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## **“The Liberal Agenda”: Biblical Values and the First Amendment**

**Burton Caine<sup>1</sup>**

At a recent conference of the National Jewish Law Students Association, a student expressed surprise and appreciation that one advocating the "liberal" point of view could quote the Bible in support of that position. The implication was that "real" or "knowledgeable" Jews - often mentioned interchangeably with "Orthodox," "pious," or even "observant" Jews, are all on the right. Without even defining terms, the assumption is that these American Jews, motivated by religion and Zionism, support and become the "settlers" on the West Bank (often referred to in their Biblical nomenclature as "Judah and Samaria"), advocate government aid to Jewish religious schools and practices in the United States, and are the only real stalwarts for Jewish life at home and abroad.<sup>2</sup> The stereotype then

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<sup>1</sup> Professor of Law, Temple Law School; Harvard Law School, J.D., 1952; Director, Temple-Tel Aviv Universities Law Program.

<sup>2</sup> See Itamar Rabinovich, *As Israel Tilts to the Right, Envoy to U.S. Makes an Exit*, N.Y. TIMES, Sept. 1, 1996, at 9. Professor Rabinovich, formerly Rector of Tel Aviv University, upon retiring as Israel's ambassador to the United States, noted that Jews both in Israel and the United States are "a divided society" along the lines of liberals on the one hand, and Orthodox who support the policies of the Netanyahu government on the other. *Id.* "Liberal Jews...have a broader agenda," observed Rabinovich, and he singled out "the Lubavitch Hasidic group, 'who take their cue from religious leaders in America.'" *Id.* From his description of his struggle to counter the lobbying of such American Jews, Professor Rabinovich would agree with the theses of this article. *Id.* Attacks by the ultra-Orthodox in Israel upon Justice Aharon Barak, President of the Supreme Court of Israel, and the Court in general, reflect policies which mirror those of American Orthodox Jews, as discussed in this article. See, e.g., Serge Schmemmann, *Israeli High Court Under Attack by Religious Jews*, N.Y. TIMES, Aug. 28, 1996, at A1 (calling Barak a new dictator and a dangerous enemy); Joel Greenberg, *Israel Court Backs Non-Orthodox on Conversions*, N.Y. TIMES, Nov. 13, 1995, at A1; *Jerusalem*

proceeds to excoriate "liberals" who oppose these ideas and ideals for lack of knowledge of,<sup>3</sup> and loyalty to Judaism and hide behind Constitutional or other doctrine as an excuse.

This picture is false and highly deleterious to the health of the Jewish polity. It stifles the debate which is the lifeblood of democratic society. Justice Louis Brandeis wrote in *Whitney v. California*<sup>4</sup> that the answer to speech is more speech, not suppression, and "the greatest menace to freedom is an inert people."<sup>5</sup> He implied - and certainly would have said if called upon - that history, tradition and the Bible itself cannot be expropriated by one side of any debate or be held captive to any political argument. The underlying assumption that "liberalism" is alien to Jewish thought is a canard.<sup>6</sup> Jewish students of the law should be proud to carry the banner of "liberalism" and take inspiration from the Tanah and the Jewish experience. That has been my credo as one with a life-long devotion to civil liberties and to Judaism.<sup>7</sup>

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*Road is Secular-Religious Battleground*, N.Y. TIMES, July 15, 1996, at A1; *Mishpat B'rosh Gadol*, HA-ARETZ, Aug. 17, 1996, at 17 (contending that Orthodox attacks on Justice Barak are unjustified); Netty C. Gross, *Justice on the Firing Line, The Death Threats Against Israel's Top Judge Represents an Ultra-Orthodox Attack on the Liberal Judiciary He Heads*, JERUSALEM REP., Oct. 3, 1996, at 26.

<sup>3</sup> "Am ha-aretz," roughly translated as "ignoramus" when it comes to Judaism, is often the term applied.

<sup>4</sup> 274 U.S. 357 (1927).

<sup>5</sup> *Id.* at 375.

<sup>6</sup> See Peter Seinfelds, *Battling for the Backing of Judaism in the United States' Cultural Wars*, N. Y. TIMES, Nov. 4, 1995, at A14 (contending that most American Jews subscribe to the "liberal" agenda, including positions the author argues for in this article). However, "a large segment of the Orthodox, plus a battalion of increasingly conservative intellectuals have challenged these positions as 'liberal pieties' that ... contradict Jewish interests. Both Jewish camps ... contend that they have Jewish tradition on their side." *Id.*

<sup>7</sup> See, e.g., *Ass'n of Jewish New Ams. v. Cawood*, No. 79 Civ. 618 (E.D. Pa. 1979). The author of this article has been active in the American Civil Liberties Union and have served as General Counsel and President of the Greater Philadelphia Chapter. As Counsel, he defended the right of the Nazis to march in front of the Liberty Bell, proclaiming their hideous message of

This article presents two themes. The first is that our passion for justice, freedom and individual liberty comes from the Bible itself. The second is that the First Amendment<sup>8</sup> guarantees of freedom of speech and separation of church and state are not only the crowning jewels of our democratic system, they are also "good for the Jews." The corollary is that Jews should actively participate in the struggle to protect these freedoms, and certainly should not endeavor to weaken, circumvent, or destroy them.<sup>9</sup>

In my view, unfortunately, Jews, and in particular Orthodox Jewish groups, have engaged in actions which have the effect, if not the purpose, of endangering First Amendment liberties of Freedom of Speech, and the Establishment Clause mandating the separation of church and state. As to the latter, I have specified in separate subsections of the article, six areas in which activities inimical to Establishment Clause values have taken place, namely, 1) placing religious symbols in public places, 2) obtaining or attempting to obtain public support - including - financial aid for religious schools, 3) getting the

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death to the Jews. Having visited all the major Nazi death camps, the author understands fully the horrors of the Holocaust.

Professor Caine has also been President of Solomon Schechter Day School in Philadelphia, and for the past 18 years has been the director of the Israel Program at Temple Law School which includes teaching in Israel every summer. On behalf of Soviet Jewry, he has visited the USSR twice and was active as a lawyer for Anatoly Sharansky. The author has lectured throughout the world on Constitutional Law, mainly on behalf of the United States Government, and also twice before the judges of Israel in Hebrew.

<sup>8</sup> U.S. CONST. amend. I. The First Amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press." *Id.*

<sup>9</sup> See Jeffrey Rosen, *The New Look of Liberalism on the Court*, N.Y. TIMES MAG., Oct. 5, 1997 at 1, 60. The author agrees with Justice Ruth Bader Ginsberg, acknowledged to be a "liberal face" and "progressive" on the Supreme Court when she "values 'the age-old connection between Judaism and law.'" *Id.* Justice Ginsberg notes, "The demand for justice runs through the entirety of the Jewish tradition." *Id.* See also *What Bring Jewish Means to Me, A New Year's Message from the American Jewish Committee*, N.Y. TIMES, Oct. 8, 1997, at A13.

legislature to gerrymander a school district for Orthodox Jews,<sup>10</sup> 4) supporting prayer in public schools, 5) closing public schools on Jewish holidays, and 6) using government to enforce the rules of kashrut, that is, Jewish religious prescriptions for kosher food.

Further, I submit that even discrimination against Jews in violation of their right to free exercise of religion is no excuse for engaging in activities in violation of the Establishment Clause.

I. Passion for Justice, Freedom and Individual Liberty comes from the Bible itself.

Fundamental principles of law and freedom that Americans trace to the Constitution have clear antecedents in the Bible. That the American Charter of Liberty was "law," was decided in 1803 in *Marbury v. Madison*,<sup>11</sup> but the Torah is also a self-defined "law" as proclaimed in *Exodus* 12:49, "There shall be one law for the citizen and the stranger who dwells among you."<sup>12</sup>

The idea of a people with a destiny of freedom was already dramatically portrayed in the Exodus saga of the liberation of Hebrew slaves from Egyptian bondage and their transformation into a free and independent nation. The holiday of Passover was not only a triumph of the Children of Israel and their God but was the model for other nations struggling to achieve freedom. The Great Seal of the United States with the depiction of a pyramid of Egypt should serve as a reminder of that momentous event.

The Ten Commandments, although normally considered to be a moral and religious code, depicts God as *liberator*, and it was divine intercession that enabled Moses to provide the model

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<sup>10</sup> *Kiryas Joel v. Grumet*, 512 U.S. 687 (1994).

<sup>11</sup> 5 U.S. (1 Cranch) 137 (1803) (holding that the Supreme Court has the power of judicial review, that is, the power to invalidate an act of Congress because it violates the Constitution and determining that the Constitution is law and therefore the judiciary has the authority to determinate whether other branches of government have complied with it).

<sup>12</sup> *Exodus* 12:49. All translations from the Bible, unless otherwise noted, are from *TANAKH* (The Jewish Publication Society 1985).

for our founding fathers. National liberation is a recurring premise in the modern world for constitutions and declarations of independence.<sup>13</sup>

I believe it goes even further. The sacred and majestic Biblical ideal that justice is the cornerstone of society found its way into the American Constitution. The prophet Amos proclaims, "But let justice well up like water, Righteousness like an unfailing stream."<sup>14</sup> Rulers - even God himself - must measure up to its standards. When God set about to destroy Sodom and Gomorrah for their unspeakable transgressions, Abraham confronted the Supreme Magistrate, "Shall not the Judge of all the earth deal justly?"<sup>15</sup> The prophets showed a distaste for kings because, as Lord Acton was later to observe, "absolute power corrupts absolutely."<sup>16</sup> That power inevitably breeds evil and oppression is echoed in the basic design of American government - to protect the people from tyranny.

Through the Prophet Elijah, God inveighed against King Ahab for seizing the vineyard of Naboth, an act of injustice that brought disaster upon the king and his evil wife, Jezebel.<sup>17</sup> This is not simply a tale of overreaching royalty. Even without specific adumbration, the unstated quintessential premise is that ordinary people have certain inalienable rights. Why else would King Ahab sulk and whine when his offer to buy his subject's

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<sup>13</sup> See SIMON GREENBERG, *THE ETHICAL IN THE JEWISH AND AMERICAN HERITAGE* (The Jewish Theological Seminary of America 1977). The late Rabbi Simon Greenberg was very perceptive in seeing the connection between the Bible, on the one hand, and the Constitution and the Declaration of Independence on the other.

<sup>14</sup> *Amos 5:24*. See JOHN MILTON, *AREOPAGITICA, A Speech for the Liberty of Unlicensed Printing, To the Parliament of England* (1644): "Truth is compared in Scripture to a streaming fountain; if her waters flow not in a perpetual progression, they sicken into a muddy pool of conformity and tradition." *THE PORTABLE MILTON* 186 (D. Bush ed., The Viking Press 1949).

<sup>15</sup> *Genesis 18:25*.

<sup>16</sup> LORD ACTON, *ESSAYS ON FREEDOM AND POWER* 364 (H. Finer ed., 1948).

<sup>17</sup> *1 Kings 21*.

vineyard was so saucily spurned?<sup>18</sup> Did not ancient monarchs have power to seize what their hearts desired? Here, the royal house did not act in a totally arbitrary manner. Naboth's vineyard was adjacent to palace grounds<sup>19</sup> and would have enhanced them in a way not unlike modern appropriations of lands in similar circumstances. Also, the offer for payment was more than modern suitors would get in a judicial proceeding, namely, land of superior value or cash.<sup>20</sup> Queen Jezebel, too, for all her brazen promises to get the vineyard for her husband,<sup>21</sup> did not even urge King Ahab to exercise what one might assume to be his royal prerogative, and take the property by force. Instead, she concocted a scheme for two witnesses to give false testimony that Naboth "reviled God and king!"<sup>22</sup>

When Naboth was convicted and executed by stoning, King Ahab went to "inherit" the vineyard.<sup>23</sup> There he was met by the Prophet Elijah who castigated him with one of the most wrathful of Biblical judgments, "God has said, 'Would you murder and take possession? ... In the very place where the dogs lapped up Naboth's blood, the dogs will lap up your blood too.'" <sup>24</sup>

One should read this story, I believe, as the forerunner of constitutionalism in the sense of a restraint on government power to abuse individuals. In the argot of our times, the Biblical tale is suffused with notions of the "unalienable rights" Thomas Jefferson proclaimed in the Declaration of Independence, and which later were translated in civil liberties protected by the Constitution.

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<sup>18</sup> 1 *Kings* 21:4.

<sup>19</sup> 1 *Kings* 21:2.

<sup>20</sup> 1 *Kings* 21:3.

<sup>21</sup> 1 *Kings* 21:7.

<sup>22</sup> 1 *Kings* 21:10.

<sup>23</sup> 1 *Kings* 21:18.

<sup>24</sup> 1 *Kings* 21:19.

Perhaps the entire concept is an axiom of the Biblical story of creation, "And God created man in his own image."<sup>25</sup> The idea that everyone is a divine creation requires that government respect the human personality. In political terms, it emphasizes that the most important words in the Constitution are at the very beginning, "We the people," meaning: the people are the master and the government is the servant. Accordingly, in my view, the most exalted term in the document is "person," whom the Constitution makes sovereign. The term appears in the Fifth<sup>26</sup> and Fourteenth<sup>27</sup> Amendments to signify the most fundamental rights of an individual in our society.<sup>28</sup>

Nor should one ignore the obvious parallel between Elijah's rebuke of the king and Alexander Hamilton's classic characterization of judicial power under the Constitution of the United States: "The judiciary ... has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment...."<sup>29</sup>

The parallel is that the ultimate power in a society under law is the *word*, not force. Neither Elijah nor the Supreme Court of the United States relies upon physical power to enforce its judgments, although ultimately it may have to resort to such power. Elijah confronts the king with judgment based upon an understood and

<sup>25</sup> *Genesis* 1:27.

<sup>26</sup> U.S. CONST. amend. V. The Fifth Amendment states in pertinent part: "No *person* shall ... be deprived of life, liberty, or property, without due process of law. . ." *Id.* (emphasis added).

<sup>27</sup> U.S. CONST. amend. XIV § 1. The Fourteenth Amendment states in pertinent part: "[N]or shall any state deprive any *person* of life, liberty, or property, without due process of law; nor deny to any *person* within its jurisdiction the equal protection of the laws. " *Id.* (emphasis added).

<sup>28</sup> *See Plyler v. Doe*, 457 U.S. 202 (1982). In *Plyer*, The Supreme Court held that the Equal Protection Clause extends even to children of illegal aliens, rejecting the argument that only citizens of the United States were the intended beneficiaries. *Id.*

<sup>29</sup> ALEXANDER HAMILTON, THE FEDERALIST NO. 78, at 15 (Gerald Gunther ed., 1991).



accepted notion of justice. As was said above, even before the prophet announces God's punishment, he pronounces God's verdict, "Would you murder and take possession?" And Ahab knows that justice limits his power to seize property he so passionately desires. He further knows that Jezebel is also a violator and that the legal proceedings she has set in motion lack the component of justice. There is no discussion on the point, it is merely understood. Ahab does not contest the verdict nor resist the judgment.

The *word* in the American system operates in similar fashion. The courts dispense justice by rendering judgments and with reasons designed to convince the people that those decisions are correct and should command both respect and obedience.

There is good reason to believe that the writers of the United States Constitution knew Bible.<sup>30</sup> "Proclaim liberty throughout the land unto all the inhabitants thereof *Lev 25:10*" was inscribed on the Liberty Bell, and sentiments behind that choice were significant in moving John Adams to declare in his correspondence with Thomas Jefferson, "[T]he Hebrews have done more to civilize men than any other nation."<sup>31</sup>

Declarations and tradition alone cannot create a democracy dedicated to liberty, nor can they sustain it. Justice Thurgood Marshall observed that it was the American people who breathed life into the spare and arid phrases of the Founding Fathers, transforming their chary prose into a glorious Charter of Liberty.<sup>32</sup> Implicit in this observation is the profound idea that no

<sup>30</sup> See EDWIN WOLF II & MAXWELL WHITEMAN, *THE HISTORY OF THE JEWS IN PHILADELPHIA FROM COLONIAL TIMES TO THE AGE OF JACKSON*, 16-18, 29, 35, 224, 306-11 (Jewish Publication Society of America 1956).

<sup>31</sup> 9 WORKS OF JOHN ADAMS 609, *quoted in* 1 THE JEWISH ENCYCLOPEDIA 184 (Funk and Wagnalls Co. 1901).

<sup>32</sup> THURGOOD MARSHALL, *REFLECTIONS ON THE BICENTENNIAL OF THE UNITED STATES CONSTITUTION*, Address at the Annual Seminar of the San Francisco Patent and Trademark Law Association (May 6, 1987), *quoted in* 101 HARV. L. REV. 1, 5 (1987). What Justice Cardozo wrote about Chief Justice John Marshall, is also applicable to his namesake here, "He gave to the constitution of the United States the impress of his own mind; ... because he molded it ... in the fire of his own intense convictions." BENJAMIN N.

constitution is capable of creating or conferring human rights - and certainly not the American document.<sup>33</sup>

The bulk of the Constitution is devoted to granting the federal government just so much of the people's power needed to enable it to carry out the people's purposes as set forth in the Preamble of the document. The principal aspiration is to "secure the Blessings of Liberty to ourselves and our Posterity." Curiously, there was nothing in the original Constitution spelling out how these "Blessings of Liberty" were to be secured, and the word "liberty" is not mentioned again until the Bill of Rights was added years later. Even then, when it comes to what is perhaps our most fundamental right, freedom of speech, the First Amendment does not say that the people have such right. What it says is, "Congress shall make no law ...abridging the freedom of speech."

The choice of words is deliberate. James Madison, who wrote the First Amendment, certainly understood that the right to basic freedoms was not born in the Constitution.<sup>34</sup> Justice

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CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 169-170 (Yale University Press 1921).

<sup>33</sup> See *U.S. v. Verdugo-Urquidez*, 494 U.S. 259, 288 (1990) (Brennan, J., dissenting) (stating "[T]he Framers of the Bill of Rights did not purport to 'create' rights. Rather, they designed the Bill of Rights to prohibit our Government from infringing rights and liberties presumed to be preexisting."). See also U.S. CONST. amend. IX. The Ninth Amendment provides as follows: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." *Id.*

<sup>34</sup> See generally ANATOLY SHARANSKY, FEAR NO EVIL (Random House 1988). The author learned this lesson in Moscow when he went to advocate for Anatoly Sharansky. Jewish "refuseniks" proclaimed that they were free because they exercised their human rights to speak out for freedom. When he reacted that they sounded like Americans vindicating their First Amendment rights, they then gave this law professor a lesson in Constitutional Law he shall never forget. They said that prisoners in the harshest conditions of their travail spoke out and maintained their dignity as free souls. No documents gave them those rights. They had them because they were human beings and were valiant enough to act as such.

William O. Douglas wrote in *Griswold v. Connecticut*,<sup>35</sup> one of our greatest civil rights decisions, that fundamental rights are older than the Constitution of the United States.<sup>36</sup> Justice Brennan echoed the same theme that the right to be free is not conferred by government - it is implicit in being a human being.<sup>37</sup>

The Constitution is an everlasting reminder of that fundamental idea, and read together with the Declaration of Independence, that fiery birth announcement of a nation with an unalienable right to deliverance from tyranny, form the American credo that freedom is both the natural state of humanity and its destiny, and that government is instituted to protect that destiny.

That, in my view, is the theory of our Constitution.

The idea that negative imperatives against abuses of authority are designed to preserve natural conditions of freedom has a close parallel in the Biblical text of Leviticus, Chapter 19, and in particular verses 15 and 18. There, as Professor Moshe Greenberg has pointed out in "Al Hamikra V'al Hayahadut,"<sup>38</sup> a series of "You shall not's"<sup>39</sup> are commanded for the purpose of clearing the way for the flowering of the affirmatives, such as, "judge your kinsman fairly," and climaxing with, "Love your fellow as yourself."<sup>40</sup> Greenberg comments, "In these instances, it is clear that the 'You shall not' is nothing but a reservation

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<sup>35</sup> 381 U.S. 479 (1965) (holding that a Connecticut law forbidding use of contraception was an intrusion on a person's right to marital privacy).

<sup>36</sup> *Id.* at 486.

<sup>37</sup> See *Verdugo-Urquidez*, 494 U.S. at 288.

<sup>38</sup> MOSHE GREENBERG, *AL HAMIKRA V'AL HAYAHADUT [ON THE BIBLE AND JUDAISM]* (Avraham Shapira ed., Am Oved 1984).

<sup>39</sup> Leviticus 19:15. Verse 15 reads: "You shall not render an unfair decision; do not favor the poor or show deference to the rich; judge your kinsman fairly." *Id.* See also Leviticus 19:18. "You shall not take vengeance or bear a grudge against your countrymen. Love your fellow as yourself." *Id.*

<sup>40</sup> MOSHE GREENBERG, *The Question of the Freedom of the Servant of the Lord in the Bible*, in *AL HAMIKRA V'AL HAYAHADUT [ON THE BIBLE AND JUDAISM]* 85, 89 (Avraham Shapira ed., Am Oved 1984).

negating the existence of the 'You shall';<sup>41</sup> the 'You shall not' clears away the thorns and weeds that prevent the flourishing of the "You shall... It is the condition for the realization of the affirmative values which the Torah establishes."<sup>42</sup>

Benjamin Franklin, at the conclusion of the Constitutional convention, summed up its work with a warning. The Founders, he said, created "a republic, if you can keep it."<sup>43</sup> Perhaps Judge Learned Hand, in his celebrated essay, *The Spirit of Liberty*,<sup>44</sup> said it more explicitly, "Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it; no law, no court can even do much to help it. While it lies there, it needs no constitution, no law, no court to save it."<sup>45</sup>

I believe that the same thought is conveyed by the Bible in the famous injunction in the book of *Deuteronomy*, "Justice, justice shall you pursue!"<sup>46</sup> Attention is often drawn to the drumbeat repetition of the noun "justice" and the placement of the double imperative at the beginning of the sentence for added import, thus thrice emphasizing its importance as a precept in the Biblical regime. But the traditional interpretation of the verse and an impercipient English translation obscures the deeper significance of the passage.

The phrase comes at the end of a list of six commands pertaining to the administration of justice, beginning with the appointment of judges. Following is a direct command to judges

<sup>41</sup> *Id.* The Jewish Publication Society translation, which is used throughout this article, in the verses of Leviticus here relevant, sometimes translates the negatives as "You shall not..." or "Do not..." and the affirmatives as "You shall..." or simply the verb itself without the "You shall...", such as "Love your fellow..." Professor Greenberg's references to "You shall..." and "You shall not..." are intended to cover all such negatives and all such affirmatives with the JPS distinction.

<sup>42</sup> *Id.*

<sup>43</sup> 11 AMERICAN HISTORICAL REVIEW 618 (J.F. Jameson ed., 1906).

<sup>44</sup> LEARNED HAND, THE SPIRIT OF LIBERTY 690 (I. Dilliard ed., 1952).

<sup>45</sup> *Id.*

<sup>46</sup> *Deuteronomy* 16:20.

to do justice<sup>47</sup>, in the plural as one would expect. At the end, the injunction to pursue justice is in the singular, indicating that it is directed not to the courts but to each of us individually, a thought confirmed by the explanation "in order that you shall live and inherit the land which the Lord your God gives you." The obligation is imposed on the people to do whatever is necessary to pursue justice, and even to correct injustice committed by the government, including the judges.

Such was the understanding of Dr. Martin Luther King, Jr. whose vision of a free and just society was neither daunted nor dimmed by a benighted judiciary. In keeping with the Biblical and Constitutional command, he acted upon his beliefs. Rosa Parks did likewise. By following the command, she brought on a new dawn of human dignity. The pursuit of justice motivated the American people not to accept the *Dred Scott* decision of the Supreme Court<sup>48</sup> that denied humanity to a runaway slave. The Fourteenth Amendment not only reversed that decision but also added immeasurably to the explicit guarantees of equality and fair treatment for each of us.<sup>49</sup> Also, the experience of Japanese-Americans during World War II<sup>50</sup> and

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<sup>47</sup> *Deuteronomy* 16:18-19.

<sup>48</sup> *Dred Scott v. Sanford*, 60 U.S. (1 How.) 393 (1857).

<sup>49</sup> U.S. CONST. amend. XIV, § 1. The Fourteenth Amendment adopted in 1868 states that all persons born in the United States are citizens - thus reversing *Dred Scott* - and goes on to provide that no state shall deprive any person of the privileges and immunities of citizens of the United States, due process of law, and the equal protection of the law.

<sup>50</sup> After the Japanese attack on Pearl Harbor, President Roosevelt issued an Executive Order authorizing the military to exclude persons of Japanese ancestry from designated West Coast areas, impose curfews, etc. In *Hirabayashi v. U.S.*, 320 U.S. 81 (1943), and *Korematsu v. U.S.*, 323 U.S. 214 (1944), the curfew and exclusion aspects of the program were upheld. The pursuit of justice with respect to these victims was desultory, taking the better part of five decades. It was not until 1984 that *Korematsu's* conviction was reversed because the government had submitted false information to the Supreme Court in the original case. *Id.* See *Korematsu v. U.S.*, 584 F. Supp. 1406 (N.D.Cal. 1984). In 1986, *Hirabayashi's* conviction for failing to register for evacuation was reversed, but the conviction for curfew violation was left standing. *Hirabayashi v. U.S.*, 627 F. Supp. 1445 (W.D. Wash.

the continuing struggle for equal rights for women in this country<sup>51</sup> are illustrations of the role the Fourteenth Amendment has played in the expansion of personal rights.

Under the American concept of democracy, the people have the ultimate power, and therefore the ultimate responsibility to see that freedom and justice are achieved. The Constitution is bottomed on the premise that government cannot be trusted to preserve our liberties and do justice; that the people deserve the blame if we allow our servants to do evil in our name; that the people are responsible for correcting the iniquities of government in accordance with the principles we set for ourselves in our Charter of Liberty. The ideal of "We the People" has been glossed by the wisdom of the sages, including the admonition of Learned Hand, the teaching of Justice Thurgood Marshall, and the Biblical charge to pursue Justice.

Justice Brandeis said it best in *Whitney v. California*:<sup>52</sup>

Those who won our independence believed that the final end of the State was to make men free .... They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty...; that the greatest menace to freedom is an inert people.<sup>53</sup>

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1986). In 1988, Congress enacted the Civil Liberties Act, 102 Stat. 903, 50 U.S.C. §§ 1989-1989(d) (1988), apologizing for the fundamental injustice inflicted upon Americans of Japanese extraction, and providing for reparations). But at least now the verdict of history has been entered that this honorable community was the victim of unmitigated racial prejudice. See generally PETER IRONS, JUSTICE AT WAR (1983).

<sup>51</sup> The pursuit of justice was evident again in the long and continuing struggle of women for equality. It was not until the Nineteenth Amendment in 1920 that women were guaranteed the right to vote, 50 years after the Fifteenth Amendment assured the same right for men of all races. U.S. CONST. amend. XIX. The pursuit of justice has still not achieved an Equal Rights Amendment guaranteeing equality regardless of gender where men as well as women would be the beneficiaries.

<sup>52</sup> 274 U.S. 357 (1927).

<sup>53</sup> *Id.* at 375 (deserving to be quoted again in fuller context for emphasis).

I believe that the responsibility to do justice - coming from a Biblical command addressed individually to each of us - falls with particular weight upon each Jew. If our society is to achieve its exalted goals, Jewish lawyers - equipped by learning and training to achieve those noble precepts of freedom, equality, and human dignity - cannot be "inert", and must actively participate in the struggle. Keeping before us always the guiding principles of human dignity is more important than prescribing the result of each application.

II. The Constitution of the United States and the First Amendment guarantees of freedom of speech and separation of church and state are not only the crowning jewels of our democratic system, they are also good for the Jews. Jews should actively participate in the struggle to protect these freedoms, and certainly should not endeavor to weaken, circumvent, or even destroy them.

There are two conflicting principles in our Constitution: First, the principle of democracy. That is, majority rules. This serves well when the question is how we choose our leaders and how they decide what legislation furthers the public welfare. The second principle - and equally precious - is the protection of individual liberty against the majority. Here, the majority loses when it comes to fundamental rights. This is the theme of the Bill of Rights. Alexis de Tocqueville in *Democracy in America* said that the crowning jewel in the diadem of the American legal system was judicial review, which enables the judiciary to protect individual and minority rights against "the tyranny of the majority."<sup>54</sup>

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<sup>54</sup> 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, 260-261 (Bradley ed., 1945). De Tocqueville observed:

When a man or a party suffers an injustice in the United States, to whom can he turn? To public opinion? That is what forms the majority. To the legislative body? It represents the majority and obeys it blindly. To the executive power? It is appointed by the majority and serves as its passionate instrument. To the police? They are nothing but the majority under arms. A jury? A jury is the

The anti-majoritarian provision will surely be the more important principle when history judges the success of the American experiment in government. Although James Madison, who wrote both the Constitution and the Bill of Rights, and Thomas Jefferson, a guiding spirit in the struggle to protect individual liberties, were gloomy on the effectiveness of a stated Bill of Rights, both concurred that it was essential to make the effort. Jefferson put his faith in a learned and independent judiciary who, fortified with life tenure, would stand up for the individual against the inevitable abuses by governmental authority.<sup>55</sup>

Justice Jackson's stirring rhetoric serves as a potent reminder that:

The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of

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majority vested with the right to pronounce judgment; even the judges in certain states are elected by the majority.

*Id.* See also Burton Caine, *Judicial Review - Democracy Versus Constitutionality*, 56 *TEMPLE L.Q.* 297, 325 (1983).

<sup>55</sup> See *THE BILL OF RIGHTS IN THE MODERN STATE*, 5-6 (Epstein, Stone, Sunstein eds., Univ. of Chi. 1992). There, Geoffrey Stone comments in *THE BILL OF RIGHTS IN THE WELFARE STATE: A BICENTENNIAL SYMPOSIUM*, 5-6, that Madison was doubtful that a bill of rights would make a difference. He wrote to Jefferson in 1788, "experience proves the inefficacy of a bill of rights on those occasions when its control is most needed," offering as an illustration "repeated violations of these parchment barriers ... committed by overbearing majorities" whenever circumstances allow. *Id.* But he offered the Bill of Rights for two reasons. First, they would be treasured by the judiciary, those "independent tribunals of justice would consider themselves ... guardians of these Rights;" the courts would serve as "an impenetrable bulwark against every [unwarranted] assumption of power," they would "sniff the approach of tyranny in every tainted breeze," and "would be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution." *Id.* Second, A bill of rights would serve an essential educational function in a self governing society. *Id.*

Jefferson emphasized "the legal check which [such a Bill would put] into the hands of the judiciary ... which if rendered independent ... merits great confidence for their learning and integrity." 14 *THE PAPERS OF THOMAS JEFFERSON* 659 (J. Boyd ed. 1958). This was the "winning argument." LAWRENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* 4 (Foundation Press 1988).



political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.<sup>56</sup>

Justice Jackson sums it up in language no schoolchild should fail to memorize:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.<sup>57</sup>

As a result, in the United States we do not vote on whether a person has the right to speak. We do not vote on whether a person has the right to worship or not; nor may we prescribe the form of worship. We do not vote on whether a person is entitled to a fair trial, or the right to be treated fairly. If the entire nation and all its officials were to act to deprive one person of any of these rights, the individual would win. We have constitutionalized the adage of John Stuart Mill, "If all mankind minus one were of one opinion and only one person were of the contrary opinion, mankind would be no more justified in silencing that person than he, if he had the power, would be justified in silencing mankind."<sup>58</sup>

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<sup>56</sup> West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

<sup>57</sup> *Id.* at 641.

<sup>58</sup> SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO 320 (Margaret E. Hall ed., Fallon Publishers 1947) (quoting JOHN STUART MILL, ON LIBERTY, 303 (H. Class, Eliot eds., 1909)).

### A. Freedom of Speech

That First Amendment rights are guaranteed as against the majority should be especially meaningful to Jews, who have been persecuted, expelled, and even exterminated in virtually every country in which they have lived *with the exception of the United States*. And in the United States, as a minority, Jews have little hope of winning a popular election and therefore must seek redress through the courts, which were designed to be the bulwarks of freedom especially in times of repression and stress.

That explains why *Jewish* lawyers defended the First Amendment rights of freedom of speech for the American Nazi Party, and to march in Skokie, Illinois, a town with a substantial population of Holocaust survivors. Viewed in a wider context, that was a proud moment in the history of defending Constitutional freedoms, no matter how scurrilous and despicable the Nazi ideology, especially for Jews. The lesson is that expression cannot be stifled no matter how "unpopular" the message, or no matter how much the majority finds it hideous.

Jewish tradition in defending unpopular speech can be traced to the Bible and the Mishnah. In Deuteronomy, Chapter 17<sup>59</sup> local judges are instructed to follow the law as given by the Sanhedrin, the equivalent of the Supreme Court of today. And those who act "presumptively"<sup>60</sup> in disobedience are subject to the extreme penalty. The all important qualifying adverb is taken by the Mishnah to affirm freedom of speech for the judge to openly disagree with the superior ruling.<sup>61</sup> Israel Supreme Court Justice

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<sup>59</sup> *Deuteronomy*, 17: 8, *et seq.*

<sup>60</sup> *Deuteronomy* 17:12.

<sup>61</sup> *Masehet Sanhedrin* 11:2 SHISHA SIDREI MISHNAH 207 (Albeck ed., The Bialik Institute and Dvir Co.1959). See also *Deuteronomy*, THE JPS COMMENTARY 165 n.12 (Jeffrey H. Tigay trans., The Jewish Publication Society 1996).

Menachem Elon, in his treatise on Jewish Law<sup>62</sup> explains the doctrine of the "rebellious elder"<sup>63</sup> with the following summary:

This is the teaching of the Jewish heritage in regard to leadership and government - that all persons and groups should be treated tolerantly, with respect for their views and world outlook. This is the great secret of tolerance and respect for the opinion of others, and the right of each individual and group to freedom of speech.<sup>64</sup>

Jews should not shy away from defending free speech for Nazis, no matter how painful that may be. Aryeh Neier, Executive Director of the American Civil Liberties Union during the Skokie events, in his book, *Defending My Enemy*<sup>65</sup>, explained in detail that freedom for hateful thoughts is necessary to guaranty free speech for lofty ideals. Neier's parents were Hebrew teachers in Germany who escaped from Hitler. He understood the virulence of Nazi doctrine. But he maintained that it was not the failure to curb Nazi speech which led to the Holocaust, rather it was the refusal to stop the unlawful actions in fulfillment of the Nazi plan, subsequently termed "the final solution of the Jewish question."

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<sup>62</sup> MENACHEM ELON, 4 JEWISH LAW, FREEDOM OF THOUGHT AND SPEECH (Bernard Auerbach & Melvin Sykes trans., Jewish Publication Society 1994).,

<sup>63</sup> In Hebrew "rebellious elder" is "zaken mamre."

<sup>64</sup> ELON, *supra* note 62, at 1846-49. A current illustration in American law, undoubtedly unintended, appears in *ACLU v. Black Horse Pike Regional Bd. of Educ.*, 84 F.3d 1471 (3d Cir. 1996), where the District Court decided that student-initiated graduation prayer did not violate the First Amendment, and upon reversal by the Court of Appeals, followed the mandate but insisted that its decision was correct:

We make it clear that the opinion of the Coui. remains that [originally] expressed. However, due regard for our "hierarchical federal judicial system ... requires us to respect the findings of the [Court of Appeals for the] Third Circuit."

*Id.* at 1476.

<sup>65</sup> ARYEH NEIER, *DEFENDING MY ENEMY* (1979).

Justice Cardozo understood the necessity for defending speech "that we hate"<sup>66</sup>: "Aglow even yet, after the cooling time of a century and more, is the coal from the fire that was the mind of Voltaire: "I do not believe in a word that you say, but I will defend to the death your right to say it."<sup>67</sup>

On a personal note, I tried the case on behalf of the American Civil Liberties Union in Philadelphia when the American Nazi Party was granted a permit to march in front of Independence Hall and the Liberty Bell with posters reading, "Kill the Jews," "Finish the Job That Hitler Started," and similar hideous messages. Suit to cancel the permit was filed by an array of municipal authorities and Jewish organizations.<sup>68</sup> Since the permit was granted by the federal government, the United States Attorney defended and the ACLU then technically speaking entered the case as *amicus curiae* on behalf of the United States.

The United States Attorney made what appeared to be a *pro forma* argument and the burden then shifted to ACLU to defend in earnest the First Amendment guaranty of free speech. Holocaust survivors were outraged that a Jewish lawyer would defend Nazis. They and other Jews apparently felt that this Jewish lawyer did not know what Nazis were and never heard of the Holocaust because they brought pictures of the atrocities and rolled up their sleeves to confront me with the numbers tattooed on their arms. They testified that the appearance of Nazis in uniform with jack boots and swastika would cause them severe emotional distress bringing back vivid memories of the most hideous scenes any human beings could experience.<sup>69</sup> "Does a

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<sup>66</sup> See generally *United States v. Schwimmer*, 279 U.S. 644 (1929) (Holmes, J., dissenting). "[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought -- not free thought for those who agree with us but freedom for the thought that we hate." *Id.* at 654-55.

<sup>67</sup> MILL, *supra* note 58, at 323.

<sup>68</sup> *Ass'n of Jewish New Ams. v. Cawood*, No. 79 Civ. 618 (E.D. Pa. 1979).

<sup>69</sup> Professor Caine brought his students in Constitutional Law to witness the trial so that they could understand emotionally as well as intellectually the raging controversy over free speech for purveyors of hate. One student stood

Jewish lawyer have to represent these beasts?!" I was asked. A survivor of Auschwitz lamented, "If you were in the death camps you could not have defended the right of Nazis to speak." I agreed but not for the reasons intimated. The destruction in the extermination camps was vast - the bulk of European Jewry was murdered. It now seems that reason itself also fell victim.

Jews are a minority in the United States and need the protection that the Bill of Rights affords. Minorities cannot rely upon elections to secure their freedom because that is a majoritarian process under which minorities are powerless to protect themselves. Jews should be among the first to understand that nowhere in the world have their rights withstood the vicissitudes of history no matter how well they appear to be ensconced in society. A trip to the Diaspora Museum in Tel Aviv proves the point. The Golden Age in Spain and periods of success and safety elsewhere ended in discrimination, expulsion, and extermination. In the United States, 200 plus years of history is still too short to say how secure fundamental rights for Jews will be. Paraphrasing Justice Jackson, people have discovered no technique for long preserving freedom except that rights of minorities be preserved under law against the majority. Such institutions may be destined to pass away. But it is the duty of minorities to be the last, not the first, to give them up.<sup>70</sup>

Jews may have been duped into thinking that in this time of "political correctness," censoring or punishing unpopular speech would inure to the benefit of slandered minorities, and especially would protect Jews from anti-Semitic remarks. Many

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up in the courtroom wearing a talit and a white kippah announcing that this is how Jews are buried and that his professor was arguing for the death of the Jewish People.

<sup>70</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). There, Justice Jackson wrote:

With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under law, and that the law be made by parliamentary deliberations. Such institutions may be destined to pass away .... But it is the duty of the Court to be the last, not the first, to give them up.

*Id.* at 655.

Jews thought that a little repression of the fundamental right to speak was worth the price.

The "water buffalo" and related incidents at the University of Pennsylvania should have provided convincing proof to the contrary. At Penn, the Jewish ox was gored. It should have been expected. Denominated "the nation's most politically correct campus,"<sup>71</sup> Penn punishes racist speech protected by the Constitution.<sup>72</sup> Jews should have taken little comfort from the expectation that it would be used to stifle anti-Semitic canards, especially from African-Americans.

In a nationwide TV program entitled *Political Correctness and College Campuses*,<sup>73</sup> Penn was Exhibit A. Murray Dolfman, a Jewish legal studies senior lecturer at Penn's Wharton School, was disciplined by the University because he asked African-American students to read the Thirteenth Amendment extirpating slavery to show the reason why contracts for employment could not be specifically enforced. He prefaced his request by saying

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<sup>71</sup> David Boldt, *Penn's Oracle of Optimism*, PHILADELPHIA INQUIRER, Sept. 12, 1995, at B1.

<sup>72</sup> Univ. of Pennsylvania Code of Student Conduct, Section III(d). Penn and Stanford, among others, maintain that as private institutions, they do not have to obey the constitution. Contemning the American Charter of Liberty is hardly an encomium to any university. See Ronald Dworkin's essay, *Why Academic Freedom?* in FREEDOM'S LAW, 244-60 (Harvard University Press 1996) (explaining that "hate speech" codes inhibit free and open exchange that nourishes independent thought. For the University of Pennsylvania, punishing speech which the Constitution protects is ironic since Penn advertises itself as "Ben Franklin's University" and Benjamin Franklin was a member of the convention which wrote the Constitution). Fortunately, every university speech code which has been litigated has been found to violate principles of the First Amendment. See, e.g., *Doe v. Univ. of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989); *UWM Post, Inc. v. Bd. of Regents of Univ. of Wis.*, 774 F. Supp. 1163 (E.D. Wis. 1991). See, e.g., *Corry v. Stanford University*, No. 740309, slip op. (Ca. Super. Ct., Santa Clara County, Feb. 27 1995) (holding state law incorporates principles of the First Amendment). See *Court Overturns Stanford Univ. Code Barring Bigoted Speech*, N.Y. TIMES, March 1, 1995, at B8.

<sup>73</sup> *Campus Culture Wars: Five Stories About 'PC'* (PBS television broadcast, Sept. 24, 1993).

that Jews and African Americans had been slaves and therefore should be especially sensitive to the Constitutional prohibition. Dolfman was subjected to sensitivity training and then his contract was not renewed.<sup>74</sup>

In January 1993,<sup>75</sup> the University initiated formal disciplinary action against Eden Jakobowitz, a student who called African-American women students "water buffalo" because they were carousing in the dormitory complex when students were studying for exams.<sup>76</sup> Jakobowitz, born in Israel and yeshiva educated, denied uttering a racist comment, saying that he was merely translating Yeshiva censure - "behamah" - into English to convey the idea of misbehavior.<sup>77</sup>

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<sup>74</sup> See NAT HENTOFF, FREEDOM OF SPEECH FOR ME BUT NOT FOR THEE 189-92 (1992). Hentoff blames the American Civil Liberties Union for not taking action to protect Dolfman's rights. *Id.* Burton Caine was President of the ACLU chapter referred to and never heard of the incident. *Id.* On checking with Murray Dolfman, the author learned that he wanted to keep civil liberties organizations, and especially the Jewish defense agencies, out of the affair because he believed that he had an understanding with Sheldon Hackney, then President of Penn, that if the matter was kept quiet and Dolfman underwent the required "retraining," his contract would be renewed. *Id.* It wasn't. Dolfman felt betrayed. *Id.*

<sup>75</sup> Prior thereto came the trashing, by African-Americans, of the entire edition of *The Daily Pennsylvanian*, the student newspaper because of an article criticizing the university's affirmative action program as unfair to whites. The university decided to take no action against the students.

<sup>76</sup> See Burton Caine, *The Dormant First Amendment*, 2 TEMPLE POLIT. & CIV. RTS. L. REV. 227, 244-46 (1993).

<sup>77</sup> The Hebrew word for "water buffalo" is "t'oh." See A. Even-Shoshan, 7 HAMEELON HEHADASH 2810 (Kariat Sefer 1970). "T'oh" appears twice in the Bible at *Deuteronomy* 14:5 and *Isaiah* 51:20. "Behamah" is more accurately translated as animal - commonly, a domesticated animal - but not water buffalo. The slang meaning is an "animal" not in the literal sense but to convey the idea of one not observing the norms of acceptable conduct. One would have thought that a yeshiva student and native Hebrew speaker would have chosen one of these terms as the correct translation for "behamah." History Professor Alan Kors defended that water buffalos come from Asia, not Africa, and therefore the comment was not racist. He recalled that "Animal House," the film which satirized college life, was not a racist slur but meant disorderly

The essential point is that Jakobowitz' speech was protected by the First Amendment, no matter what he meant to convey, and Penn's refusal to obey the Constitution should have been the issue. Penn was rescued only by the withdrawal of the complaint by the women, not by fidelity to the Bill of Rights. The rescue, however was temporary. After graduation, Jakobowitz instituted suit against the university, and the case has been settled without trial.<sup>78</sup>

Jews learned a lesson<sup>79</sup> which all censorship inevitably teaches. As has been noted frequently, repressing speech is like releasing poison gas. The wind often changes.<sup>80</sup> Benjamin

students and was the appropriate linguistic equivalent of "behamah" in student speech.

<sup>78</sup> *'Water Buffalo' Lawsuit Settled by Penn Graduate*, N.Y. TIMES, Sept 10, 1997, at A16. There was no admission of wrongdoing made by the university, and no damages paid, although Penn did agree to pay some of Mr. Jacobowitz' legal fees. *Id.* See also *Former Student Settles Suit over 'Water Buffalo' Case, Eden Jacobowitz Had Alleged That Penn Conspired to Pursue Racial Harassment Charges Against Him*, PHILADELPHIA INQUIRER, Sept. 9, 1997, at B3.

<sup>79</sup> Or, should have learned. But in the January 1993 incident, see note 75 et seq. and accompanying text, many of the professors and students were Jewish, as was the President of the University of Pennsylvania.

<sup>80</sup> Jews might have taken note of the remarks of legal philosopher Edmond Cahn at Hebrew University of Jerusalem in 1962 against a group libel law:

The officials could begin by prosecuting anyone who distributed the Christian Gospels, because they contain many defamatory statements not only about Jews but also about Christians; they show Christians failing Jesus in his hour of deepest tragedy. Then the officials could ban Greek literature for calling the rest of the world "barbarians." Roman authors would be suppressed because when they were not defaming the Gallic and Teutonic tribes they were disparaging the Italians. For obvious reasons, all Christian writers of the Middle Ages and quite a few modern ones could meet a similar fate. Even if an exceptional Catholic should fail to mention the Jews, the officials would have to proceed against his works for what he said about the Protestants and, of course, the same would apply to Protestant views on the subject of Catholics. Then there is Shakespeare who openly affronted the French, the Welsh, the Danes.... Dozens of British writers from Sheridan and Dickens to Shaw and Joyce insulted the Irish. Finally, almost every worthwhile



Franklin summed it up, "Those who would give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty or Safety."<sup>81</sup> Perhaps, Shakespeare's *Macbeth* is even more profound: "Security is mortals' chiefest enemy."<sup>82</sup>

When Justice Brandeis wrote that the answer to speech is more speech, not suppressing the speaker, he relied upon "discussion...to avert the evil by processes of education."<sup>83</sup> It is a lesson many educational institutions resist learning. The lesson is even harder to learn when the speech at issue has enormous emotional intensity.

### B. The Separation of Church and State

The very first provision of the Bill of Rights, that is, the First Amendment, provides, "Congress shall make no law respecting an establishment of religion."<sup>84</sup> In 1947, in *Everson v. Board of Education*,<sup>85</sup> the United States Supreme Court said:

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item of prose and poetry published by an American Negro would fall under the ban because it either whispered, spoke, or shouted unkind statements about the group called "white."

Edmond Cahn, Remarks at Hebrew University of Jerusalem Against Group Libel Law (1962) *reprinted in* ARYEH NEIER, DEFENDING MY ENEMY 139-40 (1979).

<sup>81</sup> DICTIONARY OF QUOTATIONS FROM THE LIBRARY OF CONGRESS 1056 (Congressional Quarterly Inc.1992).

<sup>82</sup> Hecate to the three witches. WILLIAM SHAKESPEARE, *MACBETH*, act 3, sc. 5, verses 32-33 (3 THE ANNOTATED SHAKESPEARE 445, Rowse ed., C.N. Potter 1978).

<sup>83</sup> *Whitney v. California*, 274 U.S. 357, 377 (1927).

<sup>84</sup> U.S. CONST. amend. I

<sup>85</sup> 330 U.S. 1 (1947). Nevertheless, by a 5-4 vote, the Supreme Court upheld New Jersey's reimbursement for the cost of "the transportation of pupils to both public and parochial schools." *Id.* at 358. The Court held that "[the] establishment of religion' did not prevent 'New Jersey from spending tax-raised funds to pay bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools.'" *Id.* at 360.

[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 be called, or whatever form they may adopt to teach or practice religion... . In the words of Jefferson, the clause against establishment of religion... was intended to erect "a wall of separation between church and State."

In *Lemon v. Kurtzman*,<sup>86</sup> the Supreme Court set forth a 3-prong test government action must meet to withstand an Establishment Clause attack: "First, [the action] must have a secular purpose; second, its principal or primary effect must be one that neither advances nor inhibits [religion]; finally [it] must not foster 'an excessive government entanglement with religion.'"<sup>87</sup>

In elaborating upon prong 3, the Supreme Court in *Meek v. Pittenger*<sup>88</sup> said that government action is in violation of this test when it:

creates a serious potential for divisive conflict over the issue of aid to religion - "entanglement in the broader

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<sup>86</sup> 403 U.S. 602 (1971). This case involved "[a]ctions challenging the constitutionality of state aid to, or for the benefit of, nonpublic schools." *Id.* The United States Supreme Court held both Rhode Island and Pennsylvania statutes to be unconstitutional under First Amendment religion clauses because both "involved excessive entanglement of state with church" and "posed danger of divisive political activity and possibility of progression leading toward the establishment of state churches and state religion." *Id.* at 624-25.

<sup>87</sup> *Id.* at 612-13 (citations omitted).

<sup>88</sup> 421 U.S. 349 (1975). "[S]tatutes providing for state expenditures in connection with the education of students in nonpublic schools" was held unconstitutional on First Amendment grounds. *Id.* The United States Supreme Court held that "all but the textbook loan provisions of the statutes in question violated the Establishment Clause of the First Amendment as made applicable to the states by the Fourteenth Amendment." *Id.*

sense of continuing political strife"....[i.e.] political fragmentation and division along religious lines, one of the principal evils against which the Establishment Clause was intended to protect.<sup>89</sup>

The First Amendment, as indeed the entire Constitution, binds only the government, not private persons. However, I suggest that the policy behind this provision of the First Amendment is also good for the Jews and should guide their actions. As a minority in this country Jews should adhere to, support, and fight to protect the Establishment Clause values with all their heart, and with all their soul, and with all their might, and impress them upon their children.<sup>90</sup> And Jews, I suggest, should be particularly assiduous in not taking or promoting any action which will lead to "political ... division along religious lines, one of the principal evils against which the Establishment Clause was intended to protect."<sup>91</sup>

The United States is alone among the nations of the world in proscribing such government help and hindrance to religion and it should rightfully be considered America's unique contribution to the flourishing of religious freedom. Far from being hostile to religion, the Establishment Clause has led to the prosperity of both religion and freedom virtually unequalled among the countries of the earth. Many consider the Establishment Clause the glory of the American Constitutional experiment.

Just as Jews should not try to suppress speech no matter how despicable, as I have maintained above, it is decidedly in the interest of Jews, I suggest here, to support the separation of religion and government and not take action, nor claim for themselves rights or privileges which undermine the policy underlying the Establishment Clause, nor encourage others to do so. As illustrated below, in my view Jews have not always

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<sup>89</sup> *Id.* at 372.

<sup>90</sup> *Deuteronomy* 6:5,7 (paraphrasing the prayer, "Shema, Yisrael").

<sup>91</sup> *Meek v. Pittinger*, 421 U.S. at 372.

observed this admonition, and to their detriment. Often, Jews have undermined the wall of separation of church and state without regard for the warning that "it stands for thee."

### 1. Religious symbols in public places

*Capitol Square Review and Advisory Board v. Pinette*,<sup>92</sup> is a recent case which illustrates both the folly of erecting Jewish symbols in public places and claiming the right to do so under the free speech clause while opposing the same right for the symbols of others; and also claiming an exemption from the Establishment Clause for placing Jewish religious objects in public places while opposing the same right for others. Such actions are a parade illustration of promoting "political fragmentation and division along religious lines, one of the principal evils against which the Establishment Clause was intended to protect."<sup>93</sup> Jews should not station Hanukkah menorot at the Liberty Bell, inside a capitol rotunda, in front of government buildings, or in other public places, and otherwise set an example for other religions to do likewise. Misguided Jews, largely Orthodox, have spurned this advice, as amply illustrated below, as if the Establishment Clause, and its command of separation of state and religion, is itself the enemy of the Jews.<sup>94</sup>

In *Pinette*, a rabbi obtained a permit from the state licensing board to erect a Hanukkah menorah in the public square in front of the state capitol in Columbus, Ohio.<sup>95</sup> The Ku Klux Klan [hereinafter "KKK"] then applied to install a large Christian

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<sup>92</sup> 515 U.S. 753 (1995) (holding that the KKK could not be denied the right to erect a cross in a public plaza next to the Ohio State capitol building because to do so otherwise would be a violation of the Klan's First Amendment rights).

<sup>93</sup> *Meek v. Pittenger*, 421 U.S. 349, 372 (1975).

<sup>94</sup> The policy of placing the menorah in close proximity to symbols of the nation and seats of power alone testifies to a purpose to create the impression of government "endorsement," exactly what the Establishment Clause was designed to interdict. See, e.g., *Lynch v. Donnelly*, 465 U.S. 668, 688, 691-94 (1984) (O'Connor, J., concurring).

<sup>95</sup> *Pinette*, 515 U.S. at 757-58.

cross "because 'the Jews' were placing 'a symbol' for the Jewish belief" in the square.<sup>96</sup> The Jewish message was in celebration of the Jewish holiday of Hanukkah, The Feast of Lights.<sup>97</sup> As for the KKK response, "[k]nowledgeable observers might regard it, given the context, as an anti-Semitic symbol of bigotry and disrespect for a particular religious sect."<sup>98</sup> Indeed, "[t]he Klan found the menorah offensive."<sup>99</sup> But asserting that difference in opposition to the KKK display would have run headlong into the most fundamental principle in Free Speech jurisprudence, namely, that speech may not be censored on the basis of its content, and even more so on the basis of its viewpoint.<sup>100</sup> In addition, in the religious context, "government lacks the power to judge truth of religious beliefs."<sup>101</sup> The Ku Klux Klan application was rejected by the state licensing board, which decision was overturned by the lower federal courts, which in turn was affirmed by the United States Supreme Court.<sup>102</sup>

The issue in the Supreme Court was limited to whether the KKK Christian cross installed in front of the state capitol violated the First Amendment Establishment Clause calling for the Separation of Church and State.<sup>103</sup> If so, the KKK cross would not be protected expression under the freedom of speech clause.

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<sup>96</sup> *Id.* at 797 (Stevens, J., dissenting).

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 798.

<sup>99</sup> *Id.* n.2.

<sup>100</sup> See *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 115 S.Ct 2510 (1995) (holding that viewpoint discrimination, meaning that which is based on a speaker's opinion, perspective or ideology, "was a denial of the right of free speech ... which would undermine the very neutrality the Establishment Clause requires."). *Id.* at 2525. See also *Reno v. ACLU*, 117 S. Ct. 2329 (1997) (holding that material cannot be censored just because it may be harmful, inasmuch as the Internet cannot be censored).

<sup>101</sup> *U.S. v. Ballard*, 322 U.S. 78, 86-89 (1944).

<sup>102</sup> *Pinette*, 515 U.S. at 770.

<sup>103</sup> That was the only issue decided in the lower courts and on which the Supreme Court granted *certiorari*. Justice Thomas thought the KKK act was political - that is, was intended to convey hate, not religion - suggesting that

The case for denying a permit to the KKK on grounds of the Establishment Clause was undermined by the erection of the menorah.<sup>104</sup> How can Jews put up a religious symbol, and Christians not, even if it is the KKK? The court by a vote of 7-2 held that the KKK free-standing cross did not violate the Establishment Clause calling for the separation of church and state because the other symbols there - including the menorah - gave the impression to the public that the KKK cross was just one of many symbols which together send a message that the state does not necessarily endorse religion, but permits all religions to express their own views.

I suggest that the erection of the menorah therefore backfired and encouraged the proliferation of religious symbols in public places.<sup>105</sup> This is the clear implication from a series of lower court cases where the court used the menorah to justify the erection of Christian religious symbols on public property often by the government at public expense.

The most egregious of these cases, I suggest, is the recent 2-1 decision by the Court of Appeals for the Second Circuit in *Elewski v. City of Syracuse*,<sup>106</sup> which held, that the erection of a creche by the city in downtown Syracuse replete with the Christian exaltation "Gloria in Deo Excelsis", bearing the name of the mayor, and cordoned off by police barricades, nevertheless did not constitute endorsement. In view of the Hanukkah menorah erected nearby by Chabad Lubavitch, the majority maintained, the message was diversity just as was in *Allegheny*

the Establishment Clause was not the proper issue. *Id.* at 771 (Thomas, J., concurring).

<sup>104</sup> *Id.* at 758. Although the majority opinion does not so hold, it notes the presence of the menorah as an indication that Capitol Square is a public forum where religious as well as non-religious displays and the like are exhibited. *Id.* Taking specific notice of the menorah, the author suggests, shows that its presence is significant in Justice Scalia's opinion. It could not fail to be.

<sup>105</sup> See, e.g., *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753. See also *Doe v. Small*, 964 F.2d 611, 625 (7th Cir. 1992) ("Surely the City cannot allow a religious group to turn a public park into an enormous outdoor church.") (Cudahy, J., concurring).

<sup>106</sup> 123 F.3d 51 (2d Cir. 1997).

*County v. American Civil Liberties Union.*<sup>107</sup> *Pinette*<sup>108</sup> was also cited as authority on the ground this was a public forum as indicated by the Lubavitcher's menorah, and that invites a diversity of views and symbols including those placed by the government. The vigorous dissent by Judge Cabranes emphasizes that action by the City of Syracuse in installing a creche alone is sufficient to amount to endorsement prohibited by the Establishment Clause.<sup>109</sup>

That factor was the key to the Third Circuit's condemnation of Jersey City's display of both a creche and menorah, even with the addition of plastic reindeer, Santa Claus, Frosty the Snowman, and a wooden sled in its decision in *American Civil Liberties Union v. Schundler*.<sup>110</sup> By erecting both religious symbols, the Court observed, Jersey City sends a double religious message, that is, both religions are endorsed by the municipal authorities. The *Pinette* case was distinguished on the ground that the menorah and cross were erected by private persons in a public forum and the issue there was whether the menorah privately installed by Lubavitchers legitimated the KKK cross because it signaled that this was a public forum where all private speech is guaranteed by of freedom of speech provision of the First Amendment.

Whether the United States Supreme Court will accept the *Elewski* reasoning that the Lubavitcher menorah justifies a government creche remains to be seen. But in view of what appears to be a Supreme Court crusade to accommodate, if not actually to promote religion, and particularly the Christian

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<sup>107</sup> 492 U.S. 573 (1989). The Court held that "the effect ... of placing a menorah next to a Christmas tree is to create an 'overall holiday setting' ... [and that] if the city celebrates both Christmas and Chanukah as secular holidays, then its conduct is beyond the reach of the establishment clause." *Id.* at 614-15.

<sup>108</sup> 515 U.S. 753 (1995).

<sup>109</sup> *Elewski*, 123 F.3d at 61 (Cabranes, J., dissenting).

<sup>110</sup> 104 F.3d 1435 (3d Cir. 1997) (holding that adding secular exhibits to a municipally erected display of a menorah and crèche was not enough to satisfy the constitutional prohibition against state sponsoring of religion).

religion, short of the never-to-be-reached land of "endorsement," creates the significant danger that history will record that the enthusiasm with which Orthodox Jews have joined the ranks of Onward Christian Soldiers made them essential partners in the unholy alliance to make a shambles of the Establishment Clause.<sup>111</sup>

Orthodox Jews have engaged in a campaign to station menorot wherever official government authority inheres. To date, this has resulted in numerous cases including one Supreme Court decision<sup>112</sup>, in addition to *Pinette*, and several from United States Courts of Appeals.<sup>113</sup> In one case, *Grossbaum v.*

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<sup>111</sup> Their efforts are not limited to placing religious symbols on public property. Orthodox Jews are in the forefront of the battle to get public school teachers into religious schools and to overturn established First Amendment precedents that barred the way. See *Agostini v. Felton*, 117 S.Ct. 1997 (1997). The National Jewish Commission on Law and Public Affairs, an Orthodox group, took an active part in urging the Supreme Court action. See Linda Greenhouse, *Court to Consider Reversing Decision on Parochial Aid*, N.Y. TIMES, Jan. 18, 1997, at A12.

<sup>112</sup> *Allegheny County v. ACLU*, 492 U.S. 573 (1989).

<sup>113</sup> See, e.g., *ACLU v. Schundler*, 104 F.3d 1435 (3d Cir.), cert. denied, 117 S.Ct. 2434 (1997); *Elewski v. City of Syracuse*, 123 F.3d 51 (2d Cir.), cert. denied, 117 S.Ct. 1822 (1997); *Grossbaum v. Indianapolis-Marion County Bldg. Authority*, 100 F.3d 1287 (7th Cir. 1996); *American Jewish Congress v. Beverly Hills*, 90 F.3d 379 (9th Cir. 1996) (en banc); *Separation of Church & State v. Eugene*, 93 F.3d 617 (9th Cir. 1996) (banning cross and menorah on public property); *Kaplan v. Burlington*, 891 F.2d 1024 (2d Cir. 1989), cert. denied 110 S.Ct. 2619 (1990) (stating that "semi-permanent display" of unattended menorah in City Hall Park violates Establishment Clause); *Chabad-Lubavitch v. Burlington*, 936 F.2d 109 (2d Cir. 1991) (placing a menorah next to secular holiday display in public park does not succeed in making the entire display secular); *Congregation Lubavitch v. Cincinnati*, 923 F.2d 458 (6th Cir. 1991) (holding that the city's motion to enjoin menorah from a public forum is unlikely to succeed on the merits); *Lubavitch Chabad House v. City of Chicago*, 917 F.2d 341 (7th Cir. 1990) (permitting Christmas tree at O'Hare Airport but not menorah is not discriminatory because tree is not religious and menorah is). But see *Ams. United for the Separation of Church and State v. Grand Rapids*, 980 F.2d 1553 (6th Cir. 1992) (holding the display of a privately funded menorah in the public square with municipal permission is no violation of Establishment Clause); *Chabad-Lubavitch v. Miller*, 5 F.3d 1383



*Indianapolis-Marion County Building Authority*,<sup>114</sup> Orthodox Jews went so far as to litigate the claim that the ban of all private displays from the lobby of a government building was retaliation against Orthodox Jews in violation of their First Amendment Rights. At the urging of the Jewish Community Relations Council and the American Civil Liberties Union, the argument was rejected.

Even if the motive of the campaign to set up Jewish holy vessels in public places is to match Christian ones, the notion is still ill-conceived.<sup>115</sup>

In *Lynch v. Donnelly*,<sup>116</sup> the Court held that the Establishment Clause did not prohibit the City of Pawtucket, Rhode Island, from erecting a creche celebrating the birth of Christ because set among reindeer and other allegedly non-religious objects, the nativity depiction did not convert a secular scene into a religious display. Moreover, said the majority, the birth of Jesus Christ was an historical event not a religious exercise. I suggest that the decision is absurd and deleterious to both Jews and Christians. The comments on this opinion<sup>117</sup> unite

(11th Cir. 1993) (asserting the menorah in Georgia capitol rotunda does not violate the Establishment Clause because the rotunda is a public forum).

<sup>114</sup> 100 F.3d 1287 (7th Cir. 1996).

<sup>115</sup> At the very least, it gets courts into the business of determining which symbols advanced by different, and competing, religions are "religious" and which are not. As stated elsewhere in this article, this is not a competition healthy for a society which constitutionally mandates a separation of church and state. See, e.g., *Lubavitch Chabad House v. City of Chicago*, 917 F.2d 341 (7th Cir. 1990) (rejecting contentions of Lubavitch Chabad House that the Christmas tree is "religious" as "frivolous," while the menorah was termed "religious," and therefore the denial of a permit to erect it next to the Christmas tree at O'Hare Airport was upheld against the Orthodox Jews' claim of discrimination).

<sup>116</sup> 465 U.S. 668 (1984).

<sup>117</sup> Professor Norman Redlich, then Dean of New York University Law School, commented on the op-ed page of the New York Times that the ruling was an insult to Jews requiring them to accommodate to the majoritarian religion. Norman Redlich, *Before Putting up that Creche or Menorah*, N.Y. TIMES, July 24, 1989, at A49. This prompted a response from Professor John Hart Ely, then Dean of Stanford Law School, that the Chief Justice of the

to keep public property free of religious vessels. Lubavitcher Jews have rejected this suggestion not only on the ground that their menorot are stationed on public ground at their own expense, which is not always true,<sup>118</sup> but that they actively sought government endorsement for reasons which baffle and pain this author to no end. Attempts to explore their reasoning have produced little more than suspicion that separation of religion and state is itself the enemy, and that the Lubavitcher Jews will not have "arrived" in the United States until the government itself has recognized and supported their version of Orthodox Judaism.

In Philadelphia, for example, the Lubavitchers installed what they claimed was "the world's largest menorah"<sup>119</sup> adjacent to the Liberty Bell, and Rabbi Abraham Shemtov was hoisted by a "cherry picker" crane provided at government expense to light the Hanukkah candles. This came to light in October 1979 when the American Civil Liberties Union [hereinafter "ACLU"] brought suit in federal court against the City of Philadelphia for violation of the Establishment Clause by building a platform for Pope John Paul II to conduct a mass.<sup>120</sup> Critics let loose with a flood of anti-Semitic comments and threats asserting that ACLU was anti-Catholic and looked the other way when Jews were the beneficiaries.

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United States in his opinion for the Court insulted Christians by telling them that their most sacred religious symbol was like plastic reindeers and candy canes.

<sup>118</sup> See, e.g., *Elewski v. City of Syracuse*, 123 F.3d 51 (2d Cir. 1997); *ACLU v. Schundler*, 104 F.3d 1435 (3d Cir. 1997).

<sup>119</sup> The claim is still being made. See *JEWISH EXPONENT*, Nov. 28, 1996, Col.4-5.

<sup>120</sup> *Gilfillan v. Philadelphia*, 637 F.2d 924, 934 (3d Cir. 1980). The United States District Court held the City in violation and the Court of Appeals affirmed by a vote of 2-1. *Id.* Judge Aldisert dissented on the grounds that the Vatican, like the State of Israel, was a theocratic state and the Pope as head of state was a political figure and any aid extended to him was perforce not religious. *Id.* at 935 (Aldisert, J., dissenting).

ACLU responded that suit would be brought against Philadelphia unless municipal funding ceased for the menorah.<sup>121</sup> Rabbi Shemtov sought to distinguish the cases of the menorah and the platform on the ground that Hanukkah was not a religious holiday and the menorah is not a religious symbol. This comment prompted the question, "Would you like a federal judge to decide whether a Jewish holiday and which of the holy vessels is religious?"<sup>122</sup> The city backed down only the day before Hanukkah and entered into an agreement not to support the ceremony.<sup>123</sup> But city support continued that year<sup>124</sup> and the next, the municipal administration claiming oversight.

Subsequently, in 1992, the Lubavitchers could not resist the temptation for official endorsement, and Edward Rendell, the first Jewish mayor of Philadelphia, accepted the invitation of this Orthodox Jewish sect to participate in the Hanukkah candle lighting ceremony in his official capacity as chief executive of the City. Wearing a yarmulke, Mayor Rendell was hoisted by the crane, now privately funded, together with the rabbi to light the Hanukkah candles and recite the blessings in Hebrew together with the assembled congregation. Denying any violation of the

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<sup>121</sup> The author was General Counsel for ACLU and was personally acquainted with the facts recited here. *See also Civil Liberties Record*, 30 ACLU of Pennsylvania 1 (1980), and letters from the City Solicitor of Philadelphia to Burton Caine reproduced there.

<sup>122</sup> Rabbi Shemtov was following good Christian tradition. In *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963), Protestant ministers testified that the Bible was not religious in an attempt to defend Bible reading against a First Amendment claim that the practice violated the Establishment Clause. *Id.* at 210. And when it served their purpose to assert that Quetzalcoatl, the ancient Aztec serpent god, was religious for the purpose of trying to enjoin a municipality from placing a sculpture of a deity in the park, Christian fundamentalists did so. Unsuccessfully! *See Alvarado v. City of San Jose*, 94 F.3d 1223 (9th Cir. 1996).

<sup>123</sup> *Civil Liberties Record*, *supra* note 121.

<sup>124</sup> *Id.* Rabbi Shemtov defended that the blessings were recited by a 5-year old boy and that did not count because he was not yet a bar-mitzvah. *Id.*

agreement or the First Amendment,<sup>125</sup> and justifying his actions, Mayor Rendell wrote to me and the ACLU:

I accepted an invitation from the Lubavitch House to participate in its Menorah lighting ceremony ... to recognize the cultural diversity of our population, and to join groups of citizens in celebrating their traditions.<sup>126</sup>

And the Mayor in his official capacity and so identified by the seal of the City of Philadelphia, continued the practice of participating in the Hanukkah candle lighting ceremony.<sup>127</sup>

Despite the Mayor's claim, I suggest that the facts point to "endorsement" of Hanukkah. In my view, several decisions confirm that view, most pointedly the court which sits across from Independence Square in full view of the menorah and Hanukkah candle-lighting ceremony. In *Schundler*, the Court of Appeals for the Third Circuit condemned Jersey City's display of both a creche and menorah on the ground that when the government itself is involved, "endorsement" is either present by definition, or the inevitable conclusion of any reasonable observer.<sup>128</sup> Only the astounding 2-1 decision of the Court of Appeals for the Second Circuit in *Elewski v. City of Syracuse*,<sup>129</sup> casts any doubt on this conclusion. Not only is the message that it is good to be religious, but even a particular religion is

<sup>125</sup> A similar claim was made in *Doe v. Crestwood*, 917 F.2d 1476-78 (7th Cir. 1990). The court held that the municipality's sponsorship of a Roman Catholic mass spoken in Italian as part of an Italian festival violates the Establishment Clause. *Id.* at 1479. Judge Easterbrook cited *ACLU* for the proposition that "even a herd of reindeer and a forest of jumbo candy canes could not neuter a mass - a religious observance that does substantially more than mark the birth of a figure with religious significance. [M]ass ... is an occasion for worship, not for putting a holiday in a historical context that happens to be religious." *Id.* at 1479. The same can be said for lighting Hanukkah candles with the prescribed blessings.

<sup>126</sup> Letter from Edward Rendell, Mayor, Philadelphia to Burton Caine (Feb. 10, 1993).

<sup>127</sup> See *JEWISH EXPONENT*, Dec. 17, 1993, at 9 (photo reprint 1993).

<sup>128</sup> 104 F.3d 1435 (3d Cir. 1997).

<sup>129</sup> 123 F.3d 51 (2d Cir. 1997).

preferred. In *Elewski*, the Court decided that a municipality could erect a creche where Jews installed a menorah.<sup>130</sup> And the fact that the municipal government financed the creche totally and only partially funded the menorah was not enough to prove either endorsement of both religions, or discrimination in favor of Christians. Either would transgress the Establishment Clause.<sup>131</sup>

What neither of these cases had to deal with was the Mayor of the City under the official seal of government participating together with rabbis in a religious ceremony. Those facts alone should brand the ceremony a violation of the Establishment Clause of the First Amendment.

Mayor Rendell, while denying any violation of the Establishment Clause, seems to have changed his practice and now only witnesses the candle-lighting ceremony as an official observer.<sup>132</sup>

The whole enterprise is a parade example of what not to do in a Constitutional system designed to keep the government out of the nasty business of tempting religious strife.<sup>133</sup> In the words of Justice Souter, "Constitutional lines are the price of constitutional government."<sup>134</sup> And for Jews to be active in breaching the wall of separation of religion and state is to invite the evils which so stained the Jewish experience in Europe.

In Allegheny County, Pennsylvania, Orthodox Jews entered into what I view as an "unholy alliance" with Christians

<sup>130</sup> *Id.* at 54.

<sup>131</sup> See *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

<sup>132</sup> Having recently assisted publicly in raising substantial funds for Catholic parochial schools ignoring ACLU objection, the Mayor apparently has made the decision that he was sufficiently fortified to cater to the Jewish vote. One wonders whether playing politics with religion will gain the mayor (and the Jews) approbation from Christians- including those who support using taxpayers' funds for the papal mass. Or, whether the Mayor, together with the Lubavitchers will be seen to have worked in concert to engender precisely the "political divisiveness" sought to be avoided by the First Amendment Establishment Clause.

<sup>133</sup> See *Meek v. Pittenger*, 421 U.S. 349 (1975).

<sup>134</sup> *Agostini v. Felton*, 117 S.Ct. 1997, 2026 (1997) (Souter, J., dissenting).

to make a shambles of the separation principle. The grim tale is told - in part - in *Allegheny County v. American Civil Liberties Union*.<sup>135</sup> Catholics had installed a creche in the interior of the county courthouse, without any accompanying reindeer or candy canes.<sup>136</sup> A block away, in front of the City-County Building, Christians set up a Christmas tree and Jews placed a Hanukkah menorah and between them was a sign reading, "A Salute to Liberty."<sup>137</sup>

ACLU sued to enjoin the entire display as a violation of the Establishment Clause.<sup>138</sup> The Supreme Court granted relief as to the creche because there was no dilution of the religious motif thus distinguishing *Lynch v. Donnelly*.<sup>139</sup> But the Christmas Tree/Hanukkah menorah display was permitted on the ground that two religious symbols were less than the sum of their parts because they communicated a message of diversity, a theme confirmed by the sign.<sup>140</sup>

If the story ended here, one might be tempted to applaud the Jewish strategy because the Jews achieved parity with the majority. And credit for shrewdness, as well, since one could fear that a gentile court could consider the menorah "religious", Rabbi Shemtov notwithstanding, and yet let a Christmas tree pass as friendly fir. Indeed, some justices said exactly that. But the majority was duped into believing that the religious coalition was a celebration of the "winter holiday season."<sup>141</sup>

*Allegheny County* followed the script and interdicted the menorah.<sup>142</sup> Then the Lubavitchers sued claiming that ACLU held that the Hanukkah menorah was constitutionally kosher and was

<sup>135</sup> 492 U.S. 573 (1989).

<sup>136</sup> *Id.* at 580.

<sup>137</sup> *Id.* at 581-82.

<sup>138</sup> *Id.* at 587-88.

<sup>139</sup> *Id.* at 588 (distinguishing from *Lynch v. Donnelly*, 465 U.S. 668 (1984)).

<sup>140</sup> *Id.* at 615.

<sup>141</sup> *Id.* at 616.

<sup>142</sup> See *Pennsylvania County Rejects Displaying of Nativity Scene*, N.Y. TIMES, Nov. 26, 1989, at A36.

met with the defense that only when it was twinned with a Christian religious symbol and not otherwise.<sup>143</sup> In other words, the majority held the right of veto over the Jewish candelabra. The issue was never decided by the Supreme Court<sup>144</sup> and is probably now swept up in the *Pinette* case, where the majority seems likely to approve virtually any religious symbol, free standing or otherwise, in a public forum.<sup>145</sup>

Orthodox Jews seem energized by their appetite to obtain not only state support for their religious practices, but privilege as well. How else can one explain in the *Kiryas Joel* litigation,<sup>146</sup> the passion to get the legislature of New York State to gerrymander a special school district for the benefit this sect of Satmer Jews alone among the 1600 school districts in the state. As said elsewhere in this article, the New York Times, in an unusual editorial, has pleaded with the Jews "to stop fighting the First Amendment."<sup>147</sup>

And, as seen above, the menorah campaign seems driven by missionary zeal. So much so that the American Jewish Congress brought suit in California to prevent the erection of a menorah near City Hall - unattended - for a period of two weeks

<sup>143</sup> *Allegheny*, 492 U.S. at 586.

<sup>144</sup> *Chabad v. Pittsburgh*, 492 U.S. 573 (1989). Justice Brennan allowed the menorah in this instance and the motion of the City of Pittsburgh to vacate the order was denied without opinion and with several dissents. *Id.* at 620. Justices Rehnquist, Stevens, and Scalia dissented. *Id.* at 621 (Rehnquist, Stevens & Scalia, JJ., dissenting).

<sup>145</sup> *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 755-62 (1995). Four Justices expressed the view that any private expression in a public forum was per se constitutional, not in violation of the Establishment Clause. *Id.* at 753. Other Justices reserved the right to hold that under certain circumstances private speech in a public forum could create the impression that the government endorsed the message. *Id.* at 756. One wonders what these Justices could have had in mind- that the Establishment Clause would only bar the city if it permitted Christians to turn on the interior lights of City Hall to form a giant cross at Christmas, and allowed Jews to likewise light it up in the form of a menorah at Hanukkah.

<sup>146</sup> See *infra* note 205 and accompanying text.

<sup>147</sup> See *infra* note 213 and accompanying text.

around Hanukkah - where the city denied applications for a winter solstice display and a Latin cross. The Court of Appeal for the Ninth Circuit sitting *en banc*, citing *Pinette*, enjoined the menorah on the ground that, "[t]he Establishment Clause bars the government from giving sectarian religious groups preferential access to public property."<sup>148</sup> Religious wars have been ignited elsewhere with less provocation.

Perhaps, when it comes to erecting religious symbols on public property, the issue of the eruv is the misadventure of Orthodox Jews most fraught with danger of creating "political fragmentation and division along religious lines, one of the principal evils against which the Establishment Clause was intended to protect."<sup>149</sup>

In the only two American cases<sup>150</sup> on the subject which research has revealed, *Smith v. Community Board*<sup>151</sup>, and *American Civil Liberties Union v. City of Long Branch*<sup>152</sup>, trial courts have upheld the constitutionality of the eruv. In the federal court opinion, the more substantive of the two cases, the Court described the eruv as follows:

An eruv, under Jewish law, is an unbroken delineation of an area. The demarcation of the eruv boundary is primarily created using existing telephone poles and fences with wires connecting them with small half-rounds attached to sides of poles. The designation of an eruv allows observant Jews to carry or push objects from

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<sup>148</sup> *American Jewish Congress v. City of Beverly Hills*, 90 F.3d 379 (9th Cir. 1996) (*en banc*).

<sup>149</sup> *Meek v. Pittinger*, 421 U.S. 349, 372 (1975).

<sup>150</sup> Calvin Trillin, *Drawing the Line*, NEW YORKER, Dec. 12, 1994, at 50. A bitter dispute in London with overtones of virulent anti-Semitism is described. The article is not irrelevant to the theme of this section that pushing a religious agenda is bound to cause political divisiveness along religious lines. The difference, of course, between England and the United States, is that there is no Constitutional barrier between church and state in Great Britain so there can be no danger of eroding any wall of separation. *Id.*

<sup>151</sup> 128 Misc.2d 944, 491 N.Y.S.2d 584 (Sup. Ct. Queens County 1985).

<sup>152</sup> 670 F. Supp. 1293 (D.N.J. 1987).



place to place within the area during the Sabbath. Within the eruv observant Jews may push baby carriages from their homes to the synagogue or to other homes, carry books to the synagogue, and carry food to one another's homes.<sup>153</sup>

The City of Long Branch adopted a resolution authorizing the creation of the eruv using existing telephone poles on public property and additional poles and fences which the City authorized the synagogue to erect.<sup>154</sup> ACLU and one Deborah Jacoby sued to prevent the erection of the eruv, asserting that it constituted a permanent religious symbol on public property in violation of the Establishment Clause.<sup>155</sup> The Court in rejecting the suit, accepted the claim of Orthodox Jews that the eruv is not a religious symbol.<sup>156</sup> Accordingly, the court in applying the test in *Lemon v. Kurtzman*,<sup>157</sup> decided that both the government's motive and the effect of the legislation were secular because "the eruv merely permits [observant Jews] to participate in such secular activities as pushing a stroller or carrying a book while observing the Sabbath."<sup>158</sup> Nor did the court find excessive entanglement between religion and state, the third prong of *Lemon*, because after the initial meetings and "some disputes within the community, the court sees no indication that the existence of the eruv ... will cause the kind of continuing political divisiveness within the community anticipated by the Supreme Court in *Lemon*."<sup>159</sup>

The court distinguished the 1981 ruling of the Court of Appeals for the Third Circuit in *Gilfillan v. Philadelphia*,<sup>160</sup> which

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<sup>153</sup> *Id.* at 1294.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 1295.

<sup>157</sup> 403 U.S. 602 (1971). See text accompanying notes 76-79.

<sup>158</sup> *City of Long Branch*, 670 F. Supp. at 1296.

<sup>159</sup> *Id.* at 1297.

<sup>160</sup> 637 F.2d 924 (3d Cir. 1980).

held that the City of Philadelphia violated the Establishment Clause by constructing a platform and cross for the Pope to say mass.<sup>161</sup> The eruv, said the Court in *Long Branch*, unlike the cross and the platform, were neither religious symbols nor used in a religious ceremony.

The eruv decision, I submit, is shaky on virtually every ground of Establishment Clause jurisprudence, and ought to fail all three prongs of the *Lemon v. Kurtzman*<sup>162</sup> analysis. The government's purpose was surely to relieve Orthodox Jews of one of the traditional burdens imposed by halaha, Jewish religious law, the prohibition against transporting or carrying on the Jewish sabbath. No other religion was benefited thereby and that alone should run afoul of Justice Black's admonition in full in *Everson v. Board of Education*,<sup>163</sup> "[a state cannot] pass laws which aid one religion, aid all religions, or prefer one religion over another."<sup>164</sup> The case is clearly analogous to *Barghout v. Bureau of Kosher Meats and Food Control*,<sup>165</sup> where the United States Court of Appeals in 1995 held that a Baltimore ordinance prohibiting the labeling of food as "kosher" unless approved by Orthodox Jews violated the Establishment Clause.<sup>166</sup> Two concurring judges added that it favored Jews over non-Jews.<sup>167</sup>

For the same reason, the effect was to advance the Jewish religion by lending the state's assistance to observant Jews to comply with Jewish law in obeying their most sacred holy day.

And with respect to entanglement of government with religion in the sense of political divisiveness along religious lines, the federal court virtually proves the point by favoring the Jews with their eruv as against the Catholics with their cross.

<sup>161</sup> *Id.* at 933.

<sup>162</sup> *Id.* at 929.

<sup>163</sup> 330 U.S. 1 (1947).

<sup>164</sup> *Id.* at 15.

<sup>165</sup> 66 F.3d 1337 (4th Cir. 1995).

<sup>166</sup> *Id.* at 1346.

<sup>167</sup> *Id.* at 1349 (Luttig and Wilkins, JJ., concurring).

Clearly, the district court seemed ready to gamble that the Supreme Court has all but abandoned *Lemon v. Kurtzman*<sup>168</sup> and has substituted "accommodation" of religion as the new talisman in the area of public support of religious practices. As long as the City of Long Branch has not "refused to accommodate other religious groups," declared the Court, "permitting the eruv is an acceptable accommodation and does not improperly advance religion."<sup>169</sup> This language adopts the popular misconception that if all religions are supported equally, there is no violation of the religion clauses of the First Amendment. This confuses the Fourteenth Amendment bar against discrimination with the First Amendment mandate of separation of Church and State. It echoes the erroneous sentiments expressed in the prior New York case.<sup>170</sup> If the government were to pay for the construction of every church, synagogue, mosque, and other houses of worship, together with the salaries of all priests, rabbis, and other religious personnel, and the expenses of religious education and worship, that would pass the test of no discrimination among religions, but would surely violate the separation of religion and state ordained by the Establishment Clause.

The questions that Jews should ask are whether they want a court to tell them whether vessels essential to religious practice, and even their holidays themselves, are "religious"? Do Jews want to declare their effects "secular" in order to escape the consequences of the Establishment Clause? Orthodox Jews did as much in attempting to place their Hanukkah menorah next to signs in a park in Vermont reading "Seasons's Greetings," "An

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<sup>168</sup> Four Justices have urged that the *Lemon* test should be discarded. See *Lee v. Weisman*, 505 U.S. 577, 603-04 (1992). Justice Blackmun noted in his concurring opinion, that the majority in proscribing school prayer did not even mention *Lemon*. But in the recent Supreme Court decision of *Agostini v. Felton*, 117 S.Ct. 1997 (1997), Justice O'Connor, writing for the Court, cites *Lemon v. Kurtzman* for the factors the Court uses to determine violations of the Establishment Clause. *Id.* at 2000.

<sup>169</sup> *City of Long Branch*, 670 F.Supp. at 1296.

<sup>170</sup> *Smith v. Community Bd.*, 128 Misc.2d 944, 946, 491 N.Y.S.2d 584, 586 (1984).

American Salute to Liberty," "Peace on Earth," and "Happy Holidays," but the court saw through the effort, declared the menorah "religious," and banned it as a violation of the Establishment Clause.<sup>171</sup> The Jews in the eruv case have played the high stakes game adumbrated by Rabbi Shemtov's asseveration to me that Hanukkah is not a "religious" holiday<sup>172</sup> in order to circumvent the First Amendment prohibition on municipal financing of a menorah at the Liberty Bell in Philadelphia. And one should not forget that when Protestant clergy testified in *Abington v. Schempp*<sup>173</sup> that the Bible itself is not "religious" in order to escape the Establishment Clause proscription of Bible reading in public schools, the Supreme Court unanimously rejected the thesis. With similar purpose, Christians contended in *Stone v. Graham*<sup>174</sup> that the Ten Commandments were moral or ethical, and not "religious." That effort failed, but in *Lynch v. Donnelly*<sup>175</sup> the dominant Christian community had little difficulty in convincing a court - seemingly eager to sacrifice the Establishment Clause on the altar of "accommodation" - that a creche in a Christmas celebration with plastic reindeers was not "religious." And in *Allegheny County v. American Civil Liberties Union*,<sup>176</sup> a confused Court was persuaded that pairing a Christian symbol with a Jewish one for the purpose of evading the prohibitions of the Establishment Clause will succeed either by itself, or if the word "liberty" is injected in the display. Indeed, said the Court, both symbols somehow lose their religious character.

The lesson Jews should have learned is that minorities run the risk when they seek Constitutional exemption for themselves from the strictures of the religion clauses that they succeed only

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<sup>171</sup> *Chabad-Lubavitch of Vermont v. City of Burlington*, 936 F.2d 109 (2d Cir. 1991).

<sup>172</sup> See *supra* note 122 and accompanying text.

<sup>173</sup> 374 U.S. 203 (1963).

<sup>174</sup> 449 U.S. 39 (1980).

<sup>175</sup> 465 U.S. 668 (1984).

<sup>176</sup> 492 U.S. 573 (1989).

in obtaining an exemption for majoritarian religions at the expense of minority sects. That majoritarian religions are entitled to "accommodation" by minorities, the necessary predicate of Chief Justice Burger's opinion in *Lynch v. Donnelly*,<sup>177</sup> is a frightening enough idea which turns on its head the Bill of Rights whose purpose is to protect minorities from what Alexis de Tocqueville termed the "tyranny of the majority."<sup>178</sup>

For Jews to bait the lion is sheer folly. Asking the court to adjudicate that a cross is "religious" and an eruv is not, is asking for trouble. The Christian right, for one, will mount a new crusade, never forgetting the sting of defeat at the hands of the Jews. Temporary victory in a district court in Long Branch<sup>179</sup> must be measured against ultimate defeat in the Supreme Court in *Pinnette* where the menorah and the KKK cross were held to be constitutional equivalents.<sup>180</sup>

The lesson in society at large is even more scary. Not only are Jews doing precisely what *Lemon* warns against, namely, dividing the community along religious lines, but also surrendering the right to define themselves and their religion. The Pennsylvania Supreme Court in an 1818 decision showed that it was no Sanhedrin when it declared that the Talmud did not require Jews to work six days a week as mandated in the Fourth Commandment, Exodus, 20:9; 34:21.<sup>181</sup> Thus, the Court upheld the conviction of an Orthodox Jew for performing "worldly employment or business on the Lord's day, commonly called Sunday."

The whole experience, I reiterate, cannot be good for the Jews! In my view, it is certainly not good for the United States,

<sup>177</sup> 465 U.S. 668 (1994).

<sup>178</sup> 1 A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 263 (Colonial ed. 1900).

<sup>179</sup> *ACLU v. City of Long Beach*, 670 F.Supp. 1293 (D.N.J. 1987).

<sup>180</sup> See *supra* notes 92-105 and accompanying text.

<sup>181</sup> *Commonwealth v. Wolf, III Sergeant and Rawles'* Reps.48 (S.Ct. Pa. 1817).

unique in the world, so far as I know, in erecting a wall of separation between religion and state.<sup>182</sup>

## 2. Public Funds for Religious Schools

Repeating, in part, what was said at the beginning of this Section B,<sup>183</sup> in 1947, in *Everson v. Board of Education*,<sup>184</sup> the United States Supreme Court said:

The "establishment of religion" clause of the First Amendment means at least this: ... No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they be called, or whatever form they may adopt to teach or practice religion.<sup>185</sup>

When I was President of Solomon Schechter Day School in Philadelphia in the 1960's, I wrote to the Governor of Pennsylvania on behalf of Schechter urging him to veto any bill the legislature would pass granting aid to religious schools.

I said that although the financial plight of the school bordered on the desperate, making a shambles of the First Amendment was too high a price to pay even for the survival of our school. If the institution was unable to attract the financial support it deserved from Jews, it may be doomed to pass away. But to force others to support Jewish education with their tax funds would not only violate the Establishment Clause of the First

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<sup>182</sup> Justice Aharon Barak, now President of the Supreme Court of Israel, conveyed to this author his reaction to the American scene in the nation's capital that although the First Amendment mandates separation of religion and state there is a Christmas tree and creche on one side of the White House and a Hanukkah menorah on the other and on the currency it states, "In God We Trust." What could the First Amendment mean, he inquired? Justice Barak could have cited other illustrations.

<sup>183</sup> See *supra* note 85 and accompanying text.

<sup>184</sup> 330 U.S. 1, 15-16 (1947).

<sup>185</sup> *Id.*

Amendment, but in the words of Thomas Jefferson, would be "sinful and tyrannical" as well.<sup>186</sup>

The difference between Orthodox and liberal Jews is stark when it comes to the whether tax funds may be used to finance religious schools. Support for funding has been spearheaded by the Catholic Church, now aided by fundamentalist Christian sects and, unfortunately, Orthodox Jews.<sup>187</sup> Opponents include an array of civil liberties organizations including those associated with Jewish groups.<sup>188</sup> Whether Orthodox support is based simply on the desire to get the money, or whether it stands on Constitutional principle is a subject of intense debate.

The current struggle for massive public funding for religious schools is one of the most dangerous assaults on the separation principle because, to paraphrase Cardozo's famous rhetoric, "Money invites contention!"<sup>189</sup> Cleverly misnamed "choice" legislation by its advocates because it allegedly gives parents a choice to send their children to religious schools, the

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<sup>186</sup> See *Everson v. Bd. of Educ.*, 330 U.S. 1, 13 (1947). Thomas Jefferson's Bill for Establishing Religious Freedom, enacted by Virginia in 1785 declares: "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical." *Id.*

<sup>187</sup> *Agostini v. Felton*, 117 U.S. 1997 (1997). Orthodox Jews were in the forefront of the successful effort to get the U.S. Supreme Court to overrule two pillars of the wall of separation of church and state which barred the government from placing public school teachers in private religious schools. *Id.*

<sup>188</sup> An advertisement placed by the Anti-Defamation League in *The New York Times*, on October 25, 1995, contains the following statement to which the "liberal" Jewish groups could subscribe:

Our nation's founders had the wisdom to build into the First Amendment to our Constitution the separation of church and state, which has guaranteed religious freedom to all our citizens for more than 200 years. The First Amendment was an inspired act of revolutionary genius by Jefferson, Madison, Adams and all those who helped produce a concept of freedom unparalleled in the history of the world.

*Id.*

<sup>189</sup> *Wagner v. Int'l Ry. Co.*, 232 N.Y. 176, 133 N.E. 437 (1921). Justice Cardozo warns: "Danger invites rescue!" *Id.* at 180, 133 N.E. at 437.

word is intentionally misleading because early in the century, the Supreme Court held in *Pierce v. Society of Sisters*<sup>190</sup> that the First Amendment guarantee of freedom of religion protected the right to attend private religious schools. But that right does not mean that the government must pay for religious education, any more than the right to pray requires the state to build a house of worship!

This author is squarely in favor of no public funds or support for religion, based primarily upon the First Amendment which has served the nation so well.<sup>191</sup> Religion has thrived in the United States because people have chosen to subscribe to it voluntarily, not because of government pressure or support.<sup>192</sup> And, it has been good for the Jews! Tuition vouchers would be an irreparable breach in the wall of separation between church and state and have been so found in lower court cases in various states. The United States Supreme Court has not yet ruled on the issue.<sup>193</sup>

The essential point of the separation principle, often missed by its detractors, is that it is not a denigration of religion. To the contrary, it elevates religion by providing that government may neither help nor hinder, so that religion, or a particular religion, will prosper or not by the quality of its ideas, not the

<sup>190</sup> 268 U.S. 510, 535 (1925).

<sup>191</sup> On October 29, 1991, I testified before the Education Committee of the Pennsylvania House of Representatives in Harrisburg, that House Bill 1133 providing for tuition vouchers for religious schools was unconstitutional in violation of the First Amendment separation of church and state. Accepting this position, the House decided not to vote on the bill - already passed by the Pennsylvania Senate - and the legislation failed.

<sup>192</sup> See *Capitol Square Review and Advisory Bd. v. Pinette*, 115 S.Ct. at 197-214 (Ginsburg, J., dissenting) (quoting Kathleen Sullivan, *Religion and Liberal Democracy*, 59 U. CHI. L. REV. 195 (1992)) (noting the effect that a negative bar against establishment of religion implies affirmative establishment of secular public order).

<sup>193</sup> See Doerr, Menedez, & Swomley, *The Case Against School Vouchers*, AMERICANS FOR RELIGIOUS LIBERTY (Silver Spring, Md 1995). See also cases cited in *Voice of Reason*, 60:2 *The Newsletter of Americans for Religious Liberty* 9 (1997).



force of the public fisc. James Madison wrote in his famous 1785 Memorial and Remonstrance Against Religious Assessments in Virginia:

[I]t is proper to take alarm at the first experiment on our liberties.... Who does not see...that the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?<sup>194</sup>

Destroying the wall of separation of church and state by public funding of religious education destroys a protection for Jews because Christians would get the bulk of the funds and see little reason to give Jews any substantial amounts unless Jewish help would still be needed to insure continued funding for Christians. In any contest for funds, I cannot imagine that majoritarian legislators would be expected to view Jewish religious education with the same sympathy expectable for more popular doctrine. The Pittsburgh experience referred to above is instructive.

Moreover, if financial support flows from government to religious schools, what will surely follow is governmental regulation of the use of the money, a clear danger to the independence of the schools. This is another reason why the whole scheme engenders an excessive entanglement between religion and government in violation of the Establishment Clause.<sup>195</sup> Polarization along religious lines in the competition for public money and support was a risk the authors of the First Amendment sought to avoid.<sup>196</sup>

It is not the purpose of this article to review the long and tortuous career of the Supreme Court in deciding when and whether financial aid to religious schools violates the

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<sup>194</sup> *Everson v. Bd. of Educ.*, 330 U.S. 1, 41 (1947) (Rutledge, J., dissenting).

<sup>195</sup> *See Lemon v. Kurtzman*, 403 U.S. 602, 636 (1975).

<sup>196</sup> *See, e.g., Meek v. Pittenger*, 421 U.S. 349, 372 (1945); *Sloan v. Lemon*, 415 U.S. 825, 832-33 (1973).

Establishment Clause. From *Everson v. Board of Education*, the modern Court's first decision on the subject, which held by a 5-4 decision that the state may consistent with the Establishment Clause pay to bus children to and from parochial school,<sup>197</sup> to *Agostini v. Felton*, its most recent pronouncement on state aid to religious education, where the Court, again by a 5-4 decision, overruled long-standing cases barring the government from sending public school teachers to teach in parochial schools,<sup>198</sup> controversy over the half century has been a constant companion. For the reasons stated in this article, this author has opposed all state aid to religion, and most forcefully to religious education no matter what the denomination. Justice Wiley Rutledge, a Catholic, in his profound dissent in *Everson*, viewed financial support for parochial schools as deleterious to the principle of the separation of church and state as subsidizing the church itself.<sup>199</sup>

It is not unexpected that parochial schools seek money from the government. I believe with Thomas Jefferson that to yield to such demands is sinful and tyrannical, in addition to being interdicted by the First Amendment. The thesis of this article is that is also bad for the Jews. Far from being opposed to religious school - all of my children attended for their entire pre-university education and I was also President of a Hebrew Day School - I have concluded that whether or not state aid would be beneficial, it is too high a price to pay for the devastation of the First Amendment. My Orthodox co-religionists have been so fanatic in their pursuit of taxpayers funds for their religious schools that, in my view they are bent on Constitutional destruction on a scale so vast that I fear that all Jews will suffer.

The current illustration is the zeal with which Orthodox Jews have thrown their weight behind the effort to have the Supreme Court puncture the dike holding back the flood waters of aid to parochial schools. In two 1985 cases, *Aguilar v. Felton*<sup>200</sup>

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<sup>197</sup> 330 U.S. 1, 18 (1947).

<sup>198</sup> 117 S.Ct. 1997 (1997).

<sup>199</sup> 330 U.S. at 57-58.

<sup>200</sup> 473 U.S. 402 (1985).

and *School District Of Grand Rapids v. Ball*,<sup>201</sup> the Court barred the government from sending public school teachers into sectarian schools to provide remedial instruction, which thus had to be administered outside. As Justice Brennan constantly reminded, the lesson to be learned was that separation of church and state was the essential doctrine of our Constitution.<sup>202</sup> Twelve years later, without a new trial, or another controversy, and under a rule permitting the Court to reconsider cases upon newly discovered evidence or changed circumstances, five Justices were persuaded to change the direction of the Court and to reverse the two landmark decisions. The ground cited was that with the change in the composition of the Court, subsequent cases showed that the court had changed its mind on aid to parochial schools. There were four vigorous dissents among which was Justice Ruth Bader Ginsburg who dissented also on the ground that the use of the rule on changed circumstances was illegitimate and had never before used to re-decide precedents because of new appointments to the Court.<sup>203</sup> The National Jewish Commission on Law and Public Affairs, an Orthodox group, took an active part in urging the Supreme Court action.<sup>204</sup>

### 3. Gerrymandering School Districts

Another recent misadventure of Orthodox Jews in attempts to level the wall of separation of religion and state is told in *Board of Education of Kiryas Joel v. Grumet*<sup>205</sup> and its aftermath. The Satmar Hasidim sect of Orthodox Jews prevailed upon the legislature of New York to gerrymander a school district just for them in which they could educate their handicapped children in secular studies without contact with others. The

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<sup>201</sup> 473 U.S. 373 (1985).

<sup>202</sup> *Id.* at 374.

<sup>203</sup> *Agostini v. Felton*, 117 S. Ct. 1997, 2026.

<sup>204</sup> See Linda Greenhouse, *Court to Consider Reversing Decision on Parochial Aid*, N.Y. TIMES, Jan. 18, 1997, at A12.

<sup>205</sup> 512 U.S. 687 (1994).

Satmars preferred complete isolation but could not, or would not bear the cost of such an expensive enterprise.<sup>206</sup>

The United States Supreme Court affirmed lower courts in holding the entire scheme a violation of the Establishment Clause. Before the ink was dry on the decision, the Hasidic sect persuaded the New York legislature to circumvent the high court ruling. But the Appellate Division of the New York Supreme Court condemned the new legislation as "subterfuge" whose specific demographic criteria were tailored to benefit only the Hasidic village of Kiryas Joel among the state's 1600 municipalities.<sup>207</sup> Quoting from the United States Supreme Court ruling, the New York court said, "the current law is exposed as a subterfuge and, as with the prior law, legislation 'singl[ing] out a particular religious group for favorable treatment. "'<sup>208</sup>

In the words of Louis Grumet, Executive Director of the New York State School Boards Association, "The Legislature chose to dress the wolf up in sheep's clothing and say it's a sheep, but the court said it's a wolf."<sup>209</sup>

The New York State Court of Appeals, the highest court in the state, affirmed with a ringing denunciation of the legislative rehash which retains "the non-neutral effect of allowing the religious community of Kiryas Joel, but no other group at this time and probably ever, to create its own school district."<sup>210</sup>

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<sup>206</sup> There were clear overtones of religious tyranny even within the sect. See Evelyn Nieves, *A Village Faces Another Kind of Storm*, N.Y. TIMES, Jan. 14, 1996, at A27. See also *Dissidents Gain With Kiryas Joel Pact, Settlement is Reached Hours Before Testimony by Grand Rabbi*, N.Y. TIMES, March 12, 1997, at B6 (noting that Kiryas Joel paid dissidents \$300,000 and permitted them to reopen their synagogue to avoid having the Kiryas Joel leader, Rabbi Teitlebaum, testify on the subject of discrimination against the dissidents).

<sup>207</sup> *Grumet v. Cuomo*, 225 A.D.2d 4, 12, 647 N.Y.S.2d 565, 570 (3d Dep't 1996).

<sup>208</sup> *Id.* (quoting *Kiryas Joel v. Grumet*, 512 U.S. 687 (1994)).

<sup>209</sup> *School District of Kiryas Joel is Ruled Illegal*, N.Y. TIMES, Aug. 26, 1996, at B1.

<sup>210</sup> *Grumet v. Cuomo*, 90 N.Y.2d 57, 69, 681 N.E.2d 340, 345, 659 N.Y.S.2d 173, 178 (1997).

This, the New York court proclaimed, unconstitutionally “endorses the Satmar community of Kiryas Joel” in violation of the First Amendment separation of religion and state.<sup>211</sup>

But the Satmars did not stop. On August 4, 1997, the New York State legislature passed another bill to create a special, religiously segregated public school district for the Satmar Hasidic sect in Kiryas Joel. Louis Grumet, reacted, “New York’s leaders should be ashamed of themselves because they know this is wrong.”<sup>212</sup>

The American Jewish Congress was among those who challenged the revised statute and should be congratulated for fidelity to Constitutional principles in the face of violation by fellow Jews.

The Satmars would be well advised to take the advice of *The New York Times* editorial, “It is time for the leaders of both the state and the village to stop fighting the First Amendment.”<sup>213</sup> The campaign for special privilege on behalf of an aggressive and influential religious sect smacks of monomania in a area of extreme sensitivity - the separation of religion and government - creating a precedent as dangerous as lighting a fuse in a munitions factory!<sup>214</sup>

<sup>211</sup> *Id.*

<sup>212</sup> See 60:2 VOICE OF REASON, THE NEWSLETTER OF AMERICANS FOR RELIGIOUS LIBERTY 9 (1997).

<sup>213</sup> *Time to Stop the Kiryas Joel Fight*, N.Y. TIMES, Aug. 31, 1996, at A20.

<sup>214</sup> Kiryas Joel violations of the principle of the separation of church and state, here “synagogue and state,” have extended into using a synagogue as a polling place. See *Poling Must Move From Hasidic Synagogue*, N.Y. TIMES, Nov. 2, 1997 at a38. The United States Court of Appeals for the Second Circuit upheld an order by District Judge Barrington D. Parker, Jr., that the synagogue social hall “was fundamentally unsuited” as a polling place. *Id.* The Court rejected as Constitutionally immaterial the claim of the Orthodox Jews that Satmar women and other devout Hasidim are prohibited by their religion to enter a public school to vote because men and women co-mingle there.

#### 4. School prayer

If there is anything in the religion area that should immediately recommend itself to Jews of all denominations for rejection and disqualification, it is school prayer. To borrow a phrase from the Haggadah, prayer in public schools has so "embittered" the lives of Jews that by now they should have conditioned their instincts to oppose it. Rarely, do I encounter the subject in or out of the classroom without recollections of the pain inflicted on Jews by Christian prayer or ceremony. My own memories in elementary school of the New Testament drumbeat excoriation of "the hypocrites in the synagogues"<sup>215</sup> retain their shrill vividness. After all, the prayer ritual is bound to be Christian, the most common majoritarian exercise.

The Pennsylvania statute, for example, invalidated in *Abington School District v. Schempp*<sup>216</sup> provided: "At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day,"<sup>217</sup> and the practice also included "the recitation of the Lord's Prayer ... by the students ... in unison."<sup>218</sup> The "Lord," of course, refers not to the God of the Hebrew Bible, but to Jesus.<sup>219</sup> Nor should it be expected that the majority religion would mandate prayer of any other sect.

The first school prayer case to reach the Supreme Court was *Engel v. Vitale*<sup>220</sup> in 1962. There, the New York Board of Regents composed a "non-denominational" prayer which read, "Almighty God, we acknowledge our dependence upon Thee, and

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<sup>215</sup> *Mathew* 6:2-5.

<sup>216</sup> 374 U.S. 203 (1963).

<sup>217</sup> *Id.* at 205.

<sup>218</sup> *Id.* at 207.

<sup>219</sup> *Luke* 11:1-4; *Mathew*, 6:9 -13. See also THE ANCHOR BIBLE DICTIONARY, Vol.4:357 (Doubleday 1992); 3 INTERPRETER'S DICTIONARY OF THE BIBLE 154 (Abingdon Press 1962).

<sup>220</sup> 370 U.S. 421 (1962).

we beg Thy blessings upon us, our parents, our teachers and our Country."<sup>221</sup> By a 6-1 decision, the Court declared the prayer "a religious activity" and "wholly inconsistent with the Establishment Clause."<sup>222</sup> The decision proclaimed that the Establishment Clause "must at least mean that [it] is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by the government."<sup>223</sup> Nor did the fact that recitation of the prayer was voluntary excuse the transgression.

Since the prayer was instituted by the New York Board of Regents, it is not unlikely that Jews were involved in the decision to create the prayer. If so, one wonders whether this was their rear guard action to ward off a hostile "sectarian" prayer of the dominant church. Since this was pre-*Abington v. Schempp*, one could not be confident then that the Supreme Court would hold that even Christian prayer ritual would violate the Establishment Clause. Or, if musing is in order, the opposite possibility suggests that this was the surrender to Christianity which could be relied upon to be invalidated by the United States Supreme Court.

There is no such speculation about Jewish participation almost three decades later in 1989 when Rabbi Leslie Gutterman of Temple Beth El in Providence, Rhode Island, delivered at a public middle school graduation a "nonsectarian...Invocation and Benediction" prepared in accordance with "Guidelines for Civic Occasions" of the National Conference of Christians and Jews.<sup>224</sup> The Invocation began "God of the Free, Hope of the Brave" and ended "May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled." The Benediction began, "O God, we are grateful to You ...." and ended, "We give thanks to You, Lord...." To both, the programmed response was "AMEN."

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<sup>221</sup> *Id.* at 422.

<sup>222</sup> *Id.* at 424.

<sup>223</sup> *Id.* at 425.

<sup>224</sup> *Lee v. Weisman*, 505 U.S. 577 (1992).

In *Lee v. Weisman*<sup>225</sup>, the Supreme Court held these "prayers" violated the Establishment Clause.<sup>226</sup> This time it does not appear that this was the work of Orthodox Jews. Yet, the official reports of the case reveal that conservative religious groups, including the National Jewish Commission on Law and Public Affairs, appeared as *amici curiae* urging that the prayers be permitted and the American Jewish Congress, and other liberal defense organizations urged affirmance of the lower court judgment proscribing such prayers as a violation of the Establishment Clause.<sup>227</sup> Perhaps, the comment by Justice Kennedy for the majority that the Guidelines of the National Conference of Christians and Jews "acknowledge that '[p]rayer of any kind may be inappropriate on some civic occasions'"<sup>228</sup> was meant to signal that NCCJ opposed group prayer in public schools. It may also indicate that the rabbi involved acted without sanction from any Jewish civil rights interests, or even in opposition to them.

The fact is that Jewish clergy participated in an act of religious ceremony clearly inimical to the interests of the Jews. This is another illustration of how idiosyncratic action by some Jews will act to the detriment of Jews in general by serving the cause of the battering ram forces devoted to devastating the wall of separation of religion and state.

The danger is exacerbated by the perfervid efforts of fundamentalist groups to get prayer back into the public schools. They make clear their intention to circumvent the constitutional barriers erected by *Engel-Schempp-Weisman*. For example, the Court in *Wallace v. Jaffree*<sup>229</sup> emphasized that the purpose of the legislation authorizing setting aside one minute at the beginning of the school day "for meditation or voluntary prayer" was to

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<sup>225</sup> *Id.* (5-4 decision).

<sup>226</sup> *Id.* at 598-99.

<sup>227</sup> *Id.* at 581.

<sup>228</sup> *Id.*

<sup>229</sup> 472 U.S. 38 (1985).



evade Supreme Court decisions in order to return prayer to public schools.<sup>230</sup>

The effort is fueled by what is perceived as a loophole in the *Lee v. Weisman* decision which would allow student-initiated group prayer. The United States Court of Appeals for the Third Circuit in *American Civil Liberties Union v. Black Horse Pike Regional Board of Education*,<sup>231</sup> held that school policy allowing senior class to vote for prayer at high school graduation violates the Establishment Clause.<sup>232</sup> There were four dissents.<sup>233</sup> The Third Circuit rejected the contrary decision of the Fifth Circuit in *Jones v. Clear Creek Independent School District*.<sup>234</sup>

### 5. School Closing on religious holidays

Four recent lower federal cases raise the issue of whether state mandated closing of public institutions on religious holidays - all involve Good Friday - violates the Establishment Clause. The courts divide evenly on the issue. In 2-1 rulings, the circuit courts and district courts reached opposite results. In 1991, the Court of Appeals for the Ninth Circuit in *Cammack v. Waihee*,<sup>235</sup> upheld the Hawaii statute on the theory that the state wanted to add a holiday and had no religious purpose in choosing Good Friday.<sup>236</sup> Judge D.W. Nelson, in dissent, vigorously disagreed.<sup>237</sup> In *Metzl v. Leininger*,<sup>238</sup> Judge Posner for the Seventh Circuit, held that the Illinois law violated the

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<sup>230</sup> *Id.* at 59-60.

<sup>231</sup> 84 F.3d 1471 (3d Cir. 1996).

<sup>232</sup> *Id.* at 1488.

<sup>233</sup> *Id.* at 1489 (Mansmann, Nygaard, Alito, & Roth, JJ., dissenting).

<sup>234</sup> 977 F.2d 963 (5th Cir. 1991); *see also* *Ingebretsen v. Jackson Public School Dist.*, 88 F.3d 274 (5th Cir. 1996) (distinguishing, in part, the earlier Fifth Circuit decision and banning the prayer).

<sup>235</sup> 932 F.2d 765 (9th Cir. 1991).

<sup>236</sup> *Id.* at 776.

<sup>237</sup> *Id.* at 782.

<sup>238</sup> 57 F.3d 618 (7th Cir. 1995).

Establishment Clause.<sup>239</sup> Judge Manion dissented.<sup>240</sup> The district court decisions likewise disagreed. Specifically, *Freedom from Religion Foundation v. Litscher*,<sup>241</sup> followed *Metzl* and struck down a Wisconsin law,<sup>242</sup> and *Koenick v. Felton*,<sup>243</sup> distinguished *Metzl* and upheld a Maryland statute.<sup>244</sup>

In both *Metzl* and *Koenick*, judges voted to permit a state holiday for Good Friday justifying their decisions, at least in part, on the factor that Jews are accommodated on Rosh HaShanah and Yom Kippur. Judge Manion, dissenting in *Metzl*,<sup>245</sup> remarked that although Jews represented only 2.3% of the population, many schools boards accommodate Jews on these holidays.<sup>246</sup> The asseveration was that Christians are not favored over Jews and therefore, the dissent reasoned, there is no violation of the Establishment Clause. In *Koenick*, the court was explicit that Christians outnumber Jews tenfold and Jews are officially excused from school on Rosh HaShanah and Yom Kippur.<sup>247</sup> In contrast, in *Litscher*, the successful plaintiffs were Jewish teachers who had to use personal leave to celebrate Rosh HaShanah and Yom Kippur and the Court agreed that they sustained injury by reason of the state's favoring Christians in violation of the Establishment Clause.<sup>248</sup> In *Cammack*, Jews were not mentioned.

Although many lessons may be drawn from the Good Friday cases, I suggest that one relevant to the thesis of this article is that Jews would be better off taking the Constitutional

<sup>239</sup> *Id.* at 620-21.

<sup>240</sup> *Id.* at 624.

<sup>241</sup> 920 F. Supp. 969 (W.D. Wis.1996).

<sup>242</sup> *Id.* at 973-74.

<sup>243</sup> 973 F. Supp. 522 (D. Md. 1997).

<sup>244</sup> *Id.* at 526.

<sup>245</sup> *Metzl*, 57 F.3d at 626.

<sup>246</sup> *Id.*

<sup>247</sup> *Koenick*, 973 F. Supp. at 526 n. 2.

<sup>248</sup> *Freedom From Religion Foundation, Inc. v. Thompson*, 920 F. Supp. 969, 974 (W.D. Wisc. 1996).

high ground and not seeking “equal treatment” in state accommodation of religious holidays even if one could divine what “equality” would mean. A day-for-day trade-off? Only “important” holidays would be counted? All such accommodation, I maintain, is in a real sense a weakening of the wall of separation of religion and government, and it is in the interest of minority religions to preserve that wall high and impregnable.

In my view, the Jewish school teachers in *Freedom From Religion Foundation*<sup>249</sup> were right to exercise their right protected by the Free Exercise Clause of the First Amendment to take off on Rosh HaShannah and Yom Kippur, and other Jewish holidays, and to oppose the closing of school on Good Friday.

Although unequal treatment among religions surely would violate the Establishment Clause, “equality” does not guarantee compliance.<sup>250</sup> “Equality” is the hallmark of “equal protection” analysis under the Fifth and Fourteenth Amendments, and is basically irrelevant when it comes to separation of religion and government under the Establishment Clause of the First Amendment. The reason that discrimination against one religion would violate establishment principles is that favoring another religion, and normally the majority, usually betrays government support of religion, which is the principal evil proscribed by the First Amendment.

Under these circumstances, all references to Jews as recipients of government favors out of proportion to their minuscule representation in the population is irrelevant. It also smacks of judicial political thinking. Nevertheless, realism demands that all understand how judges think, and if they think that as long as Jews “get their share,” there is nothing “wrong” in giving some - and usually more - to Christians. Courts may use code words such as “secular,” meaning “not religious” as that term is construed under the Establishment Clause, to justify

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<sup>249</sup> *Id.*

<sup>250</sup> Bd. of Educ. Of Kiryas Joel v. Grumet, 512 U.S. 687 (1994); Edwards v. Aguillard, 482 U.S. 578 (1987); cf. Everson v. Bd. of Educ., 330 U.S.1 (1947).

favoring majoritarian religious practice, but it must be understood that this too is majoritarian thinking and how minorities view any particular act is rarely considered. Thus, in the cases here presented, the debate on whether Good Friday is “religious” or “secular” is purely an intramural squabble among Christians. How Jews, Moslems, Zoroastrians, Buddhists, atheists, or others view it is never considered. Nor is Supreme Court jurisprudence on the topic different.<sup>251</sup>

There is no doubt that governmental recognition of religious holidays, of which school closing is but one example, poses a major dilemma for champions of the Establishment Clause, among whom Jews ought to be counted. It is a sore point for observant Jews enrolled in public schools. Schools are closed on Christmas, the major Christian holiday, and not on major Jewish holidays, or the holy days of other religions. In communities where there is a considerable Jewish population among the students and/or teachers, schools may be closed on the first day of the 2-day holiday of Rosh HaShanah, and also on Yom Kippur, but I have not heard of public schools closing on other holidays such as the four days of Succot, Shemini Atseret, and Simhat Torah, the four days of Pesach, and Shavuot which are also major Jewish holidays where the Hebrew Bible commands “you shall not work at your occupations,” which by practice includes school attendance.<sup>252</sup>

The judges in the Good Friday cases cited in this section would hold that where there is a substantial population which

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<sup>251</sup> See *Lynch v. Donnelly*, 465 U.S. 664 (1984) (reversing two lower courts and holding that a creche and other Christmas decorations were not “religious”); the fact that “Christmas,” meaning “the mass of Christ” (see OXFORD ENGLISH DICTIONARY 392 (1971)), is the term Christians applied to the symbol is never considered by the Court. See also *Allegheny County v. American Civil Liberties Union*, 492 U.S. 573 (1989) (holding that a Christmas tree similarly was not “religious”).

<sup>252</sup> The following Jewish holidays are referenced in the Torah as follows: Rosh HaShannah - *Numbers* 29:1; *Leviticus* 23:25; Yom Kippur - *Leviticus* 23:28; Succot - *Leviticus* 23:35-9; Shemini Atseret and Simhat Torah - *Numbers* 29:35; Pesach - *Leviticus* 23:7,39, *Numbers* 28:18; Shavuot - *Numbers* 28:26.

would absent themselves on any particular holiday, that alone would supply the “secular purpose” which would permit the authorities to close schools without violating the Establishment Clause.<sup>253</sup> This is disappointing because as Justice Brennan admonished in the landmark case of *Frontiero v. Richardson*<sup>254</sup> 25 years ago, “administrative convenience” should never be allowed to defeat a constitutional right.<sup>255</sup>

Ideally, public schools should be open on all religious holidays and observers, no matter what their religion, would be entitled to the same option to absent themselves as a matter of Free Exercise of religion protected by the First Amendment. Members of majority faiths should have the same opportunity to exercise that cherished right. That would teach an important lesson in Constitutional Law - particularly to the majority which needs the instruction - that the Free Exercise right belongs to all and members of the majority religions need its protection as well as the minority. That precious protection does not exist at the whim or generosity of the majority. It is not merely a reflection of the majority's tolerance of minorities, with the implication that it is retractable at any time.

I fully understand the futility of trying to persuade even educators of changing the school pattern to accommodate these notions of Constitutional Law. I can only hope that with more consideration and with the infusion of polyglot populations, changing demands from changing school constituencies diluting the dominance of Christians, clamoring to accommodating these demands will yield more resilience on the part of school administrators.

For the time being, then, what should be the strategy of Jews in public schools? The easiest answer is to request as much “accommodation” as the majority, read “Christians,” will allow. To many Jews this has meant, where there is a significant Jewish presence, lobbying to close public schools on those Jewish

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<sup>253</sup> See, e.g., *Metzl v. Leininger*, 57 F.3d 618, 621 (7th Cir. 1995)

<sup>254</sup> 411 U.S. 677 (1973).

<sup>255</sup> *Id.* at 690.

holidays most Jews deem “important”, i.e. the first day of Rosh HaShanah and Yom Kippur. Sukkot, Shemini Atseret-Simhat Torah, and Pesach, and Shavuot are abandoned although if Christians close schools on Good Friday, Jews may be able to trade off a day for Pesach. Shavuot comes late enough in the calendar most years that it often is not a problem. And those pious Jews who observe the remaining holidays, they absent themselves and hope that the consequences will not be severe. Or, Jews will go to private religious schools.

The Good Friday cases persuade me that the strategy is ill-advised. The Court in *Koenick* particularly supports this theme. There, the State of Maryland mandated a 4-day weekend closing for Easter, Friday to Monday.<sup>256</sup> A Jewish teacher sued both on grounds of the Establishment Clause and Equal Protection.<sup>257</sup> The district court, pointing out that Jews got off on Rosh HaShanah and Yom Kippur, but not Pesach, held therefore that it was equitable for Christians to get time out for their holiday.<sup>258</sup> There was no violation of the Establishment Clause, the court decided, for the additional reason that the school was merely “accommodating” the religious feelings of Christians who represented 44% of the school population, as many local school boards had accommodated Jews who represented only 4.3 %.<sup>259</sup> Moreover, the Court added, the action of the legislature did not amount to “endorsement” but rather was motivated by “administrative convenience,” meaning yielding to the majority religion. That fact that many students would absent themselves on major religious holidays would make it a waste of time to hold classes and thus there was a secular reason for closing school.<sup>260</sup> The district court distinguished the Seventh Circuit decision in

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<sup>256</sup> *Koenick*, 973 F. Supp. at 525.

<sup>257</sup> *Id.* at 524.

<sup>258</sup> *Id.* at 526.

<sup>259</sup> *Id.* n. 2. The percentages are cited by the Court and does not indicate who makes up the balance of almost 52%.

<sup>260</sup> *Id.* at 526.

*Metzl v. Leininger*,<sup>261</sup> which invalidated on establishment grounds a state statute closing school on Good Friday.

The opinion seems like a farrago of misapplied constitutional ideas. First, the notion that giving something to each religion here involved - Christians and Jews - somehow satisfies the demands of the Establishment Clause is dealt with above.

Second, accommodating the majority, here Christians, has significantly different consequences, than protecting the rights of minorities, which is the major objective of the Bill of Rights. As indicated above, such accommodation virtually eviscerates the First Amendment principle of separation of church and state.

Third, just because the particular school population has been accommodated to the point that there are no complaints does not signal compliance with the separation idea. Quite the opposite, where the entire school population is of one faith, that does not justify their religious practices in public school. Rather, the constitutional lesson - and it is of major importance in the education of public school children - is that the school is no place for religion. Just as government must stay out of religion, religion must stay out of government - and public schools are government institutions - not because the Constitution mandates hostility, but because the religion is elevated, not demeaned, when it attracts adherents because of the power of its ideas, not the coercion of the public fisc. The presence of such "coercion" was noted by Justice Kennedy in *Lee v. Weisman*.<sup>262</sup>

*Koenick* represented a parade example of a decision inimical to First Amendment values and should either be reversed or not followed. Since it is a warning to minorities that they should not sell their birthright for a mess of porridge, that yielding to temptation of a minor accommodation endangers precious constitutional liberties. It is appropriate once again to recall the admonition of Benjamin Franklin, "Those who would

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<sup>261</sup> 57 F.3d 618 (7th Cir. 1995).

<sup>262</sup> 505 U.S. 577 (1992). "[A]t a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise . . . in a way which establishes a [state] religion . . ." *Id.* at 587.

give up essential Liberty, to purchase a little temporary Safety, deserve neither Liberty or Safety."<sup>263</sup>

## 6. Kosher food

Another recent attempt by Orthodox Jews to use the machinery of government for purposes of achieving the ends of religion shows the extent to which zealots are willing to go to subvert the Establishment Clause. At their behest, Baltimore enacted an ordinance banning the sale of food labeled "kosher" if it does not meet Orthodox Jewish dietary laws as determined by a board of Orthodox Jewish rabbis and lay experts selected by Orthodox Jewish organizations. In 1995, the United States Court of Appeals for the Fourth Circuit in *Barghout v. Bureau of Kosher Meats and Food Control*<sup>264</sup> enjoined the ordinance as a violation of the Establishment Clause. In 1992, a similar statute was invalidated by the New Jersey Supreme Court.<sup>265</sup>

*Barghout* relied upon the *Lemon v. Kurtzman* analysis and held that the "kosher" ordinance was unconstitutional on its face in that it fostered an excessive entanglement of religious and secular authority by vesting significant investigative, interpretive, and enforcement power in a group of persons - Orthodox Jews, rabbis and lay persons - based on their membership in a specific religious sect. The United States Supreme Court made it clear in *Larkin v. Grendel's Den, Inc.*,<sup>266</sup> and most recently in *Kiryas Joel*, that a legislature may not only not delegate governmental functions to a sectarian group, but also may not otherwise "identif[y] ... recipients of governmental authority by reference to doctrinal adherence."<sup>267</sup>

The ordinance was presented to counter fraud, and thus passed prong one of *Lemon* requiring a secular legislative

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<sup>263</sup> See *infra* note 81 and accompanying text.

<sup>264</sup> 66 F.3d 1337 (4th Cir. 1995).

<sup>265</sup> *Ran-Dav's County Kosher, Inc. v. New Jersey*, 608 A.2d 1353 (1992).

<sup>266</sup> 459 U.S. 116 (1982).

<sup>267</sup> 66 F.3d 1337.



purpose. It failed, however, not only prong three against excessive entanglement, but also ran afoul of the all-important prong two because its primary effect was to advance or endorse religion.<sup>268</sup> Two concurring judges added a more basic violation, namely, that it facially favors one religious sect over another.<sup>269</sup> It takes little imagination to discern that the federal judges deciding *Barghout* considered the Orthodox maneuver here an exercise in Constitutional chutzpa!

### C. Discrimination in Violation of the Right of Free Exercise of Religion No Excuse for Violating the Establishment Clause

Nothing said here is meant to imply that Jews and all religious persons should not take vigorous action to enforce their constitutional right to the free exercise of religion. I would go further and submit that minority religions have been shabbily dealt with by the United States Supreme Court. Perhaps the low point in judicial protection of free exercise rights for these minorities came in the 1990 decision of the Supreme Court in *Employment Division v. Smith*<sup>270</sup> holding that the Native American Church had no First Amendment free exercise right to ingest a small amount of peyote as required by the religion.<sup>271</sup> The rule announced by Justice Scalia was that if the state passes a neutral law - here no drugs - there is no Constitutional right to an exemption even if the effect is to prevent the exercise of any particular religion.<sup>272</sup>

Congress enacted The Religious Freedom Restoration Act of 1993<sup>273</sup> to overrule that decision and restore the previous test of

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<sup>268</sup> *Id.*

<sup>269</sup> *Id.* at 1346 (Luttig, J., concurring).

<sup>270</sup> 494 U.S. 872 (1990).

<sup>271</sup> *Id.* at 890.

<sup>272</sup> *Id.*

<sup>273</sup> Religious Freedom Restoration Act of 1993, Pub. L. No. 103-141 (Nov. 16, 1993) (invalidated by *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997)).

*Sherbert v. Verner*<sup>274</sup> and *Wisconsin v. Yoder*<sup>275</sup> that any legislation of general applicability that places a substantial burden upon the free exercise of religion requires government to prove that it has a compelling interest in enacting the legislation and that it has used the least restrictive means to further that interest. In *City of Boerne v. Flores*,<sup>276</sup> the Supreme Court invalidated the Act as beyond the powers of Congress and a violation of the principle of separation of powers.<sup>277</sup>

Jews have borne more than their share of discrimination.<sup>278</sup> In *Braunfeld v. Brown*<sup>279</sup>, the Court denied the right of Orthodox Jews to do business on Sunday when Blue Laws required them to close on that day and the Torah mandated no work on Shabbat.<sup>280</sup>

<sup>274</sup> 374 U.S. 398 (1963).

<sup>275</sup> 406 U.S. 205 (1972).

<sup>276</sup> 117 S. Ct. 2157 (1997).

<sup>277</sup> *Id.* at 2172.

<sup>278</sup> But see the study of the Church of Jesus Christ of Latter Day Saints (the Mormons) submitted to the Supreme Court as an appendix to its *amicus* brief in *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), to the effect that Jews do best among all religions in the Supreme Court of the United States. 60:2 *Voice of Reason, Newsletter of American for Religious Liberty* 3 (1997).

<sup>279</sup> 366 U.S. 599 (1961).

<sup>280</sup> *Id.* In *Braunfeld*, the Court in essence characterized the argument of the Jews as economic because they had to stay closed two days, Saturday, as required by the Torah, and Sunday, as required by the state. *Id.* at 601. There was no contention that the Jewish religion mandated that Jews work on Sunday, and thus, no assertion of violation of the Free Exercise clause. One wonders whether the Jews would have won had they argued that the Ten Commandments, Exodus 20:9; 34:21, required Jews *to work six days* and rest on the seventh, and the state in barring Sunday labor violated the right of the Jews under the Free Exercise Clause of the First Amendment. Exodus 20:9-10 reads, "Six days shall you labor and do all your work, but the seventh day is a sabbath of the Lord your God: you shall not do any work." Since it is preceded in vs. 8 with, "Remember the sabbath day and keep it holy," the rabbis emphasize sabbath observance to the neglect of the injunction to work six days. See M.M. KASHER, Exodus, 16 TORAH SHELEMAH 69-71 (American Biblical Encyclopedia Society, Inc., New York, 1955); NAHUM SARNA, Exodus, THE JPS TORAH COMMENTARY 111-112 nn 8-10 (The Jewish Publication Society, Philadelphia, 1991).

Yet, in *Sherbert v. Verner*<sup>281</sup> Christian Seventh Day Adventists won essentially that right which Jews lost. As to Sunday closing laws in general, it was the Jewish perception as far back as a century ago that this discrimination was an axiom of "the general tendency on the part of even the higher courts that this is a Christian country, and that legislation which is in conflict with the doctrines of Christianity cannot be allowed to prevail."<sup>282</sup>

In *Goldman v. Weinberger*,<sup>283</sup> an Orthodox rabbi serving as a psychologist in the armed forces was denied the right to wear a yarmulke which he had worn for four years without incident because a military regulation proscribed the wearing of headgear indoors.<sup>284</sup> He not only lost the Free Exercise argument which he raised but the court overlooked the obvious establishment issue of conforming to church practice. That point was not raised. It

But there is clearly a separate command to work six days. See Arnold B. Ehrlich, 1 *MIKRA KI-PHESCHUTO* 172, (Ktav Pub. House New York, 1969). Ehrlich points out the parallel phrase on the command to eat matzah six days in *Deuteronomy* 16:8. Moreover, *Exodus* 34:21, reads, "Six days shall you work, but on the seventh day you shall cease from labor." The emphasis here is clearly on six days work without any mention of Shabbat.

Either way, with or without reference to Shabbat, Orthodox Jews have a claim that they must work six days and the state Blue Laws interfere with this religious command.

This construction of the Fourth Commandment was rejected by the Pennsylvania Supreme Court as a defense to a conviction of a Jew for performing "worldly employment or business on the Lord's day, commonly called *Sunday*." *Commonwealth v. Wolf, III Sergeant and Rawles Rep.* 48, 49 (Pa. 1817). Said the Court, "the Jewish Talmud, containing the traditions of [the Jewish] people, and the Rabbinical constitutions and explications of [Jewish] law, asserts no such doctrine." *Id.* at 50.

At that time, the convicted Jewish worker could not raise any First Amendment issues because the Bill of Rights did not apply to the states. See *Barron v. Mayor and City Council of Baltimore*, 7 Pet. (32 U.S.) 243 (1833). This was changed by the 14th Amendment in 1868. See *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

<sup>281</sup> 374 U.S. 398 (1963).

<sup>282</sup> 12 *JEWISH ENCYCLOPEDIA* 365 (Funk and Wagnalls Co. New York and London 1906).

<sup>283</sup> 475 U.S. 503 (1986).

<sup>284</sup> *Id.* at 504.

took Congress years to enact legislation to change the regulation permitting the wearing of the yarmulke.<sup>285</sup>

Many lower court decisions may also be cited not only for unfair judicial rulings against Jews but also striking down discriminatory laws against Jews. For example, *LeBlanc-Sternberg v. Fletcher*,<sup>286</sup> invalidated an ordinance of the Village of Airmnont restricting religious services in private homes as a discrimination against Orthodox Jews.<sup>287</sup>

For Jews to respond to discrimination against them in derogation of their rights under the Free Exercise Clause, by retaliating against the Establishment Clause, is not only unavailing, but serves to undermine one of the two pillars erected by the First Amendment to protect Free Exercise rights. Justice Brennan, in his concurrence in *Schempp*, emphasized the role of the Establishment Clause as a co-guarantor, with the Free Exercise Clause, of religious liberty.<sup>288</sup> The Framers did not entrust the liberty of religious beliefs to either clause alone. The Free Exercise Clause "was not to be the full extent of the Amendment's guarantee of freedom from governmental intrusion in matters of faith."<sup>289</sup>

Prominent First Amendment scholars agree, and interpret the religion clauses recognizing that "establishment" and "free exercise" serve a single value - protecting the individual's freedom of religious belief and practices, with "free exercise" barring the curbing of that freedom through penalties and

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<sup>285</sup> In 1987 Congress passed the Defense Authorization Act of 1987, Pub. L. No. 100-180, 101 Stat. 1086 (codified as amended at 10 U.S.C. § 774 (1997)). The current code permits members of the military to "wear an item of religious apparel while wearing the uniform," unless "the wearing of the item would interfere with the performance [of] military duties [or] the item of apparel is not neat and conservative." 10 U.S.C. § 774.

<sup>286</sup> 67 F.3d 412 (2d Cir. 1995), *cert. denied*, 116 S. Ct. 2546 (1996).

<sup>287</sup> *Id.* at 434.

<sup>288</sup> *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 255 (1963) (Brennan, J., concurring).

<sup>289</sup> *Id.*

"establishment" barring inhibitions on individual choice that arise from governmental aid to religion.<sup>290</sup>

Bringing down the temple of Dagon upon the head of Sampson with the cry, "Let me die with the Philistines!" may have served the ends of the Israelites in Biblical times,<sup>291</sup> but to pull down the Establishment Clause pillar because of disappointing infirmities in the Court's preservation of the Free Exercise Clause pillar, will destroy perhaps the staunchest protection of religion the Children of Israel ever had in foreign lands.

## CONCLUSION

In conclusion, I reiterate that the First Amendment, and the Constitution generally, are not only the crowning jewels in our Constitutional democracy, they are also good for the Jews! Jews should draw inspiration from their heritage, which in my view also inspired the authors of the American Charter of Liberty in their efforts to create a system of government most able to serve the dignity of the individual.

The failure of Jews to get the full benefit of the Free Exercise Clause is no excuse for them to tear down the protections of the Establishment Clause. Orthodox<sup>292</sup> Jews seem determined to chip away at the wall of separation between religion and state. Whether the subject is religious symbols in public places, public money for religious schools, special school districts for handicapped Orthodox students, school prayer, closing public schools on Jewish holidays or state enforcement of the Jewish laws of kashrut, it brings the Jews so close to the destruction of the wall of separation that one should wonder at the strategy. If, as I submit, the Establishment Clause is good for the Jews as well as good for America, what is to be served by

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<sup>290</sup> GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 1467 (13th ed. 1997).

<sup>291</sup> *Judges* 17:30.

<sup>292</sup> See, e.g., *Kiryas Joel v. Grumet*, 512 U.S. 2481 (1994). There, other Jewish groups opposed the Orthodox position.

tempting the fates that may bring down the wall which affords such protection for minorities?

Indeed, for example, with nothing of value for Jews to gain by putting up religious symbols in public places, it is bound to encourage their enemies to pollute the landscape with symbols hateful to them, and bystanders are likely to proclaim, "A plague o' both your houses!"<sup>293</sup>

Efforts to destroy the First Amendment freedom of speech clause by attacking the right to speak is another exercise in failed tactics.

For me, the Bible and the Constitution, and particularly the First Amendment, stand as twin sources of inspiration and I draw deeply from both. I would like to persuade other Jews to my point of view and actively participate in the struggle to make it a living credo. I again cite the Brandeis admonition that "the greatest danger to liberty lies in an inert people."<sup>294</sup>

But even if I fail to persuade, at the very least I believe that I have made the case that right-thinking Jews are not all on the right, that Jews who subscribe to the liberal agenda, and even further left, are just as good Jews and their credentials are coruscatingly intact.<sup>295</sup> Aware of the suspicion cast upon them, they act out of a knowing Judaism. *B'tslem elohim barah oto.*<sup>296</sup>

<sup>293</sup> WILLIAM SHAKESPEARE, *ROMEO AND JULIET*, act 3, sc. 1, verses 95 (3 THE ANNOTATED SHAKESPEARE 104, Rowse ed., C.N. Potter 1978).

<sup>294</sup> *Whitney v. California*, 274 U.S. 357, 275 (1927).

<sup>295</sup> Justice Aharon Barak, now President of the Supreme Court of Israel, ruled that in a democratic society even the most hideous expression must be protected. The case involved the controversial play "Ephraim Returns to the Army" in which an Israeli soldier dealing with an Arab boy is compared to a Nazi storm trooper torturing a Jewish child in the ghetto. In overruling the censor's ban, Justice Barak wrote, "I myself was a child during the Holocaust and crossed fences and borders guarded by the German army carrying forbidden articles on my body. The parallel between a German soldier stopping this boy and a Israeli soldier who detains an Arab youth sears my heart. However, we live in a democratic society and this searing of the heart is the very heart of democracy." *Laor v. Film and Play Supervising Bd.*, 41(I) P.D. 421, 441 (H.C.J Israel 1987) (Hebrew).

<sup>296</sup> *Genesis* 1:27. "In the image of God He created him."

