legal challenges around the country had upheld the state's prerogative to restrict marriage to opposite sex couples and so it came as a shock to all when, in 1993, the Hawaii Supreme Court ruled that denying these couples a marriage license might violate the equal protection clause of the Hawaii constitution.[25] The ruling in *Baehr v. Lewin* (1993) sent the question back to the trial court to determine whether the state had a compelling reason for the ban on same-sex marriages.[26] In 1996, the trial court found there was no compelling reason and returned the case to the Hawaii Supreme Court. As the first judicial ruling in favor of a same-sex couple on the question of marriage, it sent shock waves through the nation.[27]

While the court did not legalize same-sex marriage, and while the state of Hawaii eventually amended their state constitution to allow the legislature to ban same-sex marriage, the action in Hawaii reminded opponents of same-sex marriage across the country that the legalization of same-sex marriages in one state could directly impact other states through the Full Faith and Credit Clause of the U.S. Constitution. Article IV of the Constitution requires that "full faith and credit" be given to judicial proceedings from other states. In practical terms, it means that states may be obligated to recognize the marriages that occur in other states, even if the couple was ineligible to get married in the new state. Had Hawaii legalized same-sex

marriages, couples could have traveled to Hawaii, married, and returned to their home state, which would have been required to recognize their marriage. This possibility mobilized opponents of same-sex marriage across the country. Some groups formed organically in individual states to lobby elected officials, and some were mobilized through loosely coordinated networks organized by national groups. Nearly all of the groups—both local and national—were motivated by religious beliefs.

The Hawaii case is a prime example of the role played by religious groups and individuals motivated by religious beliefs. The initial debate was centered in the courts and, even there, religious groups were involved. Conservative religious groups were particularly active in the judicial proceedings through the submission of *amicus curiae*, or "friend of the court," briefs. National conservative religious groups such as the American Center for Law and Justice, the Rutherford Institute, the Christian Legal Society (on behalf of a range of groups such as the National Association of Evangelicals, the Lutheran Church-Missouri Synod, and the Institute for Religion and Democracy, among others), and the Church of Jesus Christ of Latter-day Saints all submitted briefs to the Hawaii court. A handful of groups with religious ties submitted *amicus* briefs in support of those seeking same-sex marriage rights. The Madison Society of Hawaii, a multi-denominational group advocated in favor of equal treatment of gays and lesbians, and the American Friends Service Committee associated with the Quaker faith also submitted a supporting brief.

Concerned that the Hawaii Supreme Court would soon legalize same-sex marriage in Hawaii, opponents of same-sex marriage encouraged state legislators to place a constitutional amendment on the 1998 ballot that would give the power to define marriage to the Hawaii legislature. A coalition of religiously motivated conservative groups spearheaded the campaign to encourage citizens to vote yes on the amendment (which eventually passed with the support of 70% of the voters). Though some of the groups had local roots, they were also well connected to conservative religious groups from other states. The group with the highest profile was the Alliance for Traditional Marriage (also called "Save Traditional Marriage" or the "Alliance for Traditional Marriage and Values") founded by Mike Gabbard. Gabbard, a strong Catholic elected to the State Senate in 2006, was frequently quoted or referenced in news coverage of the debate over the amendment. Another group with prominent Catholic roots was Pro-Family Hawaii. Led by Daniel McGivern and fellow Catholics from the Star of the Sea parish on the island of Oahu, the group spent nearly $93,000 on the campaign.

These groups built alliances with groups representing the evangelical

Protestant tradition and the Church of Jesus Christ of Latter-day Saints. Other members of the coalition included the Hawaii Family Forum, a Christian advocacy group associated with the national organization Focus on the Family as a part of the organization's Family Policy Council. During the campaign, Focus on the Family provided the coalition with financial and strategic support. The Hawaii Christian Coalition also participated in the debate and the national organization came under fire for undisclosed campaign donations it made during the campaign. One of the largest financial contributions to the campaign came from the Alliance for Traditional Marriage. Nearly half of the $1.2 million spent during the campaign by the group came from the Church of Jesus Christ of Latter-day Saints' central office.

Throughout the campaign, this coalition stressed the message that the purpose of the amendment was to protect "traditional marriage" rather than to deny rights to any group of citizens.[28] In her study of letters to the editor appearing in the two major Hawaii newspapers, Kathleen Hull found that the opponents of same-sex marriage, although religiously motivated, steered away from overtly religious or moral arguments, and instead focused on the importance of protecting the "will of the majority" and criticizing the tactics of opposing groups. Though some writers on both sides of the debate referenced religious beliefs or arguments, these were not the dominant argument frames. In part, this may have reflected a strategic decision to appeal to as many potential supporters as possible by not alienating those who did not share the religious values of the coalition. It also reflects the hesitancy of many Americans to mix religion and politics.[29]

These religiously motivated interest groups drew upon existing connections with churches and national interest groups to craft a defensible message, raise money, and mobilize voters. Throughout both the legal debate and the campaign surrounding the constitutional amendment, conservative religious groups dominated the public coverage of religious views on the issue, even though some religious groups opposed the amendment. A 1997 statement in support of same-sex marriage issued by the Hawaii Council of Churches, "An Interfaith Perspective on Same Gender Marriage," received almost no attention from the media. Recognizing the debates within churches, the Council argued that "while our religious communities are wrestling with the issue of whether same-gender marriages shall be sanctioned within our various traditions, we, the undersigned, believe that an essential distinction must be made between this religious debate and the question of whether couples of the same gender should have access to the legal privileges of marriage as a matter of civil rights."[30] Similarly, the well-established Rainbow of Aloha Metropolitan Community Church, founded in 1973,

was not included in media coverage of the debate, and the decision by the American Friends Service Committee to partner with a local gay rights group, *Na Mamo O Hawaii*, also received little attention.

Federal Intervention

Though Hawaiian courts did not ultimately legalize same-sex marriage, the perceived threat was enough to set federal lawmakers on a quest to protect other states from the possibility they would be forced to recognize same-sex marriage certificates from other states. The impetus for a national law that would allow states to ignore the Full Faith and Credit Clause as it applied to same-sex marriage came from a coalition of conservative religious groups, including the Christian Coalition, Colorado for Family Values, the National Legal Foundation, and the American Family Association.[31] The coalition, called the National Campaign to Protect Marriage, first met in a Memphis church basement in January 1996 and issued the "Marriage Protection Resolution," which was later endorsed by all of the Republican presidential candidates at a rally held shortly before the Iowa caucuses.

On May 7, 1996, in response to the Hawaii case and the possible decision in favor of gay marriage, Representative Bob Barr (R-Georgia) introduced legislation that would become the federal Defense of Marriage Act (DOMA). The bill was drafted with the help of Reverend Lou Sheldon of the Traditional Values Coalition, a religiously motivated conservative interest group. In his speech to Congress, Representative Barr, an outspoken critic of gay marriage, argued that "the flames of hedonism, the flames of narcissism, the flames of self-centered morality are licking at the very foundation of our society, the family unit."[32] The Defense of Marriage Act would quench those flames through a two-pronged approach. First, the bill established the right of states to refuse to recognize a same-sex marriage license issued by another state. This provision was designed to protect the laws and amendments passed by state governments from legal challenges. The second prong of the bill formally defined marriage to refer to a legal union between one man and one woman.

When the bill was initially introduced, it drew heavy criticism from gay rights groups such as the Human Rights Committee and Lambda Legal Defense, as well as from civil liberties groups such as the American Civil Liberties Union and People for the American Way. In contrast, conservative religious groups lobbied heavily in favor of the legislation. Christian groups such as Focus on the Family, Concerned Women for America, and the Christian Coalition ran extensive media campaigns to mobilize their members to contact members of Congress in support of the legislation. After a

heated debate, the House of Representatives passed the bill in July with 342 (out of 435) voting in favor. The Senate picked up the bill four days later and passed the measure in September with 85 voting in favor. President Bill Clinton, a Democrat, signed the bipartisan bill into law in the middle of the night on September 21, 1996.[33]

Mini-DOMAs

Between 1996 and 2004, thirty-seven state legislatures mirrored the federal government with similar state-level Defense of Marriage Acts (commonly called "mini-DOMAs"). In most cases, legislation establishing state DOMAs was initiated by religious conservatives and national conservative religious groups—in particular, Focus on the Family, the American Family Association, the Christian Coalition, and the Traditional Values Coalition—teamed with local conservative groups to actively mobilize support for the proposals.[34] One comprehensive study found that in the states that considered mini-DOMAs, 81 percent of the legislative sponsors had known links to conservative religious groups, 54 percent of the bills were drafted with the help of conservative religious groups, and conservative religious groups actively lobbied for the bills in all of the states that considered them.[35] As Martin Dupuis noted, "religious views, traditional family values, and the devaluation of marriage were most often cited as reasons for the legislation."[36]

Three separate studies of states' decisions to adopt defense of marriage legislation find that religious groups played a major role in the creation of state laws.[37] Donald Haider-Markel concludes that along with the influence of parties and political elite, the "timing of state adoption of same-sex marriage bans is strongly influenced by religious groups . . . "[38] Sarah Soule adds that state Family Policy Councils, groups loosely affiliated with the national organization Focus on the Family, were instrumental in pushing states to adopt marriage bans. Scott Barclay and Shauna Fisher find that religious groups played a less prominent role in the debate than expected based on other sexual orientation-related measures, though they still find religious groups to be significant players in the policy process.[39] In measuring the influence of religious groups, Barclay and Fisher look to the percentage of the population in each state that identified as Southern Baptist, Catholic, or Mormon (indicators of the strength of opposition to same-sex marriage), as well as the percentage of the population that was Jewish (indicator of the strength of support for same-sex marriage). This method accounts only for the Active Opponents referenced in Table 2.1 and may underestimate the

Table 2.2 States with Mini-Defense of Marriage Acts

Pre-DOMA*	1996	1997–1999	2000–2005
Wyoming	Alabama	Arkansas (1997)	California (2000)
Maryland	Alaska	Florida (1997)	Colorado (2000)
Wisconsin	Arizona	Indiana (1997)	West Virginia (2000)
New Hampshire	Delaware	Maine (1997)	Texas (2003)
Utah	Georgia	Minnesota (1997)	New Hampshire (2004)
	Idaho	Mississippi (1997)	Ohio (2004)
	Illinois	Montana (1997)	
	Kansas	N. Dakota (1997)	
	Louisiana	Virginia (1997)	
	Michigan	Hawaii (1998)	
	Missouri	Iowa (1998)	
	N. Carolina	Kentucky (1998)	
	Oklahoma	Washington (1998)	
	Pennsylvania	Vermont (1999)	
	S. Carolina		
	S. Dakota		
	Tennessee		

*State law predating the federal Defense of Marriage Act defines marriage. New Hampshire also passed a state DOMA in 2004

effect the successful mobilization of Passive Opponents and Passive Supporters had in the passage of these state laws.

Vermont's Civil Unions

In the midst of state legislative debates over mini-DOMAs, three Vermont couples sued the state for the right to marry. As with the Hawaii case, both the Roman Catholic diocese of Burlington and the Burlington stake of the LDS church filed briefs opposing the couples, and the Unitarians, Quakers, Congregationalists, Jews, and Presbyterians filed *amicus* briefs in support of the couples' right to marry.[40] In December 1999, the Vermont Supreme Court sided with the couples and ordered the state legislature to devise a method to provide them with the rights of marriage.[41] According to the court, the state constitution required the government to provide same-sex couples with the same rights provided to opposite-sex couples. The court directed the Vermont legislature to find an appropriate way to accommodate same-sex couples but did not outline a specific method of rectifying the problem.

As debate shifted to the state legislature, religious voices continued to

play a prominent role. Seventeen religious leaders from a range of faith traditions issued a statement in January urging the legislature to pass a bill legalizing same-sex marriage. The clergy included representatives of the United Methodist Church, the Episcopal Diocese of Vermont, the Unitarian Universalist church, the United Church of Christ, and a Jewish rabbi. As they argued, "human beings are called to live in right relationship with each other and with God. Therefore, legalizing marriage for same gender couples will build community, support the well-being of children and families and promote the common good."[42] Conservative groups were also represented in the debate. Reverend Lou Sheldon, the director of the Traditional Values Coalition, traveled to Vermont to voice his opposition to legislation.[43] Two-thirds of those who provided testimony to the legislature opposing recognition for same-sex couples cited morality or God's will as justification for their opposition.[44]

Despite opposition from some state lawmakers, in April 2000 the Vermont legislature responded with a civil union bill.[45] Preserving the definition of marriage as referring to a male-female partnership, the Vermont civil union legislation provided same-sex couples with all the legal rights and benefits awarded to heterosexual married couples by the state. The law went into effect on July 1, 2001, and almost 1,500 civil unions were performed in the first six months.[46] The policy left many on both sides of the debate dissatisfied. Some advocates of same-sex marriage argued that the policy created a separate and unequal category for same-sex couples and it did not provide the federal benefits and rights conferred upon those who are legally married.[47] In fact, one-third of the witnesses who testified at the legislative hearing in support of legal recognition for same-sex couples argued that marriage, rather than domestic partnerships or civil unions, was the only acceptable policy outcome.[48] Opponents of same-sex marriage viewed it as another step toward the destruction of the traditional family structure.

Federal Marriage Amendment

By the early months of 2003, advocates of same-sex marriage succeeded in winning a handful of court cases and the enactment of a civil union policy in Vermont, but they lost a string of legislative battles at both the national and state levels. Religious groups successfully mobilized to block the possibility that states would be forced to recognize same-sex marriages if they were eventually legalized through a court decision in another state. Though many observers looked with skepticism at the constitutionality of the DOMA, the fact that no state allowed gay or lesbian couples to marry

meant that no citizen had the legal standing to challenge the law as a violation of the Full Faith and Credit Clause of the Constitution.

Seeking to guard against the possibility that the laws would be ruled unconstitutional if challenged, opponents of same-sex marriage submitted a proposal to amend the U.S. Constitution to officially define marriage as between a man and a woman. Mississippi Representative Ronnie Shows first proposed an amendment in the 107th Congress. The amendment was drafted with the help of Alliance for Marriage, a religious group started in 1999 with the goal of protecting against changes to the traditional family structure.[49] H.J. Res. 93, introduced in May 2002, had twenty-two cosponsors and died in the House Judiciary Committee. A year later, on May 21, 2003, Colorado Representative Marilyn Musgrave introduced a similar resolution titled the Federal Marriage Amendment.

The proposed amendment received little public attention until a tangentially related Supreme Court ruling on June 26, 2003, catapulted the issue into the national spotlight. Although the Supreme Court's decision in *Lawrence v. Texas* (2003) did not directly address gay marriage, it was widely interpreted as paving the way for same-sex marriage rights. The Court struck down anti-sodomy laws in thirteen states, providing firmer legal ground to supporters of gay marriage.[50]

Three days after the *Lawrence* ruling, Senate Majority Leader Bill Frist (R-Tennessee) announced his support for a constitutional amendment defining marriage as being between a man and woman. In November, Colorado Senator Wayne Allard introduced a companion resolution in the Senate to amend the Constitution. The Senate resolution drew only six cosponsors, but 131 Representatives in the House—both Republicans and Democrats—joined the marriage amendment resolution as cosponsors. Conservative Christian leader Jerry Falwell announced in August that he would dedicate his "talents, time and energies over the next few years to the passage of an amendment to the U.S. Constitution that will protect the traditional family from its enemies who wish to legalize same-sex marriage and other diverse 'family' forms."[51] Other conservative religious groups mobilized in "defense of marriage," sponsoring rallies, mass mail campaigns, and lobbying days. Despite the support of these religious groups, neither the House nor the Senate voted on the resolution that year.

Massachusetts

The political environment changed dramatically on November 18, 2003 when the Massachusetts Supreme Court struck down Massachusetts' legislative ban on same-sex marriage on the grounds that there was "no constitu-

tionally adequate reason for denying civil benefits to same-sex couples." The decision in the case, *Goodridge v. Massachusetts Department of Public Health* (2003), ordered the legislature to remedy the situation within six months, and in a supplemental ruling the court ruled that a civil union bill would not meet the requirements outlined in the original decision.[52] With the option of a Vermont-style civil union off the table, Massachusetts legislators passed a civil marriage policy to provide legal marriage benefits to same-sex couples and became the first state in the nation to legally recognize same-sex marriages.

Marriage Protection Amendment

With a more direct threat of legalized marriage for same-sex couples, Representative Musgrave and Senator Allard resumed their calls for a federal constitutional amendment to define marriage. Allard introduced a new resolution to the Senate (SJ Res 40) in July 2004 and Musgrave introduced HJ Res 106 in the House in September 2004. This new version was renamed the Marriage Protection Amendment. As it declared, "Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman."

President George W. Bush initially refused to take a position on the proposed constitutional amendment and it was not until mid-December 2003 that he announced his support for a constitutional amendment to define marriage. In a nationally televised interview, Bush said he would support a constitutional amendment "if necessary" to codify the legal definition of marriage. Bush mentioned the importance of a traditional definition of marriage in his January State of the Union address and issued an even more explicit endorsement of the proposed amendment in a televised speech to the nation on February 24, 2004. Bush argued that "a few judges and local authorities are presuming to change the most fundamental institution of civilization," and concluded, "if we are to prevent the meaning of marriage from being changed forever, our nation must enact a constitutional amendment to protect marriage in America."[53]

Groups on the religious right were among the most active advocates of the amendment. The American Family Association drafted and circulated a petition in support of the amendment that was sent to members of Congress. Focus on the Family, the Traditional Values Coalition, the Southern Baptist Convention, and the U.S. Conference of Catholic Bishops all voiced

support for the amendment.[54] Focus on the Family ran newspaper advertisements in 13 states and used James Dobson's daily radio program to mobilize voters to contact their senators and representatives.[55] Along with organized interest groups, leaders from the Catholic Church, Southern Baptist Convention, Mormon Church, Greek Orthodox Church, Church of God in Christ, and Union of Orthodox Jewish Congregations of America gathered in Washington, D.C. in early 2006 to coordinate the efforts of religious supporters of the Marriage Protection Amendment.[56] The push inspired one commentator to note that "Falwell, Dobson, Sheldon, Robertson and their ilk are employing heated rhetoric and an abundance of resources to whip their supporters into a panic over the future of marriage in America. They are urging their members to pressure congressional lawmakers and the president to fall in line."[57]

While they did not attract the same attention, religious leaders opposed to the marriage amendment also mobilized during this period. Representatives of some liberal religious traditions united in the group Clergy for Fairness. In an open letter addressed to the Senate and signed by twenty-four national religious groups, Clergy for Fairness argued that "the Federal Marriage Amendment reflects a fundamental disregard for individual civil rights and ignores differences among our nation's many religious traditions."[58] The group collected over 2,200 signatures from clergy members and religious leaders on a petition opposing the amendment in 2006. This movement on the Left, led by Active Supporters, worked through this petition to mobilize Passive Supporters and Passive Opponents who may have opposed same-sex marriage but did not approve of making such a drastic change to the U.S. Constitution.

Unlike regular legislation, a constitutional amendment requires a two-thirds vote in both chambers before it can be sent for ratification by three-fourths of the states. The Senate took up the measure first, and senators who were opposed to the amendment quickly launched a filibuster of the resolution. Supporters forced a vote of cloture to allow the chamber to discuss the issue, but the motion failed by a narrow margin (48–50) a week after it was introduced, procedurally killing the resolution. The House held a floor vote on the resolution in mid-September, and with a vote of 227–186, supporters failed to garner the two-thirds needed for passage. This scenario repeated itself two years later in the 109th Congress. Musgrave and Allard again introduced identical resolutions in the House and Senate. The Senate version failed on a cloture vote in June 2006 and the House version failed a month later. During debate over the measures, members of Congress liberally referenced biblical texts and advanced arguments rooted in religious beliefs.[59]

State Constitutional Amendments

The first two states to amend their constitutions to define marriage—Alaska and Nebraska—took action years before the Massachusetts decision or the introduction of a federal marriage amendment. In 1998, the Alaska Superior Court found that the state's policy of denying marriage licenses to same-sex couples was unconstitutional. Opponents responded with a proposed constitutional amendment to define marriage sponsored by an evangelical state Senator.[60] Supporters of the amendment offered a strategically calculated frame focusing on marriage and the need to prevent judicial activism rather than outright hostility to homosexuality. With the support of the Catholic archdiocese and the LDS church, religious conservatives mobilized to ratify the amendment in 2000.[61]

While the central fronts of debate moved between federal and state venues, local governments also found themselves in the midst of controversy. Local officials in a handful of cities and counties across the country used their powers to issue marriage licenses to same-sex couples. On February 12, 2004, San Francisco Mayor Gavin Newsom announced that the city would begin issuing marriage licenses to same-sex couples. That decision was immediately followed in Sandoval County, New Mexico, the city of New Paltz, New York, and Multnomah County, Oregon.[62] In all these locales, judges eventually ordered an end to the distribution of marriage licenses and nullified those that were issued.

These local actions coupled with the Massachusetts decision and the failure of the federal government to pass a constitutional amendment opened the floodgates on state-level constitutional amendments. Thirteen states passed amendments in 2004 to define marriage as being between a man and a woman and to refuse state recognition of same-sex marriages performed in other states. According to Wilcox et al., members of the Christian Right had "long anticipated the emergence of the same-sex marriage issue and had planned for the issue for some time."[63] The Christian Right used the decision in Massachusetts as a means of expanding the religious coalition of opponents of same-sex marriage, reinvigorating local and national religious interest groups, and mobilizing voters in support of state-level constitutional amendments and conservative political candidates. Evangelical Christians joined with conservative Catholics, the LDS church, Muslims, and prominent African American pastors to advocate the passage of constitutional amendments defining marriage. New groups formed in states that would be voting on an amendment, and national organizations—which many political observers viewed as weakened after the 2000 elections—made the issue a central focus of their political and fundraising strategies

and helped network state and local groups. Conservative religious groups relied on connections with churches and other houses of worship to reach voters. The Alliance Defense Fund, a Christian group that helps coordinate legal and political strategies for the Christian Right, sent letters to pastors encouraging them to talk about the issue of same-sex marriage with their congregations. Focus on the Family even provided ministers with sample sermons on the topic.[64]

Many of the amendments passed in 2004 were in states that featured conservative legislatures and judiciaries and offered little protection to gays and lesbians. It was not a surprise, then, that most of the amendments passed by overwhelming margins. The closest votes were in Oregon and Michigan, where only 57 percent and 59 percent of the public, respectively, voted in favor of the amendments. Mississippi, on the other hand, passed its amendment with the support of 86 percent of the voters. As with state DOMAs, religious groups played a major role in advancing the amendments.

In Ohio, Citizens for Community Values, associated with Focus on the Family, helped to gather the required 323,000 signatures to place the amendment on the ballot and spent $3.5 million on the campaign.[65] The American Family Association of Michigan played a similar role in the passage of an amendment in Michigan. There, evangelicals united with African American clergy and the Catholic Church in leading the campaign for the amendment.[66] In both of these states, representatives of liberal religious traditions also organized to oppose passage of the amendments.

In 2006, the Christian Right relied on many of the same strategies that proved successful in 2004 but faced more organized resistance from supporters of same-sex marriage combined with less enthusiasm from the grassroots. Amendment supporters in the eight states that voted on constitutional amendments in November 2006 were faced with voters who were more concerned with issues such as the war in Iraq, were less threatened by the prospect of legalized same-sex marriage because of conservative judicial rulings in New York and Washington over the summer, and were exposed to middle ground proposals such as civil union or domestic partnership plans advocated by some gay rights groups.[67] In Arizona, opponents were even able to successfully reframe the issue, leading to the first ever defeat of a marriage amendment at the state level. In Colorado, South Dakota, Virginia, and Wisconsin, the measures passed with the support of under 60 percent of the voters.

Looking into the Future

As of August 2007, only one state—Massachusetts (2004)—allows same-sex couples to marry, and only four states—Vermont (2000), Connecticut

Table 2.3 States with Constitutional Amendments Banning Same-Sex Marriage

1998–2003	2004	2005–2006
Alaska (1998)	Arkansas	Kansas (2005)
Hawaii (1998)*	Georgia	Texas (2005)
Nebraska (2000)	Kentucky	Alabama (2006)
Nevada (2002)	Louisiana	Colorado (2006)
	Michigan	Idaho (2006)
	Mississippi	S. Carolina (2006)
	Missouri	S. Dakota (2006)
	Montana	Tennessee (2006)
	N. Dakota	Virginia (2006)
	Ohio	Wisconsin (2006)
	Oklahoma	
	Oregon	
	Utah	

*The amendment passed in Hawaii does not define marriage directly but it instead gives the state legislature the authority to define marriage through legislation.

(2005), New Jersey (2007), and New Hampshire (effective January 2008)—allow same-sex couples to enter into civil unions. Nearly every other state has a legislative or constitutional ban on same-sex marriages.[68] The policy debate, however, is far from over. In Massachusetts, opponents of same-sex marriage convinced state legislators to vote to place the issue on the ballot as a constitutional amendment to allow voters to decide whether to allow same-sex marriages.[69] According to the Massachusetts constitution, the legislature, meeting as a constitutional convention, must agree to the amendment in two concurrent sessions before it can be placed on the ballot. If the next session also approves the measure, the amendment will go to the voters. Massachusetts issued its first marriage license nearly three years ago, but no state has followed its lead in granting full marriage benefits, though several have created alternate methods for same-sex couples to receive benefits. Recent judicial decisions have either rejected claims made by same-sex couples (in Washington State and New York), or turned the task of creating an acceptable alternative over to the state legislature (New Jersey, which established a civil union policy). The Marriage Protection Amendment will likely make a reappearance in the 110th Congress, but with Democratic majorities in both the House and Senate, it is unlikely to advance.

Table 2.4 State Policies Favorable to Same-Sex Couples

Same-Sex Marriage	Civil Unions	Domestic Partnerships or Similar Benefits	Favorable State Supreme Court Decisions
Massachusetts (2004)	Vermont (2000) Connecticut (2005) New Jersey (2007) New Hampshire (2008)	Hawaii (1997) Washington, D.C. (2002) Maine (2004) California (2006) Washington (2007) Oregon (2008)	Hawaii (1996) Alaska (1998) Massachusetts (2003) New Jersey (2006)

RELIGIOUS GROUPS AND MEDIA FRAMING IN THE SAME-SEX MARRIAGE DEBATE

As the debate over same-sex marriage jumped between local, state, and federal legislatures and courts, a battle over the media's framing of the issue developed, led in part by the national religious organizations and local semi-autonomous religious groups that played such a large role in bringing the issue to the national political agenda. This section examines two dominant patterns within the media's coverage of the debate over same-sex marriage. First, two dueling argument frames dominate the debate: traditional family values versus equality.[70] Second, religious groups opposed to same-sex marriage are more prominent in news coverage of the debate than religious groups that support same-sex marriage.

Dueling Frames

Framing involves the strategic packaging of information to communicate a preferred version of political problems, public policies, or potential solutions.[71] "At the most general level, framing refers to the way in which opinions about an issue can be altered by emphasizing or deemphasizing particular facets of that issue."[72] It is an important political strategy because policy issues are inherently multidimensional and are thus ready targets for interpretation. Numerous studies find that frames can dramatically change the decision-making context, especially in terms of what aspects of the policy are most important, and can thereby alter the outcome of debates.[73] Citizens consume frames through a number of media outlets but are only rarely active in the creation of frames. Instead, politicians, scholars, and policy entrepreneurs such as interest group leaders, are responsible for developing

issue frames.[74] Groups actively work to shape public debates over policies by injecting their preferred framing of the issue into the debate. At the same time, journalists play a major role in framing because they act as gatekeepers, deciding which information to include in a story and deciding how that information should be presented.

The issue of same-sex marriage can be framed in a variety of ways. In one study of framing that focused on the public debate in Hawaii, Hull identified twenty-seven separate argument frames emerging in letters to the editor in local newspapers.[75] Twelve of these frames appeared in at least 10 percent of the letters. While these frames represent specific distinct arguments, we can also use broader groupings of arguments to help identify patterns in the emerging debate. The most obvious frame for a debate over same-sex marriage involves constructing the issue as a question of moral values. Morality, however, involves at least two separate dimensions—those addressing questions of traditional family values and those addressing aspects of equal rights. Both are grounded in morality (questions of ultimate right and wrong or good and bad) and both have strong ties to religious beliefs, but each emphasizes a different aspect of morality.[76]

In addition to moral frames, the media's coverage of same-sex marriage might also reference frames emphasizing politics, legality, democracy, and economics. A politics frame would emphasize the political strategies and key players involved in the debate as well as framing the issue as a strategic battle between two or more sides. A legality frame would emphasize legal or constitutional issues raised by the policy. A democracy frame would emphasize the will of the people or public opinion surrounding the topic. Finally, an economic frame would emphasize the economic benefits or costs associated with the policy in question. Each of these frames represents relevant considerations that provide an acceptable alternative or complement to moral frames.

Analysis of the media's coverage of the debate over same-sex marriage and the use and development of these various frames helps explain public opinion and the outcome of many policy decisions regarding same-sex marriage. The *Washington Post* and the *New York Times* provided extensive coverage of the policy debates over same-sex marriage between 1995 and 2003—the period immediately preceding passage of the DOMA and continuing past the decision in Massachusetts.[77] In the coverage of same-sex marriage by these national newspapers, moral frames—particularly those advocating the protection of traditional family values—were the dominant frames in the debate. For example, in covering a congressional debate over a domestic partnership law in the District of Columbia in 1995, the *Washington Post* reported that "lawmakers did approve a repeal of the city's do-

mestic partners law after debating '*family values*' and whether the District government should extend health benefits to the domestic partners of its unmarried employees . . . the Republican majority voted yesterday to strike the law from the city code, calling it a *reprehensible 'redefinition' of the family*" [italics added].[78] This argument frame was a powerful and long-lasting frame throughout the debate.

News coverage in the early period of the debate also emphasized the politics frame. Journalists situated the growing debate as a political battle between liberals and religious conservatives—yet did not acknowledge the role of religious liberals. At the same time, some gay rights groups questioned the wisdom of pursuing gay marriage rights when the campaign would divert attention and resources from more important issues such as preventing the spread of AIDS or eliminating job discrimination. Thus, the political frames that developed encompassed both a general strategic analysis of the unfolding debate as well as a strategic debate within the gay and lesbian community regarding tactics and timing.

The months between the introduction and passage of the DOMA marked the only period in the debate when a frame other than morality was the most common frame. In the heat of the debate over the DOMA, the politics frame was used in nearly 70 percent of the articles written on the topic. The *New York Times* began one article written during this period by emphasizing the political strategy behind the gay marriage debate: "Trying to keep the issue of same-sex marriage alive in the Presidential campaign, Ralph Reed said today that the Christian Coalition would push Congress to send President Clinton legislation by Labor Day to deny federal recognition of such unions."[79] Though the politics frame was the most common frame during this period, the morality frame was a close second. Sixty-seven percent of the articles written during these months included the morality frame. Unlike the previous period, however, the morality frame was not solely focused on traditional family values. While 68 percent of the articles included a family values moral frame, 14 percent included an equal rights moral frame. In some cases, these frames appeared in the same article, creating a direct conflict between the two versions of moral frames being developed in the debate.

These months also marked the introduction of a legal frame, which was used throughout the remainder of the debate. Arguments within the legal frame centered on the constitutionality of laws banning or creating gay marriage as well as the principles of federalism. Supporters of gay marriage argued that states should be free to implement gay marriage laws and that the Full Faith and Credit Clause of the Constitution meant that those marriage licenses should be recognized in other states. Opponents argued

that states should not be forced to recognize marriage licenses for same-sex couples issued by other states.

In terms of the dominant frames that appeared in the news, there was little change between the debate over DOMA and the state court ruling in Vermont. The morality frame remained the most common frame used in the debate. Nearly 70 percent of the articles written between January 1997 and April 2002 included the moral frame. Of these, most focused on family values morality, but a growing number of articles (30 percent) also focused on equal rights morality. In particular, argument frames regarding discrimination surfaced during this period. Supporters of gay marriage argued that it was important to protect the equal rights of gays and lesbians and to execute marriage laws fairly. Religious groups, when they were mentioned in news articles in connection with moral frames, were more commonly tied to family values moral arguments. About 30% of the articles during this time included the politics frame and one quarter of the articles included a legal frame.

Between May 2002 and December 2003, the variety of frames used in the debate over gay marriage expanded. Until this point, the debate was framed largely in terms of morality and politics, with some attention also paid to legal frames. In this final period of analysis, however, the terms of debate expanded to include democracy and economic frames as well. The moral frame continued its dominance, with 77 percent of the articles in this time period using a moral frame. Again, the family values version of the morality frame was most common, but a significant number of articles (30 percent) also emphasized the equal rights moral frame. A number of religious interest groups worked hard to push this version of the moral frame, issuing a number of press releases that included an equal opportunity frame, but religious groups were almost never associated with the frame in news coverage of the debate.

In addition to the moral frame, over half of the articles used a politics frame and 27 percent used a legal frame. The arguments associated with each of these major frames were similar to those made throughout the debate, although the judicial activism argument was made more frequently. Opponents of gay marriage, in particular religious conservatives, argued that court rulings in favor of gay marriage represented judicial activism in its most egregious form. Unelected judges, they claimed, were forcing their liberal interpretation of the Constitution on a public that was largely opposed to gay marriage.

Finally, joining these staples of the gay marriage debate were the democracy and economics frames that were rarely used in earlier periods of the debate. Nearly 39 percent of the articles used the democracy frame, empha-

sizing public opinion on the topic of gay marriage. Supporters of gay marriage argued that the public was gradually becoming more receptive to the idea of gay marriage, while opponents argued that public opinion was strongly opposed to the practice. Nearly 23 percent of the articles included the economic frame. This frame was used particularly to promote gay marriage through the argument that gay and lesbian couples needed access to the economic and legal benefits granted to heterosexual couples.

As the example that began this chapter suggests, the framing of the same-sex marriage debate can have a substantial impact on the policy outcomes. In the debate over an amendment to the Arizona constitution, opponents were able to shift the discourse from the family values moral frame to frames emphasizing economic benefits and equal rights morality. This is a significant departure from the established framing pattern in that a frame emphasizing economic benefits to heterosexuals has the potential to mobilize Passive Supporters and Passive Opponents who are usually swayed by the rhetoric of Active Opponents.

Group Representation in Media Coverage of the Debate

Religious groups opposed to same-sex marriage were significantly more prominent in news coverage of the debate than were religious groups in support of same-sex marriage, and therefore had a larger role in the framing process as it was occurring through the mass media. In many ways, this second pattern is a direct result of the first, in that reporters often have a set of preferred frames in mind and turn to sources that will provide support for those pre-selected frames.[80] The process of framing an issue as a moral issue has important consequences on the groups included in a debate and the types of arguments that are included in the debate. The underrepresentation of religious groups supportive of same-sex marriage, however, is also the result of structural differences in mobilization and media strategies.[81]

Fifty-four interest groups were mentioned in the mediated debate over gay marriage that occurred in the pages of the *Washington Post* and the *New York Times* between 1995 and 2003, but most groups were only mentioned a single time. Approximately half of the groups mentioned were religious groups and half were non-religious groups; however, the non-religious groups received more mentions than the religious groups. Table 2.5 lists the top ten groups receiving the most mentions in the media coverage of the debate over gay marriage.

All five of the religious groups among the top ten groups were strongly opposed to gay marriage. Of the 27 religious groups mentioned in this

Table 2.5 Groups in News Coverage of the Same-Sex Marriage Debate, 1995–2003

Group	Number of Mentions	Religiously Affiliated	Position on Same-Sex Marriage
Human Rights Campaign (HRC)	37	No	Support
Family Research Council (FRC)	23	Yes	Oppose
Lambda Legal Defense (LLD)	18	No	Support
Traditional Values Coalition (TVC)	10	Yes	Oppose
American Civil Liberties Union (ACLU)	9	No	Support
Christian Coalition of America (CC)	9	Yes	Oppose
Concerned Women for America (CWA)	8	Yes	Oppose
Focus on the Family (FF)	7	Yes	Oppose
Pew	7	No	Neutral
Freedom to Marry Coalition (FMC)	6	No	Support

Results are based on a content analysis of news articles from the *Washington Post* and *New York Times* between 1995 and 2003

sample of news coverage, 21 were opposed to gay marriage, three supported gay marriage, and three held a middle ground position on the issue. This pattern in media coverage oversimplifies the diversity of viewpoints held by religious groups. Despite the existence of several religious groups actively supporting gay and lesbian marriage, such as Dignity USA, Equal Partners in Faith, and Soulforce, journalists tended to focus their attention on the larger religious groups opposed to the policy.

This trend of overemphasizing the voices of Active Opponents and underemphasizing the voices of Active Supporters was not simply the result of the time frame studied, nor was it the result of the newspapers chosen for study. In examining all of the "major papers" archived by the Lexis-Nexis database between 1995 and 2006, it is clear that this pattern is systemic. Table 2.6 displays the number of times leading interest groups and denominations were mentioned in association with "same-sex marriage" or "gay marriage" during these years. Religious groups opposing same-sex marriage were simply much more likely to be mentioned in media coverage of the debate.

An examination of the press releases issued by a sample of religious groups active in the same-sex marriage debate finds that most religious interest group press releases used moral language and arguments to justify their positions.[82] Three-quarters of the press releases specifically mentioned family values moral frames, and journalists reinforced this by associating religious groups with family values frames in news stories. However, many

Table 2.6 Religious Groups Mentioned in News Coverage, 1995–2006

Year	Opposing Same-Sex Marriage		Supporting Same-Sex Marriage	
	Interest Groups*	Denominations**	Interest Groups+	Denominations++
1995	20	1	0	1
1996	279	8	4	3
1997	65	1	1	0
1998	122	5	4	2
1999	41	11	7	1
2000	95	16	15	16
2001	29	8	4	10
2002	35	4	3	1
2003	259	120	23	19
2004	893	116	54	41
2005	434	117	22	5
2006	76	41	0	11
Total	2,348	448	137	110

*Interest groups opposing same-sex marriage include: The Family Research Council, the Traditional Values Coalition, the Christian Coalition of America, Concerned Women for America, and Focus on the Family

**Denominations opposing same-sex marriage include: the Catholic Church, the Southern Baptist church, the Church of Jesus Christ of Latter-day Saints (Mormon)

+Interest groups supporting same-sex marriage include: Dignity USA, Equal Partners in Faith, Soulforce, the Interfaith Alliance, and the Religious Coalition for the Freedom to Marry

++Denominations supporting same-sex marriage include: The Metropolitan Community Church, Unitarian Universalist, Society of Friends (Quaker), and Conservative Judaism

Results are based on a full text search of "Major Papers" using the Lexis-Nexis database. Search terms included "same-sex marriage" or "gay marriage" and the name of the group for each year shown.

of the religious groups also framed the issue in terms of the equal rights moral frame. Though this version of the morality frame was not nearly as prevalent as the family values version, it was still used consistently by religious groups throughout the debate.

In contrast to the way journalists connected religious groups with the family values frame, however, religious groups were almost never associated with the equal rights frame in news coverage of the debate. The repeated use of the equal rights frame by religious groups communicating through group press releases was essentially ignored by journalists in their coverage of religious groups. Several press releases from religious groups expressed the argument that gay marriage is moral if the couple loves one another, but, again, religious groups were never associated with this frame in news articles.[83]

Furthermore, many of the religious groups supporting same-sex marriage were simply ignored by the media. The Religious Action Center of Reform Judaism and Dignity USA each issued a series of press releases on the topic of gay marriage between 1996 and 2003, but the Religious Action Center was never mentioned in the mediated debate and Dignity was mentioned only once over the entire period. Both of these groups used moral argument frames, but they spoke in the language of equal rights rather than family values morality. Activist Alison Beck notes this reclamation of the morality frame, arguing that "by reframing the debate on 'moral values' and embracing the emerging voices in Progressive Christianity and progressive wings of other religious traditions, we can provide a principled faith-based argument for the dignity and equality of all families."[84]

This is perhaps an extreme example of the power of a dominant frame in affecting the type of voices that are heard in mediated debates. The dominance of a particular frame has the effect of silencing voices that could make an important contribution to the national policy debate. The moral frames developed by these groups, which articulated support for gay marriage, were in direct conflict with the moral frames that dominated the debate. For journalists attempting to piece together a consistent narrative with a theme dominated by a moral frame, these alternate moral frames were difficult to incorporate.

Religious groups articulating moral arguments against gay marriage, however, were included in the debate and were successful in moving argument frames into the deliberation. Focus on the Family is one such group that experienced a high level of framing success. A conservative religious organization devoted to protecting traditional family values, Focus on the Family was especially persistent about using argument frames regarding the protection of the traditional family structure and the impact of gay marriage on children. Although the traditional family values frame was used by journalists several times over the course of the debate, the heaviest use of the frame occurred in 2003. The frame was rarely used between 1997 and 2003, but in 2003, Focus on the Family, along with the Family Research Council (FRC) and the National Conference of Catholic Bishops (NCCB), pushed the frame back on to the table. Focus on the Family issued a series of press releases using the traditional family frame in April, June, and July.

Shortly after the group began emphasizing the frame, the traditional family frame appeared in media coverage of the debate and was often attributed to Focus on the Family. As the year progressed, Focus on the Family continued to use the traditional family frame in group press releases, but use of the frame in news articles expanded to a variety of religious groups, including the NCCB, FRC, Eagle Forum, American Values, and Concerned

Women for America. The impact on children argument was rare through most of the debate until 2003. After Focus on the Family emphasized the impact on children argument in press releases issued in June and July 2003, however, the argument was included in a number of articles, three of which specifically mentioned Focus on the Family in conjunction with the argument.

Overall, religious groups were far more likely to be included in the debate over gay marriage when the issue was framed in terms of family values morality. Religious groups that made moral arguments but did not fall on the "right" side of the debate, however, were less likely to be included in the debate. For groups, access to the debate involves more than simply being interested in the issue or actively pursuing media access. It is more deeply connected to the framing of the issue and, furthermore, the extent to which the group's position fit within the dominant story line associated with the frame.

CONCLUSION

The debate over same-sex marriage is far from settled and religious groups will continue to occupy a prominent role in the debate. As this chapter argues, though, the role of religion in this debate is not confined to the right. Liberal religious groups are every bit as active, though significantly less visible, than conservative religious groups. As liberal religious groups have struggled to gain the media visibility that will allow them to share their message and mobilize supporters, conservative religious groups have dominated the framing battle and successfully mobilized people on the basis of religious beliefs to support state bans on same-sex marriage and state constitutional amendments to define marriage.

Supporters of same-sex marriage too often ignored the powerful role religion plays on both sides of the debate. But, as one activist who is both a lesbian and a Christian writes, "interestingly, it is our church that has helped to give us the strength to endure the politics of hate, and the perspective to take the long view in our road to equality . . . While we must continue to champion the principle that one group's religious beliefs cannot dictate the civil rights of others, we must also remember that in the battle for hearts and minds, religious faith is a central compass of morality for many people."[85] Religious values are certainly at the heart of the debate over same-sex marriage. The lesson of this brief overview of the same-sex marriage debate, however, is that the debate is not simply between religious and secular citizens, but also within religious groups and among people of faith.

NOTES

1. Sonya Geis, "New Tactic in Fighting Marriage Initiatives; Opponents Cite Effects on Straight Couples," *Washington Post*, Monday, November 20, 2006.

2. James Davison Hunter articulated the notion of a "culture war," or a political battle between the conservative Religious Right and the secular Left, in his book, *Culture Wars: The Struggle to Define America* (New York: Basic Books, 1991). Many scholars have built on this characterization. See John C. Green et al., *Religion and the Culture Wars: Dispatches from the Front* (Lanham, MD: Rowman & Littlefield, 1996), George Lakoff, *Moral Politics: How Liberals and Conservatives Think, 2nd Edition* (Chicago: University of Chicago Press, 2002), and John Kenneth White, *The Values Divide: American Politics and Culture in Transition* (New York: Chatham House Publishers, 2003). Other scholars, however, challenge this argument. This position is well articulated by Morris P. Fiorina in *Culture War? The Myth of a Polarized America* (New York: Pearson-Longman, 2006).

3. Paul R. Brewer, "The Shifting Foundations of Public Opinion About Gay Rights," *The Journal of Politics* 65, no. 4 (2003): 1208–1220; Clyde Wilcox and Robin Wolpert, "Gay Rights in the Public Sphere: Public Opinion on Gay and Lesbian Equality," in *The Politics of Gay Rights*, eds. Craig A. Rimmerman, Kenneth D. Wald and Clyde Wilcox (Chicago: University of Chicago, 2000); Fiorina, *Culture War?*

4. Scholars use a variety of terms, such as "religious salience," "religious commitment," and "religiosity," to discuss this concept. See David Leege and Lyman Kellstedt, *Rediscovering the Religious Factor in American Politics* (New York: M.E. Sharpe, 1993). Religious tradition refers to "a group of religious communities that share a set of beliefs that generates a distinctive world view" as defined by Lyman A. Kellstedt et al., "Grasping the Essentials: The Social Embodiment of Religion and Political Behavior," in *Religion and the Culture Wars: Dispatches from the Front*, eds. John C. Green, James L. Guth, Corwin E. Smidt and Lyman A. Kellstedt (Lanham, MD: Rowman & Littlefield, 1996), 176. One particularly thorough look at the relationship between religion and public opinion is Andrew Kohut, et al., *The Diminishing Divide: Religion's Changing Role in American Politics* (Washington, D.C.: Brookings Institution Press, 2000).

5. Christopher Z. Mooney, ed. *The Public Clash of Private Values: The Politics of Morality Policy* (New York: Chatham House Publishers, 2001); Clyde Wilcox, *Onward Christian Soldiers? The Religious Right in American Politics* (Boulder, CO: Westview Press, 1996); Gregory B. Lewis, "Black-White Differences in Attitudes toward Homosexuality and Gay Rights," *Public Opinion Quarterly* 67 (2003): 59–78; Kohut et al., *The Diminishing Divide*; Laura R. Olson, Wendy Cadge, and James T. Harrison, "Religion and Public Opinion about Same-Sex Marriage," *Social Science Quarterly* 87, no. 2 (2006): 340–360.

6. Kohut et al., *The Diminishing Divide*; Olson et al., "Religion and Public Opinion About Same-Sex Marriage."

7. Olson et al., "Religion and Public Opinion about Same-Sex Marriage."

8. A. James Reichley, "Faith in Politics," in *Religion Returns to the Public Square: Faith and Policy in America*, eds. Hugh Heclo and Wilfred M. McClay (Washington, D.C.: Woodrow Wilson Center Press, 2003); Green et al., *Religion and the Culture Wars*.

9. Mark J. Rozell and Debasree Das Gupta, "The 'Values Vote'"? Moral Issues and the 2004 Elections," in *The Values Campaign? The Christian Right and the 2004 Elections*, eds. John C. Green, Mark J. Rozell, and Clyde Wilcox (Washington, D.C.: Georgetown University Press, 2006); Alan Abramowitz, "Terrorism, Gay Marriage, and Incumbency: Explaining the Republican Victory in the 2004 Presidential Election," *The Forum*: 2, no. 4 (2004); Barry C. Burden, "An Alternative Account of the 2004 Presidential Election," *The Forum* 2, no. 4 (2004); D. Sunshine Hillygus and Todd G. Shields, "Moral Issues and Voter Decision Making in the 2004 Presidential Election," *PS: Political Science and Politics* 38, no. 2 (2005): 201–09; Fiorina, *Culture War?*

10. Clyde Wilcox, Linda M. Merolla, and David Beer, "Saving Marriage by Banning Marriage: The Christian Right Finds a New Issue in 2004," in *The Values Campaign? The Christian Right and the 2004 Elections*, ed. John C. Green, Mark J. Rozell, and Clyde Wilcox (Washington, D.C.: Georgetown University Press, 2006); Gregory B. Lewis, "Same-Sex Marriage and the 2004 Presidential Election," *PS: Political Science and Politics* 38, no. 2 (2005): 195–199.

11. Olson et al., "Religion and Public Opinion about Same-Sex Marriage."

12. One of the first scholarly works to address the role of religious groups was Luke Ebersole's *Church Lobbying in the Nation's Capital* (New York: The MacMillan Company, 1951).

13. See Sarah A. Soule, "Going to the Chapel? Same-Sex Marriage Bans in the United States, 1973–2000," *Social Problems* 51, no. 4 (2004): 453–477; Craig A. Rimmerman, Kenneth D. Wald, and Clyde Wilcox, eds., *The Politics of Gay Rights* (Chicago: University of Chicago, 2000); Haider-Markel, "Policy Diffusion as a Geographical Expansion of the Scope of Political Conflict; Same-Sex Marriage Bans in the 1990s"; Sara Diamond, *Not by Politics Alone: The Enduring Influence of the Christian Right* (New York: The Guilford Press, 1998); Clyde Wilcox, *Onward Christian Soldiers?*; or Mark J. Rozell and Clyde Wilcox, eds., *God at the Grass Roots, 1996: The Christian Right in the American Elections* (Lanham, MD: Rowman & Littlefield, 1997).

14. Gregory B. Lewis and Jonathan L. Edelson, "DOMA and ENDA: Congress Votes on Gay Rights," in *The Politics of Gay Rights*, eds. Craig A. Rimmerman, Kenneth D. Wald, and Clyde Wilcox (Chicago: University of Chicago, 2000); John C. Green, "Antigay: Varieties of Opposition to Gay Rights," in *The Politics of Gay Rights*, ed. Craig A. Rimmerman, Kenneth D. Wald, and Clyde Wilcox (Chicago: University of Chicago, 2000).

15. Didi Herman, *The Antigay Agenda: Orthodox Vision and the Christian Right* (Chicago: University of Chicago, 1997), 168.

16. David G. Meyers and Letha Dawson Scanzoni devote chapters to an examination of sexual orientation and scriptural references to homosexuality because it is

particularly difficult to critically explore the topic of same-sex marriage in the Christian tradition without devoting time to these theological questions in *What God Has Joined Together: The Christian Case for Gay Marriage* (New York: Harper SanFrancisco, 2005).

17. Some evangelical churches have recently been forced to confront issues of homosexuality close to home with the revelations of gay sex scandals involving high profile ministers, Associated Press, "Evangelical Pastor Confesses to 'Sexual Immorality,'" *New York Times*, November 5, 2006.

18. Some, like the ELCA, require gay and lesbian ministers to remain celibate.

19. Including, the American Apostolic Catholic Church, American Baptist Church, Buddhist, Evangelical Lutheran, United Methodist, Reformed Catholic Church (USA), Reform Judaism, Methodist, Orthodox Catholic Church and Presbyterian Church (USA), and Southern Baptist. See Chris Glaser, "The Love That Dare Not Pray Its Name: The Gay and Lesbian Movement in America's Churches," in *Homosexuality in the Church: Both Sides of the Debate*, ed. Jeffrey S. Siker (Louisville: Westminster John Knox Press, 1994).

20. Chris Bull and John Gallagher provide a thorough overview of the evolution of the debate over gay rights in *Perfect Enemies: The Religious Right, the Gay Movement, and the Politics of the 1990s* (New York: Crown Publishers, 1996), or see William Martin, *With God on Our Side* (New York: Broadway Books, 2005).

21. Jack Rogers, *Jesus, the Bible, and Homosexuality* (Louisville: Westminster John Knox Press, 2006).

22. John C. Green, "Ohio: The Bible and the Buckeye State," in *The Values Campaign? The Christian Right and the 2004 Elections*, eds. John C. Green, Mark J. Rozell, and Clyde Wilcox (Washington, D.C.: Georgetown University Press, 2006); Ruth Murray Brown, *For a "Christian America": A History of the Religious Right* (Amherst: Prometheus Books, 2002); William N. Eskridge, Jr., *Equality Practice: Civil Unions and the Future of Gay Rights* (New York: Routledge, 2002); Patrick Fagan, "Family and Religion: The Center Beam and Foundation of a Stable Nation," in *Faith and Public Policy*, ed. James R. Wilburn (Lanham, MD: Lexington Books, 2002); George Chauncey, *Why Marriage? The History Shaping Today's Debate over Gay Equality* (New York: Basic Books, 2004).

23. Chauncey, *Why Marriage?*, 145.

24. Wilcox et al., "Saving Marriage by Banning Marriage," 57.

25. Martin Dupuis, *Same-Sex Marriage, Legal Mobilization, and the Politics of Rights* (New York: Peter Lang, 2002). Initial attempts by gays and lesbians to gain the right to marry were made through the court system. In a series of lawsuits beginning with *Baker v. Nelson* in 1971, state courts upheld the right of state legislatures to restrict marriage to heterosexual couples. Other cases include *Jones v. Hallahan* (1973) in Kentucky, *Singer v. Hara* (1974) in Washington, *Adams v. Howerton* (1980) in Colorado, *DeSanto v. Barnsley* (1984) in Pennsylvania, and *Dean v. District of Columbia* (1992) in Washington, D.C.

26. *Baehr v. Lewin,* 852 P.2d 44 (Ha. Sup. Ct. 1993).

27. Unlike some of the decisions favoring same-sex marriage that followed the

Hawaii decision, the Hawaii courts did not identify a fundamental right to marry, did not approach the question as an issue of privacy rights, and concluded that same-sex marriage is not essential to liberty or justice. Instead, the court focused on the right to choose a marriage partner free from restrictions imposed the state based on sex. An Alaska trial court that ruled in favor of same-sex marriage in 1998 and the Vermont Supreme Court in 1999 did identify a "fundamental right" to marry the person of choice.

28. Kathleen E. Hull, "The Political Limits of the Rights Frame: The Case of Same-Sex Marriage in Hawaii," *Sociological Perspectives* 44, no. 2 (2001): 207–232.

29. Scholars debate the appropriateness of using religious language or arguments based in religious beliefs in the secular political world. Richard John Neuhaus argues that the exclusion of religious values from public life is detrimental to the health of American democracy in *The Naked Public Square: Religion and Democracy in America* (Grand Rapids: Eerdmans Publishing Company, 1984). Stephen L. Carter makes a similar argument in *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (New York: Anchor Books, 1993). For an alternate perspective, see Jane Bennett and Michael J. Shapiro, eds., *The Politics of Moralizing* (New York: Routledge, 2002).

30. Accessed on November 25, 2006, from http://www.religioustolerance.org/haw_coc.htm.

31. Lewis and Edelson, "DOMA and ENDA."

32. Margaret Carlson, "The Marrying Kind," *Time*, September 16, 1996.

33. Eskridge, *Equality Practice*.

34. Soule "Going to the Chapel?"

35. Haider-Markel, "Policy Diffusion as a Geographical Expansion of the Scope of Political Conflict."

36. Dupuis, *Same-Sex Marriage, Legal Mobilization, and the Politics of Rights*, 75.

37. Haider-Markel, "Policy Diffusion as a Geographical Expansion of the Scope of Political Conflict"; Donald P. Haider-Markel, "Lesbian and Gay Politics in the States: Interest Groups, Electoral Politics, and Policy," in *The Politics of Gay Rights*, ed. Craig A. Rimmerman, Kenneth D. Wald, and Clyde Wilcox (Chicago: University of Chicago, 2000), 311; Soule, "Going to the Chapel?"; Scott Barclay and Shauna Fisher, "The States and the Differing Impetus for Divergent Paths on Same-Sex Marriage, 1990–2001," *The Policy Studies Journal* 31, no. 3 (2003): 331–352.

38. Haider-Markel, "Lesbian and Gay Politics in the States," 311.

39. Barclay and Fisher, "The States and the Differing Impetus for Divergent Paths on Same-Sex Marriage, 1990–2001."

40. David Moats, *Civil Wars: A Battle for Gay Marriage* (Orlando, FL: Harcourt, 2004).

41. *Baker v. State of Vermont*, 744 A2d. 864 (1999).

42. Linda Bloom, "Bishop Morrison among Supporters of Vermont Same-Sex Union Law," United Methodist News Service, 2000.

43. Dupuis, *Same-Sex Marriage, Legal Mobilization, and the Politics of Rights*.

44. Kathleen E. Hull, *Same-Sex Marriage: The Cultural Politics of Love and Law* (Cambridge: Cambridge University Press, 2006).

45. Moats, *Civil Wars*.

46. Dupuis, *Same-Sex Marriage, Legal Mobilization, and the Politics of Rights*.

47. Chauncey, *Why Marriage?*

48. Hull, *Same-Sex Marriage*.

49. Jeremy Leaming, "Marriage Proposal: Religious Right, Political Allies Launch Crusade to Alter Constitution," *Church and State* (2003): 196–198.

50. *Lawrence v. Texas*, 539 U.S. 558 (2003)

51. Jerry Falwell, *The Federal Marriage Amendment* [Website], NewsMax.com, 2003, available at http://www.newsmax.com/archives/articles/2003/8/7/143308.shtml 2005.

52. *Goodridge v. Massachusetts Department of Public Health,* 798 N.E.2d 941 (Mass. 2003).

53. The entire text of the president's speech is available at http://www.whitehouse.gov/news/releases/2004/02/20040224–2.html.

54. Leaming, "Marriage Proposal."

55. Matthew Hay Brown, "Senate to Revisit Same-Sex Marriage: Hope for a Ban Unites Many Faiths," *Baltimore Sun*, June 5, 2006.

56. Ibid.

57. Leaming, "Marriage Proposal," 198. The quotation refers to Rev. Jerry Falwell, prominent leader in the Religious Right and founder of Liberty University; Dr. James Dobson, head of Focus on the Family; Rev. Lou Sheldon, president of the Traditional Values Coalition; and Rev. Pat Robertson, founder the Christian Coalition, the American Center for Law and Justice, and Regent University.

58. The text of this letter ("Joint Letter from National Religious Groups") as well as the "Open Letter to Congress from America's Clergy," signed by over 2,200 clergy members, is available on the Clergy for Fairness website at http://www.clergyforfairness.org.

59. Frederick Liu and Stephen Macedo, "The Federal Marriage Amendment and the Strange Evolution of the Conservative Case against Gay Marriage," *PS: Political Science and Politics* 38, no. 2 (2005): 211–15.

60. Coolidge, "Evangelicals and the Same-Sex 'Marriage' Debate."

61. Ibid.

62. Chauncey, *Why Marriage?*; Daniel Pinello, *America's Struggle for Same-Sex Marriage* (Cambridge: Cambridge University Press, 2006).

63. Wilcox et al., "Saving Marriage by Banning Marriage," 57.

64. Ibid.

65. Green, "Ohio: The Bible and the Buckeye State."

66. James M. Penning and Corwin E. Smidt, "Michigan: A War on the Home Front?" in *The Values Campaign? The Christian Right and the 2004 Elections*, ed. John C. Green, Mark J. Rozell, and Clyde Wilcox (Washington, D.C.: Georgetown University Press, 2006).

67. Kirk Johnson, "Gay Marriage Losing Punch as Ballot Issue," *New York Times*, October 14, 2006.

68. New Mexico, New York, Rhode Island, and Washington, D.C. are the only states that do not explicitly prohibit marriage for same-sex couples nor provide marriage benefits through same-sex marriage or civil unions.

69. Pam Belluck, "State Legislators Let Same-Sex Marriage Vote Proceed," *New York Times*, January 3, 2007.

70. Barry L. Tadlock, C. Ann Gordon, and Elizabeth Popp, "Framing the Issue of Same-Sex Marriage: Traditional Values Versus Equal Rights," Paper presented at the American Political Science Association, Chicago 2004; Katherine Stenger, "Defining Right and Wrong: Religious Interest Groups and the Creation and Promotion of Morality-Based Arguments in Policy Debates," Paper presented at the Midwest Political Science Association, Chicago 2005.

71. Robert Entman, "Framing: Toward Clarification of a Fractured Paradigm," *Journal of Communication* 43, no. 4 (1993): 51–58; Thomas E. Nelson, Zoe M. Oxley, and Rosalee A. Clawson, "Toward a Psychology of Framing Effects," *Political Behavior* 19, no. 3 (1997): 221–46.

72. Shanto Iyengar, "Speaking of Values: The Framing of American Politics," *The Forum* 3, no. 3 (2005).

73. For an example of this research see Frank Baumgartner and Bryan D. Jones, *Agendas and Instability in American Politics* (Chicago: University of Chicago Press, 1993) or John W. Kingdon, *Agendas, Alternatives and Public Policies*, 2nd ed. (New York: Harper Collins College Publishers, 1995).

74. Donald R. Kinder and Lynn M. Sanders, *Divided by Color: Racial Politics and Democratic Ideals* (Chicago: University of Chicago Press, 1996).

75. Hull, "The Political Limits of the Rights Frame."

76. See George Lakoff's discussion of the development of these versions of morality in *Moral Politics*.

77. These two newspapers were selected for analysis because they are national in scope and are read by opinion leaders and policy elites. Additionally, back copies of each are easy to access and search through the Lexis-Nexis database. I analyzed 172 articles (74 from the *New York Times* and 98 from the *Washington Post*).

78. Howard Schneider and David A. Vise, "Side Issues Divert House Debate on D.C. Budget," *Washington Post*, November 2, 1995.

79. Adam Nagourney, "Christian Coalition Pushes for Showdown on Same-Sex Marriage," *New York Times*, May 30, 1996.

80. See, for example, Shanto Iyengar, "Speaking of Values"; Karen Callaghan and Frauke Schnell, "Assessing the Democratic Debate: How the News Media Frame Elite Policy Discourse," *Political Communication* 18 (2001): 183–212; or Nayda Terkidsen, Frauke Schnell, and Cristina Ling, "Interest Groups, the Media, and Policy Debate Formation: An Analysis of Message Structure," *Political Communication* 15, no. 1 (1998): 45–62.

81. Deana A. Rohlinger, "Framing the Abortion Debate: Organizational Resources, Media Strategies, and Movement-Countermovement Dynamics," *The Sociological Quarterly* 43, no. 4 (2002): 479–507.

82. I examined press releases issued by a sample of active religious interest groups taken from the list of groups mentioned in the newspaper articles from the *Washington Post* and *New York Times*.

83. Hull also makes the observation that argument frames in the debate in Hawaii lacked "any assertion of the positive moral worth of same-sex marriage" Kathleen E. Hull, "The Political Limits of the Rights Frame," 224. This finding may partially reflect the fact that religious groups advocating this frame were not included in media coverage of the debate.

84. Alison Beck, "Taking the Long View: Reflections on the Road to Marriage Equality,"*Berkeley Journal of Gender, Law and Justice* 20 (2005): 50–55, 54.

85. Ibid.

FURTHER READING

The movement for gay and lesbian civil rights existed long before same-sex marriage moved on to the national political agenda. In the book, *Why Marriage? The History Shaping Today's Debate Over Gay Equality,* historian George Chauncey provides a thorough summary of the events leading up to the emergence of same-sex marriage as a primary goal for the gay rights movement. Conservative religious groups have been the most vocal and powerful opponents of gay rights groups. Journalists John Gallagher and Chris Bull narrate the history of these sparring partners in *Perfect Enemies: The Religious Right, the Gay Movement, and the Politics of the 1990s*. This book is particularly unique because it directly compares the two movements while providing a focused look at a selection of local, state, and federal debates involving gay rights.

The debate over same-sex marriage raises numerous empirical questions addressed in two edited volumes: *The Politics of Gay Rights* by Craig A. Rimmerman, Kenneth D. Wald and Clyde Wilcox and *The Values Campaign? The Christian Right and the 2004 Elections* by John C. Green, Mark J. Rozell and Clyde Wilcox. *The Politics of Gay Rights* examines the history of the gay movement, oppositions to the movement, particular policies related to gay rights, and the various political arenas in which decisions regarding gay rights are made. John Green provides a particularly interesting analysis of the religious basis of opposition to gay rights (chapter 6) and Donald Haider-Markel provides a thorough overview of policymaking at the state level, with attention to the religious groups active in state debates (chapter 13). *The Values Campaign* focuses on the impact of the Christian Right on the 2004 elections. In one particularly interesting chapter, Clyde Wilcox, Linda Merolla and David Beer examine how religious groups used the issue of same-sex marriage to mobilize voters and to reinvigorate the religious right movement (chapter 3).

3

Conscientious Objection to Military Service in the United States

Chad Michael Wayner and James F. Childress

To the ears of a community threatened by danger and seeped in fear, conscientious objection to military service may sound like a clarion call of individuality amid that anxious time when a political community seeks to assert its identity with one voice. When the objector appeals to his conscience, expressing fidelity to the norms and values of another community, the majority may too hastily mistake it for cowardice or treason. Yet, to recognize such a dissonant voice and grant the objector a special exemption from communal responsibilities may risk the dissolution of a shared communal life. To ignore that voice subjects the objector to the will of a fearful and threatened collectivity.

Conscientious objection then is a node at which basic suppositions about the individual and his[1] relation to the state converge. In the United States, a country whose Bill of Rights is surprisingly silent concerning the freedom of conscience, individual liberty has found its protection primarily through related rights of peaceable assembly, free exercise of religion, free speech, and due process. After over three centuries of grappling with conscientious objectors, the U.S. military currently designates a conscientious objector as one who "is conscientiously opposed to participation in war in any form; whose opposition is founded on religious training and belief; and whose position is sincere and deeply held."[2]

In this chapter, we will briefly survey the development and eventual recognition of conscientious objection by the United States and its military. We will then examine and analyze the arguments that support the current policy of exempting those objectors who sincerely object to war in any form. These arguments—more fully developed—may also provide support for exempting those who object to particular wars, often labeled selective conscientious objectors. We will conclude with some brief reflections concerning the lessons that conscientious objection may teach us about the relationship between the church and state in the United States.

HISTORY AND DEVELOPMENT

Since the earliest decades of European colonization in America, there have been conscientious objectors to military service.[3] Depending on the colony, the treatment of these early objectors differed vastly. At least as early as 1658, Quakers in Maryland who conscientiously refused to train with the local militia suffered stiff fines and the seizure of personal goods.[4] On the other hand, in 1673, the assembly of the colony of Rhode Island enacted a statute that allowed exemption from military training for conscientious objectors but also required them to serve the military in noncombatant roles if the colony came under attack—conveying weak, aged, or "impotent persons" from danger, administering "works of mercy" to the distressed, and serving as watchmen.[5]

A defining characteristic of these early conscientious objections was the consistent appeal to the words of Jesus recorded in the gospels of the New Testament. In 1661, George Fox and a handful of fellow Quakers submitted a "declaration from the harmless and innocent people of God" to King Charles II, noting,

> Christ said to Peter, "Put up thy sword in his place" . . . yet after, when [Christ] had bid him put it up, he said, "He that taketh the sword shall perish with the sword" . . . The spirit of Christ, by which we are guided, is not changeable, so as once to command us from a thing as evil and again to move unto it; and we do certainly know, and so testify to the world, that the spirit of Christ, which leads us into all Truth, will never move us to fight and war against any man with outward weapons, neither for the kingdom of Christ, nor for the kingdoms of this world.[6]

On the basis of this testimony and its later development, Quakers in colonial America expected members of the Society of Friends not only to refuse to bear arms, but also to refuse to pay the fine that various colonies levied

on those negligent in their militia duties.[7] Going further, some Quakers refused to pay any monies expressly destined for militia purposes.[8]

The words of Jesus also figured prominently in the Shakers' testimony to the legislature of New Hampshire from 1818, which describes the origins of their conscientious refusal not only to bearing weapons but also to hiring substitutes and paying fines:

> Christ . . . taught both by precept and example, to love our enemies, to render good for evil, and to do to others as we would that others should do to us. He also commanded saying, put up again thy sword into his place, for all they that take the sword shall perish with the sword . . . Christ has said, 'My Kingdom is not of this world.' And we cannot, as we have already shown, intermeddle with the affairs of both.[9]

Clearly it is the teachings of Jesus that sculpt the contours of the Shaker conscience, but perhaps more remarkable is that the Shaker testimony continues on to make a direct appeal for exemption from military service, on the basis of the "natural, inherent, and constitutional rights of conscience."[10] Allowing the Shakers to hire substitutes or pay fines in place of militia service would not sufficiently protect their liberty, as either "would be a virtual acknowledgement that the liberty of conscience is not our natural right; but may be purchased of government at a stated price."[11] In this Shaker testimony, one already begins to see the first indications of a shifting trajectory in the American conversation about conscientious objection. During the earliest years of objection to militia service in colonial America, the central concern of objectors was often to reveal that their *conscience* was the root of their objection, a conscience watered and fertilized by their religious convictions. Later, especially after the Revolutionary War and the ratification of the U.S. Constitution, conscientious objectors increasingly appealed to legislatures for protection, often invoking the language of rights.

In a way, the course of conscientious objection in the United States was decisively set during the congressional debates of the summer of 1789. Amid discussions about the content of what would become the Bill of Rights, James Madison proposed a host of amendments aimed at vesting political power with the people. Madison—among others—sought to address some of the worries that had beset the state legislatures of North Carolina and Rhode Island and made them hesitant to ratify the Constitution. Among the amendments, Madison proposed that "the right of the people to keep and bear arms shall not be infringed; a well armed and well regulated militia being the best security of a free country: *but no person*

religiously scrupulous of bearing arms shall be compelled to render military service in person."[12]

Ultimately, the first two clauses were accepted and approved by Congress, while the last clause—having received approval from the U.S. House of Representatives—was rejected by the U.S. Senate.[13]

Perhaps one of the reasons why the Senate removed the clause shielding the "religiously scrupulous" from militia service was that by 1789 twelve state constitutions already provided protection for the individual's freedom of conscience.[14] As more states were admitted throughout the early nineteenth century, many made express provision for conscientious objectors in their state constitutions, as long as objectors paid a fee for exemption—for example, Illinois (1818), Alabama (1819), Iowa (1846), Kentucky (1850), Indiana (1851), Kansas (1855), and Texas (1859).[15] Yet, despite the wide range of state protections, the qualification that objectors pay a fine or fund a substitute caused many who refused military service to suffer significant penalties.

One such objector was Alexander Rogers, a Rogerene[16] from Waterford, Connecticut, who refused to send his son to drill in the local "train-band." As penalty, Rogers lost his only cow, which he and his family depended upon for milk. In a letter to his fellow countrymen, Rogers invoked a biblical parable, asking "which of you on whom the Lord hath bestowed ten thousand talents should find his fellow servant that owed him fifty pence and take him by the throat, saying, 'Pay what thou owest me,' and on refusal, command his wife and children to be sold and payment to be made?"[17] For Rogers, the commands of Jesus and the state stood in stark contrast, noting that "because I have refused to obey man rather than God, you have taken away the principal part of the support of my family and commanded it to be sold at the post."[18] Like the majority of Quakers, the Rogerenes saw the payment of a fine or the hiring of a substitute to be an act of acquiescence that violated their Christian testimony. Other Christian objectors, like the Mennonites and the Brethren, conscientiously refused to bear arms, but were willing to pay the required fine; consequently, they encountered fewer difficulties in antebellum America.

Yet, it was not only Christian objectors that endured penalties and punishment during this time, for the early part of the nineteenth century also felt the first winds of conscientious objection that did not draw upon religious convictions. In 1828, the American Peace Society was founded upon the unification of the Massachusetts Peace Society and the New York Peace Society. William Lloyd Garrison was a member of this Society until 1838, when he led a group of more radical peace advocates to break from the Society and form the New England Non-Resistance Society. On one occa-

sion, Garrison found himself in court to pay a fine for failing to partake in the "pomp and circumstance" of the local militia muster; he noted that "I am not professedly a Quaker, but I heartily, entirely and practically embrace the doctrine of non-resistance, and am conscientiously opposed to all military exhibitions . . . I will never obey any order to bear arms, but rather cheerfully suffer imprisonment and persecution."[19] Henry David Thoreau also advocated for the protection of individual liberty, as well as the practice of conscientious objection. In 1846, Thoreau found himself in jail for a single night after refusing to pay six years of poll taxes, since he was scrupulous to guard his acts of allegiance to the state, a state that was at that time embroiled in a war with Mexico, and permitted slavery. In his essay on civil disobedience—an essay which one historian has called the "most uniquely radical document in American history [after the Constitution]"[20]—Thoreau offered the grounds for his selective tax resistance[21]:

> After all, the practical reason why, when the power is once in the hands of the people, a majority are permitted . . . to rule, is not because they are most likely to be in the right, nor because this seems fairest to the minority, but because they are physically the strongest. But a government in which the majority rule in all cases cannot be based on justice, even as far as men understand it. Can there not be a government in which majorities do not virtually decide right and wrong, but conscience? . . . Must the citizen ever for a moment, or in the least degree, resign his conscience to the legislator? Why has every man a conscience then? I think that we should be men first, and subjects afterward. It is not desirable to cultivate a respect for the law, so much as for the right.[22]

Thoreau refused to pay the tax because he wanted the individual to be able to dictate the times and places where allegiance would be demanded, creating space to occasionally "stand aloof from [the state] effectually."[23] For Thoreau, the authority of government emerged only from the express sanction and consent of the governed; the "really free and enlightened State" is that which recognizes the individual as a higher and independent power.[24]

For many members of historically pacifist churches, the Civil War raised a poignant conflict, as many strongly supported the abolition of slavery alongside their tradition of nonviolence. Initially, the conscription acts of the North and South offered conscientious objectors no avenues for exemption. According to the Enrollment Act of March 3, 1863, conscripts from the northern states were permitted to pay three hundred dollars to avoid military service. However, on February 24, 1864, legislators revised the conscription act such that "members of religious denominations, who shall by oath or affirmation declare that they are conscientiously opposed to the bearing of arms . . . shall . . . be considered non-combatants, and shall be

assigned by the Secretary of War to duty in the hospitals, or to the care of freedmen, or shall pay the sum of three hundred dollars . . . to be applied to the benefit of the sick and wounded soldiers."[25] Confederate objectors endured greater difficulties than their Union counterparts. As many objectors openly opposed slavery, Southerners found the loyalty of objectors—especially Quakers, Mennonites, and Dunkers—to be suspect. The first conscription act of the Confederacy was passed in April 1862, and it provided exemption for a wide range of occupations—for example, newspapermen, lawyers, school teachers, druggists, ferrymen, tanners, shoemakers, and so on—but not expressly for those who conscientiously opposed military service.[26] Not until October 1862 did the Confederate states pass a law enabling conscientious objectors to be exempt, though it required them to pay five hundred dollars (or hire a substitute) for this act of legislative grace—this amount was more than a year's wages for those objectors who tilled small farms.[27] During the last weeks of the war, the Confederacy passed legislation that banned exemptions from military service in order to alleviate their serious shortage of soldiers.

During the fifty years separating the American Civil War from the First World War, no military conflicts demanded conscription, and few studies exist that document the activity of conscientious objectors during these intervening years. When, upon its entry into World War I, the United States issued its Selective Draft Act of 1917, it did not permit commutation fees or the hiring of substitutes. Draft boards were permitted to designate members of a "well-recognized religious sect or organization" for noncombatant roles that were then yet to be determined by President Wilson.[28] However, in practice, draft boards broadened this criterion, since the late-nineteenth and early-twentieth centuries had brought waves of new immigrants to the United States and seen the emergence of several new indigenous religious sects. Consequently, objectors included not only the more familiar Quakers and Mennonites, but also Molokans, Dukhobors, Adventists, Jehovah's Witnesses, Russellites, Christadelphians, and various Brethren groups.[29]

Support for the war in some places intoned a shrill pitch, so much so that private citizens voluntarily joined the Department of Justice and local police in ferreting out draft evaders. On one occasion, men arriving by ferry in New York City were forced to display their draft cards.[30] Yet, this passionate patriotism was not universal, and the conscription act cast a spotlight upon the increasing number of conscientious objectors who did not belong to an historically pacifist religious community. In fact, the Adjutant General of the Army issued a directive in December 1917 addressing these "nonreligious" objectors, advocating that "until further instructions on the subject are issued 'personal scruples against war' should be considered as

constituting 'conscientious objection' and such persons should be treated in the same manner as other 'conscientious objectors' . . . "[31] In practice, however, the Adjutant General's directive had little influence; the primary responsibility for parsing the acceptable objectors from the unacceptable fell on the shoulders of three men on President Wilson's Board of Inquiry: Major Walter Kellogg, U.S. Circuit Court judge Julian Mack, and Harlan Stone of Columbia Law School.[32] Challenges and appeals to the Board's decisions worked their way through the court system during late 1917 and early 1918, marking an important transition in the handling of conscientious objectors. Prior to the First World War, the policy toward and treatment of conscientious objectors was determined by the executive branch of government and military leaders. Following the conscription for the First World War, the court system was increasingly called upon to adjudicate the perceived unfairness of conscientious objector provisions.

Army records note that nearly 65,000 men sought conscientious objector status between May 1917 and November 1918, only a small fraction of the nearly ten million draftees. Nearly 57,000 of these claims were judged to be sincere and valid. Of these objectors, the army inducted nearly 21,000, with 3,989 men maintaining their objections upon arrival in military camp.[33] Ultimately, about five hundred men refused the alternative noncombatant service offered by President Wilson and were subsequently subjected to court martial. Seventeen of these "absolutists" were sentenced to death, and 142 men were given life imprisonment. Though none of these sentences were carried to fruition, the last conscientious objector from the First World War was not pardoned and released until 1933.[34]

Given the widespread support for the war, one historian has noted that "conscientious objection to World War I received almost no support from major churches and synagogues and considerable antagonism from the great bulk of traditional religious people."[35] Objectors who refused the alternative noncombatant service (or were not deemed eligible) faced substantial hardships. Jehovah's Witnesses were routinely jailed, as their beliefs required them to fight in an apocalyptic war at Armageddon (prophesied in the last book of the Bible), but demanded that they not fight in any other wars. Many conscientious objectors were incarcerated alongside traitors, at Leavenworth and Alcatraz. In military camp and in jail, many objectors suffered cruelty and torture, ranging from physical beatings to being strung up by their fingers with nothing but their extended toes to support their bodyweight.[36] Others undertook a hunger strike to protest their treatment and were forcibly fed. As many as seventeen objectors died from pneumonia and other ailments that resulted from the prison conditions.[37] Lillian Schlissel attributes some of the decline in support for conscientious objectors during

this period to the changing public image of the objector. Prior to the First World War, the ready image of the conscientious objector in the public mind might be a Quaker colonial like William Penn. During and after the war, given the influx of immigrants and the more vocal and prominent "political" pacifists (like Socialist Eugene Debs), the public increasingly saw the conscientious objector as a political radical, communist, anarchist, atheist, or "yellowback."[38]

These imprisoned conscientious objectors did not go wholly unnoticed by Congress. In 1919, amid increasingly public concerns about the treatment of conscientious objectors, Congress opened hearings that exposed a wide variety of perspectives on conscientious objection, perhaps most memorably, those unsympathetic. In one speech, a Congressman railed against those objectors who were "German sympathizers" and "craven cowards."[39] Yet the experiences of these conscientious objectors had effects that extended far beyond Washington and into years to come. Roger Baldwin, an objector who was director of the American Union against Militarism, received a one-year sentence to federal prison on October 30, 1918, a mere twelve days before the armistice with Germany. In Baldwin's statement to the court on his sentencing day, he remarked that "now comes the government to take me from that service and to demand of me a service I cannot in conscience undertake. I refuse it simply for my own peace of mind and spirit, for the satisfaction of that inner demand more compelling than any consideration of punishment or the sacrifice of friendships and reputation."[40] After his release, Baldwin, Helen Keller, Crystal Eastman, and others joined together in 1920 to form the American Civil Liberties Union, which in later years provided legal counsel for conscientious objectors. In addition, reports of these abuses of conscientious objectors catalyzed the formation of numerous peace organizations, religious and secular. Joining the already existent Fellowship of Reconciliation[41] (1914) were the American Friends Service Committee (1917) and the War Resisters League (1923). The First World War represented the first time that the members of historic peace churches were the minority among pacifists, and slowly and subtly the conversation over conscientious objection began to incorporate a wider array of voices from non-pacifist religious communities and secular organizations.[42]

An additional shift was also taking place. As the voices of conscientious objection appealed to more common understandings of liberty instead of the words of Jesus in the New Testament, they increasingly sought judicial recognition for their asserted rights. In 1930, the Supreme Court heard the case of *United States v. Macintosh*,[43] in which Douglas Macintosh—Baptist pastor and professor of theology at Yale University—was refused American

citizenship because he stated on his application that he would not bear arms in defense of the United States unless he believed that the war was morally justified. The justices sustained the denial of citizenship to Macintosh by a vote of five to four, mainly because they construed nationalization as a privilege subject to restrictions laid down by Congress. Justice Sutherland's majority opinion notes that "the privilege of the native-born conscientious objector to avoid bearing arms comes not from the Constitution, but from the acts of Congress." While concurring with this principle, Chief Justice Hughes, in his dissent, argued that acknowledging Congressional authority does not preclude one from also granting space for the authority of conscience, writing that "there is abundant room for enforcing the requisite authority of law . . . and for maintaining . . . the supremacy of law . . . without demanding that either citizens or applicants for citizenship shall assume by oath an obligation to regard allegiance to God as subordinate to allegiance to civil power." This exchange between Sutherland and Hughes fixed the crucial question for the court cases yet to come—even if the authority to extend the privilege of conscientious objection resides in Congress, ought that authority require one's full and unqualified allegiance?[44]

The year 1940 saw the passage of the first prewar national conscription law. The rapid German conquest of Western Europe gave little time for deliberation, but given the relatively fresh memory of the treatment of conscientious objectors in the First World War and the prevalence of active peace societies, the Selective Training and Service Act of 1940 offered significant concessions for members of peace churches and also other pacifists. Perhaps taking inspiration from the early Rhode Island policy on conscientious objectors, the Act exempted those "who, by reason of religious training and belief, [are] conscientiously opposed to participation in war in any form."[45] Even further, those who objected to any participation in noncombatant service under the military's auspices could be assigned "to work of national importance under civilian direction." Not only had Congress broadened the scope of exemption—going beyond members of well-established pacifist religious sects to include all objectors whose conscience was formed by religious training and belief—but it had offered "absolutists" an alternative, nonmilitary service.

In the Second World War, up to fifty thousand men petitioned for conscientious objector status, with some willing to perform noncombatant service, others alternative civilian service, and the remainder—absolutely opposed to any form of alternate service—left to serve time in prison.[46] Although the number of conscientious objectors was less than one-tenth of one percent of the ten million soldiers drafted for the war, Cynthia Eller notes that this represented an eight or ninefold increase in the number of

conscientious objectors from the First World War.[47] Most of those willing to serve in noncombatant military roles entered the medical corps. Objectors who labored in alternative civilian service undertook projects in soil erosion control, forestry, and agriculture, doing so without pay, and under the control of the National Service Board for Religious Objectors.[48] Jehovah's Witnesses made up the majority of the nearly six thousand men subjected to incarceration as conscientious objectors, largely due to their "absolutist" position, which refused to accept any form of alternative civilian service.[49] At the end of 1946, well over a year after Japan's surrender, more than three hundred objectors remained incarcerated.[50]

Throughout the war, many objectors pled their case before the courts, often resulting in vastly different outcomes. In a 1943 case—*United States v. Downer*[51]—the Second Circuit Court of Appeals concluded that a deep-rooted conscientious objection based in "a general humanitarian concept which is essentially religious in character" is sufficient to receive conscientious objector status. It initially appeared that the court had established a sweeping interpretive move, expansively broadening the requirement that a conscientious objector derive his objection from his religious training and belief, perhaps going so far as to render this requirement superfluous. While this court broadened the interpretation of religion, it retained the requirement of pacifist convictions for exemption from military service on grounds of conscience. In the same year, this court ruled in *United States v. Kauten*[52] that conscientious objectors who refused to serve in a particular war would not be granted exemption. Judge Augustus Hand argued that these selective objectors were often political objectors, noting that "there is a distinction between a course of reasoning resulting in a conviction that a particular war is inexpedient or disastrous and a conscientious objection to participation in any war under any circumstances . . . The former is usually a political objection, while the latter, we think, may justly be regarded as a response of the individual to an inward mentor, call it conscience or God, that is for many persons at the present time the equivalent of what has always been thought a religious impulse."[53] In the midst of a war in the Pacific and Europe, the court was willing to interpret the "religious training and belief" clause in the broadest sense, but was stringent in its interpretation of the clause that required opposition to "participation in war in any form." Judge Hand's rationale focused on the contrast between those who pursue exemption for reasons of expediency with those who pursue it for reasons of conscience. For this reason, Hand's distinction was important for directing the court's attention in later decisions to the role of the objector's motive in a valid objection.

In 1946, in *United States v. Berman*, the Ninth Circuit Court took up

the matter of religious training and belief again, but in direct opposition to the ruling in *Downer*, this circuit court concluded that "religious training and belief" must be interpreted rigidly. Berman was a humanitarian and a socialist, whose objection, while universal (that is, opposed to participation in any war), did not arise from "religious training and belief," and thus the Court found him ineligible for exemption. To remedy this perceived conundrum between *Downer* and *Berman*, Congress revised its selective service policy in 1948, siding with the Ninth Court's reading, by adding the explicit qualification that one's conscience and belief would not qualify for exemption if either included "essentially political, sociological, or philosophical views or a merely personal moral code."[54] In addition, Congress specified that a conscientious objection grounded in one's religious training and belief must include "an individual's belief in a relation to a Supreme Being."[55]

Within the courts, this issue was readdressed in 1965, with the Supreme Court's decision in *United States v. Seeger*. Though Daniel Seeger had applied for conscientious objector status and did not *disavow* a belief in a relation to a Supreme Being, the draft board did not grant his exemption because he did not expressly affirm his belief in a relation to such a Being. In *Seeger*, the Court ruled that it was not the task of a draft board or the courts to determine whether Seeger's given belief about God was true, but merely whether it was truly held. In Seeger's case, the Court found that he truly believed in some relation to some being. In order to clearly establish the judicial precedent for future decisions, the Court proposed a test for evaluating sincerity, namely "a sincere and meaningful belief [is that] which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption . . . " In so doing, the Court avoided facing the constitutional question as to whether this statute violated the Establishment Clause of the First Amendment, but that question would not go away.

Finally, in 1970, the Supreme Court dealt the final blow to the Supreme Being requirement of the Selective Service Act of 1948. In *Welsh v. United States*, the Court exempted from military service even those objectors who held atheistic beliefs, so long as their conscientious objection rested on ethical and moral beliefs. In *Welsh*, Justice Harlan, in a concurring opinion, contended that while Seeger was "a remarkable feat of judicial surgery" because it removed the theistic requirement of the statute, *Welsh* performed "a lobotomy." The *Welsh* decision salvaged the statute's constitutionality, but in so doing, "completely transformed the statute by reading out of it any distinction between religiously acquired beliefs and those deriving from 'essentially political, sociological, or philosophical views or a merely per-

sonal moral code.'" Thus, the courts removed one of the central statutory limits on conscientious objection at the same time that the United States was embroiled in an increasingly unpopular war in Vietnam.

However, the Court did not remove all of the limits. In 1971, the Supreme Court revisited the issue of selective objectors in *Gillette v. United States*. By 1971, the United States had been conscripting soldiers for more than half a decade. Local draft boards were inundated with applications for conscientious objector status. 1972 would see over one hundred and thirty objectors exempted from military service for every one hundred soldiers enlisted.[56] By the time the draft ended in 1973, more conscripts were classified as conscientious objectors than were inducted into the army.[57] In *Gillette*, the Court held that only those conscientious objectors who refused participation in any war in any form were exempt from service. Since it would be difficult to set fair standards for draft broads to use in assessing selective objectors, the Court held that Congress had valid, neutral reasons to exempt only absolute or universal objectors. In 1973, amid fervent public protests and heightened criticism, the United States adopted a fully volunteer armed force, which has continued to the present.

Since 1973, conscientious objection to military service now only arises among members of the armed services whose objection coalesced and emerged after enlistment. Between 1985 and 1990, between 90 and 240 enlisted personnel per year applied for conscientious objector status out of a total enlisted force of over two million.[58] In 1990 and 1991, in preparation for a potential military confrontation in the Persian Gulf, between fifteen hundred and two thousand active-duty members and reservists applied for conscientious objector status.[59] Some cities, including San Francisco, Berkeley, and Oakland, declared themselves to be sanctuaries for those soldiers who conscientiously opposed service in the Persian Gulf.[60] Members of Congress discussed the possibility of reinstituting the draft, but concluded that it was not necessary. The National Interreligious Service Board for Conscientious Objectors (NISBCO) estimated that if the draft had been instituted in the early 1990s, up to 20 percent, or 320,000 conscripts would have petitioned for conscientious objector status.[61]

Currently, the Department of Defense Directive 1300.6 is the operative conscientious objector policy for uniformed military personnel. The Directive defines conscientious objection as "a firm, fixed and sincere objection to participation in war in any form or the bearing of arms, by reason of religious training and belief," and it distinguishes two classes of objectors: those who object to any participation in war, and those who object to combatant participation in war.[62] The procedure for granting objector status and discharge requires that a soldier undergo a twofold assessment, by a

chaplain and by a psychiatrist. Some commentators worry that this procedure may build in assumptions about a uniformed objector's mental stability that are likely unwarranted.[63] Further, the procedure may cause the evaluation of a soldier's sincerity to rely too heavily on the "orthodoxy" of the objector's claims, requiring that the soldier's beliefs cohere with an established pacifist tradition. An additional concern is that the current policy could be more explicit about providing enlisted personnel with proper and fair treatment in those instances in which the petition for conscientious objector status is denied.[64]

Over the centuries, conscientious objection in early America and the United States has substantially transformed—many more now object, and they do so for a wider variety of reasons. What was originally the province of a handful of Quaker and Mennonite immigrants has grown to include Christians from a wide variety of traditions and communities, and Muslims, humanists, and secularists as well. Legal protections and exemptions for conscientious objectors, though still conceived by many as an act of legislative grace, are more firmly planted in our legal and military codes than ever before. As others have noted, we face a "new conscientious objection" in the United States alongside the "old" forms, as we now protect not only the conscience formed by a religious community, but also that formed by secular beliefs and practices.[65]

CONSCIENTIOUS OBJECTION—PRESENT AND FUTURE

Much of the recent legal and ethical analysis surrounding conscientious objection emerged during a time when the United States was actively drafting its citizens for an increasingly unpopular war.[66] Since the dissolution of the draft, conscientious objection to military service has not received the attention of seasons past. Yet some important ethical and legal issues remain, issues that—were they are taken up by Congress and the courts—would further reveal the contours of the relationship between church and state in the United States. One of the most important is whether there are justifiable reasons for sharply distinguishing between absolute or universal conscientious objectors (UCOs), that is, pacifists who object to participation in any and all wars, from those objectors who are conscientiously opposed to particular wars (selective conscientious objectors or SCOs). If history is instructive, it is likely that selective conscientious objection will again receive the public scrutiny that it did in the United States during the Vietnam War era. Sound and weighty arguments can be made for treating SCOs on par with UCOs, but there are important counterarguments as well. In what follows, we will present three major arguments against exemp-

tion for SCOs: the first maintains that the selective conscientious objections are essentially political and do not warrant special protection; a second argument holds that exemptions for SCOs may lead to selective disobedience to the law; finally, a third argument asserts that exempting SCOs will damage the morale and effectiveness of the armed forces. We will assess the adequacy of each argument, and conclude with some reflections on the use of sincerity as a test for conscientious objector exemption from military service.[67]

The Nature of the Selective Conscientious Objector's Claims

A major argument against exemption for SCOs contends that their objections to a particular war are necessarily political rather than a matter of ethical or religious conscience and thus do not merit exemption from military service. As we have already seen, versions of this argument have appeared now and again, particularly in debates about how to characterize objections to military service during the Vietnam War. For instance, a sharp formulation appears in the 1967 Report of the National Advisory Commission on Selective Service, entitled *In Pursuit of Equity: Who Serves When Not All Serve?*:

> [s]o-called selective pacifism is essentially a political question of support or nonsupport of a war and cannot be judged in terms of special moral imperatives. Political opposition to a particular war should be expressed through recognized democratic processes and should claim no special right of exemption from democratic decisions.[68]

If this argument holds, it will obviously provide an important premise for other arguments that oppose exemption for SCOs. Hence, a critical question is whether it is a sound argument. It is important to note that in seeking to determine whether an act of selective conscientious objection is "essentially political," rather than moral, the distinction of interest is between moral and non-moral reasons, not between moral and immoral reasons. The relevant distinction concerns the classification of reasons in terms of their domains, not whether some reasons are, evaluatively speaking, moral or immoral. It is descriptive rather than normative. A reason could be descriptively classified as moral, but, at the same time, be, evaluatively, immoral. Similarly, it could be non-moral but not immoral. For instance, it could be an economic reason but not, for that reason alone, immoral.

A person drafted into military service in a time of war might offer several kinds of reasons for claiming that his participation in a particular war would

violate his conscience and that he should be exempted from the requirement to serve in the military:

1. All wars are wrong.
2. Our aims in this war are unjust.
3. The evil effects of this particular war will probably outweigh its good effects.
4. This particular war is wrong because we are directly killing noncombatants.

We are familiar with the first reason as a pacifist reason, offered by the absolute or universal conscientious objector who disavows participation in any war. That reason has a home in religious and secular pacifist traditions, but it may take a variety of forms.[69]

In contrast to the pacifist approach represented in (1), the other three reasons do appear, at first analysis, to operate on a different plane. Rather than addressing all wars, they focus on a particular war, whether in terms of its aims, its probable balance of bad effects over good effects, or its conduct. These claims are not exhaustive possibilities for the SCO, but they do represent major elements in the broad just-war tradition, which has been the dominant moral framework for deliberation about war in Roman Catholic, mainline Protestant, and many secular organizations.[70] The individual SCO is making a claim about his conscience, parallel to the pacifist objector, and he too may draw on a rich historical tradition, again just as the pacifist, in articulating his own conscience. The question that arises then is whether reasons are essentially political rather than moral.

In this discussion, we will stress that the SCO's qualified judgment about war, the complexity of his reasons, and his appeal to the facts of the situation do not necessarily make his position less "moral" than the UCO's. All four judgments focus on a governmental policy of war. This is their subject matter. Hence, the subject matter alone will not warrant a distinction between a political judgment and a moral judgment. UCOs and SCOs alike render a negative judgment on a governmental policy, at least to the extent of indicating that they cannot, in conscience, participate in the implementation of that policy. They may or may not go on to argue that no one should participate in that implementation. Thus, we cannot appeal to the subject matter in order to distinguish moral reasons from political reasons.

Some who charge that selective conscientious objection is "essentially political" concede that both UCOs and SCOs make a judgment about government policy—and hence are "political" in that limited sense—but they further contend that SCOs take an "essentially political" position because they are offering a judgment about their own government's policy.[71] While the UCO condemns all governments for their policies of war, the SCO

by contrast specifically condemns the particular policy of war of his own government. However, it is logically possible for the SCO to hold that both belligerents are waging an unjust war (e.g., when two powers are seeking to expand their territorial influence). Nevertheless, it is accurate to say that in many cases (perhaps most) the SCO will hold that his own government's policies are unjust—his own government's war aims are unjust, his own government's warfare is likely to produce a balance of bad over good outcomes, and his own government's military is conducting the war unjustly. Then the question is whether directing a criticism at one's own government's policy of war necessarily makes that criticism "essentially political" rather than moral.

The distinction between *subject matter*—whether war as a social practice or one's own government's particular war—and the *nature of the judgments* made about that subject matter is a crucial one.[72] An agent may make moral, political, economic, aesthetic or other kinds of judgments about governmental policy. Take a non-military example. Suppose we criticize a member of Congress for opposing a bill to protect the environment. We could criticize him or her for yielding to the demands of a particular constituency, perhaps one that could help his or her reelection, or we could criticize it as unethical because it fails to protect the environment, which has intrinsic ethical value, or because it fails to protect human beings whose long-term health could be threatened by environmental degradation. These judgments share a subject matter—a political act—but they are different and have different grounds. One is clearly more political, while the other, in either of its two forms, is clearly more ethical. Again, this is a matter of classification of kinds of reasons, not an evaluation of their merits.

But skeptics of the possibility of exempting the SCO from military service may still wonder whether this distinction between subject matter and the nature of the moral judgment captures what is crucially important. Even if both the UCO and the SCO make a moral judgment about a governmental policy, the skeptic may stress the differences in kinds of moral judgment. For instance, the skeptic may hold that consideration of the consequences of a war, as in the third position above ("the evil effects of this war will probably outweigh its good effects"), is political. But the distinction between consequentialist reasoning (appealing to the probable consequences of courses of actions) and deontological reasoning (appealing to some standards of right and wrong independent of acts' probable effects) does not map onto the distinction between political reasons and moral reasons. Not only will it not enable us to distinguish political judgments from moral judgments, it will not enable us to distinguish SCOs from UCOs. Instead, these two types of reasoning appear in political as well as in a variety of

other activities. Even if the government's reasoning about undertaking and conducting a particular war is largely consequentialist in nature, this does not mean that its reasoning is political rather than moral—again, it is a matter of the kinds of reasons, not their merit.

The mode of moral reasoning then—that is, consequentialist or deontological—does not suffice to distinguish SCOs from UCOs. Although many pacifist positions (for instance, those held by many Mennonite, Brethren, and Quakers) are deontological in nature—that is, they hold that pacifism represents the right course of action, without regard for its consequences—pacifist positions may also be grounded in consequentialist judgments, for instance, that all wars produce a net balance of bad over good effects. Similarly, SCOs may employ deontological or consequentialist reasoning or both. Insofar as SCOs draw on the just-war tradition, they are drawing on a tradition that itself embodies both kinds of reasoning. Consider, for example, the criteria of the just-war tradition identified by the U.S. Catholic Bishops in *The Challenge of Peace: God's Promise and Our Response*. The bishops offer several criteria for determining the rightness or justice of waging war (known as *jus ad bellum* criteria): (a) just cause; (b) competent authority; (c) comparative justice; (d) right intention; (e) last resort; (f) probability of success; (g) proportionality. They then identify two criteria for assessing the justice or rightness of the conduct of war (known as *jus in bello* criteria): discrimination and proportionality. Discrimination focuses on distinguishing non-combatants from combatants and refraining from directly attacking non-combatants, while proportionality focuses on the balance of probable good and bad effects in particular actions in war (in contrast to the war as a whole, which is a concern for *jus ad bellum*).

Some critics of a possible legal exemption from military service for SCOs would concede that SCOs may employ deontological reasoning, either alone or in combination with consequentialist reasoning, as in reasons 2–4 above. Nevertheless, they may further argue, SCOs do not experience that "can't help" that marks sincere UCOs. According to John Rohr, selective conscientious objection is not a "'can't help,' but is based on arguments that are constitutional, political and historical—as well as moral or religious."[73]

However, it is not so clear that SCOs do not or cannot experience a "can't help" situation. An agent who appeals to his conscience as a motive for his conduct claims that if he acted against certain moral convictions, he would experience a severe personal sanction: guilt and shame and a loss of integrity, wholeness, and unity in the self.[74] But this experience of conscience, this "can't help," may be the outcome of processes of moral deliberation. Although a person's appeal to his conscience usually involves an appeal to moral standards, conscience is not itself the standard. It is the mode

of consciousness resulting from his application of standards to his conduct. As James Childress has written, the appeal to conscience

> is not limited to intuitionists who hear voices of conscience or to fideists who hear the voice of God. It may result from a complex application of several principles to a set of circumstances. The possibility that the war itself may change, or that the agent's interpretation of the facts may change, in no way alters the moral or conscientious nature of his opposition to the war.[75]

Hence, a person's "can't help" in the face of some societal or governmental demand, such as conscription for military service, may emerge from a variety of ethical sources and forces.

Fairness and Respect for Persons

Much hinges on the previous discussion of the nature of the reasons offered by SCOs and UCOs. If one assumes that the UCO's reasons are morally based and the SCO's reasons are politically based, then the ethical principles of fairness and respect for persons would offer very limited support for the SCO's exemption from military service. However, it does not appear possible to slot the SCO's reasons into a non-moral chamber labeled "political." The SCO's reasons belong to the moral domain, just as the UCO's reasons do. Hence, the principles of fairness and respect for persons may support exemption for SCOs just as they do for UCOs.

First, fairness or formal justice at a minimum requires treating relevantly similar cases in a similar way. One could argue that the UCO and the SCO are relevantly similar. At least their reasons are relevantly similar: both are conscientiously opposed to participation in a war for moral and, often, religious reasons. If Congress exempts the UCO from military service, it appears to be unfair not to exempt the SCO because of the content (such as just-war theory) or the scope (such as viewing killing in some wars as justified) of his moral principles.[76] As we have seen, it is hard to view either the content or the scope of his principles as necessitating a label of "political" rather than "moral." An SCO should be entitled to treatment similar to that of the UCO. A policy that exempts the UCO while forcing the SCO to serve is on its face unfair. It puts the SCO at an unfair disadvantage.

Another version of the fairness principle appeared in the argument offered by some members of the National Advisory Commission on Selective Service who contended that a policy restricting exemption to UCOs discriminates against citizens in the mainstream of Jewish, Christian, and hu-

manist thought and practice in the West. It does so, according to this argument, by offering legal recognition to a "minority" or "sectarian" position (pacifism) while excluding the "consensus" position (just-war theory).[77] This argument was rejected by the majority of the commission.

A second argument focuses on equal respect and contends that denying the SCO exemption from military service while granting exemption to the UCO denies the SCO equal respect. If, for the purposes of argument, the principle of respect for persons requires respect for conscientious objection, exemption from military service cannot be justly granted to UCOs and denied to SCOs simply because SCOs appeal to principles of just war rather than pacifism. Nothing in the difference in content or scope of the two sets of principles and moral reasoning provides a warrant for denying exemption to the SCO. The denial is disrespectful to SCOs.

These arguments based on fairness (or formal justice) and on respect for persons offer strong *prima facie* support for the exemption of SCOs from military service, one parallel to the exemption that UCOs enjoy. However, whether such a policy is ultimately viewed as acceptable will depend in part on the prediction and assessment of its consequences, as compared with the narrow exemption granted to UCOs. Opponents of a broader exemption stress that some of the worst consequences can be expected to flow from the difficulties of fairly administering an exemption for SCOs. Hence, the principle of fairness may have more than one implication in the debate about the legal status of selective conscientious objection—it may have both supportive and critical implications.

Consequentialist Arguments

In *Gillette v. United States*, the Supreme Court held that Congress had valid, neutral, and secular reasons to exempt the UCO but not the SCO from military service. The government had offered lines of argument based on (1) the nature of SCO claims (that is, that selective conscientious objection is basically political) and (2) fairness (that the administration of selective conscientious objection would be erratic, uneven, and even unfair). The Court rejected the first line of argument, at least in its narrow sense, emphasizing that selective conscientious objection may be "rooted in religion and conscience," whatever other judgments are involved. Nevertheless, the Court held that the nature of selective conscientious objection, in conjunction with the fairness argument, could support the statutory restriction to UCO. Bad consequences might arise if SCOs were exempted from military service because such an exemption could not be fairly administered in

view of the "uncertain dimensions" and "indeterminate scope" of the claims of SCOs. As the Court wrote:

> But real dangers . . . might arise if an exemption were made available that in its nature could not be administered fairly and uniformly over the run of relevant fact situations. Should it be thought that those who go to war are chosen unfairly or capriciously, then a mood of bitterness and cynicism might corrode the spirit of public service and the values of willing performance of a citizen's duties that are the very heart of free government. . . . In light of these valid concerns, we conclude that it is supportable for Congress to have decided that the objector to all war—to all killing in war—has a claim that is distinct enough and intense enough to justify special status, while the objector to a particular war does not.[78]

The Court undertook this analysis of policies in order to determine whether Congress had a neutral, secular justification for drawing the lines as it did. If it found that such a justification existed, the Court could then hold that Congress's refusal to exempt SCOs from military service did not violate either the Establishment Clause or the Free Exercise Clause of the First Amendment. However, it is important to note, the Court's decision did not imply that Congress "would have acted irrationally or unreasonably had it decided to exempt those who object to particular wars."[79] Furthermore, the Court's concern about fairly administering conscientious objector exemptions may also be applicable, to some extent, to pacifists. The administration of a provision for UCOs might favor the "more articulate, better educated, or better counseled," and might favor claims more closely connected to conventional religiosity.

Those who support exempting SCOs from military service attempt to address the Court's concerns about the probable consequences of such a policy. Most often they seek to show that the consequences of such a policy are either not as probable or not as negative as opponents claim. This is their main argumentative strategy, even though occasionally they also adduce the probable good effects of such a policy—for instance, in fostering significant moral discourse about foreign policy and warfare as well as embodying in policy relevant ethical principles such as respect for conscience—and contend that those probable good effects will outweigh the probable bad effects, if any.

In the absence of relevant societal experience or experiments, the consequentialist arguments against SCO exemption from military service are, to a great extent, inevitably speculative. They point to possibilities (what could happen) rather than to probabilities (what probably would happen) as a result of the exemption of SCOs from military service. Ideally, of course, public policy regarding SCOs, and other matters, would rest on sound pre-

dictions and evaluations of probable positive and negative consequences. And yet the language of possibility dominates the consequentialist arguments against SCO exemption from military service. One important example is illustrative. The report of the majority of the National Advisory Commission on Selective Service, *In Pursuit of Equity*, which was used by the Supreme Court in *Gillette v. United States*, argued that "legal recognition of selective pacifism could open the doors to a general theory of selective disobedience to law, which could quickly tear down the fabric of government" and "could be disruptive to the morale and effectiveness of the Armed Forces."[80] An evaluation of any proposed policy of exemption for SCOs from military service needs to analyze and assess concerns about these possible consequences, marked as what "could" happen, in light of the best available evidence.

Selective Disobedience to the Law

A first question is whether the argument that the legal exemption of SCOs could or would lead to selective disobedience to the law is well founded. This argument was made in the context of SCO claims for exemption from military service in the heat of the war in Vietnam. It appears to be a version of the thin-edge-of-the wedge or the slippery-slope argument, here stated as an "open door" argument: if we grant X, then Y will follow. If the government grants SCOs legal exemption from military service, "a general theory of selective disobedience to law" could enter the now opened door.

It is possible to respond to this argument in a couple of ways. On the one hand, SCOs were claiming the same right of exemption as UCOs. If the wedge or slippery slope or open door argument holds for SCOs, it would appear also to hold for UCOs. Whether the request for an exemption from conscription for military service is based on UCO claims or SCO claims has no obvious bearing on "selective disobedience to law." After all, both the UCO and the SCO seek exemption from a particular law. It is not clear why their grounds—pacifism or just-war criteria—should or could make any difference. Nor is it clear why granting the SCO an exemption would create this threat of "selective disobedience to law" when the exemption for UCO apparently does not. After all, to take opposition to the payment of a particular tax—an example used by the National Advisory Commission—many UCOs also oppose the payment of taxes that support the military system, and they, as well as some objectors to the war in Vietnam, refused to pay part of their income taxes and the telephone tax surcharge.

On the other hand, the wedge or slippery slope argument may not hold

for either UCO or SCO. The legal exemption of conscientious objectors, whether selective or universal, from military service can be sharply distinguished from "selective disobedience to law." In the one case, the government accepts certain reasons for exemption from legal duties; in the other, individuals or groups disobey established legal requirements. It is unclear why legal recognition of certain reasons for exemption from military service would contribute to selective disobedience of law. In a society torn by disagreements over a particular war, as in the case of Vietnam, a number of individuals who were drafted refused to comply. Some of them were SCOs—that is, they were ethically opposed to participation in the war in Vietnam—while some had other reasons for their opposition to military service. Non-compliance, for instance by going underground or into exile, represented "selective disobedience to law." At a minimum, the legal exemption from military service of those who were SCOs would have reduced the number of criminal acts and hence the number of examples of "selective disobedience to law."

It is possible, of course, that fears about the "selective disobedience of law" that could occur in the wake of the legal recognition of SCOs are misdirected. The felt concerns could be somewhat different. Critics of any proposal to exempt SCOs from military service could believe that if the government grants this exemption, it will be unable consistently to deny other conscientious claims for exemption—for example, exemptions from particular taxes. But as Childress has argued, several distinctions are relevant:

> The first is between service and obedience. Individuals selected for duties of service are the law's instruments; they carry out the law. Such service is different from obedience, or at the very least, it is a special form of obedience. And the government need not treat conscientious refusals of service and (other) conscientious disobedience in the same way. The second distinction concerns the nature of the service, i.e., the kinds of action required. The society could hold that killing in war is such a distinctive and special kind of action that conscientious scruples to its performance should be respected whether they are universal or selective.[81]

If these distinctions hold, they can reduce some of the concerns about the impact of legal recognition of SCOs on compliance with laws—selective disobedience does not appear to be a likely outcome of the exemption of SCOs from military service.

Numbers

One widespread fear, often submerged rather than surfaced, is that exemption of SCOs could or would allow a de facto referendum through

which large numbers of draft-eligible citizens could thwart a national policy reached through legitimate democratic processes. It might be difficult, so the argument goes, to conduct an unpopular war if SCOs were exempted from military service, especially in view of the difficulty of distinguishing sincere objectors from fraudulent ones. Several points are relevant even if together they are not decisive in one direction or the other.

There is some historical precedent in the United Kingdom for exemption of SCOs in wartime, but that historical precedent may have limited relevance for several reasons. Britain's policy of exempting SCOs in World War II did not encounter serious difficulty. But the absence of serious difficulty may have resulted from the fact that during much of World War II Britain was under siege and fighting for its survival against an enemy widely perceived to be evil.[82] The British example only shows that legal recognition of SCO is sometimes feasible even in wartime. But feasiblity may depend on the overall public view of the war itself.

A government cannot reliably predict the number of SCOs in advance of a particular war, much less as the war evolves. By contrast, the number of UCOs is relatively stable and predictable; as a result, policy makers know how to plan for those objections in the context of military conscription. On the one hand, opponents of a legal exemption from military service for SCOs stress that the government may not be able to fight a war effectively if large numbers of citizens are conscientiously opposed to participating in that war on grounds of its injustice. On the other hand, supporters of the legal recognition of SCOs note that a particular war may need to be reconsidered if the number of SCOs is large because many consider the war to be unjust and the government cannot make a cogent case for its justice (in light of the full set of just-war criteria).

In a true emergency, a situation of necessity, it is plausible to hold that a government may justifiably draft both UCOs and SCOs. Faced with such a situation, perceived to be a genuine emergency, a government is likely to have little problem in securing the military personnel it needs—as we noted, Britain in World War II is a good example. But suppose a government believes it cannot effectively fight a war without overriding the objections of conscientious refusers. On the one hand, it is unlikely that these refusers would be effective contributors to the war effort if drafted. So the problem is unlikely to arise in this form. On the other hand, fairness and equal respect could support a very different policy than preferring the UCO to the SCO or even denying all exemptions for both types of conscientious objectors. In limiting the number of exemptions for conscience because of military needs, this different policy, based on fairness and equal respect, would determine by means of a lottery who would be exempted and who

would be forced to serve or face criminal penalties. This procedure would also be a fairer way to reduce the numbers of exemptions than, for instance, by restoring the traditional religious requirement.[83] Of course, it would also be important to set the number needed—or exempted—in a non-arbitrary and non-capricious way. But, again, the practical problems of incorporating genuine conscientious objectors into military service would probably be insurmountable.

Morale and Effectiveness of the Armed Forces

As we noted earlier, the National Advisory Commission also feared another possible negative consequence of the exemption of SCOs from military service: "a legal recognition of selective pacifism could be disruptive to the morale and effectiveness of the Armed Forces." Here the commission is making another judgment about what "could" happen and using it as a reason for opposing the legal recognition of SCOs. Hence, it is important to consider the commission's evidence, analysis, and reasoning.

First, the commission holds that "a determination of the justness or unjustness of any war could only be made within the context of that war itself."[84] This is an overstatement. Certainly, some judgments about how the war is being conducted can only be made within the war itself. But this would apply only to the judgments based on *jus in bello* criteria. And even so, the SCO may focus more on policies regarding *jus in bello* than on particular acts. For instance, the SCO may judge the policies of bombing targets or treatment of prisoners of war as unethical without having to see their actual implementation. And there is even more room for the SCO to make judgments about the *jus ad bellum* without being in the war itself.

Second, the report somehow supposes that a legal recognition of SCO places a burden on each citizen and each soldier of determining whether a particular war is just or unjust. According to this report, legal recognition of SCOs would force "upon the individual the necessity" of making that determination and put "a burden heretofore unknown on the man in uniform and even on the brink of combat." In fact, however, a legal provision for SCO would permit individuals to make this determination, without requiring them to do so. Furthermore, even now, under the laws of war, individual soldiers can be held accountable for "crimes of war," for their actions against the "laws of war" (such as killing innocent people), though not for participation in an "unjust" war. It is not clear then why a provision for SCO would have "disastrous" results for the individual soldier, his unit, and "the entire military tradition."[85]

It is not unreasonable to suppose that the morale of military personnel would suffer if large numbers of persons eligible for a draft or already

drafted claimed to be SCOs. A government finds it difficult to fight a war that many citizens consider unjust, and military personnel could reasonably view their risks as unwarranted when many other citizens provide only modest support for or even vigorously oppose a particular war. However, it is unclear what the impact of the legal recognition of SCOs would be in such circumstances. On the one hand, exemption of SCOs from military service could provide a pressure valve and even reduce societal protest about an unpopular war. On the other hand, this exemption would enable more people to avoid military service and would raise questions about the equity of the imposition of risks of military service.

To extend this last point, the most likely source of a negative effect on the morale and effectiveness of the armed forces, as the Supreme Court emphasized, is the draftee's sense of unfairness in the distribution of the burdens of military service. Consider a draftee who is conscientiously opposed to a particular war but who, nonetheless, feels bound by the results of the democratic process that produced the current set of political officials who have undertaken a particular war. His own resolve, however, could weaken if the burdens of military service appear to be distributed in an erratic and unfair way. And, the Court continued, erratic and unfair distribution could be expected in view of the "indeterminate scope" of SCO. Thus, in the Court's view, Congress had good reasons to decide "that the objector to all war—to all killing in war—has a claim that is distinct enough and intense enough to justify special status, while the objector to a particular war does not."[86] Nevertheless, according to the Court, Congress would not have acted "irrationally or unreasonably" if it had exempted SCOs.

Of course, it is difficult to predict with any assurance what consequences, both positive and negative, a policy of exemption of SCOs from military service might bring about, in part because of the likely influence of a variety of other factors. Nevertheless, in view of the important ethical principles involved, it is not implausible to argue that the government ought to seek ways to distribute burdens of military service equitably while respecting SCOs as well as UCOs. If a fair administrative procedure cannot be developed, and if the country reaches a state of emergency, universal conscription could, of course, be justified. In such a state of emergency, perceived to be real, conscription would arguably be unnecessary because of the common spirit of patriotism.

Positive Consequences of Selective Conscientious Objection

Proponents of the legal recognition of SCOs not only seek to weaken and counter the arguments offered against such legal recognition; as we

have seen, they appeal to a variety of principles, such as fairness and respect for persons, to support a policy of exemption of SCOs from military service. In addition, as we will now see, some proponents also appeal to the possible or probable positive effects of such a policy. One of their arguments is that this policy would elevate "the level of moral discourse on the uses of force" in the society.[87] Presumably, but in ways that are not totally clear, this policy would foster reflection on the criteria of the justice of and in war and the application of these criteria to particular wars.

A counterargument—or at least a cautionary argument—might concede that elevating the level of moral discourse about war is an important goal, but that (1) such a consequence would have little weight by itself in arguing for a policy of SCO exemption from military service; (2) in any event, the elevation of moral discourse about war is not a very probable result of the exemption of SCOs from military service; and (3) it can be sought and achieved in other ways. Indeed, the argument for the positive effect of a policy of the legal recognition of SCOs may encounter the proverbial chicken-egg problem. Rather than elevating society's moral discourse about war, a policy of recognizing SCOs would probably not be feasible without such an elevation. The elevation of societal moral discourse may be a presupposition rather than a probable effect of the legal recognition of SCOs. Furthermore, without this elevation, some of the consequences feared by opponents of SCO exemption may indeed occur. Elements in this elevated moral discourse would include respect for the conscience of the laws, for democratic decision-making, and for the (rebuttable) presumption in favor of compliance.[88]

Another argument for SCO exemption from military service focuses on moral education. It holds that principles or rules such as "never kill in war" are, in the words of philosopher Carl Cohen,

> almost sure to lead to error through oversimplification; while principles of a more limited scope, while also uncertain, have a far better chance of approximating the truth, if there is one. We do well, therefore, to credit the conscientious man with limited principles, rather than to discredit him because his principles are limited.[89]

This, Cohen argues, is a matter not only of justice but also of wisdom. This argument is risky, however, because it introduces the question of truth and falsity into the debate about whether conscientious objectors, whether universal or selective, should be excused from social duties. Should the SCO be exempted (a) because his reasons are more likely to be true (because more limited or qualified), or (b) because the principles of respect for persons and fairness support such a policy? According to the main arguments

that have been offered to support an SCO exemption, (b) is more plausible and powerful than (a). We will, however, return to the question of truth and falsity in the next section, where we consider the test of conscientiousness or sincerity of claims of conscience in objection to participation in war.

Before we turn to that section, we summarize the array of arguments for and against the exemption of SCOs from military service:

> [W]hile the positive consequences sometimes adduced for excusing SCOs from military service are tenuous, other arguments are more compelling. First, the principle of respect for persons supports recognition of the conscience of the selective objector as well as the universal objector. Second, because the UCO and the SCO are relevantly similar, it is unfair to excuse the UCO without also excusing the SCO. Both of these arguments hinge on the nature of the SCO's judgment and reasons. Like universal objection, selective objection may be based on religious and moral principles and may be genuinely conscientious. Although the SCO's opposition is more complex and is based, in part, on the facts of a particular war, it is not necessarily or solely political. Finally, most of the negative consequences of exemption of SCOs from military service that critics anticipate are not very probable, and the critics' claims often rest on conceptual confusions. When conjoined with an analysis of the nature of the claims of SCOs, the principles of respect for persons and fairness support governmental efforts to develop a mechanism to obviate the difficulties of administering a provision for selective conscientious objection in a fair and equitable way. If such efforts fail and serious problems develop for the armed forces or if the government faces an emergency in war, it may be forced to override the claims of conscientious objectors.

The pragmatic consideration (especially the hopelessness of making an adequate soldier out of the conscientious objector) applies to both the UCO and the SCO. Forced participation probably would be detrimental to the war effort, and many would choose jail or exile rather than military service, as they did during the war in Vietnam. Few opponents of selective conscientious objection ever deal explicitly with this consideration either (a) because they believe that the negative consequences of exempting SCOs, for the war and for the society, would outweigh the negative consequences of not exempting them, or (b) because they believe that SCOs are at best political objectors and at worst slackers and that, consequently, the threat of imprisonment for noncompliance would be sufficient to make them adequate combatants.[90]

Conscientiousness and Sincerity

If we determine that SCOs as a class should be exempted from military service, it is still necessary, in practice, to determine who is a member of

that class. Over the past century, a crucial criterion for evaluating the UCO has been his conscientiousness or sincerity. Determination of conscientiousness or sincerity in claiming conscientiousness is easier, of course, if combined with the other two traditional criteria of pacifism and religious training and belief. Indeed, pacifism and a narrow interpretation of religious training and belief could be viewed as more or less objective tests of conscientious objection. By contrast, the determination of conscientiousness hinges on subjective considerations—the task is to determine whether beliefs are truly and deeply held. This task has been very important but also very difficult in implementing the policy of exempting UCOs from military service. It became more difficult with the expansion of the notion of religious belief (the "parallel belief" test set by the *Seeger* decision), and it will become even more difficult if selective conscientious objection is legally recognized.

It is important to distinguish, as we suggested earlier, the task of determining the conscientiousness or sincerity of UCOs or SCOs from the task of determining the truth or falsity of their beliefs about war in general or about a particular war. Nevertheless, selective conscientious objection appears to raise more questions about truth or falsity than universal conscientious objection, particularly when the deontological pacifist insists that he simply cannot participate in military service because of God's command, the "hard sayings" in the New Testament, and so on. In a sense, the government undertaking a war must view both UCOs and SCOs as expressing an "erroneous conscience." Still it can view the UCO's "erroneous conscience" as based on mistaken moral principles, but principles that nonetheless should be respected. Strong critics of pacifists often nevertheless view them as performing a valuable service by reminding the society of higher ideals as long as they accept their exemption from military service and do not try to push the state in the direction of pacifism.[91]

From the U.S. government's standpoint, the SCO who appeals to criteria of the just-war tradition, many of which the government itself recognizes—for instance, debates about the Gulf War or the War in Iraq have been conducted in terms of many of those criteria—has an "erroneous conscience" in another sense. An "erroneous conscience" may be mistaken not only in its moral or religious principles but also in its interpretation of the factual situation to which it applies its principles. In recognizing the rights of the "erroneous conscience," the government may find it difficult to accept the SCO's putative factual errors. The government may more readily recognize the rights of the "erroneous conscience" when the putative error appears in the moral principles or values appealed to—for example, "all war is wrong because it is wrong to kill any human being"—than when the

putative error concerns what the government is actually doing. An SCO, for instance, could believe that the U.S. government is systematically killing innocent civilians and could offer this as the primary reason for his refusal to serve in the military when drafted. But this factual belief could be mistaken. Even if we say that the primary consideration in conscientiousness is not the truth or falsity of the moral belief but its sincerity, some factual mistakes could, in principle, disqualify an SCO's claim. Nevertheless, it is generally not easy and often impossible to separate out the factual and ethical components of moral judgments about particular wars.

Whether a proposed conscientious objection policy that emphasizes such subjective considerations can be administered evenly and fairly is, as we have seen, an important consideration in its adoption. Sorting out the genuine and spurious claims of conscientious objection will be a difficult administrative task. In this section, we will not consider various proposals about procedures (for example, local boards, appeals boards, and judicial review), even though they also need careful attention. Instead, we will make a few observations about tests of sincerity of claims of conscientious objection.

Why should the state not just accept the potential conscientious objector at his word? Why should the state not accept without question a person's claim to be a conscientious objector on moral, ethical, or religious grounds? Certainly one major reason is that exemption from military service because of conscientious objection imposes greater burdens on others, some of whom have to serve in the place of conscientious objectors and thus bear greater risks of injury and death. Thus, it is important to have some tests of sincerity because conscientious objectors gain, or are thought to gain, some advantage over others by not having to serve as combatants in military service. Further, the principle of respect for persons and their conscience does not require respect for the insincere conscience.

Earlier we suggested that because of the principles of fairness and respect for persons, the state should bear the burden of proof to show that the class of conscientious objectors, whether universal or selective, should not be exempted from military service. This placement of the burden of proof does not imply that the state bears the burden of showing that any particular claimant is not a member of the class of conscientious objectors. It is fair, and not disrespectful, for the state to require such a claimant to show that he really holds the convictions in question deeply and intensely. He should bear the burden of proof because of his presumed interest in avoiding the risks of injury and death in military service. The claimant to conscientious objector status should answer the threshold question of sincerity, but his burden of proof should not be onerous. The standard should not require establishing sincerity beyond a reasonable doubt but only by the preponder-

ance of the evidence, in part because of the complex possible and actual motivations for individuals' requests for exemption from military service. It is not unreasonable that a person who is conscientiously opposed to participation in all wars or in a war that involves what he deems to be immoral killing may also be interested in avoiding the risk of being killed in that context. But then the question becomes: how can reviewers determine whether any particular person's motive of conscience is necessary and/or sufficient for his claim for an exemption from military service?[92]

In efforts to find better tests of sincerity, some have suggested imprisonment or a severe tax or even confiscation of the conscientious objector's property.[93] Such proposals may help us distinguish those who would only have some "pinpricks" of conscience if they had to serve in the military from those "whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war."[94] But such proposals go too far. It is unfair to impose such hard choices on conscience when they can be avoided. Furthermore, the society loses the service that the conscientious objector can provide in other ways. Alternative service not only (partially) satisfies the principle of fairness but also provides one test of sincerity because it reduces (though it does not eliminate) the advantages that the objector might gain.

While demeanor and credibility are obvious tests of sincerity, one of the most important tests is a person's consistency between word and action and over time. It is easier to apply the test of consistency to the UCO than to the SCO, in part because the pacifist's commitments often—though not always—entail a way of life, a vocation, which reflects his overall outlook. In addition, draft boards have often asked hypothetical questions to determine the UCO's consistency across types of situations. One favorite challenge came in the form of a question: "What would you do if your grandmother [or some other beloved and vulnerable person] were attacked by an assailant?" The courts have indicated that such hypothetical questions are irrelevant as a test of the sincerity of UCO to military service because they presuppose that pacifism (as objection to participation in war in any form) necessarily excludes killing in all settings. A person could be a UCO and still support, for example, killing in self-defense in some circumstances.[95] Nevertheless, some hypothetical questions, for example, questions about different wars, can be useful in determining consistency, but the demand for consistency should not exclude the possibility of dramatic conversions. Finally, the demand for consistency should not require absolute certainty that a claimant for conscientious objector status will never change his views in the future.

Most tests of sincerity seek to determine the authority, power, or strength of the relevant convictions for the person who is seeking recognition as a conscientious objector—this fits with the "parallel belief" test set forth by *Seeger*. Historically, some tests have also focused on the process of conscience formation. As we have seen, a central criterion has involved "religious training and belief." It was usually interpreted to include both training *and* religious belief, not training *or* belief. Nevertheless, the Supreme Court tended to concentrate on belief, not training. After *Welsh*, however, a memorandum from the director of the Selective Service held that to

> find that a registrant's moral and ethical beliefs are against participation in war in any form and are held with the strength of traditional religious convictions, the local board should consider the nature and history of the process by which he acquired such beliefs. The registrant must demonstrate that his ethical or moral convictions were gained through training, study, contemplation, or other activity, comparable in rigor and dedication to the processes by which traditional religious convictions are formulated.[96]

Attention to such processes could avoid claims of conscience that reflect a "merely personal moral code." Fairness to claimants of conscientious objector status requires that the expected processes of training in conscience not unduly favor more articulate and educated claimants.[97] Testing the sincerity of UCOs has been difficult enough, but testing the sincerity of SCOs, if they ever qualify for exemption as conscientious objectors, will be much more difficult. In addition, the tendency to favor more articulate and educated applicants is likely to be even stronger because of the more complicated processes of reasoning involved in SCO claims.

CONCLUSION

Having briefly surveyed the history and development of conscientious objection in the United States, it is perhaps most striking to our ears to hear how gracefully a testimony of conscience can oscillate between providing a rich, sincere, tradition-shaped account of one's objection while also appealing to prevailing political norms and concepts to encourage its protection. Most exemplary in this regard is the Shaker testimony from 1818 that we briefly noted above, a testimony not bound by our understandings of church and state and their "proper relation." Speaking "bilingually" in this way comes less easily to objectors today than it did in the past, as current generations have been habituated to speak only one language at a time, depending on which side of the separation between church and state they stand.

For a variety of reasons, conscientious objection to military service has not directly engaged the church and state as often as we might suppose. First, many of the early objectors who suffered fines and punishments for their conscientious refusal came from smaller, less hierarchical ecclesial bodies, bodies perhaps less capable of leveraging their shared stance toward military service to successfully petition for exemption. Second, in the twentieth century, when members of mainline Christian churches became more involved in peace societies like the Fellowship of Reconciliation, the state was becoming increasingly accommodative to conscientious objectors. Whereas exemption from military service for conscientious objectors had been limited to members of pacifist denominations, in time Catholics, Methodists, Lutherans, and Presbyterians, among others, could gain exemption from military service, so long as their objection was universal—against all participation in war in any form—and based on religious training and belief, even though the denomination officially accepted a just-war perspective rather than a pacifist one. Third, the First Amendment protection of the free exercise of religion has provided a protective hedge for those members of ecclesial communities that fully share commitments to peace. At least since World War I, members of historically pacifist churches have not had to stand before the courts and defend their conscientious commitments as derivative from their religious training and belief. Instead, the court adjudicated cases in which an objector's practices and beliefs did not fully cohere with his particular religious community, as we observed in the *Seeger* case, or where a given religious community's approach to war did not align with dominant frameworks and categories, as was the case with Jehovah's Witnesses during the Second World War and Black Muslims during the Vietnam War. If an objector could convincingly appeal to shared conscientious commitments, and his community was sufficiently familiar, the protection of religion's free exercise generated few occasions at which his church might feel compelled to engage his state. In the end, some churches whose members spoke with an impassioned voice were not amplified; the amplified voices, if consistent in their objection to war in any form, were protected; and the amplified voices, if sufficiently familiar, could call upon constitutional protections, rather than their church.

The challenge going forward is whether we can recalibrate how we define and assess sincere objections of conscience, whether religious or secular, universal or selective. Since war and conscription can easily lead patriotic citizens to excessive exuberance and demands for conformity, might law and policy anticipate and hedge against such temptations and tendencies? As Lillian Schlissel has observed, "liberty and freedom of conscience may be rallying cries when the nation is at peace, but let the country be threat-

ened and the call is for a closing of the ranks."[98] If conscience and community are often pitted against each other in wartime, as Schlissel suggests, perhaps the task of developing laws and policies to protect the soldier's conscience is more urgent than we think. The shift to an all-volunteer military force has avoided the kinds of conflicts of conscience that conscription in wartime engenders. However, whether and how long the all-volunteer military force can meet U.S. military needs is unclear. Hence, it is important to devote attention once again to laws and policies for conscientious objection.

NOTES

1. We use masculine pronouns throughout because to date military conscription in the United States has focused on males; given the greatly increased role of women in the military, a reinstituted draft may look very different.

2. Department of Defense Directive 1300.6. Certified Current as of November 21, 2003, available at http://www.dtic.mil/whs/directives/corres/rtf/130006x.rtf (accessed May 5, 2007).

3. During the Second World War and Vietnam War, some Hopi draftees appealed to their peace tradition in order to attain conscientious objector status. Though the origin of this American peace tradition precedes European colonization, given the relative lack of influence that this tradition has had upon the development of law and policy in the United States, it will not be explored here, though see Alice Schlegel's "Contentious But Not Violent: The Hopi of Northern Arizona" in Graham Kemp and Douglas Fry's *Keeping the Peace: Conflict Resolution and Peaceful Societies Around the World* (New York: Routledge, 2004), 19–33, and A.W. Geertz's *The Invention of Prophecy: Continuity and Meaning in Hopi Indian Religions* (Berkeley: University of California Press, 1994).

4. Joseph Besse, *A Collection of the Sufferings of the People called Quakers, for the Testimony of a Good Conscience*, Vol. 2 (London, 1753), 378–380.

5. U.S. Selective Service System, *Backgrounds of Selective Service*, 2 vols. (Washington, D.C.: Government Printing Office, 1947).

6. George Fox, *A Declaration from the Harmless and Innocent People of God called Quakers, against all Sedition, Plotters & Fighters in the World . . . Presented unto the King upon the 21th day of the 11th month, 1660* (London, 1684).

7. Peter Brock, *Liberty and Conscience: A Documentary History of the Experiences of Conscientious Objectors in America through the Civil War* (New York: Oxford University Press, 2002), 4.

8. For example, eight Friends wrote a letter to the Governor of New York in 1672, explaining their refusal to pay for repairs at the fort of New York. The letter is included in Peter Brock's *Liberty and Conscience*, 11.

9. Lillian Schlissel, *Conscience in America: A Documentary History of Conscientious Objection in America, 1757–1967* (New York: E.P. Dutton & Co., 1968), 75.

10. Ibid., 73.

11. Ibid., 77.

12. For the entirety of Madison's speech and the debates that followed, see *Annals of Congress: The Debates and Proceedings in the Congress of the United States, 1789–1824* (Washington, D.C.: Gales and Seaton, 1834), Vol. 1, First Congress, First Session, June 1789. An abbreviated text of the speech is found in Schlissel, *Conscience in America*, 45–48. Our own emphasis added.

13. For a more detailed history of the legislative process and Madison's role in it, see Maj. David Brahms, "They Step to a Different Drummer: A Critical Analysis of the Current Department of Defense Position vis-à-vis In-service Conscientious Objectors" in *Military Law Review* 47 (Jan. 1970), 4–9. Brahms notes that the early sessions of the U.S. Senate were closed, and thus no comprehensive record exists that would indicate the reasons why the last clause was stricken.

14. John Whiteclay Chambers II, "Conscientious Objectors and the American State from Colonial Times to the Present," in *The New Conscientious Objection: From Sacred to Secular Resistance*, ed. Charles Moskos and John Whiteclay Chambers II (New York: Oxford University Press: 1993), 29.

15. Schlissel, *Conscience in America*, 57.

16. The Rogerenes were a small pacifist sect, followers of John Rogers (1648–1721), who resided mainly in Connecticut and insisted upon freedom of worship, the importance of education, and an indifference to material goods and wealth. See Ellen Starr Brinton's "The Rogerenes," *The New England Quarterly*, 16, no. 1 (March 1943): 2–19.

17. Rogers' letter is included in Schissel's volume, *Conscience in America*, 60. It also resides in J.R. Bolles and A.B. Williams' *The Rogerenes* (Boston: Stanhope Press, 1904), 386–87.

18. Schlissel, *Conscience in America*, 61.

19. An excerpt can be found in Brock, *Liberty and Conscience*, 101.

20. Schlissel, *Conscience in America*, 59.

21. Thoreau notes in the essay that he did not have conscientious concerns about paying the highway tax, as he was "desirous of being a good neighbor." Further, he did not feel compelled to "trace the course of [his] dollar" in order to avoid those taxes which supported those causes that affronted his conscience.

22. Henry David Thoreau, "Civil Disobedience." In *Walden and Civil Disobedience*. Ed. by Paul Lauter (Boston: Houghton Mifflin, 2000), 18.

23. Ibid., 32.

24. Ibid., 36.

25. *U.S. Statutes at Large*, 38th Congress, 1st Session. Included in Schlissel, *Conscience in America*, 98. Incidentally, Charles Moskos and John Chambers note that this statute could be construed as the first national policy of conscientious objection in the world (*The New Conscientious Objection*, 198).

26. Schlissel, *Conscience in America*, 90.

27. Brock, *A Brief History of Pacifism*, 38.

28. Selective Draft Act of 1917, excerpt in Lillian Schlissel, *Conscience in America*, 133.

29. Schlissel, *Conscience in America*, 129.

30. Ibid.

31. Ibid., 130.

32. Local draft boards could certify a draftee as a conscientious objector, if he was found to be a member of any well-recognized religious sect or organization that forbid its members to participation in war in any form. Yet, some objectors who did not meet these criteria still petitioned for conscientious objector status, and these cases were adjudicated by this three man Board of Inquiry. See Kellogg's personal account of his work on the Board in *The Conscientious Objector* (New York: Boni and Liveright, 1919).

33. Mulford Sibley and Philip Jacob hold that a good number of the 21,000 inducted objectors likely abandoned their objector status upon arrival for military training, given the "pressures of the time." See their *Conscription of Conscience: The American State and the Conscientious Objector, 1940–1947* (Ithaca, NY: Cornell University Press, 1952), 12.

34. Sibley and Jacob, *Conscription of Conscience*, 12–16.

35. Peter Brock, *Pacifism in the United States From the Colonial Era to the First World War* (Princeton: Princeton University Press, 1968).

36. Sibley and Jacob, *Conscription of Conscience*, 15. Perhaps the most gruesome case concerns the death of an objector who was incarcerated in a damp cell for refusing to wear his military uniform (likely a Mennonite who was prohibited from wearing clothes with buttons). In the cell, he caught pneumonia and died. His corpse was sent home to his family, adorned in the very uniform he refused to wear.

37. John Whiteclay Chambers II, "Conscientious Objectors and the American State from Colonial Times to the Present," in *The New Conscientious Objection: From Sacred to Secular Resistance*, ed. Charles Moskos and John Whiteclay Chambers II (Oxford: Oxford University Press, 1993), 33.

38. Schlissel, *Conscience in America*, 179.

39. 66th Congress, 1st Session, Washington 1919.

40. Schlissel, *Conscience in America*, 146–147. From *The Individual and the State, The Problem as Presented by the Sentencing of Roger N. Baldwin*.

41. See Paul R. Dekar, *Creating the Beloved Community: A Journey with the Fellowship of Reconciliation* (Telford, PA: Cascadia Publishing House, 2005).

42. Chambers, *The New Conscience Objection*, 32. See also C. Roland Marchand's *The American Peace Movement and Social Reform, 1898–1918* (Princeton: Princeton University Press, 1972) and Horace C. Peterson's and Gilbert C. Fite's *Opponents of the War, 1917–1918* (Madison, WI: University of Wisconsin Press, 1957).

43. 283 U.S. 605.

44. In 1946, the U.S. Supreme Court heard *Girouard v. United States*, in which the petitioner was a Canadian Adventist seeking citizenship but unwilling to promise to bear arms. Surprisingly similar in many respects to the *Macintosh* case, the

Court found that prevailing precedents in *Macintosh* and *United States v. Schwimmer* (1929) laid down an incorrect rule.

45. Section 5(g), Selective Training and Service Act of 1940.

46. The Selective Service claims that noncombatants numbered 25,000. Cynthia Eller, in her *Conscientious Objectors and the Second World War: Moral and Religious Arguments in Support of Pacifism* (New York: Praeger, 1991) approximates that the number of conscientious objectors in WWII was near 43,000, with 25,000 serving in noncombatant roles, 12,000 working in alternative service roles for the Civilian Public Service, and 6,000 incarcerated (52). Sibley and Jacob put the total number of conscientious objectors close to 50,000 (*Conscription of Conscience*, 83, 104), and Chambers concurs (*The New Conscientious Objection*, 37). Also see Stephen Kohn's *Jailed for Peace: The History of American Draft Law Violators, 1658–1985* (New York: Praeger, 1986), 47.

47. Eller, *Conscientious Objectors*, 52.

48. Chambers, *The New Conscientious Objection*, 37.

49. Moskos and Chambers, *The New Conscientious Objection*, 204.

50. See Scott Bennett's detailed account in "'Free American Political Prisoners': Pacifist Activism and Civil Liberties, 1945–48," *Journal of Peace Research* 40, no. 4 (July 2003): 413–33.

51. 135 F. 2d 521.

52. 133 F. 2d 703.

53. *United States v. Kauten*, 133 F. 2d 703, 1943.

54. 62 *U.S. Statutes*, 612 (1948), Public Law 1759, ch. 625, 80th Congress, 2d sess. (1948).

55. Ibid., Gov't docs. 1948.

56. Kohn, *Jailed for Peace*, 93.

57. Chambers, *The New Conscientious Objection*, 42.

58. Ibid., 43.

59. Moskos and Chambers, *The New Conscientious Objection*, 4.

60. Laurie Goodstein, "Churches Give Resisters Shelter from War's Storm," *Washington Post*, Feb. 27, 1991, A3.

61. Chambers, *The New Conscientious Objection*, 44.

62. Department of Defense Directive 1300.6.

63. Michael Noone, "Legal Aspects of Conscientious Objection: A Comparative Analysis," in *The New Conscientious Objection: From Sacred to Secular Resistance*, ed. Charles Moskos and John Whiteclay Chambers II (Oxford: Oxford University Press, 1993), 190.

64. *U.S. v. Austin* 27 M.J. 227 (1988).

65. We borrow this phrase from Moskos and Chambers, who highlight the global movement from sacred to secular resistance among conscientious objectors in their *The New Conscientious Objection*.

66. For example, see James Finn's edited volume *A Conflict of Loyalties: The Case for Selective Conscientious Objection* (New York: Pegasus, 1968) and John Rohr's

Prophets Without Honor: Public Policy and the Selective Conscientious Objector (Nashville: Abingdon Press, 1971).

67. The section that follows draws heavily for its structure, ideas, and some formulations from James F. Childress, *Moral Responsibility in Conflicts: Essays on Nonviolence, War, and Conscience* (Baton Rouge, LA: Louisiana State University Press, 1982), Chapter 6: "Policies Toward Conscientious Objectors to Military Service."

68. Report of the National Advisory Commission on Selective Service, *In Pursuit of Equity: Who Serves When Not All Serve?* (Washington, D.C.: Government Printing Office, 1967), 50, hereinafter cited as *In Pursuit of Equity*. See also John A. Rohr, *Prophets Without Honor: Public Policy and the Selective Conscientious Objector* (Nashville: Abingdon Press, 1971).

69. See, for example, John Howard Yoder, *Nevertheless: Varieties of Religious Pacifism* (Scottsdale, PA: Herald Press, 1976), and James F. Childress, "Contemporary Pacifism: Its Major Types and Possible Contributions to Discourse about War," in *The American Search for Peace: Moral Reasoning, Religious Hope, and National Security*, eds. George Weigel and John P. Langan, S.J. (Washington D.C.: Georgetown University Press, 1991), 109–131.

70. See National Conference of Catholic Bishops, *The Challenge of Peace: God's Promise and Our Response* (Washington, D.C.: U.S. Conference of Catholic Bishops, Inc., May 3, 1983); James F. Childress, "Just-War Criteria," in *Moral Responsibility in Conflicts*, 63–94.

71. Rohr, *Prophets Without Honor*, 143, 148.

72. Alan Gewirth, "Reasons and Conscience: The Claims of the Selective Conscientious Objector," in *Philosophy, Morality, and International Affairs*, eds. Virginia Held, Sidney Morgenbesser, and Thomas Nagel (New York: Oxford University Press, 1974), 99.

73. Rohr, *Prophets Without Honor*, 22. See also *In Pursuit of Equity*, 50.

74. Childress, *Moral Responsibility in Conflicts*, Chapter 5, "The Nature of Conscientious Objection," reprinted with modifications from *Ethics* 89 (July 1979).

75. Childress, *Moral Responsibility in Conflicts*, 204–205.

76. See Cohen, "Conscientious Objection," 271, 277.

77. *In Pursuit of Equity*, 48–49.

78. *Gillette v. United States*, 401 U.S. 459 (1971).

79. Ibid.

80. *In Pursuit of Equity*, 50 (emphasis added). See the criticisms by Quentin L. Quade, "Selective Conscientious Objection and Political Obligation," in *A Conflict of Loyalties*, ed. James Finn (New York: Pegasus), 195–218.

81. Childress, *Moral Responsibility in Conflicts*, 208–209.

82. For generalizations from the British experience, see Gewirth, "Reasons and Conscience," 98, and David Malament, "Selective Conscientious Objection and the *Gillette* Decision," *Philosophy and Public Affairs*, I (Summer, 1972), 383–385. Contrast with Quade, "Selective Conscientious Objection and Political Obliga-

tion," 205. For a discussion of the British experience, see Denis Hayes, *Challenge of Conscience: The Story of the Conscientious Objectors of 1939–1949* (London: George Allen & Unwin, 1949).

83. Ralph Potter contends that we should restore the religious criterion in order to accommodate SCOs because he believes that we cannot eliminate the religious requirement and the pacifist requirement at the same time. See Potter, "Conscientious Objection to Particular Wars," in Donald A. Giannella ed., *Religion and the Public Order*, *No. 4* (Ithaca, NY: Cornell University Press, 1968): 44–99. See also Paul Ramsey, "Selective Conscientious Objection," 31–77. For a defense of a lottery, see John Mansfield, "Conscientious Objection—1964 Term," in Donald A. Giannella, ed., *Religion and the Public Order 1965* (Chicago: University of Chicago Press, 1966): 46 n, 73.

84. *In Pursuit of Equity*, 50, my italics.

85. Ibid.

86. *Gillette v. United States*, 401 U.S. 437 (1971).

87. *In Pursuit of Equity*, 49 (a minority position). See also Ralph Potter, "Conscientious Objection to Particular Wars."

88. Paul Ramsey, "Selective Conscientious Objection," 35, and John Courtney Murray, S.J., "War and Conscience," in Finn, ed., *A Conflict of Loyalties*, 19–30.

89. Cohen, "Conscientious Objection," 277.

90. Childress, *Moral Responsibility in Conflicts*, 213–214.

91. Reinhold Niebuhr, "Why the Christian Church is Not Pacifist."

92. C.D. Broad, "Conscience and Conscientious Action," in Joel Feinberg, ed., *Moral Concepts* (New York: Oxford University Press, 1970): 74–79.

93. An internal Selective Service report, prepared by Donald Gurvitz, but not accepted by Selective Service. See George C. Wilson, "Conscientious Objector Problem Seen," *Washington Post*, March 27, 1980.

94. *Welsh v. United States*, 398 U.S. 340 (1970).

95. See *Goldstein v. Middendorf*, 535 F. 2d 1339 (1976).

96. The same point and much of the same language appears in the 1980 proposed revisions in the Selective Service Regulations. See *Federal Register*, XLIV, No. 234 (December 3, 1980): 80138.

97. In this discussion, we have concentrated on whether and which COs should be exempted from military service. We have not included conscientious refusals to register for a draft. For an examination of some ethical issues in the government's response to draft evasion, desertion, civil disobedience, and war crimes after they have occurred, see James F. Childress, "The Amnesty Argument," *Cross Currents*, XXIII (Fall, 1973): 310–28.

98. Schlissel, *Conscience in America*, 24.

FURTHER READING

Among the numerous exemplary works on the history of conscientious objection in the United States, a few are especially notable. Peter Brock's *Liberty and Con-*

science: A Documentary History of the Experiences of Conscientious Objectors in America through the Civil War (New York: Oxford University Press, 2002) is an anthology that documents some of the earliest objector testimonies from the seventeenth century up through the American Civil War. A second anthology by Lillian Schlissel—*Conscience in America: A Documentary History of Conscientious Objection in America, 1757–1967* (New York: E.P. Dutton, 1968)—collects those documents that survey the development of conscientious objection from the first years following American independence up through the late 1960s. Many scholars still consider Edward Wright's *Conscientious Objectors in the Civil War* (Philadelphia: University of Pennsylvania Press, 1931) to be the standard study of objectors during the Civil War. Mulford Sibley and Philip Jacob survey the treatment of conscientious objectors in the Second World War in their *Conscription of Conscience: The American State and the Conscientious Objector, 1940–1947* (Ithaca: Cornell University Press, 1952). Finally, Charles Moskos and John Whiteclay Chambers' edited volume—*The New Conscientious Objection: From Sacred to Secular Resistance* (New York: Oxford University Press, 1993)—observes and assesses some of the recent changes in the treatment of conscientious objectors in the United States and throughout the world.

4

Religiosity, Public Opinion, and the Stem Cell Debate

Eric Matthews and Erin O'Brien

If you spent the summer of 1993 in the United States there was no escaping it. Flip the radio dial—a promo for it. Turn on the television—a trailer advertising it. Hit the local mall—t-shirts plugging it. Stop in at the grocery store—cereal boxes featuring it. What is "it"? *Jurassic Park*—a scientific thriller dealing with the creation of dinosaurs. This movie offered most Americans their first exposure to research involving cellular manipulation. It was not pretty. The movie played loose (at best) with the science of stem cell research and molecular biology. Combined with the magic of Hollywood theatrics, moviegoers' first taste of research entailing stem cells suggested chaos. After all, who really wants a dinosaur chasing after them?

Flash forward some 15 years and stem cell research is no longer the province of fantasy and filmmaking for most Americans. It is a scientific and political reality. This shift has moved the topic away from the entertainment of the cinema toward the controversy of the ballot box and the moralism of Sunday pulpits and Saturday synagogues. Stem cell research is now an undeniably salient and contentious political topic. The major party candidates for presidential office usually offer contrasting positions on stem cell research.[1] A candidate's position on the issue can have dramatic effects for campaign coffers.[2] Celebrities and public icons such as Michael J. Fox, former first lady Nancy Reagan, former President Bill Clinton, and the late

Christopher Reeve hold stem cell research up as a promising resource in tackling various diseases. For many prominent religious leaders, however, the term "embryonic stem cell" cues forth a human being "that is worthy of the same protection as all of us, all the more so because it is so tiny and vulnerable."[3] For them, stem cell research represents yet another infringement upon the sanctity of human life.

But how do everyday Americans make sense of these divergent views and organize them to form their own opinions? Opinion polls consistently tell us that Americans disagree when it comes to stem cell research. But, these polls rarely tell us *why* there is such disagreement or *why* the issue is felt so deeply for many Americans. This chapter takes up these "why" questions. It does so by looking at the potentially multifaceted roles for religion. As we will see, the evidence suggests that religion matters when it comes to views on stem cell research. This is not particularly surprising. Our analysis looks at *how* religiosity influences opinion. We examine what aspects of a religious experience typically impact views on stem cell research. To facilitate this more in-depth understanding, we apply Pui-Yan Lam's dimensions of religiosity to more thoroughly investigate the sources of stem cell opinion amongst everyday Americans.[4] Doing so allows for determining what specific aspects of religion influence views on stem cell research. Is it simply identifying with a particular religious group? Is it being deeply embedded in one of these communities? Is it regular church attendance? Is it the personal devotional practices (saying prayers, reading holy books)? Something else? Is it a combination of influences and factors?

The chapter proceeds in four sections. First, we introduce the contours and trends in American public opinion on stem cell research. This section demonstrates how supporters and non-supporters of stem cell research tend to rely on different sources of information when formulating their views. Opponents are considerably more likely to rely on their religious beliefs. In light of this finding, the second section examines the state of public discourse on stem cell research as it relates to religion and the procedures involved in stem cell research. Two defining discourses (or polarities) on stem cell research are unearthed. We will see that Catholic and evangelical churches have taken the most defining stances on stem cell research. Combined with section one, this indicates that the division along religious lines in stem cell opinion is driven, in part, by the fact that particular religious groups offer distinct logics for opposing stem cell research. The third section examines how, exactly, these contrasting views affect public opinion. What aspects of one's religious experience subsequently impact views on stem cell research? Different messages are being sent, but how is it that they are translated to individuals and subsequently felt during opinion formula-

tion? Lam's dimensions of religiosity index allows for teasing these answers out. The fourth and final section summarizes the findings and their implications for politics and public policy.

Uncovering the connections between religious traditions, dimensions of religiosity, and stem cell opinion matters, as religion has always played an important, if contested, role in United States. Today this plays out most saliently with Christian evangelicals. Our research contributes to scholarship that investigates the multifaceted ways in which this group, as well as other religious traditions, impact political processes and outcomes.[5] There are also applications to religious communities more generally. Stem cell research provides yet another policy issue where church leaders and parishioners struggle to answer personal questions related to morals, technology, and the common good. Ronald Cole-Turner gives voice to these struggles, noting that issues like stem cell research may be "mediated in the political arena" and the medical community but are also deeply rooted in religious institutions and values—specifically, "competing views of the dignity of the human embryo."[6] Some religious communities focus on whether it is morally wrong to use cells from embryos for medical research. Others ask whether it is morally wrong to allow human beings to suffer from diseases and illnesses when research might provide assistance. Our research helps determine how these views are differentially internalized and given a voice in the policy arena amongst adherents of the various religious traditions. Examinations of this sort avoid homogenized assumptions about the diversity of religious experiences in the United States while simultaneously recognizing how and why particular traditions are most apt to affect public discourse and public policy today.

The analysis that follows also sheds light on how public opinion takes hold on emerging, potentially morally-laden issues. Over the past decades, medical and technological advances have presented most of us with policy issues nearly unimaginable. In medical research, for instance, "embryology has revealed to us greater detail of the stunning complexity of genetic and cellular processes."[7] As these modern day revelations and technological advancements continue, they present new questions with serious political, social, and religious ramifications. This research contributes to understanding how mass publics formulate their answers to these questions and does so in a manner that specifies how (not just if) religion matters.

It is important to note where stem cell policy research stands. To this point, the federal government has pursued a policy whereby it does not explicitly prohibit embryo stem cell research but also does not officially condone it, encourage it, or support it with public funds (though state governments have often taken more active roles in both directions). Accord-

ing to the National Conference of State Legislatures, "approaches to stem cell research policy range from statues in California, Connecticut, Maryland, Massachusetts and New Jersey and an executive order in Illinois, which encourages embryonic stem cell research, to South Dakota's law, which strictly forbids research on embryos regardless of their source."[8] Other states, including Ohio, California, New Jersey, New York, and Wisconsin are presently funding some level of stem cell research.[9] President Bush has indicated his lack of support for stem cell research. Speaking from his ranch in Crawford, Texas, President Bush stated:

> I strongly oppose human cloning, as do most Americans. We recoil at the idea of growing human beings for spare body parts, or creating life for our convenience. And while we must devote enormous energy to conquering disease, it is equally important that we pay attention to the moral concerns raised by the new frontier of human embryo stem cell research. Even the most noble ends do not justify any means. My position on these issues is shaped by deeply held beliefs. I also believe human life is a sacred gift from our Creator. I worry about a culture that devalues life, and believe as your President I have an important obligation to foster and encourage respect for life in America and throughout the world. And while we're all hopeful about the potential of this research, no one can be certain that the science will live up to the hope it has generated.[10]

Many religious traditions and religious organizations support President Bush's decision to not fund stem cell research, citing their religious convictions and beliefs as a deciding factor. The Southern Baptist Convention, the Christian Coalition, the Catholic Bishops Association and Focus on the Family oppose stem cell research, noting that this type of research violates Biblical values and is never ethically justified. Other organizations, such as the Episcopal Church and the Union of American Hebrew Congregations, overwhelmingly support stem cell research, noting the importance of saving human lives and enhancing the lives on earth. See Appendix 4.1 for an overview of how various groups feel about stem cell research. While there is no federal law prohibiting stem cell research, Americans have polarizing views about the use of embryonic stem cells for research purposes.

CONTOURS OF PUBLIC OPINION ON STEM CELL RESEARCH

So just what do Americans think about stem cell research and how much do they think about it? Figure 4.1 begins providing answers. The dotted line represents those who reported hearing "a lot" or "a little" (as opposed to "nothing") about stem cell research.[11] We see that since 2002, over 80

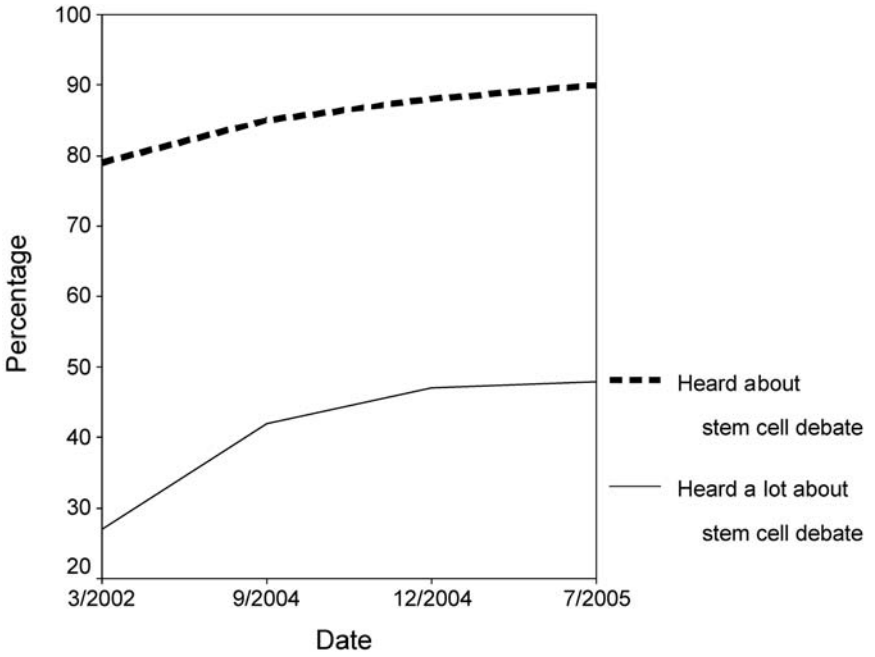

Figure 4.1 Salience of Stem Cell Research Among Mass Publics Overtime

Source: Pew Forum on Religion and Public Life. Findings released August 2005. Complete report can be downloaded at http://pewforum.org/bioethics/.

percent of Americans reported having heard at least something about stem cell research. This is rather amazing as the specific technologies and procedures of medical research rarely register on the public consciousness.[12] The lack of public opinion data on stem cell research prior to 2002 drives this point home. Simply put, before the turn of the century, stem cell research was of such low salience that those firms who make their living by polling the American public on the major issues of the day did *not* include questions about stem cell research. From Figure 4.1, we see that this changed by the year 2002. It is fair to say there has been a steady uptick in the overall salience of stem cell research since 2002 and that today most Americans have at least heard something about the issue.

A closer read of Figure 4.1 indicates that stem cell research is more than vaguely on the public consciousness. The solid line in the figure isolates the percentage of Americans who report having heard "a lot" about stem cell research. Here we see most dramatically how the issue has jumped onto the political stage and registered amongst mass publics. In March 2002, 27 percent of respondents reporting hearing a lot about stem cell research. By

August 2004, this was up to 42 percent and since then has hovered at just slightly under 50 percent. Thus, almost half of Americans have not only heard of stem cell research—rather, they report hearing a lot about it. There is a nearly infinite range of issues that may resonate for politics, and Figure 4.1 makes clear that stem cell research has emerged on the top.

So Americans are cognizant of stem cell research. But what do they think about it? Figure 4.2 provides the empirical evidence for the opinion divide discussed at the onset. It also indicates that this divide is often understood in moral terms.

The dotted line in Figure 4.2 represents the percentage of respondents who thought it most important to conduct stem cell research. The solid line represents those who thought it most important to not destroy embryos and thus not conduct stem cell research. In March 2002, some 43 percent of respondents favored conducting research while 38 percent favored protecting human embryos over conducting stem cell research (19 percent did not know). Overtime, breakdowns do shift toward favoring the research (52 percent by August 2004), but since December 2004, patterns have held

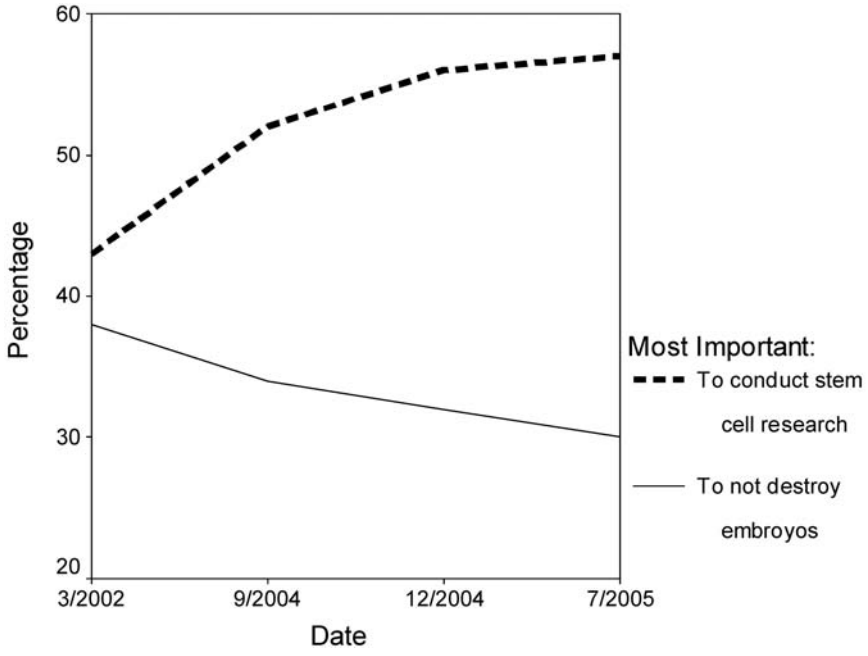

Figure 4.2 Public Opinion on Stem Cell Research Overtime

Source: Pew Forum on Religion and Public Life. Findings released August 2005. Complete report can be downloaded at http://pewforum.org/bioethics/.

relatively stable, with about 55 percent favoring stem cell research and some 30 percent coming out against it, at least in part because they do not wish to destroy human embryos. The divide on stem cell research is very real. It is not quite as stark as in 2002, but polling suggests that it persists and is often understood as a debate between conducting potentially lifesaving research for the common good *and* protecting the sanctity of life.

What explains the difference between those who find that not destroying human embryos resonates most with them and those who find that conducting potentially lifesaving research is more important to them? After all, both lines of reasoning are highly charged and moralistic. Table 4.1 suggests, not surprisingly, that religion plays a key role. The data in Table 4.1 are drawn from a question that asked supporters and non-supporters of stem cell research what was the biggest influence on their views and beliefs pertaining to stem cell research. Religious beliefs are far and away the biggest factor differentiating the two groups. Amongst opponents of stem cell research, over half (52 percent) say their religious beliefs are the biggest influence on their thinking. Just 7 percent of those who favor conducting stem cell research said their religious beliefs were the biggest influence. Supporters were much more likely than non-supporters to report that the media (31 percent versus 13 percent) or their education (28 percent versus 12 percent) drove their views.

Religious beliefs also dominate all other potential sources influencing stem cell opinion. They are the modal category. Religious beliefs do more than differentiate supporters and non-supporters, then. They dominate the

Table 4.1 Influences and Positions on Stem Cell Research

	Conduct research (%)	Not destroy embryos (%)
Biggest influence on views and beliefs pertaining to stem cell research . . .		
Religious beliefs	7	52
Media	31	13
Education	28	12
Personal experience	16	9
Something else	11	8
Friends and family	5	5
Don't know	2	1
	100%	100%

Source: Pew Forum on Religion and Public Life. Findings released August 2005. http://pewforum.org/bioethics/

thought processes of non-supporters and are the single biggest factor influencing opinion across the board.

The contours of public opinion on stem cell research are clear. Stem cell research registers high in the public consciousness; there is a substantial divide between supporters and non-supporters; this divide is couched in moral language; and religious beliefs are absolutely central to understanding the sources of opinion difference. But why? Why is it that those who rely on religious beliefs are more apt to be against stem cell research? This finding at least suggests that those who rely so heavily on their religious beliefs when making up their mind on stem cell research are getting fundamentally different messages than those who rely on the media or their education to formulate opinion. We now take up this issue by summarizing the procedures involved in stem cell research and the corresponding discourses that surround these procedures as they relate to religion. This discussion makes clear that Catholic and evangelical religious traditions have taken the most prominent stance against stem cell research and typically understand the issue as one of protecting the sanctity of human life. Those immersed in these traditions are the most apt to be exposed to the debate on stem cell research as it relates to the moral status of the embryo.

STEM CELL RESEARCH: DOMINANT DISCOURSES, RELIGION, AND THE SCIENCE INVOLVED

The two dominant discourses operating in American politics regarding stem cell research have divergent views on using human embryos for deriving genetic material.[13] Given the importance of religious beliefs when individuals do not support stem cell research, it is not surprising that only one of these polarities is overtly religious. Indeed, only one utilizes direct references to God, scripture, and particular religious conceptions of human life. We focus on the two extremes in order to demonstrate how only one is consciously grounded in religious rhetoric, as this helps illuminate why those relying on their religious beliefs tend to oppose stem cell research.

Dominant Discourses: Polarities Emerge

At one end of the discourse on stem cell research is the view that all life is sacred and that one should never destroy a human being for the benefit of the other. This position assumes a deontological approach by advocating a moral stance noting that "the human individual called into existence by God and made in the divine image and likeness . . . must always be treated as an end in himself or herself, not merely as a means to other ends . . . "[14]

To kill the innocent deliberately is to violate the God-given privilege of re-creation.[15] Creating an embryo outside the human body is also problematic in this view, because it removes the role of parents in the marital relationship, a covenant sanctified by God.[16]

This polarity is closely associated with conservative Christian and evangelical traditions. The Christian Coalition notes that "if the federal government were to allow embryonic stem cell research it would be the first time that our government has declared that a non-consenting human being may be exploited and killed for experimental research purposes." Focus on the Family, which identifies itself as having strong claims to the evangelical community, states that embryonic stem cell research not only kills "the tiniest of human beings," but it violates the medical ethics of "do no harm." (Appendix 4.1 lists just some of the high profile groups associated with either tradition that have come out strongly against stem cell research.)

It is easy to see that the opposition to stem cell research arises from views regarding the sanctity of life and is closely tied to the politics surrounding abortion.[17] Allowing women to donate stem cells from aborted fetuses is thought to encourage abortion and create an "open market" that promotes abortions.[18] While there is a "desire to respect pluralism in a democratic society," this respect for pluralism "is not a morally valid basis for failing to protect the right of each member of the community" under this view.[19]

In sharp contrast to deontological viewpoints on the status of the human embryo, there are other individuals who articulate a developmental view of the embryo. This is the other extreme of the debate. Those in this arena typically view the zygote as not being individualized prior to day fourteen (a pre-embryo) and therefore "too rudimentary in structure [and] development to have moral status or interests in their own right."[20] To those upholding this view, a cost-benefit analysis clearly demonstrates that the potential health benefits of stem cell research far outweigh protecting unformed embryonic cells. Other religious groups, such as the Episcopal Church, note that it is the responsibility of religious individuals to "heal the afflicted."

These two polarities thus turn on the moral status of the embryo. On the one hand, prominent religious traditions equate the embryo with viable human life and oppose stem cell research. On the other hand, proponents typically focus on the many potential medical benefits emerging from stem cell research and do not equate the genetic materials used in the research with viable human life. Again, see Appendix 4.1 for variation within the religious views.

Linking these views to the science of embryonic stem cell research requires some nuts and bolts on the procedures involved. First the key terms:

- *Genes:* a functional unit of heredity located on a specific site on a chromosome. Genes make up specific sections of DNA, which serves as a building block for proteins.
- *Blastocyst:* usually a spherical structure produced by cleavage of a fertilized egg cell; consists of a single layer of cells surrounding a fluid-filled cavity called the blastocel.
- *DNA:* deoxyribonucleic acid, the building block of life, often referred to as the genetic code.
- *Stem Cell:* cells that have the ability to divide for indefinite periods of time in culture and which can give rise to specialized cells.
- *Pluripotent:* cells capable of giving rise to most tissues of an organism.
- *Totipotent:* cells that have unlimited capability. Cells that are referred to as being totipotent have the ability to specialize into a myriad of tissues, membranes, and organs.[21]

Stem cells have the ability to divide for indefinite periods of time into specialized cells. When a single cell is created through fertilization, either through natural means or artificially, this single cell is *totipotent*, meaning that its potential is total. For the first several days after fertilization, the cell continues to divide into identical totipotent cells. During this time period, this mass of totipotent cells could be separated manually or separated naturally and identical twins or identical triplets could be derived from the initial, single totipotent cell. After several cycles of cell divisions, which usually take 3–4 days, totipotent cells begin to specialize, forming a hollow sphere of cells called a *blastocyst*. The blastocyst, which derives from a *blastocel,* has a cluster of cells inside the outer ring referred to as the inner cell mass and an outer layer of cells separated from the inner cell mass by the hollow sphere.

The outer layer cells form the placenta and other tissues necessary for development. The inner cell mass forms most if not all of the tissues of the human body. It is important to note in light of the polarities regarding stem cell research that the inner cell mass on its own cannot create a complete organism because the necessary supporting tissue, derived from the outer cell layers, is not present. Thus, the inner cell mass is referred to as being pluripotent—they may give rise to many types of cells but not all the cells necessary for development. Because their potential is not total (they cannot form complete human structures), they are not referred to a totipotent, nor can they be referred to as being embryos. These pluripotent cells can, however, form specialized cells that have very specific functions. An example of a pluripotent stem cell would be a myocardial stem cell. This pluripotent cell generates the heart's cardiac cells.[22]

Presently, researchers have identified two successful methods of obtaining

pluripotent stem cells for research purposes. The first method involves directly removing the inner cell mass of human embryos at the blastocyst stage. Developed by Dr. James Thomson, this procedure utilized pluripotent stem cells from consenting donor couples who had discarded the *in vitro fertilized* (IVF) embryos following successful infertility treatments. Dr. Thomson isolated the inner cell mass, extracted the pluripotent cells and cultured a new pluripotent stem cell line in Petri dishes. For the religious pole on stem cell research, this procedure is problematic because of the fact that the pluripotent stem cells are derived from discarded embryos. Proponents, however, note that the cells harvested do not have the potential to become human.

In contrast to the IVF embryo procedure, Dr. John Gearhart obtained pluripotent stem cells from fetal tissue he obtained in terminated pregnancies (not IVF embryos). Dr. Gearhart isolated inner cell mass material from consenting adult(s) prior to termination of a pregnancy and extracted the blastocysts, generating a new strain of pluripotent stem cells. Removing inner cell mass for the creation of pluripotent new stem cell lines does prevent the embryo from being viable, but as others note, these cells are collected amongst consenting women receiving abortions.[23]

In keeping with the two discourses outlined, there is also considerable discussion of what promise pluripotent stem cell therapy may hold. Pharmaceutical companies and medical researchers argue they can experiment and conduct trials on new medicines in a quicker, more effective manner with pluripotent stem cells.[24] Research at crucial times of pluripotent stem cell division may also allow researchers to identify the factors involved in the cellular decision-making process that results in cell specialization. By knowing when, where, and how to "turn genes on and off," researchers may combat such medical conditions as cancer, leukemia, and birth defects.[25] Finally, pluripotent stem cells may be used in creating therapies which generate new cells and tissues. Pluripoent stem cells have the potential to develop into specialized cells replacing damaged cells and tissues. This discovery has far reaching implications for individuals needing donor organs, for patients suffering from diseases such as Alzheimer's and Parkinson's, as well as for stroke patients, burn victims, arthritis suffers, and those with Lou Gehrig's disease.[26]

The science of stem cell research thus provides fodder for both polarities of the dominant discourses on stem cell research. It is true that as individuals learn more about stem cell research they become more apt to favor it. Indeed, roughly two-thirds of those who had heard a lot about the issue (68 percent) believe it is more important to conduct stem cell research than not to destroy the potential life of embryos. That compares with 49 percent

of those who had heard a little about the issue and just a third of those who were unfamiliar with the debate over stem cell research.[27] However, this pattern does not hold so well for those who rely on their religious beliefs for formulating their views on stem cell research.

The puzzle in need of solving is thus complete: stem cell research is a highly visible and a contested political issue. The biggest division between everyday Americans who do and do not support it is whether or not their religious beliefs are the primary source from which they formulate their opinions. Investigation into the two polarities on stem cell research indicates that only one of them makes overt, direct references to religion as it related to the moral status of the procedures involved. The science of stem cell research offers these opponents evidence to support their views but also provides evidence to support the discourse that favors stem cell research and does not make direct religious appeals. Religion thus matters for stem cell opinion in everyday politics and in the cultural discourses surrounding stem cell research. Religion seems to be the fault line along which the stem cell debate divides. In the next section, we put this proposition to a more advanced empirical test by determining how, exactly, religion influences individuals' opinions on stem cell research. Our analysis recognizes there are many aspects of religious experiences and isolates those that are influential when it comes to opinions on stem cell research. We isolate those aspects of religious experiences that specifically activate and reinforce the fault line separating supporters and non-supporters of stem cell research.

USING THE DIMENSIONS OF RELIGIOSITY TO UNDERSTAND VIEWS ON STEM CELL RESEARCH

Religious values "are comprised of a highly complex nexus of human associations steeped in tradition and normative structures. These associations may be voluntary or non-voluntary, relatively large or small, formal or informal, highly institutionalized or loosely knit together."[28] For instance, religiosity may involve formal or informal affiliation with church groups or religious political organizations. It may also involve private and/or public activities such as church attendance, frequency of prayer, Bible/Koran/Torah reading, protest activity, etc. Piu-Yan Lam recognized these gradations (or dimensions of religiosity) and offered a formal operationalization of religiosity's four key components: the affiliative dimension, the participatory dimension, the theological dimension, and the devotional dimension. His subsequent work indicates *these four dimensions differentially influence the processes by which the private aspects of religion merge with the public activities of the religious individual.*[29]

In keeping with our effort to understand how (not just if) religiosity influences opinion on stem cell research, we test for the potential effect each of Lam's measures of religiosity has on stem cell opinion. Doing so determines what, precisely, it is about particular religious experiences that impacts opinion on stem cell research. Lam's dimensions of religiosity help us determine how it is that the macro-level religious perspectives translate and filter through to influence individual-level opinion.

Data, Methodology, and Findings

Our analysis utilizes Pew's "Religion and Public Life" 2002 survey. These data are advantageous as they include questions that operationalize each of Lam's four dimensions of religiosity (described below) and allow for results generalizable to the American population. Individuals were selected for inclusion in the survey via random generation of the last two digits of telephone numbers selected on the basis of area code, telephone exchange (first three digits of a seven-digit telephone number), and bank number (fourth and fifth digits). This ensured all listed and unlisted residential households were in the sampling frame and randomly selected for inclusion. This produced a sample of some 2002 respondents.

We present a series of cross-tabulations that examines the effect of the dimensions of religiosity that in turn may reasonably influence views on stem cell research. The main variable in each model is derived from a question that asked respondents if they supported stem cell research over not destroying human embryos. For researchers this is coded as a dichotomous variable where "yes" answers signify that the individual supports stem cell research (yes = 1, no = 0).

The explanatory variables in each table are those that operationalize Lam's four dimensions of religiosity. The first dimension of religiosity he delineates is the *affiliative dimension*—or simple identification with a particular religious tradition. This aspect of religiosity is what Tocqueville noted when he praised the value of religious groups in promoting civic engagement in the United States.[30] Evidence from the modern day tempers this excitement somewhat, as not all religious bodies promote civic engagement.[31] In light of these differences, Lam identifies five affiliative possibilities: Protestants, Catholics, Mormons, Jews, and others. We also add Evangelicals to the mix (operationalized by "yes" responses to the question of whether or not one has been "born again"). Given the religious links apparent in the anti-stem cell research discourse, we expect Catholics and Evangelicals to be more likely to oppose stem cell research.

Table 4.2 clearly demonstrates the role one's religious affiliation has as it

Table 4.2 Support for Stem Cell Research Based on the Religious Affiliation

Religious Affiliation	% Who Support	% Who Oppose
Protestants	58.1	41.9
Catholics	30.7	69.3
Jews	72.8	27.2
Mormons	28.6	71.4
Others	56.3	43.7
Born Again	33.3	66.7

Source: Pew Forum on Religion and Public Life.

pertains to views pertaining about stem cell research. Protestants, Jews, and those that identify as belonging to a religious faith in the "Other" category support stem cell research at a much higher rate than the other religious traditions/faiths. Jews overwhelmingly support the idea of stem cell research at a 3:1 rate while Protestants and Others support it at much closer margins. Not surprisingly, individuals who identify as being "born-again" do not support stem cell research at a 2:1 rate. Born-again Christians are traditionally thought of as belonging to the conservative spectrum of the Protestant movement, and as such these statistics further show a separation or chasm between the modern/liberal wing of the Protestant church and the conservative wing of the Protestant church in matters of social policy.

Catholics and Mormons do not support stem cell research—Catholics at a 2:1 opposition rate while Mormons are at a much higher opposition rate (72 percent opposed; 28 percent support). It is important to note that both Catholics and Mormons have strong hierarchical leadership structures and that this may affect their overall belief patterns.

These findings are not particularly surprising given the degree to which we have seen that the anti-stem cell research position is associated with the Catholic Church in dominant discourse, as well as the strongly anti-stem cell stance taken by many Catholic Church leaders and groups (Appendix 4.1). Their stance is consistent with the Magisterium of the Catholic Church, which in the encyclical *Evangelium Vitae* states "that from the first moment of its existence, the embryo must be guaranteed unconditional respect which is morally due to the human being in his or her totality and unity in body and spirit."[32] As predicted, those who identify as "evangelical" or "born again" are also less likely to support stem cell research when compared to those who do not identify as such. Here again we see that those churches associated with a strong stance against stem cell research tend to have parishioners who are more apt to take this position.

The second dimension of religiosity outlined by Lam recognizes that

identifying as a member of a specific religious tradition does not necessarily indicate the degree to which an individual prioritizes this tradition, and the social/political views it espouses, in their life. This is the *theological dimension* of religiosity. We examine the role this influence has on stem cell opinion by including a cross-tab analysis that assesses *one's belief that religion is important in their life.*[33] Inclusion of the theological dimension, however, begins the process of understanding how (not just whether) religion matters for the stem cell debate.

The findings from Table 4.3 show that as one's religion becomes more important in their life, their support for stem cell research diminishes. It is not just belonging to a particular religious tradition that influences opinion then. The degree of immersion matters tremendously, as there is a difference of 43.6 percentage points between those whose religion is important in their life and those who say religion is not important in their life as it pertains to their support for stem cell research.

Inclusion of Lam's *participatory dimension* of religiosity continues in this regard. Churches, synagogues, mosques, and other places of worship provide "networks for social relations"[34] where participation in sponsored activities can provide civic skills transferable to other arenas, like community volunteering.[35] Alternatively, participation in the activities of religious institutions may undermine participation in secular organizations."[36] The participatory dimension is measured using two bonding activities: frequency of attendance at religious services and volunteering within one's house of worship.

Within the participatory dimension of religiosity, results indicate that as attendance at religious services increases, support for embryonic stem cell research decreases (77.2 percent to 26.4 percent). Levels of involvement in religious activities also have an effect on support levels for embryonic stem cell research. This pattern suggests that it is the formal exposure to religious tenets (through religious services) coupled with the social networks that usually develop from volunteering in one's house of worship that impact

Table 4.3 Support for Stem Cell Research Based on Whether Religion Is Important in Your Life

Religion is	% Who Support	% Who Oppose
Very Important	39.7	60.3
Fairly Important	70.1	29.9
Not Very important	83.3	16.7

Source: Pew Forum on Religion and Public Life

Table 4.4 Support for Stem Cell Research Based on Attendance at Church Services

Attendance at Church . . .	% Who Support	% Who Oppose
More than once a week	22.8	77.2
Once a week	43.6	56.4
Once/twice a month	57.6	42.4
Few times a year	66.2	33.8
Seldom	73.0	27.0
Never	73.6	26.4

Source: Pew Forum on Religion and Public Life

policy views for stem cell research—those who indicated that they were very involved in their church opposed stem cell research by a 2:1 margin (66.0 percent to 33.1 percent).

Lam's fourth dimension of religiosity, *devotional,* highlights those religious activities undertaken in private and how these may affect views on public policy. Activities like reading the Bible, Koran, Torah or other holy book can certainly be done within the confines of a religious institution. When done in private though, these devotional activities are important "symbolic reinforcements" of individual religiosity that may exacerbate one's internalization of their religious institution's policy views.[37] By the same token, praying on a regular basis may "not necessarily reinforce one's religious values and motivate involvement in community activities and political participation."[38] To differentiate between these potential effects for views on stem cell research, we include a cross-tabs measure of how frequently an individual prays in the model that follows.

This final dimension had a measurable effect on support for embryonic stem cell research. As the frequency of praying increased, the overall support for stem cell research decreased. This has enormous implications on public policy and public opinion. It demonstrates that although praying is an ac-

Table 4.5 Support for Stem Cell Research Based on Church Involvement

Involvement in Church	% Who Support	% Who Oppose
Very involved	33.1	66.9
Somewhat involved	41.6	58.4
Not too involved	55.1	44.9
Not at all involved	65.3	34.7

Source: Pew Forum on Religion and Public Life

Table 4.6 Support for Stem Cell Research Based on Prayer Frequency

Prayer Frequency . . .	% Who Support	% Who Oppose
Several times a day	35.4	64.6
Once a day	54.0	46.0
Few times a week	55.6	44.4
Once a week or less	71.4	28.6
Never	87.1	12.9

Source: Pew Forum on Religion and Public Life

tivity performed by many who do not belong to a particular faith or tradition, it has an effect on public opinion for those that are religious regardless of their religious affiliation.

For those interested in exploring the correlations listed above, a multivariate analysis is included in Appendix 4.1 as Table 4.7. This analysis shows that these correlations hold with appropriate control variables in place. So, what can we conclude about this analysis, and what are the implications for the findings in Tables 4.1–4.7?

Stepping back, the overall pattern of results has at least two major implications. First, it is impossible to understand why mass publics so frequently take opposing views on stem cell research without looking to religion. Second, religion matters in very specific ways for stem cell opinion. Those who simply affiliate or identify as Catholic or Evangelical are substantially less apt to favor stem cell research. They are more apt to mirror the stated, and highly politicized, preferences of their church leaders in this regard. By contrast, those who affiliate with religious traditions who have not taken such defining views on the stem cell debate do not, on average, have their religious tradition influence their opinions on this issue. But there is substantially more to the story than the effect of just affiliating with a particular religious tradition. The more one attends any religious service, and the more important one reports religion is in their life, the less likely they are to support stem cell research. Devotional activities, like praying, and heavy involvement in the activities of one's house of worship (social or service) impact support for stem cell research as well. *This indicates that it is a combination of the doctrinal aspects of religious involvement as well as the more informal social networking and personal devotional activities that drive policy opinions as it pertains to stem cell research*. We now have answers to the question of how, exactly, religiosity influences opinion on stem cell research. It is through regular exposure to formal religious views and the prioritization of religion in one's life coupled with religious doctrine and

Table 4.7 Dimensions of Religiosity and Support for Stem Cell Research

	Beta	Standard Error	P > |z|	Exp (B)
Affiliation Dimension				
Catholics	**−.392**	**.174**	**.024**	**.676**
Mormons	−.977	.540	.070	.377
Jews	−.298	.277	.283	.743
Others	−.913	1.568	.560	.401
Control: *Protestants*				
Evangelical (Born Again)	**−.716**	**.170**	**.000**	**.489**
Theological Dimension				
Importance of Religion	**−.508**	**.205**	**.013**	**1.057**
Participatory Dimension				
Frequency of attendance	**−.412**	**.090**	**.000**	**.662**
Involved in Church	.055	.179	.758	1.057
Devotional Dimension				
Frequency of Prayer Ritual	−.059	.083	.473	.942
Other Variables				
Age	−.084	.223	.705	.919
Age^2	.019	.030	.530	1.019
Married	−.130	.153	.395	.878
Education	**.339**	**.080**	**.000**	**1.403**
African American	.286	.254	.260	1.331
Minority, Not African Am.	−.083	.345	.811	.921
Income	.030	.070	.663	1.031
Political Conservatism	**−.322**	**.087**	**.000**	**.724**
Female	−.054	.147	.711	.947
Constant	**2.983**	**.591**	**.000**	**19.747**
−2 log likelihood	1184.087			
Nagelkerke R-Square	.220			
N	2002			

Note: Binary Logistical Regression Analysis. All test results are for a two-tailed test. *Data Source:* Politics and Religion Survey. 2002. Pew Center for the People and the Press.

religious social networks or private activities that significantly impact views on stem cell research.

CONCLUSION

Religion has always played a central, if contested, role in American politics and public policy.[39] This chapter has examined how, exactly, religion matters in the debate surrounding stem cell research. We saw how the stem cell debate has moved firmly into the political consciousness of everyday Americans and its prominence in the defining political discourse of the day.

In both instances, the division between supporters and non-supporters of stem cell research is firmly rooted in religion. Non-supporters were substantially more likely to rely on their religious beliefs when formulating their views on the issue. Cross-tabulation analysis allowed for ascertaining precisely what dimensions of religiosity influence views on stem cell research. Affiliating as Catholic or Evangelical, regular attendance of church services, and the prioritization of religion were what mattered. Thus, it was the affiliation with religious traditions that took prominent stances against stem cell research and the formal, doctrinal aspects of religiosity that mattered for stem cell opinion. The social networks that develop out of volunteering in one's house of worship and the private activities taken to affirm one's faith or religious beliefs also play an important role in forming opinions about stem cell research. Our analysis thus makes clear that religion matters for public policy opinion and matters in specific ways associated with simple religious affiliation *as well as* internalization/exposure to the formal, doctrinal aspects of one's house of worship.

All this has very real implications for politics and public policy. For example, it is clear that statements noting that particular religious groups are apt to feel one way or another on a policy issue fall somewhat short. The story is often in how these groups came to feel differently, as this is where the political possibilities lie. As various religious denominations and groups galvanize around "matters as central as procreation, family, human identity formation, and the meaning of life and death," much of what many Americans "think and feel springs from . . . religious and spiritual sources."[40] A lesson from our analysis is that policy entrepreneurs attempting to mobilize these forces toward various sides of an issue would do well to frame their attempts in language that resonates with doctrinal aspects of the religious group they are targeting. It is not a foregone conclusion that doing so denotes moving to the "right" or "left" of the political spectrum. It does, however, suggest that mobilizing (or shifting) those who rely heavily on their religious beliefs for opinion formulation requires making salient the ways a particular policy position can be rectified with doctrinal aspects of particular religious traditions. There is room for multiple policy positions in these traditions. Our analysis simply indicates that these positions must be shown to resonate within church doctrines for a sizable percentage of the American populace.

This does not mean that secular voices should not be appealed to. Far from it. As Nagel argues, "in a democracy, the aim of the procedures of decision-making should be to secure results that can be acknowledged as legitimate by as wide a portion of the citizenry as possible."[41] This requires acknowledging an array of views—those that pull on secular as well as

religious traditions. Our analysis demonstrates how religion is far from a mere undercurrent in the stem cell debate and that doctrinal and affiliative aspects of religiosity are major divisions between supporters and non-supporters. Each merits voice and attention.

APPENDIX 4.1: GROUPS ASSOCIATED WITH VARIOUS RELIGIOUS TRADITIONS AND VIEWS ON STEM CELL RESEARCH

Against Stem Cell Research

Focus on the Family Focus on the Family opposes stem cell research using human embryos. They argue that in order for scientists to isolate and culture embryonic stem cells, a living, human embryo must be killed. It is never morally or ethically justified to kill one human being in order to benefit another. By requiring the destruction of embryos, the tiniest human beings, embryonic stem cell research violates the medical ethic of "Do No Harm."[42] Focus on the Family's mission is to cooperate with the Holy Spirit in sharing the Gospel of Jesus Christ with as many people as possible by nurturing and defending the God-ordained institution of the family and promoting biblical truths worldwide. As such, Focus on the Family has strong ties to the Christian evangelical movement.

Catholic Bishops The U.S. Conference of Catholic Bishops strongly opposes the destruction of embryos for medical research. Having called the August 2000 guidelines for destructive human embryo research immoral and illegal, the bishops excoriated President Bush's "accommodation" of destructive research already performed on existing embryonic stem-cell lines as "morally unacceptable" and urged him to "return to a principled stand." The bishops' position is based on the Church's commitment to preserving human life, which they believe occurs at the moment of conception.[43]

Christian Coalition The Christian Coalition contends that embryonic stem cell research is a violation of human rights. If the U.S. government were to place its stamp of approval on the destruction of living human embryos in order to obtain stem cells, it would be the first time that our government has declared that a non-consenting human being may be exploited and killed for experimental research purposes. The killing of human beings is never justified for research ends.[44] Christian Coalition of America is a political organization, made up of pro-family Americans who care deeply about becoming active citizens for the purpose of guaranteeing that government acts in ways that strengthen, rather than threaten, families. As

such, they work together with Christians of all denominations, as well as with other Americans who agree with their mission and ideals.[45]

Concerned Women for America Concerned Women for America objects to the process by which embryonic stem cells are obtained by killing embryos and argues that these embryos are too unstable to even begin human trials. They argue that we do not have to choose between curing lives and preserving lives of embryos; we can do both.[46] The mission of CWA is to protect and promote Biblical values among all citizens—first through prayer, then education, and finally by influencing our society—thereby reversing the decline in moral values in our nation.[47]

Southern Baptist Convention The Southern Baptist Convention is on record for its enduring, consistent, and vigorous opposition to 1) elective abortion, 2) the use of fetal tissues harvested from elective abortions for research, and 3) experimentation using human embryonic stem cells obtained from electively-aborted embryos.[48]

Greek Orthodox Archdiocese of America In vitro fertilization is looked upon with great doubt by the Greek Orthodox Archdiocese of America because present methods cause the destruction of numerous human fertilized ova and even developing fetuses; this is still a form of abortion. Genetic counseling and screening cannot be objected to in principle and in fact should be encouraged.[49]

For Stem Cell Research

Union of American Hebrew Congregations (Reform Jews) There is an emerging consensus of Reform Jewish authorities that tissue obtained from either therapeutic or spontaneous abortions may be used for purposes of life-saving or life-enhancing research and treatment. Jewish requirements that we use our God-given knowledge to heal people, together with the concept of *pikuach nefesh* (the primary responsibility to save human life, which overrides almost all other laws), has been used by Jewish legal authorities to justify a broad range of organ transplants and medical experimentation. These requirements likewise justify the use of fetal tissue transplants.[50]

Episcopal Church A task force reporting to the Episcopal Church's 2003 General Convention concluded that "it is in keeping with our call to heal the afflicted" to make use of embryos already held in fertility clinics, but took a "conservative and balanced approach," its chairman said, in stressing

that the task force "does not recommend that embryos be created for this research."[51]

NOTES

1. Rupert Cornwell, "Fear and Loathing on the Road to the White House," *The Independent*, July 19, 2004, available at www.independent.co.uk, Peter S. Canellos, "Stem-Cell Vote Blurs Religion Based Politics," *The Boston Globe*, November 9, 2004.

2. Matthew Most, "Michael J. Fox Records Ad for Cardin: Actor Questions Steele's Stance on Funding for Stem Cell Research," *The Washington Post*, October 24, 2004.

3. Ronald Cole-Turner, "Religion Meets Research," *God and the Embryo: Religious Voices on Stem Cells and Cloning* (Washington, D.C.: Georgetown University Press, 2003), 7.

4. Pui-Yan Lam, "As the Flocks Gather: How Religion Affects Voluntary Association Participation," *Journal for the Scientific Study of Religion* 41, no. 3 (2002): 405–22.

5. John Green and James Guth, "From Lambs to Sheep: Denominational Change and Political Behavior," in *Rediscovering the Religious Factor in American Politics* (Armonk, NY: M.E. Sharpe, 1996).

6. Cole-Turner, "Religion Meets Research," 7.

7. Ibid., 11.

8. "Is the Ban on Federal Funding of Human Stem Cell Research Justified?" in *Taking Sides: Clashing Views on Bioethical Issues* (Dubuque, IA: McGraw-Hill Co. 2007), 206.

9. President's Council on Bioethics, "Monitoring Stem Cell Research," in *Taking Sides: Clashing Views on Bioethical Issues* (Dubuque, IA: McGraw-Hill Co. 2007), 209.

10. President George Bush, *President Discusses Stem Cell Research*, Crawford, TX, August 9, 2001; available at http://www.whitehouse.gov/news/releases/2001/08/20010809–2.html.

11. The Pew Forum on Religion and Public Life, "A Fact Sheet," January 2007, available at http://pewforum.org/docs. Survey utilized random sampling procedures and thus can be generalized to the population.

12. William T. Gormley Jr., "Regulatory Issue Networks in a Federal System," *Polity* 18, no. 4 (Summer 1986): 595–620.

13. Miriam Brouillet and Leigh Turner, "Bioethics, Religion, and Democratic Deliberation: Policy Formation and Embryonic Stem Cell Research," *HEC Forum* 17, no. 1 (2005): 49–63.

14. Richard M. Doerflinger, "The Ethics of Funding Embryonic Stem Cell Research: A Catholic Viewpoint," *Kennedy Institute of Ethics Journal* 9 (1999): 138.

15. Gene Outka, "The Ethics of Stem Cell Research," in *God and the Embryo:*

Religious Voices on Stem Cells and Cloning, ed. Brent Waters and Ronald Cole-Turner (Washington, D.C.: Georgetown University Press, 2003).

16. President George Bush, "White House News Release," as printed in *God and the Embryo: Religious Voices on Stem Cells and Cloning* (Washington, D.C.: Georgetown University Press, 2003), 7.

17. Doerflinger, "The Ethics of Funding Embryonic Stem Cell Research," 137.

18. Steve Parker, "Bringing the Gospel of Life to American Jurisprudence: A Religious, Ethical and Philosophical Critique of Federal Funding for Stem Cell Research," *Journal of Contemporary Health Law* 7 (2002): 771.

19. Brouillet and Turner, "Bioethics, Religion, and Democratic Deliberation," 53.

20. John A. Robertson, "Ethics and Policy in Embryonic Stem Cell Research," *Kennedy Institute of Ethics Journal* 9, no. 2 (1999): 117–118.

21. Numerous articles present primers that explain and expand upon stem cell research terminology. For a closer examination visit the National Institutes of Health at http://stemcells.nih.gov.

22. For further information related to how stem cells are formed, see Michael Ruse and Christopher Pynes, *The Stem Cell Controversy: Debating the Issues* (Amherst, NY: Prometheus Books, 2003) or Michael Bellomo, *The Stem Cell Divide* (New York: AMACOM, 2006).

23. On January 12, 2007, researchers announced that they had obtained viable pluripotent stem cells from the embryonic fluid surrounding the embryo. If proven to be viable, this research generates a new area of interest for stem cell research. See http://www.msnbc.msn.com/id/16514457.

24. Brouillet and Turner, "Bioethics, Religion, and Democratic Deliberation," 51. See also, I.N. Rich, "In Vitro Hexatotoxicology Testing in Drug Development," *Current Opinion in Drug Discovery and Development* 6, no. 1 (2002): 159–163.

25. Brouillet and Turner, "Bioethics, Religion, and Democratic Deliberation," 53.

26. T.L. Limke, "Neural Stem Cells in Ageing Disease," *Journal of Cellular and Molecular Medicine* 6, no. 4 (2002): 475–496.

27. Pew Forum on Religion and Public Life, August 2005, available at www.pewforum.org/bioethics/.

28. Brent Waters, "What is the Appropriate Contribution of Religious Communities in the Public Debate on Embryonic Stem Cell Research," *God and the Embryo: Religious Voices on Stem Cells and Cloning* (Washington, D.C.: Georgetown University Press, 2003), 19.

29. Lam, "As the Flocks Gather," 405–422.

30. Alexis de Tocqueville, *Democracy in America* (New York: Alfred A. Knopf, [1840] 1945).

31. Green and Guth, "From Lambs to Sheep"; Brian Lazerwitz, "Membership in Voluntary Associations and Frequency of Church Attendance," *Journal for the Scientific Study of Religion* 2, no. 1 (1962): 74–84. See also Robert Stark and

Charles Glock, *American Piety: The Nature of Religious Commitment* (Berkeley, CA: University of California Press, 1968).

32. John Paul II, *Evangelium Vitae*, quoted in Steve Parker, "Bringing the Gospel of Life to American Jurisprudence: A Religious, Ethical and Philosophical Critique of Federal Funding for Stem Cell Research," *Journal of Contemporary Health Law* 7 (2002): 771.

33. This variable is identified as a variable that separates conservatism from liberalism in many of the religious traditions today.

34. James Wilson and T. Janoski, "The Contribution of Religion to Volunteer Work," *Sociology of Religion* 56, no. 2 (1995): 138.

35. Nancy Ammerman, "Organized Religion in a Voluntaristic Society," *Sociology of Religion* 58, no. 3 (1997): 202.

36. Lam, "As the Flocks Gather," 407.

37. L.D. Nelson and R.R. Dynes, "The Impact of Devotionalism and Attendance on Ordinary and Emergency Helping Behavior," *Journal for the Scientific Study of Religion* 15, no. 1 (1976): 52.

38. Lam, "As the Flocks Gather," 408.

39. Carla Messikomer, Renee Fox, and Judith Swazey, "Presence and Influence of Religion in American Bioethics," *Perspectives in Biology and Medicine* 44, no. 4 (2001): 505.

40. Harold Shapiro, "Ethical Considerations and Public Policy: A Ninety Day Exercise in Practical and Professional Ethics: Cloning Human Beings," *Science and Engineering Ethics* 5 (1999): 3–16; see also Messikomer et al., 501.

41. Thomas Nagel, "Moral Epistemology," in *Society's Choices* (Washington, D.C.: National Academy Press, 1995), 201–214.

42. Available at http://www.citizenlink.org/FOSI/bioethics/cloning/A000002295.cfm.

43. Available at http://www.americancatholic.org/News/StemCell/default.asp.

44. Available at http://www.cc.org/content.cfm?srch=stem+cell+research.

45. Available at http://www.cc.org/.

46. Available at http://www.cwfa.org/articledisplay.asp?id=6087&department=CWA&categoryid=life.

47. Available at http://www.cwfa.org/about.asp.

48. Available at http://www.sbcannualmeeting.org/sbc99/res7.htm.

49. Available at www.goarch.org.

50. Available at http://urj.org/index.cfm?.

51. Available at http://www.episcopalchurch.org/3654_75220_ENG_HTM.htm.

FURTHER READING

There are numerous recently published articles and books dealing with the relatively new public policy issue surrounding stem cell research. The President's Council on Bioethics offers numerous views on the experimentation issues surrounding stem cell research and can be accessed by visiting http://www.bioethics

.com. When you visit this site, make sure and read the report entitled "Monitoring Stem Cell Research" (January 2004). You can also visit the website of the International Society for Stem Cell research at http://www.isscr.org, which highlights opposing views of the stem cell debate and offers valuable insight into the moral and ethical debate of using embryonic stem cells for research purposes. An additional excellent reference for understanding the debates surrounding stem cell research is *Taking Sides: Clashing Views on Bioethical Issues*, Issue 12, "Is the Ban on Federal Funding of Human Stem Cell Research Justified?" (2004, McGraw-Hill Companies). Numerous scholarly journals are available that address the question of stem cell research, including the *Kennedy Institute of Ethics Journal* (March 2004) and the January-February 2006 issue of the *Hastings Center Report*, which contain a series of articles on questions related to stem cells. For views supporting the experimentation on and use of stem cells in medical research, see "Embryonic Stem Cell Research: An Ethical Justification," *Georgetown Law Journal* 90 (2002), and website for the Union of American Hebrew Congregations (Reform Jews) at http://urj.org/index and the website of the Episcopal Church at http://www.episcopalchurch.org.

For views opposing stem cell research, see the website for Focus on the Family (http://www.citizenlink.org) and the Christian Coalition (http://www.cc.org). See also "Are We Killing the Weak to Heal the Sick? Federally Funded Embryonic Stem Cell Research," in *Health Matrix: Journal of Law-Medicine* (Summer 2002).

5

Tracing Sanctuary and Illegal Immigration as a Church and State Issue

Samuel S. Stanton Jr.

On August 16, 2006, Elvira Arellano refused to comply with an order from the U.S. Office of Immigration and Customs Enforcement directing her to return to her home country—Mexico. Instead, she has taken sanctuary in Adalberto United Methodist Church in Chicago, Illinois, resurrecting memories of the Sanctuary Movement of the 1980s when churches sheltered undocumented aliens who they claimed should have been protected refugees from civil wars in El Salvador and Guatemala. Ms. Arellano, by her own admission, came to this country from Mexico to make a better life for herself.[1] She entered the country illegally in 1997 using false documents and was caught and returned to Mexico. She returned shortly with a different set of false documents and found work in Washington State—where she gave birth to her son, Saul (who is now 7 years old). Ms. Arellano moved to Chicago in 2000, took a job at O'Hare International Airport using false documents, and was arrested in 2002. Senators Durbin and Obama previously secured stays of deportation for Ms. Arellano, but they have expired. Both of these senators are now on record saying that Ms. Arellano must obey current immigration laws.[2] Her legal entry into this country aside, the case of Ms. Arellano has little in common with the provision of sanctuary for Central Americans fleeing violence in their countries of origin.

In the late 1970s and early 1980s, churches, primarily in the southwestern United States but supported by churches found in every region of the country, provided sanctuary to people from Central America and South America who entered the United States illegally. Unlike the case of Elvira Arellano, the majority of these recipients of sanctuary came to the United States seeking asylum as political refugees from the civil wars and violence that marked Central America and South America during that time period. But as in the case of Elvira Arellano, regarding the provision of sanctuary to illegal entrants to the country, hereafter referred to as illegal immigrants, most people in the United States are unaware of the history and philosophy of religious sanctuary.

So, what is this practice to which Ms. Arellano appeals? What place does it hold in the relations of church and state? To answer these questions, this chapter is organized in three sections. First, the definition of the current understanding of sanctuary is developed. This is done by examining the Judeo-Christian tradition regarding sanctuary by tracing the practice of sanctuary from its biblical inception to the present day. Particular attention is given in this section to understanding the current status of sanctuary as providing asylum. Second, consideration is given to how theories regarding the relationship between asylum/sanctuary and immigration should be applied by states. Third, this chapter examines how the practice and theory of sanctuary bring church and state into confrontation.

SANCTUARY

Biblical Roots

The biblical inception of sanctuary is found in the books of law attributed to Moses. In the book of Numbers, there are two passages in the 35th chapter that delineate the Jewish legal system's creation of sanctuary:

> Then you shall appoint cities to be cities of refuge for you; that the manslayer who kills any person accidentally may flee there. They shall be cities of refuge for you from the avenger, that the manslayer may not die until he stands before the congregation in judgment. And of the cities, which you give, you shall have six cities of refuge. You shall appoint three cities on this side of the Jordan, and three cities you shall appoint in the land of Canaan, which will be cities of refuge. These six cities shall be for refuge for the children of Israel, for the stranger, and for the sojourner among them, that anyone who kills a person accidentally may flee there.[3]

Sanctuary in its Biblical context is God's command to Moses to create safe havens for people fleeing from the commission of manslaughter. There

were specific limits on the location and number of havens to be provided for those who "killeth any person unawares." Traditional Judeo-Christian theological writing suggests that sanctuary, as described in Numbers, was to provide protection from vigilante justice.[4] The safety of these places was provided both for the citizens of Israel and for visitors in the country. But no distinction is made in the Biblical ideal of sanctuary between a legal visitor to the country and an illegal visitor to the country. There is a contextual understanding that visitors were family and relatives of people living in the country as subjects of the king, or that they were visitors in the country at the request of the king or his ministers. Anyone else in the country who did not declare their presence to the local authorities would be considered a spy—a livelihood punishable by death if caught.

Sanctuary is not, however, in its Biblical roots, protection from trial. A person found guilty of murder is still condemned to death. Also, as seen in the passage that follows, any person found guilty of manslaughter is forced to remain inside the boundaries of the city of refuge until the death of the current high priest, at which time the individual may return to their original home. At any time that the person seeking sanctuary left the city of refuge, a blood relative of the slain could kill the person without being guilty of murder.

> Then the congregation shall judge between the manslayer and the avenger of blood according to these judgments. So the congregation shall deliver the manslayer from the hand of the avenger of blood, and the congregation shall return him to the city of refuge where he had fled, and he shall remain there until the death of the high priest who was anointed with the holy oil. But if the manslayer at any time goes outside of the limits of the city of refuge where he fled, and the avenger of blood finds him outside of the limits of his city of refuge, and the avenger of blood kills the manslayer, he shall not be guilty of blood, because he should have remained in his city of refuge until the death of the high priest. But after the death of the high priest the manslayer may return to the land of his possession.[5]

Sanctuary applied in this standard does provide a form of punishment to a manslayer, namely, a form of house arrest. It is a punishment from which there is no reprieve and to which there is no end, except the death of the high priest. This form of punishment for the sanctuary seeker is repeated in historical uses of sanctuary and in no use prior to that in the United States during the last few decades was there any hope that the recipient of sanctuary might one day walk free among the population of the country without the death of a high priest, pope, or king.

Sanctuary in Historical Context

Sanctuary as we understand it in a more modern context is devoid of the scriptural references of Mosaic times. Instead, it is in reference to the inviolability of all things sacred in the Holy Roman Church. There is little record of the application of sanctuary during the first three centuries C.E. We do know that it was generally in use in the Holy Roman Church, and that it was applied by bishops of the Church. The problematic way in which the right of sanctuary was meted out by local bishops actually led Theodosius the Great to outlaw the practice in the late 390s C.E., but it was resurrected in the first decade of the fifth century.[6]

It was determined and accepted by Clovis I at the First Council of Orleans (511 C.E.) that refuge (sanctuary) could be claimed in a church or the ecclesiastical residences. This sanctuary was for adulterers, murderers, and thieves. Also, the right of sanctuary was to be given to fugitive slaves, with the stipulation that a slave be returned to his master if the master swore on the Bible not to treat the slave cruelly.[7] This decree gives a delineation of sanctuary above and beyond the strict application of it as given in the Jewish law.

The earliest mentions of the practice of sanctuary in England trace to the reign of King Ethelbert and his 600 C.E. codifications. The practice was very limited and very structured, demanding that the offender be within the sanctuary zone surrounding the church building prior to declaring sanctuary. Ethelbert's codifications required a claimant to sanctuary declare in detail the guilt of the crime for which sanctuary was sought within 40 days of entering sanctuary. A fee was paid to the church for sanctuary and after admitting guilt the claimant had to enter exile by traveling a prescribed route within a set (and brief) period of time to the nearest port city and never return to England. If after forty days you did not confess, you were handed over to the civil authorities.[8] Henry VIII limited the number of sanctuary cities in England to 7 in 1540 and in the same act limited it to murderers and felony level thievery. James I formally abolished sanctuary in England and English Common Law in 1623.[9] For the United States, this is an important factor to remember, as most of the laws and legal practices in the United States today trace their roots to English Common Law (with the notable exception of the state of Louisiana, which traces its legal system to the Napoleonic Codes).

Sanctuary in U.S. History

In the United States, sanctuary as an organized practice prior to the 1900s finds it roots in the abolitionist movement. It was a means of smug-

gling escaped slaves into free states or out of the United States entirely. The religious aspect of this practice was exemplified by the involvement of the Society of Friends, or Quakers. Pennsylvania as a colony was formed to provide a sanctuary (safe haven) for Quakers, and Quakers have been deeply involved in every Sanctuary Movement in the United States. This participation by members of a church represents a direct link between the practice of religion by members of a church and violation of laws of this country. With the passage of the Thirteenth Amendment to the Constitution in 1865, slavery was abolished in the United States. The organized practice of sanctuary as a means of protecting and promoting the freedom of slaves was no longer necessary.

Sanctuary in the United States in its early practice became the protection not of adulterers, murderers, and thieves, as it was in England, but the protection of the freedom and liberty of individuals. It also became a movement in opposition to the legal system of the country and not a surrogate part of the legal system by common practice. Where sanctuary before had meant the harboring of fugitives with justice to be applied by trial in the church or by admission of guilt by the fugitive and punishment meted by the church, in the United States it has become the harboring of fugitives from the sanction of law. Or, as argued by the defendants in the most renowned case dealing with sanctuary in the United States in the last 30 years, sanctuary has become the enforcement of laws by the people when the state has failed in its duty.[10] Clearly, sanctuary in the United States as currently practiced is tied to the idea of the status of individuals seeking asylum in this country.

Before examining the specifics of the Sanctuary Movement in the southwestern United States and its current resurrection in connection with illegal immigration issues, it is necessary to look at how the practice of sanctuary came to be tied to the question of political asylum. The first subject to be addressed is what is political asylum? It is also necessary to address theoretically how states make determinations about the application of political asylum—which in turn better allows us to understand the decision of churches and their members to offer sanctuary in violation of the laws of the United States.

Sanctuary and Asylum, International Law

During the first half of the twentieth century, violent conflicts and political issues that arose in many areas of the world caused the displacement of many people. The League of Nations did what it could to provide ad hoc answers and negotiate solutions to specific situations, but no

general definition of refugee was created, nor was a standardized procedure adopted for handling refugees. The contemporary understanding of sanctuary, namely as a form of asylum, finds its roots in the post WWII development of the Cold War. It is a natural continuation both in language and practice to apply the idea of hosting refugees as providing a sanctuary for them.

In July 1951, the Convention Relating to the Status of Refugees was adopted by a special United Nations Conference.[11] Drafted between 1948 and 1951, and involving the participation of 26 states, it gave the first general definition of refugee. Additionally, it lists five reasons to consider a person as a refugee—race, religion, nationality, social group membership, and political opinion. If such categories were reason for a person to have a well-grounded fear of being subject to serious harm if they returned to their state of origin, then they could seek sanctuary in a foreign land.[12] The 1951 Convention also provides a guarantee of not returning a refugee to their country of origin if doing so would subject them to persecution.[13] One shortcoming of the 1951 Convention is that it limited the status of refugees to persons who feared for their well being because of events prior to January 1, 1951. Anyone seeking refuge for an event after that date was not covered by the UN Convention. In 1967 a Protocol was adopted, affirming the primary details of the 1951 Convention but eliminating the time constraints, making refugee status universally applicable regardless of the date of the event. As of 2005, over 140 states have signed the Convention and Protocol.[14]

We must recognize that some serious limitations exist pursuant to the Convention and Protocol. First, the fact is that refugee status is limited to the civil and political status of an individual caused by race, religious affiliation, national origin, membership in a social group, or expressed political opinion. There is no concern for the quality of life expressed in the legal definition of a refugee. What if events simply overtake a person, forcing this person to flee their country of origin, not because of some classification, but because natural and man-made disasters occur? By the language of the Convention and Protocol this person has no claim to refugee status. What this means is that a person fleeing a civil war does not have the right of refugee status unless they can demonstrate successfully that fitting into one of five categories provides a well-founded fear that they will be persecuted if returned to their country of origin. This is not readily demonstrable in most cases. It also means that simply wanting a better life is not cause for granting refugee status to individuals.

The second limitation that we must recognize is that the Convention and Protocol make individual states responsible for determining if a person

qualifies under the provisions of the Convention to be considered a refugee. There is no international right of immigration or to refugee status. This is in keeping with the idea that no supra-national government exists that can dictate behavior to states. States themselves are responsible for maintaining the international system, according to realist theories. Many competing theories of international relations attribute to non-state actors in the system equal or partial responsibility along side states for maintaining the international system. Examples of those non-state actors include civic/social organizations (churches, interest groups, non-governmental organizations).

However imperfect and arguable the Convention and Protocol are, they remain the authoritative source for most states trying to determine refugee status.[15] It is these definitions that are employed in U.S. laws regarding the status of refugees and immigration. In bringing sanctuary back to the foreground of issues in the United States, it is opposition to the application of the 1980 U.S. Refugee Act that led many people to participate in the Sanctuary Movement of the 1980s prominent in the southwestern United States.

The United States obligated itself to recognize valid claims for asylum (refugee status) as a signatory to the Convention and Protocol. This commitment was codified by the passage of the Refugee Act of 1980 and further affirmed and developed in the U.S. Immigration and Nationality Act (1996). No fewer than three U.S. offices in 3 different departments take part in determining refugee status, proper procedure in application, and resettlement of refugees in the United States.[16] Figures available through the United Nations High Commissioner for Refugees (UNHCR) office show that the United States accepts more refugees seeking asylum than any other country in the world and that the United States is the number one destination for general immigration as well.[17]

THEORIES

Security and Economics

There are two primary theoretical sides to the issue of admitting immigrants and refugees into a country. One side argues that the state (government) of a country must consider the general welfare of its own population as its top priority. The other believes that the primary duty of all mankind is to be humanitarian to all people and that by extension so should the state act in as humanitarian a manner as possible.

Myron Weiner correctly points out that migration creates security and policy issues for states.[18] Consider the fact that Palestinian immigrants in

Kuwait collaborated with Iraqi forces in 1990. Consider also that the United Kingdom feared that an influx of Vietnamese refugees in the mid- to late-1970s would jeopardize the security of Hong Kong and ordered them returned to Vietnam despite international protest. In the current world climate, with its robust fear of terrorism, it must be recognized that when a state's security is at stake, it is easily justifiable to create preferences in admissions policy for immigrants and refugees.

But all admissions policies cannot be predicated on fear and security. After all, not even the current executive branch of the U.S. government considers all states to be progenitors of future terrorists. In fact, most admissions of immigrants into the United States are based on economic concerns. Both concerns for those less fortunate than our average citizens and concerns for the employment needs of U.S.-based firms affect government decision-making in regard to target immigration numbers. It also affects the type of immigrant that is targeted. Most immigrant visas granted today are issued for people seeking to work in technologically-advanced fields of industry and in the public healthcare sector of the U.S. economy.

There is widespread recognition that globalization and free trade are not beneficial to all people. Some people gain; others lose. The losers are often disadvantaged minorities within their country of origin. These people are compelled by economic conditions to seek a better situation. Often that better situation will only be available to them in another country. But what about that receiving country? Can the receiving country support the influx of migrants?

Citizens of countries such as the United States, in which the state takes responsibility for provisions of services and resources to all or portions of the population, must recognize the economic cost associated with acceptance of immigrants. By accepting refugees in the United States, we accept them into a society that provides more service and infrastructure at no cost or reduced cost to individual users than most countries in the world. To what extent can states afford to keep offering these benefits when increasingly large parts of populations may not be providing revenue for state action? One reason a state sets limits upon immigration is the recognition of the costs of assimilating those people into the society.

In fact, any state that opens its borders readily to immigration "might soon find other states taking advantage of its beneficent policy."[19] Many states are perfectly willing to allow parts of their population to leave if it means financial savings for the state. If a neighboring state is lax in immigration control or readily admitting large numbers of immigrants, it is not unheard of for a state to encourage citizens to consider migrating. Not all

decisions, however, are based on bureaucratic and economic judgment; many are made based on political and moral bases.

In dealing with the question of granting refugee status to individuals or to groups, a state is making a moral and political judgment. Given the Convention and Protocol definition of who qualifies as a refugee, making that decision means passing judgment against another state. When the U.S. government grants asylum to a Cuban, saying that this person can reasonably expect to be persecuted for political opinion if they return to Cuba, a statement is being made on behalf of all citizens of this country about Cuba's government. On the public's behalf, the government is saying that another sovereign state is mistreating its own citizens. This is a strong statement to make, and it implies strong criticism of the state in the refugees' country of origin.

When State A declares asylum for citizens of State B, State B will most often see this as interference in their internal matters. State A is after all saying that State B has mistreated or might mistreat these citizens if they are returned to their nation of origin. The long-term effects of such blatant statements about the moral, ethical, and sovereign behavior of State B can be politically taxing. Consider too that most refugees receive asylum in openly democratic states that allow them to speak out against the state in their country of origin. Do citizens of State A really support the overthrow of the government of State B? This will appear to State B to be affirmed when those granted asylum speak out openly and loudly against their homeland.

Immigration and asylum policy considered in this light is inherently a political decision. It is not made out of concern for all people in the world, but out of concern for the quality of life of citizens in this country. A government that represents its citizens must first and foremost make decisions about how to best protect those citizens. Secondly, this government must make decisions about how to promote the economic well being of the greatest number of its citizens. All decisions of immigration and asylum must consider how it will affect the security of the country and the economy of the country, which are understood as the primary responsibilities of modern states.

In a globalized world, a great deal of the security and economy of the country is tied to foreign trade, investment, security arrangements, and so on. This requires a country to be extremely cautious in making moral and political judgments regarding any other country. It also means that asylum and immigration policies are tied to foreign policy goals, affecting from which areas of the world and from which specific countries of the world governments will accept people.

Equality and Human Rights

Opposed to the idea that states must be concerned about implications made about the quality of other states is the support for open immigration as a means of providing the best quality of life for the most people. The fact that some people lose and others gain from globalization and free trade is a show of the inequalities of life. According to John Rawls' difference principle, these inequalities should be acceptable only if they ultimately benefit those who are least well off.[20] Joseph Carens takes this even further by pointing out that it is only a matter of chance that people are born in democratic, peaceful, prosperous countries versus being born in poor, authoritarian, conflict-torn countries.[21] The great necessity addressed by immigration is providing a better quality of life to a maximum number of people. The overriding question is as follows: is it more moral to preserve a particular way of life or to promote the welfare of every individual of the human race?

Andrew Shacknove argues that a claim to refugee status exists whenever a state does not protect the basic needs of citizens.[22] This is a moralistic and a very broad claim. What are the basic needs of citizens? Does this include a job? Does a government owe a person protection of their employment? Does this mean protection of access to fresh water (a necessity for life) and arable land (needed to grow food or raise livestock)? Human rights activists claim that any discrimination against human rights is grounds for asylum. Liberal democracies thus ought to admit all individuals whose human rights are violated by the own governments. But what are human rights? Does government have a right to put limitations on things that are generally considered rights by most people? For instance, does a government have a right to impose a one child per family limit? Is this a violation of human rights that should cause the states to give asylum to any family asking for protection on grounds of desiring to have two or more children? Should a country grant asylum to a man from Brazil because he is openly homosexual and in Brazil the society rejects this behavior and the government does not openly protect him from social derision? In the end, it would still be a government decision as to what human rights are basic and justify granting asylum if violated.

Egalitarian arguments dismiss the notion of community as an impediment to a just world. The predominant idea is distributive justice. Proponents of this ideal argue that we should not consider immigration's impact on welfare, employment, educational benefits, healthcare, the environment, and community relations. Instead, we must make life as quality as possible

for the most people regardless of political and economic costs to individual states. This is not just a humanitarian act, it is a moral imperative.

Further complicating a simple understanding of state-centric versus open border arguments surrounding asylum is the question of whether or not sovereignty resides on more than one level. Previously, I discussed sovereignty in relation to the actions of the state in pursuit of a range of policies that are designed to maximize the outcomes for the population represented while protecting the right of a government to determine what is best in dealing with its own citizens free from encroachment by foreign powers. However, another matter to be decided is whether sovereignty is held at multiple levels within a country.

Federalism

A final theoretical consideration is based on federalism. Federalism represents power sharing between more than one level of government in a country. In the United States, this refers to cities and counties (local government), states, and the federal or U.S. national government. Which of these is sovereign? Based on the U.S. Constitution and numerous court decisions, in the United States federal laws are the supreme law of the land. State and local laws may add to federal law but cannot take away or negate sections of federal law. In this legalistic sense, sovereignty ultimately rests with the federal government.

Recent scholarship seeks to challenge this idea. Randy Lippert examines sanctuary cases in Canada and applies a definition of sovereignty existing within multiple spheres.[23] Sovereignty is held as the ability to coerce and the ability to make and suspend laws. Lippert argues that this is exactly what churches did in Canada and in the United States by offering sanctuary, because the churches did not have to offer sanctuary and could remove sanctuary at any time of their choosing. Also, the churches were seeking to coerce the government to take action.[24]

At its fullest extent, this reasoning leads us to ask the question of who determines the sovereignty of the government and/or other actors within a country? As the source of ultimate authority for the Constitution and for the government that it creates, are the citizens of the United States the last arbiters in determining where sovereignty resides? The argument can be made to favor this position for the population. However, as mentioned before, there are legal and historical precedents that dispute this argument. Nevertheless, this line of reasoning is alive and well for some Christians in the United States. The next section of this chapter will explore in more

detail the Sanctuary Movement of the 1980s and the modern progeny of this movement—namely, the offering of sanctuary to illegal immigrants who are facing expulsion after legal decisions have been rendered.

SANCTUARY, REDUX

The 1980s Sanctuary Movement

As previously mentioned, in 1980 the U.S. government enacted a policy regarding refugees and resettlement of the same within the United States based on following the principles of the UN Convention and Protocol. The act was to systematically create a process by which a target number of refugees as recognized by the Convention and Protocol would be admitted into the United States and be given official asylum or sanctuary.

In November 1980, Ronald Reagan was elected President of the United States, bringing to office a conservative outlook that included tougher measures to defeat Communism throughout the world. One area of the globe where the growth of Communism was of particular concern to President Reagan was Central America. The decision was made to support right-leaning and conservative governments in Central America economically and militarily where they were engaged in often violent conflict with portions of their populations that advocated socialist and communist ideals.

As a political matter, this meant that the U.S. government could not make negative statements about these governments in regard to their treatment of their populations. In realistic perspective, if the U.S. government had made a negative statement about one of these governments it could have caused that government to fall and the fears existed in this Cold War era that if a conservative government fell, it would be replaced with a socialist or communist government. In this vein of reasoning, a decision was made to deny most asylum applications from this region.

In truth, some of the asylum seekers were true refugees as defined by the Convention and Protocol. They had well founded fear of persecution if they returned to their countries of origin based on race, religion, nationality, social group membership, and political opinion. In criticism of the policy adopted by the Reagan Administration, several churches and individuals began in the early 1980s to create an underground network to bring people from these Central American countries illegally across the U.S.-Mexico border and provide them with "sanctuary" in their churches and in their homes. It became a classic clash between church and state over "who and what interests defined U.S. sovereignty."[25]

James A. Corbett and Rev. John Fife, pastor of Southside Presbyterian

Church (Presbyterian Church United States of America), are recognized as the co-founders of the Sanctuary Movement of the 1980s in the southwestern United States. Corbett, who passed away in early August 2001, is credited with having personally guided hundreds of Salvadorans and Guatemalans from Mexico to Tucson.[26] Fife stated in 2001 that Corbett was "the intellectual and spiritual architect of the Sanctuary Movement."[27] Both Corbett and Fife have stated that what they were doing was the ethical thing to do, because the United States was not accepting Central American refugees.

The Sanctuary Movement was contested among churches and among church leaders. Obvious questions arose over the religious correctness of liberation theology, as well as the proper role for churches in contesting laws.[28] Liberation theology emphasizes Jesus Christ as the redeemer and goes further to proclaim Jesus Christ as the liberator of the oppressed. In its inception this theology was predominantly fostered in the Roman Catholic Church and primarily in Central America and South America. Ironically, Pope John Paul II admonished such teachings and led to it being curtailed. However, among liberal theological circles, it finds a greater place in what they interpret as social justice as taught in scripture. This position is one of many points of theological controversy that still exists among Christian denominations to this day.

On March 24, 1982, a dozen congregations—primarily in southern Arizona—declared themselves open sanctuaries for illegal immigrants seeking asylum in the United States. While the fact that it was church-based gets most of the attention regarding the Sanctuary Movement, we must not ignore the fact that it was very politically motivated. Robert Tomsho, an apologist for the movement, writes that the "political goals of sanctuary were never clandestine. The movement was not smuggling refugees merely to satisfy religious commandments or provide the press with a few good headlines . . . the movement hoped to persuade Americans to reconsider their government's support of regimes the refugees were fleeing."[29]

Tomsho's assessment is echoed in statements made in 2002 by Fife, who stated in 2002 that it was gratifying to see that the movement "seems to have been a significant moment in the whole history of human rights and refugee rights."[30] It was even reasoned by some of those involved in the movement that they were actually enforcing United States law that the government was failing to enforce, and should therefore not be considered in violation of the law. Indeed, the term civil initiative was used to express the actions of the movement to recognize that they were carrying out existing law. This differs from civil disobedience, which means to disobey law that is determined to be morally reprehensible by individuals.[31]

More than 40 churches gave sanctuary to illegal aliens from Central America during the height of the movement. According to one report, "some church leaders say the churches are taking a humanitarian stand and calling attention to what they consider the unfair application of the Refugee Act of 1980."[32] Among those churches in the United States that extended sanctuary to refugees were congregations from a wide range of denominations, including American Baptist, Episcopalian, Lutheran (ELCA), Mennonite, Methodist, Presbyterian (PCUSA), Quaker, and Roman Catholic.[33]

The response of the political authorities was twofold. First, the government made regular statements to point out that no right of sanctuary was recognized by the United States. The second was to begin investigating and collecting information regarding the exact activities of members of the movement. The second area represented active infiltration of the churches involved by informants and actual agents of the U.S. government. Reagan administration officials defended the "indictments of American church workers—and the use of infiltrators with concealed tape recorders—as part of their obligation to pursue people suspected of breaking laws concerning illegal aliens."[34]

Does the infiltration of a church by government agents represent a violation of the separation of church and state? Do individuals have the right to contest the source of a state's sovereignty? Do individuals have the right to carry out law for the government? In *United States v. Aguilar* (1986), pretrial motions and the decision of the case found the answers to these questions to all be no. The government sees it as no infringement on the activities of a church for a government representative to participate and report on those activities.

However, the defendants certainly felt otherwise. Stephen Cooper, attorney for two church workers who faced trial in Texas for harboring and smuggling illegal aliens stated, "I do see it as church versus state, but in a very much different way than we normally see church versus state. I can't remember any time in the past when the Government has tried to invade the churches, tried to tell the churches they can't do things that have always been recognized as within the province of the churches, tried to turn church people into criminals for nonviolent behavior."[35]

It is an intriguing proposition. The church and Christians are to be honest, open, and truthful according to teachings of the Bible. But a certain amount of secrecy was required by the Sanctuary Movement. This is one of the many points of disagreement between congregations that were supportive of the Sanctuary Movement and those who opposed it. In the words of one Southern Baptist minister, "I could not support such interpretation of scripture and Christian duty that would require me to be dishonest to

the authorities. But it remains my dilemma to consider how to serve God and assist those in need as scripture teaches and not violate the laws of this country, which tell me to report and turn-in illegal aliens."[36]

The ruling in the *Aguilar* case was that sanctuary was not a matter of religious practice, since millions of Christians never engage in it and openly oppose it. Since the practice of sanctuary is not a religious practice, but a political practice, infiltration of the Sanctuary Movement was not infiltrating a church.

Interestingly, the insistence that they were carrying out the law for the state smacks of vigilante justice. Protection from vigilante justice appears to have been one of the important reasons for the creation of sanctuary in the first place. This is the most ironic aspect of the modern movement: it seeks to give sanctuary, which is supposed to protect people from vigilante justice, by way of exercising vigilante justice.

In the sanctuary debate, the sticking point for Christians is that Christianity teaches both obedience to authority as well as kindness and humanitarianism. Which of these is to be the guiding principle for behavior? Many denominations teach that the Bible is infallible and the ultimate source of authority. For the members of these churches, the answer to the question is the conundrum of both obedience to authority and human kindness, though it's not always clear how this works out. More liberal churches teach that the Bible needs to be interpreted in a more socially relevant manner. For members of these churches and adherents of their theological offering, it is more difficult to both obey the law and follow through with teachings of social justice—which they see as often contradictory.

The Current Sanctuary Movement

The government of the United States remains adamant that no right to sanctuary exists. The modern version of sanctuary is more concerned with distributive justice and humanitarian values than with legal and political questions concerning refugee status. Rather, contemporary practitioners of sanctuary focus on stories like that of Elvira Arellano related in the opening of this chapter.

Modern sanctuary does not care that Arellano openly admits she came here to find a better life, meaning economic opportunity. In this regard, the modern movement is more tied to the open borders philosophy than the movement was in the 1980s. She has become a celebrity for the new movement to support. *Time* named her as one of the "People Who Mattered in 2006."[37]

Statements made by Arellano's supporters say nothing about any fear of

persecution if she is returned to Mexico. Most of them focus on the fact that her son Saul was born in the United States and as such is guaranteed United States citizenship. Pastor Walter Coleman said his congregation offered Arellano refuge after praying about her plight. Coleman said he does not believe Arellano should have to choose between leaving her son behind or removing him from his home. "She represents the voice of the undocumented, and we think it's our obligation, our responsibility, to make a stage for that voice to be heard," he said.[38]

The government's statements in regard to Ms. Arellano sound the same as their statements regarding Central Americans denied their asylum petitions in the 1980s. In fact, the government has said it has every right to enter the Adalberto United Methodist Church and arrest her and will do so "at a time of their choosing."[39] In response to the government's position, Arellano has said, "If Homeland Security chooses to send agents to a holy place, I would know that God wants me to serve as an example of the hatred and hypocrisy of the current administration."[40]

DILEMMA

The remarks of this paper have been confined to sanctuary and illegal immigration as a church and state issue for Christians, largely because Christian churches predominate the religious landscape of the United States. Furthermore, the Sanctuary Movement in the 1970s and 1980s involved Christian churches, as does the revived movement in the first decade of the second millennium. That is not to say that there are no other religious institutions recognized in the United States for whom this is also an issue. Based on the premises of their belief systems, it is highly probable that this becomes an issue for Buddhist and Hindus. It would be less of an issue for stalwart Muslims for whom there is little or no separation between church and state.

Sanctuary is humanitarian. Christianity recognizes a necessary duty to preserve and defend human life and an adherence to a belief system that routinely suggests provision of aid to those in need. If people are unable to provide for the protection of their own life, sanctuary should be provided for them. This was evidenced in the movement of the 1970s and 1980s, where the concern for the physical safety of the illegal immigrants in question was repeatedly voiced.

Sanctuary is also political. The Sanctuary Movement in 1980s was a political confrontation with President Reagan's anti-communist Central American policy. Reagan policy supported governments with abysmal human rights records on the basis that these governments were at least not

communist. Sanctuary providers were challenging the legality of supporting human rights abusers in the name of fighting Communism. While good humanitarian assistance was offered, would the same assistance have been offered under different political circumstances? Remember that most sanctuary declarations included a statement that the actions were taken because of the illegal and immoral policy of the U.S. government concerning Central America. If it were truly about the moral issues of the preservation and sanctity of life, why would it be necessary to include a statement concerning the legality of U.S. policy in Central America? That it is political is certainly evidenced in the case of Elvira Arellano, where no concern exists for her safety, but plenty of concern is voiced over her possible deportation and the status of her son, Saul.

But is it really a matter of church and state relations? It is when certain churches and congregations choose to make it an issue. The state certainly has shown that it does not recognize it as a church/state issue. But the delay in violating the Adalberto United Methodist Church to seize Arellano suggests that they recognize that the image of federal agents forcibly entering a house of worship makes many Americans uncomfortable. However, some denominations continue to issue proclamations that they will support sanctuary and disobedience of the laws of the United States in answering to a higher calling.[41] Most churches have taken an approach that says illegal immigration is a problem that needs to be dealt with humanely and legally, but not in a manner that penalizes people for acting on Christian values.

POSTSCRIPT

On August 19, 2007, while this book was in process, Elvira Arellano, the face of the modern sanctuary movement, was arrested in Los Angeles, CA, and deported to Tijuana, Mexico. Arellano had decided to leave sanctuary in Chicago to lobby U.S. lawmakers. She was arrested outside of a church in Los Angeles where she had just spoken. Arellano has decided to send her son to live in Chicago with his godmother, so he can attend school, despite her claims that she did not want to be separated from her son.

NOTES

1. Notes from speech by Elvira Arellano given at the University of Wisconsin-Stevens Point on May 3, 2006. Ms. Arellano spoke in Spanish throughout the presentation and the notes are based on interpretation by an unnamed associate at the event.

2. P.J. Huffstutter, "Sanctuary Movement Still Has a Heartbeat," *Los Angeles Times*, Nov. 24, 2006, Home Edition.

3. Numbers 35: 11–15, *Bible*, New King James Version.

4. One such theological discussion can be found in the Matthew Henry Complete Commentaries. The commentaries are available online and this particular passage of the *Bible* are archived at: http://bible.crosswalk.com/Commentaries/MatthewHenryComplete/mhc-com.cgi?book=nu&chapter=035

5. Numbers 35: 24–28, in *Bible*, New King James Version.

6. "The Sanctuary," *Luminarium Encyclopedia*, available at http://www.luminarium.org.

7. "Councils of Orleans," *Catholic Encyclopedias*, available at http://www.newadvent.org

8. Numbers 35: 24–28, in *Bible*, New King James Version.

9. Ibid.

10. Susan Biber Coutin, "Smugglers of Samaritans in Tucson, AZ: Producing and Contesting Legal Truth," *American Ethnologist* 22, no. 3 (August 1995): 549–71. See also pretrial motions in *United States v. Aguilar* (1986), no. CR-85–008-PHX-EHC (D. Ariz).

11. John Vrachnas et al, *Migration and Refugee Law* (New York: Cambridge University Press, 2005), 173.

12. Article 1A (2), *Convention Relating to the Status of Refugees* (1951).

13. Article 33, *Convention Relating to the Status of Refugees* (1951).

14. John Vrachnas, *Migration and Refugee Law*. 174.

15. I say most states because in 1969 the Organization of African Unity (OAU) adopted a broader definition of refugee applicable to its member states. Also, the 1984 Cartagena Declaration incorporates a definition similar to that of the OAU signed by many Latin American states. John Vrachnas, *Migration and Refugee Law*, 173.

16. The Office of Refugee Resettlement (Department of Health and Human Services), Bureau of Population, Refugees, and Migration (Department of State), and Citizenship and Immigration Services (Department of Homeland Security).

17. Available at http://www.unhcr.org.

18. Myron Weiner, "Security, Stability and International Migration," in *International Migration and Security*, ed. Myron Weiner (Boulder, CO: Westview Press, 1993).

19. Myron Weiner, "Ethics, National Sovereignty and the Control of Immigration," *International Migration Review* 30, no. 1 (Special Issue: Ethics, Migration, and Global Stewardship) (Spring 1996): 173.

20. This idea emanates from Rawls' "difference principle," which is the primary basis for much of social justice theory among human rights scholars. John Rawls, *A Theory of Social Justice* (Cambridge, MA: Harvard University Press, 1971).

21. Jospeh Carens, "Aliens and Citizens, the Case for Open Borders," *The Review of Politics* 49, no. 2 (Spring 1987): 261.

22. Andrew Shacknove, "Who is a Refugee?" *Ethics* 95 (1985): 274–284.

23. Randy K. Lippert, *Sanctuary, Sovereignty, Sacrifice: Canadian Sanctuary Incidents, Power and Law* (Vancouver: UBC Press, 2005).

24. Ibid., 69–74.

25. Hillary Cunningham, "Sanctuary and Sovereignty: Church and State Along the U.S.-Mexico Border," *Journal of Church and State* 40, no. 2 (Spring 1998): 370–86. Quote on 370.

26. "Sanctuary Movement Co-Founder Dies," *Associated Press State and Local Wire*, August 7, 2001, BC Cycle.

27. Ibid.

28. Renny Golden and Michael McConnel discuss the contest and the eventual size and scope of the Sanctuary Movement in *Sanctuary: The New Underground Railroad* (Maryknoll, NY: Orbis Books, 1986). Eventually the movement involved approximately 70,000 members. William K. Tabb, *Churches in Struggle: Liberation Theologies and Social Change in North America* (New York: Monthly Review Press, 1986) discusses the ideas of liberation theology and its impact on the Sanctuary Movement.

29. Robert Tomsho, *The American Sanctuary Movement* (Austin, TX: Texas Monthly Press, 1987), 94.

30. Arthur Rotstein, "Sanctuary Movement Marks 20th Anniversary of Aiding Refugees," *Associated Press State and Local Wires*, March 22, 2002.

31. Susan Biber Coutin. "Smugglers or Samaritans in Tucson, Arizona," 553.

32. George Volcky, "U.S. Churches Offer Sanctuary to Aliens Facing Deportation," *New York Times*, April 8, 1983.

33. Ibid. It is not totally clear whether or not any Missouri Synod Lutherans participated in the movement, but the ELCA issued a denominational level statement in support of the movement. The same may be said of the different variants of Presbyterian Churches, and the PCUSA did issue a denominational statement in support of the movement.

34. "Sanctuary Leaders Assail U.S. for Ousting Central American Refugees," *Los Angeles Times*, March 2, 1985, Home Edition.

35. Wayne King, "Leaders of Alien Sanctuary Drive Say Indictments Pose Church-State Issue," *New York Times*, February 3, 1985.

36. Samuel S. Stanton is pastor of First Southern Baptist Church in Fallon, NV. This excerpt is from a personal conversation with the author which took place on December 29, 2006.

37. Wendy Cole, "Elvira Arellano, An Immigrant Who Found Sanctuary," *Time*, available at http://www.time.com/time/personoftheyear/2006/people/3.html.

38. Don Babwin and Karla Johnson, "Immigrant Takes Refuge in Chicago Church," *Associated Press*, August 16, 2006, available at http://www.breitbart.com/article.php?id=D8JHRKAO2&show_article=1.

39. Editorial, "Elvira Arellano and the Law," *Chicago Tribune*, August 17, 2006, available at http://www.chicagotribune.com/news/local/chi-0608170087aug17,1,2309585.story?coll=chi-photo-front.

40. "Illegal Alien Activist Elvira Arellano Hides out in Church to Avoid Deportation," available at http://www.diggersrealm.com/mt/archives/001790.html.

41. See for instance the statement of the Presbyterian Church-USA 217th General Assembly (2006) on Advocacy for All Immigrants.

FURTHER READING

If you are interested in finding out more about the Sanctuary Movement of the 1970s and 1980s, several good works exist. Biber Coutin's "Smugglers or Samaritans in Tucson, Arizona: Producing and Contesting Legal Truth" in *American Ethnologist* provides good insight in the defendants' position in *Aguilar* (1985). Similarly, Hillary Cunningham's "Sanctuary and Sovereignty: Church and State Along the U.S.-Mexico Border" in *Journal of Church and State* investigates the religious belief and political motivations of participants in the Sanctuary Movement. Robert Tomsho's *The American Sanctuary Movement* provides an accurate account of the activities of pioneers in the movement. To improve understanding of the legalities of immigration into the United States, readers should look at the U.S. Refugee Act (1980). Similarly, for information regarding the international law regarding asylum and refugee status, readers should consult the *Convention Relating to the Status of Refugees* (1951) and the subsequent *Protocol Relating to the Status of Refugees* (1967). Many works exist for understanding the theoretical issues surrounding immigration policy. Among the best for consideration are Myron Weiner's "Ethics, National Sovereignty and the Control of Immigration," in *International Migration Review* and Andrew Shacknove's "Who is a Refugee," in *Ethics*. No full accounting for a study involving ideas of social justice would be complete without considering John Rawls' *A Theory of Justice*. Finally, turning to the understanding of the nexus between Christian theology and immigration issues, works by William Tabb, such as *Struggle: Liberation Theologies and Social Change in North America*, and Luke Bretherton's "The Duty of Care to Refugees, Christian Cosmopolitanism, and the Hallowing of Bare Life," in *Studies in Christian Ethics* provide excellent background.

6

Native American Sacred Sites under Federal Law

S. Alan Ray

As Indians we don't have many responsibilities, but one of them is to fix the world.
—Julian Lang, Karuk Indian scholar,
author and performance artist[1]

INTRODUCTION

Across the United States today, thousands of Native Americans engage in traditional spiritual practices. Conducted for centuries or even millennia, these diverse practices serve to renew profound communal and personal bonds between indigenous communities and the land. For these Americans, land announces their emergence as peoples, signifies their origin and place in the cosmos, and provides the source of the sacred medicine that keeps in balance all life on earth. The displacement of many Indian communities from their aboriginal homes during the long history of European conquest and American expansion means that frequently these sacred places, which comprise millions of acres in all, are located on tracts owned by the United States and therefore are subject to its laws and policies for public lands management. When land-based spiritual practices and public land uses collide, the federal government is forced to arbitrate.

Traditional Native American practices on sacred lands are challenged

daily by a legal regime formed under the influence of Euro-American norms of property and personhood and the historically powerful force of Christianity. Like other practitioners of non-mainstream religious traditions in the United States, Native Americans struggle to establish legal entitlements in the face of assertions that permitting them to pursue their particular spiritual imperatives would harm the common good. Differences between Euro-American and Native American sensibilities about the common good run long and deep.

MANY CULTURES IN ONE COUNTRY

Native Americans Today

Native Americans in 2007 are a diverse and growing population.[2] According to the 2000 census, 2.5 million U.S. citizens claim an American Indian identity, and an additional 1.6 million identify as American Indian and at least one other race. In all, 4.1 million people, or 1.5 percent of the total U.S. population, assert an Indian identity. This figure is especially remarkable, given that in 1950, the Native American population stood at 357,499. Yet many factors combine to undermine any notion that the rapid and substantial growth of the American Indian population represents the expansion of a homogenous and uniform culture.

The 562 federally recognized tribes, including 320 Alaska village communities, plus thousands of Native Hawaiians and hundreds of non-federally recognized tribes and bands, share the distinction of being among North America's indigenous communities. They are linked by a history of conflict with and colonization by the powers of Europe and later the United States, but they experience, organize, and represent the world in very different ways. There is no single "Native American culture" and no foundational "real Indian." There are many ways of being Native American, and many kinds of indigenous cultures in North America.[3] About half of today's Native Americans live on reservations: geopolitical regions "reserved" by the tribes when the rest of their ancestral lands were ceded to the United States under treaties in the eighteenth and nineteenth centuries. The rest of the American Indian population lives in cities and towns, suburbs and exurbs, across the United States. Further, the trend toward out-marriage—the phenomenon of tribal members marrying non-tribal members, often non-Indians—is increasing and means that biological interrelation, to the extent it was ever a meaningful proxy, is an increasingly unreliable indicator of Native self-identification and traditional cultural proficiency. Finally, it is difficult to underestimate the devastating and continuing impact of European

and American colonialism on indigenous communities and their distinctive cultural and religious forms.

Faced with destabilizing social forces, Native communities are acutely aware of the need to preserve their cultures.[4] Many tribes have implemented effective and broad-ranging programs of tribal language instruction, celebration of traditional skills, tribal history instruction, and traditional methods of conflict resolution. Tribes seek to preserve and develop their cultural forms from *within* by promoting postcolonial historical research and stimulating their distinctive lifeways among community members. They also protect themselves against threats from *without* by self-regulating under tribal codes, filing legal actions to fight encroachments by non-tribal interests, and building coalitions to exploit opportunities in the political process. Many tribal communities are especially focused on revitalizing or protecting their indigenous spiritual traditions: those core ritual practices that celebrate and renew their bonds with the cosmos and allow them to fulfill their obligations to humankind.

Sacred Texts and Sacred Sites

Religions of the book—Judaism, Christianity, and Islam—find their source and touchstone in divine revelations contained in sacred texts. Religions of the land, such as traditional Native American spiritualities, recur to sacred sites for stories of human origin and the renewal of their communities.[5]

The religion of the book that has had the greatest historical impact on Native Americans is Christianity. Christianity focuses on *right belief*, literally orthodoxy: Christians profess Jesus as their Lord and Savior, and in that profession receive God's salvation. The various creeds that Christians have professed through their long history strive to state with precision—though not explain—the mysterious nature of God (a trinity of Father, Son, and Holy Spirit) and the relationship between God and humankind. For Christians, the Bible is the primary repository of God's unique revelation. As a religion of the book, Christianity is not tied to a specific place, but rather to an authoritative text, which is immanently portable and translatable to all whom the religion's missionaries encounter. Indeed, it is enjoined upon Christians to share the good news, or Gospel, of their beliefs with all, as the salvation of non-Christians depends on it. When explorers of the 15th and 16th centuries came to North America, they claimed the land for Christian rulers, even as the missionaries who accompanied them proclaimed God's salvation to the "heathen" inhabitants of the New World.[6]

Religions of the book and religions of the land differ greatly in their

understanding of space. For the former, space is an emptiness that an all-sufficient God gratuitously fills with creation and over which God has set human beings as rulers and stewards.[7] The European colonists of the first centuries after contact, who were, of course, Christians, conceived of North American space as wilderness—an unredeemed waste filled with savage animals and Indians where the power of the devil went unchecked.[8] As scholar Lloyd Burton has observed of the Puritans, "[t]heir disregard for uncultivated land and fear of all things wild was itself a product of their religious training."[9] Breaking the forests and subduing the wilderness, and converting the land's aboriginal inhabitants to Christianity were religious obligations of the colonists.

Detached from an overt commitment to Christianity, the Western experience of space perceives a Newtonian emptiness, a vacuum to be filled by objects. On this model, nature is like a finely operating machine, moving within space according to its own laws.[10] However, because of the way Western society makes use of nature, these laws are inevitably economic as well as physical. The Western notion of space finds its logical end in the commodity of real estate: the legal delineation of physical space according to the rights of ownership. Real property is a fungible commodity or resource best suited for development to its economic "highest and best use."[11]

In contrast to the Christian emphasis on right belief, Native American spirituality focuses on *right conduct*—literally, orthopraxis. Indigenous peoples feel a kinship with specific, sacred places to which, or, more precisely, to whom they feel profound responsibility and seek to honor through correct ceremonial performance. Traditional Native American spiritual practices and cultures often are grounded in worldviews that do not distinguish between spiritual and material worlds. Rather, the world is the home of many kinds of interrelated beings, including humans, animals, human-like beings including but not limited to gods, and what Euro-Americans would call inanimate objects, such as geological formations, but many of which traditional Indians know to be living entities. Given this interrelatedness, it should not be surprising that Native communities typically do not distinguish between religion and culture. Indeed, as religion scholar Phil Cousineau has observed, the concept of "religion," as institutionalized spirituality, was unknown to Native Americans before contact with Christians. Cousineau states, "Traditionally, Indians had no institutions, no dogma, no commandments, and no one idea about how to worship, or even what to call the great force at the heart of all life that was perceived by all the tribes in their own way." Pre-contact peoples experienced, and many still enjoy, "a way of life that encompassed a rich variety of ceremonies, a mosaic of

myths, legends, and poetry, together forming a complex heritage and a deep spiritual force."[12]

Native American experience of space is specific to particular places. Places are sites of tribal self-representation according to tribal myths—not just "land," but *this* land for *this* people in *this* way. In his study of the Western Apache, linguistic anthropologist Keith Basso has observed that "what matters most to the Apaches is *where* events occurred, not when, and what they serve to reveal about the development and character of Apache social life."[13] What Basso describes as place-making—the investment of meaning in specific geological locations through communal story-telling and ritual—provides the Western Apache with a powerful moral compass and an irreplaceable sense of their identity.

Basso's analysis underscores the role of human agency in delineating sacred places. As religion scholars David Chidester and Edward Linenthal have noted, the production of sacred space by human actors is marked by several key features. First, sacred space is ritualized, which means that sacred places are set apart as locations "for formalized, repeatable symbolic performances."[14] Second, sacred places are sites where meaning is made: they tell us "what it means to be a human being in a meaningful world."[15] Finally, "sacred space is inevitably contested space, a site of negotiated contests over the legitimate ownership of sacred symbols."[16] As American settlers blazed trails and cleared the North American wilderness, expanding across the Great Plains to the Pacific, the use of this land became contested in a new way. For example, where the Lakota once controlled the physical area and symbolic meaning of the Black Hills, once gold was discovered there in the late 1800s, Lakota communities fought for both their right to physically occupy their ancestral lands and their obligation to perform their sacred ceremonies.

The example of the Lakota points to an important dimension of land-based spiritualities. Ritual performance attempts to fulfill a sacred responsibility to the world. In performing the world renewal dance called the Jump Dance, for example, the Yurok, Karuk, Tolowa, and Hupa of northwestern California act ritually on behalf of everyone.[17] Failure to perform the Dance in a ritually correct way may endanger the balance not only of the tribe, but also of the entire world. Sickness, death, war, and other catastrophes, practitioners believe, will surely result.

The incongruities of religions of the book and religions of the land are more than merely formal: they are historical. Throughout his life's work, the late Lakota attorney, activist, and religion scholar, Vine Deloria, Jr., criticized the spread of Christianity among indigenous communities, not

because Christianity is a false religion, but because he believed it historically has sought to be the exclusive source of truth about ultimate reality. As a result, "what has been the manifestation of deity in a particular local situation is mistaken for a truth applicable to all times and places, a truth so powerful that it must be impressed upon peoples who have no connection to the event or to the cultural complex in which it originally made sense."[18] Deloria observed that in contrast to the religious belief-systems of Christians, for American Indians,

> The structure of their religious traditions is taken directly from the world around them, from their relationships with other forms of life. Context is therefore all-important for both practice and the understanding of reality. The places where revelations were experienced were remembered and set aside as locations where, through rituals and ceremonials, the people could once again communicate with the spirits. Thousands of years of occupancy on their lands taught tribal peoples the sacred landscapes for which they were responsible and gradually the structure of ceremonial reality became clear.[19]

In summary, religions of the book tend to view space instrumentally, as a help or hindrance to the spread of sacred doctrine. Religions of the land see space as place: unique sites where the community renews its relationship with the sacred through ritual action. As historian Andrew Gulliford explains:

> For most tribes, a sacred place is where the Great Creator or spirits, both good and evil, communicate with the living. Most Anglo Americans consecrate a church as a sacred place, and it remains sacred as long as the congregation meets there. But when congregations outgrow a building, they may well sell it and purchase a new space to make holy. By contrast, what is important for traditional Indian religious believers is not the sacred space of a church or cathedral but rather a location made holy by the Great creator, by ancient and enduring myth, by repeated rituals such as sun dances, or by the presence of spirits who dwell in deep canyons, on mountaintops, or in hidden caves . . . Sacred sites remain integral to tribal histories, religions, and identities.[20]

America's founding religion of the book, Christianity, has operated from assumptions about the world radically different than those of the place-based spiritualities of traditional Native Americans. These assumptions have informed judicial understandings of the guarantees and limits of religious liberty in the Constitution. When Native Americans have turned to the courts to try to protect the sacred character of their traditional places, they have encountered these same underlying beliefs.[21]

THE FREE EXERCISE CLAUSE AND "SOME RATHER SPACIOUS TRACTS" OF PUBLIC LAND

The Free Exercise Clause of the First Amendment of the Constitution provides that "Congress shall make no law . . . prohibiting the free exercise [of religion]."[22] The Free Exercise Clause, which applies to the states through the Fourteenth Amendment,[23] is the cornerstone of American religious liberty. Over the years, the courts have developed a constitutional jurisprudence based on three assumptions: that religion is primarily a matter of individual conscience not collective behavior; that religion can be protected against unreasonable governmental interference because religion can be distinguished from non-religion; and that religion is characteristically a set of beliefs about a Supreme Being or ultimate reality.

Three Assumptions of Constitutional Jurisprudence

The Supreme Court has consistently interpreted the Free Exercise Clause to prohibit government from constraining what people *believe* in matters of religion, even as the Court has upheld governmental regulation that burdens religiously motivated *conduct.*[24] In the early free exercise case of *Reynolds v. United States*, the Court in 1878 upheld a federal law criminalizing polygamy, even though the law burdened the religious practices of Mormons at the time.[25] The Court said that Mormons were free to believe whatever they liked about the sacrality of plural marriage; however, the justices added, the government has a legitimate interest in protecting the public against behavior such as polygamy that poses a threat to public safety, peace, or order.[26] Though in the twentieth century, the Court raised the bar that government would have to meet to constitutionally regulate religiously motivated conduct, the faith-conduct distinction expressed in *Reynolds* remains a bedrock principle of American jurisprudence.

Moreover, the Supreme Court has consistently expressed support for a constitutional distinction between religion and culture and held that the Free Exercise Clause protects *religious* beliefs and (to a qualified degree) *religious* practices but does not protect the *cultures* in which these beliefs and practices occur. Stated differently, the "quality of the claim" brought by those seeking protection must be "rooted in religious belief" and not in culture alone, to be recognized under the Free Exercise Clause.[27] Thus, the adverse impacts of government regulation on the well-being of a community do not by themselves raise Free Exercise issues, even though the impacts may be deleterious to the survival of the community and therefore to the religious beliefs and practices of its members. Government actions that

only impact culture are usually held to the lowest standard of judicial review—they must merely be rationally related to a legitimate governmental end to pass muster.

Finally, when the Supreme Court has taken up the question of what "religion" is for purposes of the Free Exercise Clause, it has focused on the beliefs, not the behavior, of religious adherents. The Court's first efforts to define "religion," in 1890, reveal the justices' debt to Christianity when they state, "The term 'religion' has reference to one's views of his relations to his Creator, and to the obligations they impose of reverence for his being and character, and of obedience to his will. It is often confounded with the *cultus* or form of worship of a particular sect, but is distinguishable from the latter."[28] Here, "religion" is distinguished by what one thinks ("one's views"), not by what one does as part of a community (the "form of worship"). More recently, in a case involving conscientious objectors to the Vietnam War, the Court broadened its definition of "religion" to include "a given belief"—again, not a practice—"that is sincere and meaningful [and] occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God."[29] Each time it has defined religion, the Court has focused on the cognitive—not the performative—aspect of spiritual engagement. This means that the Court has assumed the *beliefs* of religious adherents—*not ritual behaviors*—were the constitutionally relevant tokens of religious engagement.

In summary, (1) the faith-conduct distinction, (2) the religion-culture distinction, and (3) the notion of religion as a body of beliefs about ultimate reality reflect the power of America's religious history and culture to shape judicial assumptions about what it means to be religious. Lawmakers and courts steeped in the rhetoric, if not the beliefs, of Christianity assume that religion is primarily an act of assent of the mind or heart to divinely-revealed truths about ultimate reality (faith); that this interior disposition calls upon the will to act in conformity with these truths (conduct); and that collective behavior inspired by faith (religion) can be distinguished from collective behavior that seeks to further non-religious or "secular" ends (culture).

These three foundational assumptions of American law are, point for point, at odds with the experience and practice of traditional Native Americans. For the latter, religion is not primarily a body of beliefs with secondary ritual behavior. Indians do have belief-systems about the origin and nature of the world, of course, and these systems can be as sophisticated as any Western theology. However, there are no orthodoxies. There are sacred places that must be attended to for the good of all. For Native traditionalists, ritual comes before belief because place comes before theology.

Similarly, for indigenous communities, religion is not distinct from culture. Under the second assumption, religion can be distinguished from culture because religion is conceived-of primarily as a body of beliefs that can, indeed, for Christians should, travel freely from culture to culture, independent of all cultures in order to achieve salvation for as many people as possible. In contrast, for traditional peoples, because sacred places organize and orient their communal lifeways, there is simply no social or psychological "place" for culture to exist apart from religion.

Third, the notion that religion refers to a body of beliefs about a Supreme Being or ultimate reality misses the Native American traditional insistence that religion as practice (ritual) is directed to maintaining or restoring right relations between the tribe or humankind and the rest of reality, which is experienced as being infused with or populated by innumerable non-human but personal forces. Even where Native American spirituality includes reference to a Supreme Being—and here one must be alert to the Christianizing influence of missionaries on indigenous myths—beliefs about the Supreme Being or Great Spirit are subordinated to the performance of site-specific ritual practices that are believed to restore balance to the tribe and world.

Given such basic differences between federal constitutional jurisprudence and traditional Native American spirituality, it was perhaps inevitable that when clashes occurred over public land use and Indians called upon American constitutional law, the Free Exercise Clause would offer them little relief.

The Modern Context for Analyzing Native American Religious Liberty Claims

In the 1960s and 1970s, a series of cases in the Supreme Court expanded the scope of protection under the Free Exercise Clause while making it more difficult for the government to take actions that harmed religious practitioners. *Sherbert v. Verner* (1963) set the modern standard for constitutional analysis in this area.[30] Adeil Sherbert was a Seventh Day Adventist whose religion required her not to work on Saturday, her sabbath. Her employer demanded she work on Saturday, and when she refused, she was fired. When the state denied her request for unemployment benefits, she sued, claiming the Free Exercise Clause protected her from being forced to choose between violating her conscience and getting benefits, on the one hand, or remaining steadfast in her religion and being denied compensation, on the other. Such a choice, she argued, amounted to a constitutionally significant indirect burden on her religious liberty. An "indirect bur-

den," in this context, refers to a government action which does not overtly criminalize or prohibit religiously motivated conduct, but nonetheless coerces a believer to betray his or her religious convictions in order to obtain a government benefit.

The Court ruled in Sherbert's favor, holding that indirect burdens like hers implicated the Free Exercise Clause just as much as direct burdens, such as outright religious prohibitions. Replacing the low standard set by *Reynolds* (a threat to public safety, peace, or order), the Court held that where a burden was found, the government must identify a compelling interest for its actions which could be served by no less restrictive means. If, on balance, the harm to a claimant's religious liberty was greater than the interest of the government in pursuing its project or program, the religious claimant won. In Sherbert's case, the Court found that the state's denial of unemployment compensation did constitute an indirect burden on her religious beliefs, and outweighed the government's interest in advancing an efficient, fraud-free system of unemployment compensation. "*Sherbert* balancing," as the method of judicial analysis came to be known, led to a series of victories for religious adherents.[31]

In addition to judicial expansion of the scope of Free Exercise protection and the development of a method of analysis more favorable to religious claimants, federal legislation gave American Indians new hope that their land-based spiritual traditions could successfully resist government land development projects. The federal law, called the American Indian Religious Freedom Act of 1978, or "AIRFA," stated:

> It shall be the policy of the United States to protect and preserve for American Indians their inherent right to freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonial and traditional rites.[32]

The appearance of AIRFA in 1978 represented in the domain of religion the federal government's endorsement of tribal self-determination.[33] This marked a shift in U.S. policy, which, with some significant exceptions, had long favored eliminating the distinctively "Indian" features of indigenous life in order to improve the lot of individual Native Americans. From 1883 until the early 1920s, for example, the federal government outlawed and sought to suppress Indian religious practices, especially sacred dances, on grounds similar to those invoked in the *Reynolds* case—namely, that the dances were offensive to public health, decency, and good order. The suppression of traditional Indian dances also served the government's avowed

purpose of "civilizing" and Christianizing the Indians.[34] Though official suppression ended with the 1934 Indian Reorganization Act, hostility to tribalism returned after 1945, when the government instituted a policy of legally terminating tribes in hopes of "mainstreaming" Indians into post-war American society. The policy failed miserably, and by 1970, the pendulum of national politics had swung again, from assimilation of individual Indians to empowerment of Indian nations.

Encouraged by the government's embrace of tribal self-determination and the adoption of AIRFA, as well as by the federal courts' newly expansive elaboration of Free Exercise Clause rights in non-Indian cases, tribes fought back against a series of federal projects in the 1980s. The results of the litigation in four pivotal cases reveal how deeply the three assumptions of Free Exercise Clause jurisprudence have informed judicial analyses of Native American life.

Sequoyah, Badoni, Crow, and *Wilson:* Judicial Struggles with Sacred Sites

In *Sequoyah v. TVA* (1980),[35] the Eastern Band of Cherokee sought an injunction to stop the federal government from completing the Tellico Dam as part of a vast hydroelectric generation project. Flooding from the dam would inundate the Cherokee homeland and destroy sacred sites, medicine gathering areas, and the graves of ancestors, who Cherokee believe possess sacred knowledge for future generations. The dam's operation would flood the town of Chota, called the "birthplace" of the Cherokee and the location connecting the Cherokee "with the Great Spirit."[36] Reflecting the assumptions that religion and culture are distinguishable and that religion is protected by the Constitution but culture is not, the U.S. Court of Appeals for the Sixth Circuit held that the Cherokee had no *religious* interest in preserving their homeland. The majority asked whether the Valley was "central" or "indispensable" to Cherokee religious observances, and concluded it was not. The damage to the Cherokee would be "to tribal and family folklore and traditions, more than particular religious observances."[37] Concluding that the quality of the claim was not religious, the court said, "[t]hough cultural history and tradition are vitally important to any group of people, these are not interests protected by the Free Exercise Clause of the First Amendment."[38]

The *Sequoyah* court noted that the fact that the land in question was owned by the government, not the Cherokee, while not conclusive, was a "factor" to be considered.[39] Further, the bill creating the Tellico Dam had trumped AIRFA and any other competing legislation.[40] The Tellico Dam

was built, residents of the southeastern United States received reliable electrical power, and the Cherokee homeland—millions of acres—was lost to the Cherokee people forever.

Soon after *Sequoyah* came *Badoni v. Higginson* (1980), a decision of the Tenth Circuit Court of Appeals.[41] Seeking to increase the supply of water to Western states, the federal government raised the elevation of water behind Glen Canyon Dam on the Colorado River. The Dam's reservoir (Lake Powell) flooded a canyon of federal land beneath Rainbow Bridge, an immense sandstone arch sacred to the Navajo as the incarnation of two of their gods. The bridge, along with 160 acres, constitutes the Rainbow Bridge National Monument. Navajo plaintiffs claimed the rising waters had drowned the gods who lived in the canyon adjacent to the bridge and prevented Navajo medicine men from performing vital religious rituals at the site. Further, as the water encroached on the canyon, pleasure boaters arrived in large numbers, trashing the site with refuse and marring the bridge itself (the gods) with graffiti.

Like the *Sequoyah* court, *Badoni* rejected "the conclusion that plaintiffs' lack of property rights in the Monument is determinative."[42] The *Badoni* court acknowledged the relevance of *Sherbert* balancing to the claims of drowned gods and denial of access to a sacred site, but jumped straight to a finding that the government had a compelling interest in supplying Western states with water, which could not be served by a less restrictive means. As to restricting public access to the bridge, the court, relying on the belief-conduct distinction, held that the tribe had no recourse under the Free Exercise Clause, since the government had done nothing to coerce the Navajo to violate their religious beliefs and had left the medicine men free to enter the area, although the court was "mindful of the difficulties facing plaintiffs in performing solemn religious ceremonies in an area frequented by tourists."[43] For the government to do more would implicate the Establishment Clause and turn the Monument into "a government-managed religious shrine."[44] The court turned aside plaintiff's claim that AIRFA warranted relief, ruling that the pleadings were inadequate to state a cause of action.[45] The court denied the Navajos' request, the waters beneath the sandstone gods continued to rise, and tourists enjoyed enhanced access to the Monument.

Two years later, in *Crow v. Gullet* (1982),[46] the South Dakota district court ruled that the state's construction activities near ceremonial grounds on Bear Butte had not violated the constitutional rights of the Lakota and Tsistsistas. Bear Butte was both the site of Vision Quest ceremonies, requiring solitude and silence, and a popular site for hiking and camping by tourists. The plaintiffs claimed the construction activities unconstitutionally

diminished the spiritual power of Bear Butte. The court rejected this claim, observing, "It is clear . . . that plaintiffs have no property interest in Bear Butte or in the State Park," and holding that the Constitution does not require government "to provide the means or the environment for carrying . . . out [religious actions]."[47] The court, citing *Badoni*, rejected the claim that the state had a constitutional duty to prevent tourists from acting in ways that interfered with religious practices.[48]

Because the *Crow* plaintiffs were denied use of their usual ceremonial area because of the construction, they were obliged to camp overnight at Bear Butte Lake, where they were subject to the Lake's prohibition on building sweat lodges, used for spiritual purification and awakening. Invoking the belief-conduct distinction, the court concluded that the state's "minimal" restriction with respect to "time and place" of conducting a sweat lodge ceremony failed to constitutionally burden plaintiffs' religion.[49] The court held that AIRFA did "not create a cause of action in federal courts for violation of rights of religious freedom" and represented "merely a statement of policy of the federal government with respect to traditional Indian religious practices."[50] Defeated in court, the Lakota and Tsistsistas watched as the construction projects on their sacred mountain were completed.

Soon after *Crow*, the Court of Appeals for the District of Columbia Circuit decided *Wilson v. Block* (1983).[51] The federal government had approved permits for increased private development of a ski resort on the San Francisco Peaks. These mountains—living deities—are sacred to the Navajo and Hopi and, for the Hopi, are the home of the Kachinas, spirit beings and emissaries of the Creator. Seeking an injunction, plaintiffs argued that the act of additional commercial development would be a sacrilege offensive to the Kachinas and the Creator and would result in the peaks losing their beneficial powers. Development would also impair the plaintiffs' ability to pray and conduct religious ceremonies on the peaks and to gather necessary medicine.

The *Wilson* court rejected plaintiffs' argument that under *Sherbert* and its progeny, the Free Exercise Clause prevented "governmental actions which strongly, if indirectly, encouraged religious practitioners to modify their beliefs."[52] Instead, the court ruled narrowly to hold that "the government may not, by conditioning benefits, penalize adherence to religious beliefs."[53]

If not religious *beliefs*, might the proposed development indirectly burden the plaintiffs' religious *practices* in a constitutionally relevant way, thus putting the government to the test of showing a compelling interest? The court initially recognized that *Sherbert* and the unemployment compensation cases "did not purport to create a benchmark against which to test all indi-

rect burden claims."[54] Instead, the court looked to *Sequoyah* and announced, "If plaintiffs cannot demonstrate that the government land at issue is indispensable to some religious practice, whether or not central to their religion, they have not justified a First Amendment claim."[55] The proposed government land use must be one that "would impair a religious practice that could not be performed at any other site."[56] The *Wilson* court found that while the peaks were indispensable for plaintiffs' religious practices, the specific section of the peaks where the development would occur was not: medicine could be collected in many other locations on the peaks. Though plaintiffs failed to state a claim under the First Amendment, the court rejected any contention that the absence of property rights by the Navajo or Hopi in the Peaks was determinative, saying that "we see no basis for completely exempting government land use from the Free Exercise Clause."[57] This is consistent with the court's analysis that had the plaintiffs been able to show the indispensability of the affected portion of the Peaks for their religious practices, an indirect constitutional burden on their religion could have been stated, and the government would be forced to try to establish a compelling interest in its project, one that would be served by the least restrictive means.

The *Wilson* court also announced that an agency would be in compliance with AIRFA if, in deciding whether to undertake a land use project, decision-makers considered "the views of Indian leaders, and if, in project implementation, it avoids unnecessary interference with Indian religious practices."[58] Because the Forest Service had "held many meetings with Indian religious practitioners and conducted public hearings on the Hopi and Navajo reservations," AIRFA was satisfied.[59] Defeated in court, the Navajo and Hopi had no choice but to suffer the impact of the expansion of the ski resort on the living deities, the San Francisco Peaks.

As the end of the 1980s approached, decisions of the lower courts reflected an emerging set of conclusions regarding Native American rights to religious liberty, but no clear set of theories. Many questions swirled through the decisions of the federal courts: Should analysis under the Free Exercise Clause give any special weight to the land-based nature of Native American spirituality? How could such an analysis proceed without asking whether tribal religious beliefs were true or false? Could some practices be deemed central or indispensable to Indian spiritual traditions, and, if so, should these practices be constitutionally protected? Should the *Sherbert* balancing test—developed largely in the context of unemployment benefits claims—be extended to sacred sites? When, if ever, can the Free Exercise Clause be used as a sword to demand government cooperation with Indian religious practices, and when can it be used as a shield to prevent govern-

ment from acting to harm, even indirectly, these same practices? When should the *Sherbert* test take cognizance of government actions that do not coerce or penalize Native Americans for their worldview but simply make it harder for them to practice their religion? Could the government constitutionally accommodate Indian religious practices on public lands if it wished? What weight should be given to AIRFA? And looming behind all of these questions: what weight should be given to the government's ownership rights in public lands?

Finally, the U.S. Supreme Court provided answers to many of these questions in 1988 through the landmark case *Lyng v. Northwest Indian Cemetery Protective Association*.[60]

LYNG AND THE INSTATEMENT OF GOVERNMENT PROPERTY RIGHTS

For centuries, if not longer, tribes of remote northwestern California have been fixing the world. Through regular participation in world-renewal dances, members of the Yurok, Karok, Hupa, and Tolowa nations restore balance to the universe and thus to themselves. Their dances, which are put up at two-year intervals, last for ten days in September and involve hundreds of tribal members, men and women alike, who take part in strenuous discussion, cultural and political debate, storytelling, food, and, of course, dance, all focused on restoring the right relation of the tribes with the universe.[61] The world-renewal dances of the northwestern California Indians are part of a complex set of lifeways that depend upon access to the prehuman spiritual powers believed to be immanent in the mountains surrounding the people. The High Country, as it is known, is especially sacred and consists of twenty-five square miles of the highest peaks of the Siskiyou mountains in the Blue Creek Unit of Six Rivers National Forest—the aboriginal lands of the tribes but now property owned by the federal government. Native spiritual leaders—medicine men—make frequent pilgrimages to the High Country. Seated alone and surrounded by silence, the medicine men acquire the spiritual power needed to sustain their communities. Without their connection with the sacred forces resident in the High Country, the tribes believe their communal integrity would fail and their responsibility to fix the world would go unmet, with dire consequences for all.

In the late 1970s, the Forest Service planned to create a paved road through Six Rivers National Forest which would run 75 miles and link two small California towns, Gasquet and Orleans, for use by logging trucks and cars. However, deep in the High Country, construction of the "G-O road" halted with six miles left to complete when the project approached the foot

of Chimney Rock. As determined by the government's own study of Indian cultural and religious sites, commissioned at the outset of the project, the entire Chimney Rock area "is significant as an integral and indispensible [sic] part of Indian religious conceptualization and practice . . . [S]uccessful use of the [area] is dependent upon and facilitated by certain qualities of the physical environment, the most important of which are privacy, silence, and an undisturbed natural setting."[62] The government's study concluded that constructing the G-O road "would cause serious and irreparable damage to the sacred areas which are an integral and necessary part of the belief systems and lifeway of northwest California Indian peoples."[63] Notwithstanding this advice, the Forest Service pursued the project, and when the road reached Chimney Rock, individual Indians and groups representing the tribes went to court, claiming completion of the G-O road would constitute an indirect burden on their religious practices that was impermissible under the First Amendment. A federal district court agreed, and issued an injunction to stop the road. A panel of the Ninth Circuit affirmed. By a majority of 5–3, the Supreme Court reversed.[64]

Writing for the majority, Justice Sandra Day O'Connor agreed that the G-O road would have "severe adverse effects on [the tribes'] practice of their religion";[65] "could have devastating effects on traditional Indian religious practices";[66] and that "the threat to the efficacy of at least some religious practices is extremely grave."[67] Nevertheless, O'Connor stated, "the incidental effects of government programs, which may make it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs, [cannot] require government to bring forward a compelling justification for its otherwise lawful actions."[68] With this move, the Court made clear that the Free Exercise Clause's protection against indirect burdens on religion was limited to protection from coercion of religious conscience and penalization by denying benefits or rights enjoyed by other citizens.

In so doing, the Court closed the door opened ever so slightly by *Wilson* that government land use might implicate the Free Exercise Clause if it denied religious adherents the use of land "indispensable" for religious practices. Also precluded was *Crow*'s implication that if government denial of access to a sacred site was more than "minimal" and other than a reasonable "time and manner" restriction, Free Exercise Clause rights might be at stake. The Court's reasoning made irrelevant *Sequoyah*'s deliberations over the "centrality" or "indispensability" of a site to religious observances. Like *Badoni*, the Court hued closely to coercion and penalization as the only legitimate Free Exercise indirect burdens, while (as *Badoni* had put it) "mindful of the difficulties facing plaintiffs in performing solemn religious

ceremonies" in the presence of intrusive third parties. After *Lyng*, the Free Exercise Clause would clearly be a shield, not a sword, against government, and a small shield at that: indirect adverse impacts on religious practices would raise no constitutional question, even if the effects would virtually destroy a religion.

While *Lyng* could have been decided simply by clarifying the scope of indirect burdens recognized under the Free Exercise Clause, Justice O'Connor added a second, highly significant ground for the Court's decision. The majority expressed great concern that if the Court acceded to the tribes' request, it would be allowing the Indians to impose a "religious servitude" on the government's land: a legal right-of-way exclusive to the tribes, in the service of their religious beliefs, which would entitle them to deny anyone—"recreational visitors, other Indians, or forest rangers"—access to the Chimney Rock area.[69] O'Connor added that accommodating the Indians' religious beliefs "could easily require *de facto* beneficial ownership of some rather spacious tracts of public property . . . [T]he diminution of the Government's property rights, and the concomitant subsidy of the Indian religion, would in this case be far from trivial."[70] Concluding her point, O'Connor stated, "Whatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its rights to use what is, after all, *its* land."[71] With these words, the *Lyng* majority went further than any previous federal court in making government property ownership an absolute standard for adjudicating constitutional rights under the Free Exercise Clause. *Sequoyah*'s "factor" analysis of property rights, in comparison, appears as so much judicial handwringing.

Neglected by many commentators at the time, the majority's opinion contained an admonition that would come to be a lynchpin of policymaking in subsequent years. As Justice O'Connor wrote, "Nothing in our opinion should be read to encourage governmental insensitivity to the religious needs of any citizen. The Government's rights to the use of its own land, for example, need not and should not discourage it from accommodating religious practices like those engaged in by the Indian respondents."[72]

The Court endorsed the interpretation of AIRFA presented by *Crow* and *Wilson*: that AIRFA was a sense of Congress resolution that created no private rights of action—it conferred no "special religious rights on Indians," as the bill's sponsor, Representative Morris Udall, had said. Quoting Representative Udall, the Court observed that AIRFA would "not change any existing State or Federal law" and, in fact, "has no teeth in it."[73]

In a scathing dissent, Justice Brennan, joined by Justices Marshall and Blackmun, attacked the majority's view that the government's "prerogative as landowner should always take precedence over a claim that a particular

use of federal property infringes religious practices."[74] The dissenting justices rejected the majority's reading of precedent to diminish the scope of free exercise protection for indirect burdens to coercion and penalization, stating that "we have never suggested that the protections of the guarantee are limited to so narrow a range of governmental burdens."[75] Arguing passionately for an effects-based analysis of constitutional rights, Justice Brennan wrote, "Today, the Court holds that a federal land-use decision that promises to destroy an entire religion does not burden the practice of that faith in a manner recognized by the Free Exercise Clause."[76] Responding to the majority's averment that nothing in its opinion should be read as insensitivity to religion, he said, "I find it difficult, however, to imagine conduct more insensitive to religious needs than the Government's determination to build a marginally useful road in the face of uncontradicted evidence that the road will render the practice of respondents' religion impossible."[77] As to the majority's claim that after their ruling the tribal claimants remained free to believe whatever they liked, "Given today's ruling, that freedom amounts to nothing more than the right to believe that their religion will be destroyed."[78]

While the *Lyng* majority can be faulted for attenuating the *Sherbert* test, the test itself is not unproblematic. Recall that under *Sherbert*, once sincere religious claimants establish that the government has imposed an indirect burden on their religious observance by putting them to a choice between violating their beliefs or foregoing a generally available benefit, the onus shifts to the government to show a compelling interest for its actions, one that is achieved by the least restrictive means possible. Given the reticence of courts to challenge the sincerity of religious beliefs, under *Sherbert* a sincere religious adherent "may force government to show how almost any law serves a compelling interest and is narrowly tailored to that interest."[79] Further, balancing tests like the *Sherbert* test require courts to make value judgments, to identify the common good implicitly or explicitly with the government's interest, and to "weigh" it against what is by definition a parochial (and often culturally unfamiliar) good. The results can be idiosyncratic.

The four federal cases in the 1980s that engaged Indian use of sacred lands, for example, struggled to develop a balancing test for sacred sites claims, and their failure to produce a coherent method of analysis may well have influenced the Court's decision to take up *Lyng* in the first place. Land-based spiritual practices, intimately tied to indigenous peoples' cultures, were foreign to the experience of the courts and at odds with Euro-American assumptions about constitutional jurisprudence. Further, as to the government's rights as property owner, it is worth considering what

limitations could fairly be placed on plaintiffs, Indian or other, who claim that their religious well-being depends on certain uses of federal property. How are courts to draw lines that might prevent the destruction of a religion by conceding certain uses of land at the expense of the common good, while denying uses by others whose practices are deemed to be (by whom?) less critical to their religion's survival? According to emerging sources in international law and a growing number of legal scholars, the answer may lie in a fundamental reassessment of Euro-American notions of "property" and "property rights" in order to recognize indigenous peoples' rights to ancestral lands—cutting the Gordian knot, in effect, in favor of indigenous peoples' lifeways.[80] Clearly, *Lyng* yielded a harsh result for the tribes of northwestern California, but under the existing federal legal regime restricting government property rights in the interest of religious groups presents constitutional challenges, leading some to argue that Congress, the President, and federal agencies, not the courts, are best situated to make such determinations.[81]

From the Courts to Congress: Legislative Resources after *Lyng*

Two years after *Lyng*, the U.S. Supreme Court in *Employment Division v. Smith* (1990)[82] held that where the intent of a law is not to prohibit or burden a religion, the government may apply its law to religious practitioners, even if the incidental effect of the law is to make it harder for believers to pursue their faith. The case centered on members of the Native American Church, who had been fired from their jobs and denied unemployment compensation after using peyote for sacramental purposes. The use of peyote violated Oregon drug laws, which were neutral as to religion. In ruling for the state, the *Smith* Court put an end to *Sherbert* balancing: unless a law outright attacked religion, the state, to survive a Free Exercise challenge, had only to show that its law was reasonably related to a legitimate governmental purpose. In effect, *Smith* brought Free Exercise Clause jurisprudence back to the nineteenth century and *Reynolds*, where any law furthering public safety or good order would be sustained.

Congress responded aggressively to *Smith* by passing the Religious Freedom Restoration Act (RFRA), which expressly reversed *Smith* and restored the compelling-interest test (i.e., *Sherbert* balancing) for judicial analysis of Free Exercise claims. RFRA states, "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the government shows a compelling interest in the application of its law, which can be served by no less restrictive means.[83]

Although the Supreme Court later held RFRA unconstitutional as applied to the states, RFRA remains good law as to the federal government.[84]

Does the validity of RFRA for the federal government mean that *Lyng* is also reversed and *Sherbert* balancing restored to sacred sites cases? The answer appears to be that *Lyng* remains the law of the land. The legislative history of RFRA reveals that "Congress was assured that RFRA would not create a cause of action on behalf of Native Americans seeking to protect sacred sites. The Senate report stated that RFRA would not overrule *Lyng*."[85] Federal courts considering RFRA's applicability in the sacred sites context have agreed that *Lyng* lives. In the recent case of *Navajo Nation v. U.S. Forest Service* (2006),[86] the district court of Arizona heard claims by tribal members that the government's plan to use polluted water for snowmaking on the sacred San Francisco Peaks would violate their free exercise rights. The court found that while RFRA had reversed *Smith* and restored *Sherbert* balancing, RFRA had made no changes to what constitutes a constitutionally cognizable burden on religious practices. Since *Lyng* had rejected considering the adverse impacts of government development projects on the spiritual well being of practitioners, the *Navajo Nation* court declined to so as well. Because the tribal plaintiffs could not establish that the waste-water snowmaking project would damage their shrines, nor that the project would deny individual Indians access to the mountain, the court ruled that plaintiffs had stated no constitutional burden.

In addition to RFRA, Congress's post-*Smith* responses included RLUIPA, the Religious Land Use and Institutionalized Persons Act of 2000.[87] Like RFRA, RLUIPA also restores *Sherbert* balancing to judicial analysis of certain actions by state and local governments. In the land use context, RLUIPA has been helpful to churches and synagogues seeking to resist municipal zoning laws and other land use decisions that would adversely impact them, often by limiting their physical expansion. However, RLUIPA has not been an asset to Native Americans seeking to protect sacred sites, because RLUIPA stipulates that the religious adherents must have an ownership interest in their land—a property right that would be negatively affected by government regulation—and tribes often lack such rights in their sacred lands.

As tribes struggled to find legislative or judicial help to state claims under the Free Exercise Clause, they received support for their use of sacred sites from an unexpected quarter—the political process and federal agencies. When the political winds shifted in the 1990s, Congress and the president provided new assistance to land-based religions. The result was a series of judicial challenges testing the limits of government accommodation of Native American spiritual traditions.

THE ESTABLISHMENT CLAUSE AND ACCOMMODATION OF NATIVE AMERICAN SPIRITUALITY

The Establishment Clause of the First Amendment provides, "Congress shall make no law respecting an establishment of religion . . . "[88] The Establishment Clause, intended by the Framers to protect the Christian denominations of the former colonies from control by the federal government, today operates largely as a restraint on both state and federal government from favoring one religion over another, or religion over nonreligion.[89] Even as the Establishment Clause has been called upon throughout its modern history to keep strong the metaphorical wall of separation between "church and state," for the well-being of both, the Supreme Court and scholars of the Constitution have recognized that government has an obligation to try to accommodate religious beliefs and actions.[90] Indeed, as Justice O'Connor wrote for the *Lyng* majority, the government's ownership rights in its lands should not discourage it from accommodating Native American religious practices on those lands. How far state and federal actors may go to make such accommodations, consistent with the Establishment Clause, remains a challenge for courts in the twenty-first century.

When Streams Converge

Public law and policy today reflect an increased governmental willingness to accommodate traditional Native American practices, including religious practices. Much as *Smith* in 1990 became a call to arms for mainstream religious leaders and politicians sympathetic to their viewpoints, resulting in RFRA and RLUIPA, *Lyng* in 1988 prompted outrage in Indian Country at what was perceived as the end of judicial tolerance for indigenous religions in the United States. Immediately after *Lyng*, the American Indian Religious Freedom Coalition was formed, and through its advocacy, Congress passed legislation in 1990 that designated the sacred High Country part of a permanent wilderness area, thus denying completion of the G-O road.

Throughout the 1990s, many accommodations of traditional Indian culture were achieved through the political process. After years of work by tribal leaders, Congress passed the Native American Graves Protection and Repatriation Act (NAGPRA) of 1990,[91] an important initiative which provides for protection of unmarked Indian burials on public lands and repatriation of Indian remains and certain classes of artifacts found on federal land or in museums receiving federal funds—sacred remains and artifacts likely numbering in excess of a million.[92]

Congress also acted to protect the cultural resources of Native Americans in 1992, when, after lobbying by the Coalition and other Indian groups, it amended the National Historic Preservation Act (NHPA). The amendments allow "properties of religious and cultural importance for an Indian tribe" to be included on the National Register of Historic Places and require federal agencies to consult with tribes before undertaking development projects that could affect sensitive sites.[93] The NHPA amendments also acknowledge that tribes have the right not to disclose sensitive information about sacred sites, create the option of establishing tribal preservation offices separate from those of the state, and give tribes legal authority over administering sacred sites on their reservations.

Amendments to existing legislation also served to reverse the effects of one of the most objectionable judicial decisions of the previous decade. Angered by the outcome of *Smith*, which had upheld the criminalization of sacramental peyote use by members of the Native American Church, Native leaders worked closely with legislators to change the law. As a result, Congress passed the American Indian Religious Freedom (AIRFA) Amendments of 1994.[94] Today, federal law prohibits states from penalizing Indians who ingest peyote for traditional religious purposes.

Taken together, NAGPRA and the amendments to the NHPA and AIRFA represent some of the most significant legislation that has come to mark what one scholar calls the "era of atonement" in federal policy-making toward Indian cultures.[95] Finally, in 1996, President Clinton signed Executive Order 13,007, which directs agencies administering federal lands to accommodate access to and ceremonial use of Indian religious sites to the extent practicable and not inconsistent with essential agency functions.[96] The Implementation Report on E.O. 13,007 requires agencies to consult with tribes on a government-to-government basis, requires agencies to use tribal standards to identify sacred sites and to allow tribes to maintain control over information about sites, and requires agencies to recognize that tribal culture is dynamic, that tribal religion is practiced in the present, and that not all sacred sites are historical—some are recent in origin.

In summary, after *Lyng* and *Smith* appeared to foreclose recourse to the Free Exercise Clause, advocates of religious liberty—Indian and non-Indian—engaged in parallel and sometimes cooperative political behavior to expand the procedural and substantive scope of protection for religiously motivated conduct. Two streams, one broad and propelled by the concerns of majority-American religions and the other narrow and targeted to the exceptional characteristics of traditional Native American spirituality, converged with force. Congress and the executive branch responded, and by the start of the twenty-first century, the question for the courts had become

not whether federal agencies could devise land use plans to accommodate Native American uses of sacred sites, but how far they could go without establishing religion in violation of the First Amendment. The stage was quickly set for a contest between, on the one hand, Native American cultural and religious traditionalists, and, on the other, tourists, hikers, climbers, campers, commercial interests, and other users of public lands sacred to tribes.

Close Encounters at Devil's Tower

Devil's Tower National Monument in Wyoming rises like an immense cylinder of rock above the Great Plains that surround it. Made famous by the film *Close Encounters of the Third Kind* as the site of alien-human contact, in the last twenty years Devil's Tower has become a destination for a different kind of encounter: it is one of the world's premiere rock climbing destinations. More than 6,000 climbers scale the Tower each year, especially during the summer. Many have described their ascents of Devil's Tower in terms of respect and awe, and even in the vernacular of religious or spiritual experience. A lively industry has sprung up supporting the needs of the climbers and their families, as well as the half-million tourists a year who simply wish to visit one of "nature's miracles" in the first national monument created by President Theodore Roosevelt in 1906 and now managed by the National Park Service (NPS).

The same edifice is called *Mato Tipila*, or "Bear's Lodge," in Lakota. Since at least 1000 C.E., *Mato Tipila* has played a central role in the myths of origin for tribes including the Lakota, Arapahoe, Crow, and Kiowa. For the Lakota, at the beginning of creation, the spiritual intermediary White Buffalo Calf Woman emerged from *Mato Tipila* to give the people their most sacred religious artifact, the White Buffalo Calf Pipe. *Mato Tipila* remains one of the most sacred sites in Indian Country. It is the site of annual pilgrimages, Sun Dances, Vision Quests (requiring prayer, fasting, solitude, and sweat lodge purification), and other liturgical activity. Though active throughout the year, the most intensive use of the mountain by tribes is during the summer, especially the month of June, when the summer solstice occurs. As the number of seasonal climbers soared, run-ins between Indian spiritual practitioners and the public became frequent, tensions rose, and the NPS was forced to formulate a plan that would ameliorate antagonisms and try and suit all concerned.

The NPS was not working from whole-cloth. In the background were the federal laws enacted for the benefit of Native American culture. Accordingly, starting in the early 1990s, the NPS nationwide adopted management

policies intended to maximize traditional Indian utilization of sacred sites and minimize interference with Indian religious practitioners by third parties, whether recreational or commercial. Applying these policies to Devil's Tower, the NPS issued a management plan in 1995 which included prohibiting new fixed pitons on the mountain (considered an affront to its sacred quality), rehabilitation and maintenance of access trails, camouflaging of climbing equipment, and seasonal closing of climbing routes to protect raptors' nests. The NPS also placed signage encouraging tourists to stay on the trails around Devil's Tower ("The Tower is sacred to American Indians. Please stay on the trail.") and adopted an interpretive education program to explain to tourists the religious and cultural significance of the site for certain Native Americans. Initially, the NPS plan banned commercial climbing licenses during June in deference to Native American uses associated with the solstice. A group of commercial climbers obtained an injunction against the ban, and the NPS relented, replacing the prohibition with a "voluntary ban" on climbing for June. NPS staff would ask potential climbers to choose to refrain from their sport "out of respect for American Indian cultural values"; those who chose to climb anyway would be issued licenses without further ado.

Unsatisfied, the climbers sued the NPS, claiming that its plan even as modified with the voluntary ban violated the Establishment Clause, and in 1998 the federal district court for Wyoming, in *Bear Lodge Multiple Use Association v. Babbitt*, rejected the climbers' arguments.[97] Applying the traditional test of *Lemon v. Kurtzman*, the court found that the NPS plan had a secular purpose; did not have the primary effect of advancing religion; and would involve no excessive entanglement of government with religion.[98] First, the court accepted the NPS's argument that its plan served the valid purposes of helping to "eliminate barriers to American Indians' free practice of religion," a special concern where, as here, "impediments to worship arise because a group's sacred place of worship is found on property of the United States."[99] Further, the plan served to foster "the preservation of the historical, social and cultural practices of Native Americans which are necessarily intertwined with their religious practices."[100] Second, the court found that the voluntary ban did not have the primary effect of advancing religion, where the climbers were not improperly coerced from their activity—a proper and traditional use of the monument—and were allowed meaningful access to the Tower. While an outright ban on climbing, the court hinted, would cross the line into unconstitutional coercion, the voluntary ban did not.[101] Third and finally, the court held that enforcing the voluntary climbing ban would entail little if any governmental involvement in Native American religion (noting that tribes "are not solely religious

organizations, but also represent a common heritage and culture"[102]) and therefore pose no significant risk of excessive entanglement. In short, the court held that the National Park Service's land management plan was an appropriate accommodation of Native American religious practices. The Tenth Circuit Court of Appeals affirmed the decision in 2002 without reaching the Establishment Clause issues, holding that plaintiff climbers had suffered no injury in fact and therefore lacked standing.[103]

An Emerging Jurisprudence of Accommodation?

Bear Lodge has proven to be the "myth of origin" for other federal decisions upholding government land management plans which sought to accommodate Native American practices at sacred sites through voluntary compliance by the public. In 2002, at Rainbow Bridge in Utah—the subject of the *Badoni* litigation of the 1980s—a comprehensive plan that included discouraging, though not prohibiting, visitors from approaching or passing under the arch formed by the sandstone edifice "[out of respect] for the sacred nature of this area to American Indians" was upheld against an Establishment Clause challenge brought by a tourist.[104] The water level has receded from beneath Rainbow Bridge and policies of the NPS favorable to the accommodation of Navajo cultural values and religious beliefs, as well as the preservation of the site from degradation by overuse or misuse by tourists, have brought a measure of relief, though not satisfaction, to those who hold the site sacred.

Federal courts since *Bear Lodge* have rejected Establishment Clause challenges in two cases and found violations in none. In 2004, the Tenth Circuit Court of Appeals held that the Forest Service's historic preservation plan for the Medicine Wheel National Historic Landmark—an ancient, highly complex site in Bighorn County, Wyoming, used for centuries by innumerable tribes for religious observances—did not violate the Constitution by requiring the closing of roads used by commercial loggers, and stopping a planned timber sale in deference to Native religious sensibilities.[105] Also in 2004, the Ninth Circuit Court of Appeals upheld Arizona's Department of Transportation policy against issuing permits to private landowners that would allow them to sell the state materials mined from sites on their land (Woodruffe Butte) that were sacred to the Hopi, Zuni, and Navajo.[106] Taken together, *Bear Lodge* and its progeny may represent an emerging jurisprudence of accommodation of sacred sites, one grounded in a court-recognized policy of religious accommodation under the First Amendment and informed by federal statutory and executive commitments to preserving and fostering traditional Native American culture, history,

and tradition. Whether such politically generated commitments by the nonjudicial branches can sustain Native American spiritual practices "to the seventh generation," however, remains a profoundly unsettling and unsettled question to many.[107]

THE FUTURE OF NATIVE AMERICAN SACRED SITES UNDER FEDERAL LAW

Today federal courts are not disposed to recognize that government actions that unintentionally harm or even destroy tribal religious practices and cultures amount to constitutional burdens on the freedom of religion, at least where the practices require certain uses of government-owned land. Despite RFRA, sacred sites have no more constitutional protection than after *Lyng*. The Free Exercise Clause offers no sword to land-based religions. However, neither has the Establishment Clause provided a sword to the opponents of land-based religions, as long as federal land managers seek to accommodate Indian religious practices in ways that do not coerce the public's voluntary compliance with land use restrictions.

The Supreme Court may be willing to consider expanding the notion of indirect constitutional burdens beyond government coercion or penalization. In *Gonzales* (2006),[108] customs inspectors seized a quantity of a plant containing an illegal drug that was bound for an indigenous peoples' church to be used sacramentally in a tea called *hoasca*. The government and church members agreed that the confiscation burdened members' religion for purposes of RFRA—without its sacrament, the church's religious practices would be harmed. The Court ruled that the government had failed to show a compelling interest in enforcing its drug laws against church members, or that seizure was the least restrictive means of doing so. Might the Court be receptive to other kinds of indirect burdens, such as those in *Navajo Nation*, which also make it harder for Indians to practice their religions, without coercing or penalizing them? Probably not. The *Gonzales* Court noted that the facts behind the *Smith* case, which RFRA expressly reversed, were very much like the facts of *Gonzales* (peyote instead of *hoasca*), thus showing congressional willingness to make exceptions for sacramental drug use by indigenous communities. Also, with amendments to AIRFA in 1994 that allow sacramental peyote use by Indians, Congress had shown its support for this type of exception to generally applicable drug laws. Perhaps most significantly, in *Gonzales* the government agreed from the outset that its conduct "burdened" members' religion in a legally relevant way—a stipulation unusual if not unique for the United States. Thus, while *Gonzales* may indicate greater judicial sympathy for Indian religious practices that are *not*

land-based (like consuming peyote or other drugs in traditional religious ceremonies), the opinion does not provide a basis for optimism that *Lyng* will be overturned soon.

As long as property ownership remains conclusive for establishing a right to worship at sacred sites, Native Americans may benefit from recent work by legal scholars who are exploring new theories of property rights that Indians may assert. As law professor Kristen Carpenter has argued, "Indians have the longest and deepest relationship with sacred sites of any peoples in North America, and in some instances, some of those relationships may be cognizable under property law."[109] Easements—rights of land use—which Indians may have retained in treaties or established through long and open conduct may provide help. A federal district court has recognized such a right of use in the Zuni, holding that under Arizona law, the tribe was entitled to an easement over private property for the purpose of making a quadrennial pilgrimage to a mountain region, Kohlu/wala:wa, which the Zuni believe to be their place of origin.[110] While an easement is less than a fee simple estate (which gives the possessor all of the rights in the "bundle" that goes with ownership), it is nevertheless a powerful interest that would be familiar to judges and a legal system indebted to conventional Euro-American notions of property.

Until such time, if any, that the Supreme Court expressly overrules *Lyng* or permits judicial interpretations of "burdens" under RFRA that reach government acts affecting sacred sites, or until federal courts consistently recognize Native American relationships to land as falling within the conventional tenets of property law, or until Congress acts, the future of sacred sites on public lands may depend upon the ingenuity and "beneficence" of federal agents. Consistent with federal policies, National Park Service employees and other land managers must craft plans that aim to strike a balance between "multiple uses" by the public and religious or cultural uses by Native Americans. Allowing federal land managers to determine how sacred sites will be impacted by third parties permits those closer to the "grass roots" than judges to make decisions in dialogue with stakeholders such as Native Americans, tourists, and business owners. Land managers also are empowered by more than a decade of express federal policies favoring accommodation of Indian religious practices. Federal agents can sometimes be informed, flexible, and sensitive to all sides of a land-use issue. On the other hand, allowing land managers to determine whether a tribe has "enough" access to its sacred sites, or whether an impact will have "minor" effects, may place them in awkward, perhaps inappropriate, roles as quasi-experts in anthropology, sociology, or religion. When trying to create plans that approach but do not violate the Establishment Clause, land managers

may operate as de facto legal scholars, or even as judges. The plans themselves may please no one, or lead to litigation in any event. Individual planners may be gifted with interpersonal skills, organizational abilities and sensitivity to their constituencies—or not. Finally, even where land management plans are deemed successful enough by stakeholders, as creatures of federal agencies, they rely upon the political process for their longevity and thus rest on the shifting sands of the executive and legislative branches of government.

The future of Native American sacred sites may depend on the ability of tribes to form politically effective coalitions to persuade lawmakers and the non-Indian public that they seek no special rights but only legal protection for uses of land that have gone on for at least centuries. Whether sacred sites endure will also depend on whether Native peoples can maintain their cultural integrity—not just acquire the legal use of public land, but continue to grow and develop the languages and lifeways that sprang from their relationships with the land, in ways responsive to the difficulties and opportunities of the present day. For over five centuries Euro-Americans and Native Americans have been challenged to articulate and demonstrate their right relationship with each other. Euro-Americans may call this dialogue negotiating the common good. For many Native Americans, achieving this balance of interests is called, simply, fixing the world.

NOTES

1. Thomas Buckley, "Renewal as Discourse and Discourse as Renewal in Native Northwestern California," in *Native Religions and Cultures of North America: Anthropology of the Sacred*, ed. Lawrence E. Sullivan (New York: Continuum, 2003), 34.

2. Population and tribal statistics cited in this section appear in David H. Getches, Charles F. Wilkinson, and Robert A. Williams, Jr., *Cases and Materials on Federal Indian Law*, 5th ed. (St. Paul, MN: West, 2005), 9, 14–15.

3. See Eva Marie Garroutte, *Real Indians: Identity and the Survival of Native America* (Berkeley, CA: University of California Press, 2003), 1–98. Garroutte, a sociologist, analyzes present-day notions of American Indian identity according to law, biology, culture, and self-identification.

4. See Michael F. Brown, *Who Owns Native Cultures?* (Cambridge, MA: Harvard University Press, 2003); and Angela R. Riley, "'Straight Stealing': Towards an Indigenous System of Cultural Property Protection," 80 *Washington Law Review* 69 (2005).

5. Readers interested in Native American spiritual traditions may wish to consult Vine Deloria, Jr., *God Is Red: A Native View of Religion*, 30th Anniversary ed. (Golden, CO: Fulcrum Publishing, 2003); Huston Smith and Phil Cousineau, *A Seat at the Table: Huston Smith in Conversation with Native Americans on Religious*

Freedom (Berkeley, CA: University of California Press, 2006); Winona LaDuke, *Recovering the Sacred: The Power of Naming and Claiming* (Cambridge, MA: South End Press, 2005); and *Seeing with a Native Eye: Essays on Native American Religion*, Walter Holden Capps, ed. (New York: Harper & Row, 1976).

6. On the role of Christianity in the colonization of the Americas, including its theological antecedents in the Middle Ages, see Robert A. Williams, Jr., *The American Indian in Western Legal Thought: The Discourses of Conquest* (New York: Oxford University Press, 1990).

7. Genesis 1: 1–2 ("In the beginning God created the heavens and the earth. The earth was without form and void, and darkness was upon the face of the deep . . . "), in *Bible* Revised Standard Version. On the philosophy of creation in the Jewish, Christian and Islamic traditions, see David B. Burrell, *Freedom and Creation in Three Traditions* (Notre Dame, IN: Notre Dame Press, 1993).

8. See Catherine L. Albanese, *Nature Religion in America: From the Algonkian Indians to the New Age* (Chicago, IL: University of Chicago Press, 1990), 35 (For Puritans, "[t]he wilderness was the territory of the devil and the powers of evil. Wild beasts and wild men who dwelled there could only be his emissaries and servants").

9. Lloyd Burton, *Worship and Wilderness: Culture, Religion, and Law in Public Lands Management* (Madison, WI: University of Wisconsin Press, 2002), 55.

10. Albanese, *Nature Religion*, 53 (Beginning in the Enlightenment, "[w]ith the order and regularity of the Newtonian universe, the harmony of the spheres moved from ancient Greek philosophy to modern scientific laws").

11. Barron's defines "highest and best use" as a real estate appraisal term referring to the "legally and physically possible use that, at the time of appraisal, is most likely to produce the greatest net return to the land or buildings over a given period." *Dictionary of Business Terms*, Barron's Educational Series, Inc, 2000. See also *Answers.com*, available at http://www.answers.com/topic/highest-and-best-use.

12. Smith and Cousineau, *A Seat at the Table,* xix.

13. Keith H. Basso, *Wisdom Sits in Places: Landscape and Language among the Western Apache* (Albuquerque, NM: University of Albuquerque Press, 1996), 31.

14. *American Sacred Space*, ed. David Chidester and Edward T. Linenthal (Bloomington, IN: Indiana University Press, 1995), 9.

15. Ibid., 12.

16. Ibid., 15.

17. Buckley, "Discourse as Renewal," 33.

18. Vine Deloria, Jr., *God Is Red*, 65.

19. Ibid., 65–66.

20. Andrew Gulliford, *Sacred Objects and Sacred Places: Preserving Tribal Traditions* (Boulder, CO: University Press of Colorado, 2000), 68–69. The contrasts I draw between the two types of religion for the sake of highlighting their differences should not elide the fact that religions of the book also have sacred places (e.g., Jerusalem, Mecca) and routinely engage in ritual actions, and religions of the land have complex belief systems that explain the universe to adherents.

21. The poet Audre Lorde, speaking in a different context, famously claimed "the master's tools could never dismantle the master's house." Native Americans who have spun arguments for sacred sites protection based on American constitutional law may have reached the same conclusion. Audre Lorde, *Sister Outsider* (Berkeley, CA: Crossing Press, 1984), 112.

22. U.S. Constitution, Amendment 1.

23. *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

24. Ibid., 303; *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961).

25. *Reynolds v. United States*, 98 U.S. 145 (1878).

26. *Reynolds*, 98 U.S. at 164 ("Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order").

27. *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972). Another threshold criterion for stating a Free Exercise Clause claim is that the religious basis for the assertion be "sincere," not feigned. Courts have tended to accept the sincerity of claimants rather than engage in second-guessing their motives. See Michael W. McConnell, John H. Garvey, and Thomas C. Berg, *Religion and the Constitution* (New York: Aspen Publishers, 2002), 237–45.

28. *Davis v. Beason*, 133 U.S. 333, 342 (1890).

29. *United States v. Seeger*, 380 U.S. 163, 165 (1965). See also *Welsh v. United States*, 398 U.S. 333 (1970).

30. *Sherbert v. Verner*, 374 U.S. 398 (1963).

31. *Shebert*'s mode of analysis led to invalidations of governmental actions in the following Free Exercise Clause cases: *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (fine on Old Order Amish for failing to send children to public schools); *Thomas v. Review Board*, 450 U.S. 707 (1981) (unemployment compensation denied Seventh Day Adventist for refusing to work in a munitions factory); *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136 (1987) (unemployment compensation denied Seventh Day Adventists who refused to work on Saturday); *Frazee v. Ill. Dep't of Employment Security*, 489 U.S. 829 (1989) (unemployment compensation denial to Sabbatarian).

32. 42 U.S.C. § 1996.

33. AIRFA and subsequent Indian legislation and executive branch actions, discussed below, can be viewed as attempts by the federal government to fulfill its trust responsibilities to the tribes. On the Trust Doctrine, see Rebecca Tsosie, "The Conflict Between the 'Public Trust' and the 'Indian Trust' Doctrines: Federal Public Land Policy and Native Nations," 39 *Tulsa Law Review* 271 (2003).

34. On the history of federal policies outlawing and suppressing Indian religious practices in the late-nineteenth and early-twentieth centuries, see Allison M. Dussias, "Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases," 49 *Stanford Law Review* 773–852 (1997), esp. 788–805 (on federal policies of Christianization of Indians and suppression of indigenous religious rituals), and Ronald Niezen, *Spirit Wars: Native North American Religions in the Age of Nation Building*

(Berkeley, CA: University of California Press, 2000), 46–87 (on Indian boarding school phenomenon in United States and Canada).

35. *Sequoyah v. TVA*, 620 F.2d 1159 (6th Cir. 1980).
36. Ibid., 1162.
37. Ibid., 1164.
38. Ibid., 1165.
39. Ibid., 1164.
40. Ibid., 1161.
41. *Badoni v. Higginson*, 638 F.2d 172 (10th Cir. 1980).
42. Ibid., 176.
43. Ibid., 178.
44. Ibid., 179.
45. Ibid., 180.
46. *Frank Fools Crow v. Gullet,* 541 F. Supp. 785 (D. South Dakota 1982).
47. Ibid., 791.
48. Ibid., 792.
49. Ibid., 793.
50. Ibid.
51. *Wilson v. Block*, 708 F.2d 735 (D.C. Cir. 1983).
52. Ibid., 741.
53. Ibid.
54. Ibid., 743.
55. Ibid.
56. Ibid., 744.
57. Ibid., 744 fn. 5.
58. Ibid., 747.
59. Ibid.
60. *Lyng v. Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988).
61. Buckley, "Renewal as Discourse," 33–52.
62. Ibid., 442.
63. Ibid.
64. Justice Kennedy, who was new to the Court, took no part in the case.
65. Ibid., 447.
66. Ibid., 451.
67. Ibid.
68. Ibid., 450–451.
69. Ibid., 452.
70. Ibid., 453.
71. Ibid. (italics in original).
72. Ibid., 453–454.
73. Ibid., 455.
74. Ibid., 465.
75. Ibid.
76. Ibid., 476.

77. Ibid., 477.

78. Ibid.

79. Charles Fried, *Saying What the Law Is: The Constitution in the Supreme Court* (Cambridge, MA: Harvard University Press, 2004), 152.

80. See, e.g., the Draft United Nations Declaration on the Rights of Indigenous Peoples, the Proposed American Declaration on the Rights of Indigenous Peoples, and related international law initiatives and documents discussed in Patrick Thornberry, *Indigenous Peoples and Human Rights* (Manchester, UK: Manchester Univ. Press, 2002). See also S. James Anaya, *Indigenous Peoples in International Law* (2000) (important theoretical discussion of the basis for indigenous rights) and S. James Anaya and Robert A. Williams, Jr., "The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System," 14 *Harvard Human Rights Journal* 33 (2001).

81. Marcia Yablon, "Property Rights and Sacred Sites: Federal Regulatory Responses to American Indian Religious Claims on Public Land," 113 *Yale Law Journal* 1623 (2004).

82. *Employment Division v. Smith*, 494 U.S. 872 (1990).

83. 42 U.S.C. §§ 2000bb-1(a) and (b).

84. *City of Boerne v. Flores*, 521 U.S. 507 (1997) (RFRA invalid as to the states); *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 126 S. Ct. 1211, 1216–17 (2006) (RFRA valid as to the federal government).

85. Anastasia P. Winslow, "Sacred Standards: Honoring the Establishment Clause in Protecting Native American Sacred Sites," 38 *Arizona Law Review* 1291, 1315 (1996).

86. Navajo Nation v. U.S. Forest Service, 408 F. Supp. 2d 866 (D. Ariz. 2006).

87. 42 U.S.C. §§ 2000cc.

88. U.S. Constitution, Amendment 1.

89. The Establishment Clause applies to the states through the Fourteenth Amendment. *Everson v. Board of Ed.*, 330 U.S. 1 (1947).

90. See, for example, *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (The Constitution "mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any"); *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136, 144 (1987) (The Supreme Court "has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause"); and Michael W. McConnell, "The Origins and Historical Understanding of Free Exercise of Religion," 103 *Harvard Law Review* 1409 (1990).

91. 25 U.S.C. §§ 3001–3013.

92. The National Park Service reports that as of November 30, 2006, the total of number of remains and artifacts reported and eligible for repatriation under NAGPRA amounted to 824,405. Available at http://www.cr.nps.gov/nagpra/FAQ/INDEX.HTM#How_many.

93. 16 U.S.C. § 470a (d)(6)(A) & (d)(6)(B).

94. 42 U.S.C.A. § 1996a.

95. Burton, *Worship and Wilderness*, 107.

96. Related Executive Orders of the Clinton presidency include E.O. 12,898, "Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations" (1994), and E.O. 13,175, "Consultation and Coordination With Indian Tribal Governments" (2000).

97. *Bear Lodge Multiple Use Assn. v. Babbitt*, 2 F. Supp. 2d 1448 (D. Wyo. 1998).

98. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

99. *Bear Lodge*, 2 F. Supp. 2d at 1454.

100. Ibid.

101. Ibid., 1455 fn. 7 ("In fact, a complete elimination of climbing from the Tower in the month of June would serve as powerful evidence of actual coercion").

102. Ibid., 1456.

103. *Bear Lodge Multiple Use Assn. v. Babbitt*, 175 F.3d 814, 816 (10th Cir. 1999).

104. *Natural Arch and Bridge Society v. Alston*, 209 F. Supp. 2d 1207, 1214 (D. Utah 2002).

105. *Wyoming Sawmills, Inc. v. U.S. Forest Service*, 383 F.3d 1241 (10th Cir. 2004).

106. *Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969 (9th Cir. 2004).

107. Even in the so-called "age of atonement," federal courts have rejected Indian challenges to the siting of telescope complexes on an Apache sacred mountain (Mt. Graham in Arizona) and requests by tribes for return of the bones of ancient ancestors (the "Kennewick Man" case), to name but two high-profile cases. See Robert A. Williams, Jr., "Large Binocular Telescopes, Red Squirrel Pinatas, and Apache Sacred Mountains: Decolonizing Environmental Law in a Multicultural World," 96 *West Virginia Law Review* 1133 (1994); and S. Alan Ray, "Native American Identity and the Challenge of Kennewick Man," 79 *Temple Law Review* 89 (2006).

108. *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 126 S. Ct. 1211 (2006).

109. Kristen A. Carpenter, "Old Ground and New Directions at Sacred Sites on the Western Landscape," 83 *Denver University Law Review* 981–1002, 997 (2006); see also Kristen A. Carpenter, "A Property Rights Approach to Sacred Sites: Asserting a Place for Indians as Non-Owners," 52 *UCLA Law Review* 1061 (2005).

110. *United States on Behalf of Zuni Tribe of New Mexico v. Platt*, 730 F. Supp. 318 (D. Ariz. 1990).

FURTHER READING

Every study of American Indian spiritual traditions should begin by consulting Lakota author Vine Deloria, Jr.'s work, *God Is Red: A Native View of Religion* (30th anniversary ed., Golden, CO: Fulcrum Publishing, 2003). First published in 1973, this seminal text on Native spirituality in the modern West from an Indian perspec-

tive remains relevant to all students of history, politics, law, and religion. Complementing Deloria's classic is the recent work by Huston Smith and Phil Cousineau, *A Seat at the Table: Huston Smith in Conversation with Native Americans on Religious Freedom* (Berkeley, CA: University of California Press, 2006). Smith, a noted scholar of religion, engages in a series of well-edited dialogues with Native traditional leaders, activists, legal experts, and religionists on the challenges facing indigenous spirituality in the United States.

Readers interested in comparative cultural analysis of land-based religious practices should consult Lloyd Burton, *Worship and Wilderness: Culture, Religion, and Law in Public Lands Management* (Madison, WI: University of Wisconsin Press, 2002). Burton explores the profound differences between Euro-American and Native American experiences of nature to illuminate and challenge the ethnocentrism of U.S. laws and policies governing public lands.

The unique relationship with the land enjoyed by many Native American communities is explored in linguistic anthropologist Keith Basso's award-winning book, *Wisdom Sits in Places: Landscape and Language among the Western Apache* (Albuquerque, NM: University of Albuquerque Press, 1996). Places—sacred and otherwise—are made, not found, as Basso demonstrates in this outstanding study of the Cibecue Apache and their relationship with their land, language, and social world.

Another fine study of present-day sacred sites and their meaning for Native communities is Peter Nabokov, *Where the Lightning Strikes: The Lives of American Indian Sacred Places* (New York: Viking, 2006). Through first-person narratives and scrupulous research, Nabokov, an anthropologist and Native studies scholar, describes his encounters with indigenous communities and their sacred sites across America in this fascinating ethnographic study.

The complex story of federal law and the suppression of indigenous religious traditions in the United States is well told by legal scholar Allison M. Dussias in "Ghost Dance and Holy Ghost: The Echoes of Nineteenth-Century Christianization Policy in Twentieth-Century Native American Free Exercise Cases" (49 *Stanford Law Review* 773 (1997)). Dussias provides a compelling argument that present-day jurisprudence carries forward the nineteenth century's bias toward Christianity in this foundational article on the history of Indian law and religious liberty.

For a comprehensive exposition and analysis of federal Indian law and its impact on real world issues, including access to and protection of Native American sacred sites, see Felix Cohen, *Cohen's Handbook of Federal Indian Law* (Newark, NJ: LexisNexis Matthew Bender, 2005). This recent edition of the classic treatise contains contributions by leading scholars in all areas of Indian law, including chapters devoted to Civil Rights and Tribal Cultural Resources.

The future of sacred sites protection will depend in part on ingenious legal strategies that move beyond constitutional law and the Free Exercise Clause. In her ground-breaking article, "A Property Rights Approach to Sacred Sites Cases: Asserting a Place for Indians as Non-Owners" (52 *UCLA Law Review* 1061 (2005)), law professor Kristen A. Carpenter criticizes the legal definitions of ownership and

offers an important approach to protecting indigenous spiritual practices based on Indian rights in land under principles of Euro-American property law. Are land-based religious practitioners actually better off under the authority of federal agencies and Congress than under the protection of the Constitution? Legal scholar Marcia Yablon says yes, in her controversial perspective on Indian sacred sites and public lands, "Property Rights and Sacred Sites: Federal Regulatory Responses to American Indian Religious Claims on Public Land" (113 *Yale Law Journal* 1623 (2004)).

Readers interested in any dimension of Native American religions and the law should consult the DVD, *In the Light of Reverence: Protecting America's Sacred Lands* (Bullfrog Films, 2001). Director Christopher McLeod's award-winning documentary offers a highly engaging set of narratives focused on three tribes—the Hopi, Lakota, and Wintu—who are struggling to maintain their traditional spiritual practices in the context of non-Native values and the U.S. legal system. Information on this DVD and the Sacred Land Film Project of which it is a part is available at www.sacredland.org.

7

Consecrating the Green Movement

Nadra Hashim

Upon entering office, the Bush Administration withdrew the United States from the Kyoto Protocol. Ironically, this may have been the best thing that ever happened to the modern environmental movement, as it seems to have galvanized a community of scientists, an assortment of grass roots organizations, and a variety of politicians.[1] The Kyoto debacle specifically invigorated a lingering debate over the issue of greenhouse gases, particularly carbon dioxide emissions, and its relationship to global warming, as well as the relationship between international economic competition and American and international laws governing environmental protection.

Along with usual parties to the debate—the left-centrist greens and their opponents, the Wise Use advocates—at least one new faction has joined the fray. Recently, evangelical environmentalists, in a growing network of church-based grassroots organizations, have formed a loose coalition based on their shared interest in nature and on the doctrinal strategy of lobbying the government in the name of God. In the last two decades and in many areas of government, the Evangelical Right has enjoyed a rather swift and especially powerful influence in the Republican Party. This is especially true where matters of social policy are concerned. In light of this history, it stands to reason that the Evangelical Greens might expect similar results in the realm of regulatory protection, especially given the rather dramatic and apocalyptic melting of the polar ice caps.[2]

When George W. Bush ran for president, he made his faith, and more specifically his spiritual re-awakening, a central feature of his campaign. Once elected, President Bush created the Office of Faith-Based Initiatives, which formulates social welfare policy, coordinating and funding various advocacy and charity organizations. The president drew appointees to his faith-based initiatives from a pool of leaders within America's growing evangelical movement. In almost all areas of social policy, these evangelical leaders, both those in the White House as well as others associated with national think tanks, supported Bush Administration policy. However, in the past few years some evangelical leaders have broached topics outside the scope of the faith-based initiative. More specifically, a coalition of maverick evangelicals is pressing the Bush Administration to reconsider the Kyoto Protocol and formulate legislation which would regulate America's reliance on forms of energy that cause global warming. Like many Americans who have waged a campaign to advance regulatory law, Evangelical Greens may be aware that such a victory will be hard won.[3]

Depending on your perspective, the history of the American Green Movement can be characterized by its waves of relative popularity or obscurity. Many historians cite Rachel Carson's 1962 publication of *Silent Spring* as the epiphanic moment in modern environmental consciousness. Others suggest that the 1960s and 1970s were merely the second wave of environmental activism.[4] They assert that the first wave of environmental awareness occurred in the nineteenth century, when the early evidence of smoky fog, dubbed "smog," was detected in industrialized metropolises such as London.[5]

In this, the third wave of environmental consciousness, many scientists argue that the melting of the glaciers and ice caps requires immediate and sustained attention.[6] A far smaller group of scientists suggests that global warming is not imminent, and if it is, its effects may be self-correcting. The debate between these two scientific communities is highly charged, because most nations who signed the Kyoto Protocol argue that global warming is the leading cause of climate change.[7] The latest ripple in the current environmental debate has emerged because America's various scientific communities are discussing their differences very publicly. Due to the fact that some scientists are disputing what others believe to be verifiable facts, the focus of the political debate has shifted from formulating environmental policy to interpreting scientific data. More proverbial fuel has been added to the incendiary debate because most of the industrialized nations who signed the Kyoto Protocol are intrigued by this uniquely American debate. In a further and highly unusual departure from American environmental

history, twelve states sued the Bush Administration EPA in an effort to induce the agency to acknowledge the link between carbon dioxide emissions and global warming/climate change and to formulate policy accordingly.[8]

The study of carbon dioxide emissions and their effect on air pollution stretches back to the late-nineteenth century. However, the recent and highly dramatic effects of global warming are making the solitary study of carbon dioxide a decisive element in the strategy of interest group political activity. Whereas in previous decades environmental protection was a grassroots effort, the activism of Third Wave Greens has developed into a legal struggle concerning the science of conservation, one that is being contested at the highest levels of government.[9] Meanwhile, Evangelical Greens have begun lobbying the presidential administration to reconsider its position on global warming.

This continuing dispute over environmental science, the role of the government in promoting conservation, and the recent emergence of religious environmentalists are intriguing developments. In the latter instance, evangelical activism has caused some to fear that the wall between church and state is being breached. However, these trends also suggest that some evangelical Christians, disenchanted with scientific inquiry since the emergence of Darwinian evolution and the triumph of academic and political agnosticism, may have finally made their peace with scientific inquiry. In order to understand how the historic tensions between scientific analysis and religious study have influenced current environmental policy, it is necessary to measure the breadth of antagonism toward Darwinian evolution. This aversion has helped promote not only Creationism and Intelligent Design, but it has also sustained a vague suspicion of the environmental sciences. Evangelical Greens, with their interest in natural sciences and environmental protection, find themselves outside the mainstream of their community. Their new political activism begs the question: are the tentative efforts by evangelical Greens a passing fad or an enduring trend? If Evangelical Greens institutionalize their position within their respective religious communities, will scientific inquiry finally enjoy a more laudable position in evangelical circles, or will the legacy of the Scopes Trial continue to keep evangelical Protestants cast out of the province of scientific inquiry into the twenty-first century? Ironically, the tension between the advancement of science and the promotion of religion is not a conflict born of America's Puritan history. Rather, this cleavage emerged once the wall between church and state had been firmly established.

THE FIRST WAVE: RELIGIOUS INNOVATION, INDUSTRIAL PROGRESS AND NATURAL THEOLOGY

By the mid-nineteenth century, scientific innovation made America the world's leading economic superpower. Americans inherited an enthusiasm for the study of science from their seventeenth-century Puritan forebears, who were beneficiaries of Enlightenment scholarship. According to Robert Merton, "Experiment was the scientific expression of the practical, active and methodological bents of the Puritan. This is not to say, of course, that experiment derived in any sense from Puritanism. But it serves to account for the ardent support of the new experimental science by those who had their eyes turned towards the other world and their feet firmly planted on this one."[10]

In seventeenth-century England, Sir Francis Bacon, the father of empiricism, and Robert Boyle and Isaac Newton, Enlightenment innovators in the physical sciences, were all associated with the Puritan faith, even if they did not practice their religion publicly.[11] Boyle and Newton were distinguished not only by their intellectual discovery, but also by their willingness to incorporate their faith in the language of their discovery. Newton argued that "[God] being in all places is more able by his will to move the Bodies within his boundless uniform Sensorium and thereby form and reform the parts of the Universe, than we are by our will to move the parts of our own bodies."[12]

Like Newton, Robert Boyle implied that his laws of science were fashioned by God, "since motion does not essentially belong to matter, as divisibility and impenetrableness are believed to do; the motions of all bodies, at least at the beginning of things . . . were impressed upon them, either by an external immaterial agent, God; or by other portions of matter acting upon them."[13]

Whether the Protestant Reformation in general or Puritanism more specifically was responsible for indulging an enlightened pursuit of scientific inquiry is a matter of significant dispute. By the eighteenth century, Puritan religious authority in America was being displaced by the proliferation of less rigidly religious political communities. In the eighteenth century, among the leadership of prominent intellectual communities, there was even a movement away from organized religion. One significant manifestation of this trend was the emergence of Deism.

Like Puritanism, Americans inherited Deism from the British.[14] The controversial aspects of Deist thought included its skeptical attitudes regarding the divinity of Jesus Christ, the existence of hell, and the authenticity of

some portions of the New Testament. Many Deists believed that organized religion was extraneous to these revelations and as such should have little role in determining the ethical, legal, and political design of common law or national institutions.[15] As Deists and disciples of the European Enlightenment, Paine and Jefferson wanted secular law and rational philosophy to govern public discourse and civic life, so they argued that church and state should remain separate.[16] In his drafts of the Virginia Constitution, Jefferson stipulated that all citizens should have religious liberty and be freed from the compulsion of attending religious institutions. These sentiments found their highest ultimate expression in the Bill of Rights.[17] Thomas Jefferson's apprehension with the role of organized religion in civic life sprang from his knowledge of the turmoil caused by Europe's Thirty Years War, a feeling that was confirmed by the upheavals of America's nascent spiritual revival.

Spanning the years 1720–1750, America's First Great Awakening created a sustained schism in the ranks of various Protestant denominations over the appropriate means of interpreting the Bible.[18] In the Presbyterian Church, revivalists sought a literal interpretation of the Bible. Anti-revivalists championed a different approach to Biblical interpretation, one that drew from Enlightenment philosophy and scientific reasoning. This schism between the so-called "old" and "new" sides in the Presbyterian Church reflected a larger trend in various Protestant denominations and in the broader American society. The core dispute in most First Great Awakening communities concerned a tension over two facets of the Bible—its "inspirational" value and its "genuineness."[19] In the first instance, theological scholars were interested in determining which aspects of the Bible were wholly divine and what constituted divinely inspired human activity. The debate over inspiration often took place in the higher realms of theological discourse.[20] The second area was more mundane and concerned matters of "authorship, date and canonicity."[21]

In response to this intellectual revival, more traditional evangelical scholars, such as Samuel Tyler, led the "anti-revivalist" charge. Tyler argued that the Bible should be read for its overall message and should not be subjected to speculative criticism or reductionism.[22] This debate would reemerge in the late nineteenth century, when Darwin's focus on the mundane laws of the environment would challenge the biblical narrative of the earth's miraculous creation. Meanwhile, the political impact of the First Great Awakening and the debates it spawned between men of faith and men of reason pushed Americans toward scientific realism and political independence from England.[23] The struggle between revival and anti-revivalists in the late-

eighteenth and early-nineteenth century also began to reflect a change in cultural and political norms brought about by the growing impact of the industrial revolution.

In the eighteenth century, promising scientific innovations such as the invention of the steam engine and electricity determined how modern society would be organized. These innovations permanently altered migration and improved employment opportunities. In England the industrial innovation also began to influence theological thought. In 1802, William Paley wrote a treatise recalling St. Thomas Aquinas' effort to prove the existence of God. Paley's *Natural Theology* placed God's works into various precise categories, which he called natural, supernatural, and miraculous.[24] In the years following the Civil War, Paley's natural theology became popular among American scholars who thought they might reconcile evolution with creation.[25] In the years between the First and Second Great Awakenings, the social developments that accompanied industrialization shifted national attention from religion and politics to science and industry. Americans belonging to a range of religious denominations grew enamored of modern scientific innovation, even if they remained leery of progressive scientific reasoning, a development that promoted economic expansion at the expense of environmental protection.

During the eighteenth century, the most important development in the world of commercial manufacturing and the harbinger of the Industrial Revolution was the "harnessing" of steam power.[26] This led to further experimentation with coal, rubber, and steel, which gave way to the first generation of British and American coal-burning factories.[27] These so-called "smog producers" displaced rural cottage industries, becoming the dominant feature of urban London by the mid-nineteenth century.[28] During the decade of the 1840s, at the height of the Industrial Revolution in Europe, the British parliament passed a city ordinance to control smoke emitted by local factories.[29] The law had little effect, and by the 1870s smog covered most of London, especially trees and tall buildings, obscuring the horizon. In 1873 an emission of pale, highly toxic smog led to citywide respiratory failure and caused as many as seven hundred deaths in the span of two days.[30] This particularly virulent smog attack, and one that followed it in the 1880s, may have not been carbon dioxide alone, as carbon dioxide is not observable, but they were warnings of the pernicious side effects of industrial development.[31]

In 1870s London, Charles Darwin's research on the environment was a central feature of most intellectual and political discourse. The concept of adaptation and survival, lexicon intended for analyzing animals experiencing biological evolution over millennia, was often used to justify the mala-

dies and dislocations caused by the ever-expanding industrial economy. This was especially true in the case of a phenomenon known as "industrial melanism" observed in a moth named *B. betularia*.[32] By the 1860s, R.S. Edelson, a naturalist and moth enthusiast, noticed that some *B. betularia* had mutated. Unlike the original grey- and white-flecked moths, the new *B. betularia* were dark like the soot that covered most surfaces in urban London. In 1864, Edelson published his findings and named the new moth *carbonaria* in honor of the chemical element that furnished this adaptation.[33] As if to forewarn future environmentalists of an enduring trend, by 1900 the speckled moths had virtually "died out," and a full 90 percent of *B. betularia* were *carbonaria* moths.

The concepts of adaptation, evolution, and extinction were radical ideas outside the mainstream of much of nineteenth-century public discourse, as was the notion of environmental protection.[34] Even more problematic, Darwinian philosophy, one of the few scientific fields that addressed the function of the environment, was viewed in many circles as heretical. It seemed to directly contradict the sacred chronicle of biblical creation. In the era before industrialization—the early years of the Enlightenment—mathematicians and scientists such as Isaac Newton and Robert Boyle took pains to emphasize the harmony of their research with divine law. American scholars of the eighteenth and early nineteenth century followed suit, often quoting religious doctrine as they advanced their scientific inquiry.

In the 1840s, several religious scholars began to blend science and faith in an effort to challenge Deism, Materialism and Agnosticism, philosophies that juxtaposed science and faith and often disparaged organized religion.[35] Like their American counterparts, British theologians sought to establish a rapport between religious study and empirical research. In the 1820s, the Earl of Bridgewater asked that a conference of notable scholars work in residence on his estate and demonstrate the use of scientific constructs to describe the "Power, Wisdom and Goodness of God" in nature.[36] The *Bridgewater Treatises* were published after the Earl's death and included analysis from the fields of physics, the natural sciences, and human anatomy. By various accounts, one essay in particular, that of William Whewell's treatise on natural theology, made the most profound impact on a community of scholars interested in theology and the natural sciences. Whewell used his own observations of biological adaptation in nature to argue that there was a divine "cosmic mechanism" at work in the universe.[37] *The Treatises* became very popular reading in rarefied circles of academia and theological study.[38]

In an attempt to bring natural theology to a broader community and to lay evangelicals in particular, the University of Virginia sponsored a public

lecture series to provide "Evidences of Christianity." The Virginia lectures were delivered and published as a complement to the *Bridgewater Treatises*.[39] One lecture in particular, that of Pastor Thomas Moore of Richmond's First Presbyterian Church, spoke of the unity of the human race and suggested that creation as revealed by the book of Genesis was consistent with science. Moore maintained that only "false" science would promote the notion of separate creations and different races.[40]

Once Darwin published the *Origin of the Species*, British discord over religion and science spread to America, but due to the distractions of the impending Civil War—and the Reconstruction period that followed—the debate was somewhat muted. Political and religious tensions in Reconstruction-era American society included disagreements about western expansion, immigration control, the impending conflict between agricultural and mercantile states, and the slave dilemma.

The Second Great Awakening reflected these concerns especially during the first half of the nineteenth century. In various parts of the country, the Second Great Awakening became both a social and religious movement. It counted among its leaders Calvinists who tried once again to reconcile conservative Protestantism with Enlightenment ideas such as free will and analytical reasoning—ideologies that were not averse to academic inquiry.[41] On a more popular level, the mass revival of evangelical Protestantism promoted both personal salvation as well as religiously sanctioned political activism. These Second Great Awakening activists represented large portions of American society dissatisfied with the influence of alcohol and slavery on national culture. These groups drew strength from a broad association with other Second Great Awakening factions and their ideas became influential even as the revival began to wane in the 1840s and 1850s.[42]

In 1859, on the eve of the American Civil War, Charles Darwin published his *Origin of the Species*. It was for a time largely ignored by the vast majority of the population, but it received more urgent and considerable attention in academia. In many cases, nearly all theologians, and even the majority of secular scholars, took a rather dim view of natural selection. Several issued written and verbal refutations of evolution within the first years of Darwin's publication.[43] Darwinian evolution, unlike Newton's laws of math and physics, seemed to be in direct conflict with the narrative of the Bible. Biblical literalists, many of them evangelical, began to promote creationism as an alternative theory to the science of evolution.

According to Bertrand Russell, Darwinian evolution was as severe a shock to nineteenth century religious orthodoxy as Copernican gravity had been in the sixteenth century. According to Russell:

Not only was it necessary to abandon the fixity of species and the many separate acts of creation which Genesis seemed to assert; not only was it necessary to assume a lapse of time, since the origin of life was shocking to the orthodox, not only was it necessary to abandon a host of arguments for the beneficence of providence, derived from the exquisite adaptation of animals to the environment which was now explained as operation of natural selection—but worse than any or all of these, evolution ventured to affirm that man was descended from lower animals . . . As often happens, the theologians were quicker to perceive the consequences of the new doctrine than were its advocates, most of whom, though convinced by the evidence, were religious men and wished to retain as much of their former beliefs.[44]

Scholarly theologians, lay preachers, and other defenders of the faith tried a variety of tactics to blunt the impact evolution would have on popular thought. For a large group of American Christians, mainline Protestants, Catholics, and many Second Great Awakening evangelicals, the church took a firm stand against evolution and by extension other fields in the natural sciences, including the study of man's impact on the environment.[45] Even many liberal churches turned from science, concentrating on historical, existential, and psychological analysis in an attempt to address modern alienation. In academic circles, a variety of theologians and philosophers tried to challenge evolution. Others tried to modify this scientific theory so it harmonized with religious orthodoxy. Still others tried to co-opt Darwinism in order to promote science or to further political purposes. A large portion tried to ignore evolution, hoping it would go away.[46]

Among those who promoted science and thought it was incompatible with religion were the scientific naturalists. Among the most notable examples of this approach were Thomas Huxley and Herbert Spencer. Huxley was an agnostic and simply argued that evolution was real and that Creationism was largely mythology.[47] Unlike Thomas Huxley, who primarily promoted the biological component of evolution, Spencer believed that natural selection was a social construct as well as a biological phenomenon. Spencer suggested that some men were biologically "fitter" than others. He promoted a Malthusian interpretation of Darwinian evolution, including an idea later dubbed *multiple creations*, which suggested that the races were distinct species in competition with one another, thereby reducing Darwinism to political opinion rather than scientific fact. This sensationalized view of evolution—often called Social Darwinism or *eugenics*—came to characterize popular understanding of Darwin's theories, set the stage for the Scopes Trial, and caused a sustained reaction to or aversion of the natural sciences among many lay evangelicals.[48]

THE SECOND WAVE: ANOTHER AWAKENING, DISCOVERING HEAT, AND CONSERVING NATURE

Perhaps in reaction to the politicization of evolution, an emerging group of scholars tried to reconcile the science of evolution with the truth of religion. This struggle was best characterized by the Hodge-Gray debate of 1870s. Professor Hodge was Professor of Theology at Princeton. He believed the best way to defeat the implicit atheism of evolution was to promote an unwavering commitment to Biblical literalism.[49] Asa Gray, a scientist and theologian in the tradition of William Paley and Edward Hitchcock, believed that the facts of the natural sciences could inform and support the truths of faith. Like Paley, Gray was interested in helping reveal a greater number of Thomist evidences found in nature as further proof of God's existence. More specifically, Gray's primary occupation in the sciences was promoting natural theology and refining the taxonomy of various living creatures. When Darwin published his thesis, Gray found that it resonated with his own religious ideology in that all living creatures had a common, if divine, origin.[50] Though both pursued the study and classification of animals, Darwin's study soon garnered more attention than Gray's analysis. Many years after the publication of all these studies, theologians with an interest in promoting creationism would revisit Paley and Gray's formulations when articulating the concept of intelligent design.[51] Ultimately, throughout many political and social circles in Europe and America, various pseudo-scientific views of evolutionary biology began to prevail, thereby polarizing political camps into those who promoted Social Darwinism and those, including Second Awakening evangelicals, who fought it.

Often applied to social policy, sometimes to regulatory law, Social Darwinism became the rallying cry of many elite industrialists who directed their political rhetoric to other members of their class.[52] Paradoxically, many working class men and women, eager for wealth—and confident in America social mobility—answered the summons. They began a mass migration from country to city, which was unknown in previous centuries, and symbolized the beginning of the modern age. By the end of the nineteenth century, Britain was the world's leading industrial power, but Germany and America were quickly "evolving" into economic rivals. Although Britain had the "head start," the American adaptation of coal and steel to a variety of industries, including the mass production of automobiles, soon catapulted the United States ahead of the world's other leading economic powers.[53] In industrial Europe and in America, two distinct scientific communities emerged. There were those who pursued knowledge to advance industry, and there were those scholars who researched science for the pure

love of inquiry. Among the latter group was a tiny faction who studied the environment. Whereas scientific communities in Europe were rather small, in America a larger number of learned men pushed the Industrial Revolution ever forward. Those who worked for industry often enjoyed wealth and notoriety, while those pursuing a more personal form of inquiry often toiled in relative obscurity. The technology of the industrial era was in its infancy and the danger of carbon dioxide was not widely understood.

Many of the discoveries that addressed possible changes in the environment were discovered because of the work of a few solitary academics scattered throughout Europe and America.[54] Initial research into the properties of carbon dioxide conducted by Joseph Black, Humphry Davy, Michael Faraday, and Charles Thiloreir paved the way for the era's most rigorous study of the environment. Building on earlier research, Svante August Arrhenius declared that the atmosphere functioned like a "hot-house," or greenhouse, and human enterprise was inherent to this type of environmental transformation.[55] In the early months of 1894, Arrhenius began a study of daily changes in the local climate until at the end of the year he arrived at his various mathematic and scientific models, which tested the relationship between carbon dioxide emissions and climate change. Arrhenius argued that water vapor and carbon dioxide warm the atmosphere. Being a native of a Scandinavian region where the winters could be arctic, and like so many men of his age, Arrhenius was disinclined to see the hazards of industrialization. He praised the increase of carbon dioxide in the atmosphere as a boon to agriculture.[56]

The mere discovery that greenhouse gases such as carbon dioxide captured and stored heat stunned and impressed the scientific community. Any negative impact carbon dioxide may have—including the possibility of cataclysmic climatic reversals, such as a rash of hurricanes, flooding, or even a creeping ice age—did not worry Arrhenius. Like other scientists of that era, Arrhenius was captivated by the promise of what modernity would bring.[57]

The Second Wave Crests: Mass Production, Secular Law, and Their Discontents

Modern enterprise expanded between the mid-eighteenth century and the late-nineteenth century, and carbon dioxide emissions swelled. The dawning twentieth century marked the beginning of a new phase of industrialization, one that was characterized by an adaptation of fossil fuels, innovations in technology, and the emergence of a scientific approach to industrial management. The decades stretching from the end of the Civil War

to the turn of the century were devoted to the building and financing of railroads. Between the years 1860 and 1910, the network of railroads multiplied eightfold.[58] Once electrical mechanization was added to the industrial mix, the volume or scale of production increased exponentially, and for a time industry needed an ever-increasing number of skilled managers and semi-skilled workers.

The expansion of production and the demand for workers was especially high in newly-emerging firms, such as the commercial oil and automobile industries, where electricity and steel where utilized and where there was a convergence of new innovations and new managerial methodologies.[59] Petroleum became even more important with the invention of the internal combustion engine that emerged in the United States and Germany during the 1880s.[60] Utilizing the abundance of petroleum, the Ford Company, the world's largest car manufacturer, began promoting the internal combustion engine.[61]

Ironically, Henry Ford almost abandoned the internal combustion engine when the nation was facing a shortage of crude oil and he learned that petroleum was causing groundwater contamination. During the years 1912–13, Henry Ford thought that electricity might one day be more efficient and environmentally friendly than gas cars. Ford and Thomas Edison began working on the Edsel, their version of an electric car. They constantly improved the electrical batteries during those years, trying to make them dependable and safe. In reality, the technological innovation that would make electric cars truly reliable was at least a generation away. By 1914, the gathering war made the demand for gas-powered automobiles a national cause, which rendered efforts at improving electric cars seem truly irrelevant.[62]

In 1915 the U.S. government created the War Industrial Board in order to increase production and supply a massive amount of weaponry to the military. During World War I, War Board industries produced hundreds of warships and began tentative efforts to mass-produce fighter airplanes.[63] These new forms of transportation required carbon dioxide-emitting gasoline. The oil-refining/gas-producing industry experienced another surge a mere twenty years later when America entered the Second World War. By then, the United States was the world's undisputed military and economic leader. In 1938, President Roosevelt and Congress approved a total of three billion dollars for industrial production of warships, airplanes and vast amounts of weaponry. That same year, in what was a swell of this vast commercial optimism, a British engineer working for the British Electrical and Allied Research Association published an article confirming Svante Arrhenius's conclusion.[64] Vast and rapid industrialization was changing the

climate. Like Arrhenius, Callendar wistfully concluded that global warming was a positive development, as it would probably increase the number and variety of agricultural products.[65]

Less interested in farm production than manufactured products, by the beginning of the twentieth century Americans had become "conspicuous consumers."[66] In this era, many Americans were more interested in the impact science and industry would have on the quality of their lives than on the influence religious doctrine would have on national culture. When popular attention was focused on the realm of ideas, secular philosophies emphasizing psychological and economic explanations for man's alienation often dominated national debate. In response to the agnostic nature and growing popularity of these concepts, some religious scholars began characterizing these ideologies as the causes, rather than explanations of modern strife. A new breed of evangelical Christians began to push for a return to doctrinal Christianity.

The rise of the modern evangelical movement began in 1909 in California when two oil magnates published a volume of books called *The Christian Fundamentals*. The same publishers produced a series of pamphlets that made similar arguments advancing Christian doctrine and rebuking modernist secular education. Many of *The Christian Fundamentals* essays lambasted secular ideologies such as Darwinism, Hegelian Marxism, and Freudian Psychoanalysis. Most were especially critical of evolution. One critique suggested that evolution was responsible for bringing together "the Reds of Russia, the university professors of Germany, England and America . . . and every bum from the down-and-out sections in every city in America."[67] By 1914, millions of *The Christian Fundamentals* pamphlets were in circulation. They were distributed in churches and began to influence school boards and educational professionals.

The influence of religious lobbies on the public school system became a national controversy when a group of concerned parents sued John Scopes, a Tennessee high school teacher who was instructing students on the theories of evolution. In truth, the American Civil Liberties Union asked Scopes to test a statute, called the Butler Act, which prohibited teachers from introducing students to ideas that "contradicted the Bible's instruction regarding the Divine creation of man."[68] The Scopes Trial captured national attention because it featured the riveting performances of the talented Clarence Darrow and the populist William Jennings Bryan. More importantly, the trial pitted evangelical interests against the increasingly secular culture dominating modern American politics. Citing *The Christian Fundamentals* pamphlets, Bryan began a critique of the secularization of educational institutions, attacking false apostles and "false" or radical science. When Clarence

Darrow countered this critique and the press published the Scopes debate, the very public and sobering nature of the trial permanently cooled national ardor for both "fundamentalism" and Creationism.

The evangelicals were defeated in court, but the loss was magnified by the national press, which portrayed the "fundamentalists" as preening hillbillies.[69] Evangelicals withdrew from political life for the next few decades.[70] Their suspicion of the ACLU and the press probably deepened in the years after the Scopes Trial. It is quite likely that the evangelical mood regarding "new" scientific theories, such as those surrounding environmental protection, probably remained rather dim, as well. In a larger sense, the Scopes Trial was a national repudiation of the massive evangelical effort to influence national politics and educational policy in the years preceding the First World War.

Despite lingering unease with the science of Darwinian evolution, by the early decades of the twentieth century, the science of industry was capturing more attention than religion or politics. The Ford Motor Company and its rival car companies, inaugurated a new era in American industry—the age of science. Dubbed the second Industrial Revolution, and spanning the decades of the 1910s to the 1950s, this era was celebrated because it inspired succeeding generations to cultivate their appetites for reflexive consumption. The mobilization of World Wars I and II created the infrastructure for the mass production of various household accessories. Some of the chemicals produced for refrigeration, industrial and domestic, led to the other innovations, including the development of air conditioning and aerosol propellant for a range of pharmaceutical products. Chlorofluorocarbons, or CFCs, were astounding in their capacity to "pollute," including one 10,000 times more potent than carbon dioxide in trapping heat.[71]

Activists would not sound the admonition against chemicals such as CFCs and pesticides like dichloro-diphenyl-trichloro-ethane, or DDT, until the early 1960s. The public's attention only became focused on the harm caused by "toxins" associated with mass production when a lone voice finally considered the legacy of industrialization pollution. In 1962, Rachel Carson published a small book titled *Silent Spring*, which became as important a study for environmentalists as *Uncle Tom's Cabin* had been for Second Great Awakening abolitionists.[72] Scientists confirmed the environmental damage such toxins caused a full decade later when DDT was banned.[73] CFCs would be banned in aerosol cans in 1978, and they were banned in all other forms by international agreement nine years later. The battles over DDT and CFCs were important fights because they were a harbinger of the coming contest over carbon dioxide, and also because these early skirmishes galvanized dilettante greens to become professional environmental advo-

cates. In the meantime, throughout America's growing suburbs, refrigeration and air conditioning flourished, having been transformed from superfluous accessories to domestic necessities.[74]

A scientist by training and employed as a researcher for the U.S. Fish and Wildlife Service, Carson argued her case based on rigorous scientific analysis. *Silent Spring*'s specific campaign was to save endangered animals, in particular the bald eagle and peregrine falcon, from extinction. The culprit, DDT, was a known quantity, a man-made product sold to eliminate "pests." It also just happened to exterminate pets, and in some cases, people.[75] As the Vietnam War raged, Agent Orange, a dioxide, was used to clear Asian forests and to establish better military targets. Those who had not read Carson's book went out and bought a copy. Eventually, Agent Orange was roundly castigated, while DDT, a popular product among large agro-business firms, continued to be an acceptable product in the United States and elsewhere.[76] Despite Rachel Carson's best efforts, the struggle to regulate chemicals and protect the environment lasted beyond her death.

However, and in no small part because of *Silent Spring*, national leaders began paying attention to the devastating effects of pollutants on the environment.[77] Between the years 1967–1970, a variety of environmentalists formed various organizations, including the Environmental Defense Fund, the National Resources Defense Council, and Friends of the Earth. Congress also passed the National Environmental Policy Act. In the midst of the distractions of the Vietnam War, President Lyndon Johnson created the Environmental Protection Agency and the Council on Environmental Quality.[78] Thus, by the late 1960s environmental activism had become a popular social trend, and "legal secularism" dominated popular political culture.

In 1968 the Supreme Court revisited the *Scopes* decision and ruled that Arkansas' Butler Act, which had been devised to prevent discussion of evolution, "violated constitutional requirements regarding state neutrality toward religious doctrine."[79] Excluding the evangelical community, this reaffirmation of the 1925 ruling went all but unnoticed amidst the social and political disruptions of the late 1960s. Evangelical Christians watched mutely as popular culture became more liberal, and became especially taciturn after the 1968 ruling. A few religious intellectuals broached the decline of evangelical authority on popular culture. These included Paul Tillich and Richard Neuhaus, who argued that America needed a spiritual renewal, a "communal covenant" to challenge "the relentless secularism of the public realm."[80] Despite this call to action, the evangelical community remained largely silent, while President Nixon made his commitment to the "silent majority."

Meanwhile, the unpopularity of the military campaign in Vietnam led toward raucous opposition to the draft. This rebellious mood spread through the American public, and the growing success of *Silent Spring* emboldened a greater number of green activists to raise their profile, voicing their support of environmental protection. Between the years 1970–1980, environmental scientists waged a literary campaign, offering scientific analysis comprehendible to the average reader.

After *Silent Spring*, the environmental legislation that succeeded it, and the popular books that followed, the political habitat became more hospitable to pure scientific inquiry regarding the dangers of pollution.[81] The menacing attributes of industrialization were finally a safe topic for national dialogue. In 1974, Sherwood Rowland and Mario Molina wrote a report concerning the impact CFC had on depleting the ozone layer.[82] The report garnered international attention when it was awarded the Nobel Prize for Chemistry.[83]

Green activism blossomed during the 1970s, and environmental activists created a variety of organizations that promoted a range of environmental policies. Some greens, such as Ralph Nader, became consumer or political advocates, running for office as independent or Green Party candidates. However, the vast majority of environmental activists formed advocacy and fund-raising organizations.[84] These organizations had many environmental concerns that they wanted government to address. The primary areas of concern were ozone depletion, global warming, and the impact humans were having on the earth's land, forests, and waters.[85] Throughout the 1970s, the struggle to control DDT and CFCs had exhausted the funds and vitality of "mainstream" environmental activists. In 1987, their efforts were rewarded when the multilateral United Nations Montreal Protocol banned CFC production.[86] Evangelical participation in this era was limited due to the fact that the Evangelical Environmental Network, the foremost alliance of American evangelicals promoting "creation care," was not formed until 1994.

Ironically, two years before parties met in Montreal to discuss CFCs, the International Council of Scientific Unions reported on the intense increase in carbon dioxide and other "greenhouse" gases. Once again, the carbon dioxide problem and the academic study of climate change found its way to the back burner because industry attention was focused elsewhere.[87] A hundred years after the first Industrial Revolution, Edelson's study of the *carbonaria* moth, and Arrhenius's study of carbon dioxide-driven climate change, there seemed to be little popular consensus about curbing the global consumption of fossil fuels. While environmental advocates kept an unflinching focus on banning manmade chemicals such as DDT and CFCs,

their gaze was a little blurred when it came to carbon dioxide.[88] At the core of this pedagogical fog was a debate within the "mainstream" environmental movement. On one side of the debate, there were green activists who wanted to find ways to reduce carbon dioxide emissions. On the other side of the debate, some greens still wondered whether "too much" carbon dioxide was really a problem.

While girding themselves for the impending carbon dioxide brawl, many greens seemed to be asking whether human intervention was really necessary. More precisely, many were wondering whether the earth's atmosphere was capable of "correcting" climatic imbalances caused by an excess of "organic" effluvium, or whether attempting to reduce carbon dioxide emissions was an obligatory mission. Arrhenius and Callendar's wistful refrain that global warming may be beneficial seemed to characterize many of these internal debates. As the public would soon learn, wishful thinking was a distraction from the scientific reality. In 1979 the National Academy of Sciences released a major scientific study.[89] The NAS report stated, simply, "If carbon dioxide continues to increase, the study group finds no reason to doubt that climate changes will result, and no reason to believe that these changes will be negligible . . . A wait-and-see policy may mean waiting until it is too late."[90]

Aware, perhaps, that the history of scientific research on carbon dioxide emissions has resulted in little more than a whimper or a yawn by much of the American public, the Carter Administration sought to publish the NAS findings for a broader national audience. In 1980, the Carter Council of Environmental Quality completed a report that circulated widely. The report disclosed the fact that:

> Many scientists now believe that, if global fossil fuel use grows rapidly in the decades ahead, the accompanying carbon dioxide increases will lead to profound and long-term alteration of the earth's climate . . . Clearly a deeper appreciation of the risks of carbon dioxide build-up should be spread to leaders of government and business and to the general public. The carbon dioxide problem should be taken seriously in new ways: it should become a factor in making energy policy and not simply be the subject of scientific investigation.[91]

President Carter established the largest wildlife refuge known to man, but he also lost the 1980 election. A promising environmental agenda perished with his frustrated re-election bid.[92] Many of President Reagan's powerful patrons pressed for policies that emboldened industry, especially "big businesses" such as petrochemical firms, car manufacturers, and their advocates, the "Wise Use" conservationists.

Ron Arnold, executive vice president at the Center for the Defense of

Free Enterprise (CDFE) is widely considered the founder or de facto leader of the Wise Use Movement. Along with Arnold, Charles Cushman of the National Inholder's Association and Alan Gottlieb of the National Rifle Association emerged as the co-directors of "Wise Use." The Wise Use Movement grounds its political philosophy in property rights law.[93] It derives its name from a phrase first uttered by naturalist Gifford Pinchot. As President Theodore Roosevelt's "chief forester," Pinchot challenged John Muir's sweeping vision of environmental protection. Though Gifford Pinchot and John Muir were friends and longtime associates of Teddy Roosevelt, they had different conceptions of environmental conservation. Muir believed in preserving nature for its own sake. By contrast, Pinchot advocated "wise" industrial development. Wise Use tended to put human interest on par or ahead of environmental protection. President Roosevelt supported Pinchot's vision in most cases, ultimately constructing a dam in Yellowstone National Park.[94] From then on, Pinchot became the protagonist for Wise Use "hard" green aficionados.

In the early 1980s, a coalition of western logging, hunting, and mining organizations banded together. They decided that environmental regulation was encroaching on their right to earn a living. In the mid 1980s the Wise Use conservationists held various meetings and conferences, bolstering their attendance rolls and refining their ideology until 1988, when they sponsored a "founding conference" with a coalition of over 200 organizations in attendance.[95] Ron Arnold published *The Wise Use Agenda*, an aptly named manifesto, that same year. The agenda advanced more than twenty goals, but the most important Wise Use objectives concerned eliminating restrictions on land development by using legal property rights protections, amending the Endangered Species Act to exclude so-called "non-adaptive species," and promoting oil and mining exploration in all national parks or wildlife preserves. The latter initiative would require the Forest Service to replant ancient forests with young, carbon dioxide-absorbing trees.[96]

Throughout the 1980s, Arnold and his Wise Use staff expanded their legal and political strategies, and by the early 1990s, the Wise Use trend was more than anti-environmental backlash. It was a profound political movement, and Ron Arnold believed its message was ready for broadcast into mainstream publications.[97] Around the same time, Wise Use operatives thought they might expand to ride a wave of conservative Christian revival. It proved to be a successful strategy, because in 1988 the Wise Use Movement had a hardy roster of approximately 200 organizations, yet by the mid-1990s the movement was 1,500 organizations strong. This boost could be best described as a Wise Use leap of faith.

In the late 1980s and early 1990s, American politics was approaching

the pinnacle of what could be described as a Third Great Awakening.[98] This revival was a campaign that was both political and religious. It constituted one of the most significant cracks in the proverbial church-state wall since it was first constructed by the founding fathers and subsequently fortified by succeeding generations of American leaders.[99] In many respects, the outcome of the Scopes Trial upheld the Jeffersonian Deist notion that church and state should be kept separate, but this victory came at price. In the decades following the trial, evangelical ideologues would challenge public institutions, especially those that promoted evolutionary science, secular education, and the "liberal" press. In some instances, this suspicion permeated their discussion of environmental protection. Evangelical aversion to scientifically oriented public policy diminished somewhat with the emergence of maverick evangelicals who believed that Americans could promote science and believe in God.

THE THIRD GREAT AWAKENING AND THE WISE USE MOVEMENT

Having recovered from the ignominy of the Scopes Trial by the mid-1940s, evangelical leaders renewed their call for religious Americans to engage in intellectual and civic activism. A Boston preacher, the Reverend Harold Ockenga, led the effort to create the National Association of Evangelicals, or NAE, as an alternative to both the Southern Baptist Convention and the National Council of Churches.[100] A few years later, the bright new mood of evangelicals was described in the *Remaking of the Modern Mind*, a book penned and published by a midwestern Baptist minister named Carl Henry. The evangelical revival spread further west when Charles Fuller, a popular California radio evangelist, invited Rev. Ockenga to become the president of the seminary that bore his name.[101] Eventually, Fuller asked Carl Henry to teach on the school's faculty. These men called their ministry "Cal-tech" evangelism.[102] In another corner of the evangelical revival tent, Reverend Billy Graham began his popular public ministry.

Graham was unequaled in his ability to raise the standing of the itinerant preacher to the status of celebrity. Then, by his own particular talents and his singular station, he ascended to the role of American minister without portfolio. From the 1950s to the 1970s, the evangelicals fortified themselves. Rev. Graham, who appeared to be solidly centrist, became a popular confidant to a succession of presidents when the federal government was engaged in national recovery from World War II, conquering Communism, and venturing into outer space. Meanwhile environmental protection seemed to be a hobby pursued by obscure scientists and eccentric activists.

Silent Spring environmentalists, like the nation writ large, paid little attention to the revival of evangelicals. Few outside the evangelical movement were aware of their views on public policy or their attitudes towards environmental protection. The religious orientation of American presidents was not a major issue in most spheres of public debate. Then, the glamorous Kennedy clan ran for office. Their religious values seemed cool and meditative. John Kennedy spoke of universal themes such as "opposing foes and defending friends," and it appeared for a time that a man of any confession might become president.

Meanwhile, in the Baptist evangelical tent, Rev. Graham projected an elegance that lent the often boisterous evangelical movement gentility and decorum. Rev. Graham's success opened the civic arena to other charismatic evangelicals who considered entering the political arena. This was especially true of a group of preachers who commanded mega-churches in growing and prosperous communities. These new Christian leaders welcomed public spectacle and found an enormous audience in televised church services.

The 1980s became the era of the televangelist. A series of political, economic, and social trends encouraged the spread of evangelism. These developments included the resuscitation of conservative politics after the deluge of Watergate, the steady decline of the Soviet power, and a growing Goldwater backlash against the "radicalism" of the 1960s and 1970s.[103] Evangelicals had come into their own and were feeling somewhat confident. Their wealth derived from their partisan constituents and their televangelist empires. These resources allowed them to build a number of institutions of higher learning dedicated to promoting evangelical religious values. The evangelical community had a young energetic base and rich powerful patrons, so naturally they considered using these political resources to influence public policy.

The Third Great Awakening was characterized by a foremost alliance of televangelical power, educational might, and political authority. These influences coalesced in two important religious organizations.[104] Jerry Falwell founded the first of these groups, the Moral Majority, in 1979. Later, Pat Robertson founded the Christian Coalition after his attempt to secure the Republican presidential nomination in 1988 proved unsuccessful.[105] The Moral Majority and the Christian Coalition, which grew out of the tradition of Rev. Graham, the legacy of "Cal-tech" evangelism, and the popularity of a variety of televangelists, seemed increasingly at odds with the deliberate secularism of mainstream Republican leadership.[106]

President Reagan exemplified the popular face of Republicanism. His screen-guild persona brought a worldly ambience to Republican Party, which countered the drudgery of neoconservative scholarship that focused

almost exclusively on promoting "less government." As such, candidate Reagan captivated the National Association of Evangelicals.[107] Similarly, George Herbert Walker Bush projected diplomatic cosmopolitanism that was rare, especially in the far-right corners of the Republican Party.[108] Yet in both instances, conservative evangelicals found a nesting place in the Reagan and Bush Administrations, and they used this roost to promote the Wise Use agenda.

Alan Gottlieb, a founding member of the Wise Use Movement and a leader in the National Rifle Association, raised more than a hundred million dollars for President Reagan's 1980 and 1984 campaigns.[109] As a payment in kind, President Reagan appointed Charles Cushman, a Wise Use Movement co-founder, to the National Parks System Advisory Board. There, Cushman promoted oil and mining exploration, a policy consistent with *The Wise Use Agenda*.[110] Ronald Arnold, the other Wise Use Movement co-founder and executive in the Center for the Defense of Free Enterprise, the CDFE, was a public relations expert and an expert fundraiser. While helping secure money for the Reagan campaign, he wrote a biography about James Watt. After the election, Watt was appointed Reagan's Secretary of the Interior.[111]

As secretary, Watt's environmental policy displayed a zeal for allowing loggers and construction firms to "develop" public land without restriction. Watt's political ideology was energized by what some evangelicals, especially those associated with the Wise Use Movement, call the "dominion theology." Dominion theology argues that man has the right to "subdue the earth."[112] Ultimately Secretary Watt's proposed policy of selling or leasing public lands for coal mining proved unpopular to a broad range of interests, including real estate, environmental, and hunting organizations. Secretary Watt eventually stepped down from office.[113] Around the time of his dismissal, Watt's EPA staff stood accused of trying to misdirect congressional oversight, shredding documents in an attempt to camouflage agency negligence of environmental protections.[114] After Secretary Watt left the White House, the head of the EPA and several other EPA staff had to resign, as well.[115]

Vice President George Herbert Walker Bush was given the task of executive oversight of the EPA. His area of responsibility included working on the Presidential Task Force on Regulatory Relief, which essentially promoted a Wise Use agenda.[116] However, when George H.W. Bush became President, he appointed two men to lead the EPA and the U.S. Fish and Wildlife Service who seemed to be fairly committed to environmental protection. They were, respectively, Bill Reilly and John Turner.[117]

These appointments alarmed the Wise Use-affiliated organizations, in-

cluding the Wilderness Impact Research Foundation, or WIRF, and Ron Arnold's organization, the CDFE.[118] While Reilly and Turner were moderate, environmentally conscious Republicans, most of their efforts would be countered by Vice President Dan Quayle's Council on Competitiveness. An irony not lost on the Wise Use, the Council on Competitiveness seemed a lot like President Reagan's Task Force on Regulatory Relief.[119] Through the Christian Coalition, the Wise Use advocates continued to make inroads to the Bush White House. During the last years of George H.W. Bush's Presidency, Ralph Reed, Pat Robertson's foremost deputy, became directly associated with White House efforts to temper environmental policy.[120]

After making inroads into the Reagan White House and the Bush Presidency, the Wise Use advocates and the Christian Coalition decided they would have more influence if they also swept Congress. In 1994, the Wise Use Movement helped underwrite many Congressional reelection campaigns, most notably that of Newton Gingrich.[121] The reelection of Gingrich, the future Speaker of the House, was a watershed moment for the Wise Use Movement. When Reagan ran for national office, Gingrich, a junior congressman, began his rise to prominence. Newt Gingrich and other members of the National Republican Congressional Committee planned an event in honor of the candidates called the Capitol Steps Event. The candidates presented their "statement of pledges," which became the Republican presidential campaign platform.[122] Several years later, when Newt Gingrich was elected Speaker of the House, he hosted another gathering on the Capitol steps where he presented the Republican Contract with America.

The Contract was the brainchild of various factions of the Republican party, especially those disenchanted with their minority status in the Congress. However, the core strategists were none other than Newt Gingrich and Ralph Reed of the Christian Coalition.[123] The planks of the 1994 contract bore a striking resemblance to and fleshed out the sentiments of the "statement of pledges" found in the 1980s.[124] The Contract with America made explicit the types of cuts Republicans would make to social programs and the nature of legal and fiscal reforms they would pursue. It also committed the signatories to support Social Security, the military, and family-based initiatives such as adoption and elder care.[125]

Many of the initiatives Gingrich and other Republican leaders would pursue in the years leading to the 1996 and 2000 presidential elections were not, however, covered by the Contract. These included specific efforts to re-conceive environmental protection. Contract Republicans of the 104th Congress led the attack on the Kyoto Protocol and reversed several years of increased funding for the EPA.[126]

In the years leading to the 1996 elections, the Contract Republicans devised a strategy to refute the science of global climate treaties.[127] Vice President Albert Gore, a noted environmental author, was at the forefront of the White House environmental protection during the 1990s, directing the President's Council on Sustainable Development, the PCSD.[128] The influence of the Contract with America, however, was stronger than ever, and certainly much stronger than the PCSD. Its congressional adherents, various conservative civic alliances, and several religious organizations helped promote Contract ideology, which caused Washington public policy to drift right.[129] Despite this fact, in 1996 the Clinton Administration agreed, in principle, to reductions of carbon dioxide.[130] The Wise Use Movement leadership was not amused, and the campaign to capture the Kyoto Protocol commenced. Ultimately, it was the Senate that voted to kill the Kyoto Protocol. Meanwhile, Congress drafted appropriation bills to slow expenditures that might encourage its implementation.[131]

The plain facts of the Kyoto Protocol suggest that it might be a reasonable agreement. The Protocol required the United States to reduce carbon dioxide emissions 7 percent by 2020. To many environmental activists, this seemed like sound policy.[132] The most contentious part of the Kyoto Protocol was that it required large industrialized nations to sign the Protocol first.[133] American politicians across the ideological spectrum were concerned that newly industrializing countries, or NICS, would continue to spew diesel fuel, nitrous oxide, and even chlorofluorocarbons, while the United States would be forced to stretch its resources to build "cleaner cars."[134]

In 2000, President George W. Bush began his campaign for the presidency, criticizing Kyoto and suggesting that it was indifferent to the issue of NIC pollution.[135] However, to the joy and utter bewilderment of Greens, including Green Party political candidates, candidate George W. Bush suggested that the United States should try to control carbon dioxide emissions.[136] In the early months of 2001, President Bush indicated to his staff that his administration should work on implementing a "mandatory cap" on carbon dioxide emissions.[137]

By the end of 2001, however, Contract Republicans and Wise Use lobbyists eager to mute G-8 efforts to coordinate an endorsement of Kyoto brought pressure to bear on the White House.[138] President Bush, to the quiet consternation of EPA administrator Christine Whitman, began to distance himself from the campaign to reduce greenhouse gases.[139] Political strategists in the Bush Administration adopted the tried and true Wise Use strategy of questioning the scientific models used to describe the causal relationship between carbon dioxide and global warming.[140]

THE GLOBAL ECONOMY, AMERICAN POLITICS, AND THE GROWING OPPOSITION TO KYOTO

American opponents of the Kyoto Protocol presented a range of arguments as to why the United States should not adhere to the mandates of the agreement. These critiques can be grouped into three categories. There are those who believe that global warming is either a myth, or, if it is a problem, the dangers are remote. They warn that environmental advocates have exaggerated the hazards for political gain. John McManus, an engineer and member of the John Birch society, suggests that a variety of notable scientists dispute the significance or perils of global warming.[141] McManus cites scientific research regarding Arctic warming during the eighteenth century, which indicates that global warming is a recurring phenomenon. He claims the media and politicians who favor commercial regulation in various sectors of the American economy distort or exaggerate the scientific consensus.[142]

A second group of Kyoto dissenters argue that global warming may be a problem, but that it is not caused by human or anthropogenic activity and therefore cannot be addressed by the prescriptions advanced by the protocol. William Gray, a professor of atmospheric science, suggests that the assumptions animating the majority of scientific models used to show carbon dioxide's role in trapping water vapor may be inaccurate. As a result, Gray and similarly situated scientists argue that the assumption that the humans cause global warming is also incorrect. Citing a history of global warming between 1900–1945 that was followed by a period of cooling, Gray suggests that global warming—and for that matter, global cooling—are cyclical atmospheric phenomenon that are unrelated to anthropogenic activity and not in need of any form of human intervention.[143] Another scientist who defends this position is Ian Clark, a professor of hydrogeology, who argues that "there is no chance that we will effect [control] measurable climate changes with Kyoto or any other accord," because, Clark suggests, carbon dioxide has little effect on the climate. Further, Professor Clark contends that solar wind has a far greater effect on the earth's climate than anthropogenic carbon dioxide emissions.[144]

The third group of Kyoto dissenters maintains that climate change may be a positive development, while the "cures" for reducing carbon dioxide are worse than the global warming malady itself. Sallie Baliunas, an astrophysicist, advises that the findings of the United Nations Intergovernmental Panel on Climate Change (IPCC) and those of other reports supporting a negative impact of global warming are based on climate models that may be "too simplistic."[145] Baliunas recalls earlier speculation by Arrhenius and

Callendar, who argued that increased carbon dioxide and the global warming it generates may beneficially increase crop yields.[146]

Even those who do not necessarily endorse the argument that global warming may be beneficial to crops worry about the new forms of energy that will replace fossil fuels. A coalition of environmental, safety, and energy organizations suggest that switching from petroleum and gas to nuclear power would be dangerous and may produce far more/far worse toxic waste than carbon dioxide.[147] Still others suggest that alternative sources of energy, such as solar or wind power, will neither be cost effective nor reliable.[148] Well before these arguments were publicly expressed, or widely known, Wise Use lobbyists suggested that the "science" of the global warming debate was not settled. Since the ratification of the Montreal Protocol of 1987 concerning CFCs, global warming opponents began an intense campaign to halt a carbon dioxide-reducing protocol.

In March 2001, the Bush Administration abandoned the Kyoto Protocol. The following month, the White House removed the lead chemist, an American they appointed to the United Nations Intergovernmental Panel on Climate Change.[149] In May, President Bush appointed Vice President Dick Cheney as chair of his National Energy Policy Development Group.[150] For several months of 2001, the issue of Kyoto and political intransigence on the issue of global warming remained a subject of Washington debate. Then, on September 11, 2001, global warming, like several other pressing social policies, disappeared into oblivion.[151]

In 2003, the same year 20,000 Europeans died in an unprecedented heat wave and in which Dr. Wangari Maathai, a Kenyan political activist, received the first Nobel Peace Prize for environmental protection, the Bush Administration replaced EPA administrator Christine Todd Whitman with Dr. Gale Norton.[152] Soon after her appointment, Norton stunned the environmental community when she declared that the EPA lacked authority under the Clean Air Act to regulate carbon dioxide. Further, Norton argued that even if the EPA had the authority, it declined to regulate carbon dioxide as a precaution to global warming.[153]

A GREEN REVIVAL: THIRD WAVE ENVIRONMENTALISTS BREACH A WISE-USE FORTRESS

In response to the EPA's new environmental credo, twelve state attorneys general took the Bush Administration to court.[154] The twelve states and the other "petitioners" assert that according to the language of relevant statues, the EPA does indeed have authority over greenhouse gas emissions.[155] The petitioners included a wide range of environmental organizations from

Greenpeace to the Sierra Club, as well as important scientific organizations, including the International Center for Technology Assessment and the Union of Concerned Scientists.

In a break from routine, academic scientists and environmental activists made a concerted effort to work together to provide a unified critique of national environmental policy. This was a unique development in the epic history of the politics of carbon dioxide–driven climate change, which heretofore had been governed by an all-too-human dynamic. Very often, the communities who produced, observed, and encountered pollution were unable or unwilling to work together to resolve this problem. Beginning in the late 1800s and continuing until the first half of the twentieth century, the American government promoted vast industrial expansion while industrial and academic scientists continued to work at cross-purposes. When, in the 1970s, environmental activists began to organize a focused national conservation/protection strategy, they had to convince the majority of the American population that pollution was a serious problem. Meanwhile, the Wise Use Movement capitalized on religious misgivings about environmental science, forming a strong alliance with powerful evangelical communities. In 2006, because of the intransigence of the EPA or despite it, at least one group of evangelicals began to petition the White House to change its stance on global warming.

When various evangelical communities swept a born-again George W. Bush into office, several prominent evangelical community leaders were appointed to positions in the White House.[156] Many of these evangelical appointments were made to President Bush's Office of Faith-Based Initiatives, an evangelical re-assertion over government sponsored social welfare policy.[157] By 2003, an emerging group of "liberal" evangelical leaders worried that the faith-based initiatives would drain resources from better-established governmental programs.[158] In his popular evangelical journal *Sojourners*, founding editor Jim Wallis scolded the White House. Wallis suggested that "the administration is breaking faith with the faith-based initiative by not providing resources."[159]

In 2003, providing the economic and policy resources for climate change was an issue that seemed to elude many political activists, including many evangelicals, with the possible exception of an emerging network of evangelical Greens. In October 2004, these "creation care" evangelicals, under the auspices of the National Association of Evangelicals, published their declaration of evangelical independence.[160] The *Call for Civic Responsibility*, which announced the NAE's formal support of a variety of "left-wing" environmental protection policies, was among the organization's most revolutionary ventures.[161] The document was notable not only because of what it said,

but because as of 2001, when the NAE published the document, the NAE was tens of millions strong and was among the fastest growing evangelical organizations in the U.S.[162]

One of the first reactions to the report came from a Wise Use Republican who warned Rev. Richard Cizik, the NAE Vice President for Governmental Affairs, not to allow a flirtation with environmental concerns to distract his organization from promoting policies more traditionally associated with mainline evangelical organizations.[163] These traditional issues included, among other things, the revival of fundamentalist resistance to Darwinian evolution. Drawing on William Paley's natural theology, conservative evangelical scholars have renewed their efforts to induce school boards to teach Creationism, which they dub "Intelligent Design," and which they argue is an alternate or complementary explanation for the existence of life on earth.[164]

Despite the warning from the Wise Use conservatives, Rev. Cizik pressed the "creation care" agenda of his constituents. Many of the NAE's left-leaning "creation care" evangelicals emerged as part of a large counter-revolution within the Southern Baptist Convention during the early years of the 1980s.[165] In the late 1970s, religious neoconservatives led a doctrinal revival that captured much of the SBC leadership, and some "fundamentalist" trends resurfaced. Progressive social justice champions as well as environmentalists and other peaceniks found themselves on the margins of the evangelical tent.[166]

These fragmented "liberal" evangelicals coalesced, establishing various environmental and social welfare organizations. Ultimately, these individuals helped the NAE lead many evangelicals back to centrist positions that were consistent with many moderate Republicans.[167] Increasingly, the Christian Coalition and Moral Majority strained under the weight of controlling a colossal and highly regimented church structure. Meanwhile, the large network of small social action organizations, including a variety of green organizations, strengthened the NAE. When the NAE made the call for environmental civic responsibility, it was led by powerful Greens who promoted "creation care" as a challenge to "fundamentalist" Creationism, Intelligent Design and Wise Use "dominion theory." However, despite the gathering carbon dioxide storm, the majority of "creation care" green evangelical organizations focused on endangered species rather than regulating pollution.[168]

Things changed in mid January 2007 when Reverend Cizik announced that officials from some of the 45,000 churches NAE represents were meeting to address the issue of global warming.[169] These new evangelical "alliances" prompted immediate attention. Political analysts suggested that if

green evangelicals were to be successful, they would first have to convince their religious constituents. Then, perhaps, these Evangelical Greens could win Republicans, but only with innovative market-friendly carbon dioxide-capturing technology, and not the type of industry regulations traditionally favored by Democrats.[170] Despite these small matters of strategy, the good news that evangelism might "save" Republican environmentalists from oblivion had been delivered.[171]

Between the years 2003–2006, *The Call for Civic Responsibility* and the growth of NAE's "creation" constituents indicated that environmentalists could make inroads to bastions of creationism. Even further, it appeared that green evangelicals might carve a tunnel into the White House, challenging dominion theory and the Wise Use policies it animates.[172] Meanwhile, during the same year, but in a parallel environmental universe, several scientists brought their considerable knowledge of climate change to a legal challenge of the EPA. The scientific nature of the challenge helped to coordinate divergent civic, economic, and governmental organizations into a massive rejoinder to Wise Use rhetoric. The pressing topic that remains unanswered is whether these developments will make an impression on the Bush White House.

By December 2006, the Bush Administration suggested that it might return to a campaign promise and address environmental concerns when the Department of the Interior added polar bears to the list of threatened species. It would be a stretch to attribute this addition directly to the influence of "creation care" evangelicals, especially since Greenpeace led a 2005 suit against the Department of the Interior asserting that polar bears are a species threatened by global warming.[173] The administration parsed its response to the suit, suggesting that polar bears were threatened and that "green-house gases played a role in climate change," but it also suggested that climate change was beyond the scope of the Endangered Species Act.[174]

A few days later, and continuing throughout the month of January 2007, a flurry of debate on the environment seems to have induced the White House to change its position again. In mid-January, the Ford Motor Company introduced a hybrid electric car that could run on two sources of electric power. Many years ago, Henry Ford, the great-grandfather of the current CEO, tried to introduce an electric car without success.[175] Now one hundred years later, Ford CEO William Clay Ford was building an electric car promoted and sponsored by the U.S. government.[176]

Throughout January 2007, politicians outside the White House announced various policies to address carbon dioxide emissions and global warming. Governor Arnold Schwarzenegger, with the counsel of the environmental advocate Robert Kennedy, Jr., devised a plan for California that

was similar to the guidelines of the Kyoto Protocol and that would reduce carbon dioxide emissions by 10 percent by 2020.[177] On January 9, Governor Schwarzenegger issued an executive order to the California Air Resources Board with a recommendation that they use the assistance of scientists from UC Berkeley to implement the directive.[178] The following week, Democratic House and Senate leaders introduced two different bills to cap carbon dioxide emissions.[179] An evangelical organization, the Church of the Brethren, immediately endorsed one of those bills, the McCain/Liberman Energy Bill.[180]

Then, a week after the announcement of the two bills, industry leaders—whose alliance, the U.S. Climate Action Partnership, or USCAP, had been working on the issue of global warming—made their own surprising announcement.[181] They argued that America, as the world leader in renewable energy, must reduce carbon dioxide emissions immediately, and that the USCAP would be at the forefront of developing this technology.[182]A week following the USCAP National Press Club announcement, on January 23, 2007, President Bush gave his State of the Union Address. In his speech before Speaker Nancy Pelosi, the first female speaker of the House or Representatives, President Bush tipped his hat to evangelicals, environmentalists, and scientists when he enumerated the alternative energies and technologies that make Americans "better stewards of the environment." He then made the astonishing concession that global climate change was "a serious challenge."[183] The following day, *The Real Truth*, a magazine associated with the United Brethren in Christ, an NAE-affiliated organization, hailed the historic State of the Union Address as singular for its focus on energy policy.[184] Other more prominent media took a dimmer view of the president's speech, suggesting that the Bush Administration was merely focusing on energy to prime the nation for a new subsidy of large agro-industries that wanted to promote ethanol.[185] A few months later, on April 2, 2007, the Supreme Court finally handed down its decision regarding carbon dioxide emissions. The Court ruled in favor of the twelve states that sued that government in 2003. It specifically stipulated that the EPA could not decline to regulate greenhouse gases emitted from cars.[186]

CONCLUSION: THE FUTURE OF GREEN EVANGELICALISM

Since the foundation of the Environmental Evangelical Network in the mid-1990s, environmental consciousness-raising has intensified in various Christian organizations, especially the National Association of Evangelicals. Many green evangelicals, unable to penetrate Wise Use fortresses located

throughout Congress and the White House, have turned to science and industry for leadership on climate change. President Bush, like other politically sensitive leaders, is aware of an emerging alliance between scientists and industry regarding the need to create environmentally friendly technologies. Whether the Evangelical Greens will be able to add their committed constituents to this alliance is unclear, but it is possible. Third Wave environmental advocates are increasingly both Republican and Democratic. They work in industry, regulation, and advocacy. Third Great Awakening evangelicals have a range of views that span the arch of the political spectrum. A variety of outcomes could emerge as a result of these alliances, including a fresh commitment to alternative fuels, a new canon of environmental law, or an expansion of the Green Movement that draws on academic and religious environmentalists.[187]

One question remains: will the Jeffersonian ideal of keeping religion out of politics survive in the midst of these new coalitions? Will the wall between church and state become more porous? More specifically, will the impact of Wise Use leadership and Intelligent Design lead to other breaches, and, if it does, what impact will this have on the nature of party politics, especially in light of the reassertion of the evolutionary party into presidential politics?

In Europe, a hundred years before the Revolution of 1776, after the disruptions of the Protestant Reformation and the Thirty Years War, the Treaty of Westphalia helped restore the peace.[188] Aware of a potential conflict between politics and religion in their own country, America's founding fathers promulgated the Bill of Rights, which created a wall between church and state.[189] Drawing on Jeffersonian logic and recalling the politics of the First and Second Great Awakenings, nineteenth-century proponents of separating church and state continued to defend this political philosophy for a variety of reasons. Defenders of the wall favored protecting the secular republic from religious politics. To the chagrin of religious conservatives, secular ideals began to displace religious values in much of public life.[190] By the early decades of the twentieth century, even social issues, such as the prohibition against alcohol were framed as health issues, rather than moral causes.

Unlike Europe, where Darwinism triumphed, in America Creationism still had powerful advocates, at least until the national debacle of the Scopes Trial. Recently, the controversies of the Scopes Trial have resurfaced with the reemergence of a Creationist ideology called Intelligent Design. Proponents of Intelligent Design have led a less than successful campaign and have been challenged and defeated in the courts. By contrast, politicians promoting evangelical Wise Use conservation have enjoyed great success,

expanding and contracting the parameters of White House involvement in environmental protection, and more specifically influencing its position in the global warming debate.

Since its first days of the Bush Administration, Wise Use philosophies have animated the EPA's global warming policy. Amidst the frenzy of the 2007–2008 presidential debates, there seems to be a bubbling up of industry evangelicals and a trickling down of scientific lawmakers. If so, this paradigm shift—one in which Evangelical Greens may focus national attention on climate change—could finally coax the White House toward environmental protection that seeks to reduce carbon emissions. Perhaps some or all of these outcomes can prevail. However, if traditional evangelicals resist or defeat this endeavor, the debate over global warming may stall and environmental protection may continue to demur to wise use. Currently, the most sensitive issue political observers may want to consider is whether evangelicals and Third Wave environmentalists can formulate a permanent agenda for addressing climate change that is based on scientific fact,without offending more traditional evangelicals who promote religious truth and Intelligent Design. Perhaps a coalition comprised of scientists, green evangelicals, and industry leaders can address the contentious issue of reducing carbon dioxide emissions. This coalition will only thrive if its members can lead an awakening that makes its case for social change without demeaning conservative evangelicals. Evangelical environmentalism will succeed if they can lobby the White House while keeping the ghosts of the Scopes Trial at bay.

NOTES

1. The record of rising temperatures, the frequency of regional hurricanes, floods, and of course, most dramatically, the brisk melting of polar ice caps, have pushed the issue of global warming to the peak of popular American consciousness. In 2006, at least two films addressed the global warming phenomenon: *An Inconvenient Truth*, based on the book by Vice President Al Gore and featuring Mr. Gore, and *Happy Feet*, an animated children's movie which followed the "plight" of Arctic Penguins. These films won Best Documentary Feature and Best Animated Feature Film at the 2007 Academy Awards.

2. A significant portion of traditional evangelical Christians subscribe to dispensational theology, which suggests that the world will descend into chaos before the return of Jesus. Various signs will herald this "end of days" scenario. See Tim LaHaye and Jerry Jenkins, *Are We Living in the End Times* (Carol Stream, IL: Tyndale House Publishing, 1999). Regarding the melting of melting ice in the Arctic Ocean see, Andrew Revkin, "After 3,000 years, Arctic Ice Shelf Broke Off Canadian Island, Scientists Find," *New York Times*, December 30, 2006. Evangeli-

cal Greens may face resistance within their own party because some promote left-leaning strategies which put them at odds with more politically dominant evangelicals who promote the right-leaning Wise Use "environmentalism."

3. In the early months of 2007, James Dobson, founder of Focus on the Family, and leaders of other conservative Christian organizations called on the National Association of Evangelicals to silence the Reverend Richard Cizik, an NAE vice president. Cizik, along with leaders in the Evangelical Environmental Network, has led the evangelical effort to address climate change. See Alan Cooperman, "Evangelical Angers Peers with call for Action on Global Warming," *Washington Post*, March 3, 2007.

4. Political historians suggest environmental consciousness, especially concerning the connection between carbon dioxide and climate change, was not part of the public perception during these decades. The scientific community was not very vocal regarding their research concerning energy conservation; finding alternative energy supplies was the focus of national policy debate. See Thomas Friedman, "The First Energy President," *New York Times*, January 5, 2007.

5. Dr. H.A. Des Voeux coined the term "smog." See Gale E. Christianson, *Greenhouse* (New York: Walker and Co., 1999), 149.

6. Among lawmakers who are subscribing to this reading of the science are Senators John McCain and Joseph Lieberman, who have introduced legislation that would limit carbon dioxide emissions. See Steve Lohr, "The Cost of an Overheated Planet," *New York Times*, December 12, 2006.

7. For a review of the global warming debate and an introduction to the arguments of the various scientific camps, see Andrew Rivkin, "A New Middle Stance Emerges In Debate Over Climate," *New York Times*, January 1, 2007.

8. Gail Collins and Andrew Rosenthal, eds., "Global Warming Goes to Court," *New York Times*, November 28, 2006.

9. Second Wave activists such as Greenpeace have shifted strategy from public acts of environmental resistance to more stayed practices, such as suing the Department of the Interior to include polar bears to the list of endangered species. See Felicity Barringer and Andrew Rivkin, "Agency Proposes to List Polar Bears as Threatened," *New York Times*, December 28, 2006.

10. Robert Merton, *Science at the Cross-Roads* (London: Cassell, 1932): 435, and R.K. Merton, "Puritanism, Pietism, and Science," *Sociological Review* 28 (1936), 1. Some scholars suggest that the broader Protestant Reformation, as opposed to Puritanism more specifically, is responsible for increased tolerance of the sciences. See Jean Pelseneer, "Les Influences dans l'Histoire des Sciences," *Archives Internationales d'Historie des Science, Annee 1948,* 349.

11. C.A. Russell, *Science and Religious Belief* (London: University of London Press, 1973), 58, 80.

12. Alexander Koyre, *From the Closed World to the Infinite Universe* (Baltimore: Johns Hopkins Press, 1957), 219.

13. Robert Boyle, *The Works of the Honourable Robert Boyle* (A Millar, 1744), 394.

14. The important Deist texts were written by British authors which were read widely in intellectual circles in the United States. They included John Toland's *Christianity Not Mysterious*, Samuel Clarke's *Discourse Concerning the Being and Attributes of God*, and perhaps most importantly, Mathew Tindal's *Christianity as Old as Creation* (White Fish, MT: Kessinger Publishing LLC, 2004).

15. Allen Brooke, *Moral Minority: Our Skeptical Founding Fathers* (Ivan R. Dee, 2006), 87–90, 96–97, 101.

16. For an analysis of Paine's views on the matter, see Harvey Kaye, *Thomas Paine and the Promise of America* (New York: Hill and Wang, 2005), 81–84. For a discussion of Jefferson's views, see Allen, *Moral Minority*, 89–94.

17. Allen, *Moral Minority*, 87.

18. Europe's "Protestant upheaval" is found in Sydney Ahlstrom, *A Religious History of the American People* (New Haven, CT: Yale University Press, 1972).

19. Herbert Hovenkamp, *Science and Religion in America* (Philadelphia: University of Pennsylvania Press, 1978), 4.

20. The Tennents, a family of five evangelical Presbyterian preachers who were leaders in the Great Awakening movement, helped establish a seminary to train revivalist clergymen. The seminary was later named Princeton University. See Jerry Wayne Brown, *The Rise of Biblical Criticism in America*, (Middletown, CT: Wesleyan University Press, 1969). Thomas Paine often questioned the veracity of Biblical scriptures, and due in party to his notoriety, he bore a large measure of evangelical wrath. See Herbert W. Schneider, *A History of American Philosophy* (New York: Columbia University Press, 1963); Thomas Paine, *The Age of Reason* (New York: Liberal Arts Press, 1948), 3–5.

21. Hovenkamp, *Science and Religion in America*, 59.

22. Various British evangelicals, including George Whitfield, traveled to America and visited various American communities preaching as itinerant ministers and leading raucous revival meetings often held in the outdoors, see Christine L. Heyrman, *Commerce and Culture* (New York: Norton, 1984).

23. Towards the end of the First Great Awakening, John Witherspoon, a Scottish Presbyterian scholar was recruited to America in order to mend a cleavage between "new and old side" Presbyterians at Princeton. Witherspoon introduced Scottish Realism, which promoted scientific investigation with equal enthusiasm to matters of secular and religious thought. See Varnum Collins, *President Witherspoon: A Biography* (Princeton, NJ: Princeton University Press, 1925), 75; see also Douglas Sloan, *The Scottish Enlightenment and the American College Ideal* (New York: Columbia University Press, 1971), 62.

24. A. Williams, *The Common Expositor: An Account of the Commentaries on Genesis, 1527–1633* (Chapel Hill: University of North Carolina Press, 1948), 176–178.

25. C.E. Raven, *Science and Religion* (Cambridge: Cambridge University Press, 1953). In the 1990s, Paley's natural theory resurfaced as part of the Intelligent Design movement, a modern rebuttal of Darwinian evolution.

26. Jared Diamond, *Guns, Germs and Steel* (New York: Norton, 1997), 358–359;

Paul Mantoux, *Industrial Revolution in the Eighteenth Century* (London: Macmillan, 1961).

27. Anita Louise McCormick, *The Industrial Revolution in American History* (Berkeley Heights, NJ: Enslow Publishers, 1998), 50.

28. Gale E. Christianson, *Greenhouse* (New York: Walker Publishing Co., 1999), 152–153.

29. Christianson, *Greenhouse*, 2.

30. Ibid., 149.

31. The earliest record of lung disorders attributed to coal-burning fires dates back to the seventeenth-century observations of London residents John Evelyn and John Grant. See Barbara Frees, *Coal: A Human History* (Cambridge, MA: Perseus Publishing, 2003).

32. These gray- and white-speckled moths made their home alternately in the city and countryside near London. In the day they rested on trees covered with a gray- and white-speckled bark. The moths blended in, thereby avoiding the unwanted attention of predatory birds. At night *B. betularia* flew unnoticed.

33. Here Darwin suggests that adaptations animals make to moderate changes in climate are indicative of "acclimation" rather than adaptation. See Charles Darwin, *Origin of the Species*, ed. Ciliam Beer (Oxford: Oxford University Press, 1996), 114–117.

34. While Charles Darwin suggests that most animals have a "flexible constitution," he identifies changes in rhinos and elephants as a millennial "adaptation," rather than as the rapid "acclimation" seen among some insects. See Darwin, *Origin of the Species*, 70, 116. The connection between climate change and the current endangerment of various breeds of rhinos and lions is discussed in R. Ellis, *No Turning Back: The Life and Death of Animal Species* (New York: Harper Collins, 2004), 131–142.

35. Edward Hitchcock, a professor of natural theology and geology, wrote a number of scientific "proofs" of religious "truths." Hitchcock hoped to reconcile science with religion, and his scholarship included a book in which he spoke of the "catalytic power of Gospel" and "Mineralogical Illustrations of Human Character." See E. Hitchcock, *Religious Truth Illustrated from Science* (Boston: Philips Sampson, 1857), 35–36. Other theologians who promoted scientific analysis of religious truths included Joseph Haven of Harvard Church, Princeton theologian Archibald Alexander, and James Richards of the Auburn Seminary.

36. Cited in Elwyn Smith, *The Presbyterian Ministry in America Culture* (Philadelphia: Westminster Press, 1962), 182.

37. Whewell's treatise was called *Astronomy and General Physics Considered with Reference to Natural Theology*, cited in Charles C. Gillispie, *Genesis and Geology* (Cambridge, MA: Harvard University Press, 1951), 209.

38. Brooke, *Moral Minority*, 991, 221, 242; Hovenkamp, *Science and Religion in America*, 26.

39. Hovenkamp, *Science and Religion in America*, 43.

40. The idea that there were multiple origins and distinct species was called the

polygenist theory. Scholars who suggested there was only a single origin for common species were called monogenists. The polygenist-monogenist debate preceded Darwinian evolutionary theory by several decades. See Brooke, *The Moral Minority*, 279.

41. Beecher was a student at Yale University and classmate of Nathanial Taylor. Both men were credited with a central role in articulating New Light Calvinism. See William McLoughlin, *The American Evangelicals*, 42. Garrison was a leading abolitionist and Robert Owen was an advocated of popular education.

42. Nathan O. Hatch, *The Democratization of American Christianity* (New Haven: Yale University Press, 1989); Charles Foster, *An Errand of Mercy: The Evangelical United Front, 1790–1837* (Chapel Hill: University of North Carolina Press, 1960).

43. One such scholar was John William Draper. British by birth, Draper was raised and schooled in America. He taught Chemistry at New York University, where he was the administrative supervisor of the medical school. Draper traveled to Oxford to deliver a lecture on natural theology akin to the theme of the *Bridgewater Treatises*, but his lecture/publication was overshadowed by the Wilberforce-Huxley debate held at the same venue. See Edward White, *Science and Religion in American Thought* (Palo Alto, CA: Stanford University Press, 1952), 9.

44. Bertrand Russell, *Religion and Science* (Oxford: Oxford University Press, 1997), 75.

45. Hovenkamp, *Science and Religion in America*, 209.

46. In his personal correspondence with scientific theologians such as Asa Gray, Darwin revealed a personal faith in an "omnipotent" God who guided the universe, thereby determining the relative fitness of creatures and promoting natural selection. See David Griffin, *Religion & Scientific Naturalism: Overcoming the Conflicts* (Albany, NY: SUNY Press, 2000), 260.

47. John Hedley Brooke, *Science and Religion: Some Historical Perspectives* (Cambridge, UK: Cambridge University Press, 1991), 36. Huxley and Bishop Wilberforce debated evolution at Oxford University in 1860. Huxley debated a range of individuals, including representatives of the Roman Catholic Church and the defenders of conservative political ideology, including William Gladstone. See Peter W. Bowler, *Reconciling Science and Religion: The Debate in Twentieth Century Britain* (Chicago: University of Chicago Press, 2001): 15. Huxley coined the term agnosticism in the late 1860s. See Bowler, *Reconciling Science and Religion*, 16. Opponents of Huxley's philosophies on nature included Arthur Balfour, of the Balfour declaration, who suggested that scientific naturalism was deterministic materialism.

48. Francis Galton, Charles Darwin's cousin, made a variety of extrapolations from his relative's scientific inquiry. These extrapolations became part of popular political philosophy in late-nineteenth-century England. Some of these ideas came to be known as Social Darwinism, while others were called eugenics. See J.H. Brooke, *Science and Religion*, 1991, 306.

49. Hovenkamp, *Science and Religion in America*, 209–212.

50. Ibid., 48, 109, 186. Gray believed that the Bible supported pure science

and as such argued against the multiple creations promoted by Spencer and Huxley.

51. See William A. Dembski, *Intelligent Design* (Downers, IL: InterVarsity Press, 1999) and W. Dembski, *No Free Lunch* (Lanham, MD: Rowman & Littlefield, 2001).

52. For a discussion of the various proponents of Social Darwinism—notably, the industry leaders of the gilded age—see Frank Ryan, *Darwin's Blind Spot* (Boston: Houghton Mifflin Co., 2002), 34–36.

53. Whereas Britain led other nations in manufacturing in the 1880, by the First World War, America was leading Germany and Britain two-to-one in the share of world manufacturing. See Herman Schwartz, *States versus Markets* (New York: St. Martin's Press, 1994), 184–185.

54. Tyndall's research focused on the hypothetical relationship between drops in the level of the earth's carbon dioxide and the possible onset of another ice age. He did not hypothesize what effect a rise in carbon dioxide, a phenomenon that could come to define the Industrial Revolution, would have on changing the earth's atmosphere. A few years later in 1881, an American astronomer, Samuel Langley, added to the literature concerning the earth's absorption of solar heat. See Christianson, *Greenhouse*, 110. Glen Trewartha, a geography professor at the University of Wisconsin, described the earth's "insulating blanket," which trapped water vapor and carbon dioxide, thereby increasing temperatures and causing what he called "a greenhouse effect." See Glen T. Trewartha, *An Introduction to Weather and Climate* (New York: McGraw-Hill, 1937).

55. Joseph Priestly, "Observation on Different Kinds of Air," *Philosophical Transactions* 62 (1722): 147–264, and Humphry Davy, "On the Application of Liquids Formed by the Condensation of Gases as Mechanical Agents," *Philosophical Transactions* 113 (1823): 119–205. Arvid Gustav Hogbom, colleague and advisor to Svante Arrhenius, steered his student toward the topic of the environment. Hogbom was a geologist fascinated with Louis Agassiz's trendy and popular premise that for several millennia most of Europe had been buried in glacial ice. Like John Tyndall, who measured carbon dioxide in the hopes of solving the riddle of the ice age, Hogbom was not able to secure a definitive answer as to the relationship between carbon dioxide and a climate changing deep freeze. Hogbom did, however, identify a relationship between the annual burning of coal and increasing amounts of carbon dioxide. Once again, like Tyndall, Hogbom was unable to project what affect burning coal or other fossil fuels would have on global climate.

56. Tim Flannery, *The Weather-Makers* (New York: Atlantic Monthly Press, 2006), 40, and Christianson, *Greenhouse*, 111–113.

57. Today, various scientific reports concerning contemporary global warming and future climate change suggest that past ice ages were preceded by a "warming period" and a resulting re-direction of freshwater. Terrence Joyce, Chairman of the Department of Physical Oceanography at the Woods Hole Oceanographic Institute stresses the link between global warming and the possibility of a serious deep freeze similar to the glacial ice age of 12,000 B.C that was responsible for an ice bridge

connecting Siberia to North America. See Terrence Joyce, "The Heat Before the Cold," *New York Times*, April 18, 2002. William Curry, Director of the Climate Change Institute and colleague of Mr. Joyce at WHOI, suggests that current warming could lead to a freeze, but he emphasizes the likelihood that it might produce a "little ice age" similar to the one that characterized George Washington's winter at Valley Forge. See "Testimony to the Senate Committee on Commerce, Science and Transportation," available online at www.whoi.edu. Here Richard Wright's haiku gives this phenomenon a poetic rendering.

58. Alfred Chandler, *Scale and Scope: The Dynamics of Industrial Capitalism* (Cambridge, MA: Harvard Press, 1990), 61.

59. Before petroleum, whale blubber/oil was used extensively to light homes, as well as businesses and city streets. See Alexander Starbuck, *History of the American Whale Fishery* (Victoria, British Columbia: Castle Books, 1989), 85.

60. Edwin Black, *Internal Combustion: How Corporations and Governments Addicted the World to Oil and Derailed the Alternatives* (New York: St. Martin's Press, 2006), 32–33.

61. Lynwood Bryans, "The Origins of the Four-Stroke Cycle," *Technology and Culture* 8, no. 2 (April 1967): 178–198. The internal combustion engine, or ICE, was first developed in 1863 by Nikolaus August Otto, a German salesman who had studied the design of the Newcomen steam engine. In 1876, after years of tinkering, Otto patented the four-cycle engine. The ICE weighed less than steam engines and used fuel more efficiently. A few years later, Karl Benz, Gottlieb Daimler, and Wilhem Maybach invented a carburetor to work with the ICE. The novelty of the carbonator was that it used a previously useless byproduct of kerosene that was later named gasoline. In 1885, Benz and his associates produced an automobile based on the ICE/carburetor technology they perfected. In 1900, the company produced the first series of Mercedes-Benz available for public purchase. In the United States, Otto's ICE garnered the attention of Henry Ford, who worked as an engineer at the Edison Illuminating Company and who began tinkering with the German engine, ultimately adapting it for his famous Model T cars.

62. Black, *Internal Combustion*, 4–5, 154–155, 162–166.

63. Among the industrial giants that were recruited for this super "cartel" were the Ford Motor Company, U.S. Steel, Standard Oil, General Motors, and General Electric. See Leroy Pagano et al., *The Rise and Progress of American Industry* (Richmond, VA: U.S. Historical Society Inc., 1970), 45.

64. In a later publication, Callendar argued that carbon dioxide levels had risen 11 percent between the years 1900 and 1956. See Christianson, *Greenhouse*, 143–145.

65. S. R. Weart, *The Discovery of Global Warming: New Histories of Science and Technology and Medicine* (Cambridge, MA: Harvard University Press, 2003).

66. Philip Dolce, *Suburbia: The American Dream and Dilemma* (Garden City, NY: Anchor Press, 1976); Dolores Hayden, *Building Suburbia: Green Fields and Urban Growth 1820–2000* (New York: Pantheon Books, 2003).

67. The citation is from *The Christian Fundamentals*, cited in Edward White,

Science and Religion in American Thought: The Impact of Naturalism (Palo Alto, CA: Stanford University Press, 1952), 112.

68. The local legislature enacted the Butler Act a few months before the trial in the spring of 1925. See Edward Larson, *Summer for the Gods* (New York: Basic Books, 1997), 40–41.

69. George Marsden, *Fundamentalism and American Culture* (Oxford: Oxford University Press, 2006), 184–185.

70. Jeffery Sheler, *The Believers* (New York: Penguin Group, 2006), 57–59.

71. Dichlorotrifluoroethane is 10,000 times more efficient at capturing heat than is carbon dioxide. See Flannery, *The Weather-Makers*, 31.

72. On the eve of the Civil War, there was an astounding lack of knowledge within communities living in the northern and western regions of the United States regarding the intimate details of slave life in the South. President Abraham Lincoln credited Harriet Beecher Stowe, author of *Uncle Tom's Cabin*, with writing the book that "started the war."

73. DDT was banned in the United States in 1972. See Matthew Black et al, eds., *The Encyclopedia of the Environment* (New York; Franklin Watts, 1999), 30.

74. The same could be said of products that used aerosol propellants, such as bug and hair sprays.

75. In the 1980s, DDT was still used in many third world countries to the detriment of the population. In India, Mexico, and China, DDT was found in high levels in nursing mothers' breast milk. See James Gustav Speth, "Environmental Pollution," in *Earth 88: Changing Geographic Perspectives* (Sierra Club Books: National Geographic Society, 1988), 268–269.

76. According to various estimates, 260 pounds of chemical fertilizers were used per acre on most farms in the late 1960s. See Wendell Berry, *The Unsettling of America: Culture and Agriculture* (Sierra Club Books: National Geographic Society, 1977), 62. For a discussion of a number of large farms or "agro-businesses" that as of the 1970s did not use DDT and promoted organic farming, see Berry, 194–196.

77. Erik Reece, *Lost Mountain: A Year in the Vanishing Wilderness* (San Francisco: Penguin Publishers, 2006), 185–195. Reece discusses Robert Fitzgerald Kennedy's visit of eastern Kentucky in 1968 and the on-going "devastation" to the Appalachian environment from coal mining.

78. J. Brooks Flippen, *Conservative Conservationist: Russell E. Train and the Emergence of American Environmentalism* (Baton Rouge, LA: Louisiana State University Press, 2006), 6, 60.

79. Noah Feldman, *Divided by God* (New York: Farrar, Straus, and Giroux, 2005), 185.

80. Richard Neuhaus established an anti-war organization called the Clergy and Laity Concerned About Vietnam (CALCAV) in response to President Lyndon Johnson's characterization of anti-war debate as treason. See Damon Linker, *The Theocons: Secular America Under Siege* (New York: Double Day, 2006), 17, 30–34.

81. Three of the most important books written on the environment during this

era were published between the years 1970–1973. They included an MIT report called *Man's Impact on the Global Environment*, and two popular volumes, *This Endangered Planet* and *The Limits to Growth*. During the years these books were published, The United Nations established its environmental program (UNEP) and sponsored a conference on the Human Environment in Stockholm, Sweden. In America, Dennis Hays formed an umbrella organization for green activists called the Earth Day Network, and President Nixon ratified the Endangered Species Act. In 1970, this organization fought and won the right to establish a holiday named "Earth Day" to raise environmental awareness. For a discussion on Nixon environmental policy, see J. Flippen, *The Conservative Conservationist*, 114–136.

82. This report, entitled "Stratospheric Sink for Chloro-fluoro-methanes: Chlorine Catalyzed Destruction of Ozone," was published in *Nature* 249 (1974), 810. See Vijay V. Vaitheeswaran, *Power to the People* (Farrar, Straus, and Giroux, 2003), 159, 180, 188.

83. Dr. Wangari Mathaai was awarded a Noble Peace Prize in 2003 for her tree-planting campaign in Kenya.

84. A list of American environmental organizations and the dates they were founded is located on the Wikipedia website. See wikipedia.org/wiki/list_of_environmental_organizations.

85. See James G. Speth, *Protecting Our Environment: Toward a New Agenda* (Lanham, MD: University Press of America, 1985).

86. Wealthy signatories, especially those countries with large chemical manufacturers, wanted a gradual phase-out of production of CFCs over a 14-year period. The coalition of unwilling chemical producers and hesitating signatory countries only adopted the freeze on CFCs when global chemical giant Dupont indicated it could come up with alternative to CFCs. See James G. Speth, *Red Sky at Morning* (New Haven, CT: Yale University Press, 2004), 94. In 2006, Dupont helped form an alliance with other industry leaders, dubbed USCAP, which calls for a reduction in carbon dioxide. See "A Call for Action," available at www.us-cap.org.

87. CFCs and DDTs are manmade, difficult to capture or degrade, and are thousands of times more potent at capturing heat than is carbon dioxide. However, carbon dioxide emitted by manmade machines is the most prevalent ingredient in global warming. See Flannery, *The Weather-Makers*, 31.

88. Though most scientists of this era were not studying the impact of carbon dioxide on the atmosphere, in 1975 Roger Revelle, a graduate student, and Dr. Han Suess, of the Scripps Institution of Oceanography, published a study based on Arrhenius and Callendar's historical analysis. They tested the ocean and found rising carbon dioxide levels in water. Revell and Suess's analysis was ultimately confirmed by a young chemist name Charles Keeling, who had devised a very sensitive gauge to test rising carbon dioxide levels in the atmosphere. Charles Keeling found that no matter where in the world he traveled, wherever he tested the air, the carbon dioxide levels were the exactly the same. He arrived at the conclusion that pollution in one area was not confined to that area and the world's air was a blend of various pollutants. Keeling's subsequent readings of the atmosphere

between 1958 and 2000 indicated a rise in CO2 due to human consumption of fossil fuels. See Flannery, *The Weather-Makers*, 25, 155.

89. In the summer of 1979, four concerned scientists presented their own research to J. Gustav Speth, chair of President Carter's Council on Environmental Quality. The authors of this report predicted a "warming" that would require ambitious policies to regulate the long-term impact of consuming fossil fuels. See George Woodwell et al., "The Carbon Dioxide Problem: Implications in the Management of Energy and Other Resources," July 1979. Speth suggests that this little circulated report helped direct his attention, and the attention of the Carter White House, to the specific issues of reducing carbon dioxide emissions. See Speth, *Red Sky at Morning*, 3.

90. National Research Council, *Carbon Dioxide and Climate: Report of an Ad Hoc Study Group on Carbon Dioxide and Climate* (Washington, D.C.: National Academy of Sciences, 1979).

91. U.S. Council on Environmental Quality, *Global Energy Futures and the Carbon Dioxide Problem* (Washington, D.C.: Government Printing Office, 1981), iii–viii.

92. President Carter wanted to expand alternative sources of energy, including nuclear power.

93. The theory that environmental protection constitutes an "unreasonable" Fifth Amendment "taking" of private property by the federal government was a reinterpreted formulation of a discussion on land use derived from Richard Epstein, *Takings, Private Property and the Power of Eminent Domain* (Cambridge, MA: Harvard University Press, 1985).

94. Theodore Roosevelt, *Autobiography* (New York: Charles Scribner's Sons, 1958). John Muir founded the Sierra Club.

95. Some of the very prominent and important organizations, such as the Western Cattlemen's Association, the American Mining Congress, and the American Farm Bureau Federation are affiliated with the WUM and lobby on its behalf.

96. See Ron Arnold, *Ecology Wars: Environmentalism as if People Mattered* (Washington, D.C.: Free Enterprise Press, 1993); Philip Brick and R. McGreggor Cawley, *A Wolf in the Garden: The Land Rights Movement and the New Environmental Debate* (Lanham, MD: Rowman & Littlefield, 1996); Alan Gottlieb, ed., *The Wise-Use Agenda: The Citizen's Policy Guide to Environmental Issues* (Washington, D.C.: Free Enterprise Press, 1989).

97. Ron Arnold discussed the goals of the WUM in a 1991 interview with *Outside* magazine. He argued that WUM's spin strategy would win many converts because "facts don't matter: in politics everything is perception." See Jon Krakauer, "Brown Fellas," *Outside* (December 1991): 67–69.

98. Noah Feldman, *Divided by God: America's Church-State Problem and What We Should Do about It* (New York: Farrar, Straus, and Giroux, 2005), 217.

99. For another discussion of the Jeffersonian "wall of separation," the effort to protect religion from the state, and the effort to protect political leaders from organized religion, see Feldman, *Divided by God,* 40. See also Philip Hamburger,

Separation of Church and State (Cambridge, MA: Harvard University Press, 2000), 113–117.

100. In the 1940s, the National Council of Churches was called the Federal Council of Churches. See Joel A. Carpenter, *Revive Us Again: The Re-awakening of American Fundamentalism* (Knoxville: University of Tennessee Press, 1997), 144–147.

101. Jeffery Sheler, *Believers: A Journey into Evangelical America* (New York: Viking Adult, 2006), 61.

102. Christian Smith, *American Evangelicalism: Embattled and Thriving* (Chicago: University of Chicago Press, 1998), 11.

103. For a discussion of Barry Goldwater's position on civil rights, see Jonathan M. Schoenwald, *Time for Choosing* (Oxford: Oxford University Press, 2001), 147–151.

104. Several other important evangelical organizations were created during the end of the Carter Presidency and the beginning of the Reagan era. These included Focus on the Family, founded by James Dobson in 1978, and Family Research Council, founded in 1983. See Christine Todd Whitman, *It's My Party Too: The Battle for the Heart of the GOP and the Future of America* (New York: Penguin Press, 2005), 74.

105. The televangelist scandals of the previous year hurt Pat Robertson's presidential campaign. His Christian Coalition would resurface in the 1990s with the 1994 conservative sweep of Congress. See "The Gospel According To Ralph," *Time* (May 15, 1995): 28.

106. Noah Feldman suggests that Jerry Falwell may have specifically coined the term Moral Majority to recall Nixon's "silent majority." See Feldman, *Divided By God*, 192.

107. Johnathan Schoenwald, *A Time for Choosing: The Rise of Modern American Conservatism* (Oxford: Oxford University Press, 2001), 256. In order to get a sense of how—despite fairly unconventional credentials—Ronald Reagan was able to attract conservative evangelical patrons, see Allan J. Mayer, "A Tide of Born-Again Politics," *Newsweek* (September 15, 1980): 28. By the 1980s the NAE was the fastest growing evangelical organization within the larger movement, and by 2005 it accounted for one half of America's evangelical population. See Sheler, *Believers*, 61.

108. George Bush, "The Republican Party & the Conservative Movement," *National Review* (Dec. 1, 1964): 1053.

109. The NRA broke with its tradition of not endorsing candidates and officially endorsed President Reagan. See David Helvarg, *War Against the Greens* (Boulder, CO: Johnson Books, 2004), 36.

110. The *Agenda* was published in the last year of the Reagan presidency. See Helvarg, *War Against The Greens*, 36.

111. Ibid., 35.

112. Genesis 1:28, in *The Holy Bible*. See also Philip Shabecoff, *A Fierce Green Fire* (New York: Farrar, Straus, and Giroux, 1993), 208.

113. Lou Cannon, *President Reagan: The Role of a Lifetime* (New York: Simon and Schuster, 1991), 86, 531.

114. "The Terrible 20 Regulations," *Washington Post*, August 4, 1981.

115. Robert F. Kennedy, Jr., *Crimes Against Nature* (New York: Harper Collins, 2004), 23–25.

116. Ibid.

117. Helvarg, *War Against the Greens*, 42.

118. Ibid., 42.

119. Ibid., 4.

120. John Stauber and Sheldon Rampton, *Toxic Sludge is Good for You!: Lies, Damn Lies and the Public Relations Industry* (Monroe, ME: Common Courage Press, 1995), 75–85.

121. Kennedy, *Crimes Against Nature*, 29.

122. Major Garrett, *The Enduring Revolution: How the Contract with America Continues to Shape the Nation* (New York: Crown Forum, 2005), 33–38. It is worth noting that three of the five 1980 pledges referred to cuts to the national budget, especially various social programs and public salaries. The fourth pledge promoted urban economic development, or what Jack Kept would call "enterprise zones," and the fifth pledged to strengthen the military. See Garrett, *The Enduring Revolution*, 34.

123. Garrett, *The Enduring Revolution*, 30. For Republican strategies to defeat Democrats, see Ibid., 56, 64.

124. *New York Times*, September 16, 1980.

125. Newton Gingrich, Dick Armey et al., *Contract with America* (New York: New York Times Books, 1994).

126. Some attribute the attempt to diminish the role carbon dioxide plays in global warming to Karl Rove, the senior strategist in the George W. Bush White House. See Carl Pope and Paul Rauber, *Strategic Ignorance: Why the Bush Administration is Recklessly Destroying a Century of Environmental Progress* (Washington, D.C.: Sierra Club Books, 2004), 26. Others suggest that the Wise Use lobbyists were responsible for White House ambivalence towards Kyoto. See Kennedy, *Crimes Against Nature*, 50–53. Still others assert that the attack on Kyoto came from the Republican congressional leadership. See Whitman, *It's My Party Too*, 192–196.

127. Garrett, *The Enduring Revolution*, 22–23; Speth, 2004, 6 and Peter Huber, *Hard Greens: Saving the Environment from the Environmentalists: A Conservative Manifesto* (New York: Basic Books, 1999), 19.

128. Mark Dowie, *Losing Ground: American Environmentalism at the Close of the Twentieth Century* (Cambridge, MA: MIT Press, 1995).

129. For a sense of the type of Congressional environmental policy that was in place in the year before the Contract with America, see "Odd Trio Could Kill Nature Pact," *Chicago Tribune*, September 30, 1994. For a discussion of how the WUM tried to gain access to establish policy in President Clinton's White House, see Pope, *Strategic Ignorance,* 40–41.

130. In September 1995, the United Nations Intergovernmental Panel on Climate Change suggested that global warming, due to greenhouse gas emissions,

could lead to dangerous climatic changes, including droughts, (super) hurricanes, and floods.

131. Whitman, *It's My Party Too*, 168–170.

132. Brian O'Neill and M. Oppenheimer, "Dangerous Climate Impacts & the Kyoto Protocol," *Science* 296 (2002): 1971.

133. Speth, 2004, 62–67, 108.

134. For a discussion of the relationship between economic growth and industrial waste, see Speth, *Red Sky at Morning,* 108, 137. Governor Christine Todd Whitman, EPA administrator from 2001–2003, discusses the Kyoto Protocol's silence on the NICs of China and India. Whitman suggests that it is estimated that Asia will produce 70 percent of greenhouse gases in the next 15 years. See Whitman, *It's My Party Too*, 168–170. For a comparative discussion of current and projected emissions in the United States, China, and India, see "Emission Standards," available at http://en.wikipedia.org/wiki/Emission_standards. Regarding India and China's reliance on diesel fuel, see Keith Bradher, "Clean Air or T.V.: Paying in Pollution for Energy Hunger," *New York Times*, January 9, 2007.

135. The Bush Administration's critique of Kyoto regarding lax standards for NICs is discussed in a "special report" *Time* magazine issue that is devoted to global warming. See Bryan Walsh, "The Impact of Asia's Giants: How China and India could save the planet—or destroy it," *Time* (April 2, 2006): 61–62.

136. Regarding some of President Bush's campaign commentary on environmentalism, see Pope, *Strategic Ignorance*, 216. For a range of views regarding Bush Administration policy concerning carbon dioxide emissions, see Howie Hawkins, *Independent Politics: The Green Party Strategy Debate* (Chicago: Haymarket Books, 2006). For a discussion of how the Green Party takes an avowedly secular stand with regard to addressing spiritual aspects of nature conservation, see Michael Lerner, "The Democratic Party Should Appeal to Religious Voters," in *How Does Religion Influence Politics?* ed. James Torr (San Diego: Greenhaven, 2004), 70–72.

137. Whitman, *It's My Party Too*, 170.

138. Christine Todd Whitman traveled to a 2001 G-8 meeting in Italy to discuss carbon dioxide and the Kyoto Protocol with G-8 environment ministers. For a copy of the letter from Whitman to President Bush regarding the issues discussed at the G-8 meeting, see www.washingtonpost.com/wpsrv/onpolitics/transcripts/whitmanmemo032601.htm.

139. EPA administrator Whitman suggests several Republican Senators began a letter writing campaign to stop her from discussing mandatory CO2 caps with foreign leaders. See Whitman, *It's My Party Too*, 178; Garrett, *The Enduring Revolution*, 23. For an example of WUM and White House views regarding greenhouse gases and global warming, see Senator James Inhofe's website, www.Inhofe.senate.gov and scroll to press releases for a July 28, 2003, speech, entitled "Inhofe Delivers Major Speech on the Science of Climate Change."

140. An international author who suggests that global warming is not as bad as it seems is Bjorn Lomborg, *The Skeptical Environmentalist* (Cambridge, MA: Cambridge University Press, 2001), 4. For a different take on the enforcement of inter-

national treaties and on the dismissal of science warning about global warming, see David Levy and Peter Newell, "Oceans Apart? Business Responses to Global Environmental Issues in Europe and the United States," *Environment* 42, no. 9 (2000): 9; Martha Honey and Tom Barry, *Global Focus: U.S. Foreign Policy at the Turn of the Millennium* (New York: St. Martin's Press, 2000), 120.

141. Friends of Science, a Canadian organization, is one of several groups that disputes the link between carbon dioxide and global warming. The Cato Institute, the Robert Pielke Sr. Research Group, and the Marshall Institute are other organizations that list a variety of scientists who are skeptical of causes and existence of climate change. Website links to these organizations and a range of scientific reports disputing the significance of global warming can be found on the website of Congressman Dana Rohrabacher, available at www.rohbacher.house.gov.

142. John McManus, "The Sky Is Falling! Or is it?" *The New American* 19 (September 8, 2003). For a similar argument also suggesting that the harms caused by global warming are exaggerated, see Patrick J. Michaels, "Global Warming: So What Else is New," *San Francisco Chronicle*, February 2, 2007.

143. William M. Gray, "Get Off the Warming Bandwagon," November 16, 2002, www.bbcnews.com, and Patrick J. Michaels and Robert C. Balling, Jr., *The Satanic Gases* (Washington, D.C.: Cato Institute, 2000). Another research scientist, Jens Bischof, suggests that this cycle of warming is leading to a period of cooling, while polar ice cap melting has been occurring unrelated to carbon dioxide emissions since the 1970s. See Bischof, "Ice in the Greenhouse: Earth May be Cooling, Not Warming," *Quest* 5 (January 2002).

144. Ian Clark, "Blame the Sun/Back to Copernicus: Is it all too Human to Connect Global Warming with Human Activity," *National Post's Financial Report*, July 15, 2004.

145. S. Baliunas, "Studies Lack Hard Evidence That Warming is Human Induced," *American Legion Magazine*, 1/02.

146. Scientists who are leery of the harm caused by global warming suggest that it leads to higher crop yields in the short-run but causes long-term drought. See Thomas Karl and Kevin Trenberth, "Modern Climate Change," *Science* 302 (December, 5, 2003).

147. Groups who resist adopting nuclear power as an alternative source of fuel are listed on the Public Citizen website. See "Environmental Statement on Nuclear Energy and Global Warming," 6/05, available at www.citizen.org.

148. Jerry Taylor and Peter Van Doren, "Evaluating the Case for Renewable Energy: Is Government Support Warranted?" *Cato Institute for Public Analysis* (January 10, 2002).

149. "Battle Over IPCC Chair Renews Debate on U.S. Climate Policy," *Science* (April 12, 2002). The 2001 IPCC Third Assessment Report concluded that even if the United States and other nations aggressively sought to reduce carbon dioxide, there would still be a rise in average global temperatures, and the sea level would also rise. See IPCC 2001 Report at http:/en.wikipedia.org/wiki/IPCC. At the end of March 2001, leaders of various non-evangelical denominations—mainly Presby-

terians, Methodists, and Jewish congregations—sent a letter to President Bush asking him to reconsider his position on global warming. See Bob Edgar, *Middle Church: Reclaiming the Moral Values of the Faithful Majority from the Religious Right* (New York: Simon and Schuster, 2005), 46–55.

150. Much like Vice President Bush's efforts on President Reagan's Task Force on Regulatory Relief and Dan Quayle's services on the Council on Competitiveness, Dick Cheney would be responsible for coordinating executive environmental policy during George W. Bush's presidential administration. David Helvarg suggests that the Wise Use-affiliated Center for the Defense of Free Enterprise recruited Dick Cheney to sit on its board. See the Sierra Club website for "Wise-Use in the White House" (http://www.sierraclub.org/sierra/200409/wiseuse.asp) and Harvey Blatt, *America's Environmental Report Card: Are We Making the Grade?* (Cambridge, MA: The MIT Press, 2005), 130.

151. In August 2002, when the World Summit on Sustainable Development held its meeting in South Africa, American representatives to the conference fought to keep the Summit from endorsing the Kyoto Protocol and won. American environmental organizations were aware of this development, but to a large extent, the American public was either unaware or disinterested. See J.G. Speth, "Perspectives on the Johannesburg Summit," *Environment* 45, no. 1 (2003): 24.

152. In the 1980s, Gale Norton worked under Wise Use aficionado and former Reagan Department of the Interior Secretary James Watt. These alliances are discussed in Pope, *Strategic Ignorance*, 54–55. For a discussion of the weather in 2003, see "How it Affects your Health," by Christine Gorman (Special Report—Global Warming Edition), *Time* (April 3, 2006): 44–45. Dr. Wangari Maathai is a Kenyan activist whose Green Belt Movement is responsible for planting 30 million trees. Since receiving her award, she has argued that carbon dioxide-driven global warming needs to be addressed. See Simon Ross, "Time 100," *Time* (April 2005) and "Nobel Winners Call for Justice," *The Nation*, January 24, 2007.

153. The Norton EPA maintained that there was "substantial scientific uncertainty surrounding global climate change," see Mark Sherman (Associated Press), "Justices Hear Global Warming Case," *The Courier-Journal*, November 30, 2006; Gail Collins et al., eds., "Global Warming Goes to Court," *New York Times*, November 28, 2006.

154. On September 13, 2005, the U.S. Court of Appeals for the District of Columbia Circuit decided to uphold the EPA's decision. See http://www.cadc.uscourts.gov/bin/scripts/isysweb.

155. The plaintiffs are the states of California, Connecticut, Illinois, Maine, Massachusetts, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington. Other organizations joining these plaintiffs are the Sierra Club, the Union of Concerned Scientists, Greenpeace, and the International Center for Technology Assessment, among several others. Section 202(a)(1) of the Clear Air Act requires the EPA administrator to set emission standards for pollutants from motor vehicles. See *Massachusetts v. Environmental Protection Agency* (case #05–1120). See also http://en.wikipedia.org/ wiki/Massachusetts v. EPA.

156. It is instructive to note that none other than Rev. Billy Graham, a friend and confidant of the extended Bush clan, is attributed with George W. Bush's recommitment to Christianity. See George W. Bush, *A Charge to Keep* (New York: William Morrow and Co., 1996), 136. For an evangelical view of political life in the Bush White House, see David Kuo, "Putting Faith Before Politics," *New York Times*, November 16, 2006.

157. Organizations such as People for the American Way and Americans Untied for Separation of Church and State, as well as a variety of religious scholars, worried that the creation of this new executive "cabinet," would create a crack in Thomas Jefferson's wall that might become a religious floodgate. For a related discussion on faith-based ideology and the Iraq war, see Jim Wallis, *God's Politics* (San Francisco: Harper San Francisco, 2005), 141, 144.

158. David Aikman, *A Man of Faith: The Spiritual Journey of George W. Bush* (Nashville, TN: Thomas Nelson Publishing Group, 2004), 144–145.

159. Gary McMullen, "Increased Need, Smaller Resources," *The Ledger* (Florida), July 12, 2003.

160. For the document entitled "For the Health of the Nation an Evangelical Call to Civic Responsibility," see www.nae.net/images /civic_responsilbility2.pdf.

161. Sheler, *The Believers*, 231. Church of the Brethren, a ministry associated both with evangelical and Methodist organizations, issued a pro-environment statement as early as 1991 entitled "Called to Care," which they feature on their website, available at www.brethren.org/genbd/washof/environment.

162. Harold Ockenga created the NAE in the 1940s. Several enlightened journalist and theologians, such as Billy Graham, joined this association looking for intellectual revival and moral fellowship.

163. Michael Janofsky, "When Clean Air Is a Biblical Obligation," *New York Times*, November 7, 2005.

164. The principal use of the term Intelligent Design occurred in 1987, when the Supreme Court ruled, once again, that teaching Creationism in public school was unconstitutional. Scholars at the Discovery Institute coined the term in the year following the trial, and it was first published in Charles Thaxton ed., *Of Pandas and People* (Richardson, TX: Foundation for Thought and Ethics, 1989). Since then, an avid evangelical proponent of ID, William Dembski, has written numerous books and articles refining natural theory "proofs" in support of ID. Dembski and his Discovery colleagues have lectured on ID, presenting their theories to evangelical congregations and political organizations alike. See www .discovery.org. In 2005, President Bush indicated that students should be allowed to learn alternative theories of evolution, including ID. See "Bush: Schools Should Teach Intelligent Design," at www.msnbc.com. That same year a U.S. Federal Court ruled that a public school district's requirement to teach ID violated the First Amendment of the Constitution. See www.Wikipedia/intelligent-design. For objections to ID, see Jerry Coyne, "The Case Against Intelligent Design, *The New Republic* (August 22, 2005), and William Safire, "On Language: Neo-Creo," *The New York Times Magazine* (August, 21, 2005).

165. Sheler, *The Believers*, 16.

166. Christian Smith, *Christian America? What Evangelicals Really Want* (Los Angeles: UCLA Press, 2000), 120–122.

167. Susan Page, "Christian Right's Alliance Bends Political Spectrum," *USA Today*, June 15, 2005.

168. The Noah Alliance website has a list of approximately 30 environmental organizations. Their evangelical nature and their emphasis on protecting endangered species are available at www.Noahalliance.org.

169. Associated Press, "Evangelicals, Scientists Tackle Warming," *Courier-Journal*, January 16, 2007.

170. John Green as cited in Peter Smith, "Environmentalists Get New Ally," *Courier-Journal*, January 21, 2007.

171. David Kuo, former Deputy Director of the White House Office of Faith-Based Initiatives, suggests that whatever disagreements social welfare evangelicals have with Bush policy, they will not leave the Republican Party to join Democrats. By extension, Evangelical Greens will probably not join green or independent parties, who are left of the Democrats. See "Putting Faith Before Politics," *New York Times*, November 16, 2006.

172. For a first hand account of "counter-culture conservative" challenges of dominion theory and other evangelical concerns regarding climate change, see Rob Dreher, *Crunchy Cons* (New York: Crown Forum, 2006), 150–178.

173. Felicity Barringer and Andrew Rivkin, "Agency Proposes to List Polar Bears as Threatened," *New York Times*, December 28, 2006, A16.

174. Earlier in 2006, perhaps November or December, The National Snow and Ice Data Center in Boulder released a study to the White House suggesting the carbon dioxide-driven global warming was leading to a whole-scale thinning of ice in the Artic. The report's authors suggest that by 2040, most of the ice in the Arctic could be water, which would lead to a series of other environmental problems. See Andrew Rivkin, "By 2040, Greenhouse Gases Could Lead to an Open Arctic Sea in Summers," *New York Times*, December 12, 2006; William J. Broad, "Long-term Global Forecast? Fewer Continents," *New York Times*, January 9, 2007; John Collins Rudolph, "The Warming of Greenland," *New York Times*, January 16, 2007.

175. Edwin Black, *Internal Combustion* (New York: St Martin's Press, 2006), 124–162.

176. See Matthew L. Wald, "Ford Shows a Hybrid Car with 2 Modes: Electric and Electric," *New York Times*, January 23, 2007.

177. Kennedy, *Crimes Against Nature*, 42–43.

178. Jennifer Steinhauer and Felicity Barringer, "Schwarzenegger Orders Cuts in Emissions," *New York Times*, January 10, 2007.

179. Prominent Senators sponsoring carbon dioxide-reducing bills include Diane Feinstein, Barack Obama, John McCain, and Joseph Lieberman. This debate ensures that carbon dioxide-driven global warming will be an issue central to the presidential debate in 2007–2008. See Felicity Barringer and Andrew Rivkin, "Bills on Climate and Global Warming Move to Spotlight in the New Congress," *New*

York Times, January 18, 2007. After California Governor Arnold Schwarzenegger made his pledge to reduce carbon dioxide, the state government of Wyoming quickly offered to sell California wind energy. See Dustin Bleizeffer, "Wyoming has Opportunities in California's 'green' Energy Market," *Star-Tribune*, January 27, 2007.

180. See the Church of the Brethren website, www.brethren.org/genbd/washofc/environment.

181. The USCAP alliance includes: Alcoa, BP American, Caterpillar, Duke Energy, DuPont, and General Electric, among others, along with environmental organizations such as the Pew Center on Global Change, Environmental Defense, National Resources Defense Council, and World Resources Institute. See www.us-cap.org.

182. The USCAP alliance reflects more that $750 Billion of "combined market capitalization." See "FPL Group Joins Major Business and Environmental Leader in Call for Swift Action on Global Climate Change," available at www.dBusiness-News.org.

183. See http:www.whitehouse.gov/stateoftheunion/2007/index.html.

184. "The State of the Union Address: What the Media Missed," *The Real Truth*, January 24, 2007, available at www.realtruth.org.

185. Paul Krugman, "The Sum of All Ears," *New York Times*, January 29, 2007.

186. By the end of April, however, the EPA administrator Stephen Johnson said he would not give the Senate Environment and Public Works Committee a specific timetable for regulating gasoline emissions, "National Briefing," *New York Times*, April 25, 2007.

187. For a range of legal and scientific discussions of alternative energy sources, see Edwin Black, *Internal Combustion* (New York: St. Martin's Press, 2006). Black speaks of a "new Manhattan project of hyper-engineering," and "hydrogen solutions," 293–361. Regarding natural gas and nuclear power, see Michael Klare, *Blood and Oil* (New York: Metropolitan Books, 2004), 180–202 and Vijay Vaitheeswara, *Power to the People* (Farrar, Straus, and Giroux, 2003), 317–327, 276–282. Regarding a range of alternative technologies, see Harvey Blatt, *America's Environmental Report Card: Are We Making the Grade?* (Cambridge, MA: MIT Press, 2004), 115–126.

188. Herald Berman, *Law & Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 1983).

189. William E. Nelson, *Americanization of the Common Law: The Impact of Legal Change on Massachusetts Society, 1760–1830* (Cambridge, MA: Harvard University Press, 1975), 105–108.

190. In America, Catholics, and a few other religious communities, insisted on establishing their own schools. See Robert F. Drinan, S.J., *Can God and Caesar Coexist: Balancing Religious Freedom and International Law* (New Haven, CT: Yale University Press, 2006), 59. Catholic educational "separatism" became a contentious issue among Second Awakening evangelicals.

FURTHER READING

For a discussion of the impact of the modern environmental movement on American industry, see Ron Arnold, *Ecology Wars: Environmentalism as if People Mattered* (Free Enterprise Press, 1998). Regarding communities that are already suffering from the effects of global warming, see Mark Lynas, *High Tide: The Truth about our Climate Crisis* (St. Martin's Press, 2004). Concerning a future marked by increased global warming and a depleted oil supply, see Paul Roberts, *The End of Oil* (Houghton Mifflin, 2004). For an economic study that considers the costs of cleaning up environmental damage, see Lombor Bjorn, *The Skeptical Environmentalist* (Cambridge University Press, 2001). For a survey of Christian viewpoints on environmental protection, see R.J. Berry (ed.), *Environmental Stewardship: Critical Perspectives* (T&T Clark, 2006). Regarding the damage carbon dioxide is causing to the oceans, see David Helvarg, *Blue Frontier* (Sierra Club Books, 2006).

8

Religious Liberty and Authority in Biomedical Ethics

Courtney S. Campbell

In February and March 2005, the attention of the nation was riveted by a life-and-death drama unfolding in the courtrooms and hospital corridors in Florida, as well as within the U.S. Congress and the White House. A national controversy erupted during the dying days of Terry Schiavo, nearly seven years after her husband had requested withdrawal of her life-sustaining feeding tubes, and some fifteen years after a cardiac arrest had inflicted permanent, irreversible brain damage on Ms. Schiavo. The Schiavo case was complicated not only because of disagreement between the family of Terry Schiavo and her husband, Michael Schiavo, but also because of political pressure and media engagement by conservative Roman Catholics and evangelical Christian denominations who advocated for continued treatment as consistent with constitutional protections of the right to life. In turn, many arguments for removal of the feeding tubes maintained that this religious-based advocacy and intervention in the case inappropriately entangled religious convictions with matters of medicine and the state and sought to legally enact religious teaching about dying on all citizens.

The Schiavo case presented many salient lessons for understanding the relationship between church, synagogue, and mosque and the interests of the state as mediated in the context of medical care. While many faith traditions have articulated moral teaching on a range of issues in medical ethics, historically these commitments most frequently come into conflict

with state interests when the stakes are highest; namely, when a decision quite literally can mean the difference between life and death. In some of these life-or-death contexts, religious traditions may not only develop moral positions, but also request of their adherents, and of public officials, that these religiously based moral values become the foundation for the laws of the secular state.

My intent in this essay is to provide an overview of several church-state issues and conflicts that emerge in the setting of medical care decisions about the generation or preservation of human life or the manner and timing of death. (The scope of my analysis will not address the questions of abortion or embryonic stem cell research, as such issues are covered elsewhere in this volume.) Although there is a vibrant academic discussion regarding the public significance of religious views about medical ethics, my concerns will be those circumstances in which a policy or law of the state is deemed to infringe on the freedom of religious practice, as well as circumstances in which advocates of a moral position on a particular medical intervention on religious grounds appear to infringe the compelling interests of the state in oversight and regulation of medical practice. That is, church-state questions in medical ethics can pose difficult policy and ethical dilemmas that invoke both the Free Exercise and the Establishment Clauses of the First Amendment.

In a liberal, pluralistic, and democratic society, the free exercise of religious liberty is held to be a fundamental right of citizens. This entails that the democratic state, which derives its authority from citizen consent, has a presumptive responsibility and interest in protecting and securing religious freedom. The range of religious freedom, while most commonly manifested in political contexts, also is no less relevant and compelling in health care decision-making. In the context of decisions about health care and biomedical procedures, the prevailing trend has been that the state should seek modes of accommodation of religious liberty to the extent that other basic interests of the state are not threatened or compromised. However, in some circumstances of religious-state conflict, laws have imposed restrictions on the extent of religious liberty to protect other compelling social values.

This essay will draw on and discuss numerous concrete examples in biomedical ethics to illuminate understanding of possible accommodations of conflicts between religious faith convictions and state interests. Whether and how these accommodations are feasible requires observance of three principal distinctions:

1. The constitutional setting—that is, whether the conflict in a democratic society is rooted in the extent of freedom of religion (liberty) or in restrictions on religion as a basis for law (non-establishment);

2. The decision-making capacity of the individual—that is, whether they are a competent adult or a child; and
3. The nature of the medical decision at stake—that is, whether it involves a claim for medical treatment to generate or preserve life, or a claim of treatment refusal or withdrawal that likely will bring about death.

In general terms, the state has been willing to recognize religious grounds for refusals of treatment by adults as having equal moral and legal standing with treatment refusals of adults in general; however, state accommodation of treatment requests or refusals on behalf of children are considerably more controversial, while directives for public law to be informed and shaped by religious influences are customarily held to be at odds with the requirements for binding law in a secular, liberal democratic culture.

RELIGION IN THE LIBERAL DEMOCRATIC STATE: COMMUNITIES OF RESISTANCE AND MEANING

The prevailing models of the church-state relationship include a spectrum of possibilities that range from civic exclusion of religion to a separation and toleration model to a near-theocratic or establishmentarian model in which religious (and particularly, Christian) values are claimed to be the basis for legitimate laws promulgated by the state. While evaluating these models is a subject for more extensive discussion in political philosophy (and in other essays in this collection), it is important at the outset to acknowledge that any account of the church-state relationship, including the one delineated below, will contain assumptions and presuppositions that will impose ethical and legal presumptions in favor of the interests of one domain or the other. It is also important to acknowledge that these normative models seldom fully capture the church-state relationship as it is *experienced* in circumstances of conflict in the context of decisions about medical care.

With these caveats in mind, I want to sketch briefly the parameters of the model that will inform this discussion. This relationship is comprised, though not exhausted by, the following features:

1. The commitment of the liberal state to the principle of liberty and respect for autonomy includes providing social space for the free exercise of religious belief and practice.
2. This commitment means that individuals within society possess the freedom to choose whether to believe and practice religion, and the freedom to choose which (if any) religious denomination—church, synagogue, mosque, or other form—they will enact their freedom of association with.
3. This commitment further entails that the state grants to religious associations

the autonomy of self-governance over ecclesiastical matters internal to the denomination. For example, ecclesiastical discourse and rules regarding controversial topics, such as qualification for ordination to an ecclesiastical office or a position of authority, or matters of sexuality, are properly subjects for the religious community to articulate free of interference from state intervention.

4. The liberal democratic state is agnostic about what constitutes the good life for human beings. The state is committed to ensuring that individuals and intermediate associations (including religious communities) are provided that amount of liberty consistent with individuals and associations articulating and enacting their own view of the good life for themselves to the extent that they do not pose a risk of harm or injury to others exercising their own freedom. Moreover, securing these freedoms means the state can legitimately reject efforts to establish or impose particularistic, or religious, views of the good life (or good death) on civic society. The state thereby seeks to balance an interest in ensuring freedom of religion with an interest in prohibiting the establishment of a religious worldview as socially normative.
5. This means, on one hand, that individuals and communities have the liberty to share their own particular views of the good life with other citizens through persuasive means; on the other hand, the "harm" restriction on the exercise of liberty means the state can intervene to regulate or prohibit the practices of individuals or communities that do present a risk of serious bodily harm or injury to vulnerable individuals. Furthermore, the state can neither promote nor dissuade from religious belief and practice but should instead seek for neutral ground both between religious and secular realms, as well as between specific religions.
6. The state is required to establish procedures that ensure equal opportunity, particularly as the social arrangement of power may situate some persons with substantial authority (political, economic, professional, religious, and so on) and situate other persons in circumstances of substantial vulnerability.
7. While disavowing a view of the good life for human beings, the state does bear a responsibility to ensure that each citizen receives a share of basic needs—food, shelter, clothing, education, security, health care—that allows them to participate meaningfully as citizens in society and to take advantage of guarantees of equal opportunity. In large nation-states, often the meeting of basic needs of a substantial portion of the population can be achieved only through coordinated bureaucracy—including coordination with religiously affiliated health care facilities—and compulsory taxation methods.
8. The claims of religious belief or practice to political power or authority in affairs of the state must not overstep the realm of personal freedom and ecclesiastical autonomy guaranteed by the state. Religious convictions can exert influence in public discourse and practices through reliance on persuasive means, but an effort to ground public laws in religious values, or otherwise to align a religious community with state power and its coercive mechanisms is not only misguided politically, but compromises the integrity and vitality of the religious tradition.

> Indeed, as de Tocqueville observed, "Any alliance with any political power whatsoever is bound to be burdensome for religion. It does not need their support to live, in serving them it may die."[1]

Clearly, this is only a sketch of the parameters of one view of the relationship of church and state, and each of the above features is worthy of its own fuller discussion. However, these features should suffice for present purposes to examine the controversies and conflicts that arise between church and state in the context of the provision of medical care. My account is most heavily indebted to the ecclesiology developed by legal scholar Stephen Carter as presented in *The Culture of Disbelief*.[2] Carter offers a middle ground between the "exclusion" of religion from public discourse (a feature he finds increasingly prevalent in the civic culture of the United States) and a dominance of civic culture by one particularistic religious worldview, which fails to ensure a realm of the political-legal immune from religious authority and may neglect to protect the liberty rights of religious (and other) minorities.

By contrast, Carter presents an alternative understanding of the role of religious communities that he maintains avoids both the extremes of exclusion or theocracy. In a democratic society, religions "can serve [first] as the sources of moral understanding without which any majoritarian system can deteriorate into simple tyranny, and second, they can mediate between the citizens and the apparatus of government, providing an independent moral voice."[3] The central characteristic of "moral understanding" that Carter attributes to religions in a democratic society is "the power of resistance," that is, the affirmation of moral values that deny ultimate authority to dominant social institutions, including the state. This characteristic of resistance entails that religious communities function as a social check on the power of government and seek to keep the state "honest" according to its own political values.

In addition, Carter does not frame the primary moral relationship as that between the individual and the state (or put more cynically, between anarchy and tyranny). Rather, the self is embedded in various intermediate or mediating communities, such as family and religious tradition, which issue the set of primary moral responsibilities for the person. These mediating relationships provide access for the religious adherent to personal and collective sources of meaning and purpose, an especially vital role given that the liberal state has declared itself agnostic on such matters.

In this account, then, a religious community must, at times, say "no" or resist the state on vital matters of meaning and purpose, including decisions about life and death in medical care. At the same time, religious communi-

ties, as intermediate institutions, renounce pretensions to political authority and power. Whether and how this "no" or power of resistance and this renunciation of power can be accommodated by religious communities and the state when life is at stake is a matter best exemplified by concrete examples in medical ethics. I will begin with conflicts presented by decisions presumptively protected by exercise of the Free Exercise Clause of the First Amendment, and then turn to circumstances in which religious teaching on medical ethics is perceived to present a risk of sanctioning an establishmentarian model.

THE FREE EXERCISE OF RELIGION: REFUSAL OF TREATMENT FOR THE SERIOUSLY ILL CHILD

Some of the most intractable conflicts between state-sanctioned exercise of religious freedom and the state interests in preserving life and ensuring due process for vulnerable persons occur in cases involving children. In some circumstances, a child might be born dying and parents, based on religious commitments to the sanctity of life, may wish for treatment continuation even if it provides negligible medical benefit, or may even be harmful from a medical perspective. The contrary situation holds when parents appeal to religious grounds to refuse treatment for a seriously ill child who could benefit from treatment, but who will likely die without treatment. A variation on this latter circumstance transpires when parents appeal to religion as grounds for conscientious objection to vaccination of their healthy child, thus potentially exposing both the child and the larger community to the risk of infection. I will first consider examples in which the state presumption in favor of protecting and respecting religious liberty is challenged because of parental refusal of treatment for a seriously ill but medically treatable child.

Perhaps the most publicized of such situations are those involving treatment refusals, and when legally allowed, vaccination refusals by Christian Science parents. Christian Science teaching does not deny the biological reality of disease, but it does hold that disease is but a symptom of a deeper spiritual estrangement from God. Christian Scientists maintain that it is not possible to combine medical treatment and the ministry of spiritual healing; at the same time, they differentiate their methods from "faith healing." Thus, when a child is seriously ill, recourse to medical "treatment" is deemed less efficacious than "spiritual healing" through prayer, moral regeneration, and ministry by Christian Science practitioners.[4] According to one bioethical analysis, there are approximate five thousand Christian Sci-

entist spiritual healers, and their fees are reimbursable through some insurance programs and some state and federal programs.[5]

Treatment refusals by parents for their children do arise in other faith communities that affirm beliefs in "faith healing." For example, an evangelical church in Oregon City, Oregon, relies on faith healing when a child in the community becomes seriously ill. Adherents of the Followers of Christ Church cite authorization for faith healing from New Testament passages that promise believers recovery from disease through practices of "a prayer of faith" and "laying on of hands." Yet the Followers have become nationally known because, biblical passages notwithstanding, an estimated 25 children in the community have died from medically treatable illnesses in the past half-century.[6] Nationwide, a study in *Pediatrics* documented 172 deaths of children in faith-healing communities between 1975 and 1995; 140 of the children died from conditions in which there is a success rate from medical treatment of over 90 percent. The authors of the study believe, moreover, that their fatality figures are substantially under-reported.[7]

A final illustration of religious freedom invoked by parents to refuse medical treatment that can endanger their children involves the Jehovah Witness tradition of refusing blood transfusions. Unlike the faith or spiritual healing traditions described above, this tradition accepts many procedures of modern medicine. However, the tradition affirms a prohibition on eating or consumption of "blood" that is derived from biblical passages in both the Hebrew Bible and the Christian New Testament. When applied to modern medicine, such as in surgical procedures, this prohibition means Jehovah Witnesses are forbidden by God from "nourishing of the human body with blood transfusions."[8] This applies to all adherents of the tradition, whether or not they have reached an age of decision-making capacity by which they could affirm their own beliefs in the tradition.

These claims for extensive religious liberty have been facilitated by a federal requirement initiated in 1974 that states provide for religious exemptions to child abuse and neglect charges. While the requirement was rescinded in 1983, laws in some 40 states permit parents to claim a religious exemption from statutes prohibiting child neglect or abuse so long as the parents appeal to religious reasons or faith healing as a basis for opposing medical treatment of ill children.[9] The repeal of such laws has been an ongoing preoccupation of organizations such as the American Academy of Pediatrics (AAP) for the past two decades. The AAP and its Committee on Bioethics has argued that "constitutional guarantees of freedom of religion do not permit children to be harmed through religious practices, nor do they allow religion to be a valid legal defense when an individual harms or neglects a child."[10] Moreover, the Committee has affirmed that as important

as family and public education can be, as a last resort, pediatric physicians who encounter parents who make a decision to deny their child necessary medical care should seek court authorization to disqualify the parents. In addition, parents who make such decisions should not be immune from civil or criminal statutes of neglect or abuse.

Religious-based refusals of treatment by parents for seriously ill, medically treatable children (rather than by seriously ill children) are complicated by a collision of important state interests. These include the general presumptions of respect for parental authority and responsibility for the welfare of their children, the protection of religious liberty, the protection of vulnerable persons from harm (often phrased in this context as not permitting parents to make "martyrs" of their children), and the lack of legally acknowledged decision-making capacity by the children themselves. In a 1944 case, *Prince v. Massachusetts,* which concerned the constitutional protections of Jehovah Witness parents in having their minor children sell religious literature contrary to child labor laws, the U.S. Supreme Court addressed many of these conflicting claims: "The right to practice religion freely does not include the liberty to expose the community or child to communicable disease, or the latter to ill health or death . . . Parents may be free to make martyrs of themselves. But it does not follow [that] they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."[11]

The key distinction in this argument is not about the validity of the content of religious claims to spiritual or faith healing, but rather whether the person is of such an age as to avow or disavow the religious beliefs as his or her own. Thus, the presumption in favor of respecting religious liberty can legitimately be overridden when the person is too young to make a meaningful commitment to the religious values of the community.

In some circumstances, it may be possible for the state to accommodate and not infringe on religious freedom while seeking to ensure appropriate medical care for the child. In some cases involving Jehovah Witness children, the child may not be suffering from a life-threatening condition, or it may be possible for non-blood products, which do not violate the Witness prohibition, to be used in treatment. Both Jehovah Witnesses and Christian Scientists also have cultivated hospital liaison staffs to educate professional caregivers about the beliefs of the tradition. If none of these alternatives are accessible or beneficial and a court order authorizing treatment or transfusion is sought, Martin Smith argues that the parents' religious beliefs can still be respected through informing the parents of this decision before the medical procedure is performed.[12]

Both substantive questions about what should be decided and procedural questions about who should decide are implicated in this church-state conflict. States have accommodated parental treatment refusals for their minor children through passage of religious exemption laws. Moreover, society continues to evolve in the direction of tolerating and accepting "alternative" medicine as potentially therapeutic and it is striking, for example, that a prominent bioethics publication has presented Christian Science under the category of "alternative medicine."[13] If such a pattern persists, it will be increasingly difficult to draw a line and justify why religious resistance to treatment for children in favor of an alternative mode of healing is a socially illegitimate and legally intolerable practice.

THE FREE EXERCISE OF RELIGION: PARENTAL REQUESTS FOR FUTILE TREATMENT FOR THE DYING CHILD

The converse of the situations previously described is that in some circumstances, religious belief and an appeal to religious liberty may be invoked by parents to request medical treatment that seems futile in terms of survival of the child. A representative example of this conflict is the situation of Baby K, a child who was born with anencephaly in October 1992. At birth, Baby K had difficulty breathing and mechanical ventilation was provided in order to provide the treating physicians a chance to confirm the diagnosis and to give the mother, Ms. H., time to understand the diagnosis and prognosis. After diagnostic confirmation, medical staff informed Ms. H that they anticipated Baby K to die within a few days, as is customary with infants diagnosed with anencephaly, and recommended the withdrawal of mechanical ventilation and that Baby K be provided with supportive and comfort care only. Given the prognosis, continuation of respiratory support served no therapeutic or palliative purpose.

Ms. H refused both a recommendation of abortion upon prenatal diagnosis of anencephaly as well as the discontinuation of mechanical ventilation on religious grounds: she was reported to have a faith conviction that "all human life has value, including her anencephalic daughter's life." Furthermore, the mother held a "firm Christian faith . . . [and] believes that God will work a miracle if that is his will . . . God, and not other humans, should decide the moment of her daughter's death."[14]

Surprisingly, Baby K continued to live and was subsequently transferred to a nursing home. She was readmitted three times to the hospital to stabilize her respiration; after the second re-admission, the treating hospital brought a court case contending that health care personnel and institutions

should not be required to render what they considered "medically and ethically inappropriate treatment" or treatment "outside the prevailing standard of medical care." The Fourth Circuit Court found that the Emergency Medical Treatment and Active Labor Act mandated providing stabilizing treatment to a person with an emergency medical condition, and thus a duty to provide respiratory support when Baby K was admitted with breathing difficulties.[15]

Baby K continued to receive occasional respiratory stabilization until her death in 1995, living a life span of exceptional duration for an infant with a diagnosis of anencephaly. In the Baby K case, the issue before the courts was not the legitimacy of the religious beliefs of her mother, but rather the obligations of caregivers. The case itself does not reflect a full church-state conflict, although the legal process does reveal how significant the presumption in favor of religious liberty can be when invoked to *prolong* life. However, is this presumption so compelling that it can require health care professionals to practice medicine in what they believe to be an unprofessional manner, at the risk of compromising their professional and personal integrity and values? Coupling the Baby K case with that of a seriously ill adult with impaired decision-making capacity can illuminate the scope of religious liberty when it conflicts with the integrity of medicine.

THE FREE EXERCISE OF RELIGION: RELIGIOUS REQUESTS AND PROFESSIONAL INTEGRITY

Helga Wanglie was a married elderly woman of eighty-six years when she was admitted to a hospital in Minnesota subsequent to respiratory failure. She was placed on a respirator for over five months before she experienced a cardiopulmonary arrest; her physicians believed she had suffered severe and irreversible brain damage. Repeated medical evaluations confirmed a diagnosis of persistent vegetative state or permanent unconsciousness and permanent respirator dependency because of chronic lung disease.

Although hospital staff believed Ms. Wanglie's prognosis for any recovery in these circumstances to be negligible and recommended to her family limiting or withdrawing life-sustaining treatment, the family refused and instead requested continuation of all forms of treatment, including life support. The family's refusal was attributed to religious values: "Mr. Wanglie has said that only God can take life and that doctors should not play God."[16] Or, as stated by the hospital's ethics consultant, familial objections to discontinuation of treatment reflected a view that "Physicians should not play God, that the patient would not be better off dead, that removing her

life support showed moral decay in our civilization, and that a miracle could occur."[17]

After several months of continued treatment and mediated consultation between treating staff and the family, the attending physicians reached the conclusion that continued respirator support would not be in Ms. Wanglie's benefit; that is, to provide such treatment would violate the medical commitment to the principle of beneficence. As articulated by the medical director of the hospital in a letter to the family, life support is "no longer serving the patient's medical interest. We do not believe that the hospital is obliged to provide inappropriate medical treatment that cannot advance a patient's personal interest."[18] The hospital subsequently filed a petition in district court to disqualify Mr. Wanglie as the proxy decision-maker and have a court appointed guardian make a determination about continuation of treatment. The court rejected this petition.[19]

The central church-state concern in the Wanglie case, much as it was in the case of Baby K, is the extent to which the state presumption in protecting freedom of religion can sanction requests of physicians to provide treatment that, in the assessment of the physician and other health care professionals, provides no medical benefit to the patient. In such conflicts, the state clearly has additional concerns besides those of preserving religious liberty. This includes a (rebuttable) presumption in favor of the family as qualified proxies for the patient, and an interest in ensuring that patients are not abandoned by a health care institution or its physicians. Of no less importance, however, the state must ensure that medical professionals are not requested to act in an unprofessional manner. Physicians, as agents and stewards for an important social institution, should be protected from requests that they violate the principle of beneficence by providing treatment that does not provide medical benefits to the patient (although it may not cause any harms, either). The societal commitment to religious liberty should not be allowed to override respect for the autonomy, professional judgment, and integrity of professional caregivers.

It is also important to examine the reported arguments of the Wanglie family for continued treatment, because even though they were presented as appeals protected by religious liberty, closer scrutiny reveals that they actually offer an evaluation of various social roles that can be assessed on non-religious grounds. The claim that "physicians should not play God" does not provide a religious mandate for continued treatment; it rather is a claim about the social status of the medical profession, one that inevitably includes misjudgments attributable to finiteness and fallibility. The claim that Ms. Wangle "would not be better off dead" could be interpreted as a

religious claim about the sanctity of life, but it also is plausibly an appeal to patient welfare—an appeal disputed by the physicians, but not necessarily one protected by religious liberty. The argument that non-treatment of Ms. Wanglie is symptomatic of moral decline in society is an observation, one that is presumably subject to empirical testing, rather than a statement of religious revelation (even though it would be compatible with the social assessments of many conservative religious traditions). Finally, the language of "miracle" does invoke a hope for divine intervention; in contrast to the other appeals reflecting familial concerns about physician integrity, patient welfare, and social decline, this appeal does require a specific religious commitment. It is, however, no less a claim about the relation of history and scientific medicine; that is, that scientific diagnosis and prognosis presumes a form of closing of history to the unexpected, in contrast to an "open" account of history that may be more compatible with certain religious beliefs. My intent is not to dispute a genuine claim to freedom of religion that may ground requests for, as well as denials of, medical treatment, but rather to ensure that moral analysis distinguishes between religious and non-religious argumentation.

Society does have a method for accommodating conflicts between what appear to be irreconcilable claims of patient (or proxy) requests and professional integrity: when a patient makes a request for a treatment or procedure that would violate the moral values of the professional (or the mission of the institution), the professional can object on grounds of conscience and refuse participation. This recognized form of accommodation is typically accompanied with a requirement to transfer the care of the patient to another provider for whom the request does not present such conflicts. This process respects patient autonomy without subjecting the objecting physician to a charge of abandonment. However, in neither the Baby K or the Wanglie case did the participating physicians invoke a right to conscientious refusal; the familial request for continued treatment was viewed not as an infringement on personal conscience, but rather as a violation of a defining principle of the profession as a whole, that of beneficence. There were, nonetheless, unsuccessful efforts in both cases to transfer the patients to other care settings for the required respirator support.

Physicians should not in any event be compelled to participate in unprofessional medical procedures out of regard for the religious liberty of patients. Conversely, religious liberty can give to patients in their religious communities a similar right of conscientious objection to medical policies deemed morally oppressive, as the following example illustrates.

THE FREE EXERCISE OF RELIGION: EXEMPTION FROM BRAIN DEATH

Since the late 1960s, which witnessed technological developments in life prolongation and life-extension such as organ transplants, the United States has undergone a transformation in the standards for defining death. A brain-oriented standard has emerged to supplement, or in cases of organ transplantation, supplant a more traditional standard that relied on vital fluids such as blood circulation and respiration. In 1981, the President's Commission recommended the adoption of the Uniform Determination of Death Act by all jurisdictions in the nation: "An individual who has sustained either (1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all functions of the entire brain, including the brain stem, is dead. A determination of death must be made in accordance with accepted medical standards."[20]

In making this recommendation, the Commission was explicit in attributing diminished significance to ongoing respiration and circulation, especially as such functions can be maintained mechanically even with the irreversible loss of brain function. The brain is identified as the organ that provides for a complex and integrated wholeness of the human biological organism; hence, "breathing and circulation are not in themselves tantamount to life," but rather are "surrogate signs" for the presence or irreversible cessation of brain functioning."[21]

While social and legal movement to a brain-oriented definition of death has facilitated medical decision-making about termination of treatment or of organ transplantation, the fact that an individual could be declared dead either by vital signs or by brain criteria has been objectionable to certain religious traditions who do not equate life and death with integrative brain functioning in the way the President's Commission and the UDDA do. For members of such traditions, a person could be declared legally dead by whole brain criteria even though, by the values of their tradition, they were still a living person.

In writing about pluralism in the standards for death, medical ethicist Robert M. Veatch maintains: "the constitutional issue of separation of church and state presses us in the direction of accepting definitions [of death] with religious groundings."[22] The most salient state accommodation to religious resistance to a brain death standard is illustrated in the New Jersey Declaration of Death Act enacted in 1991. In the language of the act, a declaration of death should not "violate the personal religious beliefs of the individual."[23]

As articulated by Robert Olick, "the Act recognizes a religious exemption (a conscience clause) designed to respect the personal religious beliefs of those who do not accept neurological criteria for the determination of death . . . "[24] The "personal" religious beliefs acknowledged by the New Jersey Act pertain primarily to those held within Orthodox Judaism, and among some Asian Americans and Native American cultures. In the following, I will focus on the religious exemption as it pertains to Orthodox Jewish concerns with a brain death standard.

As articulated by Orthodox Jewish scholars J. David Bleich and Fred Rosner, death in Jewish tradition occurs upon the separation of the soul from the body. Both scholars recognize, however, that dis-ensoulment is not a phenomenon subject to empirical testing and confirmation. It is nonetheless significant in that it suggests a more complex metaphysical reality to death than envisioned by the President's Commission.

Bleich contends that the definition of death is not a medical or scientific problem but one pertaining to theological and moral values, and that Jewish law (Halakhah) must be governing for the Jewish physician and patient "whether or not these determinations coincide with the mores of contemporary society."[25] Thus, the states commitment to respect and secure free exercise of religion permits Orthodox Jews to say "no" to the statutory criteria for death. For Bleich, "Brain death and irreversible coma are not acceptable definitions of death insofar as Halakhah is concerned. The sole criterion of death accepted by Halakhah is total cessation of both cardiac and respiratory activity."[26]

Rosner's analysis of biblical and Talmudic passages indicates why circulation and respiration are of such significance within Orthodox Jewish teaching. A passage from the Talmud indicates that "life manifests itself primarily through the nose as it is written: *In whose nostrils was the breath of the spirit of life* (Genesis 7:22)."[27] This interpretation suggests respiration and breath is the essence of life. Rosner affirms that the irreversible cessation of respiration is "the classic definition of death in Judaism," for "the soul departs through the nostrils at death, just as it is in the nostrils into which the Lord blows the soul of life at birth (Genesis 2:6)."[28] Nonetheless, rabbinic commentary on the same passage in some cases reveals that cessation of respiration was itself a "sign" of "prior cessation of circulation of blood from cardiac activity." Moreover, Rosner contends that other Talmudic sources can render a conclusion compatible with a whole brain standard of death. This itself is a compelling illustration of how diversity and pluralism can be discerned within a religious tradition, but at bottom, there is a traditional religious ground within Orthodox Judaism for resisting social redefinitions of death to encompass a brain-oriented standard.

The state-synagogue question in this regard then turns on whether the state—which has an interest in uniformity in legal statute, particularly because so much turns on a declaration of death (insurance, inheritance, disposition of the body, transplantation, communal rituals, etc.)—can compel (that is, infringe on religious liberty) an individual or community to accept a standard for their own death that is contrary to their religious and moral values. The New Jersey Declaration of Death Act, which is the only one of its kind in the country, holds that "the societal need for uniformity should yield to and accommodate the personal interests of a distinct minority of the population in the exercise of their religious beliefs."[29] This is interpreted as a claim of "conscience," because the individual who utilizes the exemption is not making a generalizable claim about the standard of death that everyone ought to subscribe to, but rather advances a dissent from the majority based on their personal religious convictions.

Unlike religious exercise of what Carter refers to as the "power of resistance" against medical treatment for ill children who may be endangered by treatment refusal against or without knowledge of their will, the accommodation of the state to religious liberty in the case of dissent from a brain death standard does not pose a risk of involuntary premature death to anyone. The New Jersey religious exemption then seems less difficult to justify than religious exemptions for faith healing as a defense against child neglect or abuse. It is, of course, not without its own internal problems. For example, as has been the case with conscientious objection to conscription into the military historically, it may prove hard for the state to hold firmly to "religious" grounds for the exemption; at some point, debate may ensue about the legitimacy of an exemption for beliefs that are the moral or philosophical equivalent of a religious conviction. Moreover, if that deeply-held moral or philosophical position is one that adheres to not simply whole brain death, but a higher brain or neocortical standard of death, what began as a narrow legal exemption will have culminated in undermining the regulatory act.

THE FREE EXERCISE OF RELIGION: CONSTRAINTS ON TREATMENT REFUSALS BY ADULTS

The status of patient rights by competent adults to refuse treatment has evolved significantly in the past quarter century. In contemporary medical ethics, competent adult patients are recognized to possess a right to refuse any medical treatment, even if in some circumstances such a refusal will eventuate in death. The rationale for such a refusal, be it religious or non-

religious, is itself not grounds for denial of the right or paternalistic coercion by the state.

Prior to this contemporary consensus, refusals of blood transfusions by adult Jehovah Witnesses in the 1960s–1980s became paradigmatic cases of the conflicts between church and state and between liberty and paternalism. Most frequently, a refusal of a transfusion on religious grounds was sufficient to raise questions about the believer's rational decision-making capacities. A classic illustration was a case litigated by Georgetown University Hospital in 1964, in which the health care providers sought a court order to authorize a transfusion of a seriously ill female Witness in order to save her life following a ruptured ulcer. The husband refused to authorize the transfusion, but indicated that he would not be responsible should the court order a transfusion. The wife was in such a dire physical condition that her competency was questionable, but the intervening judge interpreted her words to mean that she also would not experience responsibility should a transfusion be ordered by the court. It appears that state infringement on religious liberty in this case not only saved the life of the woman, but also allowed both the husband and wife, even though they refused to authorize a transfusion, to live with a clear conscience, as well as preserving the integrity of medicine.[30]

While this infringement was accomplished because of the disavowal of responsibility for the transfusion by the patient and her husband, other objections have been raised regarding treatment refusals by competent adults on religious grounds. One such objection, alluded to above, is that an appeal to religious directives when it appears the consequence of professional acquiescence in the appeal will be patient death concerns constraints internal to the decision-making process of patients. The state has an interest in ensuring the voluntary, informed consent of patients to treatment and in refusals of treatment. Yet ethicist Margaret Battin argues in an analysis of "high-risk religion," including refusals of treatment by Jehovah Witnesses, as well as Christian Scientists and some faith healing denominations, that such refusals are permeated by coercion and manipulation, which undermines the conditions for voluntary choice, and by incomplete, partial, or misleading information, which undermines the basis for informed choices.

However, Battin does not find grounds in the case of refusals by Jehovah Witnesses for attributing "coercion, deception, or impairment of the individual's reasoning processes."[31] Instead, Battin finds the Witness tradition to engage in "risk encouragement by a reevaluation of outcomes,"[32] that is, the choice presented to the Witness in the context of a transfusion refusal is not the choice seen by the professional or society of life or death, but

rather that of something much more momentous, between personal salvation and damnation. This provides stronger grounds for the state to accommodate such refusals under the auspices of the protection of religious liberty. Nonetheless, Battin's analysis means the presumption of respecting religious liberty is rebuttable even in circumstances of treatment decisions by apparently competent adults. At a minimum, patient refusals of treatment on religious grounds in circumstances when treatment provision will likely restore health and prolong life should not be accepted without inquiry into the background conditions of the choice.

A second ground for caution and further inquiry on treatment refusals by adults concerns not the constraints internal to a person's decision-making processes, but rather the risks of harm to an identified person with whom the patient has a significant relationship. It is a morally and legally significant feature of the Georgetown case that the woman was the mother of a seven-month-old child. The state's interest in protecting vulnerable persons from harm, neglect, or abuse becomes very complicated in such situations because there are at least two vulnerable persons—in the Georgetown case, the reversibly dying mother and her child, who can be raised by others, of course, including the husband, but will live without the nurturance of her biological mother. In the intervening years, numerous cases have been adjudicated in which a refusal of a transfusion has implications for an already vulnerable person, with some courts intervening to preserve life while others have supported the patient's refusal. Smith observes currently that there is "neither a consistent ethical nor legal consensus" for transfusion refusals that bear on the interests of vulnerable third parties.[33]

Persons with religious convictions should not be held to a higher standard of scrutiny when they refuse treatment than persons who refuse treatment on secular grounds. However, it may be that part of what it means for a religious community to function as an intermediary between the liberal state and the believer is to assume responsibilities for the provision of medical care in situations similar to those described above. It is noteworthy in this regard that the Jehovah Witness tradition has established hospital liaison committees to provide information and consultation for both providers and religious practitioners in circumstances of conflict between medical and religious best interests; the committees can also identify physicians, including surgeons and anesthesiologists, and health care institutions that will provide medical care in accord with Witness convictions. The state's attempt to accommodate both religious liberty and third-party considerations can, nonetheless, lead to polarizing cultural politics, as reflected most recently in the Terry Schiavo case.

LIBERTY OR PRIVACY?: RELIGIONS AND THE PROBLEM OF FEEDING TUBES

The national controversy engendered by the 2005 case of Terry Schiavo came as a surprise to many in academic medical ethics. The large questions about the legal and ethical permissibility of refusing or withdrawing feeding tubes were considered generally resolved by the 1990 decision of the U.S. Supreme Court in its *Cruzan* ruling.[34] That decision categorized the provision of nutrition and hydration through tube feedings as "medical treatment," and this allowed patients (or their proxies) to legitimately refuse or withdraw them as part of a patient's right to refuse medical care and to freedom from unwanted bodily invasion. The Court did allow for states to establish a "clear and convincing" evidentiary standard to ensure that such a decision was consistent with patient autonomy and values.

However much the *Cruzan* decision may have resolved the legal, ethical, and academic controversies about the extent of patient rights to refuse medical treatment, the verdict was the subject of protests by religious conservatives. The feeding tube issue has remained a vexing question for many religious communities and their adherents over the past two decades. While for some religions a decision to remove feeding tubes is compatible with and protected by religious liberty, for others, it is a symbol of moral decline in medicine and society and possibly grounds for activism in the political and legal sphere. Three general kinds of arguments have been offered in religious reflection and ecclesiastical teaching in opposition to feeding tube removal.

A first argument disputes the classification of nutrients delivered by feeding tubes as "medical treatment." Instead, the provision of food and fluids to a seriously ill or impaired patient is held to be part of the essential comfort care that is obligatory to provide to any member of the human community. Legal permission to remove or refuse feeding tubes thereby symbolizes callousness rather than caring and undermines commitment to a foundational value, that of the sanctity of human life.

A second argument contends that the central mistake in the feeding tube issue is not conceptual but moral. Withdrawal or refusal of feeding tubes will with certainty bring on death. Thus, the moral intent behind such a treatment decision cannot be portrayed as one of "allowing the patient to die" from an underlying natural pathology, but rather as "intentionally hastening death," and perhaps even "aiming to kill."[35] That intent makes a decision to refuse feeding tubes morally indistinguishable from euthanasia and crosses a moral and legal line that should not be disturbed.

A third argument is that social acceptance of feeding tube removal dis-

plays and perpetuates continued diminishment of respect for the value of life. Society is deemed to be at a tipping point between what the late Pope John Paul II referred to as "the struggle between the 'culture of life' and the 'culture of death.'"[36] Removal of feeding tubes, in some accounts, opens the door more widely to social acceptance of hastening death immorally through physician assistance in suicide and physician-administered euthanasia. This anticipated outcome is stated succinctly by conservative Christian ethicist Gary E. Crum, "Withholding food and water leaves no hope. A genuine 'slippery slope' ethical argument develops that says that this practice will lead to the next step of legally sanctioned, active euthanasia . . . Since death is assured anyway, the impetus for just giving the patient an overdose of drugs becomes almost overpowering."[37]

The Roman Catholic tradition in which Terry Schiavo was raised, and to which her parents continue their adherence, has for decades used the categories of "extraordinary" and "ordinary" in addressing medical treatment decisions. Based on criteria of burden and proportionate benefit, extraordinary treatments refer to those that are optional morally, while ordinary treatments refer to those that are morally obligatory. Applying these categories, many, although not all, Roman Catholic moralists have argued that feeding tubes could be considered extraordinary treatments in certain circumstances and therefore refused or withdrawn by Catholic patients.[38]

This seemed to be the "consensus" within Roman Catholic bioethical teaching until an "allocution" or address by John Paul II in March 2004 on "Care for Persons in a Permanent Vegetative State." A person in a vegetative state, the Pope claimed, retains the "right to basic health care," or "minimal care," which includes nutrition and hydration, in addition to comfort for hygiene and warmth. Moreover, the papal allocution concluded that "the administration of water and food, even when provided by artificial means, always represents a natural means of preserving life, not a medical act." The use of feeding tubes was therefore morally assessed as "in principle, ordinary and proportionate, and as such morally obligatory;" cessation of such care, when done knowingly and willingly, constitutes "euthanasia by omission."[39]

Given the prior "consensus," moral theologians Shannon and Walters anticipated "monumental implications for the relationship between church and state" were the papal allocution to be strictly interpreted and applied by Roman Catholics in their health care decision-making and in Catholic health care facilities. Despite prior court holdings,[40] that prediction was quickly realized when the parents of Terry Schiavo argued that the papal allocution created "new circumstances" that required the Florida courts to reconsider their previous authorizations of feeding tube removal from their

daughter. Indeed, they maintained that, contrary to prior holdings of the courts, in view of the papal interpretation of the religious values to guide Catholics in end-of-life decision-making, their daughter would not have wanted the feeding tubes removed.

This argument, put forward in good conscience as a statement of personal belief by the Schindler family, was then employed publicly by a variety of conservative Catholic and Protestant advocates for life, as well as leading political figures in the federal government, to claim that the fundamental rights of Terry Schiavo, including the right to life, as well as the religious liberty of her parents, were being denied by the judiciary of the state. To others, however, the political involvement of religious-based advocates (not to mention the unprecedented intervention of the Congress and White House in the case) reflected an attempt to enshrine religious values into law. As physician Eric Cassell observed, "Fundamentalist religions expect personal relationships and professional activities to accord with their religious principles and values. As these religions in the United States have extended their political influence, their principles have come into conflict with the values of privacy and individual liberty, as in the case of Terry Schiavo."[41]

In this regard, the question of the ethics of providing or withdrawing feeding tubes may become the cultural equivalent at the end of life what the question of abortion is at the beginnings of life. Arguments for the state interest in protecting and respecting religious liberty seem to elide readily into occasions for questioning or dismantling the separation of church and state. It is not a surprise that the central values that Cassell invokes as moral and legal protections for Terry Schiavo from religious fundamentalism—privacy and liberty—are precisely the same values invoked to protect a woman's right to abortion; ironically, they are no less invoked to protect religious practices from state intervention. It is striking, moreover, that Cassell's critique echoes the observation of de Tocqueville that the moral influence religions can have is vital to a democratic society, but what Cassell refers to as the "political influence" of religions may compromise values the religious traditions embody and endorse. The extent of political accommodation for religious claims with respect to law can be illuminated through some further examples in medical ethics.

PROCESS AND JUSTIFICATION: RELIGIOUS APPEALS IN PHYSICIAN-ASSISTED SUICIDE

The free exercise of religion guaranteed by the state permits substantial personal autonomy in belief and practice (including the right not to believe

or practice), as well as the freedom of religions to develop and enact ecclesiastical standards without intervention by the state. Religious communities function as intermediate associations interposed between the self and the liberal state that embody moral understanding and wisdom to serve as personal, communal, and even societal resources for resistance and for meaning. Yet because the matters at the core of religious practice, ritual, and liturgy—including the meanings of birth, life, sexuality, and death—involve the most profound and intimate of human experiences, there may arise occasions in which the influence of religious values assume a mantle of authority such that, for some adherents, the values should be enshrined in law. While demanding state protection of religious liberty, religious communities or traditions are not immune from voicing arguments or appeals to audiences broader than their ecclesiastical walls, whether to adherents of other faith traditions, or to citizens and/or civic authorities of the state to change or revise laws in conformity with the moral teaching of the religious tradition. These arguments demand careful scrutiny, as some appeals can be accommodated while others should not be.

In 1994, citizens in Oregon were confronted with a unique opportunity for social reform. Through the state's initiative process, Ballot Measure 16, known as "The Death with Dignity Act," was placed before voters for approval or rejection. The unique feature of the Act was that it permitted physicians to prescribe a lethal medication for terminally ill patients that could be self-administered in order that the patient could experience what was described as a "humane and dignified death." In more commonly used language, citizens were participating in a binding referendum on "physician assistance in suicide."

The public campaign to persuade citizens of the necessity of the act relied on medical, political, and occasionally, ethical argumentation, but one of the more memorable features of the campaign was the treatment of religious values and discourse. Oregon is demographically the "least-churched" state in the country, with approximately 30 percent of the state's residents claiming affiliation with a religious denomination. Thus, religious life is rather peripheral to the civic ethos of the state, in contrast to other states. Nonetheless, proponents of the act commonly argued that the only ground for opposition to its passage would be based on religious values, such as a commitment to the sanctity of life, or opposition to freedom of choice about options in dying. However, religiously based opposition was portrayed as coercive and as authoritarian in civic life, as "imposing" values on the citizenry without or against their consent. State legislators who considered proposing revisions to the act were targeted by electoral ads reminding voters of the repercussions of "imposing religious beliefs on citizens." In general,

those opposed to passage of the act were described as "held hostage" by the "raw political power" of religious organizations.[42]

The implication of this perspective on religion was that religious discourse might be all well and good for adherents within the confines of ecclesiastical settings, but that it should be excluded from having a voice in the public square. And by and large, the civic exclusion of religion was the prevailing parameter for discussion in public education forums, community meetings, and even public debates. The culmination of this view was displayed in litigation subsequent to the passage of the act, when the Ninth Circuit Court, in overturning a Washington state statute prohibiting physician assistance in suicide, came to the following conclusion in its majority opinion: "Those who believe strongly that death must come without physician assistance are free to follow that creed . . . They are not free, however, to force their views, their religious convictions, or their philosophies, on all the other members of a democratic society, and to compel those whose values differ from theirs to die painful, protracted, and agonizing deaths."[43]

The language of the majority comes rhetorically close to suggesting that all opposition to physician assistance in suicide has a religious character, or must be ground in religious values; that is, such opposition is part of a "creed." Empirically, this is clearly fallacious. Constitutionally, however, the majority endorses the civic exclusion of religion in its finding that to express a religious objection on the matter constitutes "force" or "compulsion." The concluding clause raises the specter of religious tyranny, even inquisitorial methods, for the majority portrays those persons who affirm a different set of values as experiencing a brutal and undignified death.

This seems to get the balance a democratic society should want between protecting religious liberty and avoiding establishing religion as a basis for law entirely wrong. No argument was made in public discourse over either the Oregon Death with Dignity Act or the disputed Washington statute that the justification for law in end-of-life decisions should assume religious grounding or be determined by a "creed." However, if the question is not about the basis or justification for law, then it seems respect for religious liberty should allow for more than just individuals "following" their own personal life plans or enacting their own concepts of a good death. Religious values, no less than professional positions, or ethical principles, should have a voice in democratic discourse in the public square and in the process that leads to the formulation of policy or citizen referendums. Religious positions should be tested in the forums of democratic deliberations for persuasiveness, reasonability, tolerance, and coherence. Some positions may not meet those tests, but to contend as the Circuit Court did that such positions are not expressible in public discourse without subjecting an audience of

citizens to "force" and "compulsion" is a draconian violation of the state's responsibility to protect freedom of religion. It seems therefore necessary to distinguish reasoning in public processes from reasoning for public justification.

THE LIMITS OF ACCOMMODATING RELIGION: MORAL AND CIVIL LAW

In circumstances when public justification is at issue, and where religious argumentation is directly addressed to civil or political authorities with the intent to revise or propose a law based on particularistic religious beliefs, religious appeals have overreached the limits of the state's interests in accommodating religious liberty. This happened to some extent in the *Schiavo* situation. Here, I wish to examine illustrations that reflect much more careful thought than was demonstrated by right-to-life activists in Florida.

Roman Catholicism, the largest of U.S. denominations, has articulated prohibitions on numerous practices—contraception, abortion, infertility procedures such as in vitro fertilization and surrogacy, and research on embryos and embryonic stem cells—that are categorized in secular bioethics as matters of "reproductive rights" and "scientific freedom." Moreover, the Catholic tradition has sought to cultivate a "seamless" culture of life in opposition to the "culture of death." It has thus rejected physician assistance in dying and euthanasia (as well as other non-medical social practices like capital punishment and warfare).

In advancing and defending these bioethical prohibitions, the Catholic tradition is exercising its power of refusal to endorse or participate in medical practices it deems contrary to central values of the tradition. In many cases, Catholic teaching is addressed to an audience broader than its congregants, namely, "persons of good will" that include citizens, policymakers, and civic authorities in secular society. I will focus on two important Catholic documents on bioethical issues, the 1987 Vatican teachings in *Donum Vitae*, The Gift of Life: Instruction on Respect for Human Life in Its Origin and the Dignity of Procreation[44] and the 1994 papal encyclical *Evangelium Vitae* (The Gospel of Life),[45] to illustrate some church-state tensions when the scope for the tradition's teaching is extended broadly to civic society.

Donum Vitae presents theological analyses and moral assessments of an array of beginning of life medical technologies within the context of Catholic moral theology about the respect and dignity of human life and of procreation. The principles used in moral assessment of the technologies are derived from "divine law" and the "natural moral law." These complemen-

tary sources mean the basic norms are knowable through both revelation and reason, by both believer and non-believer. *Donum Vitae* refers to the natural moral law, for example, as "the rational moral order whereby man is called by the Creator to direct and regulate his life and actions and in particular make use of his own body."[46] The appeal to reason in this context means the moral teachings are not limited to those who affirm the particular theological beliefs of the Catholic tradition but encompass all persons capable of rationality. Through appeal to the norms of the moral law, and a rational method of moral reasoning, *Donum Vitae* argues, for example, that the creation of extra embryos through IVF or judgments of embryo worth through prenatal diagnosis offends the dignity of the human person; such biomedical procedures are assessed as "not in conformity with the moral law."[47] The unitive and procreative features of procreation lead to similar judgments about such procedures as AIH, AID, IVF, surrogacy, and embryo transfer.

The question of particular interest here is not the validity of these moral judgments but rather the relationship articulated in *Donum Vitae* between the moral law and civil laws. *Donum Vitae* contends that interventions of public authorities in regulating procedures and technologies concerned with the beginnings of life are inevitable, but that such oversight "must be inspired by the rational principles which regulate the relationships between civil law and moral law." Indeed, legislators have a "duty . . . to ensure that the civil law is regulated according to the fundamental norms of the moral law."[48]

The regulation of civil law by the moral law entails legal respect for the "inalienable rights of the person," which include the "right to life and physical integrity from the moment of conception until death," and the inherent rights of the family, marriage, and the child to be raised within a family of biological origins. These "regulatory" rights mean that specific laws must prohibit non-therapeutic research on embryos, IVF that creates embryos that will be discarded, donor gametes, and surrogacy. *Donum Vitae* affirms that it is a responsibility of legislators, and indeed, "all men of good will," to advocate for reform of unacceptable civil laws, and to engage in conscientious objection to laws contrary to human life and dignity.

Evangelium Vitae, an encyclical of John Paul II, is rhetorically memorable for situating these beginnings of life procedures along with professional practices at the end-of-life that embrace physician assisted suicide and euthanasia as a manifestation of "the struggle between the 'culture of life' and the 'culture of death.'" This coupling of beginning and end of life procedures that are permitted and tolerated by society in fact reflect "the systematic violation of the moral law."[49] Interestingly, the pope draws attention

to the "widespread development of bioethics" in promoting reflection and dialogue on such matters, which should contribute to a generalized awareness that "we are facing an enormous and dramatic clash between good and evil, death and life, the 'culture of death' and the 'culture of life.'"[50] The "gospel of life" developed and defended by John Paul II includes a responsibility to love, serve, defend, and promote human life; while displayed fully in Christ and in revelation, the gospel of life "can also be known in its essential traits by human reason."[51]

The papal encyclical devotes substantial attention to the relation of moral and civil law, in part because of recognition that many laws permitting the practices opposed by Catholic moral teaching and the encyclical have been approved by the citizenry through democratic processes. Similar to *Donum Vitae,* cultural practice or custom is rejected as morally or politically determinative; rather, "the 'natural law' written in the human heart is the obligatory point of reference for the civil law itself."[52] Further, "the doctrine on the necessary conformity of civil law with the moral law is in continuity with the whole tradition of the church."[53]

Citing the teachings of Thomas Aquinas on just and unjust laws, the pope contends that laws that do not protect the inviolable right to life of innocent human beings (especially laws that regulate but do not prohibit abortion, euthanasia, and assisted suicide) completely lack juridical authority; it follows that moral conscience presents "a grave and clear obligation to oppose them by conscientious objection."[54] The encyclical calls civil leaders to assume a "particular responsibility" to refrain from passing or supporting laws that "disregard the dignity of the person," but instead requires them to construct, especially through legislative measures, a social order in which "the dignity of each person is recognized and the lives of all are defended and enhanced."[55]

The theology of the moral law in both *Donum Vitae* and *Evangelium Vitae* is quite consistent. Its central elements seem to be these:

1. Catholic moral teaching has an invariable commitment to the protection of innocent human life.
2. This value is presented both in revelation and through reason, or the natural moral law.
3. Certain contemporary biomedical procedures pertaining to both the beginnings and endings of human life are directly contrary to the culture of life.
4. Civil laws permit these practices in the name of freedom, democratic consensus, and social coexistence.
5. Catholics as well as conscientious citizens of good will have a responsibility to re-affirm socially the fundamental rights of human persons, including the protection of human life.

6. Civil laws should conform to or be regulated by the principles of the moral law.
7. Civil laws that are not regulated by moral law have no binding authority (in short, society is just a small step away from moral anarchy, or the "culture of death") and Catholics have a duty to engage in conscientious objection regarding these laws.
8. It is a moral and political responsibility of both legislators and citizens to enact civil laws that reflect the moral law and its commitment to protection of innocent human life.

There are elements of this perspective that can and should be accommodated by a liberal democratic state. For example, the values articulated in these documents can be expressed in the discourse of the public square out of respect for freedom of religious expression and in seeking to ensure a substantive and informed discourse rather than one that is primarily procedural in nature or one that has adopted an attitude of civic exclusion of religious values. The state can also accommodate the ecclesiastical requirements for conscientious objection to morally compromising biomedical procedures. At the least, accommodations for personal conscientious objection should be accommodated in the same way that Orthodox Jewish objections to brain death criteria can be accommodated.

It is more complicated and controversial for institutional conscientious objection to be accommodated. This would require coordination of patterns of health care delivery, due to managed care options and/or health care insurance coverage and reimbursement. Should patients, be they Catholics or non-believers, seek treatment for fertility or for end of life care at a Catholic health care facility because of their health plan or insurance requirements, depending on the kind of care or treatment requested, some institutional accommodation to patient requests may be necessary. The principle of non-abandonment of patients may impose some restrictions on the freedom of institutional care providers, a concern expressed by Shannon and Walter with respect to the papal allocution on the moral status of feeding tubes.[56]

The claim that civil law should conform to the natural moral law, as interpreted within the Catholic faith tradition, is a relationship that should not be accommodated by the state. In a liberal democratic society in which moral pluralism predominates, it is far from clear that the religious-based moral values instantiated in the natural law are accessible through reason for all persons. At the very least, the Catholic bioethical teaching would need to supply an account of moral epistemology that would inform a democratic audience how they are supposed to become cognizant of the values of the moral law. Moreover, although Catholic teaching has commonly indicated that the clarity by which norms of the moral law can be recog-

nized will seldom be reflected in their concrete application in practice and civil law, an argument must be presented as to why it is that persons can with a clear conscience espouse values, practices, and laws that directly conflict with teachings of the moral law.

Even though the religious character of the values civil law is supposed to conform to recedes to the background by the language of "moral" or "natural" law, it is evident that the totality of the tradition's teaching on ethical issues at the beginnings and endings of human life are illuminated and ultimately grounded in religious teaching. The ecclesiastical context and source for such teachings may be found in revelation from Scripture, or in the reflection of the tradition over time. In either case, such an effort to regulate civil law by the natural moral law is not compatible with the commitments of the liberal democratic society of neutrality between religion and non-religion or amongst religions. The limits of state accommodation of religion have been breached when religious values are aligned with the coercive power of the state and political authority.

CONCLUSION

This essay has examined features of the relationship between church and state as illuminated by the context of conflicts in biomedical ethics. Such conflicts arise most frequently in circumstances where a decision about medical treatment has life and death consequences. My analysis has approached such wrenching situations from a societal and constitutional presumption in favor of respect for and protection of religious liberty. Within the framework of this presumption, the state has a responsibility to accommodate the claims of religious liberty by respecting many (but not all) treatment decisions rooted in appeals to religious values, through the sanctioning of religious exemptions from certain statutes (such as brain death legislation), or by permitting conscientious objection to offensive laws on religious grounds.

However, as with any presumption in moral analysis, this presumption to respect religious liberty is rebuttable and can be overridden when weightier moral and legal claims conflict with the free exercise of religion. State infringement of religious liberty can occur in several kinds of circumstances, including (a) a treatment refusal that endangers the health or life of a child who is not of an age of moral accountability to avow or disavow the religious values invoked on his or her behalf; (b) a treatment request that denies professional or personal integrity of a health care provider; (c) constraints of coercion, manipulation, or incomplete information with respect to decision-making; (d) a treatment decision that can pose risks of harm to

vulnerable third parties or dependents; (e) treatment decisions that may violate other fundamental rights of persons, such as privacy or freedom from unwanted bodily invasion; and (f) the instantiation in civil law of religious justifications for values under the guise of an appeal to religious liberty.

I have argued, following the political ecclesiology developed by Stephen Carter, that religious communities function as intermediate associations between the state and the individual and that the protection of religious liberty enables such communities and their adherents to say "no" to political authority when fundamental values of the tradition would be compromised. At the same time, recognizing that the state commitment to religious liberty is a moral presumption, not an absolute, means that it is appropriate in the circumstances delineated above for the state to say "no" to the claims of religious liberty.

This infringement of religious liberty in the context of bioethical decisions does not mean the value of religious liberty is cancelled or diminished in general, or even in the specific case. Rather, the state has the burden of proof to justify its infringement of religious liberty, and such infringements should meet most, if not all, of the following conditions: (a) state infringement must be an effective means to securing the social good (a child's life, professional integrity, autonomous choice, and so on) jeopardized by the exercise of religious freedom; (b) state infringement must be a necessary means to secure the social good, that is, there are no other alternatives to secure the good but by restrictions on religious liberty; (c) the social mechanism (education, ethics committee, court order, and so on) adopted to secure the social good should be the least restrictive alternative of religious freedom; (d) public justification of the infringement is required to signify ongoing respect for the value of religious liberty.

NOTES

1. Alexis de Tocqueville, *Democracy in America*, ed. J.P. Meyer (Garden City, NY: Anchor Books, 1969), 298.

2. Stephen L. Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion* (New York: Basic Books, 1993).

3. Ibid., 36–37.

4. *Freedom and Responsibility: Christian Science Healing for Children* (Boston: First Church of Christ Scientist, 1989).

5. Margaret P. Battin, *Ethics in the* Sanctuary (New Haven: Yale University Press, 1990), 78–80, 94–100.

6. Mark Larrabee, "The Battle Over Faith Healing," *The Oregonian,* November 28, 1998.

7. Seth M. Asser and Rita Swan, "Child Fatalities From Religion-Motivated Medical Neglect," *Pediatrics* 101 (April 1998): 625.

8. Martin L. Smith, "Jehovah's Witness Refusal of Blood Products," in *Encyclopedia of Bioethics, 3rd ed.,* ed. Stephen G. Post (New York: Macmillan Reference USA, 2004), 1341–1346, at 1342.

9. Ontario Consultants on Religious Tolerance, "Faith Healing: Legal Aspects," available at www.religioustolerance.org.

10. American Academy of Pediatrics, Committee on Bioethics, "Religious Exemptions from Child Abuse Statutes," *Pediatrics* 81 (January 1988): 169–171; "Religious Objections to Medical Care," *Pediatrics* 99 (February 1997): 279–281.

11. *Prince v. Massachusetts,* 321 US 158 (1944).

12. Smith, "Jehovah's Witness Refusal of Blood Products," 1345.

13. James F. Drane, "Alternative Therapies," in *Encyclopedia of Bioethics, 3rd ed.,* ed. Stephen G. Post (New York: Macmillan Reference USA, 2004), 159–161.

14. George J. Annas, "Asking the Courts to Set the Standard of Emergency Care: The Case of Baby K," *New England Journal of Medicine* 330 (May 26, 1994): 1542–1545.

15. *In the Matter of Baby K*, 16 F.3d 590 (4th Cir. 1994).

16. Ronald E. Cranford, "Helga Wanglie's Ventilator," *Hastings Center Report* 21 (July–August 1991): 23–24.

17. Steven H. Miles, "Informed Demand for Non-Beneficial Treatment," *New England Journal of Medicine* 325 (1991): 512–515.

18. Cranford, "Helga Wanglie's Ventilator," 24.

19. *In re the Conservatorship of Helga M. Wanglie*, No. PX-91–283, District Probate Division, 4th Judicial District of the County of Hennepin, State of Minnesota.

20. President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, *Defining Death: Medical, Legal, and Ethical Issues in the Definition of Death* (Washington, D.C., U.S. Government Printing Office, 1981), 2.

21. Ibid., 32–38.

22. Robert M. Veatch, "The Conscience Clause," in *The Definition of Death: Contemporary Controversies*, ed. Stuart J. Younger, Robert M. Arnold, and Renie Schapiro (Baltimore, MD: Johns Hopkins University Press, 1999), 138–160.

23. Legal Resources, "New Jersey Statute," available at www.braindeath.org.

24. Robert S. Olick, "Brain Death, Freedom, and Public Policy," *Kennedy Institute of Ethics Journal* 1, no. 4 (1991): 275–288.

25. J. David Bleich, "Establishing Criteria of Death," in *Ethical Issues in Death and Dying, 2nd ed.,* ed. Tom L. Beauchamp and Robert M. Veatch (Upper Saddle River, NJ: Prentice Hall Press, 1996): 31.

26. Ibid.

27. Fred Rosner, "The Definition of Death in Jewish Law," in *The Definition of Death: Contemporary Controversies*, ed. Stuart J. Younger, Robert M. Arnold, and Renie Schapiro (Baltimore, MD: Johns Hopkins University Press, 1999), 215–220.

28. Ibid.

29. Olick, "Brain Death, Freedom, and Public Policy."

30. *Application of President and Directors of Georgetown College*, 331 F 2d. (D.C. Cir.).

31. Battin, *Ethics in the Sanctuary,* 105.

32. Ibid., 101–107.

33. Smith, "Jehovah's Witness Refusal of Blood Products," 1344.

34. *Cruzan v. Director*, *Missouri Dept. of Health*, 497 U.S. 261, 1990.

35. Gilbert Meilaender, "On Removing Food and Water: Against the Stream," *Hastings Center Report* 14 (December 1984): 11–13.

36. John Paul II, "Evangelium Vitae," *Origins* 24 (April 6, 1995): 697.

37. Gary E. Crum, "Dying Well: Death and Life in the 90's," in *Life at Risk: The Crises in Medical Ethics,* ed. Richard D. Land and Louis A. Moore (Nashville, TN: Broadman & Holman Publishers, 1995), 163.

38. Thomas J. Shannon and James J. Walter, "Implications of the Papal Allocution on Feeding Tubes," *Hastings Center Report* 34, no. 4 (2004): 18–20.

39. John Paul II, "Care for Patients in a Permanent Vegetative State," available at www.catholicculture.org.

40. *In re: Guardianship of Theresa Marie Schiavo, Incapacitated. Robert Schindler and Mary Schindler, Appellants, v. Michael Schiavo, as Guardian of the person of Theresa Marie Schiavo, Appellee*, Case Number: 2D02–5394, *Florida Second District Court of Appeal,* June 6, 2003.

41. Eric J. Cassell, "The *Schiavo* Case: A Medical Perspective," *Hastings Center Report* 35, no. 3 (2005): 22–23.

42. Courtney S. Campbell, "Give Me Liberty and Death," *The Christian Century* 116 (May 5, 1999): 498–500.

43. *Washington v. Glucksberg*, 1996; reversed on appeal to the U.S. Supreme Court 117 S. Ct. 2258, 1997.

44. Congregation for the Doctrine of the Faith, *Instruction on Respect for Human Life in its Origin and on the Dignity of Procreation: Replies to Certain Questions of the Day*, February 22, 1987, available at www.vatican.va/roman_curia/congregations/cfaith/documents/.

45. John Paul II, "Evangelium Vitae," 689–730.

46. Congregation for the Doctrine of the Faith, *Instruction on Respect for Human Life in its Origin and on the Dignity of Procreation,* 3.

47. Ibid., 8.

48. Ibid., 17–18.

49. John Paul II, "Evangelium Vitae," 697.

50. Ibid., 700.

51. Ibid.

52. Ibid., 714.

53. Ibid., 715.

54. Ibid.

55. Ibid., 720.

56. Shannon and Walter, "Implications of the Papal Allocution on Feeding Tubes," 20.

FURTHER READING

For a thoughtful and unique philosophical discussion of the ethics of religious practices on confidentiality, conversion, and refusals of treatment, including "faith healing," see Margaret P. Battin, *Ethics in the Sanctuary: Examining the Practices of Organized Religion*. The issues of religious liberty in the context of both ecclesiastical culture and secular society are carefully examined in Stephen L. Carter, *The Culture of Disbelief: How American Law and Politics Trivialize Religious Devotion*. For a compelling argument from the view of liberal political philosophy on the status of religious conscience in matters of life and death, especially abortion and euthanasia, see Ronald Dworkin, *Life's Dominion: An Argument about Abortion, Euthanasia, and Individual Freedom*. A compelling narrative of how different world views—Hmong and medical science—create anguishing moral and legal dilemmas in the treatment of an ill child is presented in Anne Fadiman, *The Spirit Catches You and You Fall Down: A Hmong Child, Her American Doctors, and the Collision of Two Cultures*. For a careful examination of the extent to which citizens and elected officials in a liberal democratic society can rely on religious convictions in making political decisions and legislation, see Kent Greenawalt, *Religious Convictions and Political Choice*. For an overview of the religious values and positions in bioethics of major American denominations as well as of classic world religions, see the anthology by John F. Peppin, Mark J. Cherry, Ana Iltis, eds., *Religious Perspectives in Bioethics*. An indispensable resource about ethical and legal issues in biomedicine, with many articles specifically devoted to moral teachings of religious traditions on bioethics, is found in Stephen G. Post, ed., *Encyclopedia of Bioethics*, 3rd ed.

Appendix: Selected Cases

The following cases are discussed or referenced by the chapters in this volume. Only precedent-setting decisions or important clarifications are included in this appendix. Though not all the cases here are, strictly speaking, matters of church and state jurisprudence, all have important ramifications for the issues covered in the volume.

Badoni v. Higginson (1981): The Dine and Hopi Nations in southern Utah faced loss of their lands due to the planned flooding of Lake Powell for downstream water storage and recreational boating. Federal courts found the latter interests to be more compelling than the concerns of the Native American groups and dismissed their challenge to the National Park Service.

Baehr v. Lewin (1993): The Hawaii Supreme Court ruled in 1993 that the legal prohibition against gay marriage might be unconstitutional and sent the case back to the lower courts for the state to prove that there was a compelling reason to forbid same-sex marriage. In 1996, the lower court found no such reason and sent the case back to the Hawaii Supreme Court. By then, the legislature, following an amendment to the state constitution, had banned same-sex marriage.

Bear Lodge Multiple Use Association v. Babbitt (1983): In this case, the Wyoming federal district court ruled against a group of climbers who argued that the National Park Service's management plan for protecting sites sacred to Native Americans, including in this case the Devil's Tower, amounted to an establishment of religion. Following the *Lemon* Test (*Lemon v. Kurtzman),* the court ruled a voluntary ban on climbing to be a reasonable accommodation to Native American religious interests.

Crow v. Gullet (1982): A South Dakota district court ruled that construction projects on sites sacred to Native Americans did not violate their religious freedom. The Constitution, the court ruled, does not mandate that the government provide the means for carrying out religious obligation.

Cruzan v. Director, Missouri Dept. of Health (1990): After a severe automobile accident, Nancy Beth Cruzan entered a "persistent vegetative state." Though her parents wanted to end her life support, the hospital refused to do so without court approval, citing a state policy against ending life in this way. The Supreme Court determined that individuals in a state such as Cruzan did not enjoy the same rights to refuse medical intervention given to competent individuals and that since Cruzan's own wishes were not clear, the State of Missouri's decision to continue life support must stand.

Doe v. Bolton (1973): The state of Georgia's abortion legislation limited the procedure to extreme cases involving rape, severe fetal deformity, or concerns regarding the mother's health. Moreover, the law required approval by three doctors and a committee before an abortion could be performed and prohibited non-state residents from receiving abortions within Georgia. The Supreme Court overturned this law, thus supporting *Roe v. Wade* and maintaining the constitutional right to abortion in Georgia and all states in the country.

Employment Division, Department of Human Resources of Oregon v. Smith (1990): After ingesting peyote as part of religious practice in the Native American Church, two counselors in a private drug rehabilitation organization were fired and denied unemployment compensation. The Supreme Court concluded that religious beliefs do not excuse an individual from just laws of the state. To allow such excuses, the Court argued, would be to open a Pandora's box of religious exceptions to laws necessary to maintain an ordered society.

Everson v. Board of Education (1947): New Jersey instituted a law allowing for the reimbursement of funds to parents who sent their children to both religious and public schools on public transportation buses. Everson charged that this violated the Establishment Clause by enacting state support of religious schools. The Supreme Court upheld the constitutionality of the law by claiming the reimbursement was available to religious and nonreligious individuals alike and did not constitute direct support of religious organizations.

Gillette v. United States (1971): Gillette sought conscientious objector status due to his opposition to the Vietnam War and despite his support of other wars. His claim was denied due to his lack of an absolute moral stance against all wars. The Supreme Court found that Congress was within the

law when it required opposition to all war as a limiting criterion for conscientious objector status.

Goodridge v. Massachusetts Department of Public Health (2003): In this case, the Massachusetts State Supreme Court ruled that legislative prohibitions against same-sex marriage were unconstitutional and that a civil union bill was also unacceptable. The state legislature opted for a marriage bill giving legal recognition to same-sex marriage, and thus Massachusetts became the first state to legally recognize marriage rights for homosexuals.

Griswold v. Connecticut (1965): The Executive Director and Medical Director of the Planned Parenthood League of Connecticut were charged under a Connecticut law prohibiting any counseling or medical treatment of married individuals aimed at preventing pregnancy. The Supreme Court overturned the Connecticut law as a violation of the privacy in marital relations suggested by the First, Third, Fourth, and Ninth Amendments.

Jacobson v. Massachusetts (1905): After Cambridge, Massachusetts followed a state law allowing cities to require vaccinations of its citizens against smallpox, Jacobson refused and was fined five dollars. Citing the state's power to enforce the public health and safety of its citizens in extreme circumstances, the Supreme Court denied that this vaccination requirement violated Jacobson's Fourteenth Amendment right to liberty.

Lawrence and Garner v. Texas (2003): After entering John Lawrence's house due to a report of a weapons disturbance, Houston police discovered Lawrence and another adult man, Tyron Garner, engaged in a sexual act. The two men were arrested and charged with deviate sexual intercourse in violation of a Texas law. The Supreme Court concluded that the law violated the Due Process Clause and constituted an inappropriate involvement of government in private affairs, thus overturning *Bowers v. Hardwick*.

Lyng v. Northwest Indian CPA (1988): The U.S. Forest Service planned to build a paved road through the Chimney Rock area of the Six Rivers National Forest, land used by Native Americans to conduct religious rituals. Citing the Forest Service's research showing the damage such a road would cause, the Northwest Indian Cemetery Protective Association charged Secretary of Agriculture Richard Lyng with violating the Free Exercise Clause. The Supreme Court upheld the Forest Service's right to build the road because its primary interests were economic and the effects on the Native Americans' land were incidental.

Planned Parenthood v. Casey (1992): One of the most divisive cases in recent memory, this decision upheld a number of provisions regulating access to abortion in Pennsylvania, including parental notification and a waiting period. In its decision, the Supreme Court adopted Justice O'Connor's

"undue burden" standard for regulating abortions, meaning that only restrictions that did not place "a substantial obstacle" in the path of a woman seeking abortion were permissible. Only spousal notification was found to place such a burden on women.

Prince v. Massachusetts (1944): This case concerned child labor laws and the conviction of a Jehovah's Witness woman whose children routinely distributed and sold religious magazines. The Supreme Court upheld her conviction, finding that her religious rights had not been violated since the activity in question occurred on public property.

Reynolds v. United States (1879): George Reynolds, a member of the Church of Jesus Christ of Latter-Day Saints, was charged with bigamy in Utah. Along with certain procedural arguments, Reynolds held that religious duty obligated him to marry more than one woman at a time. The Supreme Court upheld Reynolds' conviction and drew a distinction between what religious people might believe and what they can practice in the public sphere.

Roe v. Wade (1973): This case established reproductive freedom for women in the United States. Based on the right to privacy established in *Griswold*, the Supreme Court struck down a Texas law that prohibited abortions except to save the mother's life. The Court gave women control over the first trimester of their pregnancy and established different rules for subsequent trimesters.

Sequoyah v. Tennessee Valley Authority (1980): This case was brought by the Cherokee against a plan by the Tennessee Valley Authority to build the Tellico Dam. The Sixth Circuit Court held that while the damage to Cherokee culture was unavoidable, there was no expressly religious interest in the land. The court held that since it was culture and tradition that were at issue, and not religion, the First Amendment did not apply.

Sherbert v. Verner (1963): A member of the Seventh Day Adventist Church was fired from her job for refusing to work on Saturday, which was for her the Sabbath. She was denied unemployment compensation by the South Carolina Employment Security Commission. The Supreme Court held that the state's attempt to restrict her unemployment compensation violated her rights to the free exercise of her faith.

Stenberg v. Carhart (2000): This case struck down a Nebraska law that prohibited partial birth abortions unless the life of the mother was at stake. The Court found that the Nebraska law violated the constitutional right to reproductive freedom as determined by *Planned Parenthood v. Casey* and *Roe v. Wade.*

Tennessee v. John Scopes (1925): This is the famous case dramatized in the movie *Inherit theWind*. John Scopes was a high school teacher convicted

of violating Tennessee's Butler Act—a new law banning the teaching of evolution in the classroom. The prosecution won the trial and the Butler Act was affirmed.

United States v. Seeger (1965): This case concerns the definition of religion as it related to claims for religiously based conscientious objector status. Federal law required that applicants for conscientious objector status be able to affirm a theistic, rather than a political, sociological, or philosophical understanding of reality. The Court held that the opinions of the individuals themselves must be taken into account and thus that Congress could not define what was or was not religious in this setting by mandating certain beliefs—for instance, the existence of a Supreme Being—as part of a religiously justified claim for conscientious objection.

Webster v. Reproductive Health Services (1989): The State of Missouri enacted several restrictions on access to abortion, including the requirement that no public employees or resources could be used to perform abortions outside of a procedure necessary to save the mother's life, the requirement that there could be no counseling for abortion, and the requirement that viability tests had to be performed on women seeking abortions after the twentieth week of pregnancy. While the Court specified that they were not revisiting *Roe*, it held that these restrictions were constitutionally permissible.

Wisconsin v. Yoder (1972): This case revolved around whether or not Amish families could absent their children from school facilities after a certain age on the basis of religious conviction. The Supreme Court held that public schooling was in direct conflict with the Amish way of life and that the State of Wisconsin could not therefore compel students to attend after the eighth grade.

About the Editors and Contributors

THE EDITORS

ANN W. DUNCAN is a Ph.D. Candidate in American Religious History at the University of Virginia. She received her M.A. in Religious Studies from the University of Virginia in 2005 and her B.A. from Duke University in 2000. Her research, publications, and conference presentations have focused on intersections of religion and politics, American Christianity in wartime, and, more recently, motherhood and American Christianity.

STEVEN L. JONES is Associate Professor of Sociology at Grove City College and is the former associate director of the Center on Religion and Democracy at the University of Virginia. He received his M.T.S. degree from Duke University and holds a Ph.D. from the University of Virginia. A former fellow of the Center for Children, Families, and the Law and the Institute for Advanced Studies in Culture, his main areas of academic interest are political sociology and family, state, and church conflicts. He is currently finishing a book on patriotism and church schooling in America.

THE CONTRIBUTORS

FRANCIS J. BECKWITH is Associate Professor of Philosophy and Church-State Studies, Baylor University, where he teaches in the depart-

ments of philosophy and political science as well as the J.M. Dawson Institute of Church-State Studies. A graduate of Fordham University (Ph.D.) and the Washington University School of Law, St. Louis (MJS), he is the author of over a dozen books, including *Defending Life: A Moral and Legal Case Against Abortion Choice* (Cambridge University Press, 2007) and *Law, Darwinism, and Public Education: The Establishment Clause and the Challenge of Intelligent Design* (Rowman & Littlefield, 2003). A former James Madison Research Fellow at Princeton University, he was the 2006–2007 president of the Evangelical Theological Society.

COURTNEY S. CAMPBELL is Professor and the Chair of the Department of Philosophy at Oregon State University. Prior to joining the OSU faculty in 1990, he was the Associate for Religious Studies at The Hastings Center and the editor of the *Hastings Center Report*. He received his M.A. and Ph.D. degrees in religious studies from the University of Virginia and his B.A. degree in religious studies from Yale University. Campbell's teaching and research interests at Oregon State include biomedical ethics, death and dying, philosophies of the body, and religious traditions and public policy.

JAMES F. CHILDRESS is the John Allen Hollingsworth Professor of Ethics at the University of Virginia, where he teaches in the Department of Religious Studies and directs the Institute for Practical Ethics and Public Life. He has written several books and numerous articles on a range of topics in ethics, including just war theory and pacifism, biomedical ethics, and methods in ethics.

NADRA HASHIM has a bachelor's degree in psychology from Georgetown University where she also received an Arab Studies Certificate. She completed her Ph.D. work in International Relations at the University of Virginia. She has taught as an Adjunct Professor at the University of Louisville in the Pan-African Studies Department and has been a visiting Ford Fellow in the Women's Studies Department at Amherst College. She currently works as a freelance researcher and writer and is finishing a book which concerns contemporary partisan/linguistic conflict in Zanzibar.

ERIC MATTHEWS serves as Director of the Center for Public Service and Assistant Professor of Political Science at Mount Union College. His research interests include evangelicalism, dimensions of religiosity, political culture, civic engagement, and welfare reform. A graduate of Kent State University, Dr. Matthews's dissertation involved interviewing 30 evangelical ministers in central Appalachia on topics ranging from Charitable Choice to the mega-church movement. He is also a graduate of the Pollsters and Parishioners Methods Workshop held at Calvin College on a bi-yearly basis.

ERIN O'BRIEN is Assistant Professor of Political Science at the University of Massachusetts-Boston. Her work examines issues of intersectionality and social welfare policy. Dr. O'Brien's research appears in journals, including *The American Journal of Political Science* and *Women and Politics.*

S. ALAN RAY is Senior Vice Provost for the University of New Hampshire, where he holds appointments as Affiliate Associate Professor of Political Science, Philosophy, and Justice Studies. A citizen of the Cherokee Nation, his research and teaching focus on federal Indian law and policy, race and law, religion and public policy, and political theory. He holds a Ph.D. in religion from Harvard University and a J.D. from the University of California, Hastings College of the Law.

SAMUEL S. STANTON, JR., is Assistant Professor of Humanities and Political Science at Grove City College. He earned his Ph.D. in Political Science in 2004 from Texas Tech University. Dr. Stanton specializes in the study of conflict processes and has been involved in research covering the effect of migration and immigration on civil conflict. His current research concerns the effects of divergent forms of globalization on civil conflict.

KATHERINE STENGER is Assistant Professor in the Department of Political Science at Gustavus Adolphus College in Minnesota. Her research centers on the role of religious interest groups in the policy process, with a particular focus on the contrast between the Religious Right and Left in terms of political strategy and policy success.

CHAD MICHAEL WAYNER is an instructor in the Department of Religious Studies at the University of Virginia and a research fellow at the Institute for Practical Ethics and Public Life. He is also currently studying for a doctorate in religious studies at the University of Virginia, with a concentration in religious ethics in general and Christian ethics in particular. Other research interests include the relationship between sanctification and the moral life in Christian theology, the theological virtues, the moral theology of St. Thomas Aquinas, and the Christian ethic of John Calvin. He studied philosophy and political science at Calvin College in Grand Rapids, Michigan, and received his bachelor's degree there.

Index