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Take Care of Me When I Am Dead: An Examination of American Church-State Development and the Future of American Religious Liberty

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Comments

TAKE CARE OF ME WHEN I AM DEAD: AN EXAMINATION OF AMERICAN CHURCH-STATE DEVELOPMENT AND THE FUTURE OF AMERICAN RELIGIOUS LIBERTY

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> Among those I call the great men of the world are Thomas Jefferson, James Madison, and various others who participated in formulating the ideas behind the First Amendment for this country and in writing it. . . . The First Amendment is truly the heart of the Bill of Rights. The Framers balanced its freedoms of religion, speech, press, assembly, and petition against the needs of a powerful central government, and decided that in those freedoms lies this nation's only true security. They were not afraid for men to be free. We should not be.[1]

I. INTRODUCTION

CHURCH-state relations have proved to be one of the more emotional, controversial, and confusing issues in American society. From colonial establishments of religions,[2] to the First Amendment prohibition against establishment and guarantee of free exercise,[3] to contemporary calls for a pseudo-establishment,[4] the American people have been deeply divided over religion and its place in public life. The issue has been complicated by the polarizing politicizing of religion.

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1. JAMES MADISON ON RELIGIOUS LIBERTY 6 (Robert S. Alley ed., 1985) (statement of Justice Hugo Black).

2. *See generally* MARK A. NOLL, A HISTORY OF CHRISTIANITY IN THE UNITED STATES AND CANADA 25-65 (1992) (providing a detailed analysis of the establishment of colonial religious sects).

3. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

4. Many public figures have condemned church-state separation as legal and historical fiction:

> The time has come, for those who deplore present trends and wish to resist them, to invoke their knowledge of history sufficiently to proclaim that fanatical interpretations of the separation clause of the First Amendment are unrelated to protecting the public from the illusory threat of an established religion. . . . Conservatives should be adamant about the need for the reappearance of Judeo-Christianity in the public square.

William F. Buckley, *Agenda for the Nineties*, NAT'L REV., Feb. 19, 1990, at 34. "By relearning the facts that a righteous new government came from a righteous people seeking to advance the kingdom of Christ, it will be possible to reverse the ungodly laws of this generation." CATHERINE MILLARD, THE REWRITING OF AMERICA'S HISTORY (1991). "We must reestablish the beauty and fullness in love of a Christian nation that was once ours." FRANK SCHAEFFER, A TIME FOR ANGER: THE MYTH OF NEUTRALITY 78 (1982). "God blessed this nation because in its early days she sought to honor God and the Bible, the inerrant word of the living God. Any diligent student of American history finds that our great nation was founded by godly men upon godly principles to be a Christian nation." JERRY FALWELL, LISTEN AMERICA! 25 (1980).

Political parties have seized the Christian faith, made Christian tenets a part of party platforms,[5] and painted a portrait of the Founding Fathers as devout Christians[6] who were hostile to church-state separation.

Unfortunately, the religious liberty philosophy of the Founding Fathers, the history of American church-state relations, and the legislative intent of the First Amendment's Establishment and Free Exercise Clauses have been clouded by partisan bickering. The political debate has pushed both sides to the fringes of the argument, with separationists becoming adamantly opposed to the slightest influence of religion in secular society and the opposition organizing at the grassroots level to essentially try and resurrect some form of socialized religion.

Neither side involved in what has now transmogrified from a historical debate into a political debate has done much to clarify the intent of the Founding Fathers regarding religion in secular society. This Comment traces the origins of church-state relations in America from the seventeenth century through the landmark decisions of *Lemon v. Kurtzman*[7] and *Sherbert v. Verner*.[8] Particular emphasis is given to the early life, influences, and writings of James Madison, the principle architect of the First Amendment's Establishment and Free Exercise Clauses. Widely regarded as "America's premier exponent *and* practitioner of the principle of freedom of conscience,"[9] Madison essentially spurred and consummated the American religious liberty[10] debate and position. Consequently, as a genuine understanding of religious liberty in the context of the First Amendment can only be obtained by examining the legislative history, Part II of this Comment attempts to expose the convictions of the Amendment's author.[11]

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5. *See, e.g.*, Judi Hasson, *Religion Shares Convention Stage: 'Moral Issues' Are Focus*, USA TODAY, Aug. 18, 1992, at 4A (discussing the 1992 National Republican Party Platform that was "heavy with references to God and the Scriptures").

6. In the historical view of many, "[t]he overwhelming majority of the Founding Fathers of this nation were raised and believed in the Christian faith." TIM LAHAYE, FAITH OF OUR FOUNDING FATHERS xi (1987).

7. 403 U.S. 602 (1971).

8. 374 U.S. 398 (1963).

9. JAMES MADISON ON RELIGIOUS LIBERTY, *supra* note 1, at 11.

10. The term religious liberty has been bandied about in recent years and has assumed a variety of connotative meanings. Supporters and antagonizers of church-state separation have used the term to support strict separation and liberal accommodation. Hence, it is necessary to place the term in its proper context. For the purposes of this Comment, religious liberty will assume its traditional denotative meaning:

> Freedom, as guaranteed by [the] First Amendment of [the United States] Constitution, from constraint, or control in matters affecting the conscience, religious beliefs, and the practice of religion. Freedom to entertain and express any or no system of religious opinions, and to engage in or refrain from any form of religious observance or public or private religious worship, not inconsistent with the peace and good order of society and the general welfare.

BLACK'S LAW DICTIONARY 919 (6th ed. 1990).

11. Madison biographer Irving Brant cogently explains the historical importance of James Madison:

> To know what ultimate position James Madison will hold in his country's history one must know what that country's future will be. If the American

Once the historical church-state position has been established, Part III turns to the judicial treatment of the Establishment and Free Exercise Clauses prior to *Lemon* and *Sherbert*. Judicial treatment of religious liberty was hardly cohesive prior to 1971. Although laws that prohibited unlawful religious activity were consistently upheld,[12] others that clearly established tenets of Christianity were sporadically declared constitutional as well.[13]

The United States Supreme Court attempted to bring conciliation between federal and state courts on the Establishment Clause question with its decision in *Lemon*. Part IV of this Comment analyzes this landmark case, the First Amendment test established by the Court, and a few of the plethora of decisions that have relied on *Lemon*. In addition, a survey of select twentieth century judicial opinions of justices hostile to contemporary interpretations of religious liberty are examined. Special emphasis is given to the opinions of the Court's most vocal separation antagonist, Justice Scalia, with a cursory analysis of Chief Justice Rehnquist's views.

Although *Lemon* was intended to essentially end the debate and bring judicial harmony to the Establishment Clause question, the late twentieth century has witnessed a continuing attempt to dramatically alter this aspect of religious liberty. For instance, President Ronald Reagan made Supreme Court appointments with a few primary objectives. One was assuredly to, at the very least, increase religion's (namely, Christianity's) involvement and influence in American society. Indeed, Mr. Reagan's covert agenda to bring down the wall in Germany[14] was analogous to his attempt to bring down the wall of separation between church and state.[15]

> people abandon the rights and liberties he worked so hard to establish, he will be forgotten along with them. Should those rights and liberties be taken away by force or deception, they and he will continue to live in hope and aspiration. If they are maintained and cherished, the memory of James Madison will be as enduring as the mountains at which he looked so often across field and forest from his Virginia home.

JAMES MADISON ON RELIGIOUS LIBERTY, *supra* note 1, at 13.

12. *See, e.g.*, Reynolds v. United States, 98 U.S. 145 (1878) (upholding a Utah statute declaring bigamy committed in its territories a crime against the United States); Davis v. Beason, 133 U.S. 333 (1878) (Idaho statute prohibiting bigamists from voting or holding public office not unconstitutional).

13. *Compare* State v. Ambs, 20 Mo. 214 (Mo. 1854) (religiously based statute compelling the observance of Sunday declared constitutional) *and* Swan v. Swan, 21 Fed. 299 (1884) (laws of Arkansas prohibiting the performance of labor on Sunday are a legitimate exercise of police power) *and Ex parte* Burke, 59 Cal. 6 (Cal. 1881) (prohibiting persons from transacting business on Sunday does not interfere with religious liberty, namely, the free exercise and enjoyment of religious worship) *with Ex parte* Newman, 9 Cal. 502 (Cal. 1858) (declaring language of an act "for the better observance of the Sabbath" unconstitutional and void as a violation of religious freedom by enforcing the compulsory observance of a day held sacred by believers in one religion and thus discriminated in its favor).

14. *See* Carl Bernstein, *The Holy Alliance*, TIME, Feb. 24, 1992, at 28 ("Faced with a military crackdown in Poland, Ronald Reagan and John Paul II secretly joined forces to keep the Solidarity union alive. . . . [They] agreed to undertake a clandestine campaign to hasten the dissolution of the communist empire. . . . This was one of the great secret alliances of all time.").

15. "[J]udical appointments in the 1970s, 1980s, and 1990s . . . were specifically intended by Presidents Richard Nixon, Reagan, and Bush to undo Supreme Court decisions

Part V of this Comment discusses the origins of the Christian conservative movement and its influence in a grassroots attempt to reunite religion and secular society. Part V touches on the moment of silence statutes passed by a number of state legislatures.[16] The legislative history of these statutes provide some evidence that the ultimate goal was to bring prayer back to public schools, bring a heightened Christian influence into the classrooms and hence cure the moral decline of society.[17]

These legislatures have been heavily influenced by grassroots organizations, such as the Christian Coalition[18] through its legal arm, the American Center for Law and Justice (ACLJ).[19] The ACLJ has argued a number of cases before the United States Supreme Court and federal and state courts on behalf of religious accommodation. Justice Scalia and,

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affecting a variety of public policy issues." CHRISTOPHER E. SMITH, JUSTICE ANTONIN SCALIA AND THE SUPREME COURT'S CONSERVATIVE MOMENT 7 (1993). Smith explains that Presidents Reagan and Bush made concerted efforts to alter social public policy through judicial appointments by emphasizing the appointment of very young judges, all of whom had to pass the strict conservative litmus test. In fact, "the Reagan administration 'engaged in the most systematic ideological or judicial philosophical screening of judicial candidates since the first Roosevelt administration.' " *Id.* at 13 (quoting Sheldon Goldman, *Reagan's Second Term Judicial Appointments: The Battle at Midway*, 70 JUDICATURE 326 (1987)).

16. Georgia, South Carolina, and Utah are among those states that have passed laws mandating that each public school morning begin with approximately sixty seconds of silence for reflection, meditation, or silent prayer.

17. This Comment does not extensively address the issue of prayer in public schools. Public school prayer is a treatise in itself and volumes have addressed and continue to address this volatile issue. *See, e.g.*, Jeff Horner & Ben Barlow, *Prayer in Public Schools in Light of* Lee v. Weisman *and Its Progeny*, 87 EDUC. L. REP. 323 (1994); Allan Gordus, Note, *The Establishment Clause and Prayers in Public High School Graduations:* Jones v. Clear Creek Independent School District, 47 ARK. L. REV. 653 (1994); Herbert S. Fain, Jr., *Prayer in Public Schools: A Moment of Silence*, 15 T. MARSHALL L. REV. 27 (1989); Mary E. Quinn-Johnson, Comment, *School Prayer and the Constitution: Silence is Golden*, 48 MD. L. REV. 1018 (1989); John C. Walden, *Are Prayers in High School Football Games Unconstitutional?*, 39 EDUC. L. REP. 493 (1987); Mariellen F. Scott & Perry A. Zirkel, *The Legality of Prayer in the Public Schools: Teachers' Knowledge, Attitude, and Practice*, 36 EDUC. L. REP. 533 (1987).

18. The Christian Coalition is a grassroots organization formed by Pat Robertson after his failed 1988 presidential bid "to preserve Christian freedom and religious values in America." PAT ROBERTSON, THE TURNING TIDE: THE FALL OF LIBERALISM AND THE RISE OF COMMON SENSE 107 (1993). It is an outgrowth of the extinct Moral Majority founded by Jerry Falwell. The Coalition trains, fields, endorses, and campaigns for predominantly Christian conservative candidates at the school board, local and state levels; additionally, it has recently become intimately involved in United States Senate and House of Representatives races. "The Christian Coalition is launching an effort in selected states to become acquainted with registered voters in every precinct." PAT ROBERTSON, NEW WORLD ORDER: IT WILL CHANGE THE WAY YOU LIVE 261 (1991). Its ultimate goal was to have a Conservative Republican (supposedly the party that unilaterally supports a heightened Christian influence in secular society) in the United States Senate by 1992 and a majority in the House of Representatives by 1996. *Id.* Nevertheless, the election goals of the Christian Coalition were accelerated with the election of a Republican majority in the Senate and the House after the 1994 elections. Richard Wolf, *GOP Rattles Dems: Power Shifting in Senate, House, States*, USA TODAY, Nov. 9, 1994, at 1A.

19. The ACLJ consists of a team of attorneys, including the highly visible and vocal lead counsel, Jay Sekulow. Sekulow and the ACLJ are engaged in an organized attempt to dramatically alter religious liberty by primarily litigating public school prayer cases, including a number of high profile cases before the United States Supreme Court. *See infra* note 315 and accompanying text.

more recently, Justice Thomas[20] have provided a sympathetic ear for the ACLJ's and other religious liberty law firms' attempts to reunite religion and secular society.

Part V also touches on the movement currently underway to alter the First Amendment. Two constitutional amendments have been introduced into the House of Representatives to allow student-led prayer in public schools and government funding of religious symbols.[21] This effort is due in part to lobbying efforts by Christian conservatives. They have successfully convinced many legislators that Christians in the public sector are effectively being persecuted; in this regard, Part V examines the arguments by Christian conservatives that they are a persecuted minority.

Part VI concludes that present and future Supreme Court religious liberty decisions are and will be essentially a product of presidential elections.[22] The viability of *stare decisis* appears destined to be dependent upon partisan politics. Hence, given the inability of *Lemon* and other cases to solve the religious liberty debate and the covert litmus tests applied to potential Supreme Court nominees, the entire religious liberty structure will remain in perpetual flux. Nevertheless, this Comment advocates that current interpretations of the Establishment and Free Exercise Clauses should be perpetuated.

II. COLONIAL CHURCH-STATE RELATIONS, THE WRITINGS OF JAMES MADISON, AND THE GENESIS OF RELIGIOUS LIBERTY

A. IN THE BEGINNING

From the beginning, European explorers took a religious interest in America.[23] The very first entry in the diary of Christopher Columbus during his journey to America in 1492 expressed the desire to interact with the native peoples to discover "the manner in which may be undertaken their conversion to our Holy Faith."[24] Despite failing to unilater-

20. Justice Thomas consistently votes with Justice Scalia and Chief Justice Rehnquist. In fact, during his first term, Justice Thomas voted with Chief Justice Rehnquist and Justice Scalia 75% of the time. Christopher E. Smith & Scott P. Johnson, *The First-Term Performance of Justice Clarence Thomas*, 76 JUDICATURE 172, 172-78 (1993).

21. *See infra* notes 341-50 and accompanying text.

22. For instance, Presidents Reagan and Bush made concerted efforts to appoint conservative justices to the United States Supreme Court from 1980 to 1992, with one of the primary goals being the revisiting of cases that conservatives considered bad law. Although President Reagan's nomination of Judge Robert Bork (clearly one of the more conservative judges in the United States) failed, other appointments of justices hostile to church-state separation succeeded (see, for example, the appointments of Justices Scalia and Thomas). These ulterior motives were nearly brought to fruition with the Court's attempt to overturn the abortion decision of Roe v. Wade, 410 U.S. 113 (1973). The conservative wing of the Court had decided to overturn *Roe* and penned the majority decision before an eleventh hour change of heart by Justice Kennedy. *See* SMITH, *supra* note 15, at 96 (discussing Pennsylvania v. Casey, 505 U.S. 833 (1992)). *Casey* is a clear example of the elasticity of *stare decisis*.

23. NOLL, *supra* note 2, at 11.

24. *Id.* at 12.

ally or significantly proselytize Native Americans, the religious influence of explorers and settlers resounded throughout America during the colonial period.

The Church of England, which was an offshoot of the Roman Catholic Church, was the established church in Europe, and as the state religion, compulsory adherence to its doctrines was required.[25] The Protestant Reformation initiated by Martin Luther was a response to Roman Catholicism and the Church of England.[26] A liberation from the stifling traditions of Europe, including the oppressive Church of England, "stimulated exploration across the Atlantic."[27]

Puritans, who were among the earliest settlers to establish a presence in America, were a part of the Protestant Reformation in England. "Puritans wanted to wipe out the vestiges of Roman Catholic worship and doctrine that survived within the Church of England."[28] This desire and the failure of Puritans and other Protestants to purge the Church of England in Europe were primary reasons for the en mass migration to America.[29]

Paradoxically, Puritans, aside from a few exceptions,[30] adopted a creed that turned out to be contrary to the interests of religious liberty and as oppressive as the Church of England. For example:

> Puritans believed that God created society as a unified whole. Church and state, the individual and the public, are not unrelated spheres of life but are complementary, intimately connected by God's acts of creation and his continuing providence. This conviction lay behind the Puritan effort to reform all of English society. It also provided the stimulus for the Puritan effort to fashion colonies in the New World in which all parts of colonial life would reflect the glory of God. . . . [I]t led to the high-handedness and intolerance that Puritans sometimes displayed in both Britain and America when they were in control. Since they presumed to know the will of God so clearly, they felt it was only right that they could force others to comply, even if those others did not understand God the same way they did.[31]

Despite fleeing religious oppression in Europe—abhorring the intolerant Church of England and its dogmatic citizenry control—Puritans crafted

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25. *See* F. MAKOWER, THE CONSTITUTIONAL HISTORY AND CONSTITUTION OF THE CHURCH OF ENGLAND 68-95 (1895) (discussing the religious doctrines and religious strife of the Church of England).

26. NOLL, *supra* note 2, at 31.

27. *Id.* at 11.

28. *Id.* at 32.

29. Puritans were the "single most influential cultural force at work" in colonial America. A. JAMES REICHLEY, RELIGION IN AMERICAN PUBLIC LIFE 53 (1985). In fact, by the time of the American Revolution, some 75% of American citizens had been raised with some form of Puritan influence. SYDNEY E. ALHSTROM, A RELIGIOUS HISTORY OF THE AMERICAN PEOPLE 169 (1975). Puritanism was a vital force in the formation of essentially all of England's colonies in America. REICHLEY, *supra*, at 55.

30. Roger Williams, one of the most famous Puritans in New England, believed that the Bible supported church-state separation. NOLL, *supra* note 2, at 33.

31. *Id.*

their Protestant doctrine with *prima facie* religious intolerance.[32] Unfortunately, the Puritan edict became the exordium of official religious establishments throughout colonial America.

Aside from Rhode Island, "all of the colonies erected 'establishments' of some sort."[33] This is mind boggling, given their disdain for socialized religion in Europe. Nevertheless, the colonies established religious sects, although the colonies' "establishments" were pursued with varying degrees of vigor.

For instance, the Church of England "was the established church in . . . the Carolinas, Georgia, Maryland after 1691, and parts of New York City after 1693."[34] Additionally, the Jamestown settlers quickly established the Church of England in the Virginia colony in 1607. This made life intolerable for Catholics and Quakers and uncomfortable for Protestant dissent. These tenuous conditions continued for more than one hundred years. In fact, the Puritans in Massachusetts had covenanted together to establish "God's New Israel" by 1630.[35] "Their 'city upon a hill' was a beacon of intolerance of all dissent, a theocracy that made life impossible for Quakers, Catholics, separatists, and freethinkers."[36] This totalitarian government in Massachusetts, using the Bible as apparent authority and serving as an example for other colonies, continued this religious totalitarianism until the nineteenth century. Theocratic governments existed openly and defiantly during these early years.[37]

One isolated exception was the Rhode Island territory. Roger Williams began the Providence settlement in 1656, which "admitted no reservations respecting religious liberty."[38] Williams and many of the Providence settlers were devoutly religious. Nonetheless, the settlers, with Williams leading the way, were convinced that their theological convictions gave them no right to impose their own definitions on others.[39]

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32. *Id.*

33. John Wilson, *Church and State in America*, *in* JAMES MADISON ON RELIGIOUS LIBERTY, *supra* note 1, at 97, 105.

34. NOLL, *supra* note 2, at 63.

35. JAMES MADISON ON RELIGIOUS LIBERTY, *supra* note 1, at 14.

36. *Id.* President Reagan embraced this Puritan ideal, often referring to America as a "city on a hill." In one paradigmatical observation he proclaimed, "Who but a Divine Providence could have placed this nation here . . . this new Jerusalem, this shining City on a Hill." Chris Smith & Mark Souder, *Help States Fight Illegal Aliens . . . But Protect Legal Immigrants*, WASH. TIMES, Mar. 20, 1996, at A17.

37. For example, in Massachusetts the only individuals allowed to participate in the political process, including the right to vote, were those certified as "orthodox in the fundamentals of religion." LEO PFEFFER, CHURCH, STATE, AND FREEDOM 74 (rev. ed. 1967). Those violating these provisions were prosecuted as "heretics." THOMAS L. TEDFORD, FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY: LEGACY OF SUPPRESSION 18 (1963). In 1641, the General Court of Massachusetts decreed that the state "civil authority" had the duty to ensure that "the people be fed wholesome and sound doctrine." PFEFFER, *supra*, at 75. Four years later, this same body declared that "damnable heresies . . . ought to be duly restrained" and adopted the Act Against Heresy, which punished anyone who "den[ied] the immortality of the soul, or the resurrection, sin in the regenerate, or the need of repentance." *Id.*

38. TEDFORD, *supra* note 37, at 18.

39. *Id.*

"Combining reason and piety Williams effected a system of church-state separation that was and remains the sterling example of a principle brought to practical fruition."[40]

The influx of varying Protestant sects disrupted the harmonious colonial denominations. Scottish-Irish Presbyterians in Anglican Virginia, German Mennonites in Quaker Pennsylvania, Anglicans in Congregational Connecticut and Massachusetts all contributed to the growing religious melting pot.[41] Growing religious diversity notwithstanding, many Puritans had no desire to accommodate divergent religious perspectives. For example, John Cotton, a seventeenth century Puritan leader, explained that "[t]oleration made the world anti-Christian."[42] He went on to exhort: "My heart has naturally detested . . . toleration of diverse religions, or of one religion in segregate shapes."[43] Cotton further stated that the only liberty the established sect owed to dissidents was "the liberty to keep away from us."[44] Nevertheless, the rising number of religious liberty voices provided the framework for the establishment of new colonies and sects.

One of these new colonies, Virginia, founded in 1607, established the Anglican church as its official religion. Its pre-commonwealth government, however, proved to be far more tolerant than the dogmatic Puritans. For instance, the English Act of Toleration of 1689 gave Protestant dissenters who registered their places of worship the right to hold public services.[45] As a result, dissenters accounted for approximately two-thirds of the white population in Virginia by the time of the American Revolution.[46] This made toleration of religious sects necessary, and hence the roots of religious liberty began to develop.[47]

B. THE EMERGENCE OF JAMES MADISON

In the midst of a nation searching for identity and suffering religious growing pains came James Madison. Standing only five feet six inches

40. *Id.* at 15.
41. Wilson, *supra* note 33, at 105.
42. THE AMERICAN PURITANS 98 (Perry Miller ed., 1956).
43. *Id.*
44. *Id.*
45. REICHLEY, *supra* note 29, at 85.
46. PHILLIP SCHAFF, CHURCH AND STATE IN THE UNITED STATES OR THE AMERICAN IDEA OF RELIGIOUS LIBERTY AND ITS PRACTICAL EFFECTS 28 (1972). Although church-state evolution of each colony is intriguing, Virginia is clearly the Constitutional genesis of the First Amendment's Establishment and Free Exercise Clauses. Consequently, although other colonial developments (for example, Massachusetts and Plymouth) are relevant, they are not as material to the ideology behind American religious liberty development.
47. *See generally* CHARLES F. JAMES, DOCUMENTARY HISTORY OF THE STRUGGLE FOR RELIGIOUS LIBERTY IN VIRGINIA (1971); THOMAS E. BUCKLEY, S.J., CHURCH AND STATE IN REVOLUTIONARY VIRGINIA, 1776-1787 (1977) (providing an in depth examination of the religious liberty climate in Virginia and other colonies); Daniel L. Dreisbach, *Thomas Jefferson and Bills Number 82-86 of the Revision of the Laws of Virginia, 1776-1786: New Light on the Jeffersonian Model of Church-State Relations*, 69 N.C. L. REV. 159 (1990) (analyzing the religious liberty development of Virginia).

tall, oft-ill,[48] plagued by a weak voice, and essentially bereft of most of the conventional characteristics of a "great leader," James Madison at first glance seems hardly qualified to be called a Founding Father. Nonetheless, he more than compensated for his traditional shortcomings with "his rigorously logical mind, appetite for reading, and indefatigable industry."[49] His superior intelligence, religious convictions,[50] and love of his country led him to the College of New Jersey[51] in 1769, a college with a reputation for "religious strictness and staunch patriotism."[52]

James Madison was a resilient student and particularly enjoyed government and history. Following his graduation, he spent several months studying Hebrew, law, and ethics and was exposed to a number of Scottish intellectual philosophies. The foregoing exposure brought James Madison to a realization that is essential to government, as well as to society as a whole: "The study of history yields generalizations about human nature and thus furnishes guidelines for the governance of human

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48. Biographer Ralph Ketcham explains James Madison's physical condition as paradoxical:

> He was described frequently as "feeble," "pale," or "sickly," and he wrote repeatedly of bouts of illness and fears that poor health would prevent his doing something or other, yet he lived to be eighty-five years old and until his last years seems not to have suffered seriously or chronically from an identifiable disease.

RALPH L. KETCHAM, JAMES MADISON: A BIOGRAPHY 51 (1971).

49. A. E. Dick Howard, *James Madison and the Founding of the Republic*, *in* JAMES MADISON ON RELIGIOUS LIBERTY, *supra* note 1, at 21.

50. James Madison, like many of the founding fathers, was, in rhetoric, deeply religious. His "idea of religion . . . was one of a highly personal relationship between the individual and his maker." REICHLEY, *supra* note 29, at 93. Assuredly, however, one could question the sincerity of a religious conviction that condones, participates in, and fosters the enslavement of fellow human beings. Some argue that "Madison, Jefferson, and even Washington were not in 'any meaningful sense Christians.'" *Id.* at 368 n.98. Nonetheless, "they adhered to the broad tenets of Judeo-Christian doctrine." *Id.*

Clifford Goldstein offers a caustic yet tenable theory about the sincerity of the Christian principles of early Americans:

> One wonders just what those "godly principles" were. Were they found in the uprooting and massacre of thousands upon thousands of Native Americans by "a righteous people seeking to advance the kingdom of God"? Were they in the enslavement of millions of black Africans upon whose raging sweat and spilled blood this "Christian nation" was built? Or were they in the persecution of religious dissenters in the early days, when America "sought to honor God and the Bible"?

CLIFFORD GOLDSTEIN, DAY OF THE DRAGON: HOW CURRENT EVENTS HAVE SET THE STAGE FOR AMERICA'S PROPHETIC TRANSFORMATION 69-70 (1993) (Mr. Goldstein is editor of *Liberty*, a magazine devoted to religious liberty issues).

In addition, "Benjamin Franklin, though president of the Pennsylvania Abolition Society, wanted to send away all blacks and preserve America for 'the lovely White and Red.'" DERRICK A. BELL, JR., RACE, RACISM AND AMERICAN LAW 7 (3d ed. 1992). "In his original draft of the Declaration of Independence, Thomas Jefferson, a slaveholder himself, included a paragraph critical of King George's sanction of the slave trade." *Id.* at 26. In fact, Jefferson "never deviated from his lifelong conviction that the Negro must be freed so as 'to be removed beyond the reach of mixture' so that he would not stain 'the blood of his master.'" *Id.*

51. The College of New Jersey is now known as Princeton University.

52. Howard, *supra* note 49, at 22.

affairs."[53]

Madison's passion for public service resulted in an early exposure to politics and an abundance of pontificating on a number of momentous issues. He ascended to the Virginia House of Delegates in 1784 and quickly became a leader in the General Assembly. At thirty-three, after nearly ten years of involvement in Virginia politics, James Madison helped "define the proper boundaries between church and state in a free society."[54] Although James Madison is most famous in the lay and legal communities for becoming the fourth president of the United States and making a substantial contribution to the Federalist papers,[55] his most significant legacy is, arguably, his passionate religious liberty rhetoric.

James Madison's zeal for the issue of church-state relations is evident by his celebrated and enlightened rebuke of Patrick Henry.[56] In 1784, Patrick Henry, an American patriot, statesman, and orator, became concerned over what he and others perceived as the deterioration of moral conditions.[57] In an effort to curb this perceived moral spiral, Patrick Henry, at the time the most popular politician in Virginia, introduced a bill for the General Assessment of Religion. This Assessment included a property tax to unilaterally support churches.

> The bill . . . was specifically for the support of and maintenance of several Ministers and Teachers of the Gospel who are of different persuasions and Denominations and for the upkeep of their churches. In the case of Quakers and Mennonists, which had no clergy, the money would go in a general fund to promote their particular mode of worship. In short, Henry's General Assessment was an eighteenth-century version of what the twentieth-century accom-

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53. *Id.* at 26.

54. *Id.*

55. Mr. Howard puts the importance of the Federalist papers in perspective: "Of the eighty-five essays—published in 1788 as *The Federalist*—Madison wrote twenty-nine. *The Federalist* has few competitors as America's single most important contribution to political theory and to the art of governance." *Id.* at 29.

56. Patrick Henry is probably most known for his emphatic proclamation at the onset of the American Revolution, "Give me liberty, or give me death!"

57. Ironically, contemporary figures are calling for religious mandates, such as school prayer, to curb the perceived rampant moral degeneracy that Patrick Henry, James Madison, and others believed to be an epidemic over 200 years ago. "James Madison complained . . . about the 'Poverty . . . Luxury . . . Pride . . . Ignorance . . . Knavery . . . Vice and Wickedness' which prevailed in Virginia," yet remained an adamant supporter of religious liberty. KETCHAM, *supra* note 48, at 57. Conversely, political commentator, conservative leader, and two-time presidential candidate Pat Buchannan provides a representative sample of the sentiments of many current public figures:

> Since in the thirty years [we have] taken prayer, Bible instruction, Ten Commandments out, [sic] we've seen crime, violence, rape, attacks on teachers, killings, stabbings, horrible situations in the school. Don't you see a correlation between the removal of all ethical, moral, and religious instruction from education and the decline of society?

Crossfire: Prayer & Politics (Cable News Network television broadcast, Nov. 16, 1994, transcript # 1224) *available in* LEXIS, News Library, Script File (Pat Buchanan's question to Bill Bogaman, senior pastor of the Foundry United Methodist Church, on House Speaker Newt Gingrich's proposal to offer a school prayer amendment for a vote on the House floor by July 4, 1995).

modationists believe the First Amendment allows: nonpreferential and nondiscriminatory government aid to all religions.[58]

The introduction of Patrick Henry's General Assessment prompted James Madison to write *A Memorial and Remonstrance Against Religious Assessments*, a document that served as the intellectual genesis and support for the First Amendment's religious liberty clauses.[59] He vehemently opposed what he considered a governmental entanglement with religion, exhorting that religion "must be left to the conviction and conscience of every man" as religious freedom is an "inalienable right."[60]

Madison argued that the health of religion is not dependent upon governmental support. He feared that such governmental support of religion would "destroy that moderation and harmony which forbearance of our laws to intermeddle with Religion has produced among its several sects."[61] His reference to the intermeddlance of secular laws and religion in the sects is a display of concern over the growing number of edicts with exclusively religious motives. Religious tests for public office and established colonial religions are merely a few examples of what James Madison considered to be a detrimental entanglement of government and religion. On numerous occasions, from the beginning of his philosophical and political career through the twilight of his life, James Madison retained what in modern day analysis is considered a strict separationist stance:

> As an old man he offered the opinion that the separation of church and state that took place in Virginia immediately after the War was the best thing that had ever happened to the churches in that state: "We are teaching the world the great truth that Governments do better without Kings and Nobles than with them. The merit will be doubled by the other lesson that Religion flourishes in greater purity, without than with the aid of Government."[62]

Furthermore, his reference to intermeddlance is an acknowledgment of the remnant of colonial intolerance that lingered throughout Virginia and other commonwealths.

He concluded that government's role in the religious arena is limited to "protecting every Citizen in the enjoyment of his Religion with the same equal hand which protects his person and his property; by neither invading the equal rights of any Sect, nor suffering any Sect to invade those of another."[63] James Madison's impassioned opposition to Patrick Henry's

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58. GOLDSTEIN, *supra* note 50, at 80.

59. Howard, *supra* note 49, at 26.

60. *Id.* This statement is analogous to the denotative meaning of religious liberty. *See supra* note 10.

61. Howard, *supra* note 49, at 26.

62. NOLL, *supra* note 2, at 135. *But see infra* part IV.D. (discussing Chief Justice Rehnquist's contrary view of government aid to religion).

63. HOWARD, *supra* note 49, at 26. Excerpts of *A Memorial and Remonstrance Against Religious Assessments* shed more light on James Madison's response to church-state relations, keeping in mind that this is a response to a rather simple, uniform request for religious tax assistance:

seemingly harmless and unambitious proposal helped lay Henry's bill to rest and led to the passage of Thomas Jefferson's Act for Establishing Religious Freedom.[64] Moreover, it personified this Founding Father's belief in the separation of church and state.[65]

A Memorial and Remonstrance Against Religious Assessments is merely one example of James Madison's public concern (and in some instances paranoia) over the ability of the government to influence or control individual liberty. For example:

> [H]e even opposed the appointment of chaplains to Congress and the military, calling a chaplainship to Congress "a palpable violation of equal rights, as well as Constitutional principles." This man who wrote the First Amendment, vetoed a bill that would have given the Baptist Church land, saying that it "compromises a precedent for the appropriation of funds of the United States for the use and support

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> 1. Because we hold it for a fundamental and undeniable truth, "that Religion or the duty which we owe to our Creator and the manner of discharging it, can be directed only by reason and conviction, not by force or violence." The Religion then of every man must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. . . .
>
> 4. . . . Whilst we assert for ourselves a freedom to embrace, to profess and to observe the Religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us. If this freedom be abused, it is an offense against God, not against man. . . .

To the Honorable General Assembly of the Commonwealth of Virginia: A Memorial and Remonstrance, *in* JAMES MADISON ON RELIGIOUS LIBERTY, *supra* note 1, at 55, 56-57.

64. This Act was written by Thomas Jefferson, introduced into the General Assembly in 1779, and signed into law on January 19, 1786. Although its author is Thomas Jefferson, its essence, as the following excerpts demonstrate, belongs to James Madison:

> I. WHEREAS Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens [sic], or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion . . . .
>
> II. *Be it enacted by the General Assembly*, That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened [sic] in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities.

Id. at 60-61.

65. *Id.* Further light is shed is on James Madison's views by his extensive correspondence with Princeton classmate William Bradford. The correspondence contains some of James Madison's sentiments on religious liberty and government involvement with religion:

> If the Church of England had been the established and general Religion in all the Northern Colonies as it has been among us here and uninterrupted tranquillity had prevailed throughout the Continent, It is clear to me that slavery and Subjection might and would have been gradually insinuated among us. Union of Religious Sentiments begets a surprizing [sic] confidence and Ecclesiastical Establishments tend to great ignorance and Corruption all of which facilitate the Execution of mischievous Projects.

Letter from James Madison to William Bradford (Jan. 24, 1774), *in* JAMES MADISON ON RELIGIOUS LIBERTY, *supra* note 1, at 47. This letter is one of the many that displayed James Madison's embedded cynicism of government and religious entanglement.

of religious societies."[66]

Despite James Madison's numerous expressions concerning religious liberty, his legacy in this area is undoubtedly the First Amendment. Amazingly, however, the First Amendment can in some respects be considered a fortuitous part of American society. The Articles of Confederation, which served as America's precursor to the current United States Constitution,[67] were originally intended to be the living document by which our country would abide. Nevertheless, the Articles of Confederation proved to be wanting in several regards. Many of the powers and liberties that we assume must exist for any democracy (or republic) to survive were conspicuously absent. For example, there was no executive branch. Congress had no power to levy taxes on individuals, regulate commerce, or prevent the states from coining money.[68] The Articles of Confederation failed to establish a national power, including a centralized government, and no federal courts were established to override state laws that conflicted with national legislation.[69] Most importantly, however, the Articles of Confederation contained no references to religious liberty.

The glaring deficiencies in this document led to the Philadelphia convention. "Although called merely to draft amendments to the Articles of Confederation, the Philadelphia convention soon moved to a more ambitious business—the writing of a new constitution."[70] The delegates recognized many of the potentially politically fatal flaws of the Articles and thus decided to completely discard the document.

Historians agree that "Madison was the dominant spirit of the Philadelphia convention. Certainly his influence on the convention was such that he has been aptly described as the 'master builder of the Constitution.'"[71] This is thought-provoking, given the fact that George Washington was unanimously selected to preside over the convention. At the very least, however, it correlates with James Madison's abundance of congeniality and intelligence. On September 17, 1787, after four months of debate, the delegation discarded the Articles of Confederation and adopted a completely new document; the current United States Constitution is the same document (not including the amendments) produced by the 1787 Philadelphia convention. It was similar to the Virginia state constitution[72] and was subsequently ratified by the states in 1788.[73]

66. GOLDSTEIN, *supra* note 50, at 78 (quoting EDWIN S. GAUSTAD, FAITH OF OUR FATHERS 51 (1987)).

67. The Articles of Confederation were ratified by the states in 1781. J. W. PELATSON, CORWIN AND PELATSON'S UNDERSTANDING THE CONSTITUTION 10 (5th ed. 1970).

68. *Id.* at 11.

69. Howard, *supra* note 49, at 27.

70. *Id.* at 28.

71. *Id.*

72. This was a result of James Madison's influence during the convention. *See* JAMES, *supra* note 47, at 151-58.

73. PELATSON, *supra* note 67, at 17.

Unfortunately, our new living document was again bereft of any references to church-state relations. Nevertheless, James Madison, elected to the first House of Representatives and recognizing the need to protect individual liberties, sought a speedy enactment of the Bill of Rights.[74] His first concern was the protection of religious freedom, and he introduced a series of amendments in 1789 that would affect church-state relations at the federal and state levels. He clearly considered his amendments restricting the ability of states to control or influence religious liberty to be the most important.

James Madison's first draft of what would eventually become the First Amendment was substantially different in language and scope than the ultimate final product: "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, abridged."[75] This amendment was rejected by the congressional committee, which feared that such an amendment might abolish religion altogether. The committee wanted to inject the word "national" to make clear that state and local governments would be free to support religious institutions. Although James Madison explained that the intended meaning of his proposal was "that Congress should not establish a religion, and enforce the legal observation of it by law, nor to compel men to worship God in any manner contrary to their conscience," he flatly rejected the contention that governments at any level should be allowed to support any religious sect or abridge religious liberty.[76]

In addition, the states' sovereignty argument played an enormous role (which, incidentally, turned out to be the Achilles' heel of our country, leading to the Civil War). For example, "[a]s the House moved from amendment to amendment it became evident that South Carolina, with some Northern aid, was intent on subordinating Congress to the states. [One Carolinian congressman] wanted an amendment assuring the people's right 'to instruct their representatives.'"[77]

Madison's fifth amendment included a clause that was directed at the states: "No state shall violate the equal rights of conscience. . . ."[78] Many scholars, including biographer Irving Brant, have interpreted this clause as having the primary goal of removing the vestiges of state establishments.[79] Indeed, a natural reading of this clause leads to the logical conclusion that its intent was to effect religious liberty at the state level.

In light of the opposition James Madison faced and in spite of his "intention to subject the States to a similar but separate restriction—one which he called the most valuable in his entire list," the amendment was

74. REICHLEY, *supra* note 29, at 108.
75. IRVING BRANT, JAMES MADISON: FATHER OF THE CONSTITUTION 1787-1800 269 (1950).
76. *Id.* at 270.
77. *Id.* at 273.
78. REICHLEY, *supra* note 29, at 108.
79. *Id.* at 108-09.

altered to read: "Congress shall make no laws touching religion, or infringing the rights of conscience."[80] Although this amendment was in language clearly directed to Congress, appeasing the vocal states' rights constituency, the committee adopted a substitute a few days later: "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience."[81] The final version of the amendment did not clearly identify the author, and there is no positive proof that James Madison wrote the final version; nevertheless, he was the *sine qua non* of the First Amendment, given the legislative history and language: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."[82]

C. THE FAITH OF (OTHER) FOUNDERS

Many religious and political figures link the professed religious convictions of the Founding Fathers with a liberal support of accommodation.[83] As previously stated, most of the Founding Fathers were in rhetoric very pious men.[84] As Clifford Goldstein explains, "The argument then proceeds that, because they were Christians, they couldn't have meant for the Constitution to be hostile to religion. . . . Rather, the Founding Fathers, because they were Christians, would have been accommodationists, allowing government to support religion as long is it didn't favor one church over another."[85] Mr. Goldstein and others, including church-state scholar Dr. Stan Hastey, have recognized that this argument "has become common currency among those seeking to use the state either to fund or to promote religion."[86]

Notwithstanding, contemporary contentions that the Founding Fathers were devout Christians and therefore liberal accommodationists become nebulous when compared to what the Founding Fathers have publicly said about religious liberty. For instance, George Washington is often

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80. BRANT, *supra* note 75, at 270.

81. *Id.* at 271.

82. *Id.*

83. *See, e.g.*, LAHAYE, *supra* note 6, at xi ("The overwhelming majority of the founding fathers of this nation were raised and believed in the Christian faith").

84. Although the founders were overwhelmingly religious, they were heavily influenced by the Enlightenment. "The Enlightenment taught that divine revelation could not establish truths that were contrary to reason. To many Enlightenment thinkers, however, revelation remained an important supplement to reason, and religion and reason therefore played complementary roles in the search for truth." Daniel O. Conkle, *Different Religions, Different Politics: Evaluating the Role of Religious Traditions in American Politics and Law*, 10 J.L. & RELIGION 1 (1993-94) (citing HENRY F. MAY, THE ENLIGHTENMENT IN AMERICA xiv (1976)).

85. GOLDSTEIN, *supra* note 50, at 74.

86. *Id.* Chief Justice William Rehnquist believes that the government is free to provide nondiscriminatory aid to religious sects, so long as the government does not favor one sect over another. Wallace v. Jaffree, 472 U.S. 38, 91-92 (1985) (Rehnquist, J., dissenting). See *infra* part IV.D., for a discussion of Chief Justice Rehnquist's views on church-state separation.

characterized as a devout Christian,[87] and although the depth of his (and many of the early American's) religious beliefs can always be subject to scrutiny,[88] the existence of a prayer book and his many references to God raise the inference that George Washington was indeed a Christian.

Nevertheless, his public responses to religious liberty clearly places him in the same vein as James Madison. This became apparent in 1789 when ranking members of the Presbyterian church complained to the President that the new Constitution was too secular and failed to recognize "the only true God and Jesus Christ."[89] George Washington's public response was that "the path of true piety is so plain as to require but little political direction."[90] Furthermore, when negotiating a peace treaty with Tripoli, he included language that sheds a great deal of light on his religious liberty convictions: "[T]he United States is not, in any sense, founded upon the Christian religion."[91]

Other Founding Fathers were publicly, clearly in harmony with George Washington and James Madison. One example is Benjamin Franklin, who is often cited in modern day analyses as one who would support the religious beliefs of Christian conservatives. He has been "baptized" by many religious figures who refer to him as a strong advocate of "religious freedom."[92] The contemporary uses of the term "religious freedom," however, have evolved over the years and consequently have drifted from its denotative meaning.[93] Christian conservatives have increasingly used the term "religious freedom" to essentially mean the elimination of church-state separation.

Although Benjamin Franklin was a firm believer in God, his oft-quoted pronouncement about religion and government is, to say the least, contrary to liberal accommodation and entanglement:

> When religion is good, I conceive that it will support itself; and when it does not support itself, and God does not take care to support it, to that its professors are obliged to call for the help of civil powers, "tis a sign, I apprehend, of it being a bad one."[94]

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87. Pat Robertson, one of the leading public proponents of a wholesale restructuring of religious liberty in America, contends that George Washington was "a Christian whose faith in God and respect for God's Word were the central pillars of his public policy." PAT ROBERTSON, AMERICA'S DATES WITH DESTINY 115 (1986). Says Christian author Tim LaHaye, "That [he] was a devout believer in Jesus Christ and accepted Him as His Lord and Savior, is easily demonstrated by a reading of his personal prayer book." LAHAYE, *supra* note 6, at 110. Legal historian and religious professor John Eidsmoe has the following analysis: George Washington's prayers "are the sentiments of an Orthodox Christian." JOHN EIDSMOE, CHRISTIANITY AND THE CONSTITUTION 131 (1987).

88. *See supra* note 50.

89. GAUSTAD, *supra* note 66, at 78.

90. *Id.*

91. Henry S. Commager, *Take Care of Me When I am Dead*, in JAMES MADISON ON RELIGIOUS LIBERTY, *supra* note 1, at 331.

92. LAHAYE, *supra* note 6, at 115-16.

93. *See supra* note 10.

94. GOLDSTEIN, *supra* note 50, at 77.

Of course the famous (or infamous) wall of separation metaphor originated with Thomas Jefferson. In addition to this polemical metaphor, he made numerous other statements that align him with James Madison, George Washington, and Benjamin Franklin on religious liberty. For instance, he considered any sort of general tax to support religion "sinful and tyrannical"[95] and proclaimed that "[i]t is error alone which needs the support of the government. Truth can stand by itself."[96]

Thomas Jefferson is characterized by John Eidsmoe as a man who "saw the value of Christianity for the nation and the individual, attended church, gave to the support of several churches, and lived a pious life."[97] Despite his piety, Thomas Jefferson is much harder to baptize than the aforementioned Founding Fathers. By most historical accounts, he was a Deist and a follower of the Enlightenment.[98] Nonetheless, his letter to the Danbury Baptist Association in response to the proposed First Amendment was cited by the United States Supreme Court in *Reynolds v. United States*:[99]

> Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only and not opinions,—I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion or prohibiting the free exercise thereof," thus building a *wall of separation between church and State.* Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties.[100]

James Madison was clearly, in rhetoric, a staunch supporter of church-state separation, and his previously discussed views provide a nexus to the religious liberty views of the aforementioned Founding Fathers. His position on religious liberty never changed during his lifetime and indeed became a foundation of the most important amendment in the Bill of Rights. James Madison, George Washington, Benjamin Franklin, and Thomas Jefferson, at varying moments in their political careers, all made public statements that would place them in direct contrast to modern calls for liberal accommodation and entanglement.[101]

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95. *An Act for Establishing Religious Freedom*, in JAMES MADISON ON RELIGIOUS LIBERTY, *supra* note 1, at 60 ("to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical").

96. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 160 (William Peden ed., 1955).

97. EIDSMOE, *supra* note 87, at 245.

98. *See generally* MAY, *supra* note 84 (discussing the impact of the Enlightenment on Thomas Jefferson and other Founders).

99. 98 U.S. 145 (1878).

100. *Id.* at 164 (emphasis added).

101. Indeed, current public figures proclaim America to be a "Christian nation" and call for an official pronouncement. *See, e.g.*, *Evangelical Update*, N.Y. TIMES, Nov. 21,

III. COMMON LAW TREATMENT OF RELIGIOUS LIBERTY BEFORE *LEMON V. KURTZMAN* AND *SHERBERT V. VERNER*

Common law decisions prior to 1947 were inconsistent and in some instances alarming. State and federal courts had varying interpretations of religious liberty, and the resulting judicial opinions displayed this lack of cohesiveness. For instance early blue laws,[102] although clearly compelling an adherence to a Christian doctrine (Sunday keeping), were almost uniformly upheld in numerous jurisdictions. Ironically, early blue law decisions, despite being patently unconstitutional, were the only areas of homogeneous religious liberty jurisprudence in the late eighteenth and early nineteenth centuries.

A. BLUE LAW FATALITIES

State v. Fernandez[103] is an example of a nineteenth century blue law fatality. Mr. Fernandez was prosecuted for violating the provision of Louisiana's blue law, which required all places of business to close on Sunday. Mr. Fernandez dared to open his grocery store on Sunday and was promptly tried and convicted. The Supreme Court of Louisiana held that the ordinance did not compel the observance of Sunday as a religious institution and hence was not a violation of the State constitution, which has an establishment clause provision identical to the First Amendment.[104] The court determined that the statute was a valid exercise of the State's police power.[105]

Massachusetts was another of the many states with quasi-establishment statutes. In *Commonwealth v. Has*,[106] Mr. Has was convicted of violating Massachusetts's Sunday blue law. The Supreme Judicial Court of Massachusetts held that prohibiting the opening of a shop on the "Lord's day" does not conflict with the eleventh amendment to the constitution of Massachusetts, which provides that no subordination of any one sect or denomination to another shall ever be established by law.[107]

In a similar case, the Court of Appeals of New York declared that an act prohibiting dramatic performances on Sunday does not infringe on the right to "the free exercise and enjoyment of religious profession and

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1992, at 19 (Mississippi Governor Kirk Fordice proclaimed that "America is a Christian nation"); *America is not a Christian Nation*, ST. LOUIS POST-DISPATCH, Nov. 24, 1992, at 2B (Governor Fordice stating that "[t]he less we emphasize the Christian religion the further we fall into the abyss of poor character and chaos in the United States of America").

102. Blue laws are statutes regulating entertainment activities, work, and commerce on Sundays. These laws have their origin in colonial New England. BLACK'S LAW DICTIONARY 157 (5th ed. 1979). Many states, particularly in the northeastern United States, currently have archaic blue laws on the books. *See* McGowan v. Maryland, 366 U.S. 420 (1961) (discussing the Maryland blue law).

103. State v. Fernandez, 2 So. 233 (La. 1887).

104. *Id.* at 234.

105. *Id.*

106. 122 Mass. 40 (Mass. 1877).

107. *Id.*

worship" preserved by New York's constitution.[108] The court explained that the legislature has the authority to protect the Christian Sabbath from desecration, by such laws as it may deem necessary, and is the sole judge of the acts properly to be prohibited with a view to the public peace on that day.[109]

In re King[110] is another example of establishment laws that were in direct conflict with the First Amendment. The Federal District Court for the Western District of Tennessee held that the Fourteenth Amendment of the United States Constitution had not abrogated the Sunday laws of the states and established religious freedom. The court explained that the states were free to, in spite of the First Amendment, establish a church or creed, maintain them, and still be in harmony with the Constitution.[111]

The foregoing cases represent just a few of the many decisions that sanctioned laws that undoubtedly "respected an establishment of religion" (Christianity), yet passed constitutional muster according to the judiciary. Keeping Sunday as a holy day was palatable to such large segments of society during these periods due to the overwhelming number of professed Christians in the population. Nevertheless, forcing the entire population of a city or state to observe a religious holiday by prohibiting merchants from conducting business, or prohibiting any lawful activity for that matter, is clearly an infringement of religious liberty. Despite the disestablishment among the states, lingering vestiges of establishment practices and statutes, like blue laws, remained a part of American society.[112]

B. Judicial Embracement of Church-State Separation and the Application of the Free Exercise Clause

In a free exercise case, Judge Schwellenbach of the Eastern District of Washington departed from the theocratic rationale of early blue law decisions in *United States v. Hillyard*.[113] This case involved Mr. Hillyard who, after being selected for jury duty, refused to serve as it would violate the

108. Neuendorff v. Duryea, 69 N.Y. 557 (1877).

109. *Id.*

110. 46 F. 905 (W.D. Tenn. 1891).

111. *Id.* at 915-16.

112. Although the late eighteenth and early nineteenth century enactment of blue laws had exclusively religious motives, some states maintain these laws under a different guise. The Supreme Court determined in 1961 that these laws now have a secular purpose. *McGowan*, 366 U.S. at 435-36. Blue laws represent an interesting paradox in this nation's history. Both Madison and Jefferson introduced blue laws into the Virginia General Assembly. Many scholars agree, however, given the highly partisan, religious climate, that the bills were a carrot stick approach to political compromise on the entire religious liberty issue. *See* Robert Alley, *The Madison and Jefferson Blues: Madison and Jefferson Once Supported a Sunday Law. Big Deal*, LIBERTY, Jan.-Feb. 1995, at 18 (discussing the motivation behind both bills).

113. United States v. Hillyard, 52 F. Supp. 612 (E.D. Wash. 1943).

religious tenets of the Jehovah's Witness faith.[114] The court held that the refusal of a Jehovah's Witness to serve as a juror because of a religious belief is protected by the First Amendment.

Judge Schwellenbach gave a cogent depiction of primigenial American religious liberty:

> The "history of the times" is filled with instances of bigotry, intolerance, reprehension and persecution. The colonists who fled from the old world to escape religious persecution brought with them none of the tolerance towards those with whom they disagreed which they demanded from those from whom they fled. The statute books of the Colonies were replete with laws by which the majority members of each Colony attempted to enforce upon others the precepts of the particular denomination or faith to which the majority adhered. People were taxed against their will for the support of religion and, sometimes, for the purposes of particular sects to whose tenets they could not and did not subscribe.[115]

Judge Schwellenbach goes on to extensively cite *A Memorial and Remonstrance Against Religious Assessment* in an attempt to define the parameters of religious liberty. He captures the essence of the Founding Fathers' religious liberty philosophy in the following excerpt: "We maintain therefore that in matters of religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance."[116] Judge Schwellenbach realized that only by either ignoring a substantial amount of statements made by the Founding Fathers or by taking a revisionist history approach could he prevent Mr. Hillyard's constitutional right of free exercise of religion. He concluded his opinion with a common sense analysis:

> While I cannot understand defendant's reasoning and cannot accept his conclusion . . . I have no fear that the prestige of this court will be diminished by this result. . . . Oftentimes a free government can best demonstrate its strength by frugality in its use. Power need not always beget force. Only those who need rely on power must always use it.[117]

He recognized that his personal disdain for Mr. Hillyard's religious conviction should not result in the simplistic conclusion that the practice did

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114. The Witnesses teach that the obligations imposed by God are superior to those enacted by temporal government. They believe that a literal interpretation of Exodus 20: 3-5 prohibits government service.

115. *Hillyard*, 52 F. Supp. at 612. Judge Schwellenbach gave other examples of early religious liberty deprivations:

> Even the "Act of Toleration" of which Maryland so proudly boasts, provided the death penalty for those who might thrice be convicted of violating the statute defining blasphemy to be to "deny our Savior to be the Son of God, or deny the Holy Trinity, or the Godhead of any of the three Persons, or the Unity of the Godhead."

Id. at 613.

116. *Id.* *See supra* note 63 for further excerpts of *A Memorial and Remonstrance Against Religious Assessments.*

117. *Hillyard*, 52 F. Supp. at 614.

not deserve constitutional protection.[118]

In *Everson v. Board of Education of Ewing TP*,[119] the United States Supreme Court borrowed the thought process of Judge Schwellenbach by relying on the historical intent and the convictions of the Founding Fathers when interpreting religious liberty. *Everson* involved a New Jersey statute that authorized its local school districts to make rules and contracts for the transportation of children to and from schools. Everson subsequently filed suit challenging the right of the Board to reimburse parents of parochial school students. Although the Court of Errors and Appeals of New Jersey upheld the statute and the United States Supreme Court affirmed, the Supreme Court ensured its opinion explicitly laid out what statutes or actions would be unconstitutional:

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever they may adopt to teach or practice religion. Neither a state nor a Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.[120]

The Supreme Court in *Everson*, as the Court did in *Reynolds*, relied on Thomas Jefferson's letter to the Danbury Baptist Association. The Court explained that "[t]he First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here."[121]

Reynolds and *Everson* are certainly in direct contrast with the cases that endorsed religiously oppressive laws. They are evidence of the judicial merry-go-round that engulfed religious liberty during the late nineteenth and early twentieth centuries. In addition to judicial inconsistency over the interpretation of the Establishment and Free Exercise Clauses, courts struggled over the incorporation of the Bill of Rights to the states.

C. The Incorporation Debate

Scholarly debate over the incorporation of the First Amendment to the states has been the source of volumes of intellectual discussion.[122] Ini-

118. The Supreme Court formally established the compelling state interest test for Free Exercise cases in Sherbert v. Verner, 374 U.S. 398 (1963).

119. 330 U.S. 1 (1947).

120. *Id.* at 15-16.

121. *Id.* at 18.

122. *See, e.g.*, Raoul Berger, *Incorporation of the Bill of Rights: Akhil Amar's Wishing Well*, 62 U. CIN. L. REV. 1 (1993); Note, *Rethinking the Incorporation of the Establishment Clause: A Federalist View*, 105 HARV. L. REV. 1700 (1992); Raoul Berger, *Incorporation of*

tially, the Bill of Rights as a whole was not applied to the states. This was underscored by Justice John Marshall in *Barron v. Baltimore*,[123] when he and a plurality of the Court held that the Bill of Rights does not restrain state and local authorities. Some courts subsequently struggled with incorporation,[124] while others, relying on the writings of Thomas Jefferson and James Madison, unilaterally applied the Establishment and Free Exercise Clauses to the states.[125]

The failure of the Supreme Court to address incorporation left the states with the ability to adopt all, few, or none of the Bill of Rights. The passage of the Fourteenth Amendment, which expressly applies to the states,[126] forced the Court to confront the issue of incorporation.[127] Nevertheless, the Court did not take the momentous step of applying the Bill of Rights to the states until 1925. In *Gitlow v. New York*,[128] the Court held that liberty of speech is protected by the word "liberty" in the Fourteenth Amendment. From that point on the Supreme Court began the process of "selective incorporation"[129] and "[b]y 1970, for all practical purposes, the Bill of Rights [had] been incorporated into the Fourteenth Amendment."[130]

Everson was the Court's first explicit incorporation of the Establishment Clause to the states.[131] *Cantwell v. Connecticut*[132] officially incorporated the Free Exercise Clause. Since the landmark decisions of *Everson* and *Cantwell*, there has been little debate over the incorporation of the First Amendment's religious liberty clauses, and both have subsequently been applied liberally to the states.[133]

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the Bill of Rights: A Response to Michael Zuckert, 26 GA. L. REV. 1 (1991); Michael K. Curtis, *Further Adventures of the Nine Lived Cat: A Response to Mr. Berger on Incorporation of the Bill of Rights*, 43 OHIO ST. L.J. (1982).

123. 32 U.S. 243 (1833).

124. *See* discussion *supra* part III.A.

125. *See, e.g.*, *Everson*, 330 U.S. at 12-13 (1947) (citing *Memorial and Remonstrance Against Religious Assessments* and *Bill for Establishing Religious Freedom*); McCollum v. Board of Educ., 333 U.S. 203, 211 (1948) (discussing Thomas Jefferson's letter to the Danbury Baptist Association); Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 211 (1948) (citing Thomas Jefferson's Danbury letter).

126. "No State shall make or enforce any law which shall abridge privileges or immunities of citizens of the United States . . . nor deprive any person of life, liberty, or property, without due process of law; nor . . . equal protection of the laws." U.S. CONST. amend. XIV, § 1.

127. PELTASON, *supra* note 67, at 105.

128. 268 U.S. 652 (1925).

129. *See* Palko v. Connecticut, 302 U.S. 319 (1937) (explaining the doctrine of selective incorporation).

130. PELTASON, *supra* note 67, at 107.

131. *See supra* notes 120-22 and accompanying text.

132. 310 U.S. 296 (1940).

133. *See* Abington Sch. Dist. v. Schempp, 374 U.S. 203, 253-65 (1963) (Brennan, J., concurring) (extensively discussing why the Establishment and Free Exercise Clauses apply to the states).

IV. *LEMON*, ITS PROGENY, AND THE CONSERVATIVE JUDICIAL RELIGIOUS LIBERTY PARADIGM

As the discussion in Part III exemplifies, there was indeed a need for judicial cohesiveness, particularly regarding Establishment Clause cases. Inconsistencies abounded and state legislatures and state and federal courts appeared destined for a religious liberty quagmire, with the religious liberty pendulum being subject to the predilections of continually shifting partisan judicial philosophies. An apparent solution to the Establishment Clause problem arrived in 1971 with the United States Supreme Court's decision in *Lemon v. Kurtzman*.[134]

A. *LEMON V. KURTZMAN*

The facts behind *Lemon* originated in Rhode Island and Pennsylvania. Rhode Island's controversy surrounded the State's 1969 Salary Supplement Act. The Act provided for a fifteen percent salary supplement to be paid to teachers in nonpublic schools at which the average per-pupil expenditure on secular education was below the average in public schools. Teachers eligible under the Act could only teach courses offered in the public schools using exclusive public school materials and had to agree not to teach courses in religion.[135]

Although the Act was intended to benefit all qualified teachers regardless of their religious faith, Rhode Island religious demographics resulted in a disproportionate number of Catholic teachers receiving a benefit. At the time of the Act's passage about twenty-five percent of the State's elementary school students attended private schools, about ninety-five percent of whom attended schools affiliated with the Roman Catholic church. Consequently, about 250 teachers at these Roman Catholic schools were the sole beneficiaries under the Act. Critics charged that, given the control and influence of the Catholic church over the State's parochial schools, this system fostered an excessive entanglement of the Catholic church and state government.

Pennsylvania's controversy surrounded its Nonpublic Elementary and Secondary Education Act of 1968. This Act authorized the State Superintendent of Public Instruction to purchase secular educational services from private schools and directly reimburse those schools solely for teachers' salaries, textbooks, and instructional materials. Although the reimbursement was expressly forbidden for any course involving any religious teaching, the schools involved were, as in Rhode Island, almost exclusively Roman Catholic. Critics of the Pennsylvania statute argued that despite the statute's provisions the Catholic church controlled the State's parochial schools and had a primary objective of advancing its religious beliefs.

134. 403 U.S. 602 (1971).

135. Dicenso v. Robinson, 316 F. Supp. 112, 114 (D. R.I. 1970).

As was the case with many prior religious liberty cases, the lower courts arrived at somewhat confused decisions. A three-judge panel invalidated the Rhode Island Act, reasoning that the school system was "an integral part of the religious mission of the Catholic Church" and hence fostered "excessive entanglement" between government and religion.[136] Conversely, a judicial panel, considering a closely analogous claim, granted a motion to dismiss the claim involving the Pennsylvania Act, finding no violation of the Establishment or Free Exercise Clauses.[137] The lower court made this finding despite the Catholic church having essentially the same influence and control over the private school systems of both states.

The United States Supreme Court, on the other hand, found that both statutes involved an excessive entanglement of government and religion and were thus unconstitutional. The Court found a problem with the Rhode Island Act due to the exclusive religious purpose and influence of the Catholic church and other church-affiliated (or controlled) schools. A teacher under the control of religious institutions, the Court reasoned, posed a danger to the separation of religious from purely secular aspects of elementary education in those schools.[138] States would subsequently have to provide continuing supervision of the private schools to ensure compliance with the statutory provisions as well as the religious liberty guarantees of the First Amendment. In the event a nonpublic school's expenditures per pupil exceeded the comparable figures for public schools, this supervision would further include inspection of school records to determine what part of the expenditures are attributable to secular education as opposed to religious activity.

Restrictions and state supervision provided the rationale for a finding of entanglement in the Court's invalidation of the Pennsylvania program as well. Under the Act, the State had to ensure that teachers performed a strictly non-ideological role and the state supervision of private school accounting procedures were required to establish the cost of secular as distinguished from religious education. The Court found a further defect in the Pennsylvania statute, as it provided continuing financial aid directly to the church-related schools.[139] Historically, the Court explained, governmental control and surveillance measures tend to follow cash grant programs, and here the government's post-audit power to inspect the financial records of church-related schools creates an intimate and continuing relationship between church and state.[140]

Chief Justice Burger, along with a plurality of the Court, decided that a common law nexus was required for analyzing Establishment Clause cases. Justice Burger explained that "every analysis in this area must be-

136. *Id.* at 123.
137. Lemon v. Kurtzman, 310 F. Supp. 35, 48 (E.D. Pa. 1969).
138. *Lemon*, 403 U.S. at 615-20.
139. *Id.* at 620-22.
140. *Id.*

gin with consideration of the cumulative criteria developed by the Court over many years."[141] He then brought together recent Supreme Court decisions to develop what became known as the *Lemon* test. First, any statute or governmental action substantially affecting religious liberty must have a secular legislative purpose.[142] Second, its principal or primary effect must neither advance nor inhibit religion.[143] Third, the statute or action must not foster excessive governmental entanglement with religion.[144]

Despite its secular mandate, the first prong of the *Lemon* test does not prohibit laws that have a religious as well as a secular purpose.[145] "A religious purpose alone is not enough to invalidate . . . a . . . [statute]. . . . The religious purpose must predominate."[146] Any other interpretation would make the entire test hostile to religion in general.[147]

The second prong requires courts to determine whether the government is engaged in favoring, endorsing, or inhibiting "particular religious beliefs and the degree to which this action might harm religious or irreligious minorities."[148] Hence, a statute that establishes Good Friday (an exclusively Christian holy day) as a federal or state holiday to primarily honor the death of Christ would likely have the primary effect of advancing the Christian faith.[149] Conversely, a statute that targets a particular religious faith or the tenet of a religious faith would have the primary effect of inhibiting religion.

Lemon's third prong is best exemplified by the facts of *Lemon* itself. The supervision required by the State over religious institutions, coupled with the influence of the Catholic church over the parochial school system, required the State to intermeddle in the affairs of the Catholic church. Similarly, the Catholic church exerted an unwarranted degree of influence over state employees. The type of reciprocal involvement in the Rhode Island and Pennsylvania instances are *prima facie* excessive governmental entanglement with religion.

Since the landmark decision of *Lemon v. Kurtzman*, the *Lemon* test has monitored church-state relations with judicial decisions that appeased

141. *Id.* at 612.
142. *Id.*
143. *Id.* (citing Board of Educ. v. Allen, 392 U.S. 236, 243 (1968)).
144. *Id.* (citing Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970)).
145. *See, e.g.*, Edwards v. Aguillard, 482 U.S. 578, 590, 593 (1987) (a law with a predominately religious purpose and primary objective of advancing a particular religious faith violated the first prong of the *Lemon* test).
146. *Id.* at 599.
147. *See, e.g.*, Lynch v. Donnelly, 465 U.S. 668, 681 n.6 (1984) ("Were the test that the government must have 'exclusively secular' objectives, much of the conduct and legislation this Court has approved in the past would have been invalidated.").
148. Daniel O. Conkle, *Religion and the Public Schools After* Lee v. Weisman: Lemon *Lives*, 43 CASE W. RES. L. REV. 865, 870 (1993). The second "prong asks whether, irrespective of the government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval." *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring).
149. *See* Metzl v. Leininger, 57 F.3d 618 (7th Cir. 1995) (Posner, J.) (holding that state recognition of Good Friday as a state holiday in Illinois violates the Establishment Clause).

and antagonized both separationists and accommodationists.[150] Some have argued that the *Lemon* test is hostile toward religion,[151] while others view it as judicial syllogism.[152] Nevertheless, despite the Supreme Court's own acknowledgment of the delicate complexity of religious liberty,[153] the *Lemon* test has provided a consistent (albeit controversial) theme for courts and legislatures to follow.[154]

B. *LYNCH V. DONNELLY*: THE CONSERVATIVE-LIBERAL DICHOTOMY

Notwithstanding the judicial road map provided by the Court in *Lemon*, subsequent opinions have essentially followed the "party line." Liberal jurists generally take a strict separationist approach, staunchly adhering to the wall of separation metaphor, while conservative members of the judiciary despise dogmatic interpretations of church-state separation and favor liberal accommodation of religion.

The composition of the Supreme Court in the years immediately following *Lemon* was ostensibly liberal. Consequently, religious liberty decisions, for the most part, closely adhered to a strict interpretation of the wall of separation.[155] The changing political scene of the 1980s, however, resulted in the evolution of a conservative Supreme Court and an accompanying conservative judicial philosophy.[156]

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150. *Compare* Wallace v. Jaffree, 472 U.S. 38, 56 (1985) (invalidating an Alabama statute providing for a moment of silence for "meditation or voluntary prayer" in public schools as the statute's purpose endorsed religion) *and* Levitt v. Commissioner for Pub. Educ. & Religious Liberty, 413 U.S. 472, 479 (1973) (declaring unconstitutional a state statute that allowed reimbursement to church-sponsored schools for the costs of complying with various testing and reporting requirements) *with Lynch*, 465 U.S. at 668 (upholding a city's inclusion of a crèche (Nativity scene) in a broader Christmas display) *and* Roemer v. Board of Public Works, 426 U.S. 736 (1976) (upholding non-categorical grants to church-sponsored colleges and universities).

151. *See, e.g.*, *Wallace*, 472 U.S. at 85 (Burger, J., dissenting) (criticizing the invalidation of a moment of silence statute as indicating hostility toward religion).

152. *See, e.g.*, Conkle, *supra* note 148, at 867 (Professor Conkle views the *Lemon* test as an attempt "to protect the sensibilities of religious and irreligious minorities . . . [and] promote a religiously inclusive political community, not by mindlessly excluding religion from American public life, but rather by a context-specific, case-by-case analysis of particular problems").

153. As the Court explained in *Lemon*, "[T]he line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Lemon*, 403 U.S. at 614.

154. *Lemon* has been heavily criticized by commentators. *See, e.g.*, Jesse H. Choper, *The Establishment Clause and Aid to Parochial Schools: An Update*, 75 S. CAL. L. REV. 5 (1987); William P. Marshall, *"We Know It When We See It": The Supreme Court and Establishment*, 59 CAL. L. REV. 495 (1986); Michael W. McConnell, *Accommodation of Religion*, 1985 S. CT. REV. 1; Phillip A. Kurland, *The Religion Clauses and the Burger Court*, 34 CATH. U. L. REV. 1 (1984); Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980).

155. *See supra* note 153.

156. President Reagan's Supreme Court appointments in the 1980s of Justices Scalia, O'Connor, and Kennedy, coupled with holdover Justice White and President Reagan's naming of holdover Justice Rehnquist as Chief Justice, gave the Court a solid conservative bloc. Presidents Reagan and Bush attempted to ensure that their judicial appointees held strict conservative views on social issues, including church-state separation. SMITH, *supra* note 15, at 13.

Lynch v. Donnelly[157] personifies the stark differences between liberal and conservative approaches to religious liberty. Ironically, the facts of *Lynch* arose in Rhode Island, the birthplace of *Lemon*. Each year the city of Pawtucket, Rhode Island, in conjunction with the downtown retail merchants' association, erects a Christmas display to commemorate the Christmas season. The display is set up in a park owned by a nonprofit organization in the heart of the shopping district (although all components of the display are owned by the City of Pawtucket). It includes, among other things, a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, hundreds of colored lights, and, of course, the crèche.[158] The crèche has been included in the display for more than forty years. It consists of traditional Christian figures, including baby Jesus, Mary and Joseph, angels, shepherds, kings, and animals.

Members of the Pawtucket community filed suit to stop the use of the crèche. The district court agreed with the community members and held that by including the crèche in the display, the City "tried to endorse and promulgate religious beliefs" and that "erection of the crèche has the real and substantial effect of affiliating the City with the Christian beliefs that the crèche represents."[159] The district court further reasoned that the display resulted in an "appearance of official sponsorship" and "confers more than a remote and incidental benefit on Christianity."[160] A divided First Circuit Court of Appeals affirmed the district court's holding.[161]

Chief Justice Burger, however, writing for a conservative majority, found no First Amendment violation and reversed the decision of the lower courts.[162] His analysis is very similar to the analysis of dissenting liberal Justice Brennan, yet the outcomes of each are in direct contrast. For example, Justice Burger begins his opinion by searching for an appropriate precedent to use when analyzing this case.[163] Although he acknowledges the wall of separation metaphor and refers to *Lemon* early in his opinion, he establishes his ideology as clearly supporting a loose interpretation of church-state separation.

In fact, Justice Burger characterizes Thomas Jefferson's entire concept of a wall of separation as "a useful figure of speech."[164] He further criticizes the wall of separation metaphor as being "not a wholly accurate description of the practical aspects of the relationship that in fact exists

157. 465 U.S. 668 (1983).
158. *Id.* at 669.
159. Donnelly v. Lynch, 525 F. Supp. 1150, 1173 (D. R.I. 1981).
160. *Id.* at 1178.
161. Donnelly v. Lynch, 691 F.2d 1029 (1st Cir. 1982).
162. *Lynch*, 465 U.S. at 687.
163. Justice Burger, recognizing this as an Establishment Clause case, explains that the purpose of this portion of the First Amendment is "to prevent, as far as possible, the intrusion of either [the church or the state] into precincts of the other." *Id.* at 672, (quoting *Lemon*, 403 U.S. at 614).
164. *Id.* at 673.

between church and state."[165] He concludes his ideological entrenchment by stating that "[i]t has never been thought either possible or desirable to enforce a regime of total separation. . . ."[166]

Attempting to find precedent for the decision in *Lynch*, the Court held its judicial nose and halfheartedly embraced *Lemon*. Justice Burger cited the elements of the *Lemon* test, yet qualified his reference by stating that "we have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area."[167] Consequently, rather than relying exclusively on the *Lemon* test, Justice Burger attempted to find historical support from the Founding Fathers as precedent for accommodating the use of Pawtucket's religious symbol.

A few of the historical references used by the Chief Justice are the employment of Congressional chaplains to offer prayer at the First Congress,[168] the use of God on our currency and as a part of the Pledge of Allegiance,[169] and art galleries that display religious artwork with the support of public funds.[170] Chief Justice Burger concludes his historical analysis by citing former Supreme Court Justice Joseph Story, "The real object of the First Amendment was . . . to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government."[171]

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165. *Id.*

166. *Id.* (quoting Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 760 (1973)).

167. *Id.* at 679. Justice Burger cites three cases where he contends the Court did not apply the *Lemon* test, considering it irrelevant: Tilton v. Richardson, 403 U.S. 672, 677-78 (1971); *Nyquist*, 413 U.S. at 773; and Larson v. Valente, 456 U.S. 228 (1982).

168. As the Chief Justice explains, Congress welcomed the use of Congressional chaplains:

> It is clear that neither the seventeen draftsmen of the Constitution who were Members of the First Congress, nor the Congress of 1789, saw any establishment problem in the employment of Congressional chaplains to offer daily prayers in the Congress, a practice that has continued for nearly two centuries. It would be difficult to identify a more striking example of the accommodation of religious belief intended by the Framers.

Lynch, 465 U.S. at 674. *But see supra* text accompanying note 66 (discussing James Madison's opposition to Congressional chaplains).

169. Chief Justice Burger explains why he relies on God invocations and the Pledge of Allegiance:

> Other examples of reference to our religious heritage are found in the statutorily prescribed national motto 'In God We Trust,' 36 U.S.C. § 186, which Congress and the President mandated for our currency . . . and in the language 'One nation under God,' as part of the Pledge of Allegiance to the American flag. That pledge is recited by thousands of public school children—and adults—every year.

Lynch, 465 U.S. at 676.

170. *Id.* at 676-77 ("Art galleries supported by public revenues display religious paintings of the 15th and 16th centuries, predominantly inspired by one religious faith. The National Gallery in Washington, maintained with Government support, for example, has long exhibited masterpieces with religious messages, notably the Last Supper.").

171. *Id.* at 678 (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 728 (1833)). It must be noted, however, that despite being one of the most influential Supreme Court Justices in the early United States, Justice Story's views on church-state separation can not be reconciled with the views of James Madison and other

Chief Justice Burger then turns to the central issue in *Lynch*: "[W]hether there is a secular purpose for Pawtucket's display of the crèche."[172] He determines that Christmas is a traditional American holiday with ample secular aspects and that Pawtucket is merely attempting "to celebrate the Holiday and to depict the origins of that Holiday."[173] Chief Justice Burger concludes that the totality of the display is secular and that the crèche merely happens to "coincide or harmonize with the tenets of" the Christian celebration of the birth of Jesus, but stops short of establishing, advancing, or favoring Christianity.[174]

Justice O'Connor concurred with the Court's outcome in *Lynch*; however, she takes a far more conciliatory approach to *Lemon* and in fact applies the *Lemon* test in her analysis.[175] She concludes, nonetheless, that the "[c]elebration of public holidays, which have cultural significance even if they also have religious aspects, is a legitimate secular purpose."[176] She further reasons that the Christmas "holiday itself has very strong secular components and traditions" and that "[t]he crèche is a traditional symbol of the holiday that is very commonly displayed along with purely secular symbols, as it was in Pawtucket."[177]

Justice Brennan begins his dissent in the same manner as Justice Burger: searching for an appropriate *stare decisis* to help develop his opinion. Contrary to Justice Burger's devaluation of the *Lemon* test, however, Justice Brennan has little problem embracing and relying on *Lemon* as an appropriate precedent for Establishment Clause cases.[178] He further admonishes the Chief Justice and the majority for refuting the *Lemon* test and cites as authority the very cases that Justice Burger claims ignored the *Lemon* test.

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previously discussed Founding Fathers. For instance, Justice Story believed Christianity, not religion in general, must be the fostered religion of the United States:

> The promulgation of the great doctrines of religion . . . never can be a matter of indifference to any well ordered community. It is, indeed, difficult to conceive, how any civilized society can well exist without them. And at all events, it is impossible for those, who believe in the truth of Christianity, as a divine revelation, to doubt, that *it is the especial duty of government to foster, and encourage it among all the citizens and subjects.*

STORY, *supra*, at 699 (emphasis added). *But see supra* text accompanying note 94 (quoting Benjamin Franklin's views on religion receiving encouragement from the state). It is puzzling that James Madison appointed Justice Story to the Supreme Court given their diametrically opposed religious liberty views. Nevertheless, it is similar to ideological "mistakes" made by presidents throughout history. For instance, conservative President Richard Nixon unknowingly appointed liberal Justice Harry Blackmun. Simiarly, conservative President George Bush unknowingly appointed moderate Justice David Souter.

172. *Lynch*, 465 U.S. at 681.

173. *Id.*

174. *Id.* at 682.

175. *Id.* at 690-91 (O'Connor, J., concurring).

176. *Id.* at 691.

177. *Id.* at 692.

178. As Justice Brennan explains, "This well-defined three-part test expresses the essential concerns animating the Establishment Clause . . . . [T]he test is designed to ensure that the organs of government remain strictly separate and apart from religious affairs, for a union of government and religion tends to destroy government and degrade religion." *Id.* at 698 (citing Engel v. Vitale, 370 U.S. 421, 431 (1962)).

Justice Brennan insists that the *Lemon* test has been a "fundamental tool of Establishment Clause analysis."[179] He goes on to explain that *Nyquist*, one of the decisions Justice Burger claims did not use the *Lemon* test, in fact referred to the *Lemon* test as mandatory precedent by saying that "[t]aken together, [our] decisions dictate that to pass muster under the Establishment Clause the law in question [must satisfy the three elements of the *Lemon* test]."[180]

He further refutes the majority's use of *Larson*, explaining that the Court in *Larson* "first reviewed a state law granting a denominational preference under a 'strict scrutiny' analysis . . ."[181] but then concluded by finding the statute unconstitutional under the *Lemon* analysis as well."[182] Justice Brennan further argues that Chief Justice Burger himself embraced the *Lemon* test during the prior term (1982): "This Court has consistently held that a statute must satisfy three criteria [as set forth in *Lemon*] to pass muster under the Establishment Clause."[183]

After lecturing the majority for its disregard of the *Lemon* test, Justice Brennan then looks to the intent of the Framers of the Constitution in light of the religious accommodation enunciated by Justice Burger. Justice Brennan acknowledges that the Court has, on a number of occasions, allowed public expressions of religion, such as the instances cited by Justice Burger. Nevertheless, Justice Brennan complains that in each instance cited by the majority, a "historical inquiry to the particular practice under review" was conducted by the Court, something the majority in *Lynch* failed to do.[184]

Justice Brennan further criticized the majority's reliance on the employment of chaplains to Congress by exposing the history behind the practice:

> [I]n Marsh v. Chambers, after marshalling the historical evidence which indicated that the First Congress had authorized the appointment of paid chaplains for its own proceedings only three days before it reached agreement on the final wording of the Bill of Rights, the Court concluded on the basis of this 'unique history' that the modern-day practice of opening legislative sessions with prayer was constitutional.[185]

He further explains the "In God We Trust" national motto and the references to God in the Pledge of Allegiance as merely forms of "ceremonial deism."[186] These phrases are protected from the Establishment Clause primarily because rote repetition has diminished the significance

179. *Id.* at 697 n.2 (Brennan, J., dissenting).
180. *Id.* (citing *Nyquist*, 413 U.S. at 772-73).
181. *Larson*, 456 U.S. at 246-51.
182. *Lynch*, 465 U.S. at 698 n.2 (citing *Larson*, 456 U.S. at 251-55).
183. Larkin v. Grendel's Den, Inc., 459 U.S. 116, 123 (1982) (Burger, C.J.).
184. *Lynch*, 465 U.S. at 719 (Brennan, J., dissenting).
185. *Id.*
186. *Id.* at 716 (quoting Arthur E. Sutherland, *Book Review*, 40 IND. L.J. 83, 86 (1964) (reviewing WILBUR G. KATZ, RELIGION AND AMERICAN CONSTITUTIONS (1993))).

of their religious connotations.[187] "Moreover, these references are uniquely suited to serve such wholly secular purposes as solemnizing public occasions, or inspiring commitment to meet some national challenge in a manner that simply could not be fully served in our culture if government were limited to purely non-religious phrases."[188] Justice Brennan concludes that these historical religious references are "probably necessary to serve certain secular functions, and that necessity, coupled with their long history, gives those practices an essentially secular meaning."[189] He believes that the majority purposefully avoided delving into the American origins of the Christmas celebration as there is no comparable record of its widespread acceptance of nativity scenes.[190] In fact, as Justice Brennan points out, the public colonial Christmas celebration met with considerable hostility and did not gain widespread acceptance in America for a number of years.[191]

Justice Brennan explains that colonists, particularly Puritans, were staunchly opposed to any public commemoration of Christmas. They and many other colonists viewed it as embracing a Roman Catholic doctrine that lacked Biblical foundation. "The Puritans, and later the Presbyterians, Baptists, and Methodists, generally associated the celebration of Christmas with the elaborate and, in their view, sacrilegious celebration of the holiday by the Church of England and also with, for them, the more sinister theology of 'Popery.'"[192] Unlike the primigenial chaplain, currency, and Pledge of Allegiance examples, Christmas was not granted legal recognition as a public holiday until 1836. Congress did not follow suit until 1870, when it designated December 25th, July 4th, January 1st, and November 25th as legal holidays.[193]

Justice Brennan further disagrees with the majority's benign depiction of the crèche. He reasons that the purpose of the crèche is to effect an awe in viewers of one of the material aspects of Christianity: "that God sent His son into the world to be a Messiah."[194] He concludes that a crèche consequently plays no secular role, is bereft of historical public support, and hence is an unconstitutional advancement of the Christian religion.[195]

Although the Court's decision in *Lynch* is essentially constitutionally harmless, the rationales used by the majority and dissenting opinions reveal the stark differences between conservative and liberal church-state judicial ideology. Justice Burger's opinion, as a representative conservative opinion, is genuinely patriotic and recognizes the important role reli-

187. *Id.*
188. *Id.* at 717.
189. *Id.*
190. *Id.* at 719-20.
191. *Id.* at 721.
192. *Id.* at 722.
193. *Id.* at 723.
194. *Id.* at 711.
195. *Id.* at 724-26.

gion played and continues to play in the history and development of the United States. Unfortunately, he uses a somewhat revisionist rationale by skirting historical analysis of public nativity scenes.

Additionally, Justice Burger's invocation of Justice Story reveals the origins of conservative judicial philosophy in this area of law. Justice Story, nugatory disclaimers notwithstanding, was clearly hostile to church-state separation. Like Justice Story, Justice Burger not only recognized the importance of religion in society but also displayed a willingness to promote Christianity in the American public arena.

Conversely, Justice Brennan's representative liberal opinion personifies the concern—and in some instances paranoia—of the Founding Fathers regarding church-state separation. Justice Brennan correctly exposes the patent message of a nativity scene. A depiction of the birth of baby Jesus clearly has no (even remotely) secular purpose. Nonetheless, Justice Brennan becomes overly concerned with the potential harm to potential religious minorities. Just as the appearance of "In God We Trust" and "One Nation Under God" have lost their religious significance, so too have nativity scenes—blended with contemporary, commercialized, public Christmas celebrations—probably lost their substantive promotion of Christianity.

The common ground in this and many church-state judicial decisions is reciprocal capitulation. Justice Burger[196] must acknowledge *stare decisis*, namely the *Lemon* test, and the clearly Christian purpose of a crèche. His attempted disavowal of the *Lemon* test and other cases that have relied on this test creates the appearance of judicial manipulation.

On the other hand, Justice Brennan's fierce defense of religious minorities must at times soften to accommodate theoretically harmful acts that in reality cause negligible damage. For example, the Pawtucket nativity scene, although clearly a promotion of Christianity, causes very little harm when placed beside the mythical, secular, and non-biblical Santa and his flying reindeer. Moreover, the government's attempt to promote this exclusively Christian belief (the birth of Jesus as the Messiah) was essentially rendered a nullity by placing the crèche amid the other secular displays.

C. The Scalia Paradox and Conservative Contempt for Metaphors

No justice personifies the highly partisan judicial debate over religious liberty better than Justice Scalia. His written, contemptuous expressions for the wall of separation and the *Lemon* test are legion,[197] and his reli-

196. The use of Justice Burger, Justice Brennan, and a crèche in this context is intended to serve as a metaphor for conservative and liberal judicial ideology as it impacts church-state separation.

197. *See, e.g.*, Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993), *rev'd*, 17 F.3d 1425 (1994) (Scalia, J., concurring) ("Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once

gious liberty philosophy places him in step with Chief Justice Burger and Justice Story. Justice Scalia's religious liberty opinions, particularly his dissenting opinions, are often harsh, irreverent, and condescending.

1. Lee v. Weisman

Lee v. Weisman[198] provides a paradigmatical opinion of Justice Scalia. *Weisman* revolved around public school prayer. Mr. Weisman filed suit on behalf of his daughter Deborah, a fourteen-year-old ninth grade student. Deborah graduated from the Nathan Bishop Middle School, a public school in (ironically) Providence, Rhode Island. Each year Nathan Bishop brought in preachers to give a state-sponsored invocation and benediction during the graduation ceremony. Providence school officials provided invited clergy with a pamphlet entitled *Guidelines for Civic Occasions*, written by the National Conference of Christians and Jews.

Mr. Weisman sued the school, seeking a permanent injunction against the school's practice, asserting that the government-sponsored prayers violated the Establishment Clause. The Supreme Court, in an opinion authored by Justice Kennedy, affirmed the decisions of the district court[199] and First Circuit Court of Appeals,[200] declaring the practice unconstitutional.[201]

In reaching this decision, Justice Kennedy refused to reconsider *Lemon*, as the school and solicitor general urged, yet failed to explicitly apply the elements of the *Lemon* test.[202] Justice Kennedy did, nonetheless, display a great deal of concern for the protection of religious minorities, particularly young children, from coercion. He determined that coercion of dissenting students in the present context could occur in two ways. First, a student might object to a state-sponsored prayer, believing "that she is being forced by the State to pray in a manner her conscience will not allow."[203] Second, a student's conscience may compel her to refrain from all aspects of the prayer, including standing to "maintain respectful silence."[204]

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again, frightening the little children and school attorneys of Center Moriches Union Free School District.").

198. 505 U.S. 577 (1992).

199. Weisman v. Lee, 728 F. Supp. 68 (D. R.I. 1990).

200. Weisman v. Lee, 908 F.2d 1090 (1st Cir. 1990).

201. *Weisman*, 505 U.S. at 599.

202. *Id.* at 587. Although the majority opinion did not expressly apply the elements of the *Lemon* test after its refusal to overturn *Lemon*, the majority in effect applied the first and third elements of the test in its analysis. *See* Conkle, *supra* note 148, at 874-76 (Professor Conkle asserts that Justice Kennedy implicitly applied the *Lemon* test). *But see* Michael S. Paulsen, *Religion and the Public Schools After* Lee v. Weisman: Lemon *is Dead*, 43 CASE W. RES. L. REV. 795 (1993) (refuting Professor Conkle's observation).

203. *Weisman*, 505 U.S. at 593.

204. *Id.* Justice Kennedy found voluntary prayer in the middle or public school context to be a misnomer. *Id.* at 592. He explained that a government-controlled religious exercise "puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed." *Id.* Justice Kennedy further stated:

> The lessons of the First Amendment are as urgent in the modern world as in the 18th Century when it was written. One timeless lesson is that if citizens

Justice Scalia vehemently dissented from the majority in *Weisman*. His fiery dissent characterizes Justice Kennedy's majority opinion and other religious liberty decisions that differ with his own views as an "embarrassment,"[205] "incoherent,"[206] "ludicrous,"[207] "absurd,"[208] "psycho-journey,"[209] "lamentable,"[210] "senseless,"[211] "jurisprudential disaster."[212] He begins his dissent by rightfully criticizing the majority for its failure to ground its opinion in closely analogous historical fact.[213] Notwithstanding this criticism, in fairness to Justice Kennedy, the Court had never before decided a case involving a middle school. The Court did, however, have the previously decided public school precedent to use in its rationale by analogy.[214]

Justice Scalia continues his spirited dissent by delving into an historical excursion of the many instances where prayer has been and currently is an integral part of secular society. He points to a number of instances where religion and prayer have been "prominent part[s] of governmental

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> are subjected to state-sponsored religious exercises, the State disavows its own duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people. To compromise that principle today would be to deny our own tradition and forfeit our standing to urge others to secure the protections of that tradition for themselves.

Id.

205. *Id.* at 636 (quoting American Jewish Congress v. Chicago, 827 F.2d 120, 129 (7th Cir. 1987) (Easterbrook, J., dissenting) ("I find it a sufficient embarrassment that our Establishment Clause jurisprudence regarding holiday displays . . . has come to 'requir[e] scrutiny more commonly associated with interior decorators than with the judiciary.'").

206. *Id.* ("The Court's argument that state officials have 'coerced' students to take part in the invocation and benediction at graduation ceremonies is . . . incoherent.").

207. *Id.* at 637 ("The Court's notion that a student who simply sits in 'respectful silence' during the invocation and benediction (when all others are standing) has somehow joined—or would somehow be perceived as having joined—in the prayers is nothing short of ludicrous.").

208. *Id.* at 638 ("It is fanciful enough to say that 'a reasonable dissenter,' standing head erect in a class of bowed heads, 'could believe that the group exercise signified her own participation or approval of it[.]' . . . It is beyond the absurd to say that she could entertain such a belief while pointedly declining to rise.").

209. *Id.* at 642 ("But whatever the merit of [the Court's prior school prayer cases], they do not support, much less compel, the Court's psycho-journey.").

210. *Id.* at 644 ("The Court today demonstrates the irrelevance of *Lemon* by essentially ignoring it . . . and the interment of that case may be the one happy byproduct of the Court's otherwise lamentable decision.").

211. *Id.* at 646 ("To deprive our society of that important unifying mechanism, in order to spare the nonbeliever what seems to me the minimal inconvenience of standing or even sitting in respectful nonparticipation, is as senseless in policy as it is unsupported in law.").

212. *Id.* at 644 ("Another happy aspect of the case is that it is only a jurisprudential disaster and not a practical one.").

213. *Id.* at 631. While it is true that the majority opinion provides a scanty historical analysis, the concurrence of Justice Souter is grounded in history, exclusively devoted to exposing the religious climate surrounding the First Amendment, the intention of the Founding Fathers regarding religious liberty, and relating the original intent of the Fathers to the decision by the majority. *Id.* at 609-31 (Souter, J., concurring).

214. *See* Engel v. Vitale, 370 U.S. 421 (1962) (holding that government-controlled prayer in public schools is unconstitutional); School Dist. of Abington v. Schempp, 374 U.S. 203 (1963) (holding that government-controlled Bible reading exercises in public schools are unconstitutional).

ceremonies and proclamations."[215] Included in his examples are religious references in the Declaration of Independence,[216] presidential inaugural addresses that included prayer,[217] national prayer days,[218] and prayer as a part of legislative and judicial events.[219] He concludes his historical journey by citing evidence of prayer in the public school setting dating back to 1868.[220]

The crux of his opposition to the majority decision revolves around his belief that prayer is so ingrained in American secular society that any inconvenience caused by a graduation prayer is a necessary evil and that there is absolutely no coercion involved in such an exercise.[221] He believes that peer pressure to participate in middle school graduation exercises is "absurd"[222] and that the possibility that a child may be too intimidated to excuse herself from the invocation or benediction is "ludicrous."[223]

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215. *Weisman*, 505 U.S. at 632 (Scalia, J., dissenting).

216. The Declaration of Independence "'appeal[ed] to the Supreme Judge of the world for the rectitude of our intentions' and avowed 'a firm reliance on the protection of divine Providence.'" *Id.*

217. Justice Scalia explains that George Washington "deliberately" prayed as one of his first official acts as President:

> [I]t would be peculiarly improper to omit in this first official act my fervent supplications to that Almighty Being who rules over the universe, who presides in the councils of nations, and whose providential aids can supply every human defect, that His benediction may consecrate to the liberties and happiness of the people of the United States a Government instituted by themselves for these essential purposes.

Id. at 633 (quoting INAUGURAL ADDRESSES OF THE PRESIDENTS OF THE UNITED STATES 2 (1989)). Justice Scalia additionally notes the (Deist) prayer of Thomas Jefferson during his inaugural address: "[M]ay that Infinite Power which rules the destinies of the universe lead our councils to what is best, and give them a favorable issue for your peace and prosperity." *Id.* at 634 (quoting INAUGURAL ADDRESSES OF THE PRESIDENTS, *supra*, at 17). He further refers to the first inaugural address of James Madison, who placed his trust

> in the guardianship and guidance of that Almighty Being whose power regulates the destiny of nations, whose blessings have been so conspicuously dispensed to this rising Republic, and to whom we are bound to address our devout gratitude for the past, as well as our fervent supplications and best hopes for the future.

Id. (quoting INAUGURAL ADDRESSES OF THE PRESIDENTS, *supra*, at 27). Justice Scalia concludes by making reference to the inauguration of President George Bush, who asked those attending to bow their heads as he made prayer his first official presidential act. *Id.*

218. Justice Scalia further points to our annual celebration of Thanksgiving, which was proclaimed a national day of thanksgiving and prayer by George Washington and nearly every president since: "President Washington proclaimed November 26, 1789, a day of thanksgiving to 'offe[r] our prayers and supplications to the Great Lord and Ruler of Nations, and beseech him to pardon our national and other transgressions. . . . '" *Id.* at 635 (citing J. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897 64 (1899)).

219. A chaplain's prayer has opened every Congressional session since the First Congress. *Id.* (citing Marsh v. Chambers, 463 U.S. 783, 787-88 (1983)). And, the Supreme Court has, since the days of Chief Justice Marshall, opened its sessions with the invocation "God save this United States and this Honorable Court." *Id.* (citing C. WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 469 (1922)).

220. *Id.* at 635.

221. *Id.* at 637.

222. *See supra* note 208.

223. *See supra* note 207.

After scourging the majority for what he essentially characterizes as an un-American, "jurisprudential disaster,"[224] Justice Scalia turns his contempt to what he refers to as the "so-called" *Lemon* test.[225] He condemns the *Lemon* test as a "formulaic abstraction[ ]" that conflicts with "our long-accepted constitutional traditions."[226] He further berates *Lemon* as irrelevant.[227]

Justice Scalia concludes his analysis by generally acknowledging and then ignoring the rights of religious minorities in favor of majority rule religious traditions. In his eyes, the issue is not whether the minority needs protection from the majority. "Rather, the question is whether a mandatory choice in favor of the former has been imposed by the United States Constitution."[228] Justice Scalia prefers to abandon the *Lemon* test and rest every Establishment Clause case on American tradition, regardless of the interests of religious minorities.[229] He concludes that the "age-old practices of our people" (the American public prayer tradition) is embodied in the Constitution and hence trumps the harm or "inconvenience" to religious minorities.[230]

Justice Scalia went through a painfully copious historical study of the American tradition of embracing prayer in secular environments. His opinion reflects the sentiments of a devout Christian who cherishes the vital role religion plays in our society.[231]

Nonetheless, Justice Scalia displays an alarming lack of sensitivity to the protection of religious minorities from the tyranny of religious major-

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224. *See supra* note 212.

225. *Weisman*, 505 U.S. at 644 (Scalia, J., dissenting).

226. *Id.* Justice Scalia explains that the "so-called" *Lemon* test has been criticized by many (conservative) members of the Supreme Court over the years. *See, e.g.*, County of Allegheny v. ACLU Greater Pittsburgh Chapter, 492 U.S. 573, 655-56 (1989) (Kennedy, J.); Edwards v. Aguillard, 482 U.S. 578, 636-40 (1987) (Scalia, J., dissenting); Wallace v. Jaffree, 472 U.S. 38, 108-12 (1985) (Rehnquist, J., dissenting); Aguilar v. Felton, 473 U.S. 402, 426-30 (1985) (O'Connor, J., dissenting); Roemer v. Board of Public Works, 426 U.S. 736, 768-69 (1976) (White, J., concurring).

227. *Weisman*, 505 U.S. at 644 (Scalia, J., dissenting). Contrary to Justice Scalia's contention of irrelevancy, Justice Blackmun points out that, as of 1992, "[s]ince 1971, the Court has decided 31 Establishment Clause cases. In only one instance, the decision of Marsh v. Chambers, 463 U.S. 783 (1983), has the Court not rested its decision on the basic principles described in *Lemon*." *Weisman*, 505 U.S. at 603 n.4 (Blackmun, J., concurring). In fact, two recent prominent religious liberty decisions expressly relied on the *Lemon* test. Bown v. Gwinnett County Sch. Dist., 895 F. Supp. 1564, 1567 (N.D. Ga. 1995); Metzl v. Leininger, 57 F.3d 618 (7th Cir. 1995).

228. *Weisman*, 505 U.S. at 646 (Scalia, J., dissenting).

229. *See* Board of Educ. v. Grumet, 114 S. Ct. 2481, 2515 (1994) (Scalia, J., dissenting) ("The foremost principle I would apply [in place of *Lemon*] is fidelity to the long-standing traditions of our people, which . . . [would not] leave us to our own devices."). The glaring deficiency in Justice Scalia's position is that very few religious minorities have practices steeped in historical tradition. *See infra* note 247.

230. *Weisman*, 505 U.S. at 646.

231. Justice Scalia has on various occasions quoted Biblical scripture as a part of his judicial opinions. *See, e.g.*, Morgan v. Illinois, 112 S. Ct. 2222, 2242 n.6 (1992) (Scalia, J., dissenting); California v. Hodari D., 499 U.S. 621, 624 n.1 (1991). For further insight on Justice Scalia, see generally SMITH, *supra* note 15, detailing the life and judicial philosophy of Justice Scalia; *see also infra* notes 361-63 and accompany text (discussing Justice Scalia's frank, public discussions of Christianity).

ities. Moreover, his apparent bias in favor of popular tradition does not take into account how wrongheaded the tradition may or may not be. To reach his conclusion Justice Scalia had to deny the obvious: Government controlled religious exercises, where children are the primary participants, pose patent entanglement problems. The coercion aspect aside, government-controlled religious exercises that involve children have no secular purpose, clearly advance a particular religion (mostly the Protestant form of Christianity), and involve the excessive entanglement of government officials supervising or in fact controlling a religious exercise.

2. *The* Smith *Debacle*

No case personifies Justice Scalia's capacity for callous indifference to the protection of religious minorities more than *Employment Division Department of Human Resources v. Smith*.[232] *Smith* centered around the religious practices of Alfred Smith, a seventy-year-old Klamath Indian and member of the Native American Church. Mr. Smith, a former alcoholic, went to work for the Council on Alcohol and Drug Abuse Prevention (ADAPT) in Oregon during the 1970s. He signed an adhesion contract contemporaneous with his hiring that included a clause prohibiting the use of alcohol or narcotics. He mistakenly believed his contract exempted the ritual use of peyote.[233]

Unfortunately for Mr. Smith and Galen Black, a fellow Native American co-worker, the ADAPT contract did not contain any exemptions for ritual peyote use (although ADAPT has since changed its policy), and both were subsequently fired. Upon application for unemployment benefits, the Oregon Employment Division denied the claims of both men, asserting that they were discharged for work-related misconduct. On appeal, the Oregon Court of Appeals reversed the decision of the Employment Division. The Oregon Supreme Court affirmed, holding that, although sacramental peyote use indeed violated state drug laws, the prohibition in the contract violated the Free Exercise Clause of the First

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232. 494 U.S. 872 (1990).

233. Peyote is a type of cactus called mescal, found in Mexico and the southwestern United States. It contains button-like tubercles that are dried and chewed as an hallucinatory drug. BLACK'S LAW DICTIONARY 1032 (5th ed. 1979). Peyote use by Native Americans, which can be traced back more than 1400 years, has long been a part of Native American culture:

> Indians use dried peyote buttons to assuage hunger, thirst, and fatigue during hard work, to detect the approach of an enemy, and to predict the outcome of a battle. They wore it to ward off disease and danger. Shamans used peyote in the curing process. Many tribes use peyote ritually to dispel anxiety and despair and to assist in the search for visions. In the twentieth century peyote became the focus of the Native American Church.

ARRELL M. GIBSON, THE AMERICAN INDIAN: PREHISTORY TO THE PRESENT 47 (1980); *see also* JAMES ADAIR, THE HISTORY OF THE AMERICAN INDIANS 448 (1930) (further expanding on historical peyote use among Native Americans); Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 FORDHAM L. REV. 883, 886-87 (1994) (explaining the religious importance of peyote use and validating its ancient use).

Amendment.[234]

Justice Scalia's famous (or infamous) opinion jolted the legal, legislative, and lay communities. It begins with an oversimplification of Mr. Smith and Mr. Black's constitutional claim by asserting that the issue in *Smith* is merely one of compliance with a generally applicable law.[235] He grounds his decision on the principle of *Reynolds v. United States*,[236] which states that permitting an individual to violate a neutral law of general applicability would allow anyone to place his or her religious beliefs above the law "and in effect . . . permit every citizen to become a law unto himself."[237] Justice Scalia subsequently concludes that Oregon's drug laws are neutral, apply impartially to the entire Oregon population, and are not targeted at sacramental peyote use. Hence, *Reynolds* controls the central issue in the case.[238]

However flawed the reasoning of Justice Scalia in his initial conclusion (it contains no historical analysis of Native American peyote use or the Free Exercise Clause), it was not the cause of public outcry. To the contrary, his departure from the strict scrutiny standard established by *Sherbert v. Verner*,[239] a case that controlled free exercise cases since 1963, was the portion of his opinion that resulted in a unilateral (most conservative Supreme Court justices excluded) denunciation.[240] Justice Scalia believed the twenty-seven-year-old compelling state interest test was not a

234. *Smith* had an interesting path to its final disposition in the United States Supreme Court. In the first case, the Oregon Court of Appeals, applying a strict scrutiny standard of review, reversed the decision of the Employment Division. Smith v. Employment Div., Dept. of Human Resources, 709 P.2d 246 (Or. Ct. App. 1985). And, the Oregon Supreme Court affirmed. Smith v. Employment Div., Dept. of Human Resources, 721 P.2d 445 (Or. 1985). The United States Supreme Court granted certiorari and subsequently remanded to the Oregon Supreme Court to determine the "legality of religious use of peyote in Oregon." Smith v. Employment Div., Dept. of Human Resources, 480 U.S. 916 (1987). On remand, the Oregon Supreme Court determined that Oregon law did not exempt sacramental peyote use, which constituted a violation of the Free Exercise Clause. Smith v. Employment Div., Dept. of Human Resources, 763 P.2d 146, 148 (Or. 1988). The United States Supreme Court again granted certiorari to decide whether the ritual use of peyote is protected by the United States Constitution. Smith v. Employment Div., Dept. of Human Resources, 489 U.S. 1077 (1989).

235. *Smith*, 494 U.S. at 882.

236. 98 U.S. 145 (1879).

237. *Smith*, 494 U.S. at 879 (quoting *Reynolds*, 98 U.S. at 166-67). Oddly, Justice Scalia twice cites Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940) for support of his contention that valid and neutral laws of general applicability trump religious convictions, without mentioning that *Gobitis* was subsequently overruled three years later by West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

238. *Smith*, 494 U.S. at 882. Justice Scalia further asserts that there is no precedent to support a "conscientious opposition" to an otherwise neutral, constitutional law. *Id.*

239. 374 U.S. 398 (1963). The *Sherbert* test requires government acts that substantially burden a religious practice be justified by a compelling governmental interest. *Id.* at 402-03.

240. Many religious, political, and special interest groups publicly opposed the majority's elimination of the strict scrutiny standard for free exercise cases. Included among them were the liberal ACLU and People for the American Way, the conservative Rutherford Institute, the interdenominational National Council of Churches, the American Muslim Council, and the National Council of Jewish Women. *See* Ruth Marcus, *Reins on Religious Freedom? Broad Coalition Protests Impact of High Court Ruling*, WASH. POST, Mar. 9, 1991, at A1.

sound approach because it was contrary to established precedent and "contradict[ed] both constitutional tradition and common sense."[241]

Justice Scalia provides an additional rationale for rejecting the strict scrutiny standard by claiming that it would force judges to determine when prohibited conduct is central to an individual's religion. He considers it inappropriate for judges to evaluate claims in this manner.[242]

Justice Scalia then summarizes his overruling of *Sherbert* by contending that the compelling state interest test "court[s] anarchy" and is therefore detrimental to the existence of any society.[243] He insists that forcing governments to show a compelling state interest would, potentially, raise the prospect of jeopardizing compulsory military service, the payment of taxes, compulsory vaccinations, drug laws, and social welfare legislation, all in the name of religion.[244] He reasons that these potential problems could result from continual application of the *Sherbert* test (despite twenty-seven years to the contrary) and concludes that unilateral religious liberty strict scrutiny analyses is a luxury "we cannot afford."[245] He acknowledges that his reasoning and decision places religious minorities at a disadvantage, yet believes that this is an "unavoidable consequence of a democratic government."[246]

Justice Scalia's traditional pietistical judicial reasoning was uncharacteristically absent in *Smith*; however, it was characteristically indifferent to the protection of religious minorities.[247] What makes Justice Scalia's opinion appear so callous is his markedly different approach to essentially the same type of problem that he faced in *Weisman*. Admittedly, the issue in *Weisman* revolved around the Establishment Clause, juxtaposed to the Free Exercise Clause of *Smith*. Still, both cases involve a governmental attempt to "deprive society of [an] important unifying mechanism":[248] prayer in American society and sacramental peyote use in Native American society. Hence, one of the enigmas of Justice Scalia's opinion is that it does not contain one scintilla of historical analysis of Native American Church traditions or the Free Exercise Clause.

This approach in *Smith* appears disingenuous, given Justice Scalia's emphatic defense of government-controlled prayer. He went through great pains in *Weisman* to authenticate the American secular prayer tradition

241. *Smith*, 494 U.S. at 885.
242. *Id.* at 886-87.
243. *Id.* at 888 ("[a]ny society adopting such a system would be courting anarchy").
244. *Id.* at 888-89.
245. *Id.* at 888.
246. *Id.* at 890.
247. Minority faiths are generally the only groups that need legislative or judicial protection. Such groups lack the numbers, finances, voting blocs, and mainstream orthodoxy that attract or compel political protection; majority faiths have the aforementioned factors and consequently the accompanying political influence or protection and rarely need governmental protection. As Professor Kathleen Sullivan points out, "[N]ot a single religious exemption claim has ever reached the Supreme Court from a mainstream Christian religious practitioner." Kathleen M. Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195, 216 (1992).
248. *Weisman*, 505 U.S. at 646 (Scalia, J., dissenting).

by tracing prayer in secular environments from our country's inception to contemporary practices. Nevertheless, his unfound reasoning in *Smith*[249] does not attempt to broach the plethora of information available on Native American customs.[250] Justice Scalia could have easily discovered that peyote use among Native Americans and by the Native American Church is deeply rooted in Indian tradition and is not a whimsical attempt to circumvent necessary drug laws. It is undoubtedly as much a part of Native American society as public prayer is to the United States citizenry.

In addition, Justice Scalia's opinion in *Smith* is exclusively secular. He not only avoids discussion of the Native American Church, he avoids discussion of religion altogether. This approach was necessary, however, to reach the ultimate conclusion in *Smith*. Justice Scalia could not sympathetically consider the religiosity of the constitutional claims in *Smith* (as he did in *Weisman*) or quote the writings of James Madison or Thomas Jefferson (as he likewise did in *Weisman*) while simultaneously quashing the claims and dismissing the compelling state interest test. Whatever his motivation, Justice Scalia's dissent in *Weisman* and his opinion in *Smith* appear biased—in favor of traditional Christian practices in *Weisman* and against traditional Native American religious practices in *Smith*. He appears to have fallen prey to the double-minded[251] judicial reasoning he complained about in *Weisman*. His approach to religious liberty appears to turn on the size and denomination of the religious practice or faith in question.[252] Such judicial reasoning is not consistent with the idealistic, unbiased religious liberty climate desired by the Founding Fathers. Moreover, as Justice Scalia succinctly and eloquently stated in *Weisman*, "[O]ur Nation's protection, that fortress which is our Constitution, cannot possibly rest upon the changeable philosophical predilections of the Justices of this Court, but must have deep foundations in the historic practices of our people."[253]

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249. Despite curiously concurring with the outcome in *Smith*, Justice O'Connor disagrees with the reasoning of Justice Scalia. She asserts that his opinion "dramatically departs from well-settled First Amendment jurisprudence . . . and is incompatible with our Nation's fundamental commitment to individual religious liberty." *Smith*, 494 U.S. at 891 (O'Connor, J., concurring). She further claims that "[t]he compelling interest test reflects the First Amendment's mandate of preserving religious liberty to the fullest extent possible in a pluralistic society. For the Court to deem this command a 'luxury,' is to denigrate '[t]he very purpose of a Bill of Rights.'" *Id.* at 903. Justice Blackmun offered similar criticism in his dissenting opinion, "Until today, I thought [the compelling state interest test] was a settled and inviolate principle of this Court's First Amendment jurisprudence. The majority, however, perfunctorily dismisses it as a 'constitutional anomaly . . . by mischaracterizing this Court's precedents." *Id.* at 908 (Blackmun, J., dissenting).

250. *See supra* note 233.

251. *See James* 1:8 (a double-minded man is unstable in all his ways).

252. In fairness to Justice Scalia, he supported the religious liberty claim of the relatively small Satmar Hasidic Jewish group in *Kiryas*, 114 S. Ct. at 2505-16 (Scalia, J., dissenting), although the cynic could argue that Justice Scalia's dissent was a no confidence vote for the *Lemon* test, rather than an attempt to protect the Satmar group.

253. *Weisman*, 505 U.S. at 646 (Scalia, J., dissenting).

Smith was, simply put, a bad decision.[254] The resulting public outcry was followed by a series of detrimental religious liberty decisions.[255] Moreover, the legislative response to *Smith* was swift. Groups spanning the entire religious and political spectrum formed a coalition, lobbied Congress, and were rewarded with the Religious Freedom Restoration Act of 1993 (RFRA).[256]

The RFRA, which had enormous bipartisan support in both the House and Senate, restored the compelling interest test of *Sherbert*.[257] A cross-section of leaders from liberal and conservative religious and public policy groups to law professors testified before the House and Senate Committees considering the RFRA. Oliver S. Thomas, who appeared on behalf of the Baptist Joint Committee on Public Affairs and the American Jewish Committee, provided a representative statement of public opinion concerning the implications of *Smith*: "Since *Smith* was decided, governments throughout the U.S. have run roughshod over religious conviction. Churches have been zoned even out of commercial areas. Jews have been subjected to autopsies in violation of their families faith. In time, every religion in America will suffer."[258] In fact, there was a near unanimous sentiment (save Senator Jesse Helms and two other Senators who voted against the bill) in the Senate that Justice Scalia's opinion was contrary to the very essence of the Bill of Rights.[259]

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254. Indeed, *Smith* was an embarrassing, incoherent, ludicrous, absurd, lamentable, senseless, jurisprudential disaster. *See supra* notes 205-212 and accompanying text.

255. *See, e.g.*, Minnesota v. Hershberger, 462 N.W.2d 393 (Minn. 1990) (after *Smith*, the Supreme Court of Minnesota, upon remand from the United States Supreme Court, relied on state instead of federal constitutional grounds to quash the Amish defendants' free exercise right not to display fluorescent emblems on their horse-drawn buggies); Saint Bartholomew's Church v. City of New York, 914 F.2d 348 (2d Cir. 1990) (relying heavily on *Smith*, the Second Circuit applied land marking ordinances to church-owned buildings); Ryan v. United States Dept. of Justice, 950 F.2d 458 (7th Cir. 1991), *cert. denied*, 504 U.S. 958 (1992) (citing *Smith*, the Seventh Circuit upheld the Federal Bureau of Investigation's dismissal of an employee whose religious beliefs compelled him not to investigate two pacifist groups); Yang v. Sturner, 750 F. Supp. 558 (D. R.I. 1990) (reversing an earlier decision upholding Hmong religious objection to an autopsy, in light of *Smith*).

256. Pub. L. No. 103-141, 107 Stat. 1488 (1993).

257. The purposes of the Religious Freedom Restoration Act (RFRA) are as follows:

> (1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
>
> (2) to provide a claim or defense to persons whose religious exercises is substantially burdened by government.

Id.

258. S. REP No. 111, 103d Cong., 1st Sess. (1993) (Oliver S. Thomas testifying before the Senate Judiciary Committee).

259. The Senate Judiciary Committee explains that the purpose of the Bill of Rights is to place minorities beyond the reach of majorities' political whims or controversies. "Ones right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *Id.* (quoting *Barnette*, 319 U.S. at 638). See generally Laycock, *supra* note 233, for further analysis of the RFRA. The RFRA has to date been on an interesting excursion through the federal courts. *Compare* Belgard v. State, 883 F. Supp. 510 (D. Haw. 1995) (upholding the constitutionality of the RFRA as a valid enforcement of Congress's powers under the 14th Amendment) *and* State v. Miller, 538 N.W.2d 573

D. More Conservative Contempt for Metaphors

Justice Scalia is not alone in his, at times, revisionary religious liberty philosophy. Chief Justice Rehnquist is also hostile to strict judicial embracement of the wall of separation concept. Rehnquist has expressed contempt for the wall of separation metaphor, which he dismisses as a minor afterthought of Thomas Jefferson.[260] He further discounts Thomas Jefferson's "misleading metaphor" as merely a "short note of courtesy, written 14 years after the Amendments were passed by Congress."[261]

Justice Rehnquist concludes that Thomas Jefferson's presence in France during the passage of the Bill of Rights and its ratification by the States renders him irrelevant to any determination of the legislative intent behind the First Amendment's religious liberty clauses.[262] Although he acknowledges James Madison as the primary architect of the First Amendment, he erroneously characterizes Madison as an accommodationist whose only fear was the establishment of a national religion.[263]

Justice Rehnquist, like Justice Burger before him,[264] invokes the religious liberty rationale of Justice Story as a basis for beginning his analysis of the First Amendment's Establishment Clause.[265] Hence, his reasoning leads to the conclusion that government neutrality is not required in the religious arena and that the federal government may provide nondiscriminatory, nonpreferential aid to religion.[266] He reaches this conclusion by proclaiming that "[t]here is simply no historical foundation for the proposition that the Framers intended to build [a] 'wall of separation'" between church and state.[267]

Furthermore, he considers the *Lemon* test bad law because it is based on a false reading of history.[268] He echoes the sentiments of Justice Scalia, explaining that the *Lemon* test is "useless" and "should be frankly and explicitly abandoned."[269] He fails, however, to offer a workable solu-

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(Wis. Ct. App. 1995) (agreeing with and adopting the holding of *Belgard*) *with* Flores v. City of Boerne, 877 F. Supp. 355 (W.D. Tex. 1995) (holding the RFRA violates separation of powers and is hence unconstitutional), *rev'd*, 73 F.3d 1352 (5th Cir. 1996).

260. Wallace v. Jaffree, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting).

261. *Id.*

262. *Id. But see* Donald E. Lively, *The Establishment Clause: Lost Soul of the First Amendment*, 50 Ohio St. L.J. 681, 692 (1989) (Justice "Rehnquist's revisionist notions represent the outgrowth of an equally revisionist reading of history").

263. *Wallace*, 472 U.S. at 91-99 (Rehnquist, J., dissenting). *But see supra* notes 75-81 and accompanying text (discussing James Madison's attempt to enact a constitutional amendment affecting religious liberty at the state level).

264. *See supra* note 171 and accompanying text.

265. *Wallace*, 472 U.S. at 104 (Rehnquist, J., dissenting).

266. *Id.* at 106 ("As its history abundantly shows . . . nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion, nor does that Clause prohibit Congress or the States from pursuing legitimate secular ends through nondiscriminatory sectarian means."). *But see supra* text accompanying note 120; Douglas Laycock, *"Nonpreferential" Aid to Religion: A False Claim About Original Intent*, 27 Wm. & Mary L. Rev. 875 (1986).

267. *Wallace*, 472 U.S. at 106 (Rehnquist, J., dissenting).

268. *Id.* at 110.

269. *Id.* at 107.

tion that would not quash the rights of religious minorities. Moreover, his philosophy on nonpreferential government support for religion contains a fatal flaw: For the government to support any effort, it must have revenues, namely, tax dollars from individuals who may be opposed to supporting religions other than their own. This is precisely what Thomas Jefferson's Act for Establishing Religious Freedom prohibited.[270]

By selectively accepting the rationale of Justice Story, selectively discarding the separatist views of Thomas Jefferson, and selectively embracing accommodationist references of James Madison, Justice Rehnquist falls prey to the very criticism he leveled in *Wallace*. Specifically, he embraces the errors of Justice Story and engages in revisionist history with Thomas Jefferson and James Madison, without heeding his own admonition that "no amount of repetition of historical errors in judicial opinions can make the errors true."[271]

V. CHRISTIAN CONSERVATIVE ACTIVISM AND ITS IMPACT ON RELIGIOUS LIBERTY

"What Christians have got to do is take back this country, one precinct at a time, one neighborhood at a time, and one state at a time. I honestly believe that in my lifetime we will see a country once again governed by Christians . . . and Christian values."[272] The foregoing statement by Ralph Reed, executive director of the Christian Coalition, epitomizes the current religious activist movement in the United States.

A ground swell of activist religious involvement in social and political issues occurred during the latter part of the 1980s and the early 1990s. The Christian Coalition, one of a number of religious activist organizations, have immersed themselves in the political process and in turn placed themselves in the middle of the constitutional religious liberty debate. The overwhelming majority of this activity is centered in what has been labeled the "Religious Right."[273] Although the group prefers to be

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270. *An Act for Establishing Religious Freedom*, *supra* note 95, at 61 (["n]o man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever").

271. *Wallace*, 472 U.S. at 107 (Rehnquist, J., dissenting).

272. Russell Chandler, *Robertson Moves to Fill Christian Right Vacuum: His New Grass-Roots Coalition Starts With a Donor Base of 1.8 Million Households From His Presidential Campaign*, LOS ANGELES TIMES, May 15, 1990, at A5.

273. The religious right has been vilified by many individuals, groups, and large segments of the media. *See, e.g.*, *Hypocrisy Runs Rampant Among Religious Right*, ROCKY MOUNTAIN NEWS, Jan. 30, 1995, at 31A (criticizing the political agenda of the Christian conservative movement); Witold J. Walczak, *Lets Get the Facts Straight Before Tinkering with the Constitution*, PITTSBURGH POST-GAZETTE, Jan. 20, 1995, at C2 (discussing "the radical right's agenda for a broad constitutional amendment on religious rights"); *'Radical Religious Right' Is Not the Same as Christian*, ORLANDO SENTINEL, Sept. 21, 1994, at 6 (objecting to the Christian conservative effort to ignite political Christian activism); Frank Rich, *Mainstream Jews Should Join Specter's Stand Against Radical Religious Right*, SUN-SENTINEL (FORT LAUDERDALE), July 8, 1994, at 16A (discussing Republican Senator Arlen Specter's criticism of the "religious right"); Clifford Rhodes, *Religious Right Taking over GOP?*, HOUSTON CHRON., June 18, 1994, at A33 (discussing the "radicals" taking over the GOP).

called "Christian conservatives" and claims to be nonpartisan, most, if not all, of its constituents are members of and support the Republican party.[274]

A. The History of Christian Conservative Activism

Despite recent activist trends, American religious organizations have a long history of activism. Early on, deeply embedded religious traditions that arrived with the first American settlers from Europe resulted in theocratic governments in the colonies.[275] Although socialized religion eventually dissipated, individual religious involvement flourished during the early nineteenth century.

This period, from approximately 1700 to 1750, became known as the Great Awakening.[276] The Great Awakening witnessed a rapid—and to this point—unparalleled increase in religious conversions that touched nearly every region and aspect of life in the colonies.[277] Additionally, it legitimized the use of heretofore eschewed terms, including "'liberty,' 'virtue' and 'tyranny' in public discussion" and in turn laid the groundwork for the American Revolution.[278]

The onset of the American Revolution, however, brought the Great Awakening to a screeching halt. The war disrupted religious development, and attacks on socialized religion caused a great deal of skepticism about Christianity.[279] The result was an American congregational population of well under ten percent by the late eighteenth century, with some frontier areas being bereft of all vestiges of Christian influence.[280]

The end of the American Revolution and socialized religion spurred a second religious movement, the Second Great Awakening. This movement, from approximately 1795 to 1810, "was the most influential revival of Christianity in the history of the United States."[281] This religious renaissance was accompanied by Christian-based activism. For instance, abolitionists (most of them Christian) vehemently and publicly opposed

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274. *See generally* Ralph Reed, Politically Incorrect: The Emerging Faith Factor in American Politics (1994) (describing the intimate relationship between Christian conservatives and the Republican party). Although this Comment focuses on the Christian Coalition, this group represents merely one of a number of Christian conservative activist organizations that can be considered members of the religious right. The Christian Coalition is the most visible and possibly the largest group in the Christian conservative movement. *See, e.g.*, David Cantor, The Religious Right: The Assault on Tolerance & Pluralism in America 75-142 (Alan M. Schwartz ed., 1994) (giving detailed descriptions of Christian conservative organizations around the country).

275. *See supra* note 33 and accompanying text.

276. *See generally* Mark A. Noll, et al., The Search for Christian America 48-69 (1989) (discussing the Great Awakening in detail).

277. *Id.* at 50-51. In New England, which has the most copious historical church records, the average number of Congregational converts from 1730 to 1740 was eight per year. During the height of the Great Awakening in 1741 and 1742, however, the average grew to 33 per year. *Id.* at 51-52.

278. *Id.* at 55.

279. Noll, *supra* note 2, at 166.

280. *Id.*

281. *Id.*

slavery, and women, under the guise of religion, became increasingly involved in a number of social issues. Mostly in the name of religion, Sarah and Angelina Grimke were fierce opponents of slavery; Dorthea Dix advocated improved treatment of the mentally ill; Catherine Beecher sought educational rights for women; and many others were active in the prohibition movement.[282]

The Civil War, like the American Revolution, disrupted religious growth and organized religious activism. In addition, emancipation of the slaves removed a unifying element among religious activists. Nevertheless, the Second Great Awakening left a "permanent legacy."[283] Lyman Beecher, one of the key figures from the Second Great Awakening, was instrumental in developing organizations that were designed to proselytize America and cure social ills.[284] Beecher's efforts and influence resulted in the founding of the American Board for Foreign Missions in 1810; the American Bible Society in 1816; the Colonization Society for Liberated Slaves in 1817; the American Sunday School Union in 1824; the American Education Society; and the American Society for the Promotion of Temperance in 1826, to name a few.[285] "Such agencies gave the Second Awakening a long-lived institutional influence" and served as the genesis for future religious organization and activism.[286]

B. The Rise and Fall of the Moral Majority

Religious activists were essentially politically dormant during the latter nineteenth century and the first half of the twentieth century. There were no nationwide polarizing issues, such as slavery, to cause any widespread religious involvement in the social or political arenas. This quickly changed, however, during the 1960s and early 1970s with the civil rights movement, legalized abortion, feminism, relaxed sexual codes, increased drug use, pornography, and an expanding federal government.[287] Many conservatives considered these developments to be an assault on the moral fabric of American society and, as sociologist James Davison Hunter explains, organized to "make history 'right' again."[288]

The rapid organization that followed the Second Great Awakening was duplicated during the latter 1970s in response to the foregoing social and political changes. Many conservative political and religious organizations were formed in 1978 and 1979 (many with intertwined political and religious missions), including the National Christian Action Coalition, the Religious Roundtable, Christian Voice, and the Moral Majority, Inc., headed by Jerry Falwell.[289]

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282. *Id.* at 184.
283. *Id.* at 169.
284. *Id.*
285. *Id.*
286. *Id.*
287. Cantor, *supra* note 274, at 59.
288. *Id.*
289. *Id.* at 60.

Falwell's Moral Majority became the most notorious of organizations formed in the 1970s. Falwell believed America was "a nation losing its moral values"[290] and attributed much of this perceived moral decay to church-state separation.[291] Although he (in rhetoric) abhorred Christian political activism prior to the inception of the Moral Majority,[292] he quickly became a political activist during the late 1970s and early 1980s, urging a revival of socialized religion, using the Moral Majority as his bully pulpit.[293]

He wanted to maintain the Moral Majority as an "ecumenical body of political activists."[294] The focus of this body was national political elections and national legislation. Indeed, the Moral Majority was able to register approximately two million voters in 1980, help elect Ronald Reagan, and play an instrumental role in the defeat of the Equal Rights Amendment.[295]

Unfortunately for Falwell, his staunch support of national conservative political candidates did not translate into a national advancement of Christian conservative values, including an attack on church-state separation. Professor Stephen Carter explains that this national emphasis proved to be the Moral Majority's fatal flaw:

> The error was to press at once into to the maelstrom of national politics, where every utterance of every candidate that the Moral Majority supported was subjected to intensive scrutiny for evidence of religious belief leaking into the public square. The result, after a while, was that [the] Moral Majority became so controversial that its endorsement was the kiss of death. . . . Falwell was enticed into coalitions with national candidates who spoke the language of his movement but had little true interest in his issues. [For example], neither President Reagan nor President Bush, for all of their courting of the Christian right in their rhetoric, ever made a serious effort to press

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290. *Id.* at 61.

291. As Jerry Falwell proclaimed in a March 1993 sermon:

> Modern U.S. Supreme Courts have raped the Constitution and raped the Christian faith and raped the churches by misinterpreting what the Founders had in mind in the First Amendment of the Constitution . . . [W]e must fight against those radical minorities who are trying to remove God from our textbooks, Christ from our nation. We must never allow our children to forget that this is a Christian nation. We must take back what is rightfully ours.

Id. at 4 (quoting Jerry Falwell).

292. On March 21, 1965, the day Martin Luther King began the march from Selma to Montgomery, Alabama, Falwell expressly proclaimed his objection to political activism in a sermon to the 15,000 members of his Thomas Road Baptist Church in Lynchburg, Virginia: "Nowhere are we commissioned to reform the externals. . . . Believing the Bible as I do, I would find it impossible to stop preaching the pure saving gospel of Jesus Christ, and begin doing anything else—including fighting Communism or participating in civil rights reforms." *Id.* at 61.

293. Falwell's conversion from political pacifist to activist is evidenced by the following proclamation: "I hope I live to see the day when, as in the early days of our country, we won't have any public schools. The churches will have taken them over again and Christians will be running them. What a happy day that will be!" *Id.* at 6 (quoting JERRY FALWELL, AMERICA CAN BE SAVED (1979)).

294. REICHLEY, *supra* note 29, at 321.

295. *See id.*

for school prayer or a ban on abortion in all circumstances.[296] In essence, the Moral Majority, massive voter registration notwithstanding, never developed at the grassroots level. This failure, coupled with the lack of national support, led to the demise and eventual dissolvement of the Moral Majority in 1989.[297]

C. THE NEW CHRISTIAN RIGHT: BORN AGAIN

The Moral Majority, as the foregoing discussion explains, failed to effect any substantive change in constitutional church-state separation. Nonetheless, it displayed the enormous potential of organized religious groups, particularly Christian conservatives. Prior to the demise of the Moral Majority, fundamentalist leaders began to realize the power of a conservative religious and political coalition. Following the 1978 elections, Pat Robertson, referring to the rising Christian conservative movement, boldly proclaimed that "[Christian conservatives] have enough votes to run the country."[298]

Robertson emerged from the ruins of the Moral Majority to become a highly successful entrepreneur and religious activist.[299] He formed the Christian Coalition after his failed 1988 presidential bid to "give focus and direction to the tens of thousands of Christians who had entered politics for the first time during [his] campaign with a hope of ensuring a better future for themselves and their families."[300] It has subsequently grown at an amazing rate since its inception in the fall of 1989. For example, in 1993 it added ten thousand new donors a month and had organizations in every state, with approximately 860 chapters across the country.[301] By 1994, the Coalition claimed more than 900,000 members, 870 chapters, an additional 350,000 activist member mailing list, and a budget of between twelve and fourteen million dollars.[302]

Unlike its Moral Majority predecessor, the Christian Coalition focuses its efforts primarily at state and local school boards. It sponsors many school board candidates while simultaneously avoiding political spotlights. This is an official policy of the Christian Coalition as evidenced by the Pennsylvania chapter, which attempted to "become directly involved in the local Republican committee" in 1992, yet admonished its members

296. STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 265 (1993).

297. Laura Sessions Stepp, *Falwell Says Moral Majority to Be Dissolved*, WASH. POST, June 12, 1989 at A11.

298. REICHLEY, *supra* note 29, at 320.

299. For example, in 1993 his Christian Broadcasting Network (CBN) claimed $140 million in revenue, $91 million in contributions, $15 million in overhead, and spent $15.5 million on fundraising. John Taylor, *Pat Robertson's God, Inc.*, ESQUIRE, Nov. 1994, at 76. His Regent University claimed a 1993 endowment of $154 million and his International Family Entertainment (IFE) company claimed 1993 revenues of $208 million. *Id.* He holds 3.1 million shares of IFE stock worth $50 million, and his IFE salary alone is $435,000. *Id.*

300. ROBERTSON, THE TURNING TIDE, *supra* note 18, at 61.

301. *Id.* at 62.

302. CANTOR, *supra* note 274, at 27.

and candidates to "never mention the name Christian Coalition in Republican circles."[303] These tactics resulted in Christian Coalition backed candidates being dubbed "stealth candidates."[304]

The enormous growth and intense activism of the Christian Coalition has immense implications in elections characterized by low voter turnout. Unfortunately, voter turnout in the United States is among the lowest of any democratic society.[305] As Robertson aptly notes, presidential elections generally reek of voter apathy, with scarcely fifty percent of registered voters participating.[306] Non-presidential year gubernatorial and all congressional elections have an average voter turnout of forty percent.[307] School board races are especially dismal, with the numbers falling to between eight and ten percent.[308]

Such extreme voter apathy means that fairly minuscule segments of eligible voters decide elections at every level, particularly at the grassroots level. Robertson is well aware of the implications of American voter apathy and explains that "the combined strength of dedicated Evangelicals coupled with equally dedicated pro-family Roman Catholics and Orthodox Jews is more than sufficient to decide any election for any office in the land."[309]

Robertson's observation is not an overstatement. There are many examples of the ability of the Christian Coalition to affect grassroots elections. Specifically, Christian Coalition backed candidates won fifty-seven percent of the 1993 school board races they entered in New York City and four out of five seats in a 1993 Idaho school board election.[310] Christian conservatives also took over a number of school boards across the country, including Lake County and Jacksonville, Florida; Round Rock, Texas; and Vista, California, to name a few.[311]

Notwithstanding continuing successes in school board races, the 1990 senatorial re-election bid of Senator Jesse Helms personifies the power of the Christian Coalition and organized voting blocs in general. Senator Helms was trailing Charlotte mayor Harvey Gantt by approximately eight percentage points two weeks before the election during this North

303. *Id.* at 32.

304. Stealth candidates are individuals who run for public office without fully disclosing their religious beliefs or affiliations with Christian conservative activist organizations. *See* Ken Moritsugu, *Bulwark Against 'Stealth Candidates,'* NEWSDAY, May 2, 1994, at A20; Michael D'Antonio, *Bedeviling the GOP: With 'Stealth' Candidates, Tight Discipline & Cash, The Religious Right Dominated the Republican Agenda*, LOS ANGELES TIMES, Nov. 29, 1992, at 26.

305. John Lichfield, *U.S. Election Day: Bigger Turnout Lifts Democrats*, INDEPENDENT, Nov. 4, 1992, at 10 (other than Switzerland, the United States has "the worst voting record in the industrialized world").

306. ROBERTSON, THE TURNING TIDE, *supra* note 18, at 62.

307. *Id.*

308. *Id.*

309. *Id.* at 63.

310. *Id.* at 10-11.

311. Deborah Sharp, *A Culture Clash Divides Florida County: Schools Told to Say USA is Superior*, USA TODAY, May 18, 1994, at 11A.

Carolina campaign. Senator Helms called on the Christian Coalition for help (and subsequently ran racially charged commercials). The Coalition responded two weeks before the election by mobilizing its forces and distributing 750,000 church bulletins, referred to as "voter guides," listing the candidates' positions on controversial issues, including abortion and school prayer. Their efforts resulted in a dramatic come-from-behind win by Senator Helms.[312] The "combined strength" of the Christian Coalition has caused it to become a "principle agent of the turning political tide in America."[313]

D. Religious Liberty Law Firms

Coupled with the Christian conservative race to the polls is the emergence of law firms that specialize in religious liberty litigation. First Amendment jurisprudence, once the domain of liberal groups like the American Civil Liberties Union and People for the American Way, is now deluged by Christian conservative groups waging battles in courts for greater religious accommodation. These nonprofit organizations are staffed with hundreds of lawyers who believe that religious freedoms are under attack.

Robertson formed the most prominent of these organizations, the American Center for Law and Justice (ACLJ) in 1990 "to stop the ACLU, secular humanists, and anti-family organizations that are destroying [Christians'] freedoms."[314] The ACLJ provides out-of-court legal services to individuals and primarily educational institutions and is engaged in religious liberty litigation at all levels.[315] In addition, it unambiguously opposes strict interpretations of church-state separation. Indeed, Keith Fournier, its executive director, likens the existing wall of separation to the Berlin Wall and has called for an end to church-state separation as it currently exists.[316] Many Christian conservative groups

312. Robertson, The New World Order, *supra* note 18, at 260.

313. Robertson, The Turning Tide, *supra* note 18, at 62-63. Mr. Robertson gives a telling example of how organized, grassroots groups can control elections:

> In a school board race in a city with a population of 500,000, there may be 250,000 registered voters, but only 20,000 will vote. This means that 11,000 people out of 500,000 will be sufficient to elect one or more school board members. In a state with 6 million residents in a hotly contested race for governor, about 1.6 million people will vote. This means that 801,000 people, or 13.5 percent of the total population will elect the governor. However, in a closely contested, statewide race, any determined, cohesive voter block of 10 percent, or even 5 percent, of those voting can swing an election. So in this hypothetical gubernatorial race, 80,000 to 160,000 people could easily swing an election from Democratic to Republican or vice versa.

Id.

314. Cantor, *supra* note 274, at 47.

315. *Id.* ACLJ lead counsel Jay Sekulow has successfully argued two high profile United States Supreme Court cases since coming to the ACLJ. Bray v. Alexandria, 506 U.S. 263, 286 (1993) (holding the Ku Klux Klan Act of 1871 does not give federal courts jurisdiction over abortion protests); Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 396 (1993) (unanimously holding religious groups must be allowed access to public school facilities after-hours if non-religious groups are given access).

316. In 1992, Keith Fournier proclaimed:

and individuals have followed the lead of the Christian Coalition and the ACLJ by calling for a return to socialized religion.[317]

E. A MOMENT OF SILENT . . . REFLECTION?

The Christian conservative movement is undoubtedly becoming a force in American politics at all levels. This fact was recognized by Ralph Reed when he threatened to withhold support for the 1996 GOP presidential ticket if any member of the ticket holds pro-abortion views.[318] He claims his "word of caution" is a reminder to the GOP that Christian conservatives "are the ones who burn the shoe leather in the precincts."[319]

GOP controlled state legislatures have recognized this ongoing power shift in their party and have undertaken issues that Christian conservatives consider vitally important, among them, school prayer. One result has been a movement at the state level to introduce legislation allowing moments of silence in public schools. Undoubtedly, Christian conservatives anticipate court challenges to these statutes and welcome the opportunity to try and alter current church-state relations.

Georgia's moment of silence statute was the first since *Wallace v. Jaffree* to test the judiciary's vacillating school prayer philosophy. The case revolves around Brian Bown, a Georgia high school teacher, who was fired for disobeying the state law that requires teachers of public schools to start each day with not more than sixty seconds of silence.[320] He was fired after a two-day school board hearing that he branded a "political trial."[321] Mr. Bown considers the statute an unconstitutional attempt to

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> In no uncertain terms the Court must hear the words which express the pent up sentiments of Americans throughout this wonderful country—the same words President Reagan used but in a different context [in Berlin]—Tear Down This Wall! Let our children pray again and our preachers preach again . . . Let the establishment clause once again prevent what it was intended to prevent, the coercion to belief in one government sanctioned sect. And let the freedoms of speech, assembly, press and religion again protect religious speech.

CANTOR, *supra* note 274, at 48. Similar proclamations have been issued by Pat Robertson, who calls the wall of separation a "lie of the left." *Id.* at 4.

317. *See, e.g.*, DAVID BARTON, THE MYTH OF SEPARATION: WHAT IS THE CORRECT RELATIONSHIP BETWEEN CHURCH AND STATE? (1992) (attempting to establish that church-state separation is a myth and that the Founding Fathers intended America to be a Christian nation). Other religious liberty law firms include the Rutherford Institute, founded by John Whitehead in 1982—15 staff attorneys and over 1000 volunteer attorneys; the American Family Association Law Center, founded by Donald Wildmon in 1990—5 staff attorneys and over 400 volunteer attorneys; and the Alliance Defense Fund, founded by Bill Bright in 1993—2 staff attorneys. Julia McCord, *Defending Religious Rights Nonprofit Christian Law Organizations Gain Ground Christian Legal Groups*, OMAHA WORLD HERALD, Apr. 29, 1995, at 57SF.

318. Mimi Hall, *Gingrich Wants Shift on Foster: Abortion Too Divisive He Tells GOP*, USA TODAY, Feb. 16, 1995, at 8A.

319. *Id.*

320. GA. CODE ANN. § 20-2-1050 (Supp. 1995) ("In each public classroom, the teacher in charge shall, at the opening of school upon every school day, conduct a brief period of quiet reflection for not more than 60 seconds with the participation of all pupils therein assembled.").

321. *Teacher Fired Over 'Moment of Silence,'* USA TODAY, Sept. 23, 1994, at 4A.

bring prayer back into public schools. He subsequently filed an unsuccessful suit in federal district court challenging the constitutionality of the statute.[322]

Mr. Bown questioned the intent of the Georgia legislature during an appearance on the Cable News Network's (CNN) Crossfire.[323] He claimed that the statute is a covert method of circumventing the First Amendment's religious liberty clauses.[324] Consequently, he refused to act in a manner that he considered unconstitutional and contrary to his conscience.[325]

The statute in its original form did in fact call for school prayer. It currently mandates "a brief period of *quiet reflection;*" however, a prior version and the initial draft of the current law called for "a brief period of *silent prayer or meditation.*"[326] In fact, as the district court noted in its opinion, a transcript of the debate indicated that several House members viewed this legislation as an opportunity to return prayer to public schools.[327]

Nevertheless, the court concluded that these statements did not indicate the genuine intent of the legislature. The court instead relied on Senator Scott, the legislation's sponsor, who stated "that the Act was 'not an effort to bring prayer back into the schools,' but 'was one of three bills [he] introduced to deal with the violence among our young people.'"[328] Relying exclusively on the *Lemon* test, the court then, in a well-reasoned opinion, upheld the constitutionality of the statute.[329]

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322. Bown v. Gwinett County Sch. Dist., 895 F. Supp. 1564 (N.D. Ga. 1995).

323. *Crossfire*: Sounds of Silence (Cable News Network television broadcast, Aug. 30, 1994) (transcript # 1168), *available in* LEXIS, News Library, Script File.

324. Mr. Bown asserts that the genuine intent of the Georgia legislature is evident by statements made during floor debates:

> Let's . . . talk about the intent of the Georgia legislature when they were debating this. You know, I can read from a list of the comments they made where they talked about this is how we're going to bring prayer back into the schools and, clearly, it was in the intent of the Georgia legislature to do that, and I have a copy of the bill. In fact, it's the bill that I took a look at first, and it was clearly their intent, and it's stated right in there, 'silent prayer'. Their intent here is to bring prayer in. I guess they realized that this was something they couldn't go for this time. So in that bill, you can see dot-dot-dot, prayer crossed out and moment of sil- [sic] or reflection written above it. . . .

Id. (statement of Brian Bown).

325. *Teacher Suspended Over "Moment of Silence' Sues District: Seeks Reinstatement*, LEGAL INTELLIGENCER, Aug. 26, 1994, at 3 ("'All I did was follow my beliefs and my conscience,' claimed Mr. Bown."); *see also Morning Edition*: Teacher Fired After Ignoring 'Moment of Silence' (National Public Radio broadcast, Aug. 31, 1994,) (transcript # 1423-14), *available in* LEXIS, News Library, Script File (Brian Bown commenting on the Georgia statute during an interview with Alex Chadwick of National Public Radio); Nathaniel Sheppard Jr., *Compromise on School Prayer Satisfies Few People in Georgia*, HOUSTON CHRON., Dec. 15, 1994, at D14 (describing the experience of Quakers being forced to sit through the mandatory silence period).

326. GA. CODE ANN. § 20-2-1050 (1994) (emphasis added).

327. *Bown*, 895 F. Supp. at 1568.

328. *Id.* at 1567.

329. *Id.* at 1572-86.

Other states enacting moment of silence and "voluntary" prayer laws include, but are not limited to, Arkansas,[330] Delaware,[331] Indiana,[332] Massachusetts,[333] New York,[334] Ohio,[335] Mississippi,[336] North Carolina,[337] Tennessee,[338] and Utah.[339] It is odd, given the ground swell of state moment of silence statutes, that national leaders are currently focused on amending the Constitution to allow "voluntary" prayer in public schools.

Moment of silence statutes and school prayer in general has spawned a powerful effort to amend (or replace) the Establishment and Free Exercise Clauses. Two constitutional amendments were introduced into the United States House of Representatives in November 1995.[340] The first, entitled the *Religious Equality Amendment*, was introduced by Congressman Henry Hyde on November 15, 1995.[341] Although it focuses on discrimination rather than school prayer, it would allow unfettered government funding of religious organizations, including tax aid ("vouchers") for religious schools.[342] The second amendment, named the *Religious Liberties Amendment*, was introduced by Congressman Ernst Istook on November 28, 1995.[343] It would allow student-led prayer in public schools and government display of religious symbols.[344]

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330. The Arkansas Senate passed a bill requiring up to five minutes of daily silence in public schools; the bill was modified in the House to allow local school boards to voluntarily adopt such a policy and, as of late 1995, was in the House Education Committee for further debate. *Church-State Debate: Brewing in Michigan and Arkansas*, DAILY REP. CARD, Feb. 10, 1995.

331. Although Delaware HB 499 passed the Delaware House of Representatives by a vote of 38-0, the legislation lacks a workable implementation strategy; specifics must be handled by each school district. *Delaware House Passes Voluntary School Prayer Bill*, LEGAL INTELLIGENCER, June 16, 1994, at 5.

332. IND. CODE ANN. § 20-10.1-7-11 (Burns 1994) (moment of silence).

333. MASS. ANN. LAWS ch. 71, § 1A (Law. Co-op. 1994) (moment of silence).

334. NY CLS. EDUC. § 3029-a (1994) (moment of silence).

335. OHIO REV. CODE ANN. § 3313.601 (Baldwin 1994) (moment of silence).

336. MISS. CODE ANN. § 37-13-4 (1993) (authorizing student-initiated, student-led prayer in public schools).

337. 1993 N.C. Adv. Legis. Serv. 716 § 2. G.S. 115C-36(29) (moment of silence).

338. TENN. CODE ANN. § 49-6-1004 (1994) (moment of silence).

339. 1991 Utah Laws 35(66) (moment of silence).

340. Bill Broadway, *Schism Over School Prayer; Two GOP-Proposed Constitutional Amendments Reflect Split in Conservative Thinking*, WASH. POST, Dec. 2, 1995, at B7.

341. The full text of the amendment reads: "Neither the United States nor any State shall deny benefits to or otherwise discriminate against any private person or group on account of religious expression, belief or identity; nor shall the prohibition on laws respecting an establishment of religion be construed to require such discrimination." *Id.*

342. *Id.*

343. The amendment reads:

> To secure the people's right to acknowledge God according to the dictates of conscience: Nothing in this Constitution shall prohibit acknowledgments of the religious heritage, beliefs, or traditions of the people, or prohibit student-sponsored prayer in public schools. Neither the United States nor any State shall compose any official prayer or compel joining in prayer, or discriminate against religious expression or belief.

Id.

344. *Id.*

Opinions are split on the impact either amendment would have on the First Amendment. For instance, Professor Michael McConnell, who helped draft the Hyde amendment, explains that "[t]he principle function of [the Hyde] proposal is to draw attention to the problem of discrimination against religion and influence the course of jurisprudence."[345] Indeed, Professor McConnell believes that passage of the amendment is not necessary to influence the courts on this issue. He points to the Equal Rights Amendment which, despite failing, nevertheless spurred "the process of national thought and deliberation," resulting in a restructuring of judicial philosophy.[346]

Conversely, Pastor Barry Lynn, executive director of Americans United for the Separation of Church and State, believes that either amendment "would erase the doctrine of church-state separation from the First Amendment."[347] Professor Douglass Laycock agrees, calling the Hyde proposal a disguised "school prayer" amendment.[348] Testifying before a congressional subcommittee, Professor Laycock called both proposals antithetical to our constitutional tradition of government neutrality towards religion.[349]

Although the future of both amendments hinges on the outcomes of the 1996 national and state elections, the thought process and deliberation envisioned by Professor McConnell is already taking place. For instance, on July 12, 1995, President Clinton, surely attempting to preempt the introduction of the amendments in Congress, sent a memorandum to the Secretary of Education and the Attorney General explaining what constitutes constitutionally protected religious expression in public schools.[350] In the memorandum, the President asserts that public schools are not "religion-free zones" and that students need not check their religious expression at the schoolhouse door.[351] He further explains that "the government's schools also may not discriminate against private religious expression during the school day."[352] The memorandum has since been distributed to the nation's public schools.

In any event, Christian conservatives are playing an influential role in the attempt to alter the First Amendment. The Christian Coalition included a voluntary prayer amendment in its *Contract With the American Family*, and Jay Sekulow joined with Professor McConnell and others in

345. Janan Hanna, *Proposal Seeks 'Religious Equality'; 1st Amendment Would Be Redefined*, CHICAGO TRIB., Dec. 10, 1995 at C1.

346. Broadway, *supra* note 340, at B7.

347. *Id.*

348. Hanna, *supra* note 345, at C1.

349. *See id.*

350. Memorandum from President William Jefferson Clinton to the Secretary of Education and the Attorney General of the United States (July 12, 1995), *reprinted in* William J. Clinton, *Religion-Free School?*, LIBERTY, Nov.-Dec. 1995, at 20.

351. *Id.*

352. *Id.* The President went on to discuss 16 topics affecting religious liberty, including religious expression, prayer, student assignments, the Equal Access Act, and lunchtime and recess activities. *Id.*

the discussions that produced Congressman Hyde's proposal.[353] Christian conservatives are becoming one of the most powerful influences in the political process.[354]

Their ability to control elections traditionally marked by low voter turn-out at the grassroots level and by the American voter apathy epidemic at the national level means that religious liberty is vacillating with the ever-changing political scene, rather than remaining firmly entrenched in the Constitution. Such a proposition is not alarming due to religious activism; indeed, Christianity and religion in general have been and are good for the United States. Rather, it is the apparent willingness of Christian conservatives to disregard the need to protect religious minorities and their assault on contemporary religious liberty. William F. Buckley, a highly respected and long-time conservative commentator and nationally syndicated columnist, provides this paradigmatical assessment of minority religious liberty rights: "If the minority has certain rights, so does the minority when it grows into majority. Contrary arguments are spinach, and the hell with them."[355]

F. PERSECUTION COMPLEX

> Just like what Nazi Germany did to the Jews, so liberal America is now doing to the evangelical Christians. . . . It is the Democratic Congress, the liberal-biased media and the homosexuals who want to destroy all Christians! Wholesale abuse and discrimination and the worst bigotry toward any group in America today! More terrible than anything suffered by any minority in our history![356]

The foregoing assessment by Pat Robertson has become common currency among Christian conservatives seeking to alter our current system of religious liberty. There is a concerted attempt to portray Christians as a persecuted minority. John Whitehead, president of the Rutherford Institute, has in fact written a book attempting to validate this persecution theory.[357] In a *Liberty* magazine article, he refers to this "religious apartheid" as "the separation of religion, particularly Christianity, from all aspects of American public life."[358] Mr. Whitehead and others believe that Justice Black's opinion in *Everson v. Board of Education*[359] was the

353. Hanna, *supra* note 345, at C1.

354. *See, e.g.*, Mary Ann Roser, *Might Makes Right; Organized, Committed and Politically Savvy, Christian Conservatives Have Gained a Foothold in the Texas Republican Party—and They're Not Stopping There*, AUSTIN AMERICAN-STATESMAN, Feb. 25, 1996 ("By winning precinct chairmanships, religious conservatives took over the [Texas] GOP two years ago, making Texas one of about 20 states where that has occurred.").

355. William F. Buckley, Jr., *Nothing is Wrong With Prayer in Schools . . .*, HOUSTON CHRON., Dec. 4, 1994, at O3.

356. Molly Ivins, *Christian Coalition Isn't Fundamentalist in its Democratic Beliefs*, STAR TRIB., Sept. 19, 1993, at 23A (quoting Pat Robertson).

357. *See* JOHN W. WHITEHEAD, RELIGIOUS APARTHEID (1994).

358. John W. Whitehead, *Religious Apartheid: The Systematic Elimination of Christianity From American Public Life*, LIBERTY, Mar.-Apr. 1995, at 7.

359. 330 U.S. 1 (1947).

beginning of this societal cleansing of religion in America.[360]

Christian conservatives have a powerful ally on this theory: Justice Antonin Scalia. On April 9, 1996, Justice Scalia delivered a prayer breakfast speech at the Mississippi College School of Law. The event was sponsored by the school's chapter of the Christian Legal Society. During his speech Justice Scalia chided the "worldly wise" for their scorn of Christianity.[361] He asserts that those who believe in miracles and the resurrection of Christ are regarded by society as "simple-minded."[362] "We are fools for Christ's sake," Justice Scalia proclaimed, and Christians "must pray for the courage to endure the scorn of the sophisticated world."[363]

There are many, however, who disagree with the persecution theory of Christian conservatives. For instance, James Dunn, executive director of the Baptist Joint Committee on Public Affairs, addressing Justice Scalia's comments, retorted, "[R]eligion in America is a powerful and pervasive force, and Christianity is the best-funded, the largest and the most powerful religious group in America. There's something almost laughable to me about Christians whimpering and whining about being persecuted."[364]

In short, Mr. Dunn is correct. The vast majority of American adults (86.5%) identify themselves as Christian.[365] Christians also have a commanding presence in the legislature. Nearly all of the 104th Congress carry the Christian label (93% or 497 of 535 members).[366] There are more than 215 seminaries and theological academies in the United States; more than 500,000 clergy; about 358,194 churches or houses of worship; more than 444 religious periodicals published every year; at least 1,840 full-time Christian radio and television stations; 3,400 stores that belong to the Christian Booksellers Association; and at least 120 predominantly Christian, religion-based lobbies at the federal level.[367]

Furthermore, the predominantly Christian public naturally, contrary to Justice Scalia's assertions, displays a fondness for religious figures. Pope John Paul II, Mother Teresa, and Billy Graham consistently rank at or

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360. Whitehead, *supra* note 358, at 8.

361. Joan Biskupic, *Scalia Makes the Case for Christianity; Justice Proclaims Belief in Miracles*, WASH. POST, Apr. 10, 1996, at A1.

362. *Id.*

363. *Id.* Justice Scalia was quoting I Corinthians 4:10, albeit for purposes other than what the Apostle Paul intended. Justice Scalia is an honorable man; and although he did not violate any conflict of interest rules, his statements are, to say the least, inappropriate. His wild assertions create the appearance of impropriety; they have forever comprised public perception of his objectivity for any future religious liberty case that he takes part in. *See supra* note 315 and accompanying text (Jay Sekulow, who no doubt agrees with Justice Scalia's assertion, will likely argue future cases before the Supreme Court). Though religious convictions are a valuable asset, public comments by Supreme Court justices that flow from politically and legally active members of the public are better left unsaid.

364. *Crossfire: Is America Frowning on Faith?* (Cable News Network television broadcast, Apr. 10, 1996) (transcript #1626), *available in* LEXIS, News Library, Script File.

365. Albert J. Menendez & Edd Doerr, *Persecution Complex*, LIBERTY, Mar.-Apr. 1995, at 12.

366. *Id.* (citation omitted).

367. *Id.* at 12, 13 (citations omitted).

near the top of Gallup Polls measuring the most admired men and women.[368] The clergy are consistently among the most admired figures in America, particularly on the issue of integrity. They are much more widely admired than doctors, lawyers, teachers, and a host of other professionals.[369]

If the government and "worldly wise" are attempting to persecute Christians and drive religion from public life, they are not doing a very good job. It is safe to say that Christians are not in fact being persecuted. Nevertheless, this argument is being advanced in an attempt to influence the thought process and deliberation of Congress and the courts. Christian conservatives, however, have a more ambitious goal than mere thoughtful dialog. Church-state separation is the primary target of those who adhere to the persecution theory.

The Christian conservative position on church-state separation is clear: It should not exist. This is the logical conclusion reached by examining their religious liberty rhetoric.[370] Furthermore, their presence will reverberate through state legislatures in the coming months with the tax aid for parochial and other private school initiatives, known as "vouchers" or "school choice" in Christian conservative circles.[371] School choice initiatives will probably be the subject of legislative activity in more than twelve states.[372] These proposals, along with the moment of silence stat-

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368. *Id.* at 13 (citation omitted).

369. *Id.* From a financial standpoint, Christian organizations are among the most prosperous in the country. In 1992, contributions to 44 Protestant denominations totaled $16,647,464,955, a figure that excludes Roman Catholic, Episcopalian, and Eastern Orthodox churches. *Id.* at 16 (citation omitted). All churches enjoy tax exempt status, and 20 years ago church assets exceeded $150 billion, plus $20 billion in yearly income. *Id.* (citation omitted).

370. As Beverly LaHaye, founder and president of the conservative Concerned Women of America, proclaimed:

> [T]oday instead of protecting our right to freely exercise our religious faith in public places, publicly honoring our God and Creator as our Forefathers did, we are forbidden to speak, to pray aloud, to read the Bible, to even teach Judeo-Christian values in our public schools and other public places because of an imaginary "wall of separation" conjured by non-believers.

CANTOR, *supra* note 274, at 5. Gary North, founder of the Institute for Christian Economics, claims that "there is no religious neutrality." *Id.* at 6 (quoting BILL MOYERS, GOD AND POLITICS (1987)); "Government and true Christianity are inseparable," says Robert Simonds, founder and president of Citizens for Excellence in Education. *Id.* (quoting ROBERT SIMONDS, HOW TO ELECT CHRISTIANS TO PUBLIC OFFICE (1985)). Pastor W. A. Criswell, senior pastor of Dallas' First Baptist Church, made this telling assessment the day after delivering the benediction at the Republican National Convention: "There is no such thing as separation of church and state. It is merely a figment of the imagination of infidels." *Id.*; Paul Weyrich, founder and president of the Free Congress Foundation, threatened, "We're radicals working to overturn the present structure in this country—we're talking about Christianizing America." REICHLEY, *supra* note 29, at 331.

371. *See* Carole Ware & Lyn Hutchins, *2 Sides to the Issue of School Vouchers*, ROCKY MOUNTAIN NEWS, Feb. 15, 1995, at 23D; V. Dion Haynes, *Foes Attack School-Voucher Plan: Program's Successes, Legality Questioned*, CHICAGO TRIB., Feb. 9, 1995, at S6.

372. Joseph L. Conn, *Voucher Avalanche: Battles Over Tax Aid to Parochial and Other Private Schools Loom in Congress and a Dozen State Legislatures*, CHURCH & STATE, Feb. 1995, at 5-6. At first glance, school choice initiatives, which will result in the nondiscriminatory, compulsory use of state or federal tax dollars to support religious institutions, present serious religious liberty questions. These questions will be resolved in court. *See*

utes and other coming religious liberty issues, will undoubtedly result in court challenges that will test the judiciary's partisan approach to religious liberty.

VI. CONCLUSION

The future of American religious liberty is clouded by deep divisions in the academic, judicial, and political arenas. Scholars have failed over the years to agree on the proper interpretation of the Establishment Clause,[373] heavily criticizing the twenty-five-year-old *Lemon* test.[374] The judiciary has shown a willingness to disarm the Free Exercise Clause and disregard *stare decisis*,[375] and Christian conservative activists—who have arrived as a political force—display an alarming degree of contempt for church-state separation.[376]

These factors combine to threaten the greatest and most distinguishing asset of the United States: the American religious liberty model.[377] Our country developed this concept without the aid of a historical prototype. No other country in recorded history has maintained a system of separation and free exercise, and, consequently, no country is as prosperous or as powerful as the United States. Assuredly, capitalism, democracy, property rights, and a constitution, among other things, have contributed to the success of this nation. Still, American religious liberty is the sole aspect that has no root in European common law or otherwise.

As scholars have observed, there is no "single, unifying theory of constitutional interpretation" and the search for such "may be chimerical."[378] Yet our current system of religious liberty, including *Lemon* despite its imperfection[379] and *Sherbert* with its sterling mandate of strict scrutiny, represents the very essence of what James Madison considered vital to the health and success of our nation: "[T]he equal right of every citizen to the free exercise of his Religion according to the dictates of con-

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Plaintiffs in Ohio Voucher Law Suit File for Summary Judgment, U.S. NEWSWIRE, Mar. 18, 1996, at City Desk *available in*, LEXIS, News Library, CURNWS File; Dale D. Buss, *Court Halts Milwaukee Program Educational Vouchers in Wisconsin*, CHRISTIANITY TODAY, Oct. 23, 1995, at 78. Furthermore, the initiatives are strikingly similar to Patrick Henry's nonpreferential, nondiscriminatory government aid to all religions. *See supra* note 58 and accompanying text.

373. *See, e.g.*, Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 Nw. U. L. REV. 1113 (1988).

374. *See, e.g.*, Ronald Y. Mykkeltvedt, *Souring on* Lemon: *The Supreme Court's Establishment Clause Doctrine in Transition*, 44 MERCER L. REV. 881 (1993).

375. *See* Employment Div. Dep't of Human Resources v. Smith, 494 U.S. 872, 890 (1990); Wallace v. Jaffree, 472 U.S. 38, 92 (1985) (Rehnquist, J., dissenting).

376. *See supra* parts V.D.-F.

377. As Judge Kogan of the Florida Supreme Court cogently stated: "[N]othing . . . is more private or sacred than one's religion or view of life . . . It is difficult to overstate this right because it is, without exaggeration, the very bedrock upon which this country was founded." Public Health Trust v. Wons, 541 So. 2d 96, 98 (Fla. 1989).

378. Conkle, *supra* note 373, at 1193.

379. The wall of separation is in fact often blurred and indistinct. *See Lemon*, 403 U.S. at 614.

science."[380] The reversal of *Lemon*—which appears to be inevitable—[381] or the repeal or invalidation of the RFRA will result in an end to the unique American religious liberty model. The resulting constitutional standard, be it Justice Scalia's majority rule tradition test, Chief Justice Rehnquist's nonpreferential aid, or Justices Kennedy and O'Connor's coercion test, will likely lead to an increasingly intimate church-state relationship. Although the return of socialized religion is not probable, increased government entanglement will surely follow. This is disheartening because the only thing that government can do to religion is contaminate it. Simply put, our current system of religion and government should be maintained.

American religious liberty, however, unfortunately appears dependent upon the outcome of increasingly partisan political elections. Chief Justice Rehnquist and Justices Scalia and Thomas have a singular religious liberty judicial philosophy; one that is regrettably contrary to the legacy of James Madison and Thomas Jefferson. The retirement of one or more justices (other than the aforementioned three), coupled with the appointment of a justice who shares the establishment and free exercise views of the current bloc, will trigger a wholesale departure from current religious liberty jurisprudence. The mere possibility of this departure runs afoul of the admonition given from one Founding Father to the other: "As Jefferson said to Madison, so Madison may be saying to us over the arch of time: 'Take care of me when I am dead.'"[382]

380. *A Memorial and Remonstrance Against Religious Assessments*, in JAMES MADISON ON RELIGIOUS LIBERTY, *supra* note 1, at 59.

381. In 1995, the Court made a wholesale departure from a litany of prior cases by forcing the University of Virginia to fund a student-run religious publication. Rosenberger v Rector and Visitors of the Univ. of Va., 115 S. Ct. 2070 (1995). The Court did not, however, despite numerous *amicus* brief requests to the contrary, overrule *Lemon v. Kurtzman*. *See supra* note 259 and accompanying text (discussing the judicial merry-go-round involving the RFRA).

382. Commager, *supra* note 91, at 336.