

SEPARATION OF CHURCH AND STATE—WHY?

The Texas Lyceum
22nd Public Conference

JOURNAL

July 2007

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PRESIDENT'S MESSAGE

The Texas Lyceum is a vibrant and diverse group of men and women from across the state of Texas who are eager to contribute their talents and time to the betterment of Texas. A 27-year-old non-partisan leadership group, the Texas Lyceum focuses on public policy issues facing Texas and our nation. We conduct periodic public forums, publish *The Texas Lyceum Journal*, and annually conduct the Texas Lyceum Poll to help bring a better understanding of these issues to our state's and nation's leaders and decision makers.

The Texas Lyceum's 22nd Public Conference will continue our tradition of examining issues that challenge us as leaders in our communities and as policy makers in Austin and Washington, D.C. Questions about the issues surrounding religion and public policy were significant during the recent legislative session and are likely to be discussed and debated for the foreseeable future. The Texas Lyceum's public conference seeks to bring together diverse opinions and expertise to focus on these and other topics of importance to all of us as Texans.

2007 marks the inaugural year of the Texas Lyceum Poll, a statewide, independent public opinion survey that measures Texans' attitudes about policies and issues that concern us. In addition to informing policy makers about Texans' opinions, the Poll also serves as a springboard for discussions at our public conferences. In addition to the information on the Poll contained in this *Journal*, please visit our website at www.texaslyceum.org to see the entire results of the 2007 Texas Lyceum Poll.

The Texas Lyceum is committed to keeping Texas a vibrant force in the life of our country. We hope that the discussions at this public conference, the results of our Poll, and the articles in this *Journal* inform our policy makers in their roles as decision makers.

Maggie Radford
Maggie Radford
President, The Texas Lyceum

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EDITOR'S NOTE

The Texas Lyceum continues to probe crucial policy topics in this Journal issue on the separation of church and state. What the articles point out most clearly is that this topic, most commonly thought of as fundamental and settled, is anything but clear.

The corps of authors are impressive, national experts; several have argued before the Texas or U.S. Supreme Courts and all have deep knowledge and experience which is apparent in their presentation of key insights on separation of church and state.

Three of the articles (Laycock, Shackelford and Rhodes) provide rich background on history, policy and law with detailed descriptions of the current state of the law relating to the fundamental premise of separation; the right of religious organizations to operate free of government interference; and the display of religious imagery and symbols. Lynn's article provides a good, broad overview of the landscape and describes who fights over it, while Kirkpatrick describes who does the fighting. Chauncy describes one of the topics that people fight over: Bible study in schools. I provide an overview of stem cell research, a fundamental science issue that is guided by religious-secular debate.

We know the landscape keeps changing: some religious conservatives are allying with liberal environmentalists because they believe that good Christians should be good stewards of values, which includes conservation and not polluting God's world. Few people would have predicted such an unlikely alliance 15 years ago!

The Texas Lyceum Poll, the first of a 3-year initiative, gives us insight into this landscape. It points out that Texans' views on religion vary from current policy and policy makers in several areas: most notably abortion, school vouchers, and public display of the Ten Commandments.

The response on embryonic stem cell research showed strong feelings on the issue by 60% of the respondents—35% strongly for and 25% strongly against. This is not surprising; that is the whole crux of the issue. However, many people don't understand the underlying science or the alternatives coming out of new science and thus a relatively high 12% didn't have an opinion or refused to respond.

School vouchers were a huge, noisy issue in the 2005 session of the legislature, but were a mere whisper in the 2007 session with only 4 bills introduced and all died in committee. The Lyceum Poll shows almost two-thirds (65%) supporting a program "in which parents are given taxpayer money by the government that they can use to pay for a child's tuition at the school of their choice." Maybe the proponents gave up too soon...

But maybe the problem is in rallying vocal support for such an issue—what riles people and motivates them to get involved? The articulate and detailed articles and the Texas Lyceum Poll show it to be a mixed bag on church-state issues, and so, as we said, things just aren't always clear.



Meg Wilson
Executive Editor, The Texas Lyceum Journal



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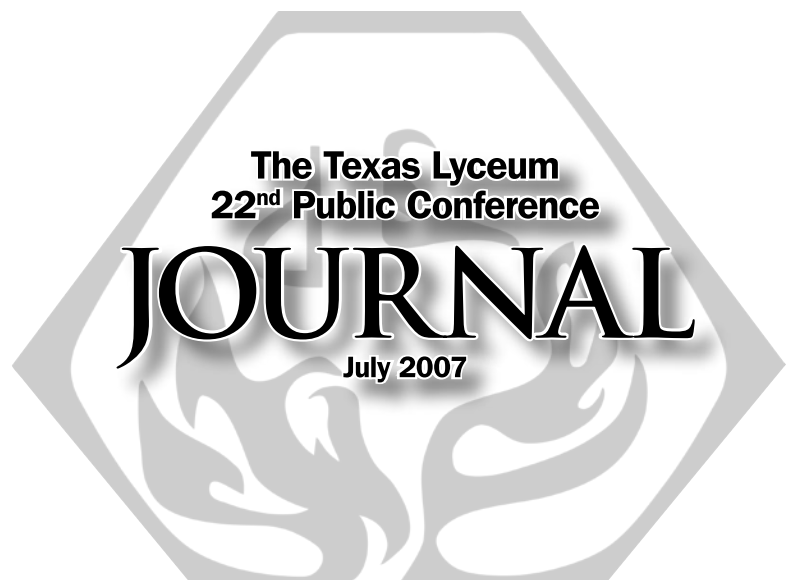
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THE TEXAS LYCEUM POLL

by Daron Shaw



Daron Robert Shaw, Director, The Texas Lyceum Poll and Associate Professor, University of Texas at Austin Government Department, received his B.A. and Ph.D. degrees from the University of California, Los Angeles before joining the faculty at the University of Texas at Austin in the fall of 1994. His most recent book is *The Race to 270*, which analyzes the effects of TV advertising and candidate visits on the 2000 and 2004 presidential elections. In 2001, Professor Shaw co-edited (along with Professor Roderick P. Hart) *Communications in U.S. Elections: New Agendas*, a book featuring innovative research in the field of political communication. In addition, Professor Shaw has published articles in the *American Political Science Review*, *American Journal of Political Science*, *The Journal of Politics*, *Political Communication*, *The British Journal of Political Science*, *Political Behavior*, *Political Research Quarterly*, *Presidential Studies Quarterly*, *PS: Political Science*, *Party Politics*, *Electoral Studies*, and *American Politics Research*.

Before accepting a position at UT, Professor Shaw worked as a survey research analyst in several campaigns, including a stint as senior national data analyst for the 1992 Bush-Quayle campaign. In 1999-2000, he served as director of election studies for the Bush-Cheney campaign. In 2004, he served as a consultant for the Bush-Cheney campaign and the Republican National Committee. Professor Shaw is currently a research fellow at the Hoover Institution, a member of the board of overseers for the National Election Study, a member of the Fox News Decision Team, a member of the advisory board for the Annette Strauss Institute, and a presidential appointee to the National Historical Publications and Records Commission. He has also served as a consultant for the Tomas Rivera Policy Institute.

The first Texas Lyceum Poll—in what we hope will be an ongoing series—shows Texans overwhelmingly concerned with the war in Iraq, support for American troops, immigration and public education.

The poll was designed to get a picture of Texans' religious views, how they see issues that intertwine public policy and personal (and often spiritual) views, and to get an early glimpse at how the crowded presidential race looks to adults in the Lone Star State.

Texans are religious. They're ambivalent about voting. They're concerned about the direction of the country and of the economy, but relatively optimistic about what's to come, particularly for their children. They haven't settled on their favorite presidential candidates. And they remain split on some perennial public affairs questions.

GENERAL INFORMATION ABOUT THE TEXAS LYCEUM POLL

We interviewed Texas adults during the April 26-May 7 period, talking to 1,002 adults, half of them female, half of them male. Four out of five said they are registered voters.

One third are “extremely interested” in politics and public affairs and another 48% are “somewhat interested.” Just over half—51%—said they vote in “every” or “almost every” election.

About a third of the respondents identified themselves as Hispanic, 11% as African American, and 54% as White. And the level of interest and participation in public affairs varied by race. While 91 percent of Whites say they're interested in politics, and 88 percent of African Americans

say they're interested, only 61 percent of Hispanics said so. And that tracks with their own voting assessments: 55% of Whites said they voted most or all of the time, compared to 43% of African Americans and 28% of Hispanics.

Over three-fourths said they have Internet access at home or at work; 13% said they get most of their political information there, roughly matching the number who said they get that information from newspapers and magazines. Most said they rely on broadcast (32%) and cable TV (31%).

More respondents (40%) identified themselves as Independents than as Republicans (28%) or Democrats (27%). More consider themselves Conservative (41%) than as Moderate (32%) or Liberal (19%).

RELIGION

Texans describe themselves as religious and somewhat faithful in the Texas Lyceum Poll. And their responses to questions about faith-based initiatives, prayer in public schools, religious displays, and public funding for private schools show they're somewhat more comfortable with those issues than some of the people they've elected to public office.

Texans have mixed feelings about praying in public schools, with 16% favoring denominational prayers, 22% favoring non-denominational prayers, and 45% in favor of a moment of reflection for personal belief. Just 14% think that schools should allow no prayer of any kind.

A large majority said they're in favor of displaying the Ten Commandments on the grounds of government offices, either strongly (60%) or somewhat (22%). Another 14% were opposed to such displays.

Faith-based initiatives find favor with most Texans. The majority (68%) support giving taxpayer money to religious organizations that minister to the poor and needy, while 28% oppose such programs. African Americans and Hispanics were more likely to support and less likely to oppose such programs than Whites in the survey.

Almost two-thirds (65%) said they support a program "in which parents are given taxpayer money by the government that they can use to pay for a child's tuition at the school of their choice." Another 30 percent oppose such voucher programs, 20% of them strongly. The racial breakdowns on vouchers tracked those on faith-based initiatives, with Whites more likely to be in opposition and African Americans and Hispanics more likely to support the idea. And younger Texans were more supportive than older ones.

Using drugs in religious ceremonies—"even though this violates federal law"—wasn't a popular idea with the respondents: 77% are opposed to those practices, while 18% support them.

Asked about their personal religious views, 68% said they believe the Bible is the literal word of God. Asked whether they personally have had a born-again experience, 47% said Yes and 49% said No.

Almost three-fourths said they regularly attend religious services, either a few times a month (20%), once a week (32%), or more than once a week (20%). Another 16% go once or twice a year and 11% said they never go.

Asked about their denomination, almost half were either Catholic, 27%, or Baptist, 19%. No other response topped 10%.

CURRENT AFFAIRS AND OTHER ISSUES

The Texas Lyceum Poll found the State worried about the present—particularly the War in Iraq and the U.S. troops there—but optimistic about the future. The issues that have their attention drop off quickly after that big one, but they're concerned about immigration and education

Most of the Texans we surveyed believe the country is on the wrong track (62%) and they overwhelming mentioned the War in Iraq/Supporting Troops (42%) when asked an open-ended question about the most important issue facing the country today. The next biggest issue—Immigration/Border Control/Illegal immigrants—was the top concern of one in ten respondents, followed by the economy, politics and government, and lack of values/morals.

Immigration and Education/School Funding are the top issues facing the State, each getting the top response from 22% of those polled. The list was rounded out with gas prices and other utility issues, health care and vaccinations, and the economy and employment.

Respondents were more upbeat about economics and the future. More think the country is in the same economic shape it was in a year ago (43%) than think it's worse off (35%) or better off (22%). Half say their own personal economic situation is the same as a year ago, while 32% said they were better off and 19% said they were worse off.

Only 20 percent said their children's economic situations would be the same as their own, while 47% expect their kids to do better economically, and 27% think their children will be worse off. Hispanics were most optimistic here, with 59% predicting their children would be better off than they, compared to 42% of Whites and 33% of African Americans.

We asked respondents for their views on abortion, the death penalty, and stem cell research—recurring issues in state and national politics, and issues that often come up in conversations about religion and politics.

Most said abortions should be permitted under certain circumstances, while 19% said all abortions should be outlawed (including 25% of Hispanics surveyed). Given three circumstances to consider, 37% said decisions about abortion should always be left to the woman, and 40% said abortions should be permitted only in cases of rape, incest or endangerment to the woman's life. Only 2 percent said abortions should be permitted if having a child would create a substantial economic hardship for the woman.

Most Texans support the death penalty for those convicted of violent crimes, 49% strongly so, and 21% percent somewhat so. Just over a quarter oppose it, 15% of them strongly and 11% somewhat. The racial divides were significant on this question. African Americans (45%-to-50%) and Hispanics (60%-to-31%) were less likely to support the death penalty and more likely to oppose it than Whites (80%-to-18%). There wasn't an appreciable gender gap on the abortion question, but men in the survey were more likely than women to favor the death penalty.

Texans are split a little more evenly over embryonic stem cell research. More approve of federal government funding for such research (52%) than oppose it (36%), but the number of people without an opinion was a relatively high 12%.

PRESIDENTIAL POLITICS

The Texas Lyceum Poll found support for presidential candidates splintered, with nobody from either party winning the support of more than one in five voters in their own primaries.

Asked where they'd vote if the presidential primaries were held now, 36% said they'd vote in the Democratic primary, 30% would turn out for the Republican primary, and 24% said they'd skip the primaries. Women were more likely to vote in the Democratic primary than men; men were more likely to skip.

The leading Democrat among the registered voters in our survey was Hillary Clinton (33%), followed by Barack Obama (21%), Al Gore (10%), John Edwards (8%), Bill Richardson (3%), Joe Biden (1%), and Dennis Kucinich (1%). About one in five voters—21%—didn't name a favorite.

Clinton did better than Obama with African Americans and Hispanics in the poll, while Obama had an edge with White voters on the Democratic side. One gender difference was that women were more likely than men to support Clinton and more men than women were likely to support Gore.

The leading Republican among registered voters in The Texas Lyceum Poll was John McCain (27%), followed by Rudy Giuliani (23%), Fred Thompson (11%), Newt Gingrich (6%), Mitt Romney (6%), Sam Brownback (3%), Tommy Thompson (1%), Duncan Hunter (1%), and Ron Paul (0%). As with the Democrats, 21% didn't name a favorite in the GOP primary.

Giuliani outdid McCain with White voters on the Republican side, while McCain did better with African Americans. Hispanics were split, giving Giuliani a slight edge. Women on the GOP side were much more likely to be undecided and were less supportive than men of either of the front-runners.

In trial head-to-head match-ups, John McCain beat Hillary Clinton by one percentage point (he won with Whites while she had more minority support). Giuliani beat Clinton by the same amount in a trial heat, but more people were undecided in that contest. The racial breakdown on that was similar to the first race, though Giuliani's support among African Americans is very thin.

Both Republicans in our poll beat Barack Obama—McCain by seven percentage points, and Giuliani by ten. Obama carried Hispanics in the first contest, and African Americans in the second, but lost among most other groups.

Clinton did better with women than men, beating either McCain or Giuliani handily. With men, the McCain race was a toss-up, and she was behind Giuliani by a percentage point. Obama didn't do as well. Women in the survey favored McCain (men did, too, but only by two percentage points). Both women and men put Giuliani in front of Obama.

METHODOLOGY

The 2007 Texas Lyceum Poll is a random-digit dial telephone survey of Texas adults. Telephone coverage within the State of Texas is approximately 97%. Randomized selection procedures were assiduously followed throughout the process, even at the level of selecting individuals within the household. The final sample size is 1,000 adult Texans. The instrument itself relies on questions that have been used previously in national polls, and have been shown to be both valid (correlating with plausible independent and dependent variables) and reliable (robust to question order and interviewer effects). A Spanish version of the instrument was developed and respondents were given a choice of participating in English or Spanish. Bilingual interviewers were utilized, and approximately 60 interviews (6% of the sample) were completed in Spanish. The overall response rate (completed interviews/contacts) is 40%. This rate is partially the result of an extended time in the field, which facilitated call-backs. The overall margin of error for the sample is +/-3.0 percentage points at the 95% confidence level. The data used to generate top-lines and tables are weighted by U.S. Census Bureau estimates with respect to age, gender, and race. For example, Census data indicate how the proportion of 18-29 year old Hispanic females in Texas, and we use these estimates to weight the survey data. As expected, the most significant weights are applied to young, male, minority respondents (who are under-represented here, as they are in almost all polls in the U.S.). 📍

THE MORE THINGS CHANGE...

by Barry W. Lynn



Barry Lynn has served as the Executive Director of Americans United for Separation of Church and State for the past 15 years. He is both an ordained minister in the United Church of Christ and a member of the District of Columbia and Supreme Court bars. His most recent book is *Piety And Politics* (Random House, 2006); Barry is also the host of the daily syndicated talk show “Cultureshocks” (see www.cultureshocks.com for more details).

In the field of constitutional litigation, there is great truth in the old adage that “the more things change, the more they stay the same.” Since Americans on both sides of the “culture wars” don’t take “no” for an answer, we all seek to find innovative ways to fight old battles over and over. In the process, good old common sense can get lost.

Some old adages are actually consistent with reality. One is “the more things change, the more they stay the same.” For example, in the arena of constitutional law regarding the separation of church and state, few issues are definitively resolved—even when the United States Supreme Court takes their supposed opportunity to do so.

For this reason many of the “hot topics” in this area are just as hot now as they were ten years ago, or even fifty years ago. They are still hot in two ways. First, fact settings continue to provide endless opportunities for lawyers on all sides of the “culture war” to assure courts that their display of the Ten Commandments or the “student-initiated” religious speech in school case is readily distinguishable from every case that has gone before it. Second, even if a case is actually determined by a lower court to fit squarely within the confines of extant Supreme Court jurisprudence, the losing side and its supporters will be angry, aggrieved, disdainful, argumentative and probably headed immediately to the studios of the Fox News Channel to complain about it.

I do a lot of talk radio, both as a guest and a host, and the two issues most likely to generate more heat than light are religion and, next in line, guns. That is why hosts understand that, even in 2007 on the slowest possible day for generating call-ins, they should simply mention, “Waco” (the siege not the city), and callers will come out of the woodwork; that event combined religion and guns. Everybody has an opinion, no matter how disconnected from reality his or her perspective may be.

Frankly, I’m conflicted about gun ownership, but I’m not conflicted about religion. As my old friend and Baptist preacher James Dunn still says: “The best thing government can ever do for religion is just to leave it alone.” I find it genuinely perplexing to find that representatives of the so-called “Religious Right” can’t seem to figure this out. Chocolate syrup and minestrone soup just don’t work together—except maybe as a varmint poison. Church and state don’t mix up well either. Keeping a decent distance between the two is absolutely imperative if both are going to work in a nation as beautifully and energetically diverse about religion as the United States. Indeed, here we have nearly 2000 identifiable religious groups and 15-20 million people characterized as non-believers, humanists, atheists and freethinkers—and all are more or less working, playing, studying, and living in harmony. Doesn’t the record of history around the world demonstrate that our strongly separationist principle works better than any other model anywhere else on the planet? Doesn’t common sense lead us to precisely the same conclusion?

Let’s take a look at some of the perennial issues around which we religious liberty thinkers (and lawyers, who are sometimes in the previous category) are battling today and about which we will be battling in the future, if that other old adage “the past is prologue” is also accurate.

RELIGIOUS DISPLAYS ON PUBLIC PROPERTY

Every winter the aforementioned Fox News Channel, usually at some point in mid-November, claims to locate

scads of examples of hostility to the practice of festooning public spaces with religious and/or secular iconography of Christmas. Similarly they will report, from the Eastern Front of this battle royale that some child in a school has been denied the alleged “right” to learn about, sing about, read about, perform a dramatic or musical event about or be taught about this festive holiday. But, no Virginia, there is no “war on Christmas.” What person living aboveground from Halloween to early January does not know that this holiday is occurring, even if the local city fathers decided not to announce it with a city parade, a Christmas (or “holiday” or “gift”) tree in the town square, or a Nativity scene in the public square next to the department store? Such a Nativity scene, following the dictates of the Supreme Court, must include some mix (recipe not yet known) of the baby Jesus, shepherds, candy canes, Santa elves and perhaps a teddy bear.

This is much more a political battle than a legal one, or at least it should be, and anyone, liberal or conservative, who actually understands even the “Idiot’s Guide” version of “religion”, ought to be on the same side. Why should the government take an interest now in celebrating a holiday with non-existent Biblical roots, which was not celebrated by the folks from the Mayflower, and which has become a cultural celebration of most of the seven deadly sins, far more than a spiritual exercise. A poll last December demonstrated that 78% of Americans wanted to see a Christmas scene at city hall, but only 59% were sure they’d be spending any time in church actually celebrating the birth of Jesus. If this is not an idiot’s compromise made on a breathtakingly bad trajectory for the faith, I don’t know what is. By the way, in many communities most Christian churches do not even display a Nativity scene on their front lawn. It is one of the things that seems to happen if Uncle Sam or Mayor Milquetoast decides to do something “religious” himself. We Christians, then, don’t have to do it ourselves.

As for all those in-school horror stories, most turn out to be the equivalent of “urban myths.” The occasional bureaucrat errs on the side of being anti-religious; but, in general the facts as initially reported and repeated are based on absolutely false information. A few years back, a group threatened to sue because a school district in Wisconsin had “changed the words in familiar Christmas carols to secular words.” It turned out that the school play did contain “secular” words to the tunes of a few carols because the author of that play, written a decade earlier, was trying to make a point about homelessness, as exemplified by a lonely conifer. No “war”; just a little holiday lesson twisted by the unapologetic threats of a right of center “legal defense” group.

And what of other more non-seasonal symbols? There is the cross—a uniquely powerful Christian statement with or without the literal presence of the image of Jesus hanging on it. Yet in an ongoing battle in San Diego, the hard-to-miss Mount Soledad Cross is being characterized as a kind of “nondenominational” spiritual blessing on

deceased Korean War veterans. This view is promoted as a way of desperately seeking a secular justification for its continued presence on what is now the property (thanks to a 2006 act of Congress) of the United States Department of Defense. The Jewish War Veterans organizations and a number of humanist vets have not been successful in their efforts to point out that the cross does not symbolize anything that is a part of their traditions. How could any rational person believe otherwise?

“CONSCIENCE CLAUSES”

Nominally, this country is big on “freedom of conscience,” the notion that sometimes people, feeling so strongly about direct involvement in an activity, reject it because it is impossible to square with their moral center. This began with “conscientious objection” to war. The Supreme Court has never construed a person’s right to “say no to war” as a constitutional right, but they have upheld the legality of statutes in this area. For example, since Congress enacted provisions which allowed for “conscientious objector” status for those “opposed to war in any form” the Court has held that this covers religious objection or objection based on non-spiritual beliefs that rise to the level of significance of religious beliefs. However, the Court has also held that if your religious objective to war is only to “unjust” ones, Congress has every right to deny your “C.O.” request. Not only does most of Christianity approach the question of war in this way, but similar “just war doctrines” arise in other faith and reason traditions. So, in fact, your conscience only takes you so far.

Many laws also grant to physicians (and other direct service providers) who are opposed to abortion on moral grounds the right to refuse to participate directly in those procedures. The analogy, real or imagined, is that people who do not want to kill “people” cannot be forced to do so directly. Although most people agree this is reasonable as a practical matter, the scope of such clauses is now the subject of litigation in a number of states because of mergers between public hospitals and private religious facilities. What happens if the solitary hospital now left in town has as its official policy that physicians may not perform abortions, refer women to other places that perform abortions, or even counsel women to use contraceptives to avoid the need to consider having abortions? Going further along life’s weary road, what if the religious doctrine on which the hospital is based also says its staff can’t stop artificial hydration or other forms of life support? Courts have not resolved these matters with any generally applicable principles.

But wait! If you can have a statutory right to “opt out” of performing an abortion, why not have your “conscience” preserved as well if you are a pharmacist who sees that a customer has a physician’s prescription for birth control and you believe that virtually all birth control devices and medications are really “abortifacients,” abortion-inducing

in that they prevent implantation of a fertilized egg into the uterine wall? This may be scientifically dubious, but in a country which has allowed people to have all manner of unscientific beliefs about other things, why not allow it here? Let's go further. What if the checkout staff sees that the pharmacist did fill a birth control prescription, but the cashier doesn't believe it is appropriate. Should we "preserve" his or her conscience as well? If the beleaguered patient gives up and goes home, has unprotected sex, and upon learning that she is pregnant calls a cab to take her to the local Planned Parenthood clinic, the cab driver knows that address and says he won't drive there because of his conscience. Is this acceptable practice as well?

Not only do these issues arise in regard to matters of great division in the nation, but also come up in other contexts as the nation becomes even more diverse. Can Muslim cabdrivers refuse to pick up the weary international traveler arriving from her international jaunt because she is carrying some liquor, forbidden in the Islamic faith? Does it matter if this cab is the only one available? What if the traveler is bringing back a chihuahua instead of Chivas Regal, another forbidden occupant in an Islamic vehicle?

The law is about drawing lines—nearly always. However, in the area of religious claims the lines can be particularly hard to create when the impact of affirming the right to "accommodate" (or is it "grant special privilege") to one person does injury to a third party, whether the injury is large or small on the cosmic playing field.

PRAYER IN PUBLIC SCHOOLS

Surely, I must be kidding. There can't continue to be battles over this. We know that the late Madelyn Murray O'Hare got prayer "kicked out of public schools" back in the sixties. Actually, Ms. O'Hare's case in Maryland, which was combined with a nearly identical case in Pennsylvania brought by the Schemp family, merely concluded that the states could not choose prayers (such as the "Lord's Prayer" as it is known in Protestant circles) or sections of Bible scripture to be read to the captive audience of public school students each day. In that decision we also learned that "freeing" the non-believer or other non-worshipping-in-that-way-to-that-God child to escape to the hall every morning was not a way to save the constitutionality of such an obvious government promotion of religion.

Give things a few decades to fester, though, and all manner of new issues would arise. Could a state have children participate in a "moment of silent prayer or meditation?" No, not if the legislative record from Alabama showed the shrewd legislators really just wanted to use this to bring government-backed prayer to public schools. Well, could a school bring in a local preacher or rabbi to give an invocation at a public school's high school graduation? No again, because even on this one occasion (a very big one) a student should not feel compelled to either participate in a religious observance with which he or she disagreed or miss part of this significant milestone event. All right,

then what about prayers at football games led by a student chosen by the student body who could say anything she wants and just happens to want to do a Christian prayer every Friday night under the lights? Again, no, because the school set up the process of having a student selected and the mechanism used was the public (as in taxpayer supported) address system in the stadium.

This is not the end of the story. Federal courts have now reached differing conclusions on issues like the following.

Can a graduating student decide to acknowledge God's help in getting him through high school and/or tell all in the audience they had better accept Jesus as well? In my view the best answer was given by the Ninth Circuit which said a student could do the former, not do the latter (but could pass out a text which did have the "altar call" to conversion in addition to his constitutionally acceptable oral remarks). Isn't this, say my friends on the right, excessive government intermeddling with the religious content of speech? Not at all; it's called "drawing lines" and we do it all the time.

Can students pray together before school begins out at the flagpole on campus? There the answer is probably "yes," but can they ask the pastor from across the street to come and join them if adult strangers are otherwise barred from school property without a permit? I hope not. Can kids form a "prayer circle" around one of their "heathen" classmates and seek her conversion, or is that a kind of "religious harassment?" The questions seem endless, and may be so.

EVOLUTION AND ITS DESCENDANTS

John Scopes may be a'moulderin' in the ground or looking down from Heaven. If the later, it would be safe to say he is shaking his head. Since the infamous trial in which he was actually convicted in Tennessee of the "crime" of teaching human evolution, the issue is still floating around in courts throughout the nation. We know that the Supreme Court struck down the kind of laws in other states that Scopes was convicted for violating (although his conviction was actually overturned on a technicality and he spent no time in the hoosegow). You can't ban the teaching of evolution. A few years later, we learned that you can't insist, as Louisiana did, that if you teach evolution in a biology class you've got to teach something called "creation science" as well. This was, noted the court's majority, because creation science doesn't meet any definition of science and is just a way to bring religious doctrine into the classroom.

Creation advocates are nothing if not, well, creative. Many of them have now abandoned the effort to prove scientifically that everything in the Bible is literally true. The earth may not be 6000 years old (making those Flintstones cartoons where people and dinosaurs lived together the equivalent of documentary films—a joke I used long before comedian Lewis Black stole it). However,

the proponents of “intelligent design” claim that the sheer complexity of the world and many of its inhabitants, from the flagellum of the bacterium to the eye of the human, is demonstrable scientific evidence that there is a creator, a Ralph Lauren of the universe. This isn’t a new idea, since it served as one of the proofs for the existence of God articulated by Saint Thomas Aquinas. It is also not a scientific idea—it is the old “creation science” gussied up in a lab coat. (I stole that line from Dr. Eugenie Scott.) With barely a blink of the eye, proponents of this belief actually say that the “designer” need not be God, positing outer space aliens or time travelers as other first causes.

In 2005, the Dover, Pennsylvania, school board decided that prior to the beginning of the biology lesson on evolution in the ninth grade, teachers were supposed to read a disclaimer that there were “alternative scientific theories” to evolution and that one called “intelligent design” could be reviewed in a textbook called *Of Pandas and People*. About sixty copies of this tome had, curiously, been donated to the high school library by a local fundamentalist church. A group of parents sought and received the assistance of Americans United for Separation of Church and State, the ACLU of Pennsylvania, and the Pepper-Hamilton law firm in suing the school district. After a trial lasting (no joke here) forty days and forty nights, Judge John E. Jones III issued a blistering opinion demonstrating that “intelligent design” although an “interesting” philosophical idea was in no way scientific. He had been impressed during the trial with the abundance of information from the written records and oral statements of developers of “intelligent design” that their purpose in teaching this perspective was to promote God and honor Jesus. A few months later a California school district, thinking better of it, decided to eliminate an elective course called “Philosophy of Design” (which featured creationist videos) and replace it with an “Ethics” class after Americans United again filed a lawsuit.

The creativity continues. Now we are being told of new approaches to attacking evolution. Could teachers claim an “academic freedom” right to teach their students about what’s wrong with evolution? So far, every court considering this has rejected it. Academic freedom is actually the doctrine that the professionals in an academic discipline have the right to set standards and use standard methodologies and that the government cannot force them to change such measures. Alternatively, perhaps we could “teach the controversy.” Sadly, most American biology teachers concede that they spend very little time teaching evolution, even though it is a cornerstone of modern science. There is no point as a practical or constitutional matter in spending precious time on pseudoscience or religion in biology classes. If one wants to teach about a scientific controversy, at least move to a climate change where a modicum of real analytic debate is still occurring.

As the late Kurt Vonnegut used to say: “and so it goes.” We come round and round to find the same kinds of issues in this field over and over again. If it wasn’t so important

to fight to preserve real religious freedom—that keeps the government’s hands off of religion—the replays might not matter. But in America, where the “first freedom” in the Bill of Rights is the freedom to worship or not, and to pay for religion or not, the stakes are just too high to check out and go fishing. ♣

THE MANY MEANINGS OF SEPARATION

by Douglas Laycock



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^{1*} I thank David Rabban and Lawrence Sager for helpful comments.

This material is excerpted from a review of Philip Hamburger, Separation of Church and State, Harvard University Press, 2002. I have deleted some of the details about the book and my criticisms of it. I have retained my summary of the book's history of separation of church and state, and of the very different ways in which Professor Hamburger and I, and the Supreme Court and the American people, understand separation of church and state.

The full review appears in 70 U. Chi. L. Rev. 1667 (2003). NOTE: The University of Chicago Law Review follows the curious practice of omitting periods from its abbreviations. I have not undertaken to put them back in.

THE MEANING OF SEPARATION—A PREVIEW

Hamburger's understanding of separation of church and state is extreme and unusual, with hostility to religion as a central element. For Hamburger, separation of church and state means hostile efforts to control religion and limit its influence. Under this definition, there were no separationists among the supporters of the First Amendment. Separation is a nineteenth century movement, originating in anti-Catholicism, later expanding or shifting to include hostility to all organized religion.

Hamburger's meaning of separation is wildly implausible as an interpretation of the Religion Clauses of the First Amendment; he and I agree on that much. But if we are both right about that, then it is also wildly implausible to impute Hamburger's meaning to all those contemporary Americans who use "separation of church and state" as a shorthand summary of what the Religion Clauses require.

Many people talk about "separation of church and state" without meaning anything more specific than if they just said "religious liberty." The most obvious and plausible connection between the two phrases is simply that religious choices and commitments of the American people should be separated from the power of government. This straightforward meaning better explains the Supreme Court's cases than Hamburger's meaning, and surely comes closer to describing popular usage.

The First Amendment limits the power of government, not the rights of churches. This is explicit in the constitutional text and inherent in the constitutional structure; all provisions in the Bill of Rights protect the people from the government, not the government from the people. State action plays a further and unique role in the Religion Clauses: State action is the difference between government religious activity, restricted by the Establishment Clause, and private religious activity, explicitly protected by the Free Exercise Clause. Once Hamburger conceives of separation as restricting church as much as state, he is discussing a concept utterly alien to the First Amendment. Undoubtedly there are Americans who use separation to restrict churches, but that is not enough to make the usage plausible, let alone to make it the self-evident and only possible meaning, which is how Hamburger treats it.

HAMBURGER'S HISTORY OF SEPARATION¹ BEFORE THE AMERICAN FOUNDING

Separation of church and state has antecedents, at least in retrospect. Jesus is quoted as saying, "My kingdom is not

¹ Most of this section summarizes points from Hamburger that I endorse. Statements about events after 1948, statements cited to a source other than Hamburger, and evaluative statements not cited to any source, are my supplement to Hamburger's account. My disagreements and reservations are noted in text.

of this world” (p. 22), and perhaps more famously, “Render therefore unto Caesar the things which are Caesar’s, and unto God the things that are God’s” (p. 351). From the beginning, Christians conceived of church and state as separate institutions (pp. 21-22). The Reformation elaborated the distinction. Martin Luther taught that the “two kingdoms” of church and state should be “sharply distinguished” and “kept apart” (p. 22). John Calvin taught that church officials should not be government officials or vice versa (p. 24), and that no Calvinist community should “unwisely mingle these two, which have a completely different nature” (p. 22).

This institutional separation implied neither disestablishment nor religious liberty. The state could and often did support the established church and suppress religious dissent, and the established church generally expected it to do so. Institutional separation sometimes served religious liberty indirectly; like any separation of powers, it created the possibility that the secular arm might pursue its own agenda or decline to persecute when asked. But institutional separation long predates religious liberty and was not designed to promote it.

The English Reformation made the King the head of the church,² thus ending institutional separation of church and state. When later English dissenters urged Calvin’s separation of clerical and governmental offices (p. 35), Richard Hooker replied that the dissenters assumed that “the Church and the Commonwealth are two both distinct and separate societies,” and that “the walles of separation between these two must for ever be upheld” (p. 36). Hamburger uses Hooker to illustrate one of his themes, that the language of separation was used early on by defenders of the establishment, accusing dissenters of some form of separationism; thus separation was viewed as a bad thing, not a good thing (pp. 32, 65-78).

In a pamphlet of 1644, Roger Williams famously argued for a “wall of Separation between the Garden of the Church and the Wilderness of the World” (p. 45). For Williams, the wall protected the purity of the separated church; when Williams published his compilation of arguments for religious liberty, he did not mention the wall of separation (p. 43). Hamburger infers that Williams saw little relationship between the two concepts, but that debatable point may be moot. Williams was forgotten for more than a century, and when eighteenth century Baptists revived his teachings on religious liberty, they apparently did not mention his wall of separation (pp. 52, 350). It is thus a bit of a puzzle why Hamburger also says, without explanation, that separation evolved from Williams’ use of the phrase (p. 32).

John Locke wrote in 1690 that ecclesiastical authority must be “confined within the bounds of the church” and not extended to civil affairs, “because the church itself is absolutely separate and distinct from the commonwealth” (p. 54). Locke accepted the established church,³ and opposed toleration for atheists, the intolerant, and any

religion loyal to a foreign power (read Catholics),⁴ so his conception of separation was far from modern. Still, it was a substantial advance on any predecessor save Williams, and unlike Williams, Locke explicitly joined his arguments for separation and toleration. And unlike either Hooker or Williams, Locke was a substantial influence on the American Founders.⁵

Hamburger reads Locke as stating the traditional understanding of church and state as separate institutions, but not as arguing for separation of church and state (pp. 54-55). This says more about Hamburger’s conception of separation than it says about Locke; there is little hostility to organized religion in Locke’s writings. But Locke appears to have urged the most fundamental principle of separation—separation of the church from the coercive power of the state. In elaborating on why the clergy should not exercise governmental powers, Locke wrote: “No man, therefore, with whatsoever ecclesiastical office he be dignified, can deprive another man that is not of his church and faith either of liberty or of any part of his worldly goods upon the account of that difference between them in religion” (p. 54).

Separation of church and state as an explicit protection for religious liberty begins here. The institutional separation of two kingdom’s theology had done little for religious liberty, because the state had too often been willing to persecute religious dissenters. But in Locke’s vision of toleration, the church could not call on the coercive power of the state, and the state could not use its coercive power for religious purposes. This is far from a rule against financial support, further still from a rule against endorsements. This is not late twentieth century separation, certainly not Hamburger’s separation, but it is the most important step. It is surely the most important point for millions of Americans who use separation as a shorthand or synonym for religious liberty.

THE FOUNDING

Hamburger reports that the eighteenth century dissenters who argued for religious liberty did not use any form of the word “separation” (pp. 58-59, 64, 74). The principal supporters of disestablishment were the leaders and members of the evangelical churches, so there was little anticlericalism in the movement and still less hostility to religion. Jefferson was anticlerical, but only in private, and rarely even there before the election of 1800 (pp. 147-48). In any event, he was in France during the crucial debates on disestablishment, the Constitution, and the First Amendment. With no one publicly anticlerical, there was no demand for separation under Hamburger’s definition.

Yet even in Hamburger’s summary of the familiar eighteenth century debates, it is easy to see arguments that others might characterize as separation. “From the dissenting side came the accusation that the establishment

⁴ *Id.* at 45-47.

⁵ See Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv L Rev 1409, 1430-31 (1990) (tracing Locke’s influence on religious liberty issues through Jefferson, Madison, and Isaac Backus).

² Supremacy Act, 1534, 26 Hen 8, ch 1 (Eng).

³ John Locke, *A Letter Concerning Toleration*, in *6 Works of John Locke* 1, 11, 29 (Scientia Verlag Aalen facsimile ed 1963).

churches ‘united’ or ‘blended’ church and state” (p. 65). The dissenters argued “that civil government should not have jurisdiction over religion” (pp. 68, 100), and that “religion is wholly exempt from its cognizance” (p. 100). Hamburger concludes that the dissenters’ demands “can be understood as variations on two basic requests” (p. 94). One was equal treatment of all faiths, and the other was for “freedom from legislation that took cognizance of religion” (p. 94).

Hamburger repeatedly insists that these demands did not amount to separation (pp. 85, 94-95, 279). The dissenters’ position does not fit his conception of separation, because they “did not attempt to limit churches or to deprive government of the moral influence of Christianity. Instead, they hoped to constrain governmental and especially legislative power” (p. 94). When defenders of the establishment argued that religion was necessary to republican government (pp. 69-73), the dissenters did not disagree. They conceded or insisted on the beneficial effects of religion on morals, and argued that religion flourished better without an establishment (p. 76).

THOMAS JEFFERSON, THE ELECTION OF 1800, AND THE DANBURY BAPTISTS

Something like Hamburger’s meaning of separation burst on the American scene in 1800. The Federalist clergy attacked the Republican presidential candidate, Thomas Jefferson, as a deist and an infidel (pp. 112-17). Republicans defended Jefferson’s Christianity, but more important for present purposes (pp. 117-20), they attacked the right of the clergy to talk about politics (pp. 120-26). The argument appears to have resonated with public opinion (p. 129), at least among Jefferson’s supporters.

The idea did not spring out of nowhere; even Hamburger, who claims that separation was not an argument in eighteenth century debates on religious liberty, concedes that “the Republicans played upon earlier establishment arguments about the necessary connection between religion and government” (p. 120). But the words “separate” and “separation” may have been new, and the specific claim—that clergy should not preach on politics—was certainly new. A concerted movement of clergy denouncing a prominent candidate by name may also have been new. As so often happens, a novel and arguably abusive use of a constitutional right—in this case, freedom of speech—provoked a novel and arguably abusive argument to limit the scope of the right.

Here is an application where the language of separation matters. Only omission or reversal of the state action requirement can turn the First Amendment into a limit on the speech of citizens.⁶ Constitutional text here is consistent with constitutional history: the eighteenth century dissenters demanded that government take no cognizance of religion, not that religion take no cognizance of government.

But if you think only about “separation” in the abstract, this mistake becomes somewhat plausible. “Separation of

church and state” does not mention state action; “separation” lends itself to the argument that any contact or influence is problematic, no matter which side is influencing the other. The argument that churches cannot address political issues continues down to the present day,⁷ and is often associated with pursuit of short-term political advantage, as it was in 1800. The Republicans in 1800 were making their own religious arguments even as they condemned the Federalist clergy for uniting church and state (pp. 133-43). To note a simple modern example, the people who object when the Catholic bishops oppose the death penalty are rarely the same people who object when they oppose abortion. Hamburger and I fully agree that some people have inferred from separation a ban on religion addressing politics, and that this inference is erroneous as an interpretation of the First Amendment. Our disagreements begin when he accepts this inference as the only possible meaning of separation.

The arguments of 1800 were the background to Jefferson’s famous exchange of correspondence with the Danbury Baptist Association. The Danbury Baptists congratulated Jefferson on his election and rehearsed their arguments for a guarantee of free exercise in Connecticut (p. 158 n. 28). Jefferson responded with a letter crediting the Religion Clauses with “building a wall of separation between Church & State” (p. 161). “Some Republican newspapers” published Jefferson’s letter, but the Danbury Baptists themselves did not publish it, circulate it, or even note it in their minutes (p. 164). Jefferson’s letter was not published in any permanent or generally available form until an edition of his papers in 1853 (p. 259).

There is no direct evidence on why the Baptists suppressed Jefferson’s letter. Hamburger speculates that they did not like the wall of separation metaphor, which was then associated with the claim in the recent election that clergy should not address political questions (p. 179). This speculation is certainly plausible and might be right, but other speculations are also plausible. Jefferson’s letter might simply have seemed more likely to antagonize than persuade the established Congregationalists who would have to be persuaded to guarantee free exercise in Connecticut.

Whether or not the exchange shows Baptist resistance to separation, the publication history shows that Jefferson’s letter had little impact. In our time, it has become Exhibit A for separation as the meaning of the First Amendment, but Hamburger convincingly shows that in Jefferson’s time, it was a non-event.

ANTI-CATHOLIC SEPARATION

Protestant-Catholic conflict raged episodically through the last three quarters of the nineteenth century and the first half of the twentieth. Protestants came to understand this conflict partly in terms of separation of church and state, and they demonstrated a capacity to make “separation” mean whatever served their interests.

⁶ See generally Douglas Laycock, *Freedom of Speech That Is Both Religious and Political*, 29 UC Davis L Rev 793 (1996).

⁷ See id at 793 nn 1-5 for academic versions of the argument.

The phrase itself got important boosts when popes denounced it in 1832 and 1884 (pp. 230-31, 397). If popes opposed separation, then Protestants must support it; “the pope did more than Jefferson to popularize the idea of separation of church and state in America” (p. 482).

Rising Catholic immigration provoked Protestant nativism and increased the salience of Protestant-Catholic conflict. Papal opposition to democracy in Europe, and Catholic statements opposing religious liberty in countries controlled by Catholics, both inflamed anti-Catholic bigots and gave grounds for quite unbigoted opposition to official Catholic positions (p. 210). It mattered little that the Catholic laity generally did not adhere to these positions (pp. 206-09); the Catholic Church could be portrayed as loyal to a foreign sovereign who would abolish religious liberty if given a chance. “Clergymen from almost all denominations joined the assault on Catholicism in one way or another, making anti-Catholicism the shared religious expression of an otherwise increasingly fragmented Protestant majority” (pp. 214-15). In this context, separation took on a new meaning, roughly but fairly summarized as restricting Catholic influence.

Catholics first demanded equal funding for their schools in New York City in the early 1820s (p. 221). Protestants opposed funding for “sectarian” schools on grounds of separation (pp. 219-29). By 1840, this dispute had grown into a major political issue (pp. 219-20). Catholics argued that the New York City public schools were in fact publicly funded Protestant schools (pp. 220-20). The Public School Society proclaimed its commitment “to inculcate the sublime truths of religion and morality contained in the Holy Scriptures,” it required children to read the King James Bible (the Protestant translation), and it assigned textbooks “in which Catholics were condemned as deceitful, bigoted, and intolerant” (p. 220). John Hughes, soon to be the Roman Catholic Bishop of New York, organized a slate of candidates on this issue in 1841 (p. 227). This horrified Protestants with the prospect of a Catholic political party (p. 227), and thus for a time united the issue of religion in schools with the issue of religion in politics.

The Protestant position that emerged by the mid-nineteenth century was that Protestants could participate in politics and teach their religion in the schools, but that Catholics could not. One can imagine many ways of rationalizing discrimination against Catholics, but separation of church and state seems one of the least likely. The key step in the Protestant argument was this: “Protestants tended to assume that, whereas Catholics acted as part of a church, Protestants acted in diverse sects as individuals” (p. 228; see also pp 229, 256, 266, 276, 283-84, 364, 372-74, 376, 481). Thus, Catholic instruction or political action violated separation, because it was the work of an authoritarian church, but Protestant instruction and political action did not violate separation, because it was the work of free individuals. Some of the more aggressive anti-Catholic organizations eventually took the position that even Catholic *individuals* should be excluded from holding

public office (pp. 366, 404-06), teaching in public schools (p. 442), or participating in politics (pp. 234-40, 366).

The distinction between churches and individuals “explained” why Catholic priests could not discuss politics while Protestant clergy were allowed unrestricted political activity. “Protestant ministers tended to view themselves as the moral light of the nation, and vast numbers of them did not hesitate to participate in politics in ways Catholics could not afford” (p. 243). Most famously, Protestant ministers preached 3200 sermons against the Kansas-Nebraska bill, and 3000 signed petitions opposing the bill (pp. 244-45), leading Stephen A. Douglas to complain without effect that they were violating the separation of church and state.⁸ Reviewing Baptist political activity in the early twentieth century, Hamburger says that Baptists “typically resolved the incompatibility simply by applying separation to Catholics but not to Baptists” (p. 376).

No version of the Protestant distinction could have been based on constitutional text or structure. It is wildly implausible to interpret guarantees of religious liberty to provide such radically different protections for the two largest faith groups, or to put particular churches at a disadvantage based on their theology and governance. And assuming there could be some viable distinction between church and religion for First Amendment purposes, the Protestants had it backwards. They said government must be separated from the church, not from religion, but the constitutional text prohibits an establishment of “religion,” not establishment of “a church.” The phrase “separation of *church* and state” was thus more conducive than the constitutional text to the principal Protestant rationalization.

Some statements of the Protestant position juxtaposed separation and state-supported Protestantism in ways that are truly astonishing from a modern perspective. A New York political pamphlet of 1845 urged “a barrier high and eternal as the Andes” to “forever separate the Church from the State,” and in the very next sentence, endorsed the Bible as “the single basis of all good government” (pp. 228-29). An 1855 book exhorted, without irony or any sense of contradiction:

We must maintain our Christian character as a nation. We must still enforce the observation of the Christian Sabbath. We must continue scrupulously to preserve the Church and the State separate from each other. We must again avow and maintain the Christianity of our public education (p. 229 n. 92).

The more extreme anti-Catholic activists eventually used “separation” to mean almost anything that was bad for Catholics. They pushed bills to impose distinctively Protestant forms of governance on Catholic churches (p. 242), demanded government inspection of convents (pp. 401, 405, 464), and opposed allowing Catholic orphans and prisoners in state custody to attend Catholic services instead of generic Protestant services (p. 339)—all in the name of separation.

8 Cong Globe, 33d Cong, 1st Sess 656 (1854).

Anti-Catholic separation made for strange allies; Ulysses S. Grant and the Ku Klux Klan each pushed anti-Catholic separation of church and state. When Grant and the Republicans needed a new issue after Reconstruction became unpopular, they adopted anti-Catholic separation with considerable success (pp. 322-26). This episode led to the Blaine Amendment, an unsuccessful attempt to enshrine in the federal Constitution a ban on any money to sectarian schools, with a savings clause protecting Bible reading in the public schools (pp. 324-26). This would have constitutionalized the Protestant position on both issues. At the other end of the two-party political continuum, the anti-Catholic Klan also became a vigorous proponent of separation. New members in Alabama swore an oath to support “white supremacy” and “separation of church and state” (p. 426); the Rhode Island chapter called itself the Roger Williams Klanton (p. 419).

Opposition to Catholic schools peaked after World War I, with Klan-supported efforts to require all children to attend public schools. Such a law actually passed in Oregon, and the Supreme Court struck it down in *Pierce v. Society of Sisters*.⁹ Hamburger reports similar movements in at least eleven states (p. 414), and he has uncovered the wonderful detail that in Oregon, “secular and Protestant private schools received quiet assurances that they would be accommodated” (p. 418 n. 65). Supporters of the movement saw Catholic schools as a threat to separation of church and state and to religious liberty (pp. 412-21). A 1922 letter to the editor argued that Catholic schools unconstitutionally deprived their students of religious liberty by permanently instilling “their peculiar church doctrines” (p. 418).

Hamburger has compiled a fascinating account of Hugo Black’s role in the religious work of the Klan (pp. 422-34).¹⁰ The Grand Dragon of the Alabama Klan first hired Black in 1921 to defend a Methodist minister who had killed a Catholic priest. The minister’s daughter had converted to Catholicism and married a Puerto Rican; the priest performed the wedding (pp. 424-26). Black got an acquittal by emphasizing the husband’s dark skin and blaming the priest for the daughter’s apostasy. He told the jury: “A child of a Methodist does not suddenly depart from her religion unless someone has planted in her mind the seeds of influence... When you find a girl who has been reared well, persuaded from her parents by some cause or person, that cause or person is wrong” (pp. 425-26). Compare the contemporaneous argument in Oregon that Catholic schools permanently instilled their denominational teachings, and that this violated their students’ religious liberty.

When Black ran for the Senate in 1925, the Klan became his unpaid campaign organization. The Grand Dragon said he “arranged for Hugo to go to Klaverns all over the state, making talks on Catholicism... Hugo could make the best anti-Catholic speech you ever heard” (p. 427). Although the Protestant version of separation was

supposed to preclude church participation in politics, Black gave campaign speeches in churches (p. 427). When Black’s Klan membership was revealed, after his confirmation to the Supreme Court, he gave a radio speech that is plausibly read—and was interpreted at the time—as threatening Klan retaliation against Catholics if his opponents continued to press the issue (pp. 430-34). The Klan’s views of Catholics may be easily seen in Black’s dissent in *Board of Education v. Allen*.¹¹

Hamburger shows that one of the old anti-Catholic nativist organizations initiated the litigation in *Everson v. Board of Education*¹² (pp. 455-57). Separationists condemned Black’s opinion, which upheld a government program to pay bus fares for students attending either public or private schools (pp. 463-68). But Black himself correctly viewed the case (in Hamburger’s paraphrase) as “an opportunity to make separation the unanimous standard of the Court while reaching a judgment that would undercut Catholic criticism” (p. 462).

The long Protestant-Catholic conflict was central to the development of American law and attitudes on religious observances in the public schools and on government money for private schools. The broad outlines of this history are reasonably well known to scholars in the field, and brief references have appeared in Supreme Court opinions,¹³ but its importance remains greatly underappreciated. Hamburger has performed a valuable service in gathering so much of that history in one place, with so much supporting detail, and in focusing attention on the use (or misuse) of arguments from separation.

LIBERAL SECULAR SEPARATION

When the Republicans revived anti-Catholic separation in 1875, they hoped also to attract a smaller block of separationist votes: a volatile coalition of atheists, non-Christian theists, and theologically liberal Christians, loosely united by hostility to religious authority (pp. 287-89). The movement’s newspaper, the *Index*, “quickly became the most distinguished heterodox paper in America—supported by Wendell Phillips, William Lloyd Garrison, Rabbi Isaac M. Wise, and even Charles Darwin” (p. 289).

Francis Abbot, the editor of the *Index*, soon found that separation of church and state was the one theme that united his diverse readers (pp. 289-90). Beginning in 1874, the *Index* proposed a separation amendment to the Constitution (p. 296), and by 1875, Abbot had formed an organization, the National Liberal League, devoted to “the ABSOLUTE SEPARATION OF CHURCH AND STATE” (p. 295). Following

11 392 US 236, 251 (1968) (“The same powerful sectarian religious propagandists who have succeeded in securing passage of the present law to help religious schools carry on their sectarian religious purposes can and doubtless will continue their propaganda, looking toward complete domination and supremacy of their particular brand of religion.”).

12 330 US 1 (1947).

13 See *Mitchell v. Helms*, 530 US 793, 828-29 (2000) (plurality) (“hostility to aid to pervasively sectarian schools has a shameful pedigree that we do not hesitate to disavow”); *Lemon v. Kurtzman*, 403 US 602, 628-29 (Douglas, concurring) (“The story of conflict and dissension is long and well known.”).

9 268 US 510 (1925).

10 Hamburger’s account draws heavily but not exclusively from Roger K. Newman, *Hugo Black: A Biography* (Pantheon 1994).

Hamburger, I will call this movement and similar ideas “Liberal” or “secular” separationism (p. 287).

The Liberal League’s 1874 amendment would have made the First Amendment and the Test Oath Clause (Article VI, sec 3), applicable to the states, and would have protected all religious opinions from any discrimination by government at any level. An 1876 draft added clauses designed to prohibit tax exemption for churches, Bible reading and other religious observances in the public schools, and government aid to secular functions (such as teaching math or feeding the homeless) in religious institutions (pp. 299-300).

The Liberals argued that separation was implicit in the Constitution, but that it needed to be explicit (pp. 301-02). Most of them opposed the Amendment because it was inadequate to the task and would “leave the Protestant sects undisturbed in their present collective mastery over the public school system” (pp. 298). The Liberals rejected the Protestant distinction between church and religion, and thus rejected any distinctions in the rules applicable to Protestants and Catholics (pp. 308, 364). They denounced political statements by clergy of any faith (pp. 308-09).

The Liberals also had a platform of nine demands (p. 294):

1. Taxation of church property.
2. No government-paid chaplains in the military, prisons, or other public institutions.
3. No government funds for “sectarian educational [or] charitable institutions.”
4. No government-sponsored religious services, specifically including no Bible reading in the public schools.
5. No religious proclamations by governors or the President.
6. Abolition of judicial oaths, and substitution of affirmations under penalty of perjury.
7. No laws “directly or indirectly enforcing the observance of Sunday as the Sabbath.”
8. No laws “looking to the enforcement of ‘Christian’ morality.”
9. “No privilege or advantage” to “Christianity or any other special religion,” and that “our entire political system” be “founded and administered on a purely secular basis.”

The Liberal League’s influence peaked in 1876; the League broke in half in 1878, and it splintered further through the 1880s (pp. 331-33). Descendant organizations continued to promulgate variations on the nine demands; Hamburger found versions from 1885, 1901, and 1937 (pp. 361-62). Protestant anti-Catholic separation remained dominant, but Liberal ideas survived, and a minority of Protestant separationists adopted at least some of them. W.C. Brann, an atheist in Waco, Texas, published the *Iconoclast*, a newspaper that promoted a Liberal version of separation (pp. 365-67). His brief career ended with his assassination in 1898, but he significantly influenced Texas

Baptists, including J.M. Dawson, who enrolled at Baylor University in 1899 (p. 365).

Dawson became a Baptist minister “who preached the social gospel, liberal theology, racial tolerance, and ecumenical relations with other denominations and religions” (p. 387)—in Texas in the early twentieth century! In 1946, he became the first Executive Secretary of the Joint Conference Committee on Public Relations (p. 388). Now called the Baptist Joint Committee for Religious Liberty, it takes strongly separationist positions with no hint of anti-religious rhetoric.¹⁴

In 1947, Dawson “took the lead” in organizing Protestants and Other Americans United for Separation of Church and State (p. 470), designed to be free of denominational influence that might resist Dawson’s more secular version of separation (pp. 470-71). The organization later dropped the first three words of its name, and today, Americans United for Separation of Church and State proclaims itself “proud of its role as the nation’s leading opponent and watchdog of the Religious Right.”¹⁵

THE MEANING OF SEPARATION REVISITED COMPETING MEANINGS OF SEPARATION

No doubt there is an important sector of public opinion that is hostile to religion and thinks of “separation” in something like the National Liberal League’s sense of the term.¹⁶ But this body of anti-religious opinion has never come close to constituting a majority, and its hostility cannot be imputed to millions of other Americans who profess support for separation of church and state. As Hamburger occasionally acknowledges—in places less prominent than his claims of separationism triumphant—most Americans have used “separation” as a shorthand for vague notions of religious liberty as guaranteed in the First Amendment (pp. 2, 21, 185, 391). For some the word probably has no very specific content; for many, it means no government funding for religious schools, and no prayer in public schools, because these are the two issues that have been widely reported in the press under the label of separation. John Jeffries and James Ryan simply equate modern separationism with these two issues.¹⁷

14 The Committee’s positions are summarized online at <http://www.bjcpa.org>. See also John C. Jeffries, Jr. & James E. Ryan, *A Political History of the Establishment Clause*, 100 Mich L Rev 279, 313-15, 346-47, 352-54 (2001) (further elaborating the history of the Baptist Joint Committee).

15 See <http://www.au.org/relright.htm>. See also Jeffries & Ryan, 100 Mich L Rev at 315-20, 354-55 (cited in n. 14).

16 See generally James Davison Hunter, *Culture Wars* (Basic Books 1991) (describing a broad range of cultural conflicts in terms of underlying conflict between “progressive” and “orthodox” views of religion); Phillip E. Johnson, *Reason in the Balance* (InterVarsity Press 1995) (arguing that “scientific naturalism and liberal rationalism” seek to relegate traditional religious views to a position of social irrelevance); Douglas Laycock, *Continuity and Change in the Threat to Religious Liberty: The Reformation Era and the Late Twentieth Century*, 80 Minn L Rev 1047, 1069-89 (1996) (surveying contemporary religious conflict in terms of Hunter’s and Johnson’s categories).

17 Jeffries and Ryan, 100 Mich L Rev at 281 (cited in n. 14).

Other scholars have ascribed a range of meanings to separation. Carl Esbeck distinguishes strict separationists, pluralistic separationists, and institutional separationists, none of them necessarily hostile to religion.¹⁸ In a later work focused on more specific issues, he adds “no-aid separationism” and “structural” or “historic” separationism.¹⁹ Steven Green, long-time counsel to Americans United and now a law professor, writes that separation “has always lacked a coherent definition. At its most basic level, separationism means the singling out of religion for distinctive treatment.”²⁰ Green and Frederick Gedicks both acknowledge the ban on government aid to religion as one of separationism’s fundamental commitments,²¹ but each also emphasizes that separation protects religion from government interference across a wide range of applications.²²

Ira Lupu came somewhat closer to Hamburger’s usage, describing separationism as “a doctrine of secular privilege at its heart,”²³ but consistent with “a strong doctrine of free exercise rights.”²⁴ I have acknowledged the existence of a faction that “may call itself separationist,” committed to “secular supremacy and religious subordination, or at least to religious marginalization,” I found “little basis for that version of separation in constitutional text, history, or structure.”²⁵ Thomas Berg thought that faction was larger and more influential than I realized, but he also recognized the more liberty-enhancing version of separation I offered as an alternative.²⁶ A policy statement by five religious organizations grounds separation “in the belief that (1) no citizen’s rights or opportunities should depend on religious beliefs or practices, ... and (2) authentic faith must be free and voluntary.”²⁷ They offer separation as a desirable middle ground between a “Judeo-Christian nation,” without separation of church and state, on the one hand, and a nation

where “religion and religious groups [are] barred from ... the vital public discourses we carry on as a democracy.”²⁸ This second rejected alternative is of course a central element of Hamburger’s conception of separation.

The diversity of definitions means that neither Hamburger nor I can assume that readers share our understanding of separation. Hamburger defines separation in terms that are obviously inconsistent with the Religion Clauses, and thus he necessarily rejects the concept as an erroneous interpretation of those clauses. I have tried instead to define separation in a way that makes it consistent with the text and purposes of the Religion Clauses, and thus make some sense of the widespread belief that the Religion Clauses require separation of church and state. To me, “the central meaning of separation is to separate the authority of the church from the authority of the state,”²⁹ so that “religion is left as wholly to private choice and private commitment as anything can be.”³⁰ Separation thus minimizes government influence on religion, a goal I prefer to describe in terms of “substantive neutrality.”³¹ This meaning is consistent with the text of the Religion Clauses and with the arguments and interests of the eighteenth century dissenters who successfully demanded the Religion Clauses. It protects all religions from the state; it does not discriminate among religions or attempt to reduce the influence of any religion. This comes much closer to the views of those citizens who vaguely think that separation protects religious liberty, although of course not all those citizens would agree with all my applications of the concept.

The Supreme Court’s understanding of separation has not been so specifically articulated, has not been consistent over time, and has not been so protective of religious liberty, but on the whole it has been closer to my view of separation than to Hamburger’s. Until very recently, the Court always spoke of separation and neutrality as though they were interdependent means of serving the same end of private religious choice. From *Everson* forward, the Court’s condemnation of government support for religion was always embedded in a strong commitment to government neutrality: government could not seek to “influence ... a belief or disbelief in any religion;”³² it could “neither advance, nor inhibit, religion.”³³ Even the ban on aid to religious schools was conceived as a form of neutrality,³⁴ a conception that left the ban vulnerable to multiple exceptions in its heyday in the 1970s and to progressive overruling as the Court adopted a different baseline for measuring neutrality in the 1990s.³⁵

18 Carl H. Esbeck, *Five Views of Church-State Relations in Contemporary American Thought*, 1986 BYU L Rev 371, 379-94. In Esbeck’s terms, “strict separationists desire a secular state,” *id.* at 379, but are often religious themselves, *id.* at 380. “Pluralistic separationists desire a neutral state.” *Id.* at 385. “Institutional separationists envision a theocentric state,” *id.* at 389, but not a theocracy, *id.* at 390.

19 Carl H. Esbeck, *Myths, Miscues, and Misperceptions: No-Aid Separationism and the Establishment Clause*, 13 Notre Dame JL Ethics & Pub Pol’y 285, 288 & n. 13 (1999). “No-aid” separationists “hold that most forms of governmental assistance to religious organizations are prohibited by the Establishment Clause;” “structural” or “historic” separationists would simply require “equal treatment of all educational and social service providers—including all faith-based providers.” *Id.*

20 Steven K. Green, *Of (Un)Equal Jurisprudential Pedigree: Rectifying the Imbalance Between Neutrality and Separationism*, 43 BC L Rev 1111, 1118 (2002).

21 *Id.* at 1121; Frederick Mark Gedicks, *A Two-Track Theory of the Establishment Clause*, 43 BC L Rev 1071, 1094 (2002).

22 Gedicks, 43 BC L Rev at 1098-1101, 1112; Green, 43 BC L Rev at 1112.

23 Ira C. Lupu, *The Lingering Death of Separationism*, 62 Geo Wash L Rev 230, 249 (1994).

24 *Id.* at 236.

25 Douglas Laycock, *The Underlying Unity of Neutrality and Separation*, 46 Emory L J 43, 47 (1997).

26 Thomas C. Berg, *Anti-Catholicism and Modern Church-State Relations*, 33 Loy U Chi L J 121, 122 & n. 5 (2001).

27 The American Jewish Committee, Baptist Joint Committee on Public Affairs, The Interfaith Alliance Foundation, National Council of Churches of Christ in the U.S.A., and Religious Action Center of Reform Judaism, *A Shared Vision: Religious Liberty in the 21st Century* 3 (2d 3d. 2002), available at the websites of the sponsoring organizations. An earlier version, with additional signatories, was published in 1994.

28 *Id.* at 1.

29 Laycock, 46 Emory L J at 46 (cited in n. 25).

30 Douglas Laycock, *Religious Liberty as Liberty*, 7 J Contemp Legal Issues 313, 319 (1996).

31 Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L Rev 993, 1001-02 (1990).

32 *Everson v Board of Education*, 330 US 1, 15 (1947).

33 *Lemon v Kurtzman*, 403 US 602, 612 (1971).

34 See Laycock, 46 Emory L J at 53-56 (cited in n. 25).

35 *Id.* at 48, 63-68.

The Supreme Court's decisions restricting government aid to religious schools were plainly influenced by Protestant anti-Catholic separationism,³⁶ and political opposition to aid to religious schools today includes a large element of hostility at least to conservative or intensely felt religion. Score this issue in Hamburger's favor; it is the only plausible example of a triumph of anticlerical separationism. But the fit is far from perfect. Hamburger claims that the Liberal vision of separation had triumphed by 1948, yet the Supreme Court did not actually strike down an aid program until 1971,³⁷ and it has not struck down another since 1985.³⁸ The influence of the anti-aid position lasted much longer than these fourteen years, but actual invalidations were confined to that period, and even at the height of those invalidations, the Court let states provide bus transportation,³⁹ textbooks,⁴⁰ standardized testing,⁴¹ diagnostic services,⁴² and remedial and therapeutic services delivered off the property of the religious school.⁴³ Restrictions on aid have been steadily unraveling since 1986,⁴⁴ four decisions invalidating aid programs have been expressly overruled.⁴⁵ To the extent that Hamburger's meaning of separation ever prevailed at the Supreme Court, it no longer does. But my claim that Hamburger's meaning never generally prevailed does not depend on these overrulings.

A second set of religious liberty issues relates to religious speech in public places or with government sponsorship. The Court has invalidated government-sponsored observances in the public schools,⁴⁶ and Hamburger's treatment of

McCullum implies that he considers this a victory for Liberal separationism. Undoubtedly, there is an anti-religious faction today that supports those decisions for reasons that track Liberal separationism. That view may have had some votes on the Court over the years and may even have had some influence in *McCullum* (pp. 474-76). But other and better reasons have commanded more support. The decisions banning school-sponsored prayer are better seen as the collapse of majority imposition on religious minorities in the public schools.⁴⁷

It takes no hostility to religion to support vigorous enforcement of the rule against government-sponsored religious observance. One of the earliest religious liberty principles to achieve consensus is that government cannot force anyone to attend a religious service. The simplest explanation of the school prayer cases is that this rule applies no matter how short the service.⁴⁸ This explanation does not limit its scope because the Court has been sensitive to the practical realities of coercion in the public school environment.⁴⁹

The endorsement test reaches further and dispenses with proof of coercion in any form. It may be explained on the ground that government should not interfere with private religious choices and commitments even if it does so noncoercively; religion should be separated even from government's persuasive influence. This does not require adopting the Liberal League's view that religion is irrelevant to government, but only the view of the eighteenth-century dissenters that religion would flourish best without government support (p. 76). The rule against endorsements can also be explained by the even more fundamental principle that we do not vote on religious questions: it is no business of government to select appropriate religious observances or religious leaders for the American people,⁵⁰ and there is no legitimate political mechanism for making such decisions.⁵¹

The argument that government should not impose or meddle in religious observances explains the Supreme Court's prayer decisions better than does hostility to religion. The indicator is the set of cases on private religious speech in public places. Some public schools and some separationist litigators have tried to suppress even privately

36 In addition to Hamburger, see *Id.* at 57-61; Jeffries and Ryan, 100 Mich L Rev at 281-82, 297-305 (cited in n. 14); John T. McGreevy, *Thinking on One's Own: Catholicism in the American Intellectual Imagination, 1928-1960*, 84 J Am Hist 97, 122-25 (1997).

37 *Lemon v Kurtzman*, 403 US 602 (1971) (invalidating state payment of 15 percent of salaries of teachers of secular subjects in religious schools).

38 The Court last invalidated school aid programs in *Aguilar v Feldman*, 473 US 402 (1985), overruled in *Agostini v Feldman*, 521 US 203 (1997), and in *Grand Rapids School District v Ball*, 473 US 373 (1985), partially overruled in *Agostini*.

39 *Everson v Board of Education*, 330 US 1 (1947).

40 *Meek v Pittenger*, 421 US 349, 359-62 (1975) (plurality); *Id.* at 385 (Burger, CJ, concurring); *Id.* at 396 (Rehnquist, J, concurring); *Board of Education v Allen*, 333 US 203 (1968).

41 *Committee for Public Education & Religious Liberty v Regan*, 444 US 646 (1980); *Wolman v Walter*, 433 US 229, 238-41 (1977).

42 *Wolman*, 433 US at 241-44.

43 *Id.* at 244-48.

44 The Court upheld school aid programs in *Zelman v Simmons-Harris*, 536 US 639 (2002) (vouchers); *Mitchell v Helms*, 530 US 793 (2000) (equipment loans); *Agostini v Felton*, 521 US 203 (1997) (remedial instruction on property of religious school); *Zobrest v Catalina Footbills School District*, 509 US 1 (1993) (sign language interpreters). See also *Rosenberger v Rector of University of Virginia*, 515 US 819 (1995) (requiring state university to subsidize student religious publication equally with other student publications); *Witters v Washington Department of Services for the Blind*, 474 US 481 (1986) (upholding use of state scholarship for the blind to attend seminary).

45 See *Mitchell*, 530 US at 835-37 (plurality and concurring opinions) (overruling invalidations of aid to religious schools in *Wolman*, 433 US at 248-55, and *Meek*, 421 US at 362-73); *Agostini*, 521 US at 235 (overruling invalidations of aid to religious schools in *Aguilar v Felton*, 473 US 402 (1985), and the "shared-time" holding in *Grand Rapids School District v Ball*, 473 US at 384-98).

46 *Santa Fe Independent School District v Doe*, 530 US 290 (2000) (prayer at football games); *Lee v Weisman*, 505 US 577 (1992) (prayer at graduation); *Abington School District v Schempp*, 374 US 203 (1963) (prayer and Bible

reading in classroom); *Engel v Vitale*, 370 US 421 (1962) (prayer in classroom).

47 See text at notes 52-54, 86-88.

48 See *Lee*, 505 US at 587 ("government may not coerce anyone to support or participate in religion or its exercise"); *Id.* at 594 (rejecting argument that graduation prayers "are of a *de minimis* character").

49 See *Santa Fe*, 530 US at 311-12 (noting the "immense social pressure... to be involved in the extracurricular event that is American high school football"); *Lee*, 505 US at 592-96 (recognizing coercive pressure to attend graduation ceremonies and to stand with everyone else for invocation and benediction); *Engel*, 370 US at 430-31 ("When the power, prestige, and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to prevailing officially approved religion is plain.").

50 See *Lee*, 505 US 577 at 587-90 (holding that school may not select person to lead prayer or give him guidelines on how to pray); *Engel*, 370 US at 425 ("[I]t is no part of the business of government to compose official prayers for any group of the American people").

51 See *Santa Fe*, 530 US at 316-17 (invalidating student election to select speaker who would deliver message or prayer at high school football games).

sponsored religious speech, and they have uniformly lost.⁵² With unusual consistency, the Court has applied the same basic principle for forty years: “There is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.”⁵³ The second half of this rule, protecting private religious speech, goes back sixty years to the Jehovah’s Witness cases.⁵⁴ And there is not a single exception—no once has the Court held that separation requires or even permits limits on religious speech that has not been sponsored or preferred by government. The school prayer cases reflect the view that government should not support or sponsor religion, not the view that government should restrict religion or keep it out of public view.

The third set of modern religious liberty issues is regulatory exemptions for religiously motivated behavior. This was not an issue in the Protestant-Catholic battles of the nineteenth century, and it was not an explicit part of the Liberal separationist agenda. The issue arose prominently in the nineteenth century only in the Mormon cases, where hostility to polygamy dominated the discussion.⁵⁵

Hamburger repeatedly suggests, without elaboration, that separation precludes exemptions (pp. 93, 101, 107, 260, 304, 327, 436, 455). This would follow from the view that separation means whatever is bad for religion, but it does not follow either from the ordinary English meaning of separation, or from the word’s use as a synonym or proxy for religious liberty. Government regulation of religious practices is a highly intrusive contact between church and state; exemption, or failure to regulate, separates religious practice from the coercive power of government regulation. Exemptions also enhance liberty; they leave more choices about religious observance to individuals and churches, and fewer such choices to government.

Here too, there is a modern faction that opposes regulatory exemptions for religious practices on grounds

that suggest hostility to religion, but that is not the view of the Supreme Court, which has unanimously upheld regulatory exemptions when enacted by legislatures to relieve burdens on religious exercise.⁵⁶ From 1963 to 1990, the Court held that the Free Exercise Clause required such exemptions, subject to an exception for compelling government interests.⁵⁷ These decisions did not use the rhetoric of separation, but they enforced a theory of religious liberty fully consistent with my meaning of separation. The Court repudiated the rationale of these decisions in 1990, holding that the Constitution does not require regulatory exemptions of its own force.⁵⁸ This was not based on anything like Hamburger’s view of separation, but rather on allowing other values to override separation entirely. The opinion says nothing about separation of church and state; it is entirely about conservative judicial methodology and hostility to judicial balancing. In the Court’s view, a regulatory exemption may be “desirable,” but that is “not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts.”⁵⁹ Serious burdens on minority religions “must be preferred to a system... in which judges weigh the social importance of all laws against the centrality of all religious beliefs.”⁶⁰

To sum up, on financial aid and regulatory exemptions, the Court is no longer writing in terms of separation at all. Hamburger’s thesis has been overtaken by events. The Court’s decisions on religious speech are far better explained by my meaning of separation than by Hamburger’s. Before the recent doctrinal changes, the exemption decisions reflected my meaning of separation, and the implausible distinctions of the older financial aid decisions reflected an impossible attempt to straddle elements of both my meaning and Hamburger’s. At this broad conceptual level, there are elements of Hamburger’s meaning in the Supreme Court’s cases, but more elements of mine. At more detailed levels of analysis, Hamburger’s claims fare much worse.

52 *Good News Club v Milford Central School*, 533 US 98 (2001) (holding that a school could not deny an elementary-school Bible club the right to meet on same terms as other clubs); *Lamb’s Chapel v Center Moriches Union Free School District*, 508 US 384 (1993) (holding that a school could not refuse to rent its premises to a church on the same terms it rented to other community groups); *Board of Education v Mergens*, 496 US 226 (1990) (upholding and broadly construing the Equal Access Act, 20 U.S.C. “4071-4074 (2000), as applied to religious clubs in public high schools); *Widmar v Vincent*, 454 US 263 (1981) (holding that state university could not deny religious group the right to meet on the same terms as other groups).

53 *Santa Fe*, 530 US at 302, quoting *Mergens*, 496 US at 250 (plurality).

54 See, for example, *Fowler v Rhode Island*, 345 US 67 (1953) (protecting religious service in a public park); *Cantwell v Connecticut*, 310 US 296 (1940) (protecting religious speech on public street). In this period, governments mostly relied on grounds other than separation in their efforts to suppress unpopular religious speech. But in the wake of *McCullum*, the separationist objection to religious speech on public property was fully briefed in *Niemotko v Maryland*, 340 US 268 (1951) (protecting “Bible talks” in public park), and appeared in dissent in a companion case, *Kunz v New York*, 340 US 290, 311 n. 10 (1951) (Jackson, dissenting) (“the Constitution will not suffer tax-supported property to be used to propagate religion”).

55 See *Reynolds v United States*, 98 US 145 (1878) (upholding criminal prosecution for polygamy). See also *Mormon Church v United States*, 136 US 1 (1890) (upholding forfeiture of property and corporate existence of Mormon Church); *Davis v Beason*, 133 US 333 (1890) (upholding test oath that excluded Mormon voters).

56 *Corporation of the Presiding Bishop v Amos*, 483 US 327 (1987) (upholding exemption of religious employers from religious discrimination provisions of the Civil Rights Act of 1964). See also *Grumet v Board of Education*, 512 US 687, 705-06 (1994) (reaffirming *Amos* in dictum); *Texas Monthly, Inc v Bullock*, 489 US 1, 18-19 n. 8 (1989) (same). *Texas Monthly* struck down a tax exemption that favored religious speech. See n. 82.

57 See *Frazee v Illinois*, 489 US 829 (1989) (exempting claimant from obligation to work on his Sabbath or forfeit unemployment compensation); *Sherbert v Verner*, 374 US 398 (1963) (same); *Wisconsin v Yoder*, 406 US 205 (1972) (exempting Amish parents from obligation to send their children to high school).

58 *Employment Division v Smith*, 494 US 872 (1990) (holding that “neutral and generally applicable laws” may be applied to restrict religious practices without further justification).

59 *Id.* at 890.

60 *Id.*

SOME DETAILS OF THE ANTICLERICAL SEPARATIONIST AGENDA

IN THE SUPREME COURT

In Hamburger's account, the Supreme Court committed to the Liberal version of separation in *McCullum v. Board of Education*, and the implications of that commitment have been unfolding ever since (p. 478). This is nonsense, made superficially tenable only by the artful device of ending his chronology with *McCullum*. Four years later, in *Zorach v. Clauson*,⁶¹ the Court distinguished *McCullum* over the dissent of its author, Justice Black—Hamburger's prime example of a justice committed to a nineteenth century meaning of separation. *McCullum* held that the state could not use its power to compel school attendance to induce children to attend religious instruction;⁶² *Zorach* held that the state could do precisely that so long as the religious instruction occurred off the school grounds.⁶³ *Zorach* has been much criticized but is still good law;⁶⁴ "*McCullum* did not have lasting impact."⁶⁵ Justice Jackson, in a remarkable letter to Frankfurter, complained that "as a legal doctrine, separation is gone."⁶⁶ He blamed *Everson* and *Zorach*; he could have been responding to Hamburger. Given the triumphal 1948 conclusion to the chronological portion of Hamburger's history, it is simply deceptive not to mention *Zorach*.

More generally, Hamburger never compares modern constitutional doctrine—before or after the recent doctrinal shifts—to the demands of the various separationists he has chronicled in such detail. For if he did that, it would be clear that they got only a small part of their agenda. Consider, as one relatively complete statement of Hamburger's view of separation, the nine demands of the National Liberal League:

Item 1, taxation of church property, was never obtained. The Court upheld church tax exemption,⁶⁷ in part on the ground that tax exemption promotes separation of church and state.⁶⁸

61 343 US 306 (1952).

62 *McCullum*, 333 US 203, 209-10 (1948) ("Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religion classes.").

63 See *Zorach*, 343 US at 324 (Jackson, dissenting) (arguing that the school "serves as a temporary jail for a pupil who will not go to Church").

64 See *Lanier v Wimmer*, 662 F2d 1349 (10th Cir 1981) (upholding "released-time" program of religious instruction under *Zorach*); *Smith v Smith*, 523 F2d 121 (4th Cir 1975) (same); *Moore v Metropolitan School District*, 2001 WL 243292 (SD Ind 2001) (treating *Zorach* as good law but invalidating religious instruction on school property and with more coercion to participate than in *Zorach*).

65 Jeffries & Ryan, 100 Mich L Rev at 319 (cited in n. 14).

66 The letter is quoted at length in J. Woodford Howard, Jr., *The Robe and the Cloth: The Supreme Court and Religion in the United States*, 7 J L & Polit 481, 496 (1991).

67 *Walz v Tax Commission*, 397 US 664 (1970). This result is not called in doubt by *Texas Monthly, Inc v Bullock*, 489 US 1 (1989), where the Court struck down, without a majority opinion, a content and viewpoint discriminatory sales-tax exemption that benefited only publications promoting religions.

68 *Walz*, 397 US at 705 (finding that tax exemption "restricts the fiscal relationship between church and state, and tends to complement and reinforce the desired separation insulating each from the other"). See also *Lemon*, 403 US 602 at 614 (stating that *Walz* "tended to confine rather than enlarge

Item 2, abolition of government-paid chaplains in the military, prisons, or other public institutions, was never obtained. The Supreme Court upheld legislative chaplains,⁶⁹ and the courts of appeals have upheld military, prison, and hospital chaplains.⁷⁰

Item 3, no government funds for "sectarian educational or charitable institutions," was obtained only in part, as already discussed, only temporarily, and only for schools. The Court imposed few restrictions on aid to religious higher education,⁷¹ and government funds to other religious charities were rarely an issue until the second Bush Administration pushed the political envelope with its high-profile proposals to both aid and deregulate faith-based charities.⁷²

Item 4, a ban on government-sponsored religious observances, was substantially achieved in the public schools, but not in legislatures or other government programs directed to adults.⁷³ And as noted, the Court has repeatedly rejected the demand to exclude from public schools even religious observances that are privately sponsored and attended only by genuine volunteers.

Item 5, a ban on religious proclamations by governors or the President, was never taken seriously.

Item 6, abolition of judicial oaths, was never obtained. American courts permit the alternative of affirming under penalty of perjury, but that exemption for dissenters was well established in colonial times,⁷⁴ and thus cannot be the achievement of any movement that Hamburger would recognize as separation.

Item 7, a ban on laws "directly or indirectly enforcing the observance of Sunday as the Sabbath," was never obtained. The Court upheld Sunday closing laws on the ground that they functioned more as a restraint of trade than as an establishment of religion,⁷⁵ and their subsequent decline has had far more to do with cultural and economic trends than with separation of church and state.

Item 8, a ban on laws "looking to the enforcement of 'Christian' morality," was never obtained. The Court has held that laws that coincide with the moral teachings of a particular religion do not thereby establish that religion.⁷⁶

the area of permissible state involvement with religious institutions").

69 *Marsh v Chambers*, 463 US 783 (1983).

70 *Carter v Broadlawn Medical Center*, 857 F2d 448 (8th Cir 1988) (hospital chaplains); *Katcoff v Marsh*, 755 F2d 223 (2d Cir 1985) (military chaplains); *Theriault v Silber*, 547 F2d 1279 (5th Cir 1977) (prison chaplains).

71 See *Roemer v Maryland Public Works Board*, 426 US 736 (1976) (upholding financial aid to religious colleges so long as funds are restricted to secular purposes and colleges are not pervasively sectarian); *Hunt v McNair*, 413 US 734 (1973) (same); *Tilton v Richardson*, 403 US 672 (1971) (same). The Fourth Circuit has held that the "pervasively sectarian" half of these limits is no longer good law. *Columbia Union College v Oliver*, 254 F.3d 496, 501-08 (4th Cir. 2001).

72 See generally *Faith-Based Solutions: What Are the Legal Issues?*, Hearing Before the Senate Comm on the Judiciary, 107th Cong, 1st Sess (2001) (Sen Hrg 107-375).

73 *Marsh v Chambers*, 463 US 783 (1983).

74 See McConnell, 103 Harv L Rev at 1467-68 (cited in n. 5). The early settlement of this solution is reflected in the Constitution's repeated provisions for "Oath or Affirmation." US Const art I, '2, cl 6; art II, '1, cl 8; art VI, cl 3; Amend IV.

75 *McGowan v Maryland*, 366 US 420, 434-35 (1961) (relying on support for Sunday laws among labor groups and trade associations).

76 *Harris v McRae*, 448 US 297, 319-20 (1980) (upholding government's refusal to

Item 9, “no privilege or advantage” to “Christianity or any other special religion,” and a requirement that “our entire political system” be “founded and administered on a purely secular basis,” is a bit vague, but however it is interpreted, it is hard to find a win for Liberal separationism. No privilege or advantage to any particular religion is certainly the rule,⁷⁷ but the demand for equal treatment of all faiths goes back to colonial times, and Hamburger insists that equal treatment is not separation (p. 85). It is also the rule that government may not support religion generally, but that has been far less rigorously enforced than the Liberal League hoped. If “no privilege or advantage” meant no tax exemptions, or no regulatory exemptions for religious observances, it has never been obtained. Our political system is founded and administered on a secular basis in many important senses: there are no religious tests for voting or office holding; government generally does not pursue overtly religious ends or use overtly religious means to pursue secular ends. But this was largely true in the nineteenth century when the demand was made.

Another way to understand this final demand is that churches, clergy, and religious arguments be excluded from political debate. Whether or not this was one of the nine demands, it was part of the Liberal agenda and it is central to Hamburger’s view of separation (pp. 13, 107, 280, 308, 490). And it plainly has not been obtained.

The Supreme Court has affirmed the constitutional right of religious organizations to make political arguments⁷⁸ and of clergy to serve in legislatures.⁷⁹ Religious movements have exercised their right to political free speech throughout our history. Considering only the period after Hamburger’s version of separation supposedly triumphed, think of the black civil rights movement, the religious opposition to war (from Vietnam to Iraq), the letters of the Catholic bishops on economic justice and nuclear disarmament, Catholic and conservative Protestant opposition to abortion and advocacy of other “social issues,” and Jewish support for Israel.⁸⁰

The Internal Revenue Code prohibits certain tax-exempt organizations from directly supporting candidates or engaging in substantial lobbying.⁸¹ Enforcing these restrictions against churches is a principal activity of Americans United, but the restrictions apply to secular charities as well as religious and are principally defended on the ground that overtly political activity should be conducted with after-tax dollars.⁸² They have not stopped

churches from addressing political issues with moral or religious implications, and as a purely legal matter, they do not even prevent churches from creating political affiliates or Political Action Committees.⁸³ They certainly do not preclude citizens from making religious arguments in political debate or from voting with religious motivations. Neither secular nor anti-Catholic separationists can claim much progress here.

To sum up, secular separationists achieved substantial but incomplete legal success on Liberal demands 3 and 4, no substantial legal success on demands 1, 2, 5, 6, 7, 8, or 9, and no constitutional success on the definitionally critical effort to exclude religion from politics. This is not Liberal separationism enshrined as constitutional law. It is not even close.

Nor is it Protestant anti-Catholic separationism. Anti-Catholic separationists supported only one of the Liberals’ nine demands—no aid to religious schools. They actively supported religious observances in public schools, and these two issues were equally central to their agenda. The anti-Catholic separationists mostly won on the school aid issue, at least until very recently, but they mostly lost on the school prayer issue. They entirely lost on the effort to exclude Catholics from politics or public institutions, or to maintain one set of rules for Protestants and a different set for Catholics.

IN PUBLIC OPINION

Hamburger fares no better in his claims about modern public opinion. He largely assumes that most Americans support separation of church and state. I share that assumption, but with somewhat less confidence. I found no opinion poll more recent than 1981, when two-thirds of Americans agreed that separation of church and state was at least somewhat important, and nearly half said “very important.”⁸⁴ But whatever they meant by that, it was not what Hamburger means.

Protestant anti-Catholicism is, for all practical purposes, dead. Immigration rates declined sharply after World War I;⁸⁵ thereafter, each successive generation of Catholics and Jews became more assimilated and seemed less threatening to the Protestant majority. When a Roman Catholic was elected President in 1960, when he and his family were popular and personally attractive, and when the Second Vatican Council endorsed religious liberty and reformed the Catholic Church in other ways,⁸⁶ American anti-Catholicism collapsed with

fund abortions); *McGowan*, 366 US at 442 (upholding Sunday closing laws).

77 *Larson v Valente*, 456 US 228, 244 (1982) (“The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.”).

78 *Lemon*, 403 US at 623 (1971) (“Adherents of particular faiths and individual churches frequently take strong positions on public issues. We would not expect otherwise”), quoting *Walz*, 397 US at 670.

79 *McDaniel v Paty*, 435 US 618 (1978).

80 For samples of religious argument on political issues in all eras of American history, see Edward McGlynn Gaffney, Jr., *Politics Without Brackets on Religious Conviction: Michael Pery and Bruce Ackerman on Neutrality*, 64 *Tulane L Rev* 1143, 1158-88 (1990); Laycock, 29 *UC Davis L Rev* at 801-03 (cited in n. 6).

81 26 USC 501(c)(3) (2000).

82 See *Branch Ministries v Rossotti*, 211 F3d 137, 143-44 (DC Cir 2000)

(“Petitioners are not being denied a tax deduction because they engaged in constitutionally protected activities, but are simply being required to pay for those activities entirely out of their own pockets”, quoting *Cammarano v. United States*, 358 U.S. 498, 513 (1959).

83 See *Id.* at 143 (holding that these alternatives eliminated any burden on religious exercise).

84 American Religion Data Archive, <http://www.thearda.com>. Within this website, search for “Separation.” This will pull up several survey questions, one of which asks about separation of church and state. Click “Analyze” to see the results; click ANTSEM81 to see a description of the survey.

85 See United States Bureau of the Census, *Statistical Abstract of the United States: 2001*, at 10 table 5 (121st ed 2001).

86 See generally Walter M. Abbott, gen ed, *The Documents of Vatican II* (Herder 1966).

astonishing speed. The school prayer decisions, beginning with *Engel v. Vitale*⁸⁷ in 1962, coincided with this collapse; they reflect increased respect for religious minorities more than hostility to all religions.

Old-style Protestant anti-Catholicism is confined to the disreputable fringes of public opinion, widely condemned on its occasional public appearances. Liberal and intellectual anti-Catholicism has survived and evolved, reinforced by the Church's teachings on sex and abortion, but this has much more in common with Liberal hostility to all culturally conservative religion than with Protestant anti-Catholicism.

Anti-Catholicism's impact on separation of church and state lives on in the widespread belief that separation precludes government funding of religious schools; here, as at the Supreme Court, this is the principal element of truth in Hamburger's claim about the triumph of anticlerical separationism. Yet the many Americans who oppose aid to Catholic schools now oppose funding for evangelical Protestant schools just as vigorously, and in my experience, most of them are genuinely surprised by the anti-Catholic history of their idea.

The rest of the agenda of anti-Catholic separationism is dead. There are no remaining public proponents for any explicit effort to minimize Catholic influence, or to maintain a permissive set of rules for Protestant connections to government and a restrictive set of rules for Catholic connections to government; if such arguments were still being made, they would have no credibility.

A form of Liberal separationism has survived into contemporary times, fueled by a general hostility to all religions that oppose themselves to the secular culture. There is a widespread sense that secularism and disbelief have become more common and more influential, although that belief is surprisingly hard to document. Whether or not hostility to religion has increased, it certainly exists.

But it is absurd to think that hostility to religion represents majority opinion. Eighty-eight percent of Americans say religion is at least fairly important in their own lives; 61 percent say very important.⁸⁸ Even the organizations that seek the most aggressive enforcement of the Establishment Clause generally deny any hostility to religion, cultivate religious supporters, and claim to support religious liberty for all. Some of their opponents treat this solicitude as mere posturing, but whether genuine or posturing, their efforts to support the rights of religious believers show their assessment of public opinion: to be hostile to religion is a losing strategy. If Hamburger is right that most Americans support separation of church and state, then they must mean something quite different from extreme anticlericalism or hostility to all organized religion.

CONCLUSION

When I was young and presumptively naive, I endorsed the view that separation is a "misleading metaphor."⁸⁹ When I was older and grayer and should have known better, I said that despite its misleading tendencies, separation represents "a long and honorable tradition" with important benefits, and that it is better to work within the tradition than to repudiate it.⁹⁰

The long and honorable tradition is the separation of government power from the religious choices and commitments of the people. This is a plausible paraphrase of the First Amendment's broad prohibitions on government interference with religion, but it is ambiguous on the critical element of state action. Condensing it further, to "separation of church and state," accentuates the ambiguity.

Hamburger shows conclusively that separation has equally long and *dishonorable* traditions as a rationalization for Protestant suppression of Catholics and for attempted secular suppression of all organized religion. Each of these usages turns a guarantee of religious liberty on its head, but it is impossible to deny their reality. If substantial political movements use a concept for more than a century, then however bizarre and distorted their usage, it is hard to deny that that usage has become one meaning of the concept. Hamburger surely errs in taking that meaning for granted and in imputing that meaning to everyone else who invokes the same concept. But it seems undeniable that Hamburger's meaning of separation is one meaning.

If to some people separation means protection of religious activity from government, and to other people it means suppression or subordination of religious activity by government, then the phrase has no agreed core of meaning that will enable anyone to communicate. The phrase is deeply entrenched in American society and people will not quit using it. But the apparent lesson of Hamburger's book is that the phrase has no sufficiently agreed meaning to be of any use, and until we develop vocabulary that communicates distinct theories of separation, we should give up the phrase altogether. Thanks to Hamburger's careful history of actual usage, we now know that from the phrase alone, without an analysis of context, we have no idea what people mean by it. ♣

87 370 US 421 (1962).

88 David W Moore, *Two of Three Americans Feel Religion Can Answer Most of Today's Problems*, Gallup Poll Monthly 53, 54 (March 2000).

89 Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum L Rev 1373, 1379 (1981), quoting Arlin M. Adams and William R. Hanlon, *Jones v Wolf: Church Autonomy and the Religion Clauses of the First Amendment*, 128 U Pa L Rev 1291, 1336-37 (1980).

90 See Laycock, 43 Emory L J at 46-47, 65, 73-74 (cited in n. 25).

TEXTBOOK CASE: BIBLE CLASS IN PUBLIC SCHOOL

by Mark A. Chancey



Dr. Mark A. Chancey attended the University of Georgia, where he earned a B.A. in Political Science with a minor in Religion (1990) and a M.A. in Religion (1992). He earned his Ph.D. from Duke University's Graduate Program in Religion in 1999, focusing on New Testament studies and early Judaism. Chancey joined the faculty of SMU in 2000 and was promoted to associate professor in 2006. His research interests include the Gospels, the Historical Jesus, archaeology and the Bible, and the political and social history of Palestine during the Roman period. He is the author of two books with Cambridge University Press, *The Myth of a Gentile Galilee* (2002) and *Greco-Roman Culture and the Galilee of Jesus* (2005); two reports on public school Bible courses; and several articles and essays. He is currently at work on a book-length overview of the archaeology of Palestine from Alexander the Great to Constantine and on a series of articles focusing on the Constitutional, political and academic issues surrounding Bible courses in public education.

This article was originally printed in Christian Century November 14, 2006, 12-13, and is printed here with permission. This article summarizes the findings of a study of the twenty-five Bible courses taught in Texas public schools in 2005-2006. It documents ways in which such courses often promote religious views, in violation of federal court rulings and the Establishment Clause.

When asked about the Bible course at the local public high school, a West Texas minister told the Abilene Reporter News, "My hope is the end result is they read their Bible and start asking questions elsewhere and they become Christians. That's the hope of the community, too."

Sentiments like that would normally not raise an eyebrow. In this case, however, the minister was also the teacher of the course. His comments raise questions about how successful he is in presenting the material "objectively as part of a secular program of education," as required in the 1963 U.S. Supreme Court ruling on the treatment of the Bible in public schools. To what extent is this teacher's presentation of material affected by his hopes that students will adopt his beliefs?

As it turns out, quite a bit. Like almost all of the other public school Bible courses in Texas, this particular course is portrayed by its school district as nonsectarian. The reality is that it is taught primarily from a conservative Protestant perspective. And like most such courses around the country, little has been known about its contents.

To learn what public schools were teaching about the Good Book, Texas Freedom Network Education Fund, affiliated with the Austin-based religious liberties advocacy group Texas Freedom Network, surveyed all 1,031 Texas

school districts. Districts were asked if they had offered a Bible course in the past five years, and if so to provide information about the course, including the syllabus, tests, handouts, a list of textbooks and videos used and a description of the teacher's qualifications.

Twenty-five districts acknowledged teaching such a course in 2005-2006. TFN sent their materials to me to assess if the courses are being taught in the neutral, nonsectarian manner that, in the words of one court, seeks neither "to disparage or to encourage a commitment to a set of religious beliefs."

Only three of the 25 school districts—Leander, Whiteface and North East (San Antonio)—succeeded in offering nonsectarian courses.

Materials from the other 22 classes revealed serious problems. Many used overtly sectarian curricular materials, such as Halley's Bible Handbook, workbooks, or online readings like one titled "Ten Reasons to Believe the Bible," which was assigned in one district. Tests show that the theological claims of such resources were typically presented to students as matters as fact. In some districts the only textbook was the Bible, with the King James and New International versions the most often recommended.

Eleven school districts used the curriculum of the National Council on Bible Curriculum in Public Schools. A

previous examination of this group's course revealed it to be heavily slanted toward fundamentalist Protestant views (see my CENTURY article "Lesson plans: The Bible in the classroom," August 23, 2005).

The NCBCPS claims that its course is taught in over 370 school districts across the nation, including 52 in Texas. If that figure for Texas is true, then 41 Texas school officials provided false information to TFN's legally binding open-records request—a very unlikely possibility. The NCBCPS appears to have greatly exaggerated its numbers.

In most courses, the Protestant Bible is assumed to be the standard. Roman Catholic, Eastern Orthodox and Jewish versions of the canon received little if any attention. The Protestant Bible is usually understood from a conservative theological perspective, often that of inerrancy. Two schools, for example, show a video that argues that copyists have made no changes to the biblical text since it was originally inspired by God. Most depict the Bible as straightforward, unproblematic, wholly accurate history. For example, the early version of the NCBCPS curriculum used by one district attempts to persuade students of the plausibility of the story of Noah's ark by asking questions such as "Approximately how many animals were on the ark the size of a rhesus monkey?" Several of the courses are named simply "Bible History."

Dispensationalist premillennialism makes an appearance in a few districts, whether in lectures or Left Behind videos. So does Christian Americanism, the belief that America was founded as a Christian (i.e., conservative Protestant) nation and that its government should return to those roots. Some courses advocate creation science (one lesson plan, for example, focused on the biblical evidence for dinosaurs) and other forms of pseudoscience, such as the claim that the modern races are descended from Noah's sons. At least one school has apparently presented an urban legend as accurate, teaching its students that NASA had discovered a missing day in time that corresponds to the story of the sun standing still in Joshua 10.

Judaism fares particularly poorly in most Bible courses. The Hebrew Bible is almost always read through a Christian lens. The Christian faith claim that the prophets supernaturally predicted the coming of Jesus is presented as fact; Jewish and other interpretations are rarely mentioned. In one district, an essay question instructs students to write about "how God's purpose and plan of the Old Testament has fulfillment in the New Testament." When a test on Genesis includes the question "Write John 3:16," the perspective of the course as a whole is quite clear.

In several cases, area ministers (almost always Protestants) served as the courses' teachers. More often, the classes were offered by social studies or literature teachers. Only a few had ever had any academic course work in biblical studies.

In some courses, the sectarian elements seem intentional, such as the invitation of a creation scientist to be a guest lecturer at one high school and the presentation

at another of a lecture titled "God's Road to Life," with the starting point "Jesus Christ is the one and only way." Often, though, problematic elements appear to be the result of a lack of training. The materials sent to TFN suggest that when teachers have no specific academic preparation, they rely primarily upon their personal experiences in shaping and presenting the material. The result is that even when they have the best of intentions, their courses often end up promoting whatever religious views they are the most familiar with.

The religious nature of these courses is not their only problem. Many do not reflect high academic standards. Memorization of Bible verses is usually a major component. Examinations often test retention of details both significant and obscure from Bible stories without encouraging analysis or critical thought. Some courses make questionable use of videos. In a recent school year, students at one school watched videos on one-fifth of the class days. Students at another saw Hanna-Barbera Bible cartoons; those at another viewed Veggie Tales videos, which feature computer-animated talking Christian vegetables.

Texas is not the only state in which Bible courses are taught. A study published by People for the American Way in 2000 discovered 14 Bible courses taught from religious perspectives in Florida. The fact that two studies involving several states and made several years apart had such similar findings suggests that these problems may be widespread elsewhere.

In the meantime, public school Bible courses are gaining support from state legislators. In April, Georgia passed a law providing state funding for such courses. Similar bills died in Alabama, Tennessee and Missouri, but are likely to be reintroduced. The Democratic Party of Alabama has already announced a covenant with Alabamans that includes a pledge to increase the number of Bible courses. [Texas dealt with Bible courses in the 2007 regular session, which just ended with a bill that calls for elective Bible courses if 15 students request such a course. It is pending the Governor's signature as we go to press.]

Neither the Georgia law nor the other bills explicitly mention funding for teacher training in biblical studies and church-state issues. The assumption seems to be that a teacher's good intentions are sufficient to guarantee that Bible courses will be taught in a nonsectarian and academically sound manner. The lessons from Texas suggest otherwise. 📌

(Mark A. Chancey's full report, *Reading, Writing, and Religion: Teaching About the Bible in Texas Public Schools*, may be read at the Texas Freedom Network Web site: www.tfn.org).

VOUCHERS WOULD ERODE PROGRESS IN TEXAS PUBLIC SCHOOLS

by **Kathy Miller**



Kathy Miller became president of the Texas Freedom Network in January 2005. Kathy has also served as communications director for the Texas Council on Family Violence and National Domestic Violence Hotline and as public affairs director for Planned Parenthood Federation of Austin. She served as TFN's deputy director from 1996 to 2000. Kathy has appeared on Texas and national broadcast media and has testified before the Texas Legislature and Congress. Kathy created and directed a nationally acclaimed public awareness campaign that included television, radio and print advertising and reached thousands of Texas victims of domestic violence and connected them to lifesaving services. Kathy believes in the tremendous strength of the grassroots and has spent her career focused on mobilizing support for important issues such as women's reproductive freedom, children's health care, public education and ending partner violence. Kathy has trained thousands of individuals from Texas and across the nation on media relations, grassroots organizing and mobilizing to combat radical-right political extremism.

Kathy earned a degree in political science from the University of Texas at Austin in 1991 and attended the University of Texas graduate school, studying philosophy. She is the mother of two daughters, Olivia and Caroline, both attending public school in Austin.

The subject of publicly funded vouchers for private school education has been discussed regularly amongst legislators. Here, Miller discusses the negative impact that would occur from the use of vouchers.

Every day, from El Paso to Texarkana and Dalhart to Brownsville, more than 4.5 million Texas children attend our neighborhood public schools. Those schools exist to fulfill a solemn promise in Article 7 of our state Constitution: "A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools."

Yet every legislative session, lawmakers consider proposals that betray that promise: using tax dollars to fund private and religious schools through vouchers granted to individual families. The state Constitution isn't silent on nonpublic schools, as in Section 5 of Article 7: "The available school fund shall be applied annually to the support of the public free schools. Except as provided by this section, the legislature may not enact a law appropriating any part of the permanent school fund or available school fund to any other purpose. The permanent school fund and the available school fund may not be appropriated to or used for the support of any sectarian school. The available school fund shall be distributed to the several counties according

to their scholastic population and applied in the manner provided by law."

The prohibition against public funding for religious schools is not misplaced. Public funding would almost surely come—and appropriately so—with government oversight. Such oversight would threaten the distinctiveness of private and religious education. Moreover, publicly funded vouchers would be oppressive to many Texans who do not want their tax dollars to fund the teaching of religious views different from their own.

In any case, there is one indisputable fact about any voucher plan: It would drain hundreds of millions of dollars from the very public schools the vast majority of our children attend. Those tax dollars would go instead to private and religious schools that are unaccountable to taxpayers. In fact, private schools don't even have to meet the same standards that taxpayers demand of our public schools.

Polls designed to gauge the popularity of vouchers among Texas voters have varied. Just two years ago, a Texas Poll showed that 55 percent of Texans opposed "allowing public school students to use vouchers to attend private schools using tax dollars for tuition." Only 38 percent of

respondents said they supported vouchers. The trend was clear: opposition had grown from 44 percent in 1998. A recent poll by Texas Lyceum, however, improbably showed that 65 percent of Texans now support the use of tax dollars to allow parents to send their children to the “school of their choice.”

That support for vouchers would have risen from 38 percent of Texans to 65 percent in just a two-year period would seem unlikely. Perhaps questionable wording played a role—“school choice” is the preferred term of those who promote vouchers. In any case, an even more definitive poll occurred in 2006: elections.

In 2006, Dr. James Leininger, a San Antonio businessman and longtime proponent of private school vouchers, poured about \$3 million into a handful of carefully selected Texas House election races. Dr. Leininger hoped to knock off a handful of Republican incumbents who had helped defeat a voucher proposal in the 2005 Legislature. Meanwhile, vouchers became a key issue in many other legislative races around the state.

Dr. Leininger succeeded in defeating just two anti-voucher incumbents, in one case by the slimmest of margins. On the other hand, a number of pro-voucher candidates went down in flames across the state. Even House Public Education Committee Chairman Kent Grusendorf, R-Arlington, one of the Legislature’s most powerful voucher backers, lost his bid for re-election.

Then during this year’s legislative session, the House voted overwhelmingly—129-8—to bar any public funding in the next biennial state budget for private school vouchers. A House-Senate conference committee ultimately dropped that measure from a final state budget bill, but the message sent by that initial vote was clear: House members wisely feared having to defend a pro-voucher vote to legions of skeptical parents of public schoolchildren back home. In fact, no voucher bill even made it to the floor of either the House or the Senate this year.

The refusal by lawmakers to pass voucher legislation shouldn’t surprise anyone. When lawmakers—and voters—learn the facts about such schemes, any support for vouchers drops.

First, Texas simply can’t afford vouchers. Lawmakers promised in 2005 to increase funding for our neighborhood public schools. Passing a voucher scheme, which would shift funding from public to private schools, would make that promise meaningless.

Second, growing evidence discounts claims made by voucher proponents that private schools do a better job than public schools. For example, a 2006 study from President Bush’s Department of Education found that, when factors such as race and wealth are accounted for, students at public and private schools scored about the same on national fourth- and eighth-grade math and reading exams. Of course, Texas doesn’t even assess the performance of private schools.

Third, voucher programs often fail the very students supporters claimed they would help. In some cases, as

in Florida, private schools taking vouchers for students with disabilities weren’t even required to hire teachers certified to teach special education classes. Lawmakers in some states have launched voucher schemes for low-income students and then moved soon after to expand the programs to include wealthier families.

Fourth, private schools “cherry pick” the best students, leaving most children in public schools that—because of vouchers—have to make do with fewer resources. In the first year of Cleveland’s voucher program, for example, about half the students awarded vouchers were denied entrance to private schools due either to lack of space or because the children did not meet school requirements.

Vouchers are simply not the path to better schools. In truth, we already know what works. Texas embarked on important education reforms beginning more than two decades ago. We know that smaller class sizes, early reading intervention, strong teacher certification standards, and equitable funding for low-income school districts helps Texas schoolchildren succeed. But vouchers would erode the progress our schools have made under those reforms.

Edgewood Independent School District in San Antonio is a prime example of the importance of maximizing public school resources. The district is one of the state’s most economically disadvantaged, but schools there have been making steady progress since the state moved in 1993 to improve funding for low-income districts. In that year, Edgewood had nine “low-performing” schools and none rated as “recognized” or “exemplary.” By 1997, just four years later, Edgewood had no “low-performing” schools and two “recognized” schools. All of that fantastic progress occurred before a privately funded voucher program began there.

The responsibility of our state’s leaders is to ensure that all Texas children—whether in Edgewood or Highland Park—attend top-notch public schools. They can do that, but only if they resist the false promise of vouchers, which would endanger the education of millions of Texas schoolchildren. 📌

The Texas Freedom Network is a nonpartisan, grassroots organization that supports public education, religious freedom and individual liberties.

PUBLIC DISPLAYS OF RELIGIOUS IMAGERY AND SYMBOLS

by Charles W. “Rocky” Rhodes



Charles W. “Rocky” Rhodes is a Professor of Law at South Texas College of Law in Houston, where he has taught Constitutional Law, First Amendment, Civil Procedure, State Constitutional Law, and Complex Litigation courses since joining the faculty in 2001. He graduated at the top of his class from Baylor University School of Law and became Editor-in-Chief of the *Baylor Law Review*. He later served as a briefing attorney for Justice Raul Gonzalez and as a staff attorney for Justice Greg Abbott at the Supreme Court of Texas, practiced appellate law at Locke Liddell & Sapp, and earned his board certification in Civil Appellate Law by the Texas Board of Legal Specialization. He has authored more than a dozen articles on constitutional and procedural issues, and has been interviewed in well over one hundred media stories, including National Public Radio’s Morning Edition, BBC Radio’s World Business News, National Public Radio’s Day to Day, Bloomberg Radio, and newspapers across the nation, including the *Washington Post*, *Dallas Morning News*, *Washington Times*, *Christian Science Monitor*, and *Houston Chronicle*.

Key cases dealing with public displays with religious content are described and explained.

The Supreme Court’s public religious display cases have a Tolkien quality. Frequently, the critical issue in the dispositive opinion is whether a hypothetical reasonable observer, who is deemed aware of all the facts and circumstances behind the display, would determine that the display either endorses or was designed to sanction religion. But this analysis is fanciful, as no such “reasonable observer” exists when it comes to religion and the state. Any observer will be heavily influenced by his or her own perception as to the appropriate role of religion in public life. For some, any governmental display acknowledging religion is highly offensive. For others, any dilution of religious imagery is equally offensive. Those remaining are frequently indifferent, sometimes not even noticing the displays that are so offensive to others. Who, then, is “reasonable”—the committed secularist, the evangelical, or the oblivious?

To sidestep this dilemma, the Justices employing this approach have conjured an extremely well-informed hypothetical observer who understands that government frequently accommodates religious imagery and practices, yet nevertheless objects vehemently if the government has crossed the “endorsement” threshold.¹ Not surprisingly,

this fictional reasonable observer standard has engendered a fuzzy compromise, whereby governmental displays of religious imagery are typically acceptable only if any religious meaning has been trivialized by an overarching secular message.

This paper explores the Supreme Court decisions addressing the constitutionality of governmental displays with religious imagery and symbols.² These cases can be separated into two groups—temporary holiday displays and permanent religious displays.

THE HOLIDAY DISPLAY CASES

The Supreme Court’s first public holiday display case, *Lynch v. Donnelly*, addressed the Christmas mélange owned by Pawtucket, Rhode Island and exhibited annually in a private park in the city’s shopping district.³ The display contained an array of figures and decorations amidst colored lights and a “SEASONS GREETINGS” banner, including Santa’s house, his sleigh, reindeer, a

¹ See, e.g., *McCreary County v. ACLU of Ky.*, 545 U.S. 844, 862 (2005); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779-80 (1995) (O’Connor, J., concurring).

² The paper thus does not address those situations in which the government merely makes its property available for private speech to anyone on a non-discriminatory, religiously neutral basis. See, e.g., *Capitol Square*, 515 U.S. at 770-76 (holding that the Ku Klux Klan’s desire to erect a Latin Cross on state-owned plaza available to anyone for expressive purposes near the state capitol would not violate the Establishment Clause).

³ 465 U.S. 668 (1984).

Christmas tree, candy-striped poles, a talking wishing well, carolers, and other cutout figurines. But among this secular merriment, the city also included (and had done so for more than forty years) its almost-life sized nativity scene, comprised of figures ranging in height from 5" to 5' of the Baby Jesus, Mary, Joseph, the Magi, angels, shepherds, and assorted animals.⁴ The crèche's inclusion in Pawtucket's display formed the basis for the plaintiffs' assertion that the city was impermissibly attempting to endorse and promulgate religious beliefs.

Not so, according to Chief Justice Burger's opinion for the Court. His opinion began by recounting various historical practices of the Founding Fathers to illustrate that the contemporaneous understanding of the Establishment Clause did not countenance complete separation of church and state.⁵ Instead, the same Congress that approved the Establishment Clause employed congressional chaplains to offer prayers in Congress (a practice continuing to this day), and President Washington, at the urging of that first Congress, proclaimed a day of public thanksgiving and prayer.⁶ This early understanding is still prevalent, according to the Court, as the nation celebrates national holidays (with pay for federal employees) on Thanksgiving and Christmas, our country's motto is "In God We Trust," the Pledge of Allegiance contains the phrase "one nation under God," and the government displays many pieces of art and sculpture with religious significance. Accordingly, the Court viewed a rigid categorical application of the Establishment Clause as both ahistorical and naive—instead, its interpretation must be sensitive to the need to respect diversity and pluralism in modern society.⁷

The Court then examined the "*Lemon* test," which considers whether the challenged governmental action has a secular purpose, advances or inhibits religion in its primary effect, and excessively entangles government with religion.⁸ Although the Court cautioned that not all Establishment Clause challenges could be resolved under this approach, it nevertheless found the purpose-primary effect-entanglement criteria helpful in evaluating the Pawtucket display.⁹

The Court first considered the proper lens for viewing the secular purpose query. The trial court's purpose-analysis singularly focused on the motivation for adding the crèche to the otherwise secular display, reasoning that the pervasive religious nature of the nativity scene belied any alleged secular purpose for its inclusion in the holiday exhibit. The Supreme Court, however, concluded that a wider focus was required, viewing the crèche in the larger context of the display as a whole and the Christmas season in general.¹⁰ In this light, the city's valid secular purposes for the crèche essentially mirrored its

permissible motivations for the entire display—to celebrate the Christmas holiday and depict its origins.¹¹

The crèche's symbolic recognition of the Christian contribution to the holiday season also did not, according to the Court, have the primary effect of advancing religion. The Court compared any "indirect, remote, and incidental" benefits inuring to religion from the city's nativity scene to other practices that had been upheld against Establishment Clause challenges, such as legislative prayers, certain governmental grants and tax exemptions, and Sunday closing laws.¹² As the crèche did not advance religion any more than any of these other practices, it satisfied the second prong of the *Lemon* standard.

Finally, the Court opined that Pawtucket's use of the crèche did not create an excessive entanglement between religion and government. The city itself owned the crèche, and had not consulted with any church authority regarding its design or content. Moreover, although this litigation had obviously engendered a degree of divisiveness, forty years of calm had preceded the present storm.¹³ Thus, the display was permissible under all three of the *Lemon* criteria.

Justice O'Connor, while joining Chief Justice Burger's majority opinion, also wrote separately to propose an endorsement analysis as a "clarification" of Establishment Clause doctrine.¹⁴ Under her proposal, the critical inquiry is whether the government's conduct endorses or disapproves of religion, considering both the subjective intent of the actors and the objective message conveyed.¹⁵ Here, according to Justice O'Connor, Pawtucket was not intending to endorse religion, but instead to celebrate a public holiday through traditional symbols, which was also the objective message the crèche conveyed.¹⁶

Justice Brennan, joined by Justices Marshall, Blackmun and Stevens, dissented, challenging the majority's underlying premise that the entirety of Pawtucket's display somehow diluted the religious significance of the nativity.¹⁷ The nativity, the dissent reasoned, symbolizes a distinctly religious idea of the miraculous birth of a divine Savior. As this message was not necessary to accomplish the city's valid secular objectives of celebrating the holiday and promoting retail sales and goodwill, the dissent surmised that the true motivation behind the crèche's inclusion was the impermissible religious purpose of keeping "Christ" in Christmas.¹⁸ Moreover, the city's ownership and display of the crèche provided special treatment for Christianity and therefore constituted an unconstitutional governmental symbolic approval of Christian religious beliefs.¹⁹ And while the crèche had not generated an

11 *Id.* at 681.

12 *Id.* at 681-83.

13 *Id.* at 684.

14 *Id.* at 688 (O'Connor, J., concurring).

15 *Id.* at 690.

16 *Id.* at 691-94.

17 *Id.* at 697 (Brennan, J., dissenting).

18 *Id.* at 699-701.

19 *Id.* at 701-02.

4 *Id.* at 671.

5 *Id.* at 673-74.

6 *Id.* at 674-75 & n.2.

7 *Id.* at 676-78.

8 See *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

9 *Lynch*, 465 U.S. at 679.

10 *Id.* at 679-80.

excessive governmental entanglement with religion before this lawsuit, the dissent noted that political divisiveness had erupted since the lawsuit and would presumably continue.²⁰ As a result, the dissent determined the crèche violated each part of *Lemon*.

Justice Brennan's *Lynch* dissent also highlighted a critical omission from the Court's litany of early religious historical practices. Because Puritans, Presbyterians, Congregationalists, Baptists, and Methodists were predominantly opposed to celebrating Christ's birth until the mid-1800s, no early American tradition existed supporting the public celebration of the Christmas holiday.²¹ Indeed, in colonial Massachusetts for a period of time, celebrating Christmas even in private was a criminal offense punishable by fine.²² Christmas was not recognized as a legal holiday in any state until 1836, and thereafter it was only gradually adopted as a holiday by the federal and state governments over the next half-century.²³ Thus, an unbroken history of widespread acceptance of public nativity scenes as part of governmental celebrations of Christmas simply did not exist in America. Instead, this practice began at the earliest in the late stages of the 19th Century, which the dissent contended distinguished religious holiday displays from the legislative prayers and religious tax exemptions that had been extant since the founding.

Lynch was not the last word from the Supreme Court on the permissibility of religious symbols in governmental holiday displays, as the issue returned in *County of Allegheny v. ACLU, Greater Pittsburgh Chapter*.²⁴ This case involved two displays, and a splintered Court rendered a split decision. The first challenged display was a crèche depicting the nativity positioned before the grand staircase inside the Allegheny County Courthouse, with an angel at the manger's crest bearing a banner proclaiming "Gloria in Excelsis Deo."²⁵ The second display, situated outside the City-County Building, consisted of an 18-foot Chanukah menorah, a 45-foot decorated Christmas tree, and a sign under the tree saluting liberty.²⁶ The Court invalidated the first display, while upholding the second display, although shifting allegiances that would have made the fictional pirate Captain Jack Sparrow proud were necessary to achieve this result.

Justice Blackmun announced the judgment of the Court and authored the principal opinion, with some portions attracting a Court majority and other portions being his alone. His evaluation of the nativity for the Court reduced the controlling issue to whether the effect of the crèche's display was to endorse religion.²⁷ He had little trouble in

concluding that it did. Not only was the crèche by its very nature promoting a religious message of the divine Christ, but the angel was reinforcing this message by pronouncing "Glory to God in the Highest." Nor was there anything in the context of display, unlike in *Lynch*, that detracted from the religious message—no secular images of Santa Clause, reindeer, talking wishing wells, or other seasonal tidings tempered the crèche's pietistic import.²⁸ The government, then, according to the Court, was impermissibly lending its support to a religious message, a clear violation of the Establishment Clause.²⁹

Justice Kennedy, joined by Chief Justice Rehnquist and Justices Scalia and Thomas, disagreed.³⁰ He contended that the principal or primary effect of the nativity scene's presence in the courthouse did not impermissibly advance religious beliefs, as the government had not coerced anyone to support a religion or participate in any pious exercise. While the government's symbolic recognition of religious faith might violate the Clause in an extreme case, such as supporting an obvious effort to proselytize on behalf of a particular religion, full governmental participation in holiday celebrations with both a secular and religious component was not an Establishment Clause violation.³¹ Indeed, to Kennedy, barring the government from acknowledging the religious aspect of such holiday celebrations would constitute a callous indifference to religion that was not justified by our nation's historical practices.³² Those who disagreed with the messages imparted by such religious symbols could freely ignore them. As there was no suggestion here that the government had proselytized through either the crèche or the menorah, both were permissible.³³

Justice Blackmun, however, perceived a critical difference between the crèche and the menorah. The menorah, he explained, is the dominant visual symbol for a holiday with both religious and secular dimensions, so the dispositive question was whether a reasonable observer would view the combined display of the Christmas tree and the menorah with a sign celebrating liberty as a permissible celebration of the winter-holiday season or an impermissible endorsement of both the Christian and Jewish faiths.³⁴ After reasoning that the Christmas tree is a

been considered by the court of appeals. See *Id.* at 594 n.45.

28 *Id.* at 598.

29 *Id.* at 601-02. Although an accompanying sign correctly announced that the Roman Catholic Holy Name Society owned the nativity scene, the Court still maintained the location of the crèche articulated an impermissible governmental endorsement of a religious message. *Id.* at 600-01. The courthouse's grand staircase was not a public forum available to all on a non-discriminatory basis, compare Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995), and the county had issued press releases clearly associating itself with the crèche. *Allegheny*, 492 U.S. at 600 n.50.

30 *Id.* at 655 (Kennedy, J., concurring in the judgment in part & dissenting in part).

31 *Id.* at 659-61.

32 *Id.* at 663-64. Justice Kennedy later summarized these historical practices, essentially adding more detail to those mentioned by Chief Justice Burger in *Lynch*. See *Allegheny*, 492 U.S. at 671-73.

33 *Id.* at 664-65.

34 *Id.* at 614-15 (Blackmun, J., separate opinion). Justice Blackmun reasoned that a governmental celebration of the religious nature of both holidays

20 *Id.* at 704.

21 *Id.* at 722.

22 *Id.* at 721.

23 *Id.* at 723.

24 492 U.S. 573 (1989).

25 *Id.* at 580 (Blackmun, J., plurality).

26 *Id.* at 581-82, 587.

27 *Id.* at 592 (majority opinion). The Court did not address the other *Lemon* prongs of "purpose" and "entanglement" as they had not

primarily secular symbol of Christmas, Justice Blackmun then concluded that the tree's presence emphasized the secular aspects of the Chanukah menorah, especially because the tree predominated over the menorah in the display both dimensionally and spatially.³⁵ Thus, to Justice Blackmun, the combined display promoted the message of a "secular celebration of Christmas coupled with an acknowledgment of Chanukah as a contemporaneous alternative tradition."³⁶

Justice O'Connor agreed with Justice Blackmun that the crèche and the menorah displays warranted different holdings, but she disagreed with his analysis of the secular message the menorah conveyed. In contrast to the modern secularity of the Christmas tree, the menorah, Justice O'Connor argued, remains the chief religious symbol and ritual object of a religious holiday.³⁷ As a result, she viewed the relevant question as whether the entire display, with the tree, menorah, and the sign saluting liberty, communicated an impermissible endorsement of Judaism or a permissible salute to pluralism, freedom of conscience, and religious tolerance. She concluded that the reasonable objective viewer would perceive the latter, especially after contemplating the sign that saluted liberty and pronounced the festive lights in the display symbolic reminders of America's legacy of freedom and liberty.³⁸

Justices Brennan, Marshall, and Stevens disagreed that the menorah display was constitutional, contending that the governmental display of any object with a religious meaning violates principles of the separation of church and state.³⁹ To these dissenters, the presence of the menorah by the Christmas tree highlighted the religious aspects of the tree, especially because the menorah was lit in a religious ceremony complete with pietistic blessings. The dissenters, then, adopted the converse of Justice Blackmun's reasoning, maintaining that the menorah changed the message of the tree, rather than the tree changing the message of the menorah.⁴⁰

The splintered reasoning of the Justices in *Allegheny* provides a microcosm of the difficulties with the Supreme Court's Establishment Clause jurisprudence. The Court's hopeless internal division on the appropriate standard to be applied provides minimal guidance for future decisions. The end result appears to be that religious symbols can be incorporated into a holiday display, but only if their religious significance has been diluted by the presence of enough secular objects that the reasonable

objective observer could discern a secular message from the entire display. It's an uneasy compromise, but such compromises are frequently encountered in Establishment Clause doctrine.

PERMANENT RELIGIOUS DISPLAYS

The Supreme Court's cases on permanent religious displays all address governmental exhibition of the Ten Commandments. The Court first considered the constitutionality of a Decalogue posting in the public school context, in *Stone v. Graham*.⁴¹ A Kentucky statute required that a "durable, permanent copy of the Ten Commandments shall be displayed on a wall" in each public classroom in the state.⁴² But the Court, in a per curiam opinion issued over the objections of several dissenters,⁴³ invalidated the statute under the *Lemon* test, discerning no secular legislative purpose behind the display.⁴⁴ Although Kentucky urged that the requisite secular purpose was evident in the statutorily mandated disclosure on the bottom of each display that the Ten Commandments have been adopted "as the fundamental legal code of Western Civilization and the Common Law of the United States," the Court determined that this legislative recitation of a supposed secular purpose could not distort the reality of the sacredness of the Decalogue in the Jewish and Christian faiths, especially as the Commandments were not confined to secular matters but also specified the religious duties of adherents. While perhaps the Ten Commandments could be studied in courses on history, comparative religion, or ethics, the statutory mandate to post a copy in each public school classroom was clearly intended to expose the students to, and hopefully facilitate their contemplation of, the religious commands dictated by the Judeo-Christian God.⁴⁵

Two terms ago, questions regarding the constitutionality of governmental displays of the Ten Commandments returned to the Court, in separate cases from Kentucky and Texas. And in a reprise from *Allegheny*, the Court rendered a split decision, complete with several separate opinions.

The Kentucky case, *McCreary County v. ACLU of Kentucky*, addressed thrice-modified displays of the Decalogue in highly trafficked halls in two Kentucky county courthouses.⁴⁶ Initially, the counties each posted, in a public hallway in their courthouses, a solitary copy of an abridged text of the Ten Commandments from the King

would endorse both Judaism and Christianity and be no less infirm than endorsing Christianity alone. However, the Establishment Clause would not be violated by celebrating Christmas and Chanukah as secular holidays. *Id.*

35 *Id.* at 617 (noting the Christmas tree was over 22 times larger than the menorah and was centered prominently under an arch in the building with the menorah off to the side).

36 *Id.* at 617-18. This was especially true for Justice Blackmun because there was not a predominantly secular symbol of Chanukah that the city could use to replace the menorah. *Id.* at 618.

37 *Id.* at 633 (O'Connor, J., concurring).

38 *Id.* at 634-35.

39 *Id.* at 637 (Brennan, J., concurring in part and dissenting in part).

40 *Id.* at 641-42.

41 449 U.S. 39 (1980) (per curiam).

42 *Id.* at 39 & n.1.

43 Chief Justice Burger, joined by Justice Blackmun, and Justice Stewart dissented with short statements, the Chief contending that the case should be given plenary consideration and Justice Stewart objecting to the Court's summary reversal when the state courts applied the correct constitutional standards. *Id.* at 43 (Burger, C.J., dissenting statement); *Id.* at 43 (Stewart, J., dissenting statement). Justice Rehnquist filed a dissenting opinion, arguing the state did have a secular purpose, as evident in the statutory text. *Id.* at 43-44 (Rehnquist, J., dissenting).

44 *Id.* at 40-41 (per curiam).

45 *Id.* at 41-42.

46 545 U.S. 844 (2005).

James Bible's Book of Exodus.⁴⁷ When the ACLU challenged the displays a few months later, the counties almost immediately authorized an expanded second display, with eight other documents highlighting religious themes in smaller frames surrounding the Ten Commandments, such as the Declaration of Independence, the National Motto, the Kentucky Constitution's preamble, the Mayflower Compact, and various presidential and congressional proclamations.⁴⁸ After losing in the federal district court on this second display and hiring new attorneys, the counties installed a third collection, entitled "The Foundations of American Law and Government Display." This collection consisted of nine framed documents of equal size, containing an edited King James version of the Ten Commandments (although not as abridged as in the first two displays), the documents from the second display (other than the proclamations), and four added documents—the Magna Carta, Bill of Rights, lyrics of the Star-Spangled Banner, and a picture of Lady Justice.⁴⁹

The majority, in an opinion authored by Justice Souter, concluded that these displays were motivated by an impermissible purpose under *Lemon* and hence were unconstitutional. As in *Stone*, the Court highlighted the religious nature of the Decalogue's text, which proclaims the existence of a single God who must be accorded undivided allegiance exhibited by compliance with divine commands that even inform the secular prohibitions that follow. Thus, to the reasonable observer, the posting of the Commandments in the first display endorsed an undeniably sectarian message espousing both religious and moral obligations subject to deific sanction.⁵⁰ And the second display fared no better; as the only common element among the displayed passages from the selected documents was that they referenced God, clearly indicating an impermissible sectarian purpose.⁵¹

While the counties argued that the third display should be considered independently of the earlier displays, the Court disagreed that a reasonable observer would ascertain that the counties had disavowed their earlier sectarian purposes, especially because the final display quoted even more of the purely religious text of the Decalogue than the earlier ones had. Plus, the selection of the alleged "foundational" documents was somewhat suspect, as it omitted such significant documents as the Constitution and the Fourteenth Amendment while including the Magna Carta and the national anthem. The Court reasoned that such selections would indicate to a reasonable observer aware of the prior displays that the counties "were simply reaching for any way to keep a religious document on the

walls of courthouses constitutionally required to embody religious neutrality."⁵² As such, the purpose of the third display was predominantly religious, violating the *Lemon* standard.

Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, and in part by Justice Kennedy, disagreed vehemently.⁵³ Justice Scalia first urged that this nation's consistent practices since its founding of acknowledging the existence of a monotheistic God in numerous contexts, such as prayers opening legislative sessions, public days of prayer and thanksgiving, and our civic creeds relying on God, belied any claim that public honoring of the Ten Commandments could be understood as a governmental endorsement of a particular religious viewpoint, unless perhaps the government sanctioned a specific version of the Decalogue as authoritative.⁵⁴ Next, even assuming for the sake of argument that the *Lemon* standard was appropriate, the dissenters maintained that these displays were still constitutional. The third display had the permissible secular purpose, according to the dissent, of exhibiting documents with a significant role in developing our governmental and legal system. The Decalogue is properly included within such an exhibit because of its unique contribution to the development of the American legal system, aptly illustrated by the several depictions of Moses holding the stone tablets in the Supreme Court building and on other public monuments and buildings throughout Washington, D.C.⁵⁵ The counties' two earlier displays were also constitutional under the dissent's view as the passive display of religious texts such as the Commandments do not compel the observance of or participation in any religious ceremony or activity.⁵⁶ The dissent simply could not fathom that celebrating the historic role of religious belief in our national life could violate the Establishment Clause.

The *McCreary* dissenters obtained a partial vindication of their preferred principle in the companion case from Texas, *Van Orden v. Perry*.⁵⁷ *Van Orden* involved a donated 6-foot high and 3-foot wide granite monolith located on the grounds of the Texas State Capitol and inscribed with the Ten Commandments. The twenty-two acres surrounding the capitol also contained sixteen other monuments and twenty-one historical markers commemorating the "people, ideals, and events that compose Texan identity."⁵⁸ An Austin resident alleged, some forty years after the monument's donation by the Fraternal Order of the Eagles, that its placement on state grounds violated the Establishment Clause.⁵⁹ The Court disagreed, but was unable to reach a majority consensus on the appropriate rationale.

⁴⁷ *Id.* at 851-52. Even though Christianity and Judaism both generally ascribe religious meaning to the Decalogue, there are distinctions in the text and numbering of God's Commandments between various religious sects, such that even different denominations within a particular faith may not follow the same version. See *Van Orden v. Perry*, 545 U.S. 677, 717-18 (Stevens, J., dissenting).

⁴⁸ *McCreary*, 545 U.S. at 853-54.

⁴⁹ *Id.* at 855-56.

⁵⁰ *Id.* at 868-69.

⁵¹ *Id.* at 870.

⁵² *Id.* at 872-73.

⁵³ *Id.* at 885 (Scalia, J., dissenting).

⁵⁴ *Id.* at 894 & n.4. Justice Kennedy did not join this portion of the dissent.

⁵⁵ *Id.* at 904-07.

⁵⁶ *Id.* at 909-10.

⁵⁷ 545 U.S. 677 (2005).

⁵⁸ *Id.* at 681 (Rehnquist, C.J., plurality) (quoting Tex. H. Con. Res. 38, 77th Leg. (2001)).

⁵⁹ *Id.* at 682. The Fraternal Order of the Eagles is a national social, civic, and patriotic organization. *Id.*

Chief Justice Rehnquist announced the Court's judgment and authored a plurality opinion joined by Justices Scalia, Kennedy, and Thomas. Chief Justice Rehnquist acknowledged that the Court's Establishment Clause jurisprudence had two separate polestars—one focused on the importance of religion throughout our nation's history, and the other centered on the concern that governmental intervention in religious matters can itself endanger religious freedom.⁶⁰ Reasoning that the *Lemon* test was not faithful to both of these principles in the context of a passive monument on state grounds, the plurality instead analyzed the nature of the monument in light of this nation's historical practices. Because of this nation's unbroken history of official acknowledgments of religion, including numerous depictions of Moses bearing the Ten Commandments around the nation's capital, and because the monument was passively displayed on state grounds rather than posted in every classroom as in *Stone*, Chief Justice Rehnquist concluded that the Establishment Clause had not been violated.⁶¹

Justice Breyer concurred, providing the crucial fifth vote upholding the monument's constitutionality.⁶² He viewed the display as presenting a "difficult borderline" case which required the exercise of "legal judgment" rather than rote application of rules and standards.⁶³ While acknowledging that the Decalogue's text highlighted an undeniably religious message, he concluded that the surrounding context conveyed a permissible secular moral and historical message. The monument itself specified that it had been donated by a private civic organization, the monument was situated within a large park designed to illustrate the ideals of Texans, and a nonsectarian text had been purposefully chosen to be as inclusive as possible. But the most important factor to Justice Breyer apparently was that the monument had been unchallenged for forty years.⁶⁴ Justice Breyer feared that striking down this display would encourage further disputes concerning the removal of longstanding depictions of the Ten Commandments from public buildings across the nation, engendering the very religiously based divisiveness the Establishment Clause was intended to prevent.⁶⁵ It might be said, then, that Justice Breyer "grandfathered" older Ten Commandments depictions while indicating his hesitancy to uphold new depictions in the absence of an identifiable secular message.

Justices Stevens, O'Connor, Souter, and Ginsburg objected in three separate dissents.⁶⁶ Justice Stevens, joined by Justice Ginsburg, urged that the only purpose

of the monument was to display the full sacred text of the Ten Commandments—it was not a work of art, did not refer to the history of state, or have any apparent connection to the other monuments on the capitol grounds.⁶⁷ Instead, the Eagles donated the monument with the specific purpose of exposing young people to the Ten Commandments in order to combat juvenile delinquency. While acknowledging that such a purpose was noble, Justice Stevens nevertheless decided that it was an impermissibly religious one. Unlike the other capital displays referenced by the plurality that merely depicted Moses holding the tablets, here the undeniably religious text of the Commandments had been transcribed *in toto*, emphasizing the sectarian nature of these deistic obligations.⁶⁸ Justice Souter, joined by Justices Stevens and Ginsburg, detailed similar themes in his dissent, contending that a governmental display of a religious text cannot be squared with neutrality unless the circumstances exhibit some other motivation besides religious indoctrination. Here, the religious text was actually emphasized on the monument, with the capitalization in "I AM the LORD thy God" rendering it the most eye-catching portion.⁶⁹ Unlike in *Lynch*, Justice Souter did not believe that the seventeen monuments scattered over twenty-two acres of the capitol grounds negated this impermissible religiosity.⁷⁰

The splintered opinions left little beyond the holdings in the two cases settled. The Court did not provide a simple answer to the question of the permissibility of governmental displays of the text of the Ten Commandments. To four Justices, the answer to this question is "usually," unless the government was supporting proselytization or a particular religious sect; to four others Justices, the answer is "rarely," unless a clearly secular message is conveyed; and to the remaining Justice, the answer depends on a number of factors, including the age of the display. But all this may be subject to change with the recent changes in the composition of the Court.

CONCLUSION

Almost all of the religious display cases were decided by a single vote, which frequently belonged to Justice O'Connor. And even when her vote did not decide the case, her endorsement "clarification" of the Establishment Clause was frequently relied upon by the Justice that did.

But now, with Justice O'Connor's replacement by Justice Alito, the approach championed by Justice Kennedy in *Allegheny* will probably become the dispositive standard. Based on their voting patterns and methodological tendencies so far, Chief Justice Roberts and Justice Alito presumably will adopt Justice Scalia's approach from

60 *Id.* at 683.

61 *Id.* at 690-92. While joining Chief Justice Rehnquist's plurality opinion, Justices Scalia and Thomas also wrote separately. *See Id.* at 692 (Scalia, J., concurring); *Id.* at 692 (Thomas, J., concurring).

62 *Id.* at 698 (Breyer, J., concurring).

63 *Id.* at 700.

64 *Id.* at 701-02.

65 *Id.* at 704.

66 *Id.* at 707 (Stevens, J., dissenting); *Id.* at 737 (O'Connor, J., dissenting); *Id.* at 737 (Souter, J., dissenting).

67 *Id.* at 707 (Stevens, J., dissenting).

68 *Id.* at 713-15.

69 *Id.* at 737-38 (Souter, J., dissenting).

70 *Id.* at 742-43. Justice O'Connor stated in her one sentence dissent that she was dissenting for "essentially the reasons given by Justice Souter." *Id.* at 737 (O'Connor, J., dissenting).

the first section of his *McCreary* dissent,⁷¹ which would authorize any governmental religious involvement arguably supported by our nation's historical practices, as long as the action did not prefer one religious sect over another. However, Justice Kennedy's prior jurisprudence indicates that he will not be willing to go quite that far.

Justice Kennedy declined to join this first section of Justice Scalia's *McCreary* dissent, and he has parted company from Justices Scalia and Thomas on the permissibility of prayers at public school graduations and football games.⁷² Moreover, Kennedy's *Allegheny* dissent illustrated that he would find certain religious displays objectionable. His approach might be described colloquially as the "look away" standard—depictions that are unobtrusive enough that those offended can easily avert their eyes will be upheld, but those displays that are obtrusive enough to be viewed as placing government's weight behind an apparent effort to proselytize on behalf of a particular religion will be invalidated. Unfortunately for those seeking a more definitive standard, Kennedy's approach will not provide it. But the more important concern is whether Justice Kennedy's approach will be applied to remain true to the Establishment Clause's role in safeguarding the religious freedoms all Americans enjoy. 🇺🇸

71 See Charles W. "Rocky" Rhodes, *Public Employee Speech Rights Fall Prey to an Emerging Doctrinal Formalism*, 15 WM. & MARY BILL RTS. J. 1173, 1202-04 (2007) (discussing Chief Justice Roberts and Justice Alito's frequent agreement with Justices Scalia and Thomas).

72 See, e.g., *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Lee v. Weisman*, 505 U.S. 577 (1992).

AN INTRODUCTION TO PUBLIC INTEREST LAW AND ITS ROLE IN ESTABLISHMENT CLAUSE AND FREE EXERCISE LITIGATION

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Public Interest Law Firms play a key role in litigation concerning church/state separation. This article provides a brief introduction to the field of public interest law.

The field of public interest law is diverse and hard to define. In general, the term “public interest law” refers to non-profit practice that provides legal representation 1) to those unable to access the services of attorneys at commercial law firms because of a lack of financial resources or an unpopular cause, or 2) in support of a movement for social change or particular policy agenda. The unifying characteristic of public interest lawyers is that they work to advance a vision of the social good rather than for their own financial gain.

THE ROOTS OF PUBLIC INTEREST LAW

Public interest law traces its roots to the early twentieth century and three main practice areas: poverty, civil liberties, and civil rights. Poverty law began with the establishment of legal aid societies in major cities. These organizations provided legal representation to the poor and were supported by charitable contributions, the private bar, and grants from local governments. In the early 1960s, as part of the war on poverty, the federal government began funding legal services for the poor through the Office of Economic Opportunity. In 1974, Congress created the Legal Services Corporation (LSC) to provide public funding for legal services to the indigent in civil cases through grants to a nationwide network of non-profit legal services offices.

Although the original legal aid programs often dealt with the problems of the poor on an individual client basis in much the same manner as traditional law practice, many legal services offices embraced the “law reform approach” and brought “impact litigation” aimed at addressing the systemic causes of poverty. This movement flourished in the poverty law community until the mid-1990s, when a series of restrictions were imposed on LSC grantees in an effort to quash impact litigation.

Public interest practice in the area of civil liberties can be traced to the predecessor to today’s American Civil Liberties Union (ACLU). Created in 1916 as the American Union Against Militarism, and later known as the National Civil Liberties Bureau, the ACLU’s predecessor groups were formed to defend conscientious objectors and pacifists opposed to the United States entry into World War I. The group later expanded the scope of its work to defend and advance the constitutional rights of a wide range of political and social minorities.

Public interest law is also rooted in the struggle for racial equality. In 1909, the National Association for the Advancement of Colored People (NAACP) was established to promote equal rights for African-Americans. The NAACP soon initiated a long-term strategy to use litigation to end discrimination in housing, education, and employment. In

1940, this strategic litigation campaign was assumed by a separate entity, the NAACP Legal Defense and Educational Fund (LDF), which won a series of landmark cases including the 1954 decision in *Brown v. Board of Education*. LDF continues to pursue racial justice by litigating civil rights cases in a variety of areas including education, voter protection, economic justice, and criminal justice.

THE TRADITIONAL PUBLIC INTEREST LAW FIRMS

During the late 1960s and early 1970s, dozens of non-profit law groups were formed to use litigation as a strategy to advance a wide number of causes such as environmental protection, women's equality, consumer protection, and government and corporate accountability. These Public Interest Law Firms (PILFs) developed specialties and made strategic choices about what cases to bring, often identifying "test cases" that could be used as a vehicle to "make law" that would advance social change, reform institutions, or shape constitutional doctrine. Some PILFs were stand-alone law offices and others were the litigating division of a membership organization involved in policy work in fora other than the courts. These PILFs were closely identified with the political left, and the phrase "public interest law" was widely understood as applying to the non-profit practice of law in support of progressive movements.

THE CONSERVATIVE PUBLIC INTEREST LAW FIRMS

In reaction to the success of the traditional PILFs in using litigation to advance a progressive agenda, the conservative movement established its own PILFs to pursue its policy goals. The conservative PILFs adopted both the strategies and the rhetoric of the traditional PILFs. Indeed, many of the conservative PILFs chose names that mimicked those of the traditional PILFs and explicitly characterized themselves as practicing "public interest law." This strategy, which some commentators have called "Orwellian," has caused a shift in the meaning of "public interest law." Where the phrase once was used exclusively to describe non-profit law practice in furtherance of a left political agenda, it now encompasses non-profit law groups on the right who use the strategic litigation tactics of the traditional PILFs in furtherance of conservative causes.

The conservative PILFs began as part of an effort by the business community to respond to increased regulation aimed at protecting the environment and the health and safety of consumers and workers. Many of the "business" or "free enterprise" PILFs are organized on a regional basis under the coordination of the National Legal Center for the Public Interest (NLCPI) and are financed by corporations. Business PILFs advance the economic interests of their funders by pursuing litigation in support of an antiregulatory agenda.

In addition to the business PILFs, conservative PILFs have been organized to use litigation to further the agenda

of the religious right on social issues. The "religious right PILFs" are involved in a range of issues, including the promotion of religious expression in public schools and religious displays in public spaces, and government funding of religious organizations and schools. This policy agenda has put PILFs of the religious right in direct conflict with the traditional PILFs that support a strong "wall of separation" between government and religion.

THE ROLE OF PILFS IN THE LEGAL BATTLES OVER CHURCH/STATE SEPARATION

In the legal contests over the interpretation of the Establishment and Free Exercise Clauses of the First Amendment, it is not unusual to find PILFs on both sides of the issue. Indeed, there are traditional PILFs, such as Americans United for Separation of Church and State, People For the American Way, and the ACLU, that regularly litigate cases in support of the view that the Establishment Clause prohibits any governmental endorsement of religion, just as there are conservative PILFs, such as the Rutherford Institute, National Legal Foundation, and the Liberty Legal Institute, that engage in strategic litigation to further the view that the Establishment Clause only prohibits the creation of a national denomination or favor to a particular sect. Although traditional PILFs and conservative PILFs will often be on opposite sides in Establishment Clause cases, they are sometimes allied in cases defending private religious speech or practice brought under the Free Speech and Free Exercises Clauses. In addition, both traditional PILFs and conservative PILFs support fee-shifting statutes that allow an award of an attorney's fees to prevailing plaintiffs in cases brought against state actors for violations of constitutional and statutory rights.

Litigation of issues relating to church/state separation is well suited to PILF involvement because the cases are complex, controversial, and often not commercially feasible for the private bar. Thus, PILFs on both sides of the issues stand ready to use their resources and specialized knowledge to support one party or the other, either through direct no-cost representation, or by filing *amicus* briefs.

CONCLUSION

Public interest law practice differs from the traditional practice of law because it is driven by principle rather than profit. Public interest lawyers choose cases that provide a vehicle to advance a particular policy agenda or develop constitutional doctrine. Although traditional PILFs are almost uniformly aligned with the political left, the conservative movement has embraced PILFs and strategic litigation campaigns to further its agenda. Thus, in Establishment Clause/Free Exercise cases in particular, it is not unusual to have PILFs engaged on both sides of the issue. 📌

CHURCH AUTONOMY: DOES THE RIGHT OF RELIGIOUS INSTITUTIONS TO OPERATE FREE OF STATE INTRUSION STILL EXIST?¹

by **Kelly J. Shackelford**

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Church autonomy is an important and core element of religious freedom. Violation of this principle violates both religion clauses of the First Amendment. Churches and religious institutions have the right to operate freely, without state intrusion, in matters touching on doctrine, church polity or administration, employment of the clergy and ecclesiastical workers, and the conduct of church membership and discipline.

INTRODUCTION

Church autonomy², also referred to as the "ecclesiastical abstention doctrine," is a central legal doctrine in religious liberty jurisprudence under U.S. law. It has been in existence in the case law for over 135 years³, but is often missed by lawyers unfamiliar with religious liberties jurisprudence.

Many lawyers are unaware of the doctrine because it cuts across the normal legal principle of equal protection and the neutrality of treating everyone the same. Religion

is special. Because we treasure religious liberty, we do not allow government, even through neutral laws, to interfere with or intervene in the internal religious affairs of religious groups.

There is a sphere of authority reserved for religious groups in which the state may not enter. The state has no authority or competence in this area. Courts thus have no subject matter jurisdiction to even hear such cases. Does the right of religious institutions to operate free of state intrusion still exist? Absolutely. Recent cases have not changed this.

There is some confusion in the state of the law currently for two reasons. First, the U.S. Supreme Court has not

2 Whenever I use "church autonomy" in this paper, I am including the autonomy of all religious institutions, whether church, synagogues, mosques or other religious groups.

3 See *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871) (mem).

addressed a religious autonomy/ecclesiastical abstention case in over 26 years.⁴ While there are numerous precedents upon which to draw, new applications are arising with no ultimate Supreme Court guidance. Second, many of the recent cases arising are being decided in state court decisions. Asserting torts against the church or its pastor or property disputes most often arise in state court. The result is myriad different, and sometimes conflicting, decisions from one state to the next on what the doctrine means and how it is to be applied.

Recent attempts to encourage the Court to provide more guidance have been unsuccessful. For example, in a recent egregious case, *Kliebenstein v. Iowa Conference of United Methodist Church*, 663 N.W.2d 404 (Iowa 2003), cert denied, 124 S. Ct. 450 (2003), the Supreme Court refused to take a case from the Iowa Supreme Court where that court held a defamation suit may continue against a church for disciplining a member for acting in the “Spirit of Satan” instead of Christ. The Iowa Court found “Satan” has secular meaning as a way to avoid the ecclesiastical abstention doctrine.

THE DOCTRINE

The church autonomy doctrine has been recognized for over 135 years and is entrenched in U.S. Supreme Court case law.

The first case to set forth the doctrine was the case of *Watson v. Jones* in 1871.⁵ In *Watson*, a minority faction sued the majority faction of their church over church property. The Court set forth an implied consent rationale for the doctrine. Simply put, when one voluntarily joins a religious association, they are agreeing to its rules and operations and courts should be very slow to interfere in such internal religious workings. The Court stated

“The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations, and officers within the general association, is unquestioned. All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.”⁶

The philosophical basis of *Watson* is now an enduring maxim of our constitutional jurisprudence wherein “[t]he structure of our government has, for the preservation of civil liberty, rescued the temporal institutions from religious interference. On the other hand, it has secured religious liberty from the invasion of civil authority.”⁷ To that end, “the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere.”⁸

Numerous cases eventually followed explaining the doctrine. The foundational principle of the abstention doctrine is that courts do not have jurisdiction to hear cases, much less decide cases, which arise as a result of internal church affairs such as church governance and internal church discipline. See *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 708-09 (1976) (holding that “religious controversies are not the proper subject of civil court inquiry, and that a civil court must accept the ecclesiastical decisions of church tribunals as it finds them”); *Presbyterian Church v. Mary Elizabeth Blue Hull Mem. Presbyterian Church*, 393 U.S. 440, 445-47 (1969); *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 114-16 (1952); *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1, 16-17 (1929); *Watson v. Jones*, *supra*; see also *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979); *New York v. Cathedral Academy*, 434 U.S. 125 (1977).

The United States Supreme Court defined the core of the abstention doctrine and why it serves to divest courts of subject matter jurisdiction in *Kedroff v. Saint Nicholas Cathedral*. The First Amendment’s restraint on civil authority acknowledges a “spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.”⁹

Essentially, church autonomy says the government may not touch on the religious domain, including doctrine, polity, religious leadership, or membership. Specifically, civil courts may not exercise jurisdiction over “a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standard of morals required of them.”¹⁰ Cases involving

resolution of doctrinal disputes, choices of structure or polity, the selection or discipline of clerics and other ecclesiastical workers, and the admission or discipline of church members should be dismissed.

⁷ *Id.* at 730.

⁸ *McCullum v. Board of Ed.*, 333 U.S. 203, 212 (1948); *Aguilar v. Felton*, 473 U.S. 402, 410 (1985).

⁹ 344 U.S. at 114.

¹⁰ *Watson*, 80 U.S. at 733.

⁴ See *Jones v. Wolf*, 443 U.S. 595 (1979).

⁵ 80 U.S. (13 Wall) 679 (1871)(mem).

⁶ *Watson*, 80 U.S. at 726-32.

FREE EXERCISE OR ESTABLISHMENT CLAUSE?

While most recognize church autonomy as basic religious liberty, the question many have is whether the doctrine arises from the Free Exercise Clause or the Establishment Clause. *Watson* mentions neither, and the Supreme Court cases do not provide a clear answer as well. Leading scholars don't even agree. Professors Esbeck and Tribe classify church autonomy under the Establishment Clause,¹¹ while Professors Laycock and Chemerinsky under the Free Exercise Clause.¹²

Professor Esbeck argues the Establishment Clause is a structural restraint on government and that church autonomy is teaching that government has no competence or authority in this area, thus a direct application of the Establishment Clause. *Free Exercise* is, however, also violated when the government interferes with such core and internal decisions. Such interference even chills future religious exercise and freedom as well.

It seems clear that church autonomy comprises a violation of both religion clauses, something very hard usually to do. Violations of church autonomy involve the government stepping into an area where it has no authority, entangling itself with core religious activity in violation of the Establishment Clause, as well as the government directly thwarting the free exercise of religious conscience by religious entities carrying out the core of their mission (doctrine, administration, religious leadership or membership). Encompassing violations of both religion clauses, church autonomy is a protection and freedom of great importance.

The government is simply not competent to be the final arbiter of internal religious decisions. Government is prohibited from deciding which priorities are core to a religion and which are not.¹³ It may not even consider whether someone or their fellow worker more correctly perceived the requirements of their faith.¹⁴ Courts, of course, may not determine the truth or falsity of religious doctrine.¹⁵ More than that, though, courts may not even make inquiry into religious doctrine or evaluate religious works, practices or events.¹⁶

11 Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 Iowa L. Rev. 1 (1980); Laurence H. Tribe, *American Constitutional Law*, § 14-11, at 1231-42 (2d ed. 1988).

12 Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373 (1981); Erwin Chemerinsky, *Interpreting the Constitution*, pg. 1035 no 113 (1987).

13 *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449-51, 457-58 (1988) (rejecting Free Exercise Clause test that "depends on measuring the effects of a governmental action on a religious objector's spiritual development"); *Employment Div. v. Smith*, 494 U.S. 872, 887 (1990) ("judging the centrality of different religious practices is akin to the unacceptable business of evaluating the relative merits of differing religious claims").

14 *Thomas v. Review Bd.*, 450 U.S. 707, 716 (1981).

15 *United States v. Ballard*, 322 U.S. 78 (1944); *Tilton v. Marshall*, 925 S.W. 2d 672 (Tex. 1996).

16 See *Mitchell v. Helms*, 530 U.S. 793, 828 (2000) (plurality) (stating that for authorities to troll through a religious institution's beliefs in order to identify if it is "pervasively sectarian" is offensive and contrary to precedent); *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 843-44 (1995) (rejecting argument that university should distinguish between evangelism, on the one hand,

The clear rationales for church autonomy protection under the religion clauses are: (i) civil courts are unschooled in theology and thereby are not competent to resolve disputes concerning religious doctrine, nor to properly interpret religious documents and canon law;¹⁷ (ii) for law to side with one faction of a religious dispute risks "establishing" the prevailing faction and inhibits change or reform in doctrine;¹⁸ (iii) both clerics and lay members of a religious group have voluntarily joined the organization, thereby giving implied consent to the internal church resolution of disputes;¹⁹ and (iv) autonomy allows for churches to continue their historically pivotal role as a mediating institution guarding against state absolutism.²⁰

The doctrine recognizes that there may well be harms and rationale for government intervention, but, absent a compelling governmental interest of the highest order, such harm is far overridden by our commitment to religious freedom. For example, in *Paul v. Watchtower Bible & Tract Society of N.V.*, 819 F.2d 875 (9th Cir.), *cert denied*, 484 U.S. 926 (1987), the court recognized the real substantial harm of being "shunned" from the church. The conduct and harsh words and orders to be cut off were severe. The court, however, held that a normal tort could not be asserted against this religious practice. The harm suffered must be tolerated by society "as a price well worth paying" to protect the religious freedoms of all citizens under the First Amendment.

TYPES OF CASES WHERE CHURCH AUTONOMY ARISES

Church autonomy cases arise in a variety of different contexts. While this freedom is not absolute, courts have generally recognized that the reach of the abstention doctrine extends incredibly broadly, providing protection to churches, pastors and priests in lawsuits involving torts,²¹

and the expression of religious view on secular subjects, on the other); *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 336 (1987) (recognizing a problem should government attempt to divine which jobs are sufficiently related to the core of a religious organization so as to merit exemption from statutory duties); *Id.* at 344-45 (Brennan, J., concurring) (same); *Widmar v. Vincent*, 454 U.S. 263, 269-70 n. 6, 272 n. 11 (1981) (holding that inquiries into religious significance of words or events are to be avoided); *Walz v. Tax Comm'n*, 397 U.S. 664, 674 (1970) (holding that it is desirable to avoid entanglement that would follow should tax authorities evaluate the temporal worth of religious social welfare programs); *Rusk v. Espinosa*, 456 U.S. 951 (1982) (mem.) (striking down charitable solicitation ordinance that required officials to distinguish between "spiritual" and secular purposes underlying solicitation by religious organizations).

17 See *Watson*, 80 U.S. at 729, 732; *Maryland & Va. Churches of God v. Church at Sharpsburg*, 396 U.S. 367, 368 (1970) (per curiam) (avoid doctrinal disputes).

18 See *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Church*, 393 U.S. 440, 449-51 (1969) (rejecting rule of law that discourages changes in doctrine); *Watson*, 80 U.S. at 730.

19 See *Benedict v. Steinbauser*, 234 U.S. 640, 647-51 (1914); *Watson*, 80 U.S. at 729

20 See Thomas Jefferson, *The Writings of Thomas Jefferson*, Albert Ellery Bergh, ed. (Washington, D.C.: The Thomas Jefferson Memorial Association, 1904), VO. VIII, pp. 112-13, to Noah Webster, Dec. 4, 1790.

21 See, e.g., *Klagsbrun v. Va'ad Harabonim of Greater Monsey*, 53 F.Supp.2d 732 (D. N.J. 1999) (subject-matter jurisdiction dismissal of libel and slander claim filed against church), *aff'd* 263 F.3d 158 (3rd Cir. 2001); *Farley v. Wisconsin Evangelical Lutheran Synod*, 821 F.Supp. 1286 (D. Minn. 1993) (dismissing defamation action

contracts,²² criminal fraud,²³ and employment cases.²⁴ Although torts and wrongs “may exist and be severe, and although the administration of the Church may be inadequate to provide a remedy, the preservation of the free exercise of religion is deemed so important a principle it overshadows the inequities which may result.”²⁵

EMPLOYMENT CASES

Application of the church autonomy doctrine in employment cases is an example of how strongly the doctrine is to be applied. Despite Title VII and strict employment laws, which are neutrally applied across the country, these laws fall, in the face of church autonomy and the First Amendment, in their application to religious organizations.

Government cannot interfere with the relationship between a church and its clergy.²⁶ Religious organizations are entitled to select their own clergy and to determine their qualifications and training, with no government interference. This “ministerial exception” extends to “all employees of a religious institution, whether ordained or not, whose primary functions serve its spiritual and pastoral mission.”²⁷

Churches and clergy must be free to “select their own leaders, define their own doctrines, resolve their own disputes, and run their own institutions. Religion includes important communal elements for most believers. They exercise their religion through religious organizations, and these organizations must be protected.”²⁸

against church where the offensive statements arose out of church controversy); *Downs v. Roman Catholic Archbishop*, 683 A.2d 808, 810-12 (Md. Ct. Spec. App. 1996) (holding that trial court lacked subject-matter jurisdiction over defamation claim against church hierarchy); *Gibson v. Brewer*, 952 S.W.2d 239 (Mo. 1997) (dismissing claim against Roman Catholic Diocese for negligent supervision of priest); *In re Pleasant Glade Assembly of God*, 991 S.W.2d 85 (Tex. App.—Ft. Worth 1998) (subject-matter dismissal of negligence claims by parishioner brought against church and youth pastor); *Korean Presbyterian Church v. Lee*, 880 P.2d 565 (Wash. Ct. App. 1994) (holding that ecclesiastical abstention doctrine precluded recovery for tort of outrage); *L.L.N. v. Clauder*, 563 N.W.2d 434, 440-41 (Wis. 1997) (holding that the First Amendment prohibited negligent supervision claim).

22 See, e.g., *Gabriel v. Immanuel Evangelical Lutheran Church, Inc.*, 640 N.E.2d 681 (Ill. App. Ct. 1994) (holding that breach of contract complaint was properly dismissed on First Amendment grounds since the matter of whether to employ plaintiff as a parochial school teacher was an ecclesiastical issue into which civil court may not inquire).

23 See, e.g., *United States v. Ballard*, 322 U.S. 78 (1944).

24 See, e.g., *EEOC v. Catholic Univ. of Am.*, 83 F.3d 455, 464-65 (D.C. Cir. 1996) (finding EEOC investigation into Catholic nun’s gender discrimination claim barred); *McClure v. Salvation Army*, 460 F.2d 553 (5th Cir. 1972) (ministers may not sue churches for employment discrimination).

25 *Tran v. Fiorenza*, 934 S.W. 2d 740, 743 (Tex. App.—Houston [1st Dist.] 1996, no writ.)

26 See *Serbian Eastern Orthodox Church v. Milivojevic*, 426 U.S. 696 (1976).

27 *Starkman v. Evans*, 198 F.3d 173, 176 (5th Cir. 1999); see also *Alicea-Hernandez v. Catholic Bishop*, 320 F.3d 698, 700 (7th Cir. 2003) (applying protection to a “Hispanic communications manager”).

28 *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 341 (1987) (Brennan, J., concurring).

EXCEPTION: SEXUAL MISCONDUCT

The most common exception to church autonomy protection is found in cases involving sexual misconduct. Such cases do not really involve ecclesiastical abstention because they are not ecclesiastical acts. They involve sexual exploitation by misusing a counseling position or other acts that they would not dare argue are religiously based.²⁹

The most noted case on this approach in the Fifth Circuit is *Sanders v. Casa View Baptist Church*, 134 F.3d 331 (5th Cir. 1998). In *Sanders*, the pastor-defendant did not even have authorization from the church to be engaged in marriage counseling in the first place.³⁰ The church, upon discovering the pastor’s conduct, forced him to resign.³¹ In fact, the *Sanders* court saw through the pastor’s defense of the abstention doctrine and stated that the pastor’s First Amendment argument “reflected the obvious truth that the activities complained of by the plaintiffs were not part of his religious beliefs and practices and he is not so brazen as to now contend otherwise.”³²

CHURCH AUTONOMY IS NOT LIMITED TO INTERPRETATION OF DOCTRINE

A common mistake made by lawyers unfamiliar with this area of the law is to think that church autonomy and ecclesiastical abstention is limited to the court not interpreting doctrine. That is not the law. As stated above, the protection applies not just to cases touching religious doctrine, but also polity or administration, selection and dismissal of clergy and employees, and admission, moral requirements and discipline of members.

This type of argument—that abstention is only proper if the court has to “review church doctrine”—was made in *Simpson v. Wells Lamont Corp.*, 494 F.2d 490, 493 (5th Cir. 1974). The Fifth Circuit rejected this argument, stating that while “[plaintiff] would narrowly limit ecclesiastical disputes to differences in church doctrine...[t]he cases negative such a strict view.”³³

The Fifth Circuit, in another case, acknowledged that government could not be involved in evaluating church doctrine, and stated a “second quite independent concern” is to not allow secular authorities to “intrude into church governance in a manner that would be inherently coercive, even if the alleged discrimination were purely nondoctrinal.[t]his second concern alone is enough to bar the involvement of the civil courts.”³⁴ The point? Church autonomy bars any intervention into the inner workings of the ecclesiastical body. It is not limited to doctrine.

29 See e.g. *Hawkins v. Trinity Baptist Church*, 30 S.W. 2d 446 (Tex. App.—Tyler 2000, no pet.); *Barnes v. Outlaw*, 937 P.2d 323, 326 (Ariz. Cts. App. 1996) (no “evidence this conduct was part of the observance of the Church’s religious practices or beliefs”); *Odenthal v. Minn. Conf. of Seventh Day Adventists*, 649 N.W. 2d 426 (Minn. 2002) (court notes no argument that sexual exploitation religious).

30 See *Id.* at 334.

31 See *Id.* at 335.

32 *Id.* at 338.

33 494 F.2d at 493 (citing *Kedroff*, 344 U.S. at 116).

34 *Combs v. Central Texas Annual Conf.*, 173 F.3d 343, 350 (5th Cir. 1999)

THE CHURCH AUTONOMY DOCTRINE IN STATE COURTS

As stated in the Introduction, one of the main reasons for problems in clarity in the doctrine is because of the numerous, and sometimes conflicting, cases in the states. The Constitution, obviously, should not mean different things in different states. Currently, it does in certain instances.

While a few cases reject the First Amendment's church autonomy bar to claims for tort such as defamation for comments made during church processes like discipline, the vast majority of cases agree that the First Amendment bars such suits.

STATES: CHURCH AUTONOMY DOCTRINE IN STATE COURTS

While partially explainable by bizarre facts, some state courts have refused to apply church autonomy to bar non-doctrinal tort suits against the church or individuals who acted on the church's behalf.³⁵ As mentioned *supra*, in *Kliebenstein*, the Iowa Supreme Court allowed a defamation case against a church and pastor to continue even though the defamation was a church discipline statement that the member had acted in the "Spirit of Satan" instead of Christ. This is a clear misapplication of church autonomy.

In *Brewer*, the California Supreme Court upheld a libel judgment in favor of two plaintiffs who were members of the defendant church. The church drew up "charges" against the two individuals including describing one of the plaintiffs as having a "vile spirit", while both were charged with association with another person who was "one of Satan's choicest tools."³⁶ The "charges" were read to the membership and included in a press release to the local press and Baptist newspaper. A libel judgment was allowed against the church.

Similarly, the Oregon Supreme Court in *Murphy*, affirmed a defamation claim against a pastor of a church brought by a former pastor. The defendant pastor sent two letters to another pastor concerning the plaintiff pastor's improper conduct as a missionary in Japan. One of the letters referred to plaintiff pastor as carrying "out Satan's plan of division and destruction."³⁷ The Oregon Supreme Court held this was an actionable defamation claim.

The Supreme Court of Pennsylvania in *Bear v. Reformed Mennonite Church*, 341 A.2d 105, 107 (Pa. 1975), held that the practice of "shunning" "may be an excessive interference with areas of 'paramount concern', i.e., the maintenance of marriage and family, alienation of affection, and the tortuous interference with a business relationship" and thus an area

35 See *Kliebenstein*, *supra* text page 1 ("Spirit of Satan" case); *McAdoo v. Diaz*, 884 P.2d 1385, 1391 (Alaska 1994) (First Amendment only gives the church or pastor a conditional privilege to speak); *Brewer v. Second Baptist Church*, 197 P.2d 713 (Cal. 1948); *Murphy v. Harty*, 393 P.2d 206, 214 (Ore. 1964); *House of God v. White*, 792 So. 2d 491 (Fla. App. 4th Dist. 2001) (claims barred against church but allowed against pastor individually).

36 197 P.2d at 716

37 393 P.2d at 212.

the state may regulate, despite the First Amendment. This, of course, directly conflicts with the *Paul v. Watchtower* case discussion "on shunning".³⁸

While there are cases in the states allowing such claims, most of the cases in the states hold otherwise.

STATES: CHURCH AUTONOMY IS A BAR TO SUIT

Most states that have dealt with the issue of whether a church or pastor may be brought into court for theologically motivated statements have held that they are without subject matter jurisdiction to decide the issue, lest they involve themselves in ecclesiastical disputes. There are a significant number of states that refuse to adjudicate tort claims against churches and pastors that arise out of the church disciplinary process. These states include Hawaii, Georgia, Montana, Massachusetts, Virginia, Maryland, Ohio, Louisiana, Minnesota, and Indiana.³⁹

In *Rasmussen v. Bennett*, 741 P.2d 755 (Mont. 1987), plaintiffs brought a defamation claim based on statements made before the congregation that the plaintiffs were "disfellowshipped" for "conduct unbecoming Christians" and that "[w]e got the filth cleaned out of the congregation, now we will have God's spirit."⁴⁰ The Montana Supreme Court held the Free Exercise Clause of the federal constitution barred that plaintiffs' tort claim.

The Supreme Court of Hawaii held that the court is without subject matter jurisdiction to adjudicate a defamation claim brought against the Catholic Church and a bishop. See *O'Connor v. Diocese of Honolulu*, 885 P.2d 361 (Haw. 1994). In *O'Connor*, the plaintiff accused the defendants of defamatory remarks, including accusing the plaintiff of schism, "misrepresenting the Catholic faith," coming "from a neolithic mind frame," being a "fanatic," "duping the faithful," causing "others to suffer the loss of their immortal souls," and stating that the only way to redeem the lost souls was to excommunicate the plaintiff.⁴¹ The Supreme Court of Hawaii, citing to *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 710-11 (1976), held that the court is barred by the First Amendment from exercising jurisdiction to decide the tort claim presented by the plaintiff.

In *Schoenhals v. Mains*, 504 N.W.2d 233 (Minn. Ct. App. 1993), a defamation action brought by church

38 See *Supra* page 4.

39 See *O'Connor v. Diocese of Honolulu*, 885 P.2d 361, 368 (Haw. 1994); *Rasmussen v. Bennett*, 741 P.2d 755, 758-59 (Mont. 1987) (claims not actionable); *Crosby v. Lee*, 76 S.E.2d 856, 859 (Ga. 1953); *Hiles v. Episcopal Diocese of Mass.*, 773 N.E.2d 929, 936-38 (Mass. 2002); *Ja-Woo Cha v. Korean Presbyterian Church*, 553 S.E.2d 511, 514-15 (Va. 2001), cert. denied, 535 U.S. 1035 (2002); *Downs v. Roman Catholic Archbishop*, 683 A.2d 808, 811-13 (Md. Ct. Spec. App. 1996) (specifically noting the lack of any specific guidance by Supreme Court of the United States regarding the application of the church autonomy doctrine to a defamation claim); *Howard v. Covenant Apostolic Church, Inc.*, 705 N.E.2d 385 (1st Dist. Hamilton County—Ohio 1997), dismissed, appeal not allowed, 688 N.E.2d 1043 (1998); *Glass v. First United Pentecostal Church of DeRidder*, 676 So. 2d 724 (La. Ct. App. 3d Cir. 1996); *Schoenhals v. Mains*, 504 N.W.2d 233 (Minn. Ct. App. 1993); *Brazauskas v. Fort Wayne-South Bend Diocese, Inc., et al.*, 714 N.E.2d 253 (Ind. Ct. App. 1999).

40 *Id.* at 756

41 *Id.* at 367-68.

members against the church and the pastor, the court held that “[s]ince examination of the truth of Mains’ statements would require an impermissible inquiry into Church doctrine and discipline, the district court did not err in concluding that the defamation claim is precluded by the First Amendment.”⁴² In *Schoenhals*, the pastor read a letter to the entire congregation that formed the basis for the church members’ claim of defamation.⁴³ The letter included accusing the plaintiff-members of “a lack of... faithful tithing,” “a desire... to consistently create division, animosity and strife in fellowship,” and “direct fabrication of lies.”⁴⁴ This letter was written as part of a disciplinary action taken against the plaintiff-members.

The court went on to hold that “[w]hile Mains’ statement that the Schoenhals had engaged in ‘direct fabrication of lies with the intent to hurt the reputation and the establishment’ of the Church appears unrelated to church doctrine on its face, the statement nevertheless relates to the Church’s reasons and motives for terminating the Schoenhals’ membership.”⁴⁵ Thus, under Minnesota’s interpretation of the First Amendment, great importance is placed not only on the words used by the church or pastor but also the disciplinary context in which those words were used. Even facially secular words may be used in an ecclesiastical context that takes the adjudication of any claim arising out of those words outside of the jurisdiction of the court.

The Georgia Supreme Court, in *Crosby v. Lee*, 76 S.E.2d 856 (Ga. 1953), held that the court is without jurisdiction under the “United States Constitution” as well as their state constitution to decide whether remarks made in a letter and stated in a sermon are defamatory. The letter, written by the pastor and addressed to “brethren and sisters in the Lord,” and confirmed as true orally during a sermon in front of the congregation, alleged that the plaintiff was “bastardly,” was an “Edomite,” and reference, although figurative as the court pointed out, was made to “the innocent blood he has shed.”⁴⁶ The court recognized that this letter, especially being written in the course of a disciplinary action, was not cause for the court to interfere with purely ecclesiastical concerns.

In *Howard v. Covenant Apostolic Church, Inc.*, 705 N.E.2d 385 (1st Dist. Hamilton County—Ohio 1997), *dismissed, appeal not allowed*, 688 N.E.2d 1043 (1998), the church “disfellowed” plaintiff and statements were made by church officials that plaintiff was a liar, “that he was in league with Satan, that he had been overtaken by a fall, that he was a defiler of the temple and an enemy of the church, and that he was ‘sleeping around.’”⁴⁷ The Ohio court held the court was without jurisdiction to adjudicate these tort claims. In so holding, the Ohio court pointed out that these statements concerned issues of the plaintiff’s morality.⁴⁸

42 *Id.* at 236.

43 *Id.* at 235.

44 *Id.* at 234.

45 *Id.* at 236.

46 *Id.* at 856.

47 *Id.* at 388.

48 *Id.*

The court further held that a “secular tribunal” is prohibited from exercising jurisdiction over issues concerning “internal church discipline and ‘the conformity of the members of the church to the standard of morals required of them.’”⁴⁹ *Id.* (citing *Watson*, 80 U.S. at 733).

TEXAS CASES

Texas cases follow the vast majority of the other states in recognizing church autonomy is a bar to torts against a church or pastor touching on ecclesiastical conduct. The only Texas Supreme Court directly implicating the issue is *Tilton v. Marshall*, discussed *supra*. *Tilton* stands for the proposition that courts may not determine the truth or falsity of religious belief and that claims are allowed for non-ecclesiastical conduct.

The other Texas cases shedding light on church autonomy are court of appeals cases. In *Tran v. Fiorenza*,⁵⁰ the court affirmed a lower court decision that whether appellant had been excommunicated was an ecclesiastical issue and thus the First Amendment prohibited review. A Vietnamese Catholic priest who wanted to start a church and help refugees sued after the Diocese sent a letter to priests that he was not authorized and discouraged attending his mass.

The court rejected Tran’s arguments that the issues he presented would require no ecclesiastical questions, stating that civil courts were not to touch ecclesiastical matters like church governance at all.⁵¹ Although torts, the court found they arose out of an ecclesiastical matter and were thus off limits to civil courts.

In *Williams v. Gleason*,⁵² the Fourteenth Court of Appeals at Houston held that a suit, against a church for disciplinary actions arising from a difference of theological opinion and teaching, clearly implicated the ecclesiastical immunity provided by the First Amendment, and prevented disciplined members of the church from recovering tort damages against either the church or its members acting in accordance with the church’s disciplinary precepts. The plaintiffs accused the defendants of injuring them through the publication of defamatory statements in the instrument through which the church brought the disciplinary charges against them.

Although the plaintiffs argued that their claims arose in tort, the court of appeals found that each claim, regardless how characterized, implicated an ecclesiastical matter, “namely their subjection to church discipline.”⁵³ Because the plaintiffs sought adjudication of an essentially ecclesiastical dispute, and despite their assertion of defamation, breach of fiduciary duty, intentional infliction of emotional distress, and negligence theories of liability, the court of appeals affirmed the judgment of trial court in declining to exercise

49 *Id.* (citing *Watson*, 80 U.S. at 733).

50 *See supra* footnote 24.

51 934 S.W. 2d at 743.

52 26 S.W.2d 54 (Tex. App.—Houston [14th Dist.] 2000, writ denied), *cert. denied*, 533 U.S. 902 (2001).

53 *Id.* at 59.

subject matter jurisdiction.⁵⁴ The court held “[b]ecause the genesis of this lawsuit implicates...what is essentially an ecclesiastical dispute, we are constitutionally prohibited from exercising jurisdiction over it.”⁵⁵

Likewise in *In re Pleasant Glade Assembly of God*, 991 S.W.2d 85 (Tex. App.-Fort Worth, 1988, orig. proceeding), a mandamus was granted because the torts asserted focused on behaviors (forced exorcism) intertwined with religion and because any inquiry into such matters was constitutionally impermissible. All the tort claims were barred.⁵⁶

Texas thus follows most states in recognizing church autonomy as a bar to cases touching ecclesiastical matters, while allowing suits for sexual exploitation and abuse.

CURRENT CONTROVERSIES

Because of the variety of decisions from state to state and the lack of specific U.S. Supreme Court guidance for over 26 years, there are a number of current controversies or questions on church autonomy. While one of these controversies focuses on the implications of an opinion from the U.S. Supreme Court, the other major issues are ironically awaiting decisions in Texas before the Texas Supreme Court.

THE EFFECT OF EMPLOYMENT DIVISION V. SMITH

In 1990, the U.S. Supreme Court handed down a major decision on the Free Exercise Clause—*Employment Division v. Smith*.⁵⁷ Before *Smith*, any burden on Free Exercise by the government was subjected to strict scrutiny, requiring the government to prove a compelling interest of the least restrictive means in order to justify such a burden.⁵⁸

Under *Smith*, that approach was changed in some cases. *Smith* held government restrictions which were not targeted at religion but were, instead, generally applicable and neutral on their face, are per se constitutional. While numerous exceptions have arisen to *Smith*⁵⁹, the question presented under church autonomy is whether *Smith* altered or even completely dissolves church autonomy protection.

The reason this question is asked is that church autonomy is a direct exception to neutrality. The whole point of church autonomy is that secular rules, regulations or actions, even neutral ones, may not be applied to ecclesiastical matters. The government is forbidden from entering such areas. If neutrality were all that is required of

government for religious freedom, church autonomy would cease. Fortunately, it appears clear that *Smith* does not have this effect.

Smith does not affect church autonomy for a number of reasons. First, *Smith* was only a Free Exercise case. It involved no claims under the Establishment Clause. Thus, no matter what one says *Smith* means, it has no effect on the Establishment Clause basis for church autonomy, which is to prevent the entanglement of government with religious matters and to recognize the structural restraint and lack of competence in the government deciding ecclesiastical concerns. The Establishment Clause alone supports church autonomy, and *Smith* has no intent to touch on Establishment Clause matters.

Second, *Smith* has no application to church autonomy and ecclesiastical abstention. The case itself references this.⁶⁰ Additionally, the cases subsequent to *Smith* have explicitly stated it has no application. *See, e.g., Combs v. Central Texas Annual Conf.*, 173 F.3d 343, 347-50 (5th Cir. 1999); *EEOC v. Roman Catholic Diocese*, 213 F.3d 795, 800 (4th Cir. 2000); *EEOC v. Catholic Univ.*, 83 F.3d 455, 461-63 (D.C. Cir. 1996). The rule excluding government from matters involving the clergy has a completely different rationale that is unaffected by *Smith*. That rationale is grounded in the premise that state interference with ecclesiastical matters, however slight, must meet the highest judicial scrutiny.

To hold otherwise would mean Catholic churches could now be sued under neutral sex discrimination laws for not hiring women priests, Catholic priests could be arrested for serving alcohol to minors in communion, internal church doctrine and decisions could be determined by civil court judges applying “neutral laws,” and much more. Such intervention is not allowed. The Fifth Circuit thus stated, we hold that the church-minister exception survives *Sherbert’s* demise. As the D.C. Circuit observed in *Catholic University*, the primary doctrinal underpinning of the church-minister exception is not the *Sherbert* test, but the principle that churches must be free ‘to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.’” *Kedroff*, 344 U.S. at 116, 73 S. Ct. at 154 (cited by this Court in *McClure*, 460 F.2d at 560, and by the D.C. Circuit in *Catholic University*, 83 F.3d at 462). This fundamental right of churches to be free from government interference in their internal management and administration has not been affected by the Supreme Court’s decision in *Smith* and the demise of *Sherbert*.

Church autonomy still remains in full force after *Smith*.

THE TEXAS CASES— *Penley & H.E.B. Ministries*

Church autonomy is also squarely before the Texas Supreme Court in two significant cases. *Westbrook v.*

54 *Id.* at 60

55 *Id.*

56 The only other Texas cases allowing such tort claims are the *Hawkins* and the *Sanders* sexual exploitation cases mentioned *supra*. As stated there, these are not true church autonomy cases, since the conduct complained of is not rooted or based in any religious or ecclesiastical belief.

57 494 U.S. 872 (1990).

58 *See Sherbert v. Verner*, 374 U.S. 398 (1963).

59 It is not the purpose of this paper, to analyze the numerous exceptions to *Smith*. For example, however, *see Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d (3rd Cir. 1999).

60 494 U.S. at 882 (stating it does not apply to Free Exercise cases involving religious associational rights).

*Penley*⁶¹ and *H.E.B. Ministries v. Texas Higher Education Coordinating Board*.⁶² Both of these cases center on crucial church autonomy, religious liberty issues yet to be decided in Texas or nationwide.⁶³

Westbrook v. Penley is a church discipline case. Penley filed suit against her pastor, elders, and church for publishing a disciplinary letter to the congregation, which included that she had left her husband, had a “biblically inappropriate relationship” with another man, was confronted under *Matthew 18* and refused to repent. All of her claims were dismissed at the trial court as lacking subject matter jurisdiction under church autonomy. On appeal, the appeals court reversed on one claim, allowing suit against the pastor for professional negligence to continue, since he was a licensed counselor. Pastor Westbrook petitioned the Texas Supreme Court to reverse.

A central issue is what the standard is for evaluating whether an action is ecclesiastical enough to be covered by church autonomy. The standard is not clear in Texas cases. Pastor Westbrook argues courts may only adjudicate cases or controversies that are purely secular in nature. See *Jones v. Wolf*, *supra*; *Bryce v. Episcopal Church*, 289 F.3d 648 (10th Cir. 2002) (“We must determine whether the defendant’s alleged statements were ecclesiastical statements protected by church autonomy or purely secular ones”); *Bell v. Presbyterian Church (U.S.A.)*, 126 F.3d 328, 331 (4th Cir. 1997) (“jurisdiction appropriate only to resolve ‘purely secular disputes between third parties and a particular defendant, albeit a religiously affiliated organization’”). The purely secular standard is a minimum standard whereby courts engage in the minimal analysis necessary in applying the ecclesiastical abstention doctrine. Courts merely view the petition and determine whether the actions in question are *purely* secular. Any less deferential standard than the purely secular would require case-by-case analysis, weighing the ecclesiastical and the secular, which is itself unconstitutional.

The purely secular standard avoids case-by-case analysis of individual actions to parse and weigh the secular from the ecclesiastical by simply requiring the court to look to the petition itself and see if the conduct complained of is, on its face, purely secular. This would prohibit a court from trolling through the doctrine, beliefs and actions of clergy and churches to determine the level of religiosity associated with the actions in question.⁶⁴

Texas cases do not answer whether a purely secular standard is required. In fact, Texas Courts of Appeal are directly in conflict.⁶⁵

61 No. 04-0838; case below, *Penley v. Westbrook*, 146 S.W. 3d 220 (Tex. App.—Fort Worth 2004, pet. filed).

62 No. 03-0995; case below, *H.E.B. Ministries, Inc. v. Texas Higher Education Coordinating Board*, 1145 S.W. 3d 617 (Tex. App.—Austin 2003, pet. granted).

63 In the interest of full disclosure, that author of this paper is counsel for the Petitioner in both of these cases.

64 See *supra* footnote 15.

65 The court in *Hawkins* articulated a standard that fell short of the “purely secular” standard by stating, “The First Amendment’s respect for religious relationships does not require a minister’s counseling relationship with a

In *H.E.B. Ministries*⁶⁶, three seminaries sued the Texas Higher Education Coordinating Board after Tyndale Seminary was fined \$173,000 for issuing 34 religious diplomas without first obtaining state approval. All three seminaries challenge the state’s authority to control all Texas seminaries through state regulations, including control of their curriculum and professors, as well as who may serve on their Board.

Law considers seminaries an “integral part of the church, essential to the paramount function of training ministers who will continue the faith.”⁶⁷ The main argument is thus that the state has no right to control or regulate the training of pastors. Such interference violates church autonomy and thus both the Free Exercise and Establishment Clauses.

The state argues it is not interfering with religion by merely controlling certain words like “degree” “doctorate” and “seminary” so that citizens are not deceived by fraudulent degrees or diplomas. In fact, it is applying the same neutral secular rules to seminaries that it applies to colleges, universities, law schools and med schools.

The case is the first of its kind in the country. The Texas Supreme Court heard oral argument January 5, 2005, and all counsel are awaiting the decision. It obviously will greatly affect the training of all future clergy in Texas, if not nationwide, since the main claims are actually federal constitutional claims.

CONCLUSION

Church autonomy is an important and core element of religious freedom. Violation of this principle violates both religion clauses of the First Amendment. Churches and religious institutions have the right to operate freely, without state intrusion, in matters touching on doctrine, church polity or administration, employment of the clergy and ecclesiastical workers, and the conduct of church membership and discipline.

While the doctrine has not been clarified by the U.S. Supreme Court in over 26 years, it is alive and well in use in numerous cases in state and federal courts across the country.

Hopefully, the U.S. Supreme Court will give more guidance and clarity in the near future. In the interim, the Texas Supreme Court will be addressing some big church autonomy issues, and hopefully adding clarity to religious freedom for all of us in Texas. 📌

parishioner to be purely secular in order for a court to review the propriety of the conduct occurring within that relationship.” *Hawkins*, 30 S.W.3d at 452. This directly conflicts with the standard applied in *In re Pleasant Glade Assembly of God*, 991 S.W.2d 85, 88-89 (Tex. App.—Fort Worth 1998, orig. proceeding) (while “the freedom to act is subject to regulation, this regulation only burdens purely secular activities that are nonreligious in motivation.”).

66 See *supra* footnote 60.

67 *EEOC v. Southwestern Baptist Theological Seminary*, 651 F.2d 277,283 (5th Cir. 1981), *cert denied*, 456 U.S. 905 (1982).

STEM CELL RESEARCH: A CHURCH-STATE ISSUE?

by Meg Wilson



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Stem Cell Research is the subject of much controversy that is tangled in a web of ethical, religious, and scientific concerns. This article seeks to explain the dilemma and demystify key policy issues.

“THE SCIENCE”¹

Biomedical researchers believe that stem cell therapy has the potential to treat myriad degenerative or incurable diseases such as diabetes, Parkinson's disease, Alzheimer's disease and spinal cord injuries, to name a few. Stem cells are useful in regenerative medicine because they have the capability of dividing and self-renewing over a long period of time, and they are undifferentiated, meaning they can be coaxed into becoming any of the 220 cell types in the body. Stem cells could be used to replace cells that are deficient in patients with certain diseases.

Adult stem cells are cells found in the body that can self-renew, but are not totally undifferentiated. They already have a pathway to becoming a type of cell for their own organ system, like a heart cell or a liver cell, says Judith Haley, president of Texans for the Advancement of Medical Research.

Embryonic stem cells are truly undifferentiated, and are derived from the inner cells of a 4- to 5-day-old human embryo. One source of embryonic stem cells is

frozen embryos from in vitro fertilization clinics that will otherwise be thrown away. When a couple is using in vitro fertilization, usually several eggs are fertilized, and the healthiest few are implanted. The leftovers are either frozen or tossed. There are more than 400,000 frozen embryos in clinics throughout the country, 11,000 of which have been donated by the parents for medical research, Haley says.

Another source of embryonic stem cells is somatic cell nuclear transfer, which is when DNA from a particular patient is inserted into a donated unfertilized egg to create stem cells that could be used to replace damaged cells in the patient's body. Somatic Cell Nuclear Transfer research could eliminate the issue of immune system rejection, because the stem cells would contain the patient's own DNA, Haley says.

THE POLITICS

Because the creation of an embryonic stem cell line requires the destruction of a human embryo, some proliferators, who believe life begins at conception, oppose embryonic stem cell research. Supporters argue that the embryos would otherwise be thrown away and could be used to save or improve many lives. ‘What is the moral high ground of throwing them away, when they could be used to cure terrible diseases?’ Haley asks. Opponents say the use of discarded embryos is a slippery slope to

1 This science section and the following Politics section (7 paragraphs) was written by Megan Headly for the *Texas Observer* website and appears on their April 11, 2007 blog at <http://www.texasobserver.org/blog/?p=246>. It is used here with permission from the *Texas Observer*.

See also an excellent primer set of 5 short papers on the website of the Texans for the Advancement of Medical Research, http://www.txamr.org/index.php?option=com_docman&Itemid=108&task=view_category&catid=86&order=dmdate_published&asc=DESC

creating human embryos only to destroy them for research. Supporters say that guidelines can be set to prevent that from happening.

All types of stem cell research are legal. Currently, federal funding is banned for embryonic stem cell research other than that which uses stem cells from lines created before Aug. 9, 2001, when President Bush established the policy. Haley says there are only a little more than 20 stem cell lines left that can be used in federally funded research. New stem cell lines can be derived and used for research, but only if it's privately funded. 'The problem with that is that you are closing off the biggest source of basic research funding,' Haley says. 'Private companies pick it up at a point that you've come far enough along to develop a product.'

Another problem, she says, is that research facilities that receive both government and private funding have to make sure that none of the federal money goes toward embryonic stem cell research beyond the stem cell lines created before 2001. 'If federal dollars have paid for it, you can't use that microscope or even a test tube,' she says, which sometimes means building a 'whole separate laboratory and wasting millions of dollars.'

Adult stem cell research is not controversial, but the separation of embryonic versus adult stem cell research is predominately political rather than scientific,' says Paul Simmons, director of the Institute for Molecular Medicine Center for Stem Cell Biology at the University of Texas Health Science Center at Houston, which performs adult stem cell research.

'For all scientists, it's really a question of both,' he says. 'There are opportunities for amazingly good synergy between the two fields. It's greater than the sum of the two. You get observations made when you're allowed to work on both that you would not make if you just worked on either alone.'

TEXAS AND U.S. POLICY

The Legislature dealt with a number of stem cell bills in the 2007 session but only one passed which authorizes the publication of a brochure on umbilical cord blood options, supporting saving the blood for future stem cell use.² There were attempts to stop any research with stem cells as well as a variety of efforts to support stem cell research.

On the national scene, the House and Senate passed a bill June 8, 2007, to lift the 2001 ban on stem cell research by allowing research on new lines of "embryonic stem cells regardless of the date of their creation, as long as they were donated from in-vitro fertilization clinics, they would 'otherwise be discarded' and donors gave their approval."³ President Bush is expected to veto it, as he did for a similar bill last year.

While the embryonic stem cell debate continues, new research is finding alternatives to embryonic stem

cells: researchers announced in early June that skin cells have been converted into stem cells in mice. Other work continues on adult stem cells as well as cells from amniotic fluid and umbilical cord blood.

One particularly contentious issue is that of cloning. The word is loaded and the science issues are subject to misunderstanding. "Not all cloning is the same. Scientists do many kinds of cloning every day, most of which is commonly accepted. Cloning has allowed scientists to develop powerful new drugs and to produce insulin and useful bacteria in the lab. It also allows researchers to track the origins of biological weapons, catch criminals, and free innocent people. There's a world of difference between reproductive cloning—something that should be banned right away—and therapeutic cloning, also known as somatic cell nuclear transfer (SCNT). Therapeutic cloning is the transplanting of a patient's own DNA into an unfertilized egg in order to grow stem cells that could cure devastating diseases. Reproductive cloning is the use of cloning technology to create a child... Therapeutic cloning produces stem cells, not babies. With therapeutic cloning, there is no fertilization of the egg by sperm, no implantation in the uterus and no pregnancy. Dr. Harold Varmus, the former head of the National Institutes of Health (NIH) and a Nobel laureate, says there is a profound distinction between cloning with the intent of making a human being and research cloning to help understand and treat life-threatening diseases and conditions."⁴

Proponents of therapeutic cloning have been concerned with legislation that would ban cloning with unqualified language because they support a *reproductive* ban but not a *therapeutic* ban and the policy language needs to differentiate between the two types of research.

While other states and other nations have staked out stem cell research as a topic for competitive research, Texas just approved a \$3 billion bond proposal that will go to voters in November. It is the enabling funding for an initiative to spend \$300M per year for 10 years, through a Cancer Research and Prevention Institute, which would support cross—institutional research on cancer. Given the vagaries of basic research, it will be interesting to see if there are any cancer prevention or therapy strategies that include stem cell research, thus stymieing a potentially productive line of cancer research. Meanwhile, Texas remains susceptible to having bright, capable researchers lured away to California or Singapore to more freely pursue stem cell research.

POLICY IMPLICATIONS

What is the connection of this issue to the separation of Church and State? Opponents of embryonic stem cell research claim that it is counter to their belief in the sanctity of life. As with abortion, they believe that life begins at inception, and thus research on embryonic stem

2 <http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=80R&Bill=HB709>

3 <http://www.chron.com/dispatch/story.mpl/ap/politics/4872672.html>

4 Texans for Medical Advancement, http://www.txamr.org/index.php?option=com_content&task=view&id=61&Itemid=84

cells is akin to abortion—destroying life. The premise for this belief is embedded in religious belief and so the policy battle lines are often perceived as being a debate between the religious and secular worlds.

However, stem cell research, with its promise for cures for some of society's most devastating illnesses, garners support from some pro-lifers who believe that carefully regulated use of embryonic stem cells causes no new harm to doomed embryos, and those embryos may then play a heroic role in finding cures for illnesses such as juvenile diabetes. This is insufficient solace for opponents of embryonic stem cell research and thus, this is where the debate centers.

The cloning issue generates substantial agreement that reproductive cloning is a reprehensible concept and should be banned. Therapeutic cloning should generate substantial agreement that it is highly beneficial since embryos are not involved—but that agreement only comes with clear understanding of the technology of SNCT and close peer monitoring of research so that it does not cross the boundary into reproductive cloning.

The scientific community has a long history of operating in an unprejudiced and neutral environment on topics that respond to inquiry based on the scientific method. The scientific community is resistant to outside regulation of research since, by the very nature of basic research, answers are not available at the outset and bounding the scientific enterprise is viewed as shortsighted and counterproductive since it may shut off a line of work that reaps tremendous benefits that cannot be predicted at the outset of the research process. Issues of religious belief do not fit into this schema and so difficulty ensues when there is an asymmetric discussion of issues that have both religious and scientific elements.

Separation of church and state does not come into this argument directly. But to the extent that religious concerns advise public science policy, there is an effect of religion on public policy that properly plays out in the public policy arena. The hope is that the opponents of stem cell research understand the science involved and craft their arguments to address their direct concerns: embryonic stem cells and reproductive cloning, without painting the whole field with the same brush; and that the proponents of stem cell research will continue to find alternatives to working with embryonic stem cells and treat the opponents' religious concerns with the courtesy that our system of religious freedom demands. 🇺🇸

LOBBYING AND ELECTIONEERING BY CHARITIES

by **R. Todd Greenwalt**



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A look at the permissibility of electioneering and lobbying by charitable organizations.

GENERAL

An organization will continue to be described in section 501(c)(3)¹ only so long as, among other things, no substantial part of its activities constitutes the carrying on of propaganda or otherwise attempting to influence legislation (i.e., lobbying) and none of its activities constitute participation or intervention in any political campaign (i.e., electioneering). As such, organizations described in section 501(c)(3) must be concerned about two distinct types of political activities—lobbying and electioneering. Keeping this distinction in mind is important because, with respect to lobbying activities, some level of activity is permissible but, with respect to electioneering activities, no activity is permitted.

LIMITATION ON LOBBYING ACTIVITIES

Organizations described in section 501(c)(3) may engage in a certain level of lobbying activity. The Code provides two measures of permissible activity—the "no substantial part" test under section 501(c)(3) and the expenditure test under section 501(h). Before either test can be applied, however, an organization must first focus on what constitutes lobbying. As discussed below,

lobbying activities generally involve attempts to influence legislation. However, activities that constitute attempts to influence legislation and the amount of such activities that are permissible vary depending on whether the applicable standard is the "no substantial part" test or the expenditure test.

"NO SUBSTANTIAL PART" TEST DEFINING "LEGISLATION" AND "ATTEMPTING TO INFLUENCE LEGISLATION"

The parameters of lobbying activities depend upon two things—the definition of "legislation" and the definition of "attempting to influence legislation." For purposes of the "no substantial part" test, the Treasury Regulations (the "Regulations") promulgated under section 501(c)(3) define each of those terms in the context of "action" organizations. For purposes of the Regulations under section 501(c)(3),

(ii) An organization is an "action" organization [i.e., an organization that has violated the limitation on political activities] if a substantial part of its activities is attempting to influence legislation by propaganda or otherwise. For this purpose, an organization will be regarded as attempting to influence legislation if the organization—

¹ All section references are to the Internal Revenue Code of 1986, as amended (the "Code"), unless otherwise indicated.

- (a) Contacts, or urges the public to contact, members of a legislative body for the propose of proposing, supporting or opposing legislation; or
- (b) Advocates the adoption or rejection of legislation.

The term “legislation,” as used in this subdivision, includes action by the Congress, by any State legislature, by any local council or similar governing body, or by the public in a referendum, initiative, constitutional amendment, or similar procedure.²

The activities that constitute legislation under the Regulations, which are equally applicable under either the “no substantial part” test or the expenditure test, are broadly defined. As such, legislation includes both acts of lawmaking bodies, in connection with resolutions, laws or other actions, and acts of the public, in connection with elections not involving candidates for office but involving referendums and similar provisions. For example, actions or discussions with legislators or other government officials involved in the legislative process with respect to proposed or pending bills constitutes legislation³ as does a public vote on a referendum having the effect of law.⁴ The term has also been expanded to include Congressional deliberations on judicial nominees.⁵ Thus, legislation generally includes actions that could or will have the force of law whether the individuals adopting such legislation are legislators or other government officials or employees acting on a bill, judicial nomination or similar matter or members of the general public voting on a referendum or similar provision.

Influencing, or attempting to influence, legislation is a concept that also lacks precisely defined borders, particularly under the “no substantial part” test. Influencing, or attempting to influence, legislation is more narrowly defined in the Regulations applicable under section 501(h) and the expenditure test. Under both tests, activities constituting influencing legislation can result from direct contacts with legislative bodies or other government officials having legislative responsibility (i.e., direct lobbying) or from attempts to influence public opinion (i.e., grass roots lobbying). However, the precise rules for determining whether a specific activity is or is not influencing, or attempting to influence, legislation differ.

Under the “no substantial part” test, direct lobbying includes contacts with legislators and other government officials or employees having legislative authority if the purpose of the contact is to propose, support or oppose legislation. For example, oral and written presentations to Congress, personal contacts with members of Congress, personal contacts with members of a legislator’s staff and personal contacts with members of standing congressional committees have all been held to be direct lobbying.⁶ Encouraging the members of an organization to contact legislators directly in the members’ individual capacities can

also constitute direct lobbying.⁷ Similarly, communications with the general public urging the sponsorship of, support of, or opposition to any referendum or similar vote can also be direct lobbying.⁸ Thus, the scope of direct lobbying can be broad in terms of both the actions covered and the types of activities that constitute legislation.

One significant exception to the direct lobbying rules under the “no substantial part” test exists in the case of appearances before, and at the request of, legislative bodies to provide technical assistance or expertise on matters contemplated by such legislative bodies (the “testimony exception”). In Rev. Rul. 70-449,⁹ the Internal Revenue Service (the “IRS”) gave express recognition to the testimony exception stating “it is unlikely that Congress, in framing the language of [section 501(c)(3)], intended to deny itself access to the best technical expertise available on any matter with which it concerns itself.”¹⁰ In determining whether contacts by organizations described in section 501(c)(3) with legislators or other government officials or employees having responsibility with respect to legislative matters come within the testimony exception, it is important to determine whether such contacts are initiated by the organization or by the legislative body. Efforts by organizations with section 501(c)(3) status to secure appearances before legislative bodies to present information often will not come within the testimony exception.¹¹ Moreover, it is possible that an appearance before a legislative body at which an organization goes beyond the parameters of the requested testimony to opine on unrelated or corollary matters can result in lobbying activities by that organization.

Another exception to the direct lobbying rules under the “no substantial part” test exists for appearances before, or communication with, any legislative body with respect to decisions by the legislative body that might affect the continued existence of the respective organization, its powers and duties, tax-exempt status or the deductibility of contributions to the organization.¹² The “self-defense exception” is a codification of the discussion in *Slee v. Com’r* that a charity should be allowed to lobby to protect its own existence.¹³

In light of the foregoing discussion, an organization described in section 501(c)(3) can reasonably assume that

7 *League of Women Voters*, *supra* note 5.

8 *Commarrano*, *supra* note 6.

9 1970-2 C.B. 111.

10 *Id.*

11 *Harswell*, *supra* note 8.

12 I.R.C. § 4911(d)(2)(C).

13 *Slee v. Com’r*, 42 F.2d 184 (2d Cir. 1930) (Judge Learned Hand, writing for the Second Circuit, recognized the need for tax-exempt organizations to lobby in order to protect such organizations’ ability to further their purposes; however, the stated purpose of lobbying for the repeal of birth-control laws made the American Birth Control League’s purposes, which included the operation of a free clinic, other than exclusively charitable); *See also* G.C.M. 34289 (May 8, 1970) (In addition to the exemption for appearances made at the request of a legislative body, the IRS recognized that appearances before a legislative body that pertain to matters being considered by the body that could affect the existence of a tax-exempt organization were not the type of activities prohibited by section 501(c)(3)).

2 Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii).

3 *See, e.g., League of Women Voters of the United States v. U.S.*, 180 F.Supp. 379 (Ct. Cl. 1960).

4 *See, e.g., Cammarano v. United States*, 358 U.S. 498 (1959).

5 Notice 88-76, 1988-27 I.R.B. 34.

6 *Haswell v. U.S.*, 500 F.2d 1133 (Ct. Cl. 1974).

all contacts with legislators or other government officials having legislative responsibility regarding sponsoring, proposing, supporting or opposing legislation will result in direct lobbying activities under section 501(c)(3), unless an affirmative showing is made that the contact involves an invited appearance before a legislative body solely to provide technical assistance or other expertise in connection with a specific matter contemplated by the legislative body or involves activities permitted under the self defense exception. Direct lobbying will also occur if a section 501(c)(3) organization contacts members of the general public with respect to sponsoring, supporting or opposing any referendum. Organizations described in section 501(c)(3) subject to the “no substantial part” test must be mindful of all activities undertaken by their directors, officers, employees or agents that would amount to direct lobbying.

Under the “no substantial part” test (and the expenditure test), lobbying activities can include not only direct lobbying—contact with legislators for purposes of influencing legislation—but grass roots lobbying, as well. Grass roots lobbying involves actions that are designed to influence the public to take action with respect to legislation. It is in the area of grass roots lobbying that many organizations described in section 501(c)(3) run afoul of the limitations on lobbying activities. Some of the difficulties with defining the exact parameters of grass roots lobbying are evident in *Christian Echoes National Ministry, Inc. v. United States*.¹⁴ In that case, a religious organization was deemed to have engaged in substantial grass roots lobbying activities through the continuous publication and broadcast of materials urging individuals to act with respect to many legislative issues. In many instances, specific legislation was named; however, in many instances, general issues, rather than specific legislation, were discussed. Similarly, in some instances readers were urged to act directly, such as contacting specific, named legislators; in other instances, no direct or specific action was urged. Making no distinctions, the court held that all of these activities constituted grass roots lobbying and, as such, the organization’s status under section 501(c)(3) was revoked.

The *Christian Echoes* decision highlights the most vexing problem regarding grass roots lobbying under the “no substantial part” test—when is a communication aimed at the general public intended to spur action with respect to legislation. As the *Christian Echoes* decision demonstrates, there are few clear guidelines under the “no substantial part” test. It appears that any mass or targeted communication with potential legislative impact could be troublesome. As such, organizations described in section 501(c)(3) should be wary of the content of any direct mail or other mass communications activity, including speeches and other presentations and articles in trade or technical publications.

¹⁴ 470 F.2d 849 (10th Cir. 1972).

It is important to note that grass roots lobbying does not include mass communication activities that consist of nonpartisan analysis, study or research.¹⁵ Examples of nonpartisan analysis, study or research are set forth in published rulings of the IRS. For example, in Rev. Rul. 64-195,¹⁶ an organization became interested in the question of court reform in a particular state and legislation proposed to carry out such court reform. The activities of the organization, as described in the ruling, were as follows:

The instant organization does not expend any of its funds or participate in any way in the presentation of suggested bills to the State legislature and it does not expend its funds in any campaign necessary to persuade the people to vote for the constitutional amendment. Its activity in connection with court reform is limited to the study, research and assembly of materials and the presentation of an objective analysis to those interested in court reform including those who oppose it as well as those who favor it, and to the general public.¹⁷

The nonpartisan analysis, study or research exception, like the testimony and self defense exceptions, could be important to an organization described in section 501(c)(3) depending upon the types of projects it undertakes or sponsors and the manner in which the results are communicated. To the extent such research involves any issue that might be the subject of legislation, no lobbying activity will be attributable to the section 501(c)(3) organization so long as the research is an even-handed analysis of the topic. Section 501(c)(3) organizations should be aware, however, that lobbying activities may be attributable to the organization if particular nonpartisan analysis, study or research is subsequently used in connection with other lobbying activities.¹⁸

DEFINING “NO SUBSTANTIAL PART”

Once it has been determined that an organization described in section 501(c)(3) has identified legislation and taken steps to influence such legislation, whether through direct or grass roots lobbying, it is necessary to determine

¹⁵ Treas. Reg. § 1.501(c)(3)-1(c)(3)(iv).

¹⁶ 1964-2 C.B. 138.

¹⁷ 1964-2 C.B. at 138.

¹⁸ Under the expenditure test, discussed *infra*, subsequent use of the results of nonpartisan analysis, study or research may be recharacterized as grass roots lobbying for purposes of the Regulations. Treas. Reg. § 56.4911-2(b)(2)(v)(A). The recharacterization depends upon the organization’s “primary purpose” in undertaking or preparing the particular materials. In making the determination of “primary purpose”, the Regulations provide that the extent of the organization’s nonlobbying distribution in comparison to the distribution with a direct encouragement to action is considered. Treas. Reg. § 56.4911-2(b)(2)(G). Another particularly relevant factor, for purposes of the Regulations, is whether the materials are used by the preparing organization and a related organization or by an unrelated organization. Use by an unrelated organization will not constitute grass roots lobbying by the preparer organization absent “clear and convincing evidence”, including cooperation or collusion between the organizations, that the primary purpose for preparing the materials was for use in lobbying. *Id.* Although the Regulations promulgated under section 4911 of the Code do not apply directly to the “no substantial part” test, the analysis that a court examining the issue would apply is likely to be similar.

if the level of those activities exceeds the “no substantial part” limitation. Unfortunately, no clear definition of the term “no substantial part” has been formulated by either the IRS or the courts. Moreover, “the vague standards of the substantial part test [tend] to create uncertainty and allow subjective and selective enforcement [of the limitation on political activities of organizations described in section 501(c)(3)].”¹⁹ This definitional uncertainty places a great burden on organizations described in section 501(c)(3) that attempt to comply with the “no substantial part” test.

The cases that have analyzed the question of what constitutes “no substantial part” with respect to the limitations imposed on lobbying activities under section 501(c)(3) have uniformly avoided the promulgation of any numerical or percentage guidelines. Moreover, even when numerical or percentage information is presented in the decision, the courts have consistently stated that such information is not the basis of their holding. For example, in *Seasongood v. Commissioner*,²⁰ the court, in finding that an organization devoted to educating the public on issues of current interest, as well as investigating proposed legislation, sponsoring legislation and opposing legislation, had not exceeded the limitations on lobbying activities imposed on organizations described in the predecessor to section 501(c)(3), noted that less than five percent of the activities of the organization consisted of lobbying activities. The Court did not base its holding on such evidence, however, but rather determined that the lobbying activities of the organization in issue were not of the type proscribed under the law.

Similarly, in *League of Women Voters*²¹ the court accepted evidence that showed that the lobbying activities of the League of Women Voters (the “League”) constituted between .52 percent and two percent of the organization’s overall activities. The court nonetheless held that the League’s lobbying activities were a substantial part of the League’s overall activities and concluded that the League was not an exempt organization under the predecessor provision to section 501(c)(3). In so holding, the court noted that once the League had reached a position with respect to sponsoring, opposing or supporting legislation, the members were called upon to act, the ensuing action constituted lobbying activities, and such lobbying activities were an important part of the League’s purposes.

The reluctance of the courts to establish or rely on numerical or percentage evidence in defining what constitutes “no substantial part” of an organization’s activities is specifically addressed in *Christian Echoes*.²² In *Christian Echoes*, the court examined the lobbying activities of a religious organization. In holding that the organization’s published and broadcast statements on proposed and pending legislation, as well as the

organization’s urgings to its members to act on proposed or pending legislation, constituted lobbying activities, the court refused to set forth a numerical or percentage test for what constitutes “no substantial part” of an organization’s activities, stating:

The political activities of an organization must be balanced in the context of the objectives and circumstances of the organization to determine whether a substantial part of its activities was to influence or attempt to influence legislation. A percentage test to determine whether the activities were substantial obscures the complexity of balancing the organization’s activities in relation to its objectives and circumstances. An essential part of the program of Christian Echoes was to promote desirable governmental policies consistent to its objectives through legislation. The activities of Christian Echoes in influencing or attempting to influence legislation were not incidental, but were substantial and continuous.²³

As a result of the courts’ refusal to quantify the “no substantial part” test, uncertainty as to its parameters exists. In the cases cited above, loss of section 501(c)(3) status resulted where as little as .52 percent of an organization’s overall activities were lobbying activities and section 501(c)(3) status was sustained where as much as five percent of an organization’s overall activities were lobbying activities. Moreover, the refusal of the courts to rely on numerical or percentage evidence when analyzing the “no substantial part” test allows much discretion in finding that lobbying activities are substantial because of their importance to an organization’s goals or their impact on targeted legislation.²⁴ Thus, once an organization described in section 501(c)(3) has undertaken lobbying activities, it is subject to much uncertainty regarding application of the “no substantial part” test.

EXPENDITURE TEST

A. DOLLAR LIMITATION

The principal problem with the “no substantial part” test is the lack of certainty surrounding the concept of substantial. In an attempt to address this concern, section 501(h) was added to the Code. Pursuant to section 501(h), an organization described in section 501(c)(3), other than a private foundation, may elect (an “electing charity”) to avoid the “no substantial part” test and apply an expenditure test for purposes of determining whether it has engaged in impermissible levels of lobbying activities. Thus, one immediate difference between the two tests is that the expenditure test measures lobbying expenditures whereas the “no substantial part” test measures lobbying activities. This distinction can be important especially for organizations whose representatives engage in lobbying activities on a volunteer basis.

Generally, section 501(h) permits an electing charity to make annual lobbying expenditures equal to 20 percent

19 Preamble to Proposed Amendments to 26 C.F.R. Parts 1, 53 and 56, 53 F.R. 51,826, 51,827 (1988).

20 227 F.2d 901 (6th Cir. 1955).

21 *Supra*, note 5.

22 *Supra*, note 16.

23 *Supra*, note 16.

24 See Treas. Reg. § 1.501(c)(3)-1(c)(3)(iv); *League of Women Voters*, *supra* note 5.

of the electing charity's first \$500,000 of exempt purpose expenditures, 15 percent of the electing charity's exempt purpose expenditures between \$500,000 and \$1,000,000, 10 percent of the electing charity's exempt purpose expenditures between \$1,000,000 and \$1,500,000 and 5 percent of the electing charity's exempt purpose expenditures in excess of \$1,500,000, but irrespective of the percentage formula, annual permitted lobbying expenditures are capped at \$1,000,000. For purposes of section 501(h), "exempt purpose expenditures" are amounts spent by an organization described in section 501(c)(3) in pursuit of its charitable goals. An electing charity would reach the maximum permitted amount of lobbying expenditures with annual exempt purpose expenditures equal to or in excess of \$17,000,000. In addition to the overall limitation on lobbying expenditures, a separate limitation is imposed on the amount of grass roots lobbying expenditures that an electing charity can make. Specifically, grass roots lobbying expenditures are limited to 25 percent of an electing charity's overall lobbying expenditure limitation.

In comparison to the "no substantial part" test, the expenditure test formula affords much greater certainty for an electing charity attempting to determine whether it has exceeded the limit on permissible lobbying activities. Equally significant, the expenditure test provides an alternative penalty to loss of section 501(c)(3) status for electing charities that exceed the applicable expenditure limitations. Specifically, section 501(h) provides for an excise tax on excess lobbying expenditures equal to 25 percent of the amount of such excess. The tax is imposed on the greater of excess total lobbying expenditures or excess grass roots lobbying expenditures. For example, if an electing charity's overall lobbying expenditure limit is equal to \$100,000 and it has total lobbying expenditures equal to \$120,000, of which \$50,000 are grass roots lobbying expenditures, the electing charity would be subject to an excise tax equal to \$6,250 (i.e., 25 percent of its excess grass roots lobbying expenditures—\$50,000—\$25,000).

Under the expenditure test, an electing charity will lose its section 501(c)(3) status only if the electing charity's total lobbying expenditures or grass roots lobbying expenditures normally exceeds by more than 150 percent the applicable limitation on the electing charity's total lobbying expenditures or grass roots lobbying expenditures. Whether an electing charity has normally exceeded either limit is determined based on a four-year, rolling average. In other words, an electing charity's total lobbying expenditures and grass roots lobbying expenditures are totaled for the most recent four-year period (less than four years in the case of a newly created or newly electing organization) and the actual yearly average compared to 150 percent of the applicable limitations. Absent violation of the 150 percent test, an electing charity will never lose its section 501(c)(3) status due to impermissible lobbying activities.

B. DEFINING "LEGISLATION" AND "ATTEMPTING TO INFLUENCE LEGISLATION"

Subsequent to the enactment of section 501(h), few charities elected to be covered by the expenditure test. To make the expenditure test more attractive, the IRS embarked upon a large scale regulations project that, in 1990, culminated in final Regulations under section 501(h), the election provision, and section 4911, the excise tax provision. These Regulations embody the second significant advantage to the expenditure test in comparison to the "no substantial part" test. Specifically, the Regulations are much more precise and much narrower, relative to the pertinent case law, with respect to defining activities that would constitute influencing, or attempting to influence, legislation. As mentioned earlier, "legislation" is generally defined similarly for purposes of both the expenditure test and the "no substantial part" test. With respect to influencing legislation, the Regulations provide as follows:

- (1) Direct Lobbying Communication—
 - (i) Definition. A direct lobbying communication is any attempt to influence any legislation through communication with:
 - (A) Any member or employee of a legislative body; or
 - (B) Any government official or employee (other than a member or employee of a legislative body) who may participate in the formulation of the legislation, but only if the principal purpose of the communication is to influence legislation.
 - (ii) Required Elements. A communication with a legislator or government official will be treated as a direct lobbying communication... if, but only if, the communication:
 - (A) Refers to specific legislation...; and
 - (B) Reflects a view on such legislation.
 - (i) Special Rule for Referenda, Ballot Initiatives or Similar Procedures. Solely for purposes of this section 4911, where a communication refers to and reflects a view on a measure that is the subject of a referendum, ballot initiative or similar procedure, the general public in the state or locality where the vote will take place constitutes the legislative body, and individual members of the general public are, for purposes of this paragraph (b)(1), legislators. Accordingly, if such a communication is made to one or more members of the general public in that state or locality, the communication is a direct lobbying communication.
- (2) Grass Roots Lobbying Communication—
 - (i) Definition. A grass roots lobbying communication is any attempt to influence any legislation through

an attempt to affect the opinions of the general public or any segment thereof.

- (ii) Required Elements. A communication will be treated as a grass roots lobbying communication... if, but only if, the communication:
 - (A) Refers to a specific legislation...;
 - (B) Reflects a view on such legislation; and
 - (C) Encourages the recipient of the communication to take action with respect to such legislation...²⁵

The foregoing definitions are clearly more precise and narrowly drawn than the definitions of influencing legislation in the case law developed under the “no substantial part” test. In addition to the foregoing definitions, these Regulations expand on the meaning of “specific legislation”. Under the Regulations, “specific legislation” includes both legislation that has already been introduced in a legislative body and a specific legislative proposal that the organization either supports or opposes. In the case of a referendum, ballot initiative, constitutional amendment, or other measure that is placed on the ballot by petitions signed by a required number or percentage of voters, an item becomes “specific legislation” when the petition is first circulated among voters for signature.²⁶

The Regulations also limit “action” with respect to lobbying activities that constitute legislation to “the introduction, amendment, enactment, defeat or repeal of acts, bills, resolutions or similar items.”²⁷ The specificity of the meaning of “specific legislation” and “action”, together with the foregoing definitions, provide much more definitional certainty regarding what activities will or will not constitute lobbying activities.

PROHIBITION ON ELECTIONEERING ACTIVITIES

The “no substantial part” test and the expenditure test cover only one of the limits regarding political activities imposed on organizations described in section 501(c)(3). While limited in the amount of lobbying activities in which they can participate, organizations described in section 501(c)(3) are absolutely prohibited from engaging in electioneering activities. This prohibition applies separately and apart from considerations of lobbying activities under either the “no substantial part” test or the expenditure test. In contrast to the limitation on lobbying activities, the prohibition against electioneering activities by organizations described in section 501(c)(3) is absolute. As such, compliance requires not a measurement of activity but an identification and avoidance of prohibited activities. Organizations described in section 501(c)(3) must always be mindful of the difference between lobbying and electioneering activities. The Regulations

define electioneering, again in the context of an “action” organization, as follows:

(iii) An organization is an “action” organization if it participates or intervenes, directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office. The term “candidate for public office” means an individual who offers himself, or is proposed by others, as a contestant for an elective public office, whether such office be national, State or local. Activities which constitute participation or intervention in a political campaign on behalf of or in opposition to a candidate include, but are not limited to, the publication or distribution of written or printed statements or the making of oral statements on behalf of or in opposition to such a candidate.²⁸

Fortunately, in light of the absolute nature of the prohibition, electioneering is generally easy to identify. Examples of electioneering can be seen in the Christian Echoes decision. The proscribed activities, as described by the court, were as follows:

In addition to influencing legislation, Christian Echoes intervened in political campaigns. Generally it did not formally endorse specific candidates for office but used its publications and broadcasts to attack candidates and incumbents who were considered too liberal. It attacked President Kennedy in 1961 and urged its followers to elect conservatives like Senator Strom Thurmon and Congressmen Bruce Alger and Page Belcher. It urged followers to defeat Senator Fulbright and attacked President Johnson and Senator Hubert Humphrey. The annual convention endorsed Senator Barry Goldwater. These attempts to elect or defeat certain political leaders reflected Christian Echoes’ objective to change the composition of the federal government.²⁹

As this passage demonstrates, opposition to candidates, as well as support of candidates, violates the electioneering prohibition.

Because the proscription on electioneering activities is absolute, it is vital that organizations described in section 501(c)(3) closely monitor their activities to insure that no electioneering activities are involved. Activities to avoid include written or oral statements by officials of 501(c)(3) organizations (in their official capacities) promoting or opposing any candidate for public office, the use of any section 501(c)(3) organization’s funds, assets or facilities by any candidate in connection with any political function (e.g., candidate appearances at the section 501(c)(3) organization’s facilities, use of the section 501(c)(3) organization’s mailing lists, etc.) and contributions to any political action committee. Any of these activities, irrespective of size or significance, could pose a threat to the organization’s continued section 501(c)(3) status. 📌

²⁵ Treas. Reg. § 56.4911-2(b)(1)(2).

²⁶ Treas. Reg. § 56.4911-2(d)(1)(ii).

²⁷ Treas. Reg. § 56.4911-2(d)(2).

²⁸ Treas. Reg. § 1501(c)(3)-1(c)(3)(iii).

²⁹ 470 F.2d at 856.

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