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A Tale of Two Kingdoms: Can There be Peaceful Coexistence of Religion with the Secular State?

H. Wayne House*

“[I]n America we don’t have Christian law, Jewish law, Moslem law. We only have law-law.”¹

Nicholas von Hoffman, syndicated columnist

“The highest glory of the American Revolution was this; it connected in one indissoluble bond the principles of civil government with the principles of Christianity.”²

John Quincy Adams, sixth President of the United States

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1. Nicholas von Hoffman, “We Don’t Have Christian Law or Jewish Law; Only Law-Law,” (column licensed with King Features, source on file with the author). With these words, syndicated columnist Nicholas von Hoffman threw down a gauntlet against any who would presume that the law might be viewed from another perspective than a neutral framework. This statement was in response to rumors that Oral Roberts University allegedly had a policy against admitting non-Christian students into their law program and proclaiming that they were attempting in their law school to teach a Christian perspective on the law. Von Hoffman continues in his article,

No Jews or agnostics need apply. Catholics, also, probably aren’t welcome, although the news reports don’t make that completely clear You must also submit letters of recommendation from your local fundamentalist ayatollah or pastor, such letters to include a detailed description of how well you practice your devoirs, how fervent your prayers and how orthodox your thought and theology.

Id.

Von Hoffman makes these acerbic comments without knowing, apparently that the law school had a policy of admitting Christians of all faiths as well as Jewish students who should apply and qualify under standard law school standards. I have personally known graduates from the law school at ORU who were Roman Catholics. As well, I have a letter from the admissions office indicating that they not only admit Christians of various persuasions but also have students representing Judaism, Islam, and Tibetan Buddhism, among others.

2. JOHN WINGATE THORNTON, THE PULPIT OF THE AMERICAN REVOLUTION XXIX (1860; 1970), *quoted in* WILLIAM J. FEDERER, AMERICA’S GOD AND COUNTRY ENCYCLOPEDIA OF QUOTATIONS 18 (1996).

An uneasy peace exists between the kingdom of God and the kingdom of the world³ in contemporary America. At an earlier time in American history it seemed that Christian religious sects had found the promised land similar to what the Israelites had done more than three thousand years earlier.⁴ Arriving from European persecution, largely religious persecution,⁵ these Christian immigrants (Puritans and Separatists or Pilgrims alike) were to be "a City upon a hill"⁶ and the new Israel.⁷

The words of John Quincy Adams at the fiftieth anniversary of the inauguration of George Washington as the president of the United States, reflects this type of perspective shared by Americans at the time:

Fellow-citizens, the ark of *your* covenant is the Declaration of Independence. Your Mount Ebal, is the confederacy of separate state sovereignties, and your Mount Gerizim is the Constitution of the United States. In that scene of tremendous and awful solemnity, narrated in the Holy Scriptures, there is not a curse pronounced against the people, upon Mount Ebal, not a blessing promised them upon Mount Gerizim, which your posterity may not suffer or enjoy, from your and their

3. The two kingdoms perspective was a key ingredient of the Reformation (*cf.* Martin Luther's kingdom of the left, the state, and the kingdom of the right, the church). See *infra* text accompanying notes 166-67.

4. I speak of the Hebrews' Exodus from Egypt, circa 1445 B.C., although many scholars place the date at 1290 B.C. or later.

5. See the discussion in BENJAMIN HART, FAITH AND FREEDOM: THE CHRISTIAN ROOTS OF AMERICAN LIBERTY 67-75 (1988).

6. The phrase "a City upon a hill" is taken from Matthew 5:14, where Jesus speaks of a "city on a hill" and is used by Puritan John Winthrop, the founder and first governor of the Massachusetts Bay Colony. The fuller statement in his famous work, *A Model of Christian Charity*, penned on June 11, 1630, says,

For we must Consider that we shall be as a City upon a Hill, the eyes of all people are upon us; so that if we shall deal falsely with our God in this work we have undertaken and so cause him to withdraw his present help from us, we shall be made a story and a by-word through the world.

ADAM WINTHROP, "A Model of Christian Charity," 2 WINTHROP PAPERS 1623-1630 (1931) at 292-295, (*quoted in* FEDERER, *supra* note 2, at 700).

See the discussion on John Winthrop by HART, *supra* note 5, at 83-96. See also the study on the contribution of early Puritans to American constitutionalism, John Witte, Jr., *How to Govern a City on a Hill: The Early Puritan Contribution to American Constitutionalism*, 39 EMORY L.J. 41-64 (1990).

7. The terminology of the Pilgrims often coincided with that found in the Bible. Hart remarks

They were there on a mission-on God's errand into the wilderness. They were the new children of Israel, spiritual descendants of Abraham, sent by the winds of Providence into a desolate wasteland, just as Moses and the Jews were sent for 40 years into the desert. But the faith of Brewster, Carver, Bradford, and their Pilgrim brethren, that indeed their ordeal would serve a purpose, was very definitely the source of their power to begin the awesome task of building the United States of America - a fact that should cause even the atheist to marvel.

HART *supra* note 5, at 78-79.

adherence to, or departure from, the principles of the Declaration of Independence, practically interwoven into the Constitution of the United States. Lay up these principles, then, in your hearts, and in your souls – bind them for signs upon your hands, that they may be frontlets between your eyes – teach them to your children, speaking of them when sitting in your houses, when walking by the way, when lying down and when rising up – write them upon the doorplates of your houses, and upon your gates – cling to them as to the issues of life – adhere to them as to the cords of your eternal salvation. So may your children’s children at the next return of this day of jubilee, after a full century of experience under your national Constitution, celebrate it again in the full enjoyment of all the blessings recognized by you in the commemoration of this day, and of all the blessings promised to the children of Israel upon Mount Gerizim, as the reward of your obedience to the law of God.⁸

Much has happened in approximately three hundred and fifty years.⁹ What was largely a white European and religiously Protestant populace has become ethnically and religiously diverse.¹⁰ This state of affairs has become obvious only in this century, since a series of decisions were issued by the Supreme Court which disestablished the Christian religion from places of influence in the public sphere which it had held for more than one hundred and fifty years of America’s history as a republic.

Not only does the past serve as an indication of religion’s influence on America, but the continued embracing of religion by Americans in the contemporary Western world is astounding.¹¹ Moreover, our public life of

8. “The Jubilee of the Constitution,” A discourse delivered at the request of the New York Historical Society in the City of New York, on Tuesday, the 30th of April, 1839, being the fiftieth anniversary of the Inauguration of George Washington as the President of the United States, on Thursday, the 30th of April, 1789; by John Quincy Adams (entered according to the Act of Congress, in the year 1839, by Joseph Blunt, for the New York Historical Society, in the District Court of the Southern District of New York, at 56).

9. This dating refers to the founding of Jamestown in 1609.

10. It is estimated that America has more than 1200 different religious groups. See Note, *II. The Complex Interaction between Religion and Government*, 100 HARV. L.REV. 1612 (1987). The state of religious pluralism in America has been described as “[f]ar from being in a position to squelch pluralism, religion today is itself a riot of pluralism.” Maimon Schwarzschild, *Religion and Public Debate in a Liberal Society: Always Oil and Water or Sometimes More Like Rum and Coca-Cola?*, 30 SAN DIEGO L. REV. 903, 913 (1993).

11. Polls reveal that ninety-five percent of Americans believe in God and seventy percent are members of a church or synagogue. Michael J. Perry, *Religion, Politics, and the Constitution*, 7 J. CONTEMP. LEGAL ISSUES 407 (1996); Maddigan reveals other statistics even more illustrative:

[T]he controversy surrounding Establishment Clause issues is likely to continue because religion plays an increasingly important, though paradoxical role in American public life.

what may be called civil religion¹² reveals an amazing pervasiveness of religious faith in the public sphere, from common parlance to the chambers of the Supreme Court. Religion is in the life of the people in clichés (thank God its Friday), holidays (Christmas, Easter, even Halloween [hallowed eve]), cities in which they live (St. Paul, Corpus Christi), attendance at religious worship¹³ and reporting of the polls,¹⁴ music and art (Christmas carols in shopping centers, Amazing Grace a top tune on secular stations, and religious art in art galleries, including the National Art Gallery in Washington, D.C.), to mention widely known examples.

The civil religion of America is also obvious in the statements and proclamations of its leaders (e.g. presidents and candidates saying God bless America at conventions and television addresses, prayer breakfast addresses by government leaders); the appearance of "In God We Trust" on its coinage; our pledge of allegiance including "one nation under God;" observance of "national days of prayer;" the use of the Bible for administering oaths to federal and state officials as well as to witnesses in court; Thanksgiving as a national holiday; religious statements etched in stone on government buildings; recognition of Sunday in the Constitution as a day in which bills do not need to be signed; the ways in which prayer is offered in the federal and state legislative chambers and in the courts of the land; acknowledgment of God in state preambles; and the presence of the Decalogue behind the Justices of the Supreme Court.¹⁵

Considering the pervasiveness of religion, especially the Christian religion, on so many facets of the private sector and the governmental sector too, one would think that religion and the state were on friendly

Statistics show that Americans are among the most religious people in the world. More than 94% of Americans believe in God or a universal spirit, 71% believe in heaven, and 53% believe in hell. More than 40% of Americans attend church or synagogue weekly, with college graduate more likely to go than high school dropouts. Furthermore, 78% of Americans pray at least once a week and 57% pray at least once a day. In fact, Americans reportedly invoke the deity more frequently than they go to work or have sex.

See Michael M. Maddigan, *The Establishment Clause, Civil Religion, and the Public Church*, 81 CALIF. L. REV. 293, 294-295 (1993).

12. Maddigan speaks favorably of the value of civil religion to law and morals. Maddigan, *supra* note 11, at 294-348. Richards, on the other hand, believes civil religion is opposed to the constitutional government given by the Framers. See David A. J. Richards, *Civil Religion and Constitutional Legitimacy*, 29 WM. & MARY L.REV. 177 (1987).

13. See Perry, *supra* note 11, at 407.

14. *Id.*

15. The existence of the Ten Commandments in the Supreme Court chambers is interesting in view of the decision of the Court regarding the posting of these commandments in the public school classrooms: "The framers and ratifiers could not conceivably have anticipated that the Supreme Court, sitting in a courtroom with a painting of Moses and the Ten Commandments, would hold it an unconstitutional establishment of religion for a high school to have a copy of the Ten Commandments on a wall." ROBERT H. BORK, *SLOUCHING TOWARDS GOMORRAH: MODERN LIBERALISM AND AMERICAN DECLINE* 289-90 (1996) (referring to the courts ruling in *Stone v. Graham*, 449 U.S. 39 (1980)).

terms, certainly not married but at least dating. Such is very often not the case. For example, underlying von Hoffman's sardonic comments at the head of the article seems to be the assumption shared by many in the legal community that there is a safe zone or no-man's land in the law so that a person's own worldview or value system is not present when dealing with the law.¹⁶ They teach this assumption to the uninitiated in the general public with slogans like "wall of separation of church and state,"¹⁷ or the

16. A good example of imposing one's own value system is illustrated in statements I have made elsewhere:

A good example of this is found in Justice Brennan's well known perspective on the death penalty and the Eighth Amendment. He considers capital punishment to be in violation of the Eighth Amendment against Cruel and Unusual Punishment. This very statement portends that he can understand the meaning of the Eighth Amendment. But he contends that modern society has raised itself above the eighteenth century's archaic morality which advocated the death penalty. This position, however, is wrought with inconsistency since the Eighth Amendment is in tandem with the provisions for capital crimes. Moreover, the morality of the eighteenth century in this area has not significantly fluctuated to the present day. Consistently, the public has favored capital punishment by large margins.

So how does Brennan support this thesis? He substitutes *his* wisdom for that of the Framers who included capital punishment, those Justices who have not sequaciously followed him, and the public, he admits, who in general disagree with him. This assuredly is problematic for a Justice who has sworn to uphold and defend the Constitution and is required to serve under good behavior.

H. WAYNE HOUSE, *Introduction to RESTORING THE CONSTITUTION: IS JUDICIAL ACTIVISM DESTROYING THE CONSTITUTION?* 5 (H. Wayne House ed., 1987).

17. Even before Jefferson's phrase "wall of separation between Church and State" written to the Danbury Baptists (see Daniel S. Dreisbach, "*Sowing Useful Truths and Principles*": *The Danbury Baptists, Thomas Jefferson, and the "Wall of Separation,"* 39 J. CHURCH AND STATE 455 (1997) for a thorough look at the Danbury letter and Jefferson's views of church and state), appeared in *Everson* (see *infra* text accompanying notes 286-90, especially comment by Levy note 286), its first use in a Supreme Court opinion, to my knowledge, was in *Reynolds v. United States*, 98 U.S. 145, 164, where the Court was reviewing the history of the adoption of the Bill of Rights, particularly the First Amendment:

Mr. Jefferson afterwards, in reply to an address to him by a committee of the Danbury Baptist Association . . . took occasion to say: 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.

Jefferson's mention of the "whole American people" indicates that his concern was with the federal legislature, the only body he viewed as capable constitutionally of reaching into religion. His acts as president would belie a firm wall when sectarian means achieved secular ends (see ROBERT L. CORD, *SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION* 115-116 (1982) or when individual states acted in the area of religion (see Dreisbach, *supra* at 471-481). Some believe that Jefferson may have developed his metaphor "wall of separation between church and state" from Rhode Island Baptist leader Roger Williams who had earlier said:

when they have opened a gap in the hedge or wall of separation between the garden of the church and the wilderness of the world, God hath ever broken down the wall itself, removed the candlestick, and made His garden a wilderness, as at this day. And that therefore if He will eer please to restored His garden and paradise again, it must of

dogma that law operates in a religionless vacuum. Such a perspective would be shared by few in the first two centuries of the Republic¹⁸ and proves not to be the reality, in my view, that one encounters in the academy, the courts, or the marketplace today.¹⁹ The purpose of this article is to examine the present state of affairs between religion and the state, to investigate the historic relationship between church and state, and to evaluate the current status of establishment clause jurisprudence in light of the present and historic perspectives, and last to offer a modest suggestion as to how these questions can be better approached to minimize church and state tension in America.

The organization of the article is found in three parts. Part I presents how Christianity is often treated in the legal sphere in society so that religious values are pushed from the public sphere to the private realm. Part II sets forth evidence that such has not always been the case. In fact, Christian perspectives dominated the moral and legal thought of the West and heavily influenced the development of law in Western Europe and England, as well as the founding and development of American government and law. Part III seeks to demonstrate that the failure of the Supreme Court to articulate a consistent and historically informed meaning of religion has produced contradictory and confusing Establishment Clause jurisprudence. This section also examines ways in which the Court has stipulated and experimented with various legal theories and how legal writers have sought to provide guidance to the Court in this area.

I. THE CONTEMPORARY ASSAULT ON CHRISTIAN VALUES IN SECULAR SOCIETY

A. *The Current State of Law and Religion in American Law*

The attempt of religious citizens, particularly the majority religion, Christianity, to make an impact on the political and legal process has fallen on hard times in recent years under a theory that the law should reflect no religious view since this would violate the Establishment Clause.²⁰ The fact that this might be an expression of the free exercise of religion²¹

necessity be walled in peculiarly unto Himself from the world.

(quoted in JOHN EIDSMOE, *THE CHRISTIAN LEGAL ADVISOR* 143 (1984)).

To Williams, the purpose of the wall was to protect the church from the government, not vice versa. *Id.* Dreisbach, however, provides evidence for a common source to Jefferson and Williams in the Scotsman James Burgh. See Dreisbach, *supra* at 486-490.

18. See *infra* text accompanying note 156.

19. See *infra* text accompanying notes 178-463.

20. See *infra* text accompanying notes 253-368.

21. "Congress shall make no law . . . prohibiting the free exercise thereof [religion]." U.S. CONST. amend I.

carries little weight, for in the jurisprudence of the Court, the Establishment Clause, which is absolute, always trumps the free exercise clause which is more narrow as to conduct, though not belief.²²

The desire to have one's deepest convictions have an impact in the culture or marketplace of ideas receives a judicial rebuff in a way that would have been unheard of in former days for two reasons. First, the court has come to believe that religious views, apart from clearly stated secular purposes, are violative of the Establishment Clause.²³ Second, the arm of the federal government, against which the First Amendment is addressed, was once short. The states, before the incorporation doctrine,²⁴

22. The meaning of "religion" in the Establishment Clause is viewed as absolute by the courts, whereas "religion" in free exercise is limited, with the right to believe being absolute but the right to practice one's belief being necessarily limited. The Court enunciated this free exercise belief-action dichotomy in *Cantwell*, where Justice Roberts explained that

the amendment raises two concepts – freedom to believe and freedom to act. The first is absolute, but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.

Cantwell v. Connecticut, 310 U.S. 296, 303-04 (1940).

23. This perspective gave rise to the famous "secular purpose" doctrine developed in *Lemon*. See *infra* at text accompanying notes 318-30. *Allen* affirmed the appeals court of New York (20 N.Y.2d 109, 117 (1967)) which permitted distribution of materials to citizens without regards to religious affiliation:

The Court of Appeals said that the law's purpose was to benefit all school children, regardless of the type of school they attended, and that only textbooks approved by public school authorities could be loaned. It therefore considered "completely neutral with respect to religion, merely making available secular textbooks at the request of the individual student and asking no question about what school he attends."

Board of Education of Central School District No. 1 v. Allen, 392 U.S. 236, 241 (1968).

Lemon sought to limit the practice advocated in *Allen* but found itself enmeshed in its own web of entangling itself in religion:

The Court held that before the state could aid the secular component of sectarian education, the state must ensure that public aid would not breach the imaginary wall erected between the secular and religious components. In order to satisfy this command, the state was required to employ vigilant and comprehensive surveillance to ensure that no aid be used for the inculcation of religion. The states had undertaken to do so in this case by conditioning aid on the schools' acquiescence to state audit to ensure compliance with grant restrictions. The Court concluded, however, that such surveillance necessarily entailed excessive government interference in the affairs of religious schools and therefore resulted in an unconstitutional entanglement between government and religion. Justice Rehnquist subsequently described this situation as the *Lemon* test's "Catch-22." Aid to sectarian schools must be vigorously policed lest it be put to sectarian use and thereby violate the effects test. Yet this supervision constitutes an impermissible entanglement. That of course leaves only one solution: exclude religious schools from receiving government aid altogether.

Mark J. Beutler, *Public Funding of Sectarian Education: Establishment and Free Exercise Clause Implications*, 2 GEO. MASON INDEPENDENT L. REV. 7, 22-23 (1993).

24. From *Everson* on the court has recognized the Establishment Clause as incorporated through the Fourteenth Amendment against the states. The difficulty of this clause being applied against the states in view of the state churches that existed at the time of the writing of the

had the freedom to establish or disestablish religion,²⁵ at the behest of the citizenry, through political debate and were more pluralistic in their treatment of other religions within their borders than sometimes assumed.²⁶ With incorporation this is no longer the case; and uniformity rather than diversity is enforced on all.²⁷ With the ever enlarging growth of government at all levels, the area of the public has increased so that religious expression finds fewer and fewer places in which one can express her views without inviting a charge of violation of "separation of church and state."²⁸

amendment has been answered by Brennan in *Schempp*.

It has been suggested, with some support in history, that [incorporation of the establishment clause] is conceptually impossible because the Framers meant the [clause] also to foreclose any attempt by Congress to disestablish the existing official state churches. [But] the last of the formal state establishments was dissolved more than three decades before the Fourteenth Amendment was ratified, and thus the problem of protecting official state churches from federal encroachments could hardly have been any concern of those who framed the post-Civil War Amendments.

Quoted in G. GUNTHER and K. SULLIVAN, *CONSTITUTIONAL LAW* 1466-1467 (13th ed. 1997).

25. The puzzling silence of the federal constitution makes more sense if seen in this light: [O]ne important function of the First Amendment was to restrain the federal government's power to interfere with state regulation of religion. The state was the appropriate overseer of religion under the federal system, and states were assumed to have been left free to establish, disestablish, or partially establish religion as they saw fit.

ELIZABETH B. CLARK, *Church-State Relations in the Constitution-Making Period*, in *CHURCH AND STATE IN AMERICA: A BIBLIOGRAPHICAL GUIDE: THE COLONIAL AND EARLY NATIONAL PERIOD* 157 (John F. Wilson ed., 1986) (quoted in James J. Knicely, *High Wall or Lines of Separation?*, 6 *WM. & MARY BILL RTS. J.* 261, 274).

26. Strict separationist Leonard Levy recognizes the truthfulness of this:

Clearly the provisions . . . show that to understand the American meaning of "an establishment of religion" one cannot arbitrarily adopt a definition based on European experience. In every European precedent of an establishment, the religion established was that of a single church. Many different churches, or the religion held in common by all of them, i.e., Christianity or Protestantism, were never simultaneously established by any European nation. Establishments in America, on the other hand, both in the colonial and early state periods, were not limited in nature or in meaning to state support of one church. An establishment of religion in America at the time of the framing of the Bill of Rights meant government aid and sponsorship of religion, principally by impartial tax support of the institutions of religion, the churches.

Not one of the six American states maintaining establishments of religion at the that time preferred one church to others in their constitutional law. Even in New England where the Congregational church was dominant as a result of numerical superiority, there were constitutional and legal guarantees against subordination or preference. Such an establishment can hardly be called an exclusive or preferential one, as in the case where only one church, as in all European precedents, was the beneficiary.

LEONARD W. LEVY, *JUDGEMENTS: ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY* 201-202 (1972).

27. See Stephen B. Presser, *Some Realism about Atheism: Responses to the Godless Constitution*, 1 *TEX. REV. L & POL.* 87, 121 (1997) (interacting with the perspectives of Krannick and Moore regarding whether the Framers intended a purely secular Constitution and government).

28. The term "separation of church and state" is not found in the First Amendment but if read literally would more accurately reflect the meaning of the First Amendment, that is, the separation of the institution of the church from the institution of the state, not speaking to the matter of the religious influences on governmental views and functions, nor to accommodations or benefits that the governmental may give to religious citizens and causes which are religious in nature.

Whether one believes there to be a necessary nexus between law and religion very likely depends on whether one speaks of law and religion in the twentieth century or in the earlier periods of our history. As subsequent analysis will demonstrate,²⁹ this state of affairs is of recent origin and is largely due to the development of a world view which has been adopted by the courts different than that shared by lawyers and judges in the Western world for the last several hundred years.³⁰ Until recently, religious perspectives, particularly Christianity, informed the law, providing the moral basis for the requirements of right and wrong, truth and falsehood, that the law requires to have credibility and effectiveness. The reason for this is that religion informed of all life. As Professor Steven Smith says,

Religious premises, assumptions, and values provided the general framework within which most Americans thought about and discussed important philosophical, moral, and political issues. For that reason, Americans of the time could not seriously contemplate a thoroughly secular political culture from which religious beliefs, motives, purposes, rhetoric, and practices would be filtered out.³¹

It is not, however, simply the rejection of Christian morality and the substitution of another religious persuasion that is at question. Modern law disavows adherence to any religious basis to its pronouncements whether in the halls of the legislatures or in the court chambers. Under the guise of secular versus sacred, modern law is supposedly neutral to religious edicts of right and wrong in contrast to the important dependence on religious views for most of recorded history.³²

B. Religion as the Black Sheep of Western Liberty in Modern Law

1. The marginalization of Christianity, and other religious views, in America's public square

Christianity has come on hard times in America in contrast to its pervasive influence on law and culture in the previous two centuries. Judge Robert Bork says that there is even a fear among many in the

29. See *infra* text accompanying notes 79-270.

30. See Virginia Armstrong, *The Flight From America's Foundations: A Panoramic Perspective on American Law*, in *RESTORING THE CONSTITUTION* 103-134 (H. Wayne House ed., 1987).

31. Steven D. Smith, *Separation of the "Secular": Reconstructing the Disestablishment Decision*, 67 *TEX. L. REV.* 955, 966 (1989).

32. See *infra* text accompanying notes 59-78.

general public about the enforcement of Christian morality in the public square:

It thus appears, at least for society as a whole, that the major and perhaps only alternative to “intellectual and moral relativism and/or nihilism” is religious faith. That conclusion will make many Americans nervous or hostile. While most people claim to be religious, most are also not comfortable with those whose faith is strong enough to affect their public behavior. That can be seen in the reaction of many Americans to the appearance in the public square of religious conservatives. A letter to the editor, for example, proclaims, The “ardor” shown by many people of the religious right is often intolerance masquerading as principle. In seeking to impose its ideas about school prayer, abortion and a host of other issues on society at large, the religious right is pursuing a program of bigotry and demagoguery that is antithetical to the U.S.’s pluralistic heritage.

The fear of religion in the public arena is all too typical of Americans, and particularly the intellectual class, today. Religious conservatives cannot “impose” their ideas on society except by the usual democratic methods of trying to build majorities and passing legislation. In that they are not different from any other group of people with ideas of what morality requires. All legislation “imposes” a morality of one sort or another, and, therefore, on the reasoning offered, all law would seem to be antithetical to pluralism. The references to “bigotry” and “demagoguery” seem to mean little more than that the author would like to impose a very different set of values.³³

But if religious meaning is divorced from the public arena, this does not mean that the square will be empty. Rather, other ideologies will vie for the place of prominence, and often escape notice or scrutiny by the courts that often look for “holy books” instead of worldviews in defining religion. Judge Bork anticipates this type of take over.

By removing religion from the public space, we marginalize it; we deny its importance to society and relegate it to the private sphere. But if men need a transcendence that can be brought to bear on public affairs, and if religion is denied that role, other forms of transcendence, some of them quite ugly and threatening, may move in to occupy the empty space. In part,

33. BORK, *supra* note 15, at 277.

that has already happened. Many of the causes of the day – from environmentalism to animal rights – are pressed with an enthusiasm, a zealotry, that can only be called religious, and sometimes violence has resulted. There is also a splintering of morality when religion no longer provides a common set of moral assumptions.³⁴

In similar tones, Stephen Carter, Yale law professor, believes that the importance of religious beliefs are minimized alongside of other societal interests:

In contemporary American culture, the religions are more and more treated as just passing beliefs – almost as fads, older, stuffer, less liberal versions of so-called New Age – rather than as the fundamentals upon which the devout build their lives. (The noes have it!) And if religions are fundamental, well, too bad – at least if they're the wrong fundamentals – if they're inconvenient, give them up! If you can't remarry because you have the wrong religious belief, well, hey, believe something else! If you can't take your exam because of a Holy Day, get a new Holy Day! If the government decides to destroy your sacred lands, just make some other lands sacred! If you must go to work on your sabbath, it's no big deal! It's just a day off! Pick a different one! If you can't have a blood transfusion because you think God forbids it, no problem! Get a new God! And through all of this trivializing rhetoric runs the subtle but unmistakable message: pray if you like, worship if you must, but whatever you do, do not on any account take your religion seriously.³⁵

34. *Id.* at 274.

35. STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF, HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* 14-15 (1993). Carter gives some examples of kinds of activities that are considered taboo in modern liberal thought:

When Hillary Rodham Clinton was seen wearing a cross around her neck at some of the public events surrounding her husband's inauguration as President of the United States, many observers were aghast, and one television commentator asked whether it was appropriate for the First Lady to display so openly a religious symbol. But if the First Lady can't do it, then certainly the President can't do it, which would bar from ever holding the office an Orthodox Jew under a religious compulsion to wear a yarmulke.

Back in the mid-1980s, the magazine *Sojourners* – published by politically liberal Christian evangelicals – found itself in the unaccustomed position of defending the conservative evangelist Pat Robertson against secular liberals who, a writer in the magazine sighed, “see[im] to consider Robertson a dangerous neanderthal because he happens to believe that God can heal diseases.” The point is that the editors of *Sojourners*, who are no great admirers of Robertson, also believe that God can heal diseases. So do tens of millions of Americans. But they are not supposed to say so.

2. *Religious expression is privatized*

Many are open to religion being generally unencumbered by the government but it must stay out of the public arena to escape the control of the state.³⁶ As Bork has stated, "The difficulty is that within the last several decades, the Supreme Court, at the urging of organizations such as the ACLU, has read the clause as though it commanded the separation of religion and society."³⁷ This evolving perspective in the Supreme Court is found in *Lemon*, where it declared "[t]he Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice."³⁸ The legal community reflects similar thinking, as illustrated by the comment of Lawrence Friedman that "religion is an individual choice, a private not a public matter."³⁹

In the early 1980s, the state of New York adopted legislation that, in effect, requires an Orthodox Jewish husband seeking a civil divorce to give his wife a *get* – a religious divorce – without which she cannot remarry under Jewish law. Civil libertarians attacked the statute as unconstitutional. Said one critic, the "barriers to remarriage erected by religious law . . . only exist in the minds of those who believe in the religion." If the barriers are religious, it seems, then that are not real barriers, they are "only" in the woman's mind – perhaps even a figment of the imagination.

When the Supreme Court of the United States, ostensibly the final refuge of religious freedom, struck down a Connecticut statute requiring employers to make efforts to allow their employees to observe the sabbath, one Justice observed that the sabbath should not be singled out because all employees would like to have "the right to select the day of the week in which to refrain from labor." Sounds good, except that, as one scholar has noted, "It would come as some surprise to a devout Jew to find that he has 'selected the day of the week in which to refrain from labor,' since the Jewish people have been under the impression for some 3,000 years that this choice was made by God." If the sabbath is just another day off, then religious choice is essentially arbitrary and unimportant; so if one sabbath day is inconvenient, the religiously devout employee can just choose another.

. . . When President Ronald Reagan told religious broadcasters in 1983 that all the laws passed since biblical times "have not improved on the Ten Commandments one bit," which might once have been considered a pardonable piece of rhetorical license, he was excoriated by political pundits, including one who charged angrily that Reagan was giving "short shrift to the secular laws and institutions that a president is charged with protecting." And as for the millions of Americans who consider the Ten Commandments the fundaments on which they build their lives, well, they are no doubt subversive of these same institutions.

Id. at 4-6.

36. See R. Randall Rainey, *Law and Religion: Is Reconciliation Still Possible*, 27 LOY. L.A. L. REV. 147, 166-170 (1993) for an interaction with the preclusion of religious arguments from public debate.

37. BORK, *supra* note 15, at 289.

38. *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971). Richard S. Myers, *The Supreme Court and the Privatization of Religion*, 41 CATH. U. L. REV. 19, 36 (1991), believes that the privatization in regards to religious school issues is losing influence on the Court.

39. LAWRENCE MEIR FRIEDMAN, *THE REPUBLIC OF CHOICE* 165 (1990), *quoted in* Myers, *supra* note 38, at note 14. Observe the comment of the attorney general of New York, who speaking

3. *Hostility against religious influence in American society*

Professor Kent Greenawalt has described the kind of hostility that exists in certain elements of society: "A good many professors and other intellectuals display a hostility or skeptical indifference to religion that amounts to thinly disguised contempt for the belief in any reality beyond that discoverable by scientific inquiry and ordinary human experience."⁴⁰

Professor Randall Rainey has suggested that such persons may be classified as "enlightenment or liberal fundamentalists." He says that he uses the term

as a general term to describe the tenancy of a certain strand of liberal thought to oppose the nontheocratic presence of religion in the political life of the community [T]he term is intended to describe that variant of liberalism that reveals, with varying degrees of intensity, an antireligious "stance" or "disposition." While this stance may not be cast as a full position, it may readily be discerned as an "undercurrent" in the treatment of religion in a variety of disciplines, including law.⁴¹

When one speaks of legislating morality⁴² or of the impact of a judges' religious worldview on her judicial decisions,⁴³ or actions of the

against the claims of those who advocated their freedom of speech had been violated on the basis of content:

{u}nlike the community purposes for which authority is designated in the statute, religion is an "individual experience," that is "inviolately private." Religion "must be a private matter for the individual." Religious advocacy, like petitioners' effort to persuade the community residents to "instill" "Christian values" in their children "from an early age," serves the community only in the eyes of its adherents and yields a benefit only to those who already believe.

Brief for Respondent Attorney General at 24, *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.* (quoted in Michael W. McConnell, *God is Dead and We Have Killed Him!: Freedom of Religion in the Post-Modern Age*, 1993 B.Y.U. L. Rev. 163, 165 (1993)). See *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993).

40. KENT GREENAWALT, *RELIGIOUS CONVICTION AND POLITICAL CHOICE* 6 (1998).

41. Rainey, *supra* note 36, at 154 (1993).

42. See generally NORMAN GEISLER & FRANK TUREK, *LEGISLATING MORALITY* (1998) (arguing that the legislation of morality is inevitable).

43. See generally *Smith v. Board of School Comm'rs*, 655 F. Supp. 939 (S. D. Ala. 1987), reprinted in *AMERICAN EDUCATION ON TRIAL: IS SECULAR HUMANISM A RELIGION?* (The opinion of Judge W. Brevard Hand in the Alabama Textbook Case) (Center for Judicial Studies 1987) (attempting to overturn the Supreme Court's Establishment Clause interpretation in a district court decision) and *Wallace v. Jaffree*, 472 U.S. 38 (1985) (holding that a daily period of silence in public schools for meditation or voluntary prayer was violation of the establishment clause); See the following essays which demonstrate the degree to which judicial decisions and legislative enactments are influenced by religious views of the judges and legislators: Scott C. Idleman, *The Role of Religious Values in Judicial Decision Making*, 68 IND. L.J. 433 (1993); Stephen L. Carter, *The Religiously Devout Judge*, 64 NOTRE DAME L. REV. 932 (1989); Kent Greenawalt, *Religious*

government that affect religion, the issue is not whether religion and these areas mix but to what degree they mix.

Belief that a secular state must be separated from the sacred,⁴⁴ – that legal perspectives and laws must not be unduly influenced by religious ideology – puts people of faith and their perspectives in a second class status in American culture. They are at the best tolerated.⁴⁵ But some religious sentiments are not even tolerated. Judge Bork speaks of the manner in which the journalistic guild reacted to religious statements made by Governor Mario Cuomo:

Journalist Fred Barnes, for example, reports a dinner with then Governor Mario Cuomo and a dozen journalists during which Cuomo said he sent his children to Catholic schools because “The public schools inculcate a disbelief in God.” Barnes wrote, “From the reaction of my colleagues, one might have thought Cuomo had advocated mandatory snake-handling as a test of faith for the state’s students.” They peppered the Governor with dozens of hostile questions. There is, Barnes says, a “peculiar bias in mainstream American journalism against traditional religions [W]henver religion comes in contact with politics or public policy, as it increasingly does, the news media reacts in three distinct ways, all negative. Reporters treat religion as beneath mention, as personally distasteful, or as a clear and present threat to the American way of life.”⁴⁶

Convictions and Law Making, 84 MICH. L. REV. 352 (1985).

44. An interesting problem with the terms “secular” and “sacred” is that the Court desires to be secular, a term defined in the dictionary as “irreligion” or non-religious. Yet it advocates that it is neutral between religion and irreligion. This seems to be like the fox in the henhouse saying he is neutral between whether chickens should be eaten or not. In reality, the Court can never be truly or absolute neutral. See Carl H. Esbeck, *A Constitutional Case for Government Cooperation with Faith-Based Social Service Providers*, 46 EMORY L.J. 1 (1997). “Indeed, to demand that any theory of church/state relations transcend its pedigree or its presuppositions and be substantively neutral is to ask the impossible.” *Id.* at 2.

45. Myers speaks of tolerance as the “sense of grudging concession to a practice of which one disapproves.” Myers, *supra* note 38, at n.46. He continues,

It is implicit in the history and character of American public education that the public schools serve a uniquely public function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort – an atmosphere in which children may assimilate a heritage common to all American groups and religions. This is a heritage neither theistic nor atheistic, but simply civic and patriotic The Court’s enthusiasm for government indoctrination and distrust for religious indoctrination is instructive. It now seems generally recognized that the public schools are not religiously neutral.

Id.

46. BORK, *supra* note 15, at 291.

Another significant example is the response to the religious remarks of Justice Antonin Scalia, which he made in a non-judicial private setting about the requirement of Christian sacrifice. Paulsen and Johnson give us an assessment of these seemingly alarmist responses:

In our judgment, Scalia's remarks – and especially the remarkable reaction they elicited – do indeed have much to say about open-mindedness, tolerance, objectivity, and judicial ethics. But the lessons they teach are precisely the opposite of those urged by Scalia's critics. The reactions to Antonin Scalia's prayer breakfast homily reflect a shocking ignorance about Christian theology and biblical literature, about the First Amendment's protections of freedom of speech and of religion, and about the role of religion (and personal statements about religion) in a pluralistic public square.⁴⁷

Though separatists in the media or the courts are desirous to limit the influence of religion in the public square, particularly the public schools, they are not as fastidious about other ideologies. McConnell seeks to explain the way in which secularists view the religious impulse:

From a secular point of view, it is difficult to appreciate the religious impulse. Faith seems antithetical to reason and obedience to higher authority seems submissive and antidemocratic. A liberalism based on individualism, independence, and rationalism thus has a tendency to see traditional religion as authoritarian, irrational, and divisive – as a potential threat to our democratic institutions rather than as one of their sturdiest pillars, as was typically thought at the Founding. Today, it is not unusual to find law professors writing that religions “undermine rather than mutually reinforce habits of mind necessary for democratic decision-making,” or that religion is “fundamentally incompatible with [the] intellectual cornerstone of the modern democratic state.” Justice John Paul Stevens has called religions “divisive forces” and told us that it is vital to keep these forces out of our public schools – even when the religious activity in question is voluntary, extracurricular, and student-initiated. This, he says, is because the schools are “the symbol of our democracy and the most pervasive means of promoting our common destiny.” Needless to say, modern liberals see no need to keep other “divisive forces” out of the schools. Indeed they are the first to protest “censorship” when *Soul on Ice* or books

47. Michael Stokes Paulsen & Steffen N. Johnson, *Scalia's Sermonette*, 72 NOTRE DAME L. REV. 863, 866 (1997).

containing vulgar and offensive language are removed from the curriculum.⁴⁸

The hostility has grown to the degree that the free exercise clause has been turned on its head, with the concern being “freedom from religion” rather than “freedom of religion.” McConnell elucidates this theme:

With such a change in perspective, freedom of religion came to be seen as less important than freedom from religion. It is revealing that Felix Frankfurter, the prototypical liberal of this school, described religious freedom as “freedom from conformity to religious dogma,” and Justice Harry Blackmun describes the Establishment Clause as protecting “secular liberty” (not “religious liberty”). This is a far cry from those who understood religious freedom as willing obedience to the sovereignty of God, and gave it pride of place in our First Amendment.⁴⁹

A contemporary example of this view of “religious liberty” is found in an Oregon case, *Meltebeke v. BOLI*.⁵⁰ The state of Oregon argued that an employer who had “witnessed” to an employee at least twice per week for a period of a month both on and off the job and to employee’s relatives and fiancé and labeled employee “sinner” because his lifestyle did not conform to employer’s religious beliefs was in violation of “religious harassment.”⁵¹ Whereas the state regulation⁵² seemingly was written to protect an employed person from being harassed by his employer because of the employed person’s religion, BOLI and the ACLU argued that it was a prohibition of a person with religious conviction (here the employer) from harassing another (with no stated religious conviction) because of the employer’s religious views. The dissent in the case creates a new right, “freedom from religion”:

Freedom from religious harassment exists for atheists, agnostics and the nonobservant, as well as for the demonstrably religious. For many, freedom from religion is as important as freedom to practice religion. I believe freedom from religion is entitled to the same level of constitutional, statutory and administrative protection in the workplace. I

48. McConnell, *supra* note 39, at 173-174.

49. *Id.* at 174.

50. *Meltebeke v. BOLI*, 120 Or. App 273 (1993), *aff'd*, 322 Or. 132 (Or. Sup. Ct.) (1995).

51. *Id.* at 273.

52. The statute reads: “ORS 659.030(1)(b): (1) . . . [I]t is an unlawful employment practice: . . . (b) For an employer, because of an individual’s . . . religion, . . . to discriminate against such individual in compensation or in terms, conditions or privileges of employment.”

also do not agree with the lead opinion that an intent element is essential in order to uphold BOLI's rule from a facial or an as-applied attack. I am not sure how intent could ever be shown in this context.

While it is true that Oregon's guarantees of religious freedom are intended to permit minorities to engage in religious practices that the majority might find objectionable, what occurred here went far beyond the mere providing of religious information. I would therefore hold that the intensity of uninvited religious proselytizing by the employer in this case constituted common harassment and religious discrimination within the meaning of the rule and the statute, and that such conduct is not constitutionally protected.⁵³

Though the Court has traditionally recognized the importance of not taking sides in regards to religion or irreligion in Establishment Clause cases where governmental action is in view, the new "freedom from religion" carries such a view into the private sphere. One could ask whether "freedom from speech" would establish no speech zones, so that if one walks into a discussion that one does not like the discussion must stop since the offended party's freedom from speech must be honored. Or perhaps, if one joins a group in which the new person entering the group does not like one of the parties, the unliked person must leave to fulfill the new person's "freedom from association." Though the law recognizes that all freedoms have limitations, it does not usually acknowledge that the rights of the Bill of Rights are negatives rather than positives.

4. *Denial of America's Christian heritage*

One might ask why Christian values should have any more moral authority than any other competing system? The obvious response is that this is primarily the underlying substructure of American law, society, and culture that has served the country well. In addition, to change the moral foundation of the nation may undermine the liberty that such a foundation has provided. To counter such a claim, some have argued that the intention of the Framers was to create a "godless constitution" to minimize the influence of Christianity in the formation of the new government.⁵⁴ This perspective is countered by a large amount of evidence to the contrary, as Presser explains,

53. *Id.* at 293 (Riggs, J. dissenting).

54. See generally ISAAC KRAMNICK & R. LAURENCE MOORE, *THE GODLESS CONSTITUTION: THE CASE AGAINST RELIGIOUS CORRECTNESS* (1996).

Indeed, the commonplace view until very recently that the United States was a "Christian Nation" was repeatedly acknowledged by the United States Supreme Court and on countless public occasions by spokesmen for a myriad of political views. For most of our history, then, most of our leaders appeared not to have believed in a Godless constitution at all.⁵⁵

Though certainly I would support a broad understanding of religious freedom in our pluralistic society today, it is flawed thinking that the Constitution does not have a particular religious worldview standing behind it. The Framers had inherited perspectives from both the conservative enlightenment, especially in the thinking of John Locke,⁵⁶ and heavy reliance on the Bible and western Christianity. The Declaration of Independence and the permeation of broad (non-sectarian) views of the nature of God and reality both underlie the document that sets order to the state that formed in 1776.⁵⁷

II. ONCE UPON A TIME: THE CHRISTIAN PAST IN THE WEST AND THE PRE- EVERSON AMERICA

Though there are some who would deny the reliance of American law and government on its Christian roots, this position is hard to sustain. It is not within the intent of this article to give a comprehensive presentation of data regarding the Christian influences on Western law but I will provide a few examples of how this influence played out in the Europe, England, and America.⁵⁸

55. See Presser, *supra* note 27, at 91 (interacting with the perspectives of Kramnick and Moore). Also see the interaction between Kramnick and Moore and Dreisbach. See Isaac Kramnick and R. Laurence Moore, *Our Godless Constitution*, LIBERTY 12 (May/June 1996); Daniel L. Dreisbach, *A Godless Constitution*, LIBERTY 11 (Nov/Dec 1996); Dreisbach, LIBERTY 2 (March/April 1996). See also Daniel L. Dreisbach, *In Search of a Christian Commonwealth: An Examination of Selected Nineteenth-Century Commentaries on References to God and the Christian Religion in the United States Constitution*, 48 BAYLOR L. REV. 927 (1996).

56. See *infra* text accompanying footnotes 82-102.

57. It is a mistake to believe that the Constitution is the beginning of the American government. In reality, the wording of the Declaration itself reveals that the Framers of that document viewed themselves as beginning a new government, and the Constitution itself assumes the Declaration as the beginning of the government. See *infra* text accompanying notes 144-55.

58. An interesting tidbit of how reference to Christian ideals impacted decisions in law is found in an interaction between some bishops and monks in the middle ages:

[A] key question arose in the manuscripts: Which form of legal record is the more reliable, oral or written? A historical anecdote involving the investiture controversy between the Archbishop of Canterbury's monks and the bishops of King Henry I depicts the struggle between orality and literacy that characterized the law at the midpoint of the

A. *Religious Foundations of Law and Government in Western Europe*

One would search long and hard for a society in the ancient Mesopotamian or Mediterranean world in which religion and the religious cultus were not inextricably connected to the functions of the state.⁵⁹ In the words of Jean-Jacques Rousseau, “[N]o state was ever founded without having religion as its basis.”⁶⁰ For example, Greek religion was connected to the religious preferences of the city-state as Socrates discovered.⁶¹ In Rome, religion was identified with the state, especially the state cult, so that the state religion, with occasional tributes to the gods of Greece and Rome, was primarily dedicated to the genius of the emperor who embodied the divine Rome.⁶² Linder comments on the Roman civil religion:

The Roman Empire provides an even clearer example of the concept of civil religion in ancient times. The Roman state cult under the emperors served as the civil religion of the realm. Various particular religions existed alongside it, and their adherents could practice as enthusiastically as they pleased as long as they gave nominal acceptance to the state cult. But this nominal acceptance was obligatory. Further, the position of the emperor made the state cult something of a peculiarity. He was both pontifex maximus (chief priest) of the state cult

scribal period:

Anselm's monks: "But what about the evidence of the letters?"

Henry's bishops: "As we don't accept evidence of monks against bishops, why should we accept that of a sheepskin?"

Anselm's monks: "Shame on you! Are not the Gospels written down on sheepskins?"

M.T. CLANCHY, *FROM MEMORY TO WRITTEN RECORD: ENGLAND 1066-1307* 209 (1979) (quoted in Ronald K. L. Collins & David M. Skover, *Paratexts*, 44 *STAN. L. REV.* 509, 528 (1992)).

59. See Kirk for his discussion of the glory and ruin of the Greek world, particularly its religious views that could not serve as the basis of lasting liberty and equality. RUSSELL KIRK, *THE ROOTS OF AMERICAN ORDER* 51-96 (1991).

60. Quoted in Linder, *Civil Religion in Historical Perspective: The Reality that Underlies the Concept*, 17 *J. CHURCH AND STATE* 399, 403 (1975).

61. Socrates was condemned by an Athenian jury in 399 B.C. on a charge of "introducing strange gods and corrupting the youth of the city-state. Whether or not these were trumped up charges against a man who had professed reverence for the laws of Athens, there is no doubt that he had attacked the religio-political order of the day." *Id.* at 405-06.

62. See EVERETT FERGUSON, *BACKGROUNDS OF EARLY CHRISTIANITY* 153-165 (1987) for a look at the "ruler cult" in the Hellenistic world, culminating in the Roman emperor cult. H. Brown elucidates this perspective:

The Roman republic began as a city-state with authority residing in an assembly and with the people, symbolically expressed by the political tetragrammaton SPQR, *Senatus Populusque Romanorum*, "the Senate and the People of the Romans", but as its reach (das Reich) spread across the Mediterranean world, it was symbolized as the *dominium* (lordship) of a single man, the emperor.

H. Brown, *Civil Authority and the Bible*, in *THE CHRISTIAN AND AMERICAN LAW* 112 (H. Wayne House ed., 1998).

and, after the first century A.D., increasingly an object of adoration and worship himself.⁶³

The connection of religion with the state is also true with the Roman world of the fourth century on. With the triumph of Christianity in the Roman Empire the tie of this new faith to Roman law seemed a natural pair. Christianity already had a natural affinity to law in view of the Old Testament so that, as Ullmann has said regarding Roman law, "the law, could, as indeed it did, effortless penetrate into the very matrix of the rapidly growing Christian doctrinal body."⁶⁴ One early Christian apologist especially helped the church take Roman law under its wings, namely Tertullian. He was a Roman jurist and shaped religious ideas into legal forms in his writings. He believed that the relationship between God and man was a legal relation cast in terms of rights and duties and he often used contemporary Roman legal terms to explain Christian theology.⁶⁵

Several ideas in Roman law were consistent with Christian theology. One especially important was the monotheistic nature of Christianity. The monarchic idea was important to the later Roman emperors but became pivotal to Constantine. Ullmann observes,

By himself striking up monotheistic chords, Constantine anticipated the response of the Christians who since the end of the first century had held that a clear distinction must be drawn between the person of the emperor and his governmental power. This view was a concrete application of the Pauline thesis as enunciated in the letter to the Romans Their stern and uncompromising attitude towards the "divinity" of the emperor's person sharply contrasted with their equally uncompromising affirmation of the divine origin of the emperor's governmental power.⁶⁶

By the time that Theodosius I decreed that the Christian religion was the only recognized religion throughout the empire, the union of the church and state had become a reality. Ecclesiastical officers were appointed public officials; church councils were called by the emperor. The way in which the church so readily identified with the governmental structure became a new theology:

63. Linder, *supra* note 60, at 406. See generally MICHAEL AUCKLAND SMITH, FROM CHRIST TO CONSTANTINE 74-91 (1971); ETHELBERT STAUFFER, CHRIST AND THE CAESARS (trans. K. and R. Smith, 1955); and A.N. SHERWIN-WHITE, ROMAN SOCIETY AND ROMAN LAW IN THE NEW TESTAMENT (1963).

64. WALTER ULLMANN, LAW AND POLITICS IN THE MIDDLE AGES 32 (1975).

65. *Id.* at 32-33.

66. *Id.* at 35.

[T]he Church universal was a new society altogether, composed as it was of beings who through baptism had shed their "naturalness" and had become "new creatures", "new men" altogether. By losing their naturalness, they had entered a divinely created society – the Church – which followed its own principles, its own norms; in short, to the "new creature" corresponded a new society and new way of life, the *novitas vitae*. Its basis was the Bible. Its members were subjected to the laws as given by divinity and made known through the qualified officers. And one of the conclusions that was drawn, concerned the very question of government. Here it was above all the papacy which was able to call upon a respectable body of scholarly opinion . . . supported as it was by its own governmental manifestations in the shape of decretals which authoritatively claimed that this new society must be governed in accord with biblical precept.⁶⁷

Possibly as important as the Christian doctrine which found its way easily in the Roman law was the vehicle for that transmission, the Vulgate. By the turn of the fourth and fifth centuries Jerome's Latin translation became the source of governmental thoughts in the Middle Ages. Latin was the language of the cultured and educated classes of the late fourth century. Jerome's translation of the Hebrew and Greek Testaments was filled with Roman terminology – made easier by the legal terminology of the Old Testament but also found in Paul's terminology in the New. The Latin Bible and the belief in the totality of the Christian life, even into the body politic created a virtual monopoly for church men.⁶⁸

This reliance on the Vulgate had impact for centuries, affecting even the development of Anglo-Saxon law in the seventh and eighth centuries. The Bible became the one common bond between the various nations, provinces, and regions of Western Europe. The God of the Bible became the great lawgiver to the different societies.

For it was axiomatic within the monotheistic framework that God was the governing organ of the cosmos. But this organ was not accessible to any subjective-human evaluations of a moral order or on a moral plane. What divinity had laid down, enacted, in short created, was unchangeable. There was a singularly unanimous agreement that the cosmos was based on an immutable, objective order, precisely because it emanated from absolute divinity. Consequently, the law that

67. *Id.* at 39.

68. *Id.* at 42-43.

manipulated the cosmos partook of the objective features of the cosmos. On this basis human law could not contradict divine law as demonstrated in the Bible, and in some respects became, when once issued, part of the world order itself. In the last resort this is the explanation of why law in the Middle Ages assumed so crucial and overriding a role and was viewed with a respect which it has never since enjoyed.⁶⁹

Though this union of Roman law began after the time of Constantine, it reached fulfillment in the reign of the emperor Justinian, who in approximately A.D. 534 had a massive collection of legal materials compiled which wedded Christianity with Roman law. Though often known as the Justinian Code,⁷⁰ it included more than the laws of Justinian. After the fall of the west to barbarian hordes,⁷¹ Roman law and Christian theology was still joined and was adopted by the largely Christian barbarians but it was not systematized.⁷² This systematization began around the year A.D. 1100 due to the beginning of the first modern law school in the town of Bologna in Northern Italy. Thousands of students each year from all over Europe came to this school to study law as a "distinct and coherent body of knowledge."⁷³ But what law was studied? It was the works of Justinian and thus the Christianized Roman law served as the foundation for the civil law of Western Europe.⁷⁴

There were a few other influences on the development of the law in Europe, England and America that should not go unmentioned before we must proceed to the major influence on American law, the common law of England. Important rulers such as Charlemagne⁷⁵ and Alfred the Great⁷⁶

69. *Id.* at 46.

70. Berman provides a breakdown of the Justinian material:

The manuscript consisted of four parts: (1) the Code (*Codex*), comprising twelve books of ordinances and decisions of the Roman Emperors before Justinian; (2) the Novels (*Novellae*), containing the laws promulgated by Emperor Justinian himself; (3) the Institutes (*Institutiones*), a short textbook designed as an introduction for beginning law students; and (4) the Digest (*Digestum*), whose 50 books contain a multitude of extracts from the opinions of Roman jurists on a wide variety of legal questions. In a modern English translation, the Code takes up 1,034 pages, the Novels 562 pages, the Institutes 173 pages, and the Digest 2,734 pages.

HAROLD J. BERMAN, FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION 37, n.2 (1993) (citing THE CIVIL LAW (Samuel P. Scott ed., 1932)).

71. See generally RICHARD FLETCHER, THE BARBARIAN CONVERSION: FROM PAGANISM TO CHRISTIANITY (1997).

72. BERMAN, *supra* note 70, at 36.

73. *Id.* at 37.

74. For more discussion on this point see *id.* at 35-53.

75. G. de Suvigny explains how Charlemagne understood biblical law and applied it to his rule:

Charles saw the state as more than the king's private property. He was strongly influenced by the ideas of St. Augustine and the Old Testament, and felt a responsibility to create an ordered, harmonious society in which all men could work together toward

sought to codify biblical law into the secular laws in their realms, and the Magna Carta,⁷⁷ called the "fountainhead of Anglo-American liberty"⁷⁸ also placed a big part of the evolution of Western law.

B. Major Influences on American Law

Christianity had various influences on the development of Western law. It was embedded in the common law,⁷⁹ provided the basis to

eternal salvation. To achieve Christian concord, he labored to discover the causes of disorder and injustice. He issued a flood of laws, call capitularies, to correct abuses and prevent their reoccurrence. He imposed on his local agents, the courts, the responsibility to enact these laws and do justice to all who had complaints . . . This activity did much to bring order and justice out of the political chaos that had plagued the Frankish state at an earlier age.

EIDSMOE, *supra* note 17, at 26 (quoting G. DE BERRIER DE SAUVIGNY, 3 NEW CATHOLIC ENCYCLOPEDIA 498 (1967)).

76. Berman speaks of Alfred's codification of biblical law:

The Laws of Alfred (about A.D. 890) start with a recitation of the Ten Commandments and excerpts from the Mosaic Law; and in restating and revising the native Anglo-Saxon laws. Alfred includes such great principles as: "doom (i.e. judge) very evenly; doom not on doom to the rich, another to the poor; nor doom one to your friend, another to your foe." (cf. Exodus 23:1-3; Deut. 1:16-18).

HAROLD J. BERMAN, THE INTERACTION OF LAW AND RELIGION 55 (1974).

77. Originally spelled Charta.

78. EIDSMOE, *supra* note 17, at 27. Eidsmoe, quoting T. Dufwa, says,

Among the parallels Silving notes between the Bible and the Magna Carta are the "self-curse" found in both documents, the fear of monarchy and requirement that the king adhere to the law found in the Magna Carta and in Deuteronomy 17, the power of excommunication or being "cut off from the people," the land as a sanctioning agent under an oath, the requirement that law be clearly written (Deut. 27:8) and clearly explained (Deut. 1:5), limitations upon punishment (Deut. 25:1-3), like punishment for perjury in criminal cases (Deut. 13:15; 19:17-21); (*Magna Carta Leonesa*, articles 12-13), and the covenant as the ultimate source of authority.

Id. at 28, citing HELEN SILVING, SOURCES OF LAW 243-248 (1968).

Eidsmoe draws one other interesting observation about influence on the Magna Carta, and consequently on English common law, that of the Vikings:

In the ninth century the Danes and Norwegians held considerable portions of England, Scotland, and Ireland. There was a boundary in England, the north of which was called the "Danelaw" where viking law held sway. Thamar E. Dufwa has traced the effect of viking law upon the Magna Carta, comparing the wording of portions of the viking law to portions of the Magna Carta and demonstrating that the noblemen who forced King John to sign the Magna Carta in 1215 A.D. came mostly from the area north of the Danelaw where the vikings had ruled several centuries earlier. The highly individualistic character of viking law is reflected in the Magna Carta and in English and American institutions today.

EIDSMOE, at 27 (citing THAMAR E. DUFWA, THE VIKING LAWS AND THE MAGNA CARTA: A STUDY OF THE NORTHMEN'S CULTURAL INFLUENCE ON ENGLAND AND FRANCE 39-92 (1963)).

79. CHING-HSIUNG WU, FOUNTAIN OF JUSTICE 64 (1955), quoted in Virginia C. Armstrong, *Law, Politics & the Social Sciences—A Troubled Trinity*, 4 SIMON GREENLEAF L. REV. 131 (1984-1985) ("the common law has one advantage over the legal system of any country: it was Christian from the very beginning of its history"); see generally Stuart Banner, *When Christianity was Part of the Common Law*, 16 LAW & HIST. REV. 27 (1998) (arguing that the relation of common law to

understand the relationship of criminal law and punishment,⁸⁰ and has even been recognized by the American Bar Association as having been the root of tort law.⁸¹

1. *The influence of John Locke*

At least five major direct influences fell upon the development of American law, with the legal history found in the above discussion serving as a shadow upon the picture of American law and liberty. These five are the conservative enlightenment as manifested in John Locke, the common law of England, the influence of Sir William Blackstone, the influence of the Bible itself, and the impact of the Protestant Reformation.⁸²

John Locke is generally considered by American historians and legal scholars alike as a major influence on the leaders of the American Revolution. Carl Becker presents this view of Locke:

So far as the "Fathers" were, before 1776, directly influenced by particular writers, the writers were English, and notably Locke. Most Americans had absorbed Locke's works as a kind of political gospel; and the Declaration, in its form, in its phraseology, follows closely certain sentences in Locke's second treatise on government.⁸³

Though Locke certainly had importance in the formulation of ideas in the Framers of the Declaration of Independence, his ideas of social contract had been practiced in the American colonists at least half a century before he published his work.⁸⁴ Moreover, though Locke discusses rights in his work, his *Second Treatise on Government* contains none of the things

Christianity, though true, was not controlling in the development of the law).

80. John E. Witte & Thomas C. Arthur, *The Three Uses of the Law: A Protestant Source of the Purposes of Criminal Punishment?*, 10 J.L. & RELIGION 433 (arguing that the third use of the law in Reformation theology, the moral law, provided a basis for the use of punishment in criminal law).

81. Special Committee on the Tort Liability System, *Towards a Jurisprudence of Injury: The Continuing Creation of a System of Substantive Justice in American Tort Law*, Committee's Preface (1984), quoted in Douglas H. Cook, *Negligence or Strict Liability? A Study in Biblical Tort Law*, 13 WHITTIER L. REV. 1 (1992):

So far as we know, there is no word in the Bible for "torts." Yet the "norms" which the Creator told Moses to set before the Israelites, in the chapter of Exodus following the Ten Commandments, are filled with what we think of as "tort" rules We have indicated the depth of the roots of tort law in the Judeo-Christian tradition.

Id.

82. This is not to deny that there other influences on various Framers of the government but that these were the major sources of influence on the matter of law and religion.

83. CARL BECKER, *THE DECLARATION OF INDEPENDENCE* 27 (1922, 1942).

84. The concepts of compact or covenant were well known by the people who came to the shores of America. See generally, Donald S. Lutz, *Religious Dimensions in the Development of American Constitutionalism*, 39 EMORY L.J. 21 (1990).

found in the Bill of Rights. American colonists had developed their sense of rights, not from Locke, but from the Bible.⁸⁵

John Locke was not a radical reformer. He grew up in a Puritan home and held strong views on man, sin, and God from that context. His first volume on civil government, upon which the second builds, uses Scripture as a basis of argument.⁸⁶ Some of Locke's views did not mesh with the Puritan theology of his upbringing, such as his perspectives on the "state of nature" (some problems here with the biblical creation account) and the acceptance of the *tabula rasa*, "blank slate" (in contrast to the Calvinist, thus Puritan, doctrine of original sin).⁸⁷ Nonetheless, he did accept special creation and even wrote an important work on the "reasonableness of Christianity",⁸⁸ including the authority of the Bible: "The Bible is one of the greatest blessings bestowed by God on the children of men. – It has God for its author; salvation for its end, and truth without any mixture for its matter. – It is all pure, all sincere; nothing too much; nothing wanting."⁸⁹

In reference to the matter of law and government, Locke believed that the "law of nature" had its source and authority in the Creator:

Thus the Law of Nature stands as an Eternal Rule to all Men, Legislators as well as others. The Rules that they make for other Men's Actions, be conformable to the Law of Nature, i.e., to the Will of God, of which that is a Declaration, and the fundamental Law of Nature being preservation of Mankind, no Human Sanction can be good, or valid against it.⁹⁰

Locke, accordingly, as Blackstone at a later time,⁹¹ did not see the law of nature as incompatible with the Bible (the law of God):

Human Laws are measures in respect of Men whose Actions they must direct, albeit such measures they are as have also their higher Rules to be measured by, which Rules are two, the Law of God, and the Law of Nature; so that Laws Human must be made according to the general Laws of

85. *Id.* at 39-40 (1990) (arguing that as a covenantal people religion is an important background to politics but should not be involved with the Constitution proper).

86. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 7-118 (ed. Thomas I. Cook, 1947).

87. EIDSMOE, *supra* note 17, at 38.

88. See comments of Hall and references, VERNA M. HALL, THE CHRISTIAN HISTORY OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 56 (1966).

89. THE NEW DICTIONARY OF THOUGHTS – A CYCLOPEDIA OF QUOTATIONS 46 (C.H. Catrevas et al. eds., 1891), *quoted* in FEDERER, *supra* note 2, at 399.

90. JOHN LOCKE, OF CIVIL GOVERNMENT 94, *quoted* in EIDSMOE, *supra* note 17, at 39.

91. See *infra* text accompanying note 125.

Nature, and without contradiction to any positive Law of Scripture, otherwise they are ill made.⁹²

It is interesting to compare Locke's terms "law of God" and "law of nature". This is very close to the statements of the declaration of "the laws of nature and [the laws] of nature's God."⁹³ This would seem to be an affirmation of what was true in both Locke and Blackstone, that nature and the Bible serve as the basis of the liberty to which God calls his creatures based on their creation with certain inalienable rights.⁹⁴ At another instance Locke identified the "law of nature" with Scripture: "And upon this is grounded the great Law of Nature, whoso sheddeth Man's Blood by Man shall his Blood be shed,"⁹⁵ quoting Genesis 9:6.

John Locke is well known for his views on social contract. J. Budziszewski gives a helpful breakdown of the logic developing Locke's perspective:

To have a government is to have known, authorized, impartial judges over all, whose judgments can be "executed" or enforced.

In the beginning, however, there is no government. This is not just our original condition but our natural condition – our state of nature.

Having no government does not mean moral chaos because the state of nature has a law of nature to govern it.

But the fact that people recognize the law of nature does not mean that they always obey it, so it must be enforced.

Enforcement of the natural law means especially enforcement of natural rights, probably because individuals are responsible only to God in points of natural law that do not affect others.

Enforcement also entails imposing punishments, provided they do not exceed the natural-law limits of reparation and restraint – that is, provided that they do not go beyond what is necessary for compensation of damages and prevention of further wrongdoing.

But because there is no government, each person is himself an "executioner" or enforcer of the law of nature.

Now, even when a person knows the principles that ought to be enforced, he finds it difficult to apply them with coolness and impartiality when his own interests are concerned.

92. Quoted in EIDSMOE, *supra* note 17, at 40.

93. The Declaration of Independence para. 1 (U.S. 1776).

94. The Declaration of Independence para. 2 (U.S. 1776).

95. See LOCKE, *supra* note 90, at 60 (quoted in EIDSMOE, *supra* note 17, at 40).

For this reason, self-enforcement does not work very well; natural rights are persistently violated, and in punishment the limits of reparation and restraint are persistently transgressed.

The remedy for this inconvenience is for all the people in a particular area to appoint certain persons to serve as impartial judges – to be a government.

But this does not work unless the judges can enforce their judgments, and they cannot enforce their judgements unless people first agree to transfer their “executive,” or enforcement, power to the community as a whole.

The mutual promise or agreement that transfers the enforcement power to the community as a whole is called the social covenant, or social contract. Once this agreement is made, people are said to have left the state of nature and entered the state of civil society.

Entering civil society is not the same thing as setting up a government. There is no going back on the agreement to enter civil society; however, the people can change their minds about the proper form of government.⁹⁶

Not only in his view of the law of nature, but also in social contract, Locke recognized its divine origin and authority. To support his view, he cited a speech made by King James I in 1609 to Parliament, in which the King recognized the source of the contract in the covenant between God and Noah:

And again, in his speech to the parliament 1609, he hath these Words, The King bind himself by a double Oath, to the Observation of the fundamental Laws of his Kingdom. Tacitly, as by being a King, and so bound to protect as well the People, as the Laws of the Kingdom, and expressly by his Oath at his Coronation; so as every just King, in a settled Kingdom, is bound to observe the Paction made to his People, by his Laws in framing his Government agreeable Thereunto, according to that Paction which God made with Noah after the Deluge. Hereafter, seed Time and Harvest, and Cold and Heat, and Summer and Winter, and Day and Night, shall not cease which the Earth remaineth. And therefore a King governing in a settled Kingdom, leaves to be a King, and degenerates into a Tyrant, as soon as he leaves off to rule according to his Laws.⁹⁷

96. J. BUDZISZEWSKI, *WRITTEN ON THE HEART: THE CASE FOR NATURAL LAW* 98-99 (1997).

97. “King James I Speaks to Parliament 1609,” in HALL, *supra* note 88, at 112 (as quoted by Locke).

2. *The common law tradition and Christianity*

A second significant influence on the American law of the eighteenth century, even until today, is the common law. When William of Normandy conquered England in 1066 he found a nation already rich in culture, including a well developed law, unlike what was true of Normandy. He pledged to these Englishmen that they could keep their law. Certainly there were elements from the more warlike Normans that came into England, such as trial by battle, and the ecclesiastical courts were separated from the shires and hundreds,⁹⁸ as well as an oppressive 'forest law' protecting the royal hunt,⁹⁹ causing many of us to recall the legendary Robin Hood and his merry men in Sherwood forest. The common law emerged in the twelfth century from institutions that had been in elementary form prior to 1066. The laws of the English combined with the strong suit of Normans for administration¹⁰⁰ eventually developed into the court systems that dispensed judge-made law, called common law.

"[W]hile the Roman law was a deathbed convert to Christianity, the common law was a cradle Christian"¹⁰¹ wrote John C.H. Wu. Wu, an international statesman, jurist and law professor, demonstrated the accuracy of his claim by tracing the history of the English common law from Bracton to Blackstone.¹⁰² As important to the common law as men

98. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 11 (1979). Eidsmoe says regarding the law of the Anglo-Saxons prior to the Norman conquest:

These early Anglo-Saxons maintained a legal and political system very much similar to that of Old Testament Israel. They had a system of decentralized government in which the head of ten families was called a tithing man, the head of fifty families was called a vil-man, the head of a hundred families was called a hundred-man, and the head of a thousand families was called an eolderman, later shortened to earl The earl governed a territory called a shire, and his assistant was called a "shire reef," later shortened to sheriff.

EIDSMOE, *supra* note 17, at 26 (citing W. CLEON SKOUSEN, MIRACLE OF AMERICA STUDY GUIDE 20 (1981)). See also BAKER, *supra* at 12 on these structures in Anglo-Saxon society.

99. *Id.* at 11.

100. *Id.* at 11-33.

101. Herbert W. Titus, *God's Revelation: Foundation for the Common Law*, 4 REGENT U. L. REV. 1 (1994) (quoting CHING-HSUNG WU, FOUNTAIN OF JUSTICE: A STUDY IN THE NATURAL LAW 65 (1955)). See Banner, *supra* note 79, at 27 (1998) (arguing that the relation of common law to Christianity was not controlling in the development of case law). There was no uniform opinion at the beginning of the nineteenth century as to whether the common law embodied Christianity. Jefferson resisted such ideas but a cadre of legal scholars contradicted Jefferson's opinions on this. See the discussion on this controversy in Dreisbach, *supra* note 55, at 988-992.

102. Titus, *supra* note 101, at 1. See Titus' article for a look at the religious foundations of the common law and how the Bible played a definitive part in the development and practice of the common law.

like Bracton and Coke were, probably no person had as much influence on the Framers of our Declaration and Constitution than did Sir William Blackstone.

3. *The influence of Sir William Blackstone, professor of common law and a Christian*

In the early 1980s three evangelical Christian historians wrote a book in which they attempted to demonstrate that Christian thought had minor importance to the founding of America.¹⁰³ Yet within their book they failed even to mention Sir William Blackstone. Often those individuals most commonly thought to have influenced the Founding Fathers of our nation were of the radical enlightenment, such as Voltaire, Diderot, and Helvetius,¹⁰⁴ but actually the conservative revolution of the Founders relied much more on Locke for the formation of the new government and men like Montesquieu and Blackstone for the structure of the new government.

Why was not Blackstone reviewed by the above writers as an influence on the national legal system? He would seem to be a prime candidate according to Lutz:

The prominence of Blackstone would come as a surprise to many, and he is the prime candidate for the writer most likely to be left out in any list of influential European thinkers. His work is not readily available in inexpensive form, but like Montesquieu he was cited frequently by all sides. A trenchant reference to Blackstone could quickly end an argument. Such a respected writer deserves a much closer look by those studying American political thought.¹⁰⁵

Blackstone wrote his famous *Commentaries on the Laws of England*, to a mixed audience. He offered lectures to those contemplating law as a career. They were encouraged to attend his lectures to obtain a general knowledge of common law before taking on the rigorous study in the Inns of Court.¹⁰⁶ His lectures, then, were to explain broad principles for his "young and largely ignorant audience."¹⁰⁷ D.A. Nolan argues that legal

103. MARK A. NOLL ET AL., *THE SEARCH FOR CHRISTIAN AMERICA* (1983).

104. The Enlightenment may be divided into at least three periods: the first represented by men like Montesquieu, Locke, and Pufendorf; the second by Voltaire, Diderot, and Helvetius; and the third by Beccaria, Rousseau, Mably, and Raynal. See Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 *THE AMERICAN POLITICAL SCIENCE REV.* 189, 190 (1984).

105. *Id.* at 195-196.

106. I.G. Doolittle, *Sir William Blackstone and His Commentaries on the Laws of England (1765-9): A Biographical Approach*, 3 *OXFORD J. LEGAL STUDIES* 99 (1983).

107. *Id.* at 99.

education was the true significance of Blackstone rather than Blackstone having influence on the founding of America or the political structures afterward.¹⁰⁸ But how to separate Blackstone, the writer of the *Commentaries*, from Blackstone, the teacher is difficult to imagine. As Lord Coleridge once said, "One speaks and thinks of Blackstone as a writer, not as a man."¹⁰⁹

Many American students returning from the Inns of Court in England brought Blackstone back home with them. So popular did he become that one thousand copies of his *Commentaries* were sold at ten pounds per set before the first American edition was printed. Prepublication sales for the first American edition were 1500.¹¹⁰ Blackstone's *Commentaries* became the chief, if not the only law book, in every lawyer's office in New England. Daniel Webster read Blackstone before beginning the study of law in 1804. James Kent, the famous American commentator and professor of law, wrote that reading Blackstone at sixteen caused him to want to become a lawyer. Abraham Lincoln, in 1835, came into possession of the *Commentaries* and read them intensely.¹¹¹ Blackstone's influence is not only stamped on the dissemination of the common law to a broader public, he is also important on the writing of the Declaration of Independence.

4. *The influence of Christianity on the Declaration and Constitution*

Scholars have long recognized the influence of the Bible¹¹² and the Christian religion on the development of Western law, but many have rejected the influence on the organic documents of our government,

108. Dennis R. Nolan, *Sir William Blackstone and the New American Republic: A Study of Intellectual Impact*, 51 NEW YORK U. L. REV. 731 (1976). For a positive evaluation of Blackstone's impact on American politics, see DAVID A. LOCKMILLER, *SIR WILLIAM BLACKSTONE* 169-190 (1938).

109. Doolittle, *supra* note 106, at 99.

110. PAUL M. HAMLIN, *LEGAL EDUCATION IN COLONIAL NEW YORK* 64-65 (1939), quoted in Nolan, *supra* note 108, at 737.

111. Nolan, *supra* note 108, at 748, quotes Lincoln saying, "I never read anything which so profoundly interested and thrilled me." (Citing James M. Ogden, *Lincoln's Early Impressions of the Law in Indiana*, 7 NOTRE DAME L. REV., 325, 325-29 (1932)).

112. For example, René Cassian and Charles Malik, important leaders in the development of the Universal Declaration of Human Rights saw these rights built on the Ten Commandments. JOHN WARWICK MONTGOMERY, *HUMAN RIGHTS AND HUMAN DIGNITY*, 275, n. 23 (1986). This was confirmed when I attended the *Institut International des Droits de l'Homme* (International Institute of Human Rights) at the University of Strasbourg in July, 1998. Two of the speakers – Professor Boyle of the University of Essex and Professor M. Camille Kuyu Mwissa of the Catholic University of Central Africa and University of Paris – specifically acknowledged the dependence of the Declaration on Christian views, though Professor Boyle explained that resistance from Marxist countries caused the Framers to make the language ambiguous; other examples exist in the development of criminal law (see Witte and Arthur, *supra* note 80, at 433), tort law (see Cook, *supra* note 81), and contract law (see Harold J. Berman, *The Religious Sources of General Contract Law: An Historical Perspective* 103, 4 J. L. & RELIGION (1986)), to mention only a few.

namely the Declaration of Independence and the Constitution of the United States. It is thought that the Declaration was written from purely an enlightenment perspective relying on natural law and that the Constitution is a totally secular document, intentionally so, to avoid the types of religious divisions¹¹³ that occurred in the lands from which they came.

We have already seen how John Locke was an important figure for the War for Independence¹¹⁴ but after this period his writings gained little hearing.¹¹⁵ The people were moving to the matter of how to structure this new government that began in 1776. Other sources were used in the political rhetoric of the day.¹¹⁶ The most quoted book of the period from 1760-1805 in the political writings of the day was the book of Deuteronomy (the law book), in the Bible, accounting for thirty-four percent of all the quotes.¹¹⁷ The person, after Montesquieu, who was most quoted in the era immediately before and after the drafting of the Constitution was Blackstone¹¹⁸ and almost as much as Locke during the period leading up to the Declaration.¹¹⁹

Several key statements of the Declaration may reflect Blackstonian thought. The phrase "laws of nature and of nature's God"¹²⁰ particularly reminds one of Blackstone's emphasis on this two-fold view of law. Following Burlamaqui and Pufendorf, Blackstone saw nature as having certain laws established by God which expressed the will of God and were superior to any contrary law made by men:¹²¹

113. See Dreisbach, *supra* note 55, at 961-62.

114. See *supra* text accompanying notes 83-83.

115. Lutz, *supra* note 104, at 192-193.

116. See *infra* APPENDIX for graphs of the thinkers and sources quoted during the period of 1760-1805.

117. Lutz, *supra* note 104, says:

Anyone familiar with the literature will know that most of these citations come from sermons reprinted as pamphlets; hundreds of sermons were reprinted during the era, amounting to at least 10% of all pamphlets published. These reprinted sermons accounted for almost three-fourths of the biblical citations, making this nonsermon source of biblical citations roughly as important as the Classical or Common Law categories.

Id. at 192.

118. D.S. Lutz and C.S. Hyneman reviewed 15,000 items in the political writings between 1760-1805, reading closely 2,200 with explicitly political content. Included were all books, pamphlets, newspaper articles, and monographs printed for public consumption. Lutz, *supra* note 104, at 191; see also AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA 1760-1805 (Charles S. Hyneman and Donald S. Lutz eds., 1983).

119. He is quoted more than two and one-half times that of Locke (see APPENDIX for chart). Probably this is because his writings are strong on governmental process, operation, and interaction of institutions.

120. The Declaration of Independence para. 1 (U.S. 1776).

121. This latter idea has been held by Augustine, Thomas Aquinas, Samuel Rutherford in *Lex Rex*, and adopted by Dr. Martin Luther King Jr. King cites Aquinas saying, "An unjust law is a human law that is not rooted in eternal law and natural law." MARTIN LUTHER KING, JR., WHY WE CAN'T WAIT 85 (1964). Also he writes, "All segregation statutes are unjust because segregation distorts the soul and damages the personality. It gives the segregator a false sense of inferiority . . .

[W]hen the Supreme Being formed the universe, and created matter out of nothing, he impressed certain principles upon that matter, from which it can never depart, and without which it would cease to be. When he put that matter into motion, he established certain laws of motion, to which all moveable bodies must conform.¹²²

Consequent to this initial postulate of Blackstone, he continues:

Man, considered as a creature, must necessarily be subject to the laws of his Creator, for he is entirely a dependent being And, consequently, as man depends absolutely upon his Maker for everything, it is necessary that he should in all points conform to his Maker's will.

This will of his Maker is called the law of Nature. For as God, when he created matter, and endued it with a principle of mobility, established certain rules for the perpetual direction of that motion; so, when he created man, and endued him with free-will to conduct himself in all parts of life, he laid down certain immutable laws of human nature These are the eternal, immutable laws of good and evil.¹²³

Since God's laws in nature are preeminent over human laws, human laws are invalid when in conflict with them:

This law of nature being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other. It is binding over all the globe, in all countries, and at all times: no human laws are of any validity if contrary to this; and such of them as are valid derive all their force and all their authority mediately or immediately, from this original.¹²⁴

Blackstone did not only consider the "laws of nature" as a standard of law for human laws to conform, he viewed the divine law, the Holy Scriptures as even a clearer standard:

[I]f our reason were always, as in our first ancestor [Adam] before his transgression, clear and perfect, unruffled by

segregation is not only politically, economically, and sociologically unsound, it is morally wrong and sinful." *Id.* at 85. Ironically, "[t]he late Austrian legal theorist Hans Kelsen stated that an unjust law is a contradiction in terms, because it is law itself that sets the standard for what is just. Indeed, although Kelsen was Jewish, the anti-Semite Hitler availed himself of Kelsen's arguments in setting up his totalitarian system." Brown, *supra* note 62, at 123.

122. WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 38-39.

123. *Id.* at 39.

124. *Id.* at 41.

passions, unclouded by prejudice, unimpaired by disease or intemperance, the task would be pleasant and easy; we should need no other guide but this [i.e., the law of nature]. But every man now finds the contrary in his own experience; that his reason is corrupt, and his understanding full of ignorance and error.

This has given manifold occasion for the benign interposition of divine providence; which, in compassion to the frailty, the imperfection, and the blindness of human reason, hath been pleased . . . to discover and enforce its laws by an immediate and direct revelation. The doctrines thus delivered we call the revealed or divine law, and they are to be found only in the holy scriptures These precepts [the ones written in the holy Scriptures]. . . , when revealed, are found on comparison to be really a part of the original law of nature, as they tend in all their consequences to man's felicity. But we are not from thence to conclude that the knowledge of these truths was attainable by reason, in its present corrupted state; since we find that, until they were revealed [in writing], they were hid from the wisdom of the ages. As then the moral precepts of this law are indeed of the same original with those of the law of nature, so their intrinsic obligation is of equal strength and perpetuity.¹²⁵

Titus explains the practical outworking of Blackstone's comments:

In other words, God's putting in written form, "Thou shalt not murder" (Ex. 20:13) did not make murder wrong, but His putting the rule in writing revealed more effectively to fallen people the original law protecting the sanctity of human life that God had placed and revealed in the created order from the beginning. Murder was wrong, therefore, because it was contrary to the nature of people and to the very nature of God's creation.¹²⁶

How did Blackstone view the disobedience to a human law that came into conflict with God's law in nature or Scripture? He walked in the train of many before him: "Nay, if any human law should allow or injoin us to commit it [an act contrary to divine or natural law], we are bound to transgress that human law, or else we must offend both the natural and the

125. *Id.* at 41-42, quoted in Herbert W. Titus, *God's Revelation: Foundation for the Common Law*, in *THE CHRISTIAN AND AMERICAN LAW: CHRISTIANITY'S IMPACT ON AMERICA'S FOUNDING DOCUMENTS AND FUTURE DIRECTION* 19-20 (H. Wayne House ed., 1998).

126. Titus, *supra* note 125, at 20.

divine.”¹²⁷ One can readily see that young men reading Blackstone, coupled with the thinking of Locke, could easily be led to confront England who seemed to place itself above just laws in dealing with the colonies.

Blackstone may not be the only Christian influence on the Declaration. According to Gary Amos, the Declaration is not merely a theistic document, that few could dispute, but is distinctly Christian in nature: “When we examine the terminology, argument, and logical structure of the Declaration, we find them to be consistent with the Bible and Christian teaching.”¹²⁸ This is in stark contrast to the pervasive influence of Carl Becker, whose ideas on the primary enlightenment influence on the Declaration has held sway for seventy years.¹²⁹ I am compelled by the arguments of Amos that the primary influence on the Declaration was Christian in nature, but certainly not devoid of those enlightenment influences of men like Locke whose enlightenment thinking was tempered (the reason I have called it conservative above) with the Christian worldview and biblical guidance. This is notwithstanding the contribution to the Declaration by Jefferson. But we must bear in mind that a committee wrote the Declaration, not Jefferson alone, and that the Declaration is not a person letter of Jefferson to King George; it is a statement from the colonists,¹³⁰ and written with that in mind, who were almost entirely Christian, and written to the King and England, who also were Christian.

Edward Humphrey’s listing of Christian terminology is convincing that the Declaration and other documents of the time reflecting Protestantism.

The multiplicity of references to the Deity in the Declaration reflects similar invocations in the proclamations and other state papers of the Continental Congress. These unabashedly exhibited a belief in Trinitarian Protestantism. Congress continually invoked, as sanction for its acts, the name of “God,” “Almighty God,” “Nature’s God,” “God of Armies,” “Lord of Hosts,” “His Goodness,” “God’s

127. BLACKSTONE, *supra* note 122 at 40.

128. GARY AMOS, DEFENDING THE DECLARATION: HOW THE BIBLE AND CHRISTIANITY INFLUENCED THE WRITING OF THE DECLARATION OF INDEPENDENCE 128 (1989). See also Gary Amos, *The Philosophical and Biblical Perspectives That Shaped the Declaration of Independence*, in THE CHRISTIAN AND AMERICAN LAW 49-82. See discussion of the Christian nature of the Declaration in Dreisbach, *supra* note 55, at 969.

129. See BECKER, *supra* note 83.

130. Lutz, *supra* note 84, at 36. “Contrary to popular belief today, Jefferson did not write the Declaration of Independence de novo. As Jefferson himself later explained, he pieced it together from the political literature of his time to ‘reflect the American mind.’” *Id.* at n. 18 (alluding to Jefferson’s letter to Henry Lee on May 8, 1825, 10 THE WRITINGS OF THOMAS JEFFERSON 343 (P. Leicester Ford ed. 1899)).

Superintending Providence," "Providence of God," "Providence," "Supreme and Universal Providence," "Overruling Providence of God," "Creator of All," "Indulgent Creator," "Great Governor of the World," "The Divinity," "Supreme Disposer of All Events," "Holy Ghost," "Jesus Christ," "Christian Religion," "Free Protestant Colonies," and other expressions of devout Christian Protestantism.¹³¹

The Constitution, as well, is a document that reflects a Christian worldview. Let me be clear, the Constitution is a federal document, first of all, seeking to provide a structure to a government begun with the Declaration, and limiting the power of the government in deference to individual state governments.¹³² It is not a theological document or creed, so largely absent of such terminology.¹³³ At the same time it is not an anti-Christian document either.¹³⁴ One would be surprised to find, in a document like the Constitution, terms as found in the Declaration, but there are internal signs of the influence of Christian ideas in the Constitution that many in the early days of the Republic sought to demonstrate.¹³⁵ For my purpose, it is sufficient to mention but a few examples of Christian influence to illustrate that Christianity and the federal government are not intended to be at opposite poles or separated by a high and impenetrable wall.¹³⁶

Before the drafting and passage of the First Amendment guaranteeing "free exercise" of religion, the Constitution had already contained provisions for such a doctrine. The Constitution provides in Article VI that "no religious Test shall ever be required as a Qualification to any Office or

131. EDWARD FRANK HUMPHREY, NATIONALISM AND RELIGION IN AMERICA, 1774-1789 407 (1924), quoted in Leo Pfeffer, *The Deity in American Constitutional History*, 23 J. CHURCH & STATE 215, 217 (1981).

132. Approximately half of the delegates to the federal convention of 1787 had been representatives at their state conventions where the documents were replete with religious references. In the federal (not national) constitution, such references are largely, though not totally omitted, since none really believed that the federal government should be involved in furtherance of religion, leaving this alone for the state to determine. David E. Maas, *The Philosophical and Theological Roots of the Religious Roots of the Religious Clause in LIBERTY AND LAW: AMERICAN LIFE AND THOUGHT* 1, 7 (Ronald A. Wells & Thomas A. Askew eds., 1987).

133. For a discussion of reasons why some believe statements regarding God and the Christian religion are omitted from the Constitution, see Dreisbach, *supra* note 55, at 955-964.

134. For the various type of explicit and implicit references to God and the Christian religion in the Constitution, see *id.* at 964-994.

135. For example, Knicey, at *supra* note 25, at 265, indicates the position of Jasper Adams, strong advocate for the Christian nature of the Constitution:

The failure to express more sympathy to religion in the Constitution, however, was in Adam's view by design, just as the Constitution left unstated other fundamental truths, such as the inalienable rights of the people, the political sovereignty of the people, and the right of the people to resist and abolish tyranny. *Id.*

136. See generally JOHN EIDSMOE, CHRISTIANITY AND THE CONSTITUTION (1987).

public Trust under the United States.”¹³⁷ Such a statement was not denying religious tests in the various states, however, for

[m]any in the founding generation supported a federal test ban because they valued religious tests required under state laws, and they feared a federal test might displace existing state test oaths and religious establishments. Even among the most ardent proponents of Article VI, few denied the advantage of placing devout Christians in public office.”¹³⁸

A second provision relating to oaths was the matter of taking oaths. Certain Christians would not take oaths, for religious reasons, such as the Quakers, so the authors deferred to them in the writing of the document by adding “affirmation.” Oaths in the eighteenth century carried religious import, a solemn statement before the Supreme Being and affirmation carried the same idea.¹³⁹ Michael McConnell properly observes that these two elements – no religious tests and the affirmation exception to the taking of oaths – “reflect a spirit and purpose similar to that of the (First Amendment’s) free exercise clause.”¹⁴⁰ Another minor implicit indication of the Framers concession of Christianity in the Constitution is providing for a Sunday exception in the signing of legislation.¹⁴¹

Two explicit examples of Christian ideas in the Constitution are the mention of the “year of our Lord” in Article VII, and the recognition of the Declaration as the proper preamble to the Constitution. Regarding Article VII, there is no question that this dating method was the common method in the Christian west and was used regularly on official documents. Unlike the French calendar, which began a new calendar with the revolution,¹⁴² the colonists maintained association with their Christian past. Such continuance, though significant to many nineteenth commentators,¹⁴³ gives but a small benefit to the Christian nature of the Constitution. More significant, in my opinion is the argument that the Declaration is the preamble to the Constitution, so that the documents, though different in nature, serve as one organic whole.

137. For the meaning of the oath and religious test in the Constitution see Maas, *supra* note 132, at 1-23.

138. Dreisbach, *supra* note 55, at 951.

139. See *id.* at 981-986.

140. Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1473 (1990), quoted in Dreisbach, *supra* note 55, at 983.

141. See Dreisbach, *supra* note 55 at 974-75.

142. *Id.* at 965-96.

143. *Id.* at 966.

The Declaration of Independence, an unarguably theistic, if not Christian document, may be understood as the preamble to the Constitution. As Donald Lutz says,

After approving the Declaration, the Continental Congress turned to writing a national constitution. The Articles of Confederation that resulted proved defective in important respects. As a result, the new Constitution of 1787 replaced the Articles. The Declaration, however, continued to stand as the preface to the American national compact. The Constitution begins, "We the people of the United States, in order to create a more perfect union." The people already exist, and exist in a political union. This can be only if there is a first part to a compact of which the Constitution is the second part. There is no document that can be pointed to as fulfilling such a role other than the Declaration of Independence. To say that we live under a national compact of which the Declaration is the first part may sound a bit strange at first, but it would be stranger still to have begun our national bicentennial in 1976 if the Declaration of Independence was not part of our national founding.¹⁴⁴

Another line of argument that demonstrates the relationship between these two documents is found in the Constitution itself. The Constitution, in several places, connects the founding of the government with the Declaration of the Independence, and upon which it relies for its philosophical foundation.

The first line of evidence, however, is from the Declaration itself. The heading to the Declaration is "The Unanimous Declaration of the Thirteen United States of America."¹⁴⁵ The document, then, portends to come from the "one people" of the United States of America, though of course the manner in which the states will relate to each other is uncertain until after the ratification of the Constitution in 1791. They wanted the world to know that they were a new nation, rightly independent of England. Second, the Declaration toward the end concludes, "We, therefore, the representatives of the United States of America, in General Congress, assembled."¹⁴⁶

The Constitution written in 1787 was "for" the nation already formed in 1776. Further evidence that this was the way the Framers of the Constitution viewed the situation is found within the Constitution itself.¹⁴⁷

144. Lutz, *supra* note 84, at 37. See also Dennis J. Mahoney, *The Declaration of Independence as a Constitutional Document*, in *THE FRAMING AND RATIFICATION OF THE CONSTITUTION* 54, 65 (Leonard W. Levy & Dennis J. Mahoney eds., 1987) (arguing that the Declaration of Independence "is the real preamble to the Constitution") (*cited in* Dreisbach, *supra* note 55, at 184).

145. The Declaration of Independence, heading (U.S. 1776).

146. The Declaration of Independence, para. 32 (U.S. 1776).

147. I am indebted for some of these observations to an unpublished paper by Cannada,

Article I, §2(2), requires that the representatives must have been “seven years a citizen of the United States”¹⁴⁸ before holding office. Such a requirement presupposed the existence of the nation in order for the House of Representatives to convene in 1789. A similar example is found regarding senators in Article I, §3(3) but “nine years a citizen of the United States”¹⁴⁹ Unless the government already existed, they would need to wait nine years to meet after 1789. One more qualification clause is used with similar import, that of President. The pertinent clause reads (Art. II, §1(5)), “No person except a natural born citizen, or a citizen of the United States, at the time of the adoption of this Constitution, shall be eligible to the office of President . . . and been fourteen years a resident within the United States.”¹⁵⁰ Cannada elucidates on this:

Clearly, this provision recognizes that there could a “natural born citizen” at the time of the adoption of the Constitution and thus “citizenship” did exist prior to the time of the adoption of the Constitution. It is also interesting to note that the “residence” requirement went even beyond the date of the Declaration and that the term “resident” was used rather than the term “Citizen”. There was no such thing as a Citizen until the nation was established and that was done by the adoption of the Declaration.¹⁵¹

The last indication of the existence of the United States from the time of the Declaration is found at the very end of the Constitution. It concludes, “DONE in convention by the unanimous consent of the states present the seventeenth day of September in the year of our Lord one thousand seven hundred and eighty-seven and of the Independence of the United States of America the twelfth.” The unanimous consent was from “states present” at the Declaration.

The Declaration of Independence and the Constitution worked together to provide the soul and the body of the law for the proper ordering of society, maintaining morality and civility for the majority of the nation’s governmental history. These documents should not be separated. The Declaration sets forth the principles upon which the government of the nation was to be founded, whereas the Constitution establishes the civil powers to accomplish the principles of the Declaration. In view of this, the Constitution cannot be viewed as absent the theological ideas that permeate the Declaration. This perspective gives meaning to the words of

Inalienable Rights and the Declaration of Independence 6-7 (1992).

148. U.S. Const. art. I, §2(2).

149. U.S. Const. art. I, §3(3).

150. U.S. Const. art. II, §1(5).

151. Cannada, *supra* note 147, at 6.

John Quincy Adams who said, "The highest glory of the American Revolution was this; it connected in one indissoluble bond the principles of civil government with the principles of Christianity"¹⁵² and "From the day of the Declaration . . . they (the American people) were bound by the laws of God, which they all, and by the laws of The Gospel, which they nearly all, acknowledge as the rules of their conduct."¹⁵³

One last example puts the coup d'grace on this argument. Cannada illustrates:

[I]t is significant that as states were subsequently admitted into the Union the statutes admitting such admission provided that they would be admitted with "equal footing" or to the "same footing" as the original states. In fact, the admission statutes for thirteen states, including the states of Alaska in 1958 and of Hawaii in 1959, contained language such as that their respective Constitutions "shall be republican in form . . . and not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence." Thus we have Congress, as late as 1959, protecting the structure of the government of this nation¹⁵⁴

Accordingly, each state in the union, with the exception of Oregon, specifically make reference to either Almighty God, the Supreme Ruler of the Universe, God, Creator, or Supreme Being, being consistent with the Declaration, upon whom the principles of the Declaration rely.¹⁵⁵

5. *The Reformation doctrine of the two kingdoms*

The Founders of the United States shared many theological points in common with the Reformers that gave rise to the Protestant Reformation. Views of God, the sinfulness of man, kinds of church government, and the use of covenant, among others, were shared by this generally homogenous group of men. They were largely Calvinists, influenced by some enlightenment thinking, and well versed in the history, politics, and philosophy of the past.¹⁵⁶

Rather than entering into these matters, I would like to suggest one area in which the Reformation influenced the nature of church and state,

152. THORNTON, *supra* note 2, quoted in FEDERER, *supra* note 2, at 18.

153. *Id.*

154. Cannada, *supra* note 147, at 7.

155. For example, California, the state of my citizenship has in its preamble, "We, the People of the State of California, grateful to Almighty God for our freedom, in order to secure and perpetuate its blessings, do establish this Constitution." CALIFORNIA CONST. preamble (amend. Nov. 5, 1996).

156. See EIDSMOE, *supra* note 136, at 17-38.

which I believe, had major impact on the formation of the American system of government: the doctrine of the two kingdoms.

The doctrine of the two kingdoms is first seen in the history of the kingdom of Israel. Though Israel is commonly thought of as a theocracy (the direct rule of God) in reality it appears to be more like a constitutional monarchy. The king himself was under the covenant that Yahweh made with Israel (Ex. 19), and the king, unlike the "ruler cults" of the ancient world¹⁵⁷ could not legally enter into the functions of the cultus. The clearest example of this prohibition is found in the confrontation between Samuel and Israel's first king, Saul. Samuel, the prophet-priest of Yahweh, took longer to come to Gilgal to offer a sacrifice than Saul thought advisable so he offered the sacrifice himself. Due to this Yahweh cut Saul and his line from the kingship (1 Sam 13). Another example is King Uzziah who attempted to burn incense at the altar of God. Because of this Yahweh inflicted him with leprosy which remained with him the rest of his life (2 Chron. 26:16-21). One might say that Yahweh created a wall of separation between the religious cultus of Israel and the state, though it was never intended to be a separation of Yahweh and state.

The doctrine of separate kingdoms was first explicated by Jesus Christ. When he was approached by certain Jewish leaders regarding whether one should pay taxes to Caesar or not (Luke 20:22) he uttered the famous statement: "Render to Caesar the things that are Caesar's and to God the things that are God's" (Luke 20:25). Jesus thereby acknowledged that the state had legitimacy and a jurisdiction, though all things belong to God. Lord Acton speaks to these words of Christ:

When Christ said "Render unto Caesar the things that are Caesar's and unto God the things that are God's," He gave to the State a legitimacy it had never before enjoyed, and set bounds to it that had never yet been acknowledged. And He not only delivered the precept but He also forged the instrument to execute it. To limit the power of the State ceased to be the hope of patient, ineffectual philosophers and became the perpetual charge of a universal church.¹⁵⁸

The other major New Testament presentation of the two kingdoms is found in the letter of the apostle Paul to the Romans, though the emphasis there is on the kingdom of the left (to use Luther's designation):

Let every soul be subject to the governing authorities. For there is no authority except from God, and the authorities that

157. See *supra* text accompanying notes 62-63.

158. EIDSMOE, *supra* note 17, at 111 (quoting Gertrude Himmelfarb 45 (1955)).

exist are appointed by God. Therefore whoever resists the authority resists the ordinance of God, and those who resist will bring judgment on themselves. For rulers are not a terror to good works, but to evil. Do you want to be unafraid of the authority? Do what is good, and you will have praise from the same. For he is God's minister to you for good. But if you do evil, be afraid; for he does not bear the sword in vain; for he is God's minister, an avenger to execute wrath on him who practices evil.¹⁵⁹

The apostle indicates that the power of the state is not by human design but by divine, to the point that Christians were to obey the civil ruler, at Paul's time the Roman emperor Nero,¹⁶⁰ though this obedience was not absolute,¹⁶¹ articulated first by the apostle Peter on the loyalties of the Christian when it seeks to place the duty of the Christian to God over against that of the state.¹⁶²

All of these biblical texts set forth the teachings that the powers of the state are legitimate, since ordained by God, but that they are limited in scope to those areas instituted by God and separate from the duties imposed by God on the religious community and religious individual. Michael McConnell explains the importance of this theological construct:

While theological in its origin, the two-kingdoms idea lent powerful support to a more general liberal theory of government, because once the government could be limited in one respect, it could be limited in others. The state could no longer be understood as omniscient. This idea provided probably the most important counterweight to the common Enlightenment belief that the best form of government was enlightened despotism. It can be argued that of the two great intellectual upheavals of the early modern period, the Enlightenment and the Protestant Reformation, the latter was the more significant for the advance of political liberty. Of course, much blood was spilled for conscience – not least by Protestants – before these implications of Protestant doctrine became apparent and ultimately dominant.¹⁶³

159. Romans 13:1-4 (NKJV).

160. See R.C. SPROUL, *The Biblical View of Submission to Constituted Authority*, in *THE CHRISTIAN AND AMERICAN LAW* 126-138 (H. WAYNE HOUSE ed., 1998).

161. See H. WAYNE HOUSE, *The Christian's Duty of Civil Disobedience to the Government: Contemporary Struggles Between Christians and the State*, in *THE CHRISTIAN AND AMERICAN LAW* 139-174 (H. WAYNE HOUSE ed., 1998).

162. See Acts 4:19.

163. McConnell, *supra* note 39, at 168-169. McConnell likewise notes that "The two-kingdoms view of competing authorities is at the heart of our First Amendment." *Id.* at 169.

Though Christians have generally held to a two-kingdoms doctrine from the initiation of the church and the teaching we have observed from the Scriptures, there has been disagreement on how this doctrine should be understood and what jurisdiction the church and state held in respect to each other.

Catholic theologians have generally recognized a difference between the church and the state – the two kingdoms (to use Luther’s terminology) – but have usually viewed the church as the greater of the two.¹⁶⁴ The reasoning for the church as greater than the state largely rests on the perspective of Augustine. He argued for the superiority of the church since it is eternal and the state temporal, and because the church must answer to God for the conduct of the state. The two kingdoms, or two swords, perspective was given by Pope Boniface VII in his papal bull, *Unam Sanctum*, in A. D. 1304:

We are told by the word of the gospel that in this His fold there are two swords, – a spiritual, namely, and a temporal. For when the apostles said “Behold here are two swords” – when, namely, the apostles were speaking in the church – the Lord did not reply that this was too much, but enough. Surely he who denies that the temporal sword is in the power of Peter wrongly interprets the word of the Lord when He says: “Put up thy sword in its scabbard.” Both swords, the spiritual and the material, therefore, are in the power of the church; the one, indeed, to be wielded for the church, the other by the church; the one by the hand of the priest, the other by the hand of kings and knights, but at the will and sufferance of the priest. One sword, moreover, ought to be under the other, and the temporal authority to be subjected to the spiritual. For when the apostle says “there is no power but of God, and the powers that are of God are ordained,” they would not be ordained unless sword were under sword and the lesser one, as it were, were led by the other to great deed.¹⁶⁵

In contrast to the Roman Catholic view, Luther saw the church and state to be neither superior nor inferior to the other, but both as being created by God to different purposes. He viewed the state as being responsible to restrain evil. Believers belong to both kingdoms, the church

164. This section on the different theories of the Roman Catholic, Lutheran, Calvinist, and Anabaptist perspectives on the relation of church and state is largely drawn from my discussion in H. WAYNE HOUSE, *CHRISTIAN MINISTRIES AND THE LAW: WHAT CHURCH AND PARA-CHURCH LEADERS SHOULD KNOW* 34-37 (1992).

165. EIDSMOE, *supra* note 17, at 112 (quoting Pope Boniface VIII, *Unam Sanctum*, 1304 A.D. printed in E. F. HENDERSON, *SELECT HISTORICAL DOCUMENTS OF THE MIDDLE AGES* 435-37 (1965)).

and the state, and have responsibilities to each. Luther believed that believers relate to the first kingdom, the church, by faith, and to the second kingdom, the state, by reason.¹⁶⁶

Luther, unlike Calvin, did not believe that Christians had the right to use the state to promote Christianity. Christians who were in government should use Christian principles in government only inasmuch as the principles could also be justified by reason. Even a prudent but evil ruler is to be preferred to an imprudent but virtuous ruler, since the latter may bring ruin to the state while the former at least may resist evil.¹⁶⁷

Calvin believed that the state's authority came from God and that this authority came directly from God and not through the church, unlike Roman Catholics. He accepted the legitimate separations of these spheres:

For the Church has no power of the sword to punish or coerce, no authority to compel, no prisons, fines, or other punishments like those inflicted by civil magistrates. Besides, the object of this power is not that he who has transgressed may be punished against his will, but that he may profess his repentance by a voluntary submission to chastisement.¹⁶⁸

Even though Calvin had no difficulty with the government maintaining the official public church, he did believe in limiting government's activity in reference to religion. This recognition between the separate jurisdictions of the church and the state caused Calvin to express a view strikingly similar to that found in the First Amendment Establishment Clause:

Nor let anyone think it strange that I now refer to human polity the change of the due maintenance of religion which I may appear to have placed beyond the jurisdiction of men. For I do not allow men to make laws respecting religion and the worship of God now, any more than I did before: though I approve of civil government which provides that the true religion which is contained in the law of God be not violated, and polluted by public blasphemies with impunity.¹⁶⁹

166. Luther has often been viewed as placing reason and faith at opposite poles. See House, for a discussion of how Luther used the term *ratio*. House, *Luther's View of Apologetics*, 7 CONCORDIA THEOLOGICAL J. 65 (1981).

167. Luther is purported to have said that he would rather have a "competent Turk rule than an incompetent Christian." (quoted in DAVID W. HALL, SAVIOR OR SERVANT? PUTTING GOVERNMENT IN ITS PLACE 210 (1996)).

168. JOHN CALVIN, 1 INSTITUTES OF THE CHRISTIAN RELIGION 116, quoted in PHILIP KURLAND AND RALPH LERNER, 5 THE FOUNDER'S CONSTITUTION 44 (1987) [hereinafter FOUNDER'S].

169. FOUNDER'S, *supra* note 168, at 44.

It may very well be that the framers picked up Calvin's words "laws respecting religion", since his thinking and writings were ever present among the predominant Calvinist colonists. These colonists also sought to extend "freedom of conscience," believing that every person should worship God "according to his own conscience."¹⁷⁰

This view of Calvin had already found a firm footing in England. King James II saw a need for toleration of religious sects, as evidenced in his letter to Thomas Dongan in 1682, where he used the phrase, "free exercise" of religion.¹⁷¹

You shall permit all persons of what religion soever quietly to inhabit within your government without giving them any disturbance or disquiet whatsoever for or by reasons of their differing opinions in matters of Religion, provided they give no disturbance to ye public peace, nor do molest or disquiet others in ye free Exercise of their Religion.¹⁷²

A couple of examples in the early colonies of America provide further evidence that the doctrine of the two kingdoms had found root, with its implications of religious freedom. In a charter that Pennsylvania agreed upon with England in 1682 a reciprocal duty of free exercise was guaranteed:

persons that hold themselves obliged in conscience to live peaceable and justly in Civil Society [would] in no ways be molested or prejudiced for their religious persuasion or practice, in matters of faith and worship, nor shall they be compelled at any time, to frequent or maintain any religious worship, place or ministry whatever.¹⁷³

Even with this liberality toward religious conscience, though, William Penn, in that charter, required one common element, "faith in Jesus Christ."¹⁷⁴

Massachusetts Christians also followed the thinking of John Calvin, at least in regards to other Christians being in their midst: "If any people of other nations professing the true Christian Religion *shall flee to us from the Tyranny* or oppression of their persecutors or from famine, wars or the like necessary and compulsory cause, they *shall be entertained and*

170. *Id.*

171. FOUNDER'S *supra* note 168, at 52 (quoting King James II Instructions to Governor Thomas Dongan).

172. *Id.*

173. *Id.* (quoting Pennsylvania Charter Of Liberty).

174. *Id.*

succored amongst us, according to that power and prudence, god shall give us.”¹⁷⁵ The Rhode Island Baptist Roger Williams expanded this idea to argue that God did not demand uniformity in any civil state¹⁷⁶ and that nations should not pursue holy wars for Christianity but evangelize with the sword of the Spirit:

It is the will and command of God, that since the coming of his Son the Lord Jesus, a permission of the most Paganish, Jewish, Turkish, or anti-Christian consciences and worship be granted to all man, in all nations and countries; and they are only to be fought against with that sword which is in soul-matters able to conquer, to wit; the sword of the Spirit-the Word of God.¹⁷⁷

The Christian is a citizen of both kingdoms, being under the authority of both the state and the church. The state’s authority, however, is limited to the areas of authority given to it by God. If the state steps beyond its authority, its acts are without legitimacy and are lawless, to which authority believers owe no duty and should resist. These Calvinistic ideas generally set well with the purposes of the late 18th century colonists due to the thinking of Calvin being so pervasive in the thinking of most of the churches, and consequently the citizens.¹⁷⁸

One other perspective on the relationship of church and state existed in the eighteenth century and before, the Anabaptist view. I will not be discussing it at any length and consider it but a minor significance for the present study. The Anabaptists (and some of their descendants) believed that the state was part of the evil world system ruled by Satan and thus Christians were to do all possible to remove themselves from it and its affairs. Thus Christians were not to vote, hold public office, serve in the armed forces, or be involved in government in any other way. Christians, generally, were to obey the state but the state had no real authority over Christians, nor did the church have any authority over unbelievers.

Though the doctrine of two kingdoms was held differently by various Christian traditions – the perspective of Calvin probably was predominant in the New England colonies since virtually all the churches were Calvinistic in their views – the impact of the two kingdoms was ideally suited to the new form of government intended by the Framers. They desired a state limited in power and unable to reach the institutional

175. FOUNDER’S, *supra* note 168, at 47 (quoting Body of Liberties of the Massachusetts Colony in New England).

176. FOUNDER’S, *supra* note 168, at 48 (quoting Roger Williams, The Bloody Tenent of Persecution for Cause of Conscience).

177. *Id.*

178. See *supra* text accompanying notes 112-55.

church. They did not want a Church of New England. Unfortunately, as subsequent analysis will demonstrate, the relationship between church and state, and between religious values and beliefs and the state have become more complicated in this century.

III. CAUGHT IN THE MIRE: CAN THE SUPREME COURT EXTRICATE ITSELF FROM ESTABLISHMENT CLAUSE CONFUSION?

A. *A Befuddled Court Presses on with Judicial Confidence but not with Judiciousness*

There is unprecedented confusion in the courts today regarding the interpretation and application of the religion clauses of the First Amendment to the Constitution. The First Amendment seems straightforward but has engendered considerable debate. The amendment reads simply, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."¹⁷⁹

Until the *Everson*¹⁸⁰ decision of 1947 the courts gave little consideration to the establishment prong and instead dealt with certain free exercise claims of minority religious groups that had arisen on American soil.¹⁸¹ The general view of the courts of this land was that the first part of the amendment was forbidding Congress, the only law making body of the federal government, from establishing a national religion or preferring one religious group or religious tenets over other groups or doctrines. This seems to have been the understanding of those that actually wrote and adopted this amendment based on the debates and revisions that occurred in the summer and early fall of 1787.¹⁸²

179. U. S. CONST. amend. I.

180. *Everson v. Board of Education of Ewing Township*, 330 U.S. 1 (1947).

181. The Mormon polygamy cases concerned religious practices that were viewed as being the tenets of mainline Christian beliefs (*Reynolds v. United States*, 98 U.S. 145 (1878); *Late Corporation of the Church of Jesus Christ of Latter Day Saints v. United States*, 136 U.S. 1 (1890); *Davis v. Beason*, 133 U.S. 333 (1890)), whereas the Jehovah's Witnesses came under fire in several decisions over a variety of religious freedom issues (*Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Jobin v. Opelika*, 316 U.S. 584 (1942); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Minersville School District v. Gobitis* 310 U.S. 586 (1940); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); *Cox v. New Hampshire*, 312 U.S. 569 (1941); *Prince v. Massachusetts*, 321 U.S. 158 (1944)).

182. See rehearsal of history by the Court in *Holy Trinity Church v. United States*, 143 U.S. 457, 465-471 (1892).

B. *Seeing Through a Glass Darkly: How the Courts Have Interpreted the Establishment Clause*

"[T]heir legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a *wall of separation* between Church & State."¹⁸³

Thomas Jefferson

"I must admit, moreover, that it may not be easy, in every case, to trace the line of separation, between the right of Religion & the Civil authority, with such distinctness, as to avoid collisions & doubts on unessential points."¹⁸⁴

James Madison

But when a man's fancy gets astride on his reason, when imagination is at cuffs with the senses, and common understanding, as well as common sense, is kicked out of doors, the first proselyte he makes is himself; and when that is once compassed, the difficulty is not so great in bringing over others.¹⁸⁵

Jonathan Swift

How then did we get to the current constitutional malaise we observe today? In 1947, the United States Supreme Court embarked on a course that would prove both controversial and, at times, paradoxical when it decided the seminal *Everson v. Board of Education* case.¹⁸⁶ The case purported to be consistent with the Framers' understanding of the Establishment Clause of the First Amendment¹⁸⁷ and the Court, for the first time in its history, found the Establishment Clause of the First Amendment to be applicable to state action through the Fourteenth Amendment.¹⁸⁸

183. Letter from Thomas Jefferson to Messrs. Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, a committee of the Danbury Baptist association in the state of Connecticut, 1 January 1802, *The Papers of Thomas Jefferson* (Manuscript Division, Library of Congress), Series 1, Box 89, 2 December 1801-1 January 1802; Presidential Papers Microfilm, Thomas Jefferson Papers (Manuscript Division, Library of Congress), Series 1, Reel 25, 15 November 1801-31 March 1802, quoted in Dreisbach, *supra* note 17, at 1; (emphasis added).

184. DANIEL DREIBACH, *RELIGION AND POLITICS IN THE EARLY REPUBLIC* 157 (quoting Madison).

185. JONATHAN SWIFT, *A Tale of a Tub*, in 1 *THE NORTON ANTHOLOGY OF ENGLISH LITERATURE* (Abrams et al., eds. 1979).

186. 330 U.S. 1 (1947).

187. *Id.* at 11.

188. "The First Amendment, as made applicable by the Fourteenth, commands that a 'state shall make no law respecting the establishment of religion or prohibiting the free exercise thereof'". *Id.* at 8. Although this is the first instance the Court makes the establishment clause applicable, it is not the first case in which the Court deals with an establishment issue. See *Bradfield v. Roberts*,

Since this case, many have criticized,¹⁸⁹ and others praised,¹⁹⁰ the Court's application of the Establishment Clause to state action.

Whether initially legitimate or not,¹⁹¹ the incorporation of the First Amendment via the Fourteenth is now a permanent fixture of Constitutional law. However, now that the First Amendment Establishment Clause is part of the landscape, the question becomes one of its meaning and significance to claims brought under the clause,¹⁹² specifically, the proper model or test which ought to be used in Establishment Clause adjudication.

In this portion of the article, I will first endeavor to establish the proper meaning of the Establishment Clause by examining the text itself, the Founder's intention, as informed by the study of history, and the historical precedent prior to *Everson*, insofar as practicable.¹⁹³ Second, I will examine Supreme Court decisions for both consistency with the meaning established in the preceding argument of this section and provide insight into a possible test for the Establishment Clause. Third, I will examine alternative models which have been suggested for examining the

175 U.S. 291 (1899) (finding that money given through a federal appropriations act to construct buildings on a hospital grounds in the District of Columbia, owned by Sisters of Charity, did not violate the First Amendment since the purposes of the hospital were non-sectarian in nature); *Rueben Quick Bear v. Leupp*, 210 U.S. 50 (1908) (finding that moneys appropriated under a trust fund established by Congress for the education of members of the Sioux tribe by the Bureau of Catholic Missions did not violate recent Congressional statutes prohibiting the use of congressional funds among the Indian tribes for sectarian purposes); and *Cochran v. Louisiana State Board of Education*, 281 U.S. 370 (1930) (upholding a Louisiana statute which provided for the purchase of books for children attending parochial school against a challenge that the Louisiana statute violated the Fourteenth Amendment by constituting a taking of private property for a private purpose).

189. See CORD, *supra* note 17, at 109-133; WILLIAM H. MARNELL, *THE FIRST AMENDMENT: THE HISTORY OF RELIGIOUS FREEDOM IN AMERICA 186-189* (1964); MARK DE WOLFE HOWE, *THE GARDEN AND THE WILDERNESS: RELIGION AND GOVERNMENT IN AMERICAN CONSTITUTIONAL HISTORY 22* (1965); L. ALLEN SMITH, *RELIGIOUS LIBERTY IN THE UNITED STATES 298-300* (1972); G. BRADLEY, *CHURCH-STATE RELATIONSHIPS IN AMERICA* (1987); and MICHAEL J. MALBIN, *RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT* (1978).

190. A. A. STOKES & LEO PFEFFER, *CHURCH AND STATE IN THE UNITED STATES 130-131* (1964); LEO PFEFFER, *CHURCH, STATE, AND FREEDOM 131-133* (1967); LEONARD W. LEVY, *THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT 187-189* (1986); LEONARD W. LEVY, *ORIGINAL INTENT AND THE FRAMER'S CONSTITUTION 2* (1988); and ERWIN CHERMERINSKY, *INTERPRETING THE CONSTITUTION* (1987).

191. For a critique of the incorporation doctrine, see R. BERGER, *GOVERNMENT BY THE JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* (1977); and R. BORK, *TRADITION AND MORALITY IN CONSTITUTIONAL LAW* (1984); ROBERT H. BORK, *THE TEMPTING OF AMERICA* (1989).

192. I am employing these terms in a fairly specific way. The meaning of the text is that which is represented by the text and the significance is the relationship between the meaning and the facts at hand. See Jeffery A. Aman and H. Wayne House, *Constitutional Interpretation and The Question of Lawful Authority*, 18 MEM. ST. L. R. 1, 20-21 (1987), quoting E.D. HIRSCH, JR., *VALIDITY IN INTERPRETATION* (1967).

193. The list of criteria given are in order of importance and have been adopted from Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Approach to Establishment Clause Adjudication*, 61 NOTRE DAME L. R. 311, at 325 (1986).

Establishment Clause along with a critique of these models utilizing the analysis developed in the proper meaning I have suggested. Last, I will conclude with a suggested approach that is consistent with my proposed understanding of the Establishment Clause and inclusive of tests examined in this portion.

I. The meaning of the establishment clause in the First Amendment

a. The text of the Establishment Clause

The First Amendment to the United States Constitution declares, in pertinent part, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."¹⁹⁴ The operative words in the Establishment Clause include "respecting," "establishment," and "religion." The word "respecting" implies that the types of laws that Congress cannot make about "an establishment of religion," would include both proscriptive and prescriptive legislation.¹⁹⁵ One author has suggested that, in this "field" [e.g., "an establishment of religion"], "there was to be a total lack of legislative power insofar as Congress was concerned."¹⁹⁶ The term "respecting" is synonymous with "concerning, and regarding" which implies that the First Amendment did not prohibit an establishment of religion *per se*, it merely prohibited Congress from making any law "concerning or regarding an establishment of religion."¹⁹⁷

The word "establishment," is synonymous with "institution," "organization," "business," "company," or "enterprise." Thus, an establishment of religion would be a religious organization, or institution. As it is shown *infra*, this definition is substantiated by the records covering the proposed versions of the First Amendment Establishment Clause.¹⁹⁸

194. U.S. Const. amend I.

195. Paulsen, *supra* note 193, at 321. See also CORD, *supra* note 17, at 9 and 25.

196. EDWARD DUMBAULD, THE BILL OF RIGHTS 104 (1957). The author makes an interesting point in footnote 5, which accompanies the text, wherein he states that the "exertion of federal judicial power to make the First Amendment applicable to the states, by virtue of the Fourteenth Amendment's due process clause would undoubtedly have shocked the framers of the Bill of Rights." The reason for this lies in the nature of invoking the establishment clause. When the Supreme Court does so, it prohibits establishment of religion by the state, an activity outside the realm of Congressional power. The exercise of federal judicial power beyond the legislative authority of Congress was condemned in *Erie R. R. Co. v. Tompkins*, 304 U.S. 64, 78-80 (1938), as unconstitutional usurpation.

197. CORD, *supra* note 17, at 9.

198. See *infra* note 247; and see EIDSMOE, *supra* note 17 at 130-132.

This concept of "establishment" is linked inseparably with the term religion in the Establishment Clause.¹⁹⁹ Yet the shifting meaning of the term religion in the First Amendment has made it difficult for the Court over the years to determine exactly what is not to be established by the Congress. This failure to adequately define "religion" makes one wonder whether we are at the conundrum of Justice Stewart who said that he could not define obscenity but he knew it when he saw it.²⁰⁰ Note the words of Judge Augustus N. Hand in *Kauten*:

It is unnecessary to attempt a definition of religion; the content of the term is found in the history of the human race and is incapable of compression into a few words. Religious belief arises from a sense of the inadequacy of reason as a means of relating the individual to his fellow-men in the most primitive and in the most highly civilized societies. It accepts the aid of logic but refuses to be limited by it. It is a belief finding expression in a conscience which categorically requires the believer to disregard elementary self-interest and to accept martyrdom in preference to transgressing its tenets.²⁰¹

The Second Circuit, in *Kauten*, on the one hand, says that there is no need to "attempt" a definition of religion. Then it turns immediately around and describes religion in opposition to reason. Religion supposedly relates to conscience and the willingness to self-sacrifice and even martyrdom. Two elements appear to exist under the definition given by the

199. Although it is linked with the term "an establishment" in the first clause, it is not in the second part or free exercise clause. This point of distinction has led many to search for a definition of religion that is compatible in free exercise and establishment clause analysis. For varying views see, Jesse H. Choper, *Defining "Religion" in the First Amendment*, 1982 U. III. L. REV. 579; Note, *Defining Religion: Of God, the Constitution and the D.A.R.*, 32 U. CHI. L. REV. 533 (1965); George C. Freeman, III, *The Misguided Search for the Constitutional Definition of "Religion"*, 71 GEO. L. J. 1519 (1983); Greenawalt, *Religion as a Concept in Constitutional Law*, 72 CALIF. L. REV. 753 (1984); Timothy L. Hall, *The Sacred and Profane: A First Amendment Definition of Religion*, 61 TEX. L. REV. 805 (1982); Gail Merel, *The Protection of Individual Choice: A Consistent Understanding of Religion Under the First Amendment*, 45 U. CHI. L. REV. 805 (1978); Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233, at note 3 (1989).

200. "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that." *Jacobellis v. State of Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J. concurring). This approach to defining, or faining not to define, terms is reflected also in *Roe v. Wade*, where Justice Blackmun, writing for the Court, felt it unnecessary to defend when life began (though this was the pivotal issue in balancing claims) and then defined it as not beginning until the third trimester. *Roe v. Wade*, 410 U.S. 113, 159 (1973). This slight of hand in cases like religion, obscenity, and abortion may be difficult for Justices, but it is no excuse for making hard, and properly informed, choices on their part.

201. *United States v. Kauten*, 133 F.2d 703, 708 (1943).

court: religion relates to irrationality²⁰² and to willingness to die rather than transgress one's beliefs. Surely such is too limiting and even contradictory to a person's own religious faith. For example, the court has used examples of such martyrs "found in the history of the human race" as Martin Luther and Socrates.²⁰³ This argument begs the question for how does the court know this is a necessary component of religion without first defining what a religion is.²⁰⁴ This circular reasoning goes something like this: Martyrdom is religious because people who were religious were willing to be martyred. Would a soldier's willingness to die for the country he loves be an example of religious belief, or would the unwillingness of a person to die for his religious convictions demonstrate that he is not religious? A better definition of religion and religious is needed.

A similar problem develops when one assumes that religion is pitted against reason. One might refer to Hebrews in the New Testament where the writer says, "Now faith is the substance of things hoped for, the evidence of things not seen."²⁰⁵ Such an understanding of "religion" or "religious" is inadequate. A person claiming no religion might be guided by a similar definition waiting for a presumed gift at Christmas. The New Testament also requires reason to explain religious experience: "always be ready to give a defense to everyone who asks you a reason for the hope that is in you, with meekness and fear."²⁰⁶ As well, the writers of the New Testament relied on objective criteria in deciding on the truthfulness of the resurrection of Jesus Christ,²⁰⁷ and disavowed beliefs absent credible evidence,²⁰⁸ and considered less than objective truth to be a sign of moral failure.²⁰⁹

Placing the religious (faith-based) and the secular (reason-based) in juxtaposition minimalizes the importance of religion to the area of law. To

202. See Dmitry N. Feofanov, *Defining Religion: An Immodest Proposal*, 23 HOFSTRA L.REV. 309, 329. The author suggests that "[t]he unique character of religion is brought about by its reliance on faith, rather than reason, as an allegedly valid means of cognition." *Id.*

203. *United States v. Kauten*, 133 F.2d at 708. The court stated:

A religious obligation forbade Socrates, even in order to escape condemnation, to entreat his judges to acquit him, because he believed that it was their sworn duty to decide questions without favor to anyone and only according to law. Such an obligation impelled Martin Luther to nail his theses on the door of the church at Wittenburg and, when he was summoned before Emperor Charles and the Diet of Worms, steadfastly to hold his ground and to utter the oft quoted words: "I neither can nor will recant anything, since it is neither right nor safe to act against conscience. Here I stand. I cannot do other. God help me. Amen.

204. M. Ayers, *Is a Workable Definition of Religion Possible in a Pluralistic Society?*, 8 (unpublished paper on file with author).

205. Hebrews 11:1 (NKJV).

206. 1 Peter 3:15 (NKJV).

207. 1 Corinthians 15:3-8.

208. 2 Pet. 2:16, 1 Cor. 15:14.

209. 1 Corinthians 15:15.

recognize, however, that all ideologies are based on unproved assumptions and that faith can be reasonable, is to develop a level playing field for religion and law. Paul Toscan rightly observes,

[A]ll ideologies are fundamentally religious. They are grounded upon assumptions that are not susceptible of proof: they are matters of faith Secular ideas, it is contended, are premised on objective, verifiable, demonstrable data, while theistic notions are based on no data at all, or at best, data that is subjective, mystical, and nondemonstrable. Those who make this argument fail to see that mysticism, subjectivism, and faith undergird even the most objective of our knowledge and data, as well as our information-gathering methods. In the first place, all data must be interpreted: the bones, the numbers, the photos, the readings taken on delicate scientific equipment – all of the quantifiable and verifiable pieces take on meaning only when they are arranged within the meaning – giving framework of some hypothesis. Hypothesizing is, itself, a subjective, even mystical, process.²¹⁰

A better definition of “religion” is needed for First Amendment analysis. In trying to decide on a definition to guide them in First Amendment cases, the Supreme Court has fluctuated between religion needing content and religion only needing aspiration. Early cases which recognized Christianity as the official religion of the country, and religion²¹¹ having *content*, gave way over the years²¹² to mere recognition that Americans are a religious people and our institutions presuppose a Supreme Being,²¹² to finally, religion is an amorphous “belief” in some ultimate reality.²¹³

210. Paul James Toscano, *A Dubious Neutrality: The Establishment of Secularism in the Public Schools*, 1979 B.Y.U. L. REV. 177, 200 (quoted in Feofanov, *supra* note 202, at 331).

211. In a letter from John Marshall to Jasper Adams, Marshall acknowledged that

One great object of the colonial charters was avowedly the propagation of the Christian faith. Means have been employed to accomplish this object, & those means have been used by government.

No person, I believe, questions the importance of religion to the happiness of man even during his existence in this world. It has at all times employed his most serious meditation, & had a decided influence on his conduct. The American population is entirely Christian, & with us, Christianity & Religion are identified. It would be strange, indeed, if with such a people, or if institutions did not presuppose Christianity, & did not often refer to it, & exhibit relations with it.

Letter from John Marshall to Jasper Adams (May 9, 1883), in DREISBACH, *supra* note 184, at 113-114.

212. “We are a religious people whose institutions presuppose a Supreme Being.” *Zorach v. Clauson*, 343 U.S. 306 (1952) (Douglas, J.).

213. In *United States v. Seeger*, 380 U.S. 163 (1965) and *Welsh v. United States*, 398 U.S.

One of the problems in finding a definition of religion for First Amendment adjudication is that the term religion never meant only one thing in the eighteenth century. At times the term refers to what would be understood today as a "denomination" or a religious body with rituals and doctrines, or more generally the Christian religion itself. In the words of Chief Justice John Marshall, "The American population is entirely Christian, & with us, Christianity & Religion are identified. It would be strange, indeed, if with such a people, our institutions did not presuppose Christianity, & did not often refer to it, & exhibit relations with it."²¹⁴

Madison, for example, in speaking of the meaning of religion in the First Amendment, uses it this way where he identifies Quakers and Mennonites as separate "religions" and in the next sentence, as "denominations" indicating that Madison considered the terms synonymous.²¹⁵ This is a typical use referring "to an institution with a recognized body of communicants who gather together regularly for worship, and accept a set of doctrines offering some means of relating the individual to what is taken to be the ultimate nature of reality."²¹⁶

At other times it speaks of morality and duties to the Creator,²¹⁷ as found in the Northwest Ordinance, which in part reads, "[r]eligion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."²¹⁸ In this sense, then, religion refers to a person's views regarding his relationship with his Creator, and to the obligations that his relationship imposes on him "of reverence for his being and character, and of obedience to his will."²¹⁹

The preceding indicates that the term may indicate a religious denomination, with rituals and particular doctrines, or religious beliefs that direct one's acts toward God and others. Both of these perspectives may be seen in the statement of the *Macintosh* Court, which said, "We are a Christian people according to one another the equal right of religious freedom, and acknowledging with reverence the duty of obedience to the will of God."²²⁰

Yet identifying the American religion as Christian, and believing that Christian people will seek to obey the Creator, did not resolve any First

333 (1970).

214. Letter from John Marshall to Jasper Adams (May 9, 1883), in DREISBACH, *supra* note 184, at 113-114.

215. James Madison, Memorial and Remonstrance Against Religious Assessments, in THE MIND OF THE FOUNDER 8-16 (Marvin Meyers ed., 1973).

216. W. Reese, DICTIONARY OF PHILOSOPHY AND RELIGION, s.v. "religion," 488.

217. Northwest Ordinance, Section 14, Article 3, 1787.

218. *Id.*

219. *Davis v. Beason*, 133 U.S. 333 (1890).

220. *United States v. Macintosh*, 283 U.S. 605 (1931).

Amendment problems. During the early period of First Amendment jurisprudence, the Court acknowledged the need to look outside the Constitution for a definition of religion. In the important Free Exercise case of *Reynolds*, the Court dealt with the claim of a Mormon regarding the matter of the religious practice of polygamy:

Congress cannot pass a law for the government of the Territories which shall prohibit the free exercise of religion The word "religion" is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted. The precise point of the inquiry is, what is the religious freedom which has been guaranteed.²²¹

In deciding what was a valid exercise of religion, the Court referred to the prevailing, and historic, practice of Christianity which did not consider polygamy as an element of religious free exercise.

On this hearing we can only consider whether . . . an offense was committed of which the territorial court had jurisdiction to try the defendant. And on this point there can be no serious discussion or difference of opinion. Bigamy and polygamy are crimes by the laws of all civilized and *Christian* countries They tend to destroy the purity of the marriage relation Probably never before in the history of this country has it been seriously contended that the whole punitive power of the government for acts (i.e., polygamy), recognized by the general consent of the *Christian* world in modern times as proper matters for prohibitory legislation, must be suspended in order that the tenets of a religious sect encouraging crime may be carried out without hindrance.²²²

My point for mentioning these cases is not to decide the prudence of the Court regarding whether *Reynolds* or *Davis* were decided rightly, but that the decision on the nature of a religious activity was based on the beliefs of Western Christianity and that the definition had *content*, rather than being merely *subjective*. Moving from this approach in the two polygamy cases mentioned here we may turn to *Ballard*,²²³ where the Court "significantly undermined the view expressed in *Davis* . . . that

221. *Reynolds v. United States*, 98 U.S. at 162.

222. *Davis v. Beason*, 133 U.S. at 333, 341-343 (1890).

223. *United States v. Ballard*, 322 U.S. 78 (1944).

beliefs that 'offend the common sense of [Christian] mankind' are not religious."²²⁴

The Court, as subsequent analysis of Establishment Clause cases will reveal, seems to jostle between definitions for religions which have traditional theistic elements and views that seem to be little different from the basic beliefs that anyone and everyone in society might hold so that religion has been robbed of any protection from the state.²²⁵

John Eidsmoe provides a brief look at the stark changes in the definition of religion by the Court:

- 1899, *Holy Trinity*: "... this is a Christian nation."
 1951, *Zorach*: "We are a religious people whose institutions presuppose a Supreme Being."
 1961, *Torcaso*: "... neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs."
 1965, *Seeger*: "... whether a given belief that is sincere and meaningful occupies a place that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God."

The Court has thus moved from Christian, to religions presupposing a Supreme Being, to religions whether or not they believe in God, to whatever is meaningful to the individual. Most of the Founding Fathers would only shake their heads in disbelief.²²⁶

Moreover, the inability of the court to give a definition of religion in the First Amendment has given rise to a number of inconsistent and contradictory decisions, some which border on silliness. This undermines the credibility and dignity of the Court. As we shall see below the fact that the Court has truly not settled on a reasonable meaning of the word

224. See Comment, *Beyond Seeger/Welsh: Redefining Religion Under the Constitution*, 31 EMORY L.J. 973, 979 (1982).

225. This is especially evident in the draft cases. In *Kauten* (133 F.2d at 707) the Court distinguished between beliefs formed from religious training and beliefs only philosophical. In *Seeger* (380 U.S. at 174) the Court required a broad theistic view of religion, while in *Welsh* (398 U.S. 333, 335 (1970)), any belief that would be based on a view of ultimate reality was acceptable. By the latter definition the Court lost any serious distinction between strong personal views and religious faith.

226. EIDSMOE, *supra* note 17, at 151-152.

religion in the text of the First Amendment has caused them to adopt tests that often are strained and which fail to adequately serve between the interests of the state, the public sphere, and private religious interests. This inconsistency has been illustrated by the comments of Keith Fournier, which I have put into chart form for easy contrast.²²⁷

Constitutional	Unconstitutional
A state may lend to parochial school children geography textbooks that contain maps of the United States. <i>Board of Education v. Allen</i> , 392 U.S. 236 (1938).	A State may not lend maps of the United States for use in geography class at parochial schools. <i>Meek v. Pittenger</i> , 421 U.S. 349, 362-66 (1975).
A state may lend a science book to parochial school children. <i>Wolman v. Walter</i> , 433 U.S. 229, 249 (1977).	A state may not lend a science kit. <i>Wolman v. Walter</i> , 433 U.S. 229, 249 (1977).
A state may lend textbooks on American colonial history. <i>Meek v. Pittenger</i> , 421 U.S. 349, 354-55, n.3 - 4 (1975).	A State may not lend a film on George Washington, or a film projector to show it in history class. <i>Meek v. Pittenger</i> , 421 U.S. 349, 354-55, n.3 - 4 (1975).
A state may lend classroom workbooks. <i>Meek v. Pittenger</i> , 421 U.S. 354-355, n.3 - 4, 362-366 (1975).	A state may not lend workbooks in which the parochial school children write, thus rendering them nonreusable. <i>Meek v. Pittenger</i> , 421 U.S. 349, 354-355, n.3 - 4, 362-366 (1975).
A state may pay for bus transportation to religious schools. <i>Everson v. Board of Education</i> , 330 U.S. 1 (1947).	A state may not pay for bus transportation from the parochial schools to the public zoo or natural history museum for a field trip. <i>Wolman v. Walter</i> , 433 U.S. 229, 252-255 (1977).
A state may pay for diagnostic services conducted in the parochial school. <i>Meek v. Pittenger</i> , 421 U.S. 349, 367, 371 (1975).	A state may pay for therapeutic services but they must be given in a different building. <i>Meek v. Pittenger</i> , 421 U.S. 349, 367, 371 (1975).

227. Keith A. Fournier, *In the Wake of Weisman: The Lemon Test is Still a Lemon, But the Psycho-Coercion Test is More Bitter Still*, 2 REGENT U. L.REV. 1, 23 (1992).

Constitutional	Unconstitutional
A state may conduct speech and hearing diagnostic testing inside the sectarian school. <i>Wolman v. Walter</i> , 433 U.S. 229, 241 (1977).	A state may not conduct speech and hearing "services" inside the sectarian school. <i>Meek v. Pittenger</i> , 421 U.S. 349, 367, 371 (1975).
A state may provide counseling to exceptional parochial school students if outside of the parochial school such as a trailer parked down the street. <i>Wolman v. Walter</i> , 433 U.S. 229, 241-248 (1977); <i>Meek v. Pittenger</i> , 421 U.S. 349, 352, n. 2, 367-373.	A state may not provide counseling to exceptional school students unless outside of the parochial school such as a trailer parked down the street. <i>Wolman v. Walter</i> , 433 U.S. 229, 241-248 (1977); <i>Meek v. Pittenger</i> , 421 U.S. 349, 352, n. 2, 367-373.
A state may give cash to a parochial school to pay for the administration of state-written test and state-ordered reporting services. <i>Comm. for Public Educ. & Religious Liberty v. Regan</i> , 444 U.S. 646 (1980).	A state may not provide funds for teacher-prepared tests on secular subjects. <i>Levitt v. Comm. for Public Educ. & Religious Liberty</i> , 413 U.S. 413 U.S. 472 (1973).
A state (public school) may release students during the day for religion classes elsewhere and may enforce attendance at those classes. <i>Zorach v. Clauson</i> , 343 U.S. 306 (1952); <i>Wallace v. Jaffree</i> , 472 U.S. 38, 110-111, 127-136 (1985).	A state (public school) may not provide for religious instruction inside a public school. <i>Illinois ex rel. McCollum v. Board of Education</i> , 333 U.S. 203 (1948).

One might add many other examples but a couple will suffice.²²⁸ A state legislature may begin each day with a prayer by state paid chaplains,²²⁹ but students in public school may not begin each day in prayer.²³⁰ A school may not display the Ten Commandments in the classroom²³¹ but the doors leading into the U.S. Supreme Court chambers, as well as the wall behind the justice display the Ten Commandments.²³²

228. For several other examples see Paulsen, *supra* note 193, at 315-316.

229. *Marsh v. Chambers*, 463 U.S. 783 (1983).

230. *Wallace v. Jaffree*, 1055 S.Ct. 2479 (1985).

231. *Stone v. Graham*, 449 U.S. 39 (1980) (holding the Kentucky statute on posting the Ten Commandments in public school classrooms unconstitutional under the Establishment Clause); see Paul Grimely Kuntz, *The Ten Commandments on School Room Walls? Why Did the Supreme Court Reject the 1978 Kentucky Statute (Stone v. Graham)? Could Such a Law Succeed?*, 9 U. FLA. J.L. & PUB. POL'Y 1 (1997) (analyzing the Kentucky Ten Commandments Statute and suggesting ways in which it might be rewritten to pass constitutional muster).

232. See comment by BORK, *supra* note 15, at 5.

b. *The Founders' intent*

In discussing intent, the proper methodology one should use must be established. Most of the scholars who have argued against interpreting the Establishment Clause and the rest of the Constitution by examining the intent of those who have drafted it have argued that the intent of the Framers is impossible to determine. Further, if one could determine the intent, it is irrelevant to the modern application of the clause.²³³ However, those who advocate what has been labeled "interpretivism" or "originalism" argue that the historical record is clear enough to establish, though not demonstrate,²³⁴ the intent of those who framed the Constitution.²³⁵

This seems to be the most reasonable methodology since it coincides with the way premises are accepted or rejected in almost every other area of mediated study.²³⁶ As it has been noted, to argue that since the historian is a product of his or her own time and objectivity is impossible, one confuses the content of knowledge with the process of obtaining it. One also engages in a self – defeating endeavor since the very statement that

233. See Boris I. Bittker, *The Bicentennial of the Jurisprudence of Original Intent: The Recent Past*, 77 CAL. L. REV. 235 (1989); and Paul Finkelman, *The Constitution and the Intentions of the Framers: The Limits of Historical Analysis*, 50 U. PITT. L. REV. 349 (1989) (for a response to the objections raised by this author see Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U.L. REV. 226 (1988)). It should be noted that there is a whole panoply of methodologies which have been suggested for constitutional adjudication. Among some of the more innovative ones are: RONALD D. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977) (arguing for an interpretation of the constitution as laying down "moral concepts" rather than "particular conceptions" which require the court to frame and "answer questions of political morality," *Id.* at 147); John Leubsdorf, *Deconstructing the Constitution*, 40 STAN. L. REV. 181 (1987) (arguing that the literary theory of deconstructionism, a methodology which presupposes an inherent conflict between contradictory principles or ideas in any text, as applied to the constitution may offer some new insights into the "meaning" of the text); and Daniel S. Goodman, *American Constitutionalism and the Myth of the Creative Era*, 29 SANTA CLARA L. REV. 753 (1989) (criticizing the originalist or interpretivist position and offers a view of constitutionalism which demands social progress as an end to any legitimate methodology).

234. Much of the criticism of this position, *supra* at note 233, comes from the contention that absolute certainty cannot be obtained from history. However, as demonstrated in the following portion of the text, the methodology that embraces historical objectivity does not require certainty; rather, it searches for the meaning that is supported by the evidence. See Aman and House, *supra* note 192, at 16-19 for additional arguments on the possibility of historical objectivity in constitutional interpretation.

235. See Kay, *supra* note 233, at 236-243; Aman & House, *supra* note 192, at 16-19. In our article, we offer a philosophical argument for historical objectivity and note that objectivity is not "absolute" knowledge but a "fair but revisable" presentation that reasonable men and women should accept.

236. Aman & House, *supra* note 192, at 18. The example given is that of geology where fragmentary evidence is analyzed and hypotheses are accepted or rejected based on an underlying epistemology that assumes the possibility of historical objectivity.

one *cannot* come to objective historical conclusions is itself a historical conclusion that asserts itself as an objective one.²³⁷

After determining that objective statements about historical events are possible, one can then turn to the documents surrounding the drafting and adoption of the First Amendment to discover the *intent* of those who framed it. Since numerous documentations can be analyzed, I will attempt only a cursory review of those documents typically invoked when one desires to determine the intent of the Framers, and a more detailed look at documents that are relevant but often ignored.²³⁸

In *Everson*,²³⁹ the Court looked to documents drafted by both Thomas Jefferson and James Madison as controlling in the Court's interpretation of the Establishment Clause.²⁴⁰ In fact, one historian has suggested that Justice Black's treatment of the history of the First Amendment would lead one to the conclusion that "Madison and Jefferson fought the battle for religious freedom in Virginia, wrote a few letters on the subject, and then retired from the issue of defining the proper relationship between Church and State."²⁴¹ In Madison's "Memorial and Remonstrance,"²⁴² Madison argues against the use of governmental authority to enforce inequality and for the "equal right of every citizen to the free exercise of his Religion according to the dictates of conscience."²⁴³ Additionally, Thomas Jefferson's letter to the Danbury Baptists was, at best, an opinion about a constitutional provision enacted while he was in France.²⁴⁴ Furthermore, the views were distilled from the "Virginia Bill of Religious Liberty," which was proposed prior to the events of the Constitutional Congress.²⁴⁵ Although the documents preceding the Congress which contain Madison's view of Church and State are important, the events during and immediately preceding the Congress may, perhaps, be more relevant in light of the collective effort that was put forth to draft the Establishment Clause of the First Amendment.

This leads one to examine a number of Madison's actions before, during, and after the co-drafting of the First Amendment. Among these include Madison's membership on the Congressional Committee that

237. *Id.*

238. In the proceeding section, I will rely primarily upon the work of CORD, *supra* note 17, at 18-82.

239. 330 U.S. at 16,18.

240. 330 U.S. at 11-13.

241. CORD, *supra* note 17, at 121.

242. TOWARD A BENEVOLENT NEUTRALITY: CHURCH, STATE, AND THE SUPREME COURT 586 (Ronald B. Flowers & Robert T. Miller eds., 1987).

243. *Id.* See also Paulsen, *supra* note 193, at 326.

244. See CORD, *supra* note 17, at 36-47, 120-122, 133-143; *Wallace v. Jaffree*, 105 S. Ct. at 2508-20 (Rehnquist J., dissenting); Paulsen, *supra* note 193, at 326.

245. CORD, *supra* note 17, at 20-23.

recommended the Chaplaincy system,²⁴⁶ Madison's initial draft of the Establishment and Free Exercise Clauses,²⁴⁷ Madison's successful proposal for a law punishing Sabbath breakers which was passed the same year as the "Bill for Establishing Religious Freedom,"²⁴⁸ and Madison's "Thanksgiving Day" proclamations passed during his presidency.²⁴⁹ All of these would lead one to think that the caricature of Madison as a strict separationist contains little, if any, validity when the historical record is examined.

Madison's actions,²⁵⁰ taken in conjunction with the actions of the Congress which served under the early presidencies, lead to the historical premise that the Establishment Clause of the First Amendment was drafted primarily to proscribe the actions of Congress in regards to the establishment of a *national* religion and the preferential treatment of one sect over others.²⁵¹ This particular premise is also in agreement with the historical understanding of Church and State held by those who helped settle America and those who later drafted the Constitution.²⁵²

c. *The historical precedence prior to Everson*

Prior to the *Everson* case in 1947, the Supreme Court had examined relatively few cases that dealt with the Establishment Clause. In this subsection, I will go through those cases and examine them for a possible understanding of the Supreme Court's interpretation of the Establishment Clause prior to *Everson* and its progeny.

In *Bradfield v. Roberts*,²⁵³ a suit was brought to enjoin the performance of an agreement between a private hospital run by a monastic order, Sisters of Charity, and the Commissioners of the District of

246. CORD, *supra* note 17, at 23.

247. "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 any pretext, infringed." *Id.* As Cord points out, it is clear from this proposed amendment that Madison viewed the establishment of a state-church as an evil to be protected against through the First Amendment.

248. *Id.* at 217-19.

249. *Id.* at 219.

250. *Id.*

251. For a detailed analysis, see CORD, *supra* note 17, at 49-82. Cord cites numerous documents, including early treaties with American Indians, to support the historicity of the premise that the Establishment Clause does not embrace a strict separationist view but an accommodationist one.

252. For some excellent examples of this, see MARNELL, *supra* note 189; WINTHROP STILL HUDSON & JOHN CORRIGAN, *RELIGION IN AMERICA* (1965); and SIDNEY E. MEAD, *THE LIVELY EXPERIMENT* (1963).

253. 175 U.S. 291 (1899). The following analysis is taken from CORD, *supra* note 17, at 103-04.

Columbia and the Surgeon General.²⁵⁴ The plaintiff, a U.S. citizen and taxpayer, brought the suit on the grounds that it violated the Establishment Clause of the First Amendment.²⁵⁵ The Supreme Court held that, despite the alleged “sectarian character of the hospital,”²⁵⁶ the agreement did not violate the Establishment Clause since the case was one of “a secular corporation being managed by people who hold to the doctrines of the Roman Catholic Church, but who nevertheless are managing the corporation according to the law under which it exists.”²⁵⁷

The next case involved the use of a Congressional Trust to pay a Roman Catholic Mission to educate members of the Sioux tribe.²⁵⁸ In this case, members of the Sioux Tribe brought suit for themselves and all other members to enjoin the Commissioner of Indian Affairs from using Indian funds to execute the contract with the Catholic Missions. The contract was allegedly forbidden by the Indian appropriation acts of 1895, 1896, 1897, 1898, and 1899.²⁵⁹ The Court analyzed the case not under the Establishment Clause but strictly within the confines of the claim that payments under the contract were in conflict with the prohibitions of the appropriation acts. The Court found that the funds were not traceable to monies made available under the acts and, hence, were not subject to the prohibitions.²⁶⁰

In both *Pierce v. Society of Sisters*²⁶¹ and *Cochran v. Louisiana State Board of Education*,²⁶² the Court had the opportunity to review what, potentially, were cases involving First Amendment issues. However, since the Establishment Clause had not been incorporated yet, the Court analyzed each case under an equal protection, Fourteenth Amendment, analysis. In *Pierce*, the Court discussed the “liberties” which the Fourteenth Amendment guaranteed; and it found that among these liberties was the right of parents to teach their children as they chose.²⁶³ This substantive “right” was “found” within the concept of “liberty” in the Fourteenth Amendment. In *Cochran*, Louisiana’s state legislature had enacted a law providing for the purchase of secular textbooks for use by school children, including those enrolled in parochial schools.²⁶⁴ The law was challenged on the basis that the Fourteenth Amendment forbids states

254. *Id.* at 295.

255. *Id.*

256. *Id.*

257. *Id.* at 298-99.

258. *Rueben Quick Bear v. Leupp*, 210 U.S. 50 (1908). The following analysis of this case is also taken from CORD, *supra* note 17, at 104-06.

259. *Id.* at 80.

260. *Id.* at 77-78.

261. 268 U.S. 510 (1925).

262. 281 U.S. 370 (1930).

263. 268 U.S. at 534, 535.

264. 281 U.S. at 373.

from depriving persons of their property without due process of law.²⁶⁵ The Court rejected this argument, stating that the benefits of the program were not to the parochial schools but to the children of the state of Louisiana,²⁶⁶ and introduced the "child benefit theory", a consideration used when examining state aid to parochial schools.²⁶⁷

d. *The meaning of the Establishment Clause prior to Everson*

One can adduce from a historical analysis that an understanding of the Establishment Clause, prior to 1947, was one that viewed the clause as restricting an establishment of national religion²⁶⁸ and any preferential treatment to a particular religious sect.²⁶⁹ The writings of both Madison and Jefferson, as well as the acts of the initial presidents and Congress²⁷⁰ and pre-1947 Court decisions, amply demonstrate this premise. Having established this, I shall now turn to *Everson* and the subsequent cases to evaluate them in light of this historical perspective of the Establishment Clause.

2. *Everson and its progeny*

a. *Everson v. Board of Education of Ewing Township*²⁷¹

The line of demarcation for church-state law was established in *Everson v. Board of Education of Ewing Township*. With this case the states were limited in their ability to define church-state relations and a "wall of separation" was placed between the previously friendly relationship of these two spheres of American life. Knicely says,

The 1947 *Everson* case effected a profound shift of power premised upon what Professor Howe has described as "the blunt and undocumented assumption that when the nation adopted the Fourteenth Amendment it was the people's purpose to outlaw all state laws respecting an establishment of religion, even those which do not appreciably affect property, liberty or equality." Whereas before *Everson* the states had been free to define church-state relationships, *Everson* withdrew from "the states the ability to define church-state

265. *Id.* at 374.

266. *Id.* at 375.

267. *Id.* See also Flowers & Miller, *supra* note 242, at 453.

268. See CORD, *supra* note 17, at 229.

269. See Bradfield v. Roberts, *supra* note 188 at 297-298.

270. See CORD, *supra* note 17, at 21-83.

271. 330 U.S. 1 (1947).

relationships within their own jurisdictions." More importantly, *Everson*, in effect, subjected the states to a uniform national regime of law expounded by the Supreme Court. Prior to *Everson*, there were few, if any, Establishment Clause decisions in any of the federal courts. After *Everson*, they have been legion. Lower court judges, lawyers, commentators, and government officials must now read the tea leaves of the United States Report quite literally to discern the height, length, and depth of what Justice Jackson once predicted would be, and has now become, the "serpentine wall" dividing church and state. The power of elected government to act benevolently toward religion and the moral values associated with it, once geared more loosely to standards prevalent in the communities of the states, is now bound by a straitjacket of judicial doctrine that has become increasingly indecipherable because of shifting divisions on the Court.²⁷²

In *Everson*, the Supreme Court was faced with a case in which the Ewing Township Board of Education, pursuant to authority granted to it by a New Jersey statute, authorized reimbursement to parents of money expended by them for public bus transportation of their children to and from school.²⁷³ Part of this money went to parents for the payment of transportation to and from parochial schools.²⁷⁴ The appellant was a taxpayer in the school district who brought the suit as a violation of provisions in the state and federal constitutions,²⁷⁵ claiming that the action of the school board violated both the due process clause of the Fourteenth Amendment and the Establishment Clause of the First Amendment as made applicable to the states by the due process clause of the Fourteenth Amendment.²⁷⁶

The first contention raised by the appellant was readily dismissed by the Court on the grounds that the "fact that a state law, passed to satisfy a public need, coincides with the personal desires of the individuals most directly affected is certainly an inadequate reason for us to say that a law has erroneously appraised the public need."²⁷⁷ This is the same reasoning found

272. *Knically*, *supra* note 25, at 275 (footnotes omitted).

273. 330 U.S. at 3.

274. *Id.*

275. *Id.* at 4.

276. *Id.* at 5.

277. *Id.* at 4.

in *Cochran*²⁷⁸ that held a tax may be constitutionally valid even if the people against whom it is levied are not directly benefited by the tax.²⁷⁹

The second contention the Court examined was the Establishment Clause issue. After a brief analysis of the various persecutions of sects which have allegedly flowed from government favored churches,²⁸⁰ the Court looked at the history of establishment of church-states and state-churches²⁸¹ in the colonies, with particular emphasis on Virginia,²⁸² which Justice Black saw as the paradigm for proper analysis.²⁸³ Justice Black concluded his historical analysis with this often quoted passage:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against the establishment of religion by law was intended to erect "a wall of separation between church and State."²⁸⁴

By making this statement, Justice Black effectively incorporated not only the Establishment Clause but also an interpretation of that clause built on a concept of strict separation between church and state.²⁸⁵ By using the

278. 281 U.S. 370 (1930), *see infra* text accompanying note 297.

279. *Id.* at 375.

280. 330 U.S. at 8.

281. For an excellent discussion arguing that two "types" of institutions existed in the colonial era and into the early 19th century (e.g. the "state-church" [Virginia, Georgia] and the "church-state" [Massachusetts]), see MARNELL, *supra* note 189, at 63-72 and 49-61, respectively. Marnell argues that the reformation era led to the "Calvinistic" styled church-state of New England, specifically Massachusetts, and the English style of the established church influenced the state-church model followed in the South.

282. 330 U.S. at 11.

283. *Id.* at 12-14.

284. *Id.* at 15-16.

285. *See* SMITH, *supra* note 189, at 299. Concerning this opinion, Smith wrote:

With the dicta of *Everson* we enter the golden age of the doctrine of separation of church and state. Roger Williams' famous metaphor has never been more loudly saluted nor more unjustly burdened with so much that is strange to its earliest pronouncement than in the train of the *Everson* case.

verb “means” to preface his discussion of the Establishment Clause, Justice Black makes an assertion about the historical meaning of the test as applied today, opening his analysis to critical evaluation.

One of the most glaring problems most have noticed about Justice Black’s decision is the selective use of the historical data.²⁸⁶ For example, both Justice Black’s opinion and Justice Rutledge’s dissenting opinion²⁸⁷ completely ignore pertinent facts surrounding the adoption of the First Amendment.²⁸⁸ Justice Black’s suggestion that the Establishment Clause “means” that neither state nor Federal government may aid “all” religions²⁸⁹ seems to contradict completely the historical record, particularly when both James Madison and early Congresses appropriated aid for various religious groups.²⁹⁰

Additionally, Justice Black’s use of Jefferson’s letter to the Danbury Baptists and his adoption of Jefferson’s metaphor²⁹¹ provide further insight into the failure to examine fully the record.²⁹² As one author notes,²⁹³ only one year after Jefferson wrote his letter to the Danbury Baptists he approved a treaty with the Kaskaskia Indians, pledging federal money to build them a Roman Catholic Church and to support their priest.²⁹⁴

Despite the glaring selectivism applied to the historical record that produced a strict separationist perspective, a further question is raised by the last lines of the majority opinion. Justice Black writes, “The 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.”²⁹⁵ If Justice Black’s earlier statement

286. See Smith, *supra* note 189, at 298; CORD, *supra* note 17, at 103; and MARNELL, *supra* note 189. Even strict separationist Leonard Levy sees the grave problems with Black’s analysis:

Black did not merely misread history, nor wishfully attribute to it a factual content that it did not possess; he mangled and manipulated it by artfully selecting facts from one side only, by generalizing from grossly inadequate ‘proof,’ by ignoring confusion and even contradictions in the minds of some of his key historical protagonists, and by assuming that silence on the part of their opponents signified acquiescence. In this way he invoked the fatherhood of ‘the framers’ in support of his position.

LEVY, *supra* note 26 at 68-69.

287. 330 U.S. at 28 (J. Rutledge, et al., *dissenting*).

288. See *supra* notes 23-36.

289. 330 U.S. at 15.

290. See CORD, *supra* note 17, at 112, for his discussion of the early appropriation acts, signed into law by Madison, which authorized the expenditure of Federal funds for the aid of various religious groups working among the Indian tribes. This is particularly relevant since these early actions involved Congressional action that is specifically addressed by the Establishment Clause.

291. 330 U.S. at 16, 18. See also Dreisbach, *supra* note 17.

292. See *supra* text accompanying notes 286-94.

293. See CORD, *supra* note 17, at 115.

294. *Id.* Cord’s point is well taken. If Jefferson meant by the “wall of separation” a “high and impregnable” wall (330 U.S. at 18), he would not have signed the treaty since the treaty provides aid to a religious institution.

295. 330 U.S. at 18.

was applicable to the existing facts, one wonders how he could conclude that this wall was not breached. In fact the dissenting Justices, led by Justice Rutledge, criticized the majority's opinion for not following the logical conclusion of its analysis.²⁹⁶ However, if one examines the analysis given by the majority, their reliance upon the aid which is given to all citizens and which may coincide with the desires of some is similar to the argument given by the *Cochran* Case in upholding the Louisiana statute.²⁹⁷ In *Cochran*, the Court upheld a statute which gave secular textbooks to all children in the state and which happened to benefit those children going to the parochial schools.²⁹⁸

While it rejects the majority's opinion, the dissent in *Everson* adopts the same historical arguments to conclude that the Establishment Clause requires strict separation of church and state.²⁹⁹ Thus the dissent engages in the same selective use of the historical documents, relying primarily on Madison's "Memorial and Remonstrance" and Jefferson's Letter.³⁰⁰

b. *McCullum*³⁰¹ to *Lemon*³⁰²

Although the majority upheld as constitutional the program of the school district in *Everson*, it was only a matter of time before the strict separationist dicta of *Everson* was used to defeat state action under the Establishment Clause. In fact the very next year, 1948, the Court in *McCullum v. Board of Education*³⁰³ ruled that a release time program for religious instruction violated the Establishment Clause of the First Amendment. The Court relied on the conclusion reached in *Everson* that the "wall of separation" between church and state "must be kept high and impregnable"³⁰⁴ while at the same time rejecting the state's argument that the First Amendment, historically, was intended to forbid "only government preference of one religion over another."³⁰⁵

In subsequent cases, the Court gradually developed some tests for the application of the Establishment Clause to suspect state action. In *Engel v.*

296. *Id.* at 49. See also Justice Jackson's remark that the majority's opinion reminds him of "Julia, who according to Byron's reports, 'whispering "I ne'er consent," consented.'" (330 U.S. at 19).

297. *Id.* at 7; cf. 281 U.S. 370 (1930).

298. 281 U.S. at 374.

299. See 330 U.S. at 26-27 (Jackson, J., with Frankfurter, J., *joining*); *Id.* at 31-42 (Rutledge, J., et al.).

300. *Id.*

301. 333 U.S. 203 (1948).

302. 403 U.S. 602 (1971).

303. 333 U.S. at 203.

304. *Id.* at 212.

305. *Id.* at 211.

Vitale,³⁰⁶ the Court held that a non-denominational prayer, required by the public board of education and drafted by a state agency which was recited at the beginning of each school day, violated the Establishment Clause. The Court utilized the same historical analysis as *Everson*³⁰⁷ and concluded that strict separation of church and state must be sustained.³⁰⁸ Justice Douglas, in his concurring opinion,³⁰⁹ stated that "the great condition of religious liberty is that it be maintained free from sustenance as also from other interferences, by the state."³¹⁰ He found support for this statement, which points towards the test by his majority opinion in *Lemon*,³¹¹ in Justice Rutledge's dissent in *Everson*.³¹² In another case decided almost one year later, *School District of Abington Township v. Schempp*,³¹³ the Court ruled that a statute requiring the reading of ten verses from the Bible without comment at the beginning of each school day in public school classrooms violates the Establishment Clause, even if individual students may be excused.³¹⁴ The Court again squarely rejected the state's contention that the First Amendment forbids only governmental preference of one religion over another.³¹⁵ Furthermore, the Court expanded on the *neither aiding nor inhibiting of religion* test set forth by Justice Douglas in *Engel*.³¹⁶ The Court found:

The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that *to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion*.³¹⁷

The Court felt that this test was consistent with the interpretation of the Establishment Clause that they adopted in the ruling and, for that matter, which was adopted in *Everson*, *McCullum*, and *Engel*.

306. 370 U.S. at 421.

307. *Id.* at 428.

308. *Id.* at 436.

309. *Id.* at 437.

310. *Id.* at 444.

311. 403 U.S. 602, 612-13 (1971).

312. 330 U.S. at 29.

313. 374 U.S. 203 (1963).

314. *Id.* at 223.

315. *Id.* at 216.

316. *Supra* note 306 and accompanying text.

317. 374 U.S. at 222 (emphasis added).

c. *The Lemon*³¹⁸ test, a "tripart" analysis:

Prior to this decision, the Court applied a rough test of several factors including purpose and effect,³¹⁹ but not entanglement. In *Lemon*, the Court held that a proper Establishment Clause analysis of any state or Federal action should include a tripart test:

First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, *Board of Education v. Allen*, 392 U.S. 236, 243 (1968); finally, the statute must not foster "an excessive government entanglement with religion."³²⁰

Under this tri-part test, the Establishment Clause allegedly takes a "neutral" stand towards religion, promoting government activity in extending general benefits to nonreligious and religious interests alike.³²¹

In most of the decisions that soon followed *Lemon*, the Court upheld the application of this tripart test in an Establishment Clause analysis. In *Committee for Public Education & Religious Liberty v. Nyquist*,³²² the Court analyzed a New York statute which permitted financial aid to non-public elementary and secondary schools. The Court reaffirmed the analysis of *Everson*,³²³ and it adopted the test as expounded in *Lemon*.³²⁴ The Court determined that the New York statute, "as written," violated the second prong of the *Lemon* test by having a "primary effect that advances religion."³²⁵ In *Wallace v. Jaffree*,³²⁶ the Court characterized the Establishment Clause as requiring "complete neutrality towards religion," citing the strict separation decisions.³²⁷ The Court found that the Alabama statute, which allowed for a voluntary moment of silence, not to exceed one minute, at the beginning of each school day³²⁸ violated the first prong of the *Lemon* test by having "no secular purpose."³²⁹

318. *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971).

319. *Supra* note 317.

320. 403 U.S. at 612-13.

321. See Bird, *Freedom From Establishment and Unneutrality in Public School Instruction and Religious School Regulation*, 1979 HARV. J.L. & PUB. POL'Y 143-154.

322. 413 U.S. 756 (1973).

323. *Id.* at 770.

324. *Supra* note 320.

325. 413 U.S. at 798.

326. 472 U.S. 38 (1985).

327. *Id.* at 52.

328. *Id.* at 38.

329. *Id.* at 55 (holding that a statute must have a secular legislative purpose whose primary effect must be one that neither advances nor inhibits religion).

Finally the fourth prong suggested in *Lemon*, which Justice Brennan and Justice Marshall sought to be added, the “political devisiveness” test, entails difficulty in that it takes the providence of political interaction within a democratic society away from the people and legislatures and places it with the life tenured Court. I find it hard to believe that Brennan, Marshall, and Burger are attempting to save us from a political controversy which they feel we just don’t have time enough to consider. Chief Justice Burger announced that it “goes against our entire history and tradition to permit questions of the Religion Clauses to assume such importance in our legislatures and in our elections that they could divert attention from (other issues).”³³⁰

d. *Deviations from Lemon*

Not all the Court’s decisions have so willingly followed the *Everson* line of cases. In fact, some have significantly deviated from the strict separationist approach. *Zorach v. Clauson*³³¹ is a relatively close case to the *Everson* decision which departed from the strict separation approach. In *Zorach*,³³² the Court examined a released time program that enabled public school students to receive religious instruction off school grounds during the school day for an hour each week.³³³ The Court ruled that this released time program did not violate the Establishment Clause, because it merely accommodated religious belief and acknowledged the nation’s religious heritage. Note the following language:

The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the *common sense* matter. Otherwise the state and religion would be aliens to each other – hostile, suspicious, and even unfriendly The government must be neutral when it comes to competition between sects.³³⁴

330. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

331. 343 U.S. 306 (1952).

332. *Id.*

333. *Id.*

334. *Id.* at 312, 314 (emphasis added).

The neutrality that the Court talks about in *Zorach*³³⁵ seems at odds with the neutrality mentioned in *Lemon*³³⁶ and those cases following it. In *Zorach*, neutrality is equivalent to accommodation without preferentialism. Since the release program was off school grounds and voluntary, the Court found no problem with accommodating the religious needs of the students.³³⁷

In a subsequent case, *Marsh v. Chambers*,³³⁸ the Court was faced with a challenge to a state legislature's use of a paid chaplain who opened each session with the chaplain's prayer.³³⁹ The Court did not mention the tripart test³⁴⁰ and, instead, opted to use an alternative historical test.³⁴¹ The Court also quoted *Zorach* approvingly, stating that "[w]e are a religious people whose institutions presuppose a Supreme Being." *Zorach v. Clauston*, 343 U.S. 306, 313 (1952).³⁴² This case presents a rather refreshing approach that rejects a test when the overwhelming historical evidence points to the practice as a permissible means of accommodation.

One year after *Marsh*, the Court decided a case³⁴³ that addressed the display of a crèche in a city park. The crèche was owned by a non-profit organization and included with the nativity scene a Santa Claus house, a Christmas tree, and a "Seasons Greetings" banner.³⁴⁴ The Court found that the display did not violate the tripart test in *Lemon* since the "City has a secular purpose for including the creche . . . the City has not impermissibly advanced religion, and that including the creche does not create excessive entanglement between religion and government."³⁴⁵ In analyzing the second part of the test, the Court found that some advancement or accommodation is permissible since the Court "has refused 'to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective as illuminated by history.'" *Walz v. Tax Commission*, 397 U.S. 664, 671 (1970).³⁴⁶

A case that is similar to *Lynch* in its accommodationist use of the *Lemon* test is *Bowen v. Kendrick*.³⁴⁷ In this case, the Court looked at the

335. *Id.* 306.

336. 403 U.S. 602.

337. 343 U.S. at 313-314.

338. 463 U.S. 783 (1983).

339. *Id.*

340. *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

341. 463 U.S. at 791. The Court states, "This unique history leads us to accept the interpretation of the First Amendment draftsmen who saw no real threat to the Establishment Clause arising from a practice of prayer similar to that now challenged." *Id.*

342. *Id.* at 792.

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

344. *Id.* at 671.

345. *Id.* at 685.

346. *Id.* at 678.

347. 487 U.S. 589 (1988).

validity of the Adolescent Family Life Act which provided for, in part, aid to organizations that provided services necessary for the care of pregnant adolescent parents and adolescent parents.³⁴⁸ The court rejected the Establishment claim, finding that the primary effect of the statute did not advance religion due to the “long history of cooperation and interdependency between governments and charitable or religious organizations.”³⁴⁹ Justice Kennedy, joined by Justice Scalia, states in a concurring opinion that the fact that public funds go to pervasively sectarian institutions is not sufficient to invalidate a statute that has been found constitutional on its face.³⁵⁰

Possibly the most significant Establishment Clause case since *Lemon* is *Agostini v. Felton*.³⁵¹ *Agostini* has squarely moved from a strict separationist position to an accommodationist approach regarding the issue of government aid that directly aids the educational religious organizations. The significance of this case is evident when the Court contrasted two earlier cases in its analysis.

In *Aguilar v. Felton*,³⁵² the United States Supreme Court, in applying the *Lemon* test, held that New York City’s program that sent public school teachers into parochial schools to provide remedial education necessitated an excessive entanglement of church and state and, therefore, violated the Establishment Clause. In a companion case, *School District of Grand Rapids v. Ball*,³⁵³ the Supreme Court held that a “Shared Time” program was analogous to New York City’s Title I program and, therefore, was invalid. The Court found in both cases that providing government funding for religious organizations violated the third prong of *Lemon*. Since parochial schools were deemed to have an atmosphere dedicated to the advancement of religious belief, any instruction in that atmosphere was perceived to create “[t]he potential for impermissible fostering of religion.”³⁵⁴

According to *Ball*, the presence of public teachers on parochial school grounds had a second related impermissible effect: It created a “graphic symbol of the ‘concert or union or dependency’ of church and state,”³⁵⁵ especially when perceived by “children in their formative years.”³⁵⁶ The Court feared that this perception of a symbolic union between church and

348. 42 U.S.C. §§ 300z to 300z-10 (1982).

349. 487 U.S. at 604.

350. *Id.* at 622. Justice Kennedy states, “the question in an as-applied challenge is not whether the entity is of a religious character, but how it spends its grant.”

351. *Agostini v. Felton*, 117 S.Ct. 1997 (1997).

352. 473 U.S. 402, 413 (1985).

353. 473 U.S. 373 (1985).

354. *Id.* at 386 (quoting *Meek v. Pittenger*, 421 U.S. 349, 372 (1975)).

355. *Id.* at 391 (quoting *Zorach v. Clauson*, 343 U.S. 306, 312 (1952)).

356. *Id.* at 390.

state would "conve[y] a message of government endorsement . . . of religion" and thereby violate a "core purpose" of the Establishment Clause.³⁵⁷

Third, the Court found that the Shared Time program impermissibly financed religious indoctrination by subsidizing "the primary religious mission of the institutions affected."³⁵⁸ The Court separated its prior decisions evaluating programs that aided the secular activities of religious institutions into two categories: those in which it concluded that the aid resulted in an effect that was "indirect, remote, or incidental" (and upheld the aid); and those in which it concluded that the aid resulted in "a direct and substantial advancement of the sectarian enterprise" (and invalidated the aid).³⁵⁹ In light of *Meek* and *Wolman*, Grand Rapids' program fell into the latter category.

The New York City Title I program challenged in *Aguilar* closely resembled the Shared Time program struck down in *Ball*, but the Court found fault with an aspect of the Title I program not present in *Ball*: The Board had "adopted a system for monitoring the religious content of publicly funded Title I classes in the religious schools."³⁶⁰ Even though this monitoring system might prevent the Title I program from being used to inculcate religion, the Court concluded, as it had in *Lemon* and *Meek*, that the level of monitoring necessary to be "certain" that the program had an exclusively secular effect would "inevitably resul[t] in the excessive entanglement of church and state," thereby running afoul of *Lemon*'s third prong.³⁶¹

The Court's conclusion that the Shared Time program in *Ball* had the impermissible effect of advancing religion rested on three assumptions: (i) any public employee who works on the premises of a religious school is presumed to inculcate religion in her work; (ii) the presence of public employees on private school premises creates a symbolic union between church and state; and (iii) any and all public aid that directly aids the educational function of religious schools impermissibly finances religious indoctrination, even if the aid reaches such schools as a consequence of private decisionmaking.

Since *Aguilar* and *Ball*, the Court has had several opportunities to revisit the issue of whether placement of government officials or giving of aid to sectarian schools was presumptively a government inculcation of religious belief. In *Zobrest v. Catalina Foothills School District*,³⁶² the

357. *Id.* at 389.

358. *Id.* at 385.

359. *Id.* at 393 (internal quotation marks omitted).

360. *Id.* at 409.

361. *Id.*

362. 509 U.S. 1 (1993).

Court expressly disavowed the notion that “the Establishment Clause [laid] down [an] absolute bar to the placing of a public employee in a sectarian school.”³⁶³ “Such a flat rule, smacking of antiquated notions of ‘taint,’ would indeed exalt form over substance.”³⁶⁴ Instead, the Court assumed that the interpreter would dutifully discharge her responsibilities as a full time public employee and comply with the ethical guidelines of her profession by accurately translating what was said.³⁶⁵ Because the only *government* aid in *Zobrest* was the interpreter, who was herself not inculcating any religious messages, no *government* indoctrination took place and the Court was able to conclude that “the provision of such assistance [was] not barred by the Establishment Clause.”³⁶⁶

In *Agostini*, the Court also acknowledged that it had departed from the idea found in *Ball* that all governmental aid that directly assists the educational function of religious schools is invalid. Thus, *Agostini* acknowledges that it is no longer, as a matter of law, presumed that governmental aid results in a “symbolic union” of church and state.

The Court also looked at whether such aid would result in excessive entanglement. The Court found that not all entanglements have the effect of advancing or inhibiting religion. The Court states, “[i]nteraction between church and state is inevitable, . . . and we have always tolerated some level of involvement between the two. Entanglement must be ‘excessive’ before it runs afoul of the Establishment Clause.”³⁶⁷

The Court concluded by holding: 1) “that a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees pursuant to a program containing safeguards such as those present here;” and 2) “that a carefully constrained program also cannot reasonably be viewed as an endorsement of religion.”³⁶⁸

e. Alternatives to the Lemon tripart test

In recent years the Court has used two major alternative tests to that of *Lemon*, the endorsement test and the coercion test. Neither test has yet received much support from the entire Court as serious permanent alternatives to the *Lemon* tests.

363. *Id.* at 13.

364. *Id.*

365. *Id.* at 12.

366. *Id.*

367. *Agostini*, 117 S.Ct. at 2015. See, e.g., *Bowan*, 487 U.S. at 615-17.

368. *Id.* at 2016.

1. Endorsement test

The chief proponent of this test is Justice O'Connor.³⁶⁹ Justice O'Connor argues for the abandonment of the entanglement prong as an element for separate analysis.³⁷⁰ She reasons that the "anomalous results"³⁷¹ in many of the Court's analyses of Establishment Clause claims were due to the "establishment prong" of the tri-part test.³⁷² Thus in *Wallace v. Jaffree*,³⁷³ Justice O'Connor argues that "direct government action endorsing religion or particular religious practice is invalid under this approach because it 'sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'"³⁷⁴ She argues that "endorsement is useful" because of the "analytical content" it gives to the Lemon-mandated inquiry.³⁷⁵ Justice O'Connor views this as a type of preference test since "it does not preclude government from acknowledging religion or from taking religion into account in making law and policy,"³⁷⁶ however, it does "preclude government from conveying or attempting to convey a message that religion or a particular religious belief is favored or preferred."³⁷⁷

This view has met with considerable acceptance, particularly among those who wish to maintain the *Lemon* test.³⁷⁸ However, it has also faced its share of criticism. One critic is Justice Kennedy who, in his dissenting opinion in *Allegheny v. ACLU*,³⁷⁹ criticizes Justice O'Connor's endorsement test as one that requires an inquiry "into the feelings of the

369. See *Allegheny v. ACLU*, 492 U.S. 573 (1989) (O'Connor, J., concurring); *Aguilar v. Felton*, 473 U.S. 402, 422-30 (1985) (O'Connor, J., dissenting); *Lynch v. Donnelly*, 465 U.S. 668, 691-692 (1984) (O'Connor, J., concurring); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (O'Connor, J., concurring in judgment); see also Arnold H. Loewy, *Rethinking Government Neutrality Towards Religion Under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight*, 64 N.C.L. REV. 1049, 1050-1052 (1986).

370. *Aguilar v. Felton*, 473 U.S. at 422-30 (O'Connor, J., dissenting).

371. See Alexandra Petrich, *Bowen v. Kendrick: Retreat From Prophylaxis in Church-State Relationships*, 16 HASTINGS CONST. L.Q. 513, 521 (1989):

For example, we permit a State to pay for bus transportation to a parochial school, *Everson v. Board of Education*, 330 U.S. 1 (1947), but preclude states from providing buses for parochial school field trips, on the theory that such trips involve excessive state supervision of the parochial officials who lead them. *Wolman v. Walter*, 433 U.S. 229 (1977).

Id. at n.62.

372. *Id.* at 521 n.63 (1989).

373. 472 U.S. 38.

374. *Id.*

375. *Id.*

376. *Id.*

377. *Id.*

378. See Loewy, *supra* note 369; Note, *Sharpening the Prongs of the Establishment Clause: Applying Stricter Scrutiny to Majority Religions*, 23 GA. L.REV. 1085 (1989).

379. 492 U.S. 573, 654 (1989).

objective observer” without any meaningful guidance on resolution of that inquiry.³⁸⁰ Justice Kennedy’s point lies in his perception of the inherent ambiguities in Justice O’Conner’s approach.

2. *Coercion test*³⁸¹

One of the first cases to use a coercion analysis in relation to the establishment clause was *Engel*.³⁸² The Supreme Court found that a public school prayer (“Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country”) said aloud each day in each classroom with a teacher present, violated the Establishment Clause.³⁸³ Although the Court was clear to state, “[W]hile proof of coercion might provide a basis for a claim under the Free Exercise Clause, it [is] not a necessary element of any claim under the Establishment Clause”³⁸⁴ The Court went on to find that “when the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain.”³⁸⁵

This analysis was incorporated into a component of the *Lemon v. Kurtzman* test in the fragmented *Allegheny v. ACLU*, opinion.³⁸⁶ In *Allegheny*, Allegheny County had permitted (since 1981) a Roman Catholic group to display a crèche in the county courthouse. Eventually, the crèche was displayed in a separate area of the courthouse (on a staircase) near a “gallery forum” (with other cultural displays) but far enough away to be distinguished from the forum. The case also involved a challenge to the display of a Menorah in front of the City-County building.

Justice Kennedy, in his concurrence, rejects the interpretation of the *Lemon* prong (primary or principle effect of the government practice should neither advance nor inhibit religion) that would include any direct or symbolic advancement. He states that “absent coercion, the risk of infringement of religious liberty by passive or symbolic accommodation is minimal. Our cases reflect this reality by requiring a showing that the symbolic recognition or accommodation advances religion to such a degree

380. *Id.* See also Hirt, “Symbolic Union” of Church and State and The “Endorsement” of Sectarian Activity: A Critique of Unwieldy Tools of Establishment Clause Jurisprudence, 24 W. FOR. L.R. 823 (1989).

381. Rodriguez, *God is Dead: Killed by Fifty Years of Establishment Clause Jurisprudence*, 23 SAINT MARY’S L.J. 1155, 1171-1184 (1992).

382. *Engel v. Vitale*, 370 U.S. 421 (1962).

383. *Id.* at 430 (1962).

384. *Id.*

385. *Id.* at 431.

386. *Allegheny v. ACLU*, 492 U.S. 573 (1989).

that it actually “establishes a religion or religious faith, or tends to do so.”³⁸⁷ He goes on to state how coercion may be evident:

Our cases disclose two limiting principles: government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact “establishes a [state] religion or religious faith, or tends to do so.” *Lynch v. Donnelly*, 465 U.S., at 678. These two principles, while distinct, are not unrelated, for it would be difficult indeed to establish a religion without some measure of more or less subtle coercion, be it in the form of taxation to supply the substantial benefits that would sustain [492 U.S. 573, 660] a state-established faith, direct compulsion to observance, or governmental exhortation to religiosity that amounts in fact to proselytizing.³⁸⁸

In *Lee v. Weisman*,³⁸⁹ public school officials in middle and high schools in providence would routinely invite members of the clergy to give invocations and benedictions at their school’s graduation ceremonies. Justice Kennedy wrote, “the principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause.”³⁹⁰ Kennedy found that the school’s action violated the second prong of the *Lemon* test by coercing students, who “are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention.”³⁹¹ Kennedy goes on to explain how this is distinguished from *Marsh* where the Court did not find a violation of the establishment clause. Kennedy states,

But there are also obvious differences. The atmosphere at the opening of a session of a state legislature, where adults are free to enter and leave with little comment and for any number of reasons, cannot compare with the constraining potential of the one school event most important for the student to attend. The influence and force of a formal exercise in a school graduation are far greater than the prayer exercise we condoned in *Marsh*. The *Marsh* majority in fact gave

387. *Lynch*, 465 U.S. at 678.

388. *Id.* at 662.

389. 505 U.S. 577 (1992).

390. *Id.* at 587.

391. *Id.* at 593.

specific recognition to this distinction, and placed particular reliance on it in upholding the prayers at issue there.³⁹²

f. *Summary: separation to accommodation*

From the foregoing, one can see two distinct directions the Court has taken in Establishment Clause analysis. The first, represented by the general strict separationist sentiments of *Everson*,³⁹³ tends to utilize a tripart test as an instrument that roots out any vestige of separation. The second, represented by *Zorach*³⁹⁴ and cases following it, especially *Agostini*,³⁹⁵ presents an accommodationist view of history that allows non-preferential aid to religions.

3. *In search of a new model for Establishment Clause claims*

Strict separation is an unworkable, if not unconstitutional, model. Articulated in *Everson*,³⁹⁶ but arguably not followed,³⁹⁷ it posits a view of the church and state which is out of accord with the intention of the Framers,³⁹⁸ sets forth a misguided, if not contrived, presentation of the historical information on which it relies,³⁹⁹ and is contrary to the relationship between organized religion and the state for most of America's history.⁴⁰⁰ *Everson* could not apply the strict separation model it engendered because of the generally understood meaning of the First Amendment that preceded *Everson*. It floundered in trying to separate religion itself from generally applicable and non-preferential government assistance to school children without distinction. This may be a significant contributing factor that brought the inconsistency in *Everson*. Moreover, the comments of Justice Black are addressed to the institutional church or

392. 463 U.S. 792.

393. *Everson v. Board of Education*, 330 U.S. 1 (1947).

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

395. 521 U.S. 203.

396. 330 U.S. 1 (1947).

397. 330 U.S. at 18 (Jackson, J., joined by Frankfurter, J., *dissenting*):

[The] Court's opinion marshals every argument in favor of state aid and puts the case in its most favorable light, but much of its reasoning confirms my conclusions that there are no good grounds upon which to support the present legislation. In fact, the undertones of the opinion, advocating complete and uncompromising separation of Church from State, seem utterly discordant with its conclusion yielding support to their commingling in educational matters.

398. See *supra* text accompanying footnotes 58-179.

399. See comment by LEVY, *supra* note 286.

400. See *supra* text accompanying footnotes 58-179.

its sub-groups such as schools, not to individual religious practices of citizens. Subsequent Court decisions attacked individual religious practices apart from the matter of the institution of the church and the institution of the state.

Recent Court decisions have begun to unravel these strict separationist perspectives enacted through the artificial *Lemon* tests, instead favoring more of an accommodationist view. The *Lemon* tests are still referred to in an erratic way, but *Lemon* and strict separation appear to be gone for the immediate future. As one author has noted, the decision in *Bowen v. Kendrick*⁴⁰¹ has sufficiently eroded the *Lemon* test so that there is a need for a new "intellectually defensible" standard.⁴⁰² Subsequent cases have even done more so. It is this need that has created in the past number of years suggestions for re-tooling the tripart test or re-inventing another test altogether and has caused Courts and legal scholars seek to find a new view of the Establishment Clause which does not yield such divergent and contradictory decisions.⁴⁰³

The purpose of this section is not to catalogue every attempt to grapple with a new model for Establishment Clause jurisdiction; rather, its purpose is to present certain representative approaches to understanding the Establishment Clause or models that are oriented around fairly clear interpretations of the Establishment Clause. Each of these models is an attempt to allow the Establishment Clause to be more "friendly" toward religion. Once a commitment has been made to a particular understanding of what the clause "means," one then can analyze the appropriate significance of this meaning.⁴⁰⁴

a. *State constitutions*

Some authors, disturbed with the "trend" in Establishment Clause adjudication on the federal level, have urged litigants to go to their state constitutions since they provide stricter, more explicit prohibitions on the relationship between the state and religion.⁴⁰⁵ Although this does not solve

401. 487 U.S. 589.

402. See Petrich, *supra* note 371.

403. An emerging alternative theory, not discussed in this article, to that of strict separationism and accommodationism, is the neutrality theory. See ESBECK, *supra*, note 44; see also Carl H. Esbeck, *The Establishment Clause: an Individual Rights Guarantee Or a Structural Clause Limiting Governmental Power?*, 84 IOWA L.REV. 1 (1998).

404. Aman and House, *supra* note 192.

405. See Note, *Rebuilding the Wall Between Church and State: Public Sponsorship of Religious Displays Under the Federal and California Constitutions*, 37 HASTINGS L.J. 499 (1986); and Robert F. Utter & Edward J. Larson, *Church and State on the Frontier: The History of the Establishment Clauses in the Washington State Constitution*, 15 HASTINGS CONST. L.Q. 451(1988).

the Federal Establishment Clause issue, it does, perhaps, provide a "stricter" forum for the decision of Establishment Clause issues in general.

b. Deconstruction and moral theory

I have placed these rather divergent theories together since, though they posit different models, they both require a non-interpretivist approach to the Establishment Clause.

The theory of deconstruction of a text is not new; it has been applied in the area of literary theory for quite some time.⁴⁰⁶ Deconstructionism essentially views text as a "scene of repressed conflict"⁴⁰⁷ that the reader inevitably joins as the text is read. Such a theory is based on a type of Hegelian understanding whereby the text presents both thesis and antithesis; and the reader may or may not provide a synthesis. It is this synthesis, obtained internally by the reader, which becomes the meaning of the text. Thus, it is not difficult to conceive how nine Supreme Court Justices may develop nine syntheses of the text. It is also not difficult to see the inherent problems with such an approach. The essential task accomplished by the reading involves how "it may enlarge our thoughts about what a constitution is and how one can live in it."⁴⁰⁸ Although "readings that develop this perspective [a deconstructionist one] should not lead to the demolition and dismissal of the Constitution,"⁴⁰⁹ this is the very thing that happens. Once the text is couched in internally conflicting terms, the text "unwinds" under any "objective" attempt to analyze it.

Another non-interpretivist model advocated is the "political-moral reasoning model" of Establishment Clause adjudication.⁴¹⁰ This approach may either find the non-interpretivist position unconvincing⁴¹¹ or as defensible, yet not preferable, to the non-interpretivist.⁴¹² The theory is founded on the idea of "moral evolution" or "belief in moral progress."⁴¹³ In applying this to the Establishment Clause, one author has commented, "None of these relatively nonactivist theories, however, adequately explains the Supreme Court's Establishment Clause doctrine. This doctrine requires instead a nonoriginalist theory of political-moral reasoning, a theory that permits the Court simply to identify and apply

406. See JACQUES DERRIDA, *DISSEMINATION* (B. Johnson trans, 1981); JACQUES DERRIDA, *OF GRAMMATOLOGY* (G. Spivak trans 1976); and BARBARA JOHNSON, *THE CRITICAL DIFFERENCE* (1980).

407. Leubsdorf, *supra* note 233, at 182.

408. *Id.* at 181.

409. *Id.*

410. See Daniel O. Conkle, *Toward a General Theory of the Establishment Clause*, 82 NW. U.L. REV. 1113 (1988).

411. See DWORKIN, *supra* note 233.

412. See MICHAEL PERRY, *THE CONSTITUTION, THE COURTS, AND HUMAN RIGHTS* (1982).

413. *Id.* at 97.

principles and policies that are sound."⁴¹⁴ He goes on to state that "judicial activism of the sort defended here may be indefensible in other areas of constitutional law. In this particular setting, however, the court's activism is not merely justified, it is essential to the political and moral health of our society."⁴¹⁵

Critics of this theory have laid the ax, so to speak, at its roots by challenging the concept of "moral evolution." The term is not self-defining. Rather, it raises all sorts of questions about what type of "moral" goals should we be working towards. As one commentator noted, "the question of 'moral evolution' like that of 'social progress' is ultimately a political question. To disjoin moral evolution and political philosophy . . . is necessarily unsatisfactory. Put differently, any adequate defense of 'human rights' must be, ultimately, a political defense, a defense of a particular kind of society."⁴¹⁶ Thus, the political-moral theory is one, ultimately, of good intentions but without objective direction.

c. *Institutional separation*

This model proposes the "eighteenth century" view of the Establishment Clause as one that recognizes an institutional separation of church and state be adopted over the "twentieth century" view that interprets the "disestablishment" clause as a commitment to secular government and policies.⁴¹⁷ The "original" commitment to institutional separation is seen as having two purposes:⁴¹⁸ first, to protect the state from "control or corruption" by the church,⁴¹⁹ and second, to protect the church from "control or corruption" by the state.⁴²⁰ Thus, the "essential task" of the Establishment Clause would be both to prevent government from interfering "with the internal affairs of religious institutions and, conversely, to prohibit religious institutions from directly exercising governmental authority."⁴²¹ Under this approach, essential questions would involve the institutional interactions between government and religion.

Some critics of this model have pointed out that it would significantly cut back the role of the judiciary in Establishment Clause questions.⁴²² If the alternative to institutional separation, integration of church and state, is

414. Conkle, *supra* note 410, at 1193.

415. *Id.* at 1194.

416. CHARLES HERMAN PRITCHETT, *THE AMERICAN CONSTITUTIONAL SYSTEM* 70 (5th ed. 1981).

417. Smith, *supra* note 31, at 955.

418. *Id.* at 1016.

419. *Id.*

420. *Id.*

421. *Id.*

422. See *Gerard v. Bradley, The No Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself*, 37 *CASE W. RES. L.REV.* 674, at 679 (1987).

no longer a possibility, the adoption of a separation construction would seemingly render the Establishment Clause superfluous.⁴²³ However, the model does coincide with the historical or interpretivist view.⁴²⁴ Additionally, the test would solve the "conflict" between the current establishment and free exercise clause analysis.⁴²⁵ Additionally, it is argued that this model would permit an accommodationist approach as the purpose for free exercise exemptions. The concept of establishment as any government involvement with religion would be done away with and in its stead, a concept of institutional separation would permit certain types of interaction.⁴²⁶

d. Class action and Equal Protection models

In a student note,⁴²⁷ the author responds to recent arguments that have been made about the complementary nature of the two "clauses" in the First Amendment.⁴²⁸ He notes that although this view coincides with the text and history of the First Amendment, it raises the question of whether it is improper to "collapse them into each other."⁴²⁹ It is from this concern that he suggests a new approach. The Establishment Clause, functionally, is a "public law" analogue of the Free Exercise Clause.⁴³⁰ Traditionally, free exercise claims have been framed as requiring a compelling state interest to justify the "coercion" of an individual's religious exercise.⁴³¹ The protection from being required to act contrary to one's religious convictions is the "heart of the religious liberty guaranteed by the First Amendment."⁴³² This element of coercion has also been identified in cases involving one entity that receives a "public benefit" while another, similarly situated, does not.⁴³³ This disparity in treatment can also be viewed as government "endorsement."⁴³⁴

Although the concept of group litigation or class action was not present at the framing of the constitution, it might provide a realistic and uniform approach to protect the types of interests, injury to individual

423. Smith, *supra* note 31, at 1029.

424. *Id.* at 959-975.

425. See Thomas v. Review Board, 450 U.S. 707 (1981). Smith, *supra* note 31, at 990.

426. *Id.*

427. Note, *Reconceptualizing Establishment Clause Cases as Free Exercise Class Actions*, 98 YALE L.R. 1739 (1989).

428. *Id.*

429. *Id.*

430. *Id.*

431. *Id.* at 1745.

432. *Id.* at 1746.

433. *Id.*

434. *Id.* at 1748.

religious liberties, which the Establishment Clause allegedly protects against.⁴³⁵ This view would allegedly clear up the standing and remedial problems currently associated with Establishment and Free Exercise Claims.⁴³⁶

Potential problems with this approach might arise in the court's application of class action concepts to First Amendment claims. The First Amendment protects what has been traditionally viewed as an individual right. Although the Establishment Clause may arguably not do so, the Free Exercise Clause does. Converting Establishment Clause analysis into a class action claim may minimize the free exercise claim underlying it.

Another approach that has been argued is an equal protection model utilized for both establishment and free exercise claims.⁴³⁷ This approach would seek to use a strict scrutiny/compelling state interest approach in cases that involve a free exercise claim or burden.⁴³⁸ The Establishment Clause is viewed as protecting religious liberty⁴³⁹ and the free exercise clause as defining the freedom of religious liberty-religious exercise.⁴⁴⁰ Thus, the free exercise clause "defines the important individual liberty while the Establishment Clause addresses the limits of allowable state classifications affecting this liberty."⁴⁴¹ The equal protection analysis would accomplish the same effect by viewing any religious *bias* classification as "suspect," requiring a strict scrutiny analysis.⁴⁴²

Although this model has a high view of the history and text of the First Amendment, it is based on a test that is potentially ambiguous. The strict scrutiny/compelling state interest analysis lacks the same "objective" frame of reference as the above-described "endorsement" test.⁴⁴³

e. Nonpreferentialism

This is the view widely accepted prior to the *Everson* decision and enjoys considerable historical evidence of its practice in the founding period and thereafter.⁴⁴⁴ Yet this is a specific view singled out by the *Everson* court when it said that the Establishment Clause at least means this: "Neither a state nor the Federal Government can . . . aid all

435. *Id.*

436. *Id.* at 1754, 1756.

437. Paulsen, *supra* note 193.

438. *Id.* at 313.

439. *Id.*

440. *Id.*

441. *Id.*

442. *Id.* at 324.

443. See text accompanying notes 369-80.

444. See generally, DREISBACH, *supra* note 184.

religions."⁴⁴⁵ This addition serves as a major reason why the court has had confusing holdings for more than fifty years.

In contrast to the separationist model, nonpreferentialism reflects the sense of the freedom of religion envisioned by the Founders of the Constitution. They wanted to minimize the tension among competing religious groups (though not obliterating the Christian worldview that underpinned the government and law) and to broaden the exercise of personal and corporate religious freedom. The evidence is plain⁴⁴⁶ that this was their design and they were largely consistent with this intent:

Probably, at the time of the adoption of the Constitution, and of the amendment to it, now under consideration, the general, if not the universal, sentiment in America was, that Christianity ought to receive encouragement from the State, so far as such encouragement was not incompatible with the private rights of conscience, and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.⁴⁴⁷

The pluralistic attitude of the Framers, however, does not mean that they would view Christianity alongside of other religions as being equal. Joseph Story sets forth his view of the sentiment of these Framers that may have preferred Christianity to other religions:

The real object of the First Amendment was not to countenance, much less to advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects, and to prevent any national ecclesiastical establishment which should give to a hierarchy the exclusive patronage of the national government. It thus cuts off the means of religious persecution (the vice and pest of former ages), and of the subversion of the rights of conscience in matters of religion which had been trampled upon almost from the days of the Apostles to the present age.⁴⁴⁸

445. *Everson*, 330 U.S. at 15.

446. See *CORD*, *supra* note 17.

447. JOSEPH STORY, *FAMILIAR EXPOSITION OF THE CONSTITUTION* (1862).

448. JOSEPH STORY, 2 *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* §1874, at 593 (2nd ed., 1851) *cited in* *CORD*, *supra* note 17, at 13. See also *FEDERER*, *supra* note 2 at 573-575; *Jaffree v. Board of School Commissioners of Mobile County*, 544 F. Supp. 1104 (S.D. Ala. 1983); *THE ASSAULT ON RELIGION: COMMENTARIES ON THE DECLINE OF RELIGIOUS LIBERTY* 84 (Russell Kirk ed., 1986); GARY DEMAR, *AMERICA'S CHRISTIAN HISTORY: THE UNTOLD STORY* 113 (1993).

In the eighteenth century there were no true rivals to Christianity in the public or private spheres and so the concern for parity was of little concern. Today various religious groups grace the religious completion of America but the principle of equity among religions envisioned by the Framers holds similar viability. When the government allows freedom for all religions and equally permits participation in the opportunities offered to all citizens, it serves rightly the intent of the First Amendment.

f. Suggestions for developing an operative model

The proposal for a new model to Establishment Clause adjudication is not without potential problems, as seen above. Furthermore, the Court's retreat from granting religious exercise claims that conflict with any government interest, compelling or not, seems to be quickening at an alarming rate.⁴⁴⁹ This has been attributed to the "conservative" majority⁴⁵⁰ that now exists on the Supreme Court. Yet, whatever the reason, it seems apparent that the *Lemon* test will undergo further mutation. Furthermore, the narrow distinctions made between supplying parochial school with books but not maps,⁴⁵¹ has been ridiculed for the seemingly absurd lines that the Supreme Court has drawn in the name of *Lemon*.⁴⁵²

In formulating a new model, I believe those based on a non-originalist view⁴⁵³ and those which rely on a non-objective model are doomed to continue a clash between the Religion Clauses. A model that gives due consideration to the historical evolution of American law within a Judeo-Christian framework and yet allows for the pluralistic development of religions requires a non-preferential and institutional separation

449. See, L.A. TIMES April 18, 1990, sec. 1 col. 3. The article discusses *Employment Division v. Smith*, written by Justice Scalia, which criticizes past accommodation of individual religious exercise over government interest. The case involved a Native American Indian's use of peyote in religious exercises. Justice Scalia argued that a compelling interest no longer needed to be asserted although he did suggest that if an individual's religious freedom is to be protected, Congress could provide such protection through legislation.

450. Chief Justice Rehnquist, Justice White, Justice Scalia, Justice O'Connor and Justice Kennedy.

451. Compare *Wolman v. Walter*, 433 U.S. 229, at 252-255 (1977) (invalidating a loan to parochial schools of materials such as maps and globes because these materials would be used in an integrated and religious education) with *Board of Education v. Allen*, 392 U.S. 236, 248 (1968) (sustaining a loan of books to parochial schools because there was no indication that the books would be used to teach religion). See also *Smith*, *supra* note 31, at 1022.

452. See Philip E. Johnson, *Concepts and Compromise in First Amendment Religious Doctrine*, 72 CALIF. L. REV. 343, 352 (1986).

453. See text accompanying notes 233-36.

approach.⁴⁵⁴ Thus, I would prefer to endorse the institutional separation view. This view seems to be the most objective in its application.⁴⁵⁵ In cases that deal with state aid programs, the question asked by the Court would shift from whether tile program, in some way, "advances religion" to whether the program directly and impermissibly involves the state in the internal affairs of a religious institution.⁴⁵⁶ The separation construction would not require the courts to determine whether the form of aid is purely or inherently secular. State aid that might have the "effect" of assisting religion would not, of itself, require invalidation of the law.⁴⁵⁷

Additionally, it would reduce the number of conflicts between the Establishment Clause and other Constitutional provisions such as free exercise and free speech clauses.⁴⁵⁸ For example, in exempting religious believers from military service or compulsory secondary education, government would not have to interfere with the doctrine or ecclesiastical structure of religious institutions. However, under the secularism requirement, this type of accommodation would be impermissible since it both serves a religious purpose and it has the effect of advancing religion by facilitating the practice of religious convictions.⁴⁵⁹ In situations like this the Court would only need to look to religious liberty or free exercise concerns, not establishment.

The institutional separation model may help in keeping the state out of the institution of the church but what about activities such as prayer at public gatherings that are not strictly "church" activities. In situations like this, the direct coercion standard advocated in the dissent by Justice Scalia in *Lee v. Weisman* may prove helpful. In this matter, only what directly interferes with religious liberty becomes an establishment of religion. No one can be pressured or forced by the government to practice a religious exercise or adopt religious beliefs. Such coercion would not be interpreted as being respectful and quiet as someone is allowed to practice their own belief. Ralph Johnson correctly points out that in *Lee v. Weisman*, the

Weismans were not coerced by force of law or threat of penalty to join in the graduation prayers. Indeed, they never complained of any coercion to participate. Rather, Mr.

454. See Smith, *supra* note 31.

455. *Id.* at 1021.

456. *Id.*

457. *Id.* Although it would not prevent the government from advancing religion in certain ways (see *Lynch v. Donnelly*, 465 U.S. 668 (1984); *Marsh v. Chambers*, 463 U.S. 783 (1983)), it would prevent government from establishing an official state church or conferring governmental powers upon churches (see *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982), a statute permitting churches to veto applications for liquor licenses when the establishment applying for said license is within 500-foot radius of the church was held unconstitutional).

458. See Smith, *supra* note 31, at 1026.

459. *Id.*

Weisman was "opposed to and offended by the inclusion of the prayer." However, under the direct coercion test, this can not be the basis of an Establishment Clause violation.⁴⁶⁰

Although the Establishment Clause began its "career" in the concept of separation of church and state,⁴⁶¹ the phrase came to mean, in the twentieth century, political and governmental secularism.⁴⁶² In an attempt to recapture the true meaning of the Establishment Clause, one can find a test and approach to Religion Clause jurisprudence, I believe, that is both workable and consistent with the proper interpretation of the First Amendment.

V. CONCLUSION

Providing for institutional separation of church and state but not intruding into voluntary religious expression of individuals is the ideal manner for religion and government to function in our pluralistic society. The continuing clash between religion and the state is due to the attempt to separate us from our past, a past that cannot be eradicated from our law and government without doing irreparable harm to our form of government. The rise of non-Christian religions provides a challenge, but not one insurmountable. Allowing all religious perspectives access to the public forums of America is both legally correct and religiously satisfying. It is impossible (and perhaps undesirable) to aspire to a completely secular state that is devoid of any public religious expression. Religion, for good or ill, has been the foundation of Western law and provided the very model for legitimate "separation" and it remains one of the primary motivations for human action. It serves at the "lynchpin" for fundamental freedoms such as liberty and equality. The strict separationist model, as found in the majority of the cases from *Everson* through *Lemon*, and still occasionally haunts the Court's decisions, needs to be forever abandoned and a model which keeps the state out of the activities of organized religion, but not religion from the public sector, needs to be warmly embraced by the Court. When the state provides for the general public, religion may have nonpreferential access to the benefits of government without there being an establishment, as long as government does not try to dictate to the

460. Johnson, *Lee v. Weisman: Easy Cases Make Bad Law Too—The Direct Coercion Test is the Appropriate Establishment Clause Standard*, 2 GEO. MADISON INDEPENDENT L. REV. 123, 192 (1993).

461. In using this phrase, I am speaking of the historical concept of separation which would be that of the institutions of Church and State. See *CORDE*, *supra* note 17.

462. See Smith, *supra* note 31, at 975-979.

religious entity. When groups or individuals have a public forum, they should be on the same footing with non-religious groups and individuals and toleration should be expressed toward all. The key is that there be no force of the government to require one to practice religious ritual or devotion nor adopt religious beliefs that are specifically sectarian in nature; this is the vision of the Framers based on the Reformation foundation.

The kingdom of God and the kingdom of the world are not incompatible when we move toward such a model that I have suggested. Many details need to be worked out, but the state and religion can peacefully exist without either losing its proper function in America.

APPENDIX

The following graphs reveal the level at which the Bible and Blackstone were heavily relied on during the period of 1760-1805:⁴⁶³

DISTRIBUTION OF CITATIONS BY DECADE

	1760s	1770s	1780s	1790s	1800-05	Total %
<i>Bible</i>	24	44	34	29	38	34
<i>Enlight'ment</i>	32	18	24	21	18	22
<i>Whig</i>	10	20	19	17	15	18
<i>Common Law</i>	12	4	9	14	20	11
<i>Classical</i>	8	11	10	11	2	9
<i>Peers</i>	6	2	3	6	5	4
<i>Others</i>	8	1	1	2	2	2

CITATIONS OF THINKERS IN EARLY AMERICA BY DECADE (%)

	1760s	1770s	1780s	1790s	1800-05	Total %
<i>Montesquieu</i>	8	7	14	4	1	8.3
<i>Blackstone</i>	1	3	7	11	15	7.9
<i>Locke</i>	11	7	1	1	1	2.9
<i>Hume</i>	1	1	1	6	5	2.7
<i>Plutarch</i>	1	3	1	2	4	1.3
<i>Pufendorf</i>	4	0	1	0	5	1.3
<i>Coke</i>	5	0	1	2	4	1.3
<i>Hobbes</i>	0	1	1	0	0	1.0
<i>Others</i>	69	78	73	74	65	73.3

463 Hyneman, *supra* note 118. See these charts in EIDSMOE, *supra* note 136, at 52 - 53; and Lutz, *supra* note 104, at 189 - 197.

QUANTITY ORDERING OF MOST CITED THINKERS, 1760-1805 (%)

1.	<i>Montesquieu</i>	8.3 %
2.	<i>Blackstone</i>	7.9 %
3.	<i>Locke</i>	2.9 %
4.	<i>Hume</i>	2.7 %
5.	<i>Plutarch</i>	1.5 %
10.	<i>Coke</i>	1.3 %
11.	<i>Cicero</i>	1.2 %
12.	<i>Hobbes</i>	1.0 %
15.	<i>Rousseau</i>	.9 %
17.	<i>Bacon</i>	.8 %
19.	<i>Shakespeare</i>	.8 %
25.	<i>Plato</i>	.5 %
28.	<i>Machiavelli</i>	.5 %
31.	<i>Voltaire</i>	.5 %

The most quoted source, including books and authors, during the Constitutional Period, 1780s-1790s was the Old Testament book of Deuteronomy, the Covenant Book.