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Civil Religion versus Wall of Separation:

Examining the Constitutionality of Religious Expressions & Symbols in American Public Square

Diplomová práce

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Statutory Declaration

"Herewith I declare that I have developed and written the enclosed Master Thesis by myself without any external unauthorized help, and have not used sources or means without declaration in the text. Any thoughts from others or literal quotations are clearly marked."

Prague, May 21, 2007

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INTRODUCTION

The First Amendment to the Constitution of the United States affirms that *"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ...."*[1]

It was primarily the first part of the provision, commonly referred to as the Establishment Clause that has become a major point of contention and debate among justices and legal scholars alike. While advocates of textual interpretation maintain that Congress is not allowed to establish a national church but can provide aid to religion on a nondiscriminatory basis, others prefer a wider interpretation, barring Congress from any interference with religion and banning religious practices in all institutions falling within the governmental sphere.

In a landmark case of *Everson v. Board of Education* (1947), in an attempt to define for the first time the parameters of the Establishment Clause, the Supreme Court justices unanimously declared the second, wider approach to be the basis of the Supreme Court's jurisprudence in religion-related cases. To justify their interpretation, they referred to Thomas Jefferson and his "wall of separation," which they viewed as a symbol of an absolute separation between church and the state, and held, it was to remain "high and impregnable." Using this "high and impregnable wall" as a commentary on the Establishment Clause of the First Amendment, and applying its separationist logic to the rising number of Establishment Clause challenges, resulted in a gradual removal of many traditional religious expressions, such as prayers and moments of silence in schools, from the public square.

The thesis addresses what I believe is a paradox between the existence of the "high and impregnable" wall of separation between church and state and the extensive presence of religious expressions and practices throughout the public sphere. Legislative prayers, the invocation "God save the United States and this Honorable

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[1] U.S. Constitution, First Amendment: http://www.usconstitution.net/const.html (viewed May 13, 2007), non-paginated.

Court" prior to judicial proceedings, the proclamation of a National Day of Prayer or "One Nation under God" in the American Pledge of Allegiance, the nation's motto "In God We Trust," or supplication "So Help me God" in the oaths of office of public officials being only a few examples of what is sometimes referred to as the American public religion.

The primary objective of my thesis is to examine the compatibility of the widespread religious expressions and practices in American public sphere with the principle of strict separation that has become the basis for the Supreme Court's Establishment Clause jurisprudence. A compatibility of the "high and impregnable" "wall of separation" with Jefferson's "wall" will also be examined.

With the aim to present a qualified assessment of what is a rather broad and complex topic, I will divide the thesis into three parts, each consisting of a number of chapters.

Part I of my thesis, somewhat introductory in character, will examine the phenomenon of the so called public or civil religion, its origins, nature and language. It will demonstrate the role that religion has played in American society from its early days up until now. A closer examination of the current situation will reveal a lasting attachment of American people towards religion but at the same time a significant trend towards "no-religion" or non-Christian religious identification, which can in the long run certainly have repercussions for the current form of American civil religion.

Part II will serve as an introduction to the Supreme Court's Establishment Clause jurisprudence. It will examine the entry of the "high and impregnable" "wall of separation," supposedly based on Jefferson's "wall," into the American constitutional law and point out to the consequences of using this metaphor as a standard of constitutional interpretation.

The Supreme Court justices justified their "separationist" approach by referring to a long history of "separation," particularly to the words and deeds of

Thomas Jefferson. Taking into account the indisputable role that religion and religious symbols played in American society and government from the very beginning, it is in my view disputable, if the "high and impregnable" wall that the Supreme Court constructed on the bases of Jefferson's "wall" in 1947, was indeed what Jefferson had in mind in 1802, when he erected his "wall of separation." Before proceeding with examination of the Supreme Court Establishment Clause jurisprudence in greater detail, I will therefore make a short detour designed to expose Jefferson's views on religion and his own "wall of separation" that would justify the strict separation that the Supreme Court introduced and followed in his name for a great part of the 20th century.

Part II will also discuss the tests and standards adopted by the Supreme Court in the later years to determine whether or not a religious practice or expression meets constitutional muster. It will demonstrate that despite the official separationist doctrine, the Court has – especially since the 1990s - lowered the "wall of separation" and made it more porous.

Part III will examine the approach of the Supreme Court towards the constitutionality of the various religious expressions and practices hidden behind the concept of public religion. Given the fact, that the Supreme Court's doctrine was based to a large extent on strict separationism, it is highly unlikely that an application of the same tests and standards that made prayers and moments of silence in schools unconstitutional would hold civil religion practices such as legislative prayer permissible. Indeed, the few public religion challenges that appeared in front of the Supreme Court demonstrate that to justify their constitutionality, the Court employed a so called "acknowledgment" exception, ignoring existing standards and making certain practices and expressions immune to the current Establishment Clause doctrine. The justifications for this approach will also be examined.

Brief Note on Bibliography

When selecting suitable sources that are central to any valuable analysis, I was confronted with a vast amount of books as well as articles in scholarly periodicals and journals. Yet, it soon became obvious that the topic under examination is rather contentious, different scholars offering diametrically opposed assessments of history and the role that religion should play in a society, reaching conclusions that inevitably support their authors' normative views.[2]

While some believe that religion should be an active player in political affairs and argue that it's been inappropriately marginalized,[3] others assert that it has been too active a participant in the political scene and contend that its role should be circumscribed.[4] The interpretation of Jefferson's wall or the Supreme Court's Establishment Clause jurisprudence is being often analyzed in the same biased manner, proponents of both positions claiming to have the Founding Fathers and the Framers of the First Amendment on their side and – of course – emphasizing data that support their own prepossessions and minimizing significant facts that complicate or conflict with their biases. When doing so, they often employ selective references to

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[2] Accordingly, many scholars have come to the conclusion that history is inconclusive. E.g. Arnold H. LOEWY, "Rethinking Government Neutrality towards Religion under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight" (*North Carolina Law Review*, Vol. 64, 1986, pp. 1049-1121), p. 1053.

[3] For a representative sample, see Chester James ANTIEAU (ed)., *Freedom from Federal Establishment Formation and Early History of the First Amendment Religion Clauses* (Milwaukee, Wisconsin: Bruce Publishing Company, 1964); Gerard V. BARDLEY, *Church-State Relationships in America* (Westport: Greenwood, 1987); Walter BERNS, *The First Amendment and the Future of American Democracy* (New York: Basic Books, 1976); Robert L. CORD, *Separation of Church and State: Historical Fact and Current Fiction* (New York: Lambeth Press, 1982); Michael J. MALBIN, *Religion and Politics: The Intentions of the Authors of the First Amendment* (Washington, D.C.: American Enterprise Institute for Public Policy Research, 1978); Michael W. McCONNELL, "Accommodation of Religion" (*Supreme Court Review*, Vol. 1, 1985).

[4] For a representative sample, see Thomas CURRY, *The First Freedoms: Church and State in America to the Passage of the First Amendment* (New York: Oxford University Press, 1986); Derek DAVIS, *Original Intent: Chief Justice Rehnquist and the Course of American Church/State Relations* (Buffalo, NY: Prometheus Books, 1991); LEVY, Leonard, *The Establishment Clause: Religion and the First Amendment* (New York: Macmillan Publishing Company, 1986); Leo PFEFFER, *Church, State and Freedom* (Boston: Beacon Press, 1967), Mark V. TUSHNET, "The Constitution of Religion," (*Connecticut Law Review*, Vol. 18, 1986).

history, citing one issue but omitting to mention another, thus contributing little to a reasonable understanding and discussion of the topic.

Aware of this "objectivity" problem, I have entirely avoided authors such as David BARTON,[5] an eminent religious right scholar, known for his misuse of quotes and creation of his own "myths" (arguing that the U.S. is a Christian nation and should return to its Christian roots), or Cornell University professors Isaac KRAMNICK and Laurence R. MOORE,[6] who in order to rebut the "Christian nation" rhetoric of the religious right, wrote a polemic that can also hardly be presented as an honest appraisal of history.

I have attempted to rely on historians and legal scholars who "did their homework" and were able to present a more balanced account of the historical events.

In order to portray the place of religion and early America, I have relied primarily on the valuable historical accounts of Thomas J. CURRY,[7] Derek H. DAVIS[8] and the Anson P. STOKES & Leo PFEFFER.[9] The best available sources for an introduction to the concept of public religion were Robert N. BELLAH[10] and Will HERBERG.[11]

When assessing the history of separation of church and state, I have for the most part drawn upon the modern scholarship of the last decade, which appeared to

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[5] BARTON, David, *Myth of Separation: What Is the Correct Relationship Between Church and State?* Aledo, TX: Wallbuilder Press, 1992.
[6] KRAMNICK, Isaac & MOORE, R. Laurence, *The Godless Constitution: The Case Against Religious Correctness,* New York: Norton & Co. Inc., 1996.
[7] CURRY, Thomas J., *The First Freedoms: Church and State in America to the Passage of the First Amendment,* New York: Oxford University Press, 1986.
[8] Derek H. DAVIS, *Religion and the Continental Congress, 1774-1789: Contributions to Original Intent,* Oxford: Oxford University Press, 2000.
[9] STOKES, Anson P. & PFEFFER, Leo, *Church and State in the United States*, New York: Harper & Row, 1964.
[10] BELLAH, Robert N., *Beyond Belief: Essays on Religion in a Post-Traditionalist World*, Berkeley: University of California Press, Reprint edition, 1991. See also his famous essay "Civil Religion in America", *Daedalus, Journal of the American Academy of Arts and Sciences*, Vol. 96, Winter 1967, pp. 1-21.
[11] HERBERG, Will, *Protestant – Catholic – Jew,* New York: Doubleday, 1955.

me less biased than the relatively limited amount of literature written by Progressive historians such as Charles and Mary BEARD,[12] who – in line with their creed – considered religion as the enemy of economic and political progress and revisited the Founders' view of establishment and religious liberty to make it compatible with their own.

The modern historians have begun to challenge what they often considered to be Progressive revisionism. James T. HUTSON[13] has demonstrated Thomas Jefferson's support for the co-habitation between politics and religion; Philip HAMBURGER[14] and Daniel DREISBACH[15] have offered more balanced interpretations of the Establishment Clause, both making a case that prior to the 20th century no major religious or political group sought governmental neutrality, much less hostility, to religion. Also opposing early 20th century liberalism, Michael ZUCKERT[16] has argued that the Founders sought an "amalgam" or co-habitation between liberty and faith. While it was not the objective of this thesis to examine the original intent of the Framers of the First Amendment, but rather to examine what certainly was not their intent, these authors have provided me with a better understanding of the values underlying the First Amendment and a good starting point to the analysis of the Supreme Court's Establishment Clause jurisprudence.

When analyzing the current Supreme Court's jurisprudence and the compatibility of religious expressions and symbols with the established doctrines and standards of the Court, I have for the most part relied on articles written by legal scholars, such as Ira LUPU,[17] all of which were accessible through *Proquest* or *JStor*

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[12] BEARD, Charles & BEARD, Mary, *The Rise of American Civilization,* New York: The MacMillan Company, 1930.
[13] HUTSON, James, H, *Religion and the New Republic*, Lanham, MD: Rowman & Littlefield Publishing Co., 2000.
[14] HAMBURGER, Philip, *Separation of Church and State*, Cambridge, Mass.: Harvard University Press, 2002.
[15] DREISBACH, Daniel L., *Thomas Jefferson and the Wall of Separation between Church and State*, New York: New York University Press, 2002.
[16] ZUCKERT, Michael P., *Natural Rights and the New Republicanism*, Princeton, N.J.: Princeton University Press, 1998.
[17] LUPU, Ira, "Developments in the Law – Religion and the State," *Harvard Law Review*, Volume 100, 1987, pp. 1606-1762.

in the American Center, Prague, and on my own reading and understanding of the cases in question.[18]

I have deliberately focused on the Establishment Clause only and omitted the analysis of the second provision of the First Amendment, the so called Free Exercise Clause, as it does not have any implications for the constitutionality of religious expressions and practices that is being examined in this thesis.

[18] Supreme Court decisions listed by party name: http://straylight.law.cornell.edu/supct/cases/name.htm#Case_Name-L; (viewed on May 11, 2007).

I. RELIGION IN AMERICAN PUBLIC SQUARE

1. Defining American Civil Religion

1.1. The Origins of Civil Religion

"What we have, from the earliest years of the republic, is a collection of beliefs, symbols and rituals with respect to sacred things and institutionalized in a collectivity ... American civil religion has its own prophets and its own martyrs, its own sacred events and sacred places, its own solemn rituals and symbols. It is concerned that America be a society as perfectly in accord with the will of God as men can make it, and a light to all the nations."[19]

Robert Bellah, "Civil Religion in America," 1967

The concept of civil religion can be found under various headings: civic faith, public piety, republican religion, civil mythology, or ceremonial religion being only a few examples. Benjamin Franklin and John Adams referred to a so called "public[k] religion;"[20] Abraham Lincoln to a "political religion."[21]

The phrase "civil religion" was first coined by the 18th century French philosopher Jean-Jacques Rousseau in his treatise "On the Social Contract" (1762),[22]

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[19] BELLAH, Robert, N.: "Civil Religion in America," *Daedalus, Journal of the American Academy of Arts and Sciences*, Vol. 96, Winter 1967, p.1, http://hir.hartsem.edu/Bellah/articles_5.htm (viewed April 9, 2007).

[20] WITTE, John Jr., "From Establishment to Freedom of Public Religion," Emory University School of Law, Research Paper No. 04-1, 2003, p. 504; online at: https://culsnet.law.capital.edu/LawReview/BackIssues/32-3/Witte5.pdf (viewed April 17, 2007).

[21] LINCOLN, Abraham, Speeches and Writings: Lyceum Address, 1838, non-paginated; http://showcase.netins.net/web/creative/lincoln/speeches/lyceum.htm (viewed May 19, 2007); see also CORLETT, William S., Jr., "The Availability of Lincoln's Political Religion," *Political Theory*, Vol. 10, November 1982, pp. 520-540.

[22] ROUSSEAU, Jean-Jacques, "On the Social Contract," http://www.constitution.org/jjr/socon_04.htm (viewed April 9, 2007) Rousseau analyzed the many different arrangements between government and religion: theocracy, divine-right monarchy, and the divine emperors of Rome and Egypt. He disliked his contemporary model of absolutist monarchies, in which the head of state was the head of the church; and he took a negative view of Christianity itself, because he believed it divided citizens' loyalties between their civic and spiritual obligations. His solution was to create a "purely civil profession of

and did not receive much scholarly attention or commentary until the American sociologist Robert N. Bellah revived and popularized the subject in his 1967 essay, "Civil Religion in America."[23]

Bellah suggested that "there actually exists, alongside of and rather clearly differentiated from the churches, an elaborate and well institutionalized civil religion [i.e.] certain common elements of religious orientation that the general majority of Americans share [and that] have played a crucial role in the development of American institutions and still provide a religious dimension for the whole fabric of American life, including the political sphere."[24] This civil religion, Bellah argued, was a sort of millenarian Protestantism that had been secularized and assimilated into American culture, eventually taking the form of a comprehensive set of values, symbols, rituals and assumptions, all rooted in the American historical experience.[25] It was not a "worship of the American nation but an understanding of the American experience in the light of ultimate and universal reality."[26] Yet, while involving patriotism, civil religion also has a significant spiritual or religious dimension.[27]

The somewhat vague content of civil religion was captured by President Eisenhower's famous observation that American government "makes no sense, unless

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faith" that would be promoted by a nation's leaders. ("The dogmas of civil religion ought to be few, simple, and exactly worded, without explanation or commentary," Rousseau wrote. "The existence of a mighty, intelligent and beneficent Divinity, possessed of foresight and providence, the life to come, the happiness of the just, the punishment of the wicked, the sanctity of the social contract and the laws: these are its positive dogmas." See ibid).

[23] BELLAH, Robert, N.: "Civil Religion in America," *Daedalus, Journal of the American Academy of Arts and Sciences*, Vol. 96, Winter 1967, pp. 1-21; online at: http://hir.hartsem.edu/Bellah/articles_5.htm (viewed April 9,2007).

[24] Ibid., non-paginated; (According to Bellah, there are four basic dogmas of this religious dimension: "the existence of God, the life to come, the reward of virtue and the punishment of vice, and the exclusion of religious intolerance." See BELLAH, Robert N., *Beyond Belief: Essays on Religion in a Post-Traditionalist World*, University of California Press, Reprint edition, 1991; p. 172) (borrowing from Rousseau, "The Social Contract").

[25] Professor WEST has suggested a definition of civil religion that captures its essentially political nature. He defines civil religion as "a set of beliefs and attitudes that explain the meaning and purpose of any given political society in terms of its relationship to a transcendent, spiritual reality, that are held by the people generally of that society, and that are expressed in public rituals, myths and symbols." See WEST, Ellis, "A Proposed Neutral Definition of Civil Religion," *Journal of Church & State*, Vol. 22, Winter 1980, pp. 22-40), p. 39.

[26] BELLAH, R., "Civil Religion in America," non-paginated.

[27] Ibid., non-paginated.

it is founded in a deeply felt religious faith – and I don't care what it is."[28] Civil religion was supposed to provide a substitute for the established church, a means of morally instructing and spiritually unifying the people so as to bind them to republican government.[29] By ascribing theological or spiritual meaning to the events of America's founding and history, it encouraged the social and political cohesion necessary for the effective functioning of liberal democratic government.[30]

There are several unifying ideas and values that stand behind the concept of American civil religion. There is a belief that "America is, or ought to be, responsible to some sort of transcendent principle of morality;" there is "a faith in democracy" and in an "American mission to spread it all over the world;" there is "a sense of civic piety – responsible exercise of one's civic responsibilities," and a "belief that Destiny has great things in store for the American people."[31] All of these aspects have been and continue to be the defining features of the American nation. Especially visible is the belief of many Americans that God has uniquely blessed their country and will guarantee its prosperity and its special place and role in the world and in human history. This aspect has been present since colonists first arrived in America and remained engraved in the American society to this day.[32] According to a 2002 survey,

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[28] Quoted in: HERBERG, Will, *Protestant – Catholic – Jew,* New York: Doubleday, 1955, p. 97.

[29] GEDICKS, Frederick M., "'Uncivil Religion': 'Judeo Christianity' and the Ten Commandments," *Express Preprint Series,* Working Paper 1813, 2006, p. 41.

[30] Ibid., pp. 4-5.

[31] RICHEY, Russell E. & JONES, Donald G. (eds.), *American Civil Religion*, New York: Harper & Row, 1974, p. 28.

[32] John Winthrop's speech aboard the *Arabella,* where he spelled out the mission he and his followers were about to embark upon was perhaps the earliest articulation of the theme: "Thus stands the cause between God and us: We are entered into a covenant with Him for this work; we have taken out a commission. … For we must consider that we shall be as a city upon a hill, the eyes of all people upon us." (Winthrop's Speech aboard the Arabella, 1630, http://religiousfreedom.lib.virginia.edu/sacred/charity.html, non-paginated);

Jefferson continued this theme in his Second Inaugural Address. He acknowledged that he would "need … the favor of that Being in whose hands we are, who led our fathers, as Israel of old, from their native land and planted them in a country flowing with all the necessaries and comforts of life.[32] (Second Inaugural Address of President Thomas Jefferson, 1805, http://www.yale.edu/lawweb/avalon/presiden/inaug/jefinau2.htm, (May 11, 2007), non-paginated.)

Abraham Lincoln expanded the idea of America as a holy place in the Gettysburg Address when he spoke of the country already blessed by the blood of those Union martyrs "who here gave their lives, that that nation might live." (The Gettysburg Address of President Abraham Lincoln, 1863,

nearly half of respondents (48%) think that the United States has had special protection from God for most of its history, only one quarter says America has had no special divine protection.[33]

1.2. The Language of Civil Religion

The best way to define civil religion is through its direct expressions. These are to be heard from politicians in formal settings and in inaugural speeches, from veterans consecrating Memorial Day ceremonies, at sports events etc.

The early American presidents were instrumental in laying the foundation of civil religion, which has been carried on ever since. Their inaugural (and farewell) addresses are filled with the language of civil religion. In his first inaugural address, President Washington spoke of God as "that Almighty Being who rules the universe," "Great Author of every public and private good," "Invisible Hand," and "benign Parent of the Human Race."[34] President Adams addressed the "Providence," the "Being who is Supreme over all, the "Patron of Order," the "Fountain of Justice," and "Protector in all ages of the world of virtuous liberty."[35] Thomas Jefferson, who coined the phrase "wall of separation," and is the patron of strict separationists, referred in his inaugural address to "that Infinite Power which rules the destinies of the universe"[36] and "that Being in whose hands we are."[37]

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http://www.americanrhetoric.com/speeches/gettysburgaddress.htm (May, 11, 2007), non-paginated; (also quoted in BELLAH, Robert N., *Beyond Belief: Essays on Religion in a Post-Traditionalist World,* pp. 175-8)

[33] Pew Research Center for the People and the Press Survey: http://people-press.org/reports/display.php3?PageID=386 (April 15, 2007), non-paginated.

[34] First Inaugural Address of President George Washington, 1789, http://www.yale.edu/lawweb/avalon/presiden/inaug/wash1.htm (May 20, 2007), non-paginated.

[35] Inaugural Address of President John Adams, 1797, http://www.yale.edu/lawweb/avalon/presiden/inaug/adams.htm (May 20, 2007), non-paginated.

[3636] First Inaugural Address of President Thomas Jefferson, 1801, http://www.yale.edu/lawweb/avalon/presiden/inaug/jefinau1.htm (May 20, 2007), non-paginated.

[37] Second Inaugural Address of President Thomas Jefferson, 1805, http://www.yale.edu/lawweb/avalon/presiden/inaug/jefinau2.htm(May 20, 2007), non-paginated

And this tradition has continued unbroken to this day. On January 20, 2001, George W. Bush became the forty-third President of the United States to flavor his inaugural address with an appeal to the deity when he referred to a "power larger than ourselves who creates us equal in His image."[38] When sworn-in to second term, Bush spoke in his second inaugural of the "Maker of Heaven and Earth," of "God who moves and chooses as he will," God who will "watch over the United States of America."[39]

Public acknowledgment of God and religion goes beyond inaugurations; it permeates American public life and culture. The national motto "In God We Trust" is imprinted on the U.S. currency;[40] "one Nation; under God" is daily proclaimed by countless children in schools;[41] the United States has a statutorily mandated Prayer Day;[42] the House of Representatives and many state legislatures open sessions with an invocation by a chaplain who is paid by the government;[43] the various branches of the military keep their own chaplains on the payroll;[44] Supreme Court sessions open with "God save the United States and this Honorable Court;"[45] witnesses in American courts have for centuries taken oaths on the Bible;[46] the Supreme Court building has an image of Moses with the Ten Commandments; Presidents since George Washington with the exception of Thomas Jefferson have issued proclamations of

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[38] First Inaugural Address of President George W. Bush, 2001, http://www.whitehouse.gov/news/inaugural-address.html (viewed April 25, 2007), non-paginated.
[39] Second Inaugural Address of President George W. Bush, 2005, http://www.whitehouse.gov/inaugural/ (viewed April 25, 2007), non-paginated.
[40] U.S. Code Collection: Title 31, 5112. Denominations, specifications, and design of coins, 31 U.S.C. §324 (1983), http://straylight.law.cornell.edu/uscode/html/uscode31/usc_sec_31_00005112----000-.html (viewed May 21, 2007), non-paginated.
[41] U. S. Code Collection: Title 4.4. Pledge of Allegiance to the Flag; manner of delivery, http://straylight.law.cornell.edu/uscode/html/uscode04/usc_sec_04_00000004----000-notes.html (viewed May 21, 2007), non-paginated
[42] U.S. Code Collection: 36 U.S.C. §169(h) (1983), non-paginated
[43] See Marsh v. Chambers, 463 U.S. 783 (1983) (upholding the constitutionality of opening legislative sessions with prayer led by a chaplain); see http://straylight.law.cornell.edu/supct/html/historics/USSC_CR_0463_0783_ZS.html (May 21, 2007)
[44] See Lee v. Weisman, 505 U.S. 507 (1992), p. 620 (Souter, J., concurring); http://straylight.law.cornell.edu/supct/html/historics/USSC_CR_0505_0577_ZC1.html (May 21, 2007)
[45] See, e.g., Lee, 505 U.S. 507 (1992), p. 635 (Scalia, J., dissenting); http://straylight.law.cornell.edu/supct/html/historics/USSC_CR_0505_0577_ZD.html (May 21, 2007)
[46] See e.g. ibid.

Thanksgiving; and churches and other religious institutions do not pay property taxes.[47]

1.3. The Nature of American Civil Religion

Unlike the churches existing throughout America from its early days, the "civil religion" linked American citizenship and loyalty to a "nonsectarian" Christian understanding of the United States.[48] As America became more diverse, the various state religious establishments disappeared, but civil religion and its symbols stayed.[49]

The tenets of this civil religion consisted of beliefs purportedly shared by all Christian religions,[50] such as the existence of God, the literal truth of the Bible, the efficacy of prayer, and the expectation of an afterlife in which virtue is rewarded and vice is punished.[51] Public schoolchildren were led in prayer and Bible-reading by government-paid teachers,[52] public prayer became common in the state legislatures,[53] important days of Christian worship were recognized as civic holidays,[54] biblical and other expressions of devotion to God appeared on government buildings, documents

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[47] See Walz v. Tax Comm'n of New York, 397 U.S. 664 (1970) (holding that tax exemptions for churches are constitutional);
http://straylight.law.cornell.edu/supct/html/historics/USSC_CR_0397_0664_ZS.html (May 21, 2007)

[48] BELLAH, Robert N., "Civil Religion," non-paginated.

[49] John WITTE presents an interesting argument by pointing out to what he understands as one of the preconditions for the system of state patronage of public religion to function. This precondition, Witte argues, was the presence of the frontier where one could easily emigrate. Religious minorities who could not accept a community's religious restrictions or its religious patronage did frequently move westwards. Thus, Mormons moved from New York to Ohio, to Missouri, and to Illinois, before finally settling in Utah and in neighboring states. Catholics moved to California, the Dakotas, Illinois, Louisiana, Montana, Nevada and New Mexico. Baptists and Methodists poured from Georgia and Tennessee to Mississippi and Missouri. Free spirits escaped to the mountainous frontiers of Wyoming, Montana, Washington, and Oregon. See WITTE, John, "From Establishment to Freedom of Public Religion," Emory University School of Law, Research Paper No. 04-1, 2003, p. 508.

[50] FELDMAN, Noah, *Divided by God. America's Church-State Problem – and What We Should Do About It,* Farrar, New York: Straus and Giroux, 2005; p. 61.

[51] BELLAH, Robert N., *Beyond Belief...*, pp. 171-2.

[52] FELDMAN, Noah, *Divided by God*, p. 165.

[53] WITTE, John Jr., *Religion and the American Constitutional Experiment: Essential Rights and Liberties,* Boulder: Westview Press, 2000; p. 118.

[54] Ibid., p. 118.

and seals,[55] and blasphemy and Sunday-closing laws reinforced respect for the Christian Sabbath and the Christian God.[56]

Even though the "civil religion" was "nonsectarian," the nature of this "nonsectarianism" was very much in accordance with Protestant values and principles.[57] It is therefore not surprising that this assimilation to the "nonsectarian" Protestantism,[58] which was visible particularly in public schools,[59] resulted in resistance from the Jews and the Catholics alike. These conflicts have, however, largely disappeared by the 1950s, as the succeeding generations of Catholics and Jews absorbed some of the Protestant individualism inherent to "nonsectarianism," and nonsectarianism relaxed its ties to alternative beliefs and observances.[60]

These developments allowed for a gradual reformulation of the American "civil religion" from a "nonsectarian" Protestantism to a more inclusive transdenominational "Judeo-Christianity."[61] This development can be documented on the speech pattern used by government officials and justices. While in 1892 the Supreme Court noted that "[w]e are a Christian people, and the morality of the country is deeply engrafted upon Christianity,"[62] in 1952 it declared that "[w]e are a religious people whose institutions presuppose a Supreme Being."[63] The transformation of "Christian people" into "religious people" is a good demonstration of the increasing degree of Protestant openness towards Christians and Jews.

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[55] Ibid., pp. 112-113.
[56] Ibid., p. 118.
[57] FELDMAN, N., *Divided by God*, pp. 63-64.
[58] Ibid., p. 77 (describing Protestant "paranoia toward the Catholic church," and a "corresponding elevation of the Bible to the foundational text of American republicanism," based on the purported "connection among Bible reading, morality, and successful participation in republican government")
[59] HAMBURGER, P., *Separation of Church and State,* pp. 209-221 (relating intensification of tensions between Protestants and Catholics during the nineteenth century as the latter resisted the "nonsectarian" religion in the common schools and accused Protestants of religious intolerance).
[60] FELDMAN, N., *Divided by God,* pp. 90-91.
[61] Ibid., p. 91.
[62] Holy Trinity Church v. United States, 143 U.S. 457 (1892) (Brewer, D., opinion of the Court), http://members.aol.com/TestOath/HolyTrinityOp1-2.htm (viewed May 21, 2007), non-paginated.
[63] Zorach v. Clawson, 343 U.S. 306 (1952), p. 313 (Douglas, J., opinion of the Court); online at: http://supct.law.cornell.edu/supct/html/historics/USSC_CR_0343_0306_ZO.html (May 21, 2007).

It was also in the 1950s that Will Herberg published his classic of American civil religion, *Protestant - Catholic - Jew.*[64] Herberg argued that unlike other immigrant characteristics, such as language or national origin, religious identity did not disappear into the "melting pot" of American assimilation. To the contrary, an immigrant could enter the mainstream of American society only by retaining his or her religious identity – as long as this identity was Protestant, Catholic, or Jewish.[65] "Unless one is either a Protestant, or a Catholic, or a Jew," Herberg argued, "one is a 'nothing;' to be a 'something,' to have a name, one must identify oneself to oneself, and be identified by others, as belonging to one or another of the three great religious communities in which the American people are divided."[66] Noting that nearly all Americans identified themselves with one of these groups, Herberg concluded that Protestantism, Catholicism, and Judaism were each a quintessentially American religion and that "Judeo-Christianity" was thus the American civil religion.[67]

The U.S. Supreme Court did not, however, take this into account as it went on to invalidate the government use of many symbols and observances of Judeo-Christianity, particularly in the public schools.[68] In reaction, numerous religious activist groups entered the scene, the most powerful one of them being the Christian Right. Concerned about various court cases that have limited religious displays on public property, banned overtly-led school prayer, and legalized abortion, and seeking to restore Christianity as the dominant cultural and political force, the Christian Right has argued that American society is straying from the covenant with God.[69] The

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[64] HERBERG, Will, *Protestant – Catholic – Jew,* New York: Doubleday, 1955, pp. 1-320.
[65] Ibid., pp. 40-54.
[66] Ibid., pp. 53-54.
[67] Ibid., p. 101.
[68] See e.g., Stone v. Graham, 449 U.S. 39 (1980) (holding that public school display of decalogue violated Establishment Clause); Epperson v. State of Arkansas, 393 U.S. 97 (1968) (same with respect to ban on teaching any theory of human origin in public schools); Abingdon School Dist. v. Schempp, 374 U.S. 203 (1963) (same with respect to public school-sponsored prayer and Bible-reading, even though nonconsenting students were exempted from attendance and participation); Engel v. Vitale, 370 U.S. 421 (1962) (same with respect to nondenominational government-composed prayer offered at the start of each school day); Torcaso v. Watkins, 367 U.S. 488 (1961) (same with respect to state requirement that notaries affirm belief in God). All cases found under: http://supct.law.cornell.edu/supct/cases/name.htm#Case_Name-W-Z (viewed on May 21, 2007)
[69] The origins of the Christian Right go back to the 1920s, when fundamentalism emerged as a religious movement to counter the principles of liberal democracy and the modernist, scientific conceptions of

Christian Coalition gained national attention in the early 1980s when members of the Christian Right, a self-named and self-proclaimed movement of Christian evangelicals and fundamentalists, mobilized to elect Ronald Reagan as President. Since then, led by Pat Robertson and Ralph Reed, the Christian Coalition has risen to prominence as a major political force, exerting substantial ideological control over the Republican Party platform.[70]

2. A Nation under God: Past versus Present

2.1. Religion in Early America

Alexis de Tocqueville observed more than a century and a half ago, "[t]here is no country in the whole world, where the Christian religion retains a greater influence over the souls of men than in America."[71] Indeed, the religious character of American society has long been noted as a distinguishing feature of the United States[72] and everything seems to suggest that religion played a formative role in American public life from the very beginning.

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the State. After WWII and well into the fiftieth, fundamentalism seemed to be fading both as a religious doctrine and a cultural force. In the early 1960s, however, with the presidential candidacy of the political conservative, Barry Goldwater, there emerged a revival of religious fundamentalism that has gained momentum throughout the latter half of the 20th century. His concern with the social upheaval of the time and the apparent breakdown of social morality appealed to Christian evangelical voters. (See WATSON, Justin: *Christian Coalition: Dreams of Restoration, Demands for Recognition,* New York: St. Martin's Press, 1997.)

[70] ZINKE, Robert C., "The Role of Religion in Public Life," *Public Administration Review*, Vol. 59, March/April 1999, pp 170-171.

[71] TOCQUEVILLE, Alexis: *Democracy in America,* http://www.gutenberg.org/files/815/815-h/815-h.htm; non-paginated (viewed May 11, 2007).

[72] French Catholic philosopher Jacques Maritain called America a nation of "pilgrims in their own land." (See CURRY, Thomas J., "The Pilgrims' Progress," *Reviews in American History,* Vol. 13, June 1985, pp. 167-171). Beginning with the first Pilgrims and Puritan colonists to settle in Massachusetts, followed by the many subsequent waves of immigrants to land on America's shores, most of the new arrivals were indeed men and women of deep religious convictions – fleeing religious persecution, hunger or seeking America's "city on a hill." And "pilgrims they have remained in their new land," wrote religious historian Martin E. Marty (MARTY, Martin E.: *Pilgrims in Their Own Land: 500 Years of Religion in America,* New York: Penguin Books, 1988). The new waves of eighteenth century immigrants brought their own religious zeal across the Atlantic and the nation's first major religious revival in the middle of the eighteenth century further strengthened the religious character of what was to become a new nation.

The citizens of colonial America were "virtually all Christians,"[73] the "overwhelming majority" of them Protestants.[74] Not surprisingly, therefore, "the values, customs, and forms of Protestant Christianity thoroughly permeated civil and political life."[75]

By the time of the American Revolution, there were established churches in ten of the thirteen colonies: the Anglican Church of England was established in Virginia, Maryland, South Carolina, North Carolina, and Georgia; the Congregational Church was established in Massachusetts, Connecticut, and New Hampshire; the Episcopal and Dutch Reformed Churches were established in New York and New Jersey.[76] Blasphemy was a crime in most jurisdictions; in Vermont it was punishable by death.[77] Toleration of dissidents within the established religion was limited, as was toleration of minority religious beliefs.[78] There was, moreover, little or no sympathy for the notion that religious liberty might include the right not to be religious.[79]

Although many of the colonists fled Europe specifically to escape religious test oaths, these same colonists did force dissenters to take test oaths in conformity with their faith. Maryland and Massachusetts required a belief in the Christian religion. Georgia, New Hampshire, New Jersey, and North Carolina had Protestant tests.

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[73] STOKES, Anson P. & PFEFFER, Leo, *Church and State in the United States*, New York: Harper & Row, 1964, p. 39. At the time the First Amendment was ratified in 1791, there were only 1,500 - 2,000 Jews in the nation, out of a population of approximately four million people. See BORDEN, Morton, *Jews, Turks, and Infidels*, Chapel Hill, The University of North Carolina Press, 1984, p. 6.

[74] CURRY, Thomas J., *The First Freedoms: Church and State in America to the Passage of the First Amendment.* New York: Oxford University Press, 1986, p. 218. This is not to suggest that Protestant Christians were homogenous in their views or beliefs. Protestant Christians in early America were divided into well-defined sects of widely differing views and beliefs.

[75] CURRY, T., *The First Freedoms: Church and State in America...*, p. 219.

[76] STOKES, Anson P.: *Church and State in the United States*, New York: Harper and Brothers, 1950. p. 274. Vermont did not disestablish its state church until 1807; Connecticut until 1818; New Hampshire until 1819; and Massachusetts until 1833. See ibid.

[77] CURRY, T., *The First Freedoms...*, p. 190.

[78] Baptists, Catholics, Jews and Quakers, among others, suffered persecution, ostracism, banishment, and death because of their religious beliefs. See MILLER, Robert & FLOWERS, Ronald, *Towards Benevolent Neutrality: Church, State and the Supreme Court,* Waco, Tex: Baylor University Press, 1982, pp. 272-91.

[79] See CURRY, T., *The First Freedoms ...*, p. 79 (asserting that "colonial writers proclaimed liberty of conscience, but they grounded that liberty in the unexamined assumption that the legal systems of the time would uphold and maintain a Christian and Protestant State")

Delaware required "faith in God the Father and in Jesus Christ, His only Son, and in the Holy Ghost, One God, blessed forever more."[80] Pennsylvania that belonged to the most tolerant states required a "belief that God was 'the rewarder of the good and the punisher of the wicked,'" and eleven of the thirteen states restricted office holding to Protestants or Christians.[81] It was not until 1868 that the Constitution of North Carolina was amended to allow non-Christians to hold public office, and even then, all "who den[ied] the being of Almighty God" were excluded.[82] New Jersey did not permit non-Protestants to hold public office until 1874.[83] Maryland and Tennessee required a belief in God until the Supreme Court held such a requirement unconstitutional in 1961.[84]

Most American statesmen, when they began to form new governments at the state and national levels, shared the convictions of the majority of their constituents that religion was, to quote Alexis de Tocqueville's observation, "indispensable to the maintenance of republican institutions."[85] The Declaration of Independence (1776) advanced the notion that government and law must conform to a higher law - the "Laws of Nature and Nature's God."[86] It "appeal[ed] to the Supreme Judge of the world for the rectitude of our intentions" and affirmed "a firm reliance on the protection of a divine Providence."[87] The eye of Providence and the motto "Annuit Coeptis" (he [God] has favored our undertakings) appeared also on the reverse side of the Great Seal, alluding to the many interventions by Providence in favor of the American cause.[88] The Articles of Confederation (1777) paid tribute to the "Great

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[80] See STOKES, A. P. & PFEFFER, L., *Church and State in the United States,* p. 37.
[81] See CURRY, T., p. 221.
[82] Ibid. p. 72.
[83] Ibid. p. 80.
[84] See Torcaso v. Watkins, 367 U.S. 488 (1961), p. 496 (the Supreme Court ruled that Maryland's religious test violated Torcaso's religious freedom); http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=US&vol=367&invol=488 (May 22, 2007)
[85] TOCQUEVILLE, Alexis: *Democracy in America,* http://www.gutenberg.org/files/815/815-h/815-h.htm, non-paginated (viewed May 11, 2007).
[86] DAVIS, Derek H., *Religion and the Continental Congress, 1774-1789: Contributions to Original Intent*, Oxford: Oxford University Press, 2000; p. 201.
[87] The Declaration of Independence (U.S. 1776): http://www.constitution.org/usdeclar.htm (May 13, 2007); non-paginated.
[88] Congress named the first committee (namely Franklin, J. Adams and Jefferson) to design a Great Seal, or national emblem, on July 4, 1976, the same day that independence from England was declared

Governor of the World."[89]

Continental Congress rarely hesitated to deal with religion. To borrow a few words from Professor Davis, it resembled "a group of priests, laboring on behalf of a new national church" so that its sessions were "sometimes imbued with a profoundly religious spirit."[90] It engaged in prayer, heard sermons and attended funerals as a group, and legislated on such matters as "sin, repentance, humiliation, divine service, fasting, morality, prayer, mourning, public worship, funerals, chaplains, and 'true' religion."[91] To seek God's aid in fighting the war, the Continental Congress appointed thanksgiving and fast days, which were then proclaimed by state executives, and authorized mass production of an American edition of the Bible, as there were difficulties to obtain Bibles from England due to the war.[92]

The First Congress of the United States took over most of the practices of its predecessor. On the very day when the debates about the First Amendment commenced, Congress reenacted the Northwest Ordinance, stating among other things that "[r]eligion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged."[93] Endorsement of religious symbols and ceremonies by the state and local governments became commonplace. "In God We Trust" and similar confessions

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by the thirteen states. The task proved far more difficult than anticipated. It was not until June 20, 1782 that the Great Seal of the United States became a reality.
www.state.gov/www/publications/great_seal.pdf; see also DAVIS, D., *Religion and the Continental Congress,* p. 201.

[89] The Articles of Confederation (1777, coming to force 1781), www.usconstitution.net/articles.html (viewed on April 30, 2007), non-paginated.

[90] DAVIS, D., *Religion and the Continental Congress*, pp. 65-66.

[91] Ibid., p. 66.

[92] See STOKES, Anson P., *Church and State in the United States*, New York: Harper and Brothers, 1950, pp. 470-75. (The Continental Congress refused to fund the project because it lacked funds and it feared that the Bible might not appeal to all religious groups. It was therefore paid for by the states. See DAVIS, D., *Religion and the Continental Congress,* p. 201).

[93] Northwest Ordinance, 1 Stat. 51, 1789, usinfo.state.gov/usa/infousa/facts/democrac/5htm (viewed on April 30, 2007), non-paginated; The Ordinance provided the means by which new states would be created out of the western lands and then admitted into the Union. The importance of the statute, aside from providing for orderly westerly settlement, is that it made clear that the new states would be equal to the old; there would be no inferior or superior states in the Union. Moreover, in the Ordinance Congress compacted with the settlers of the territories that they would be equal citizens of the United States, and would enjoy all of the rights that had been fought for in the Revolution. Ibid.

appeared on governmental seals and stationery. The Ten Commandments and Bible verses were inscribed on the walls of courthouses, public schools, and other public buildings; many of the first public schools and state universities had mandatory courses in the Bible and religion and compulsory attendance in daily chapel and Sunday worship services. Crucifixes were erected in state parks and on state house grounds, Sundays declared official days of rest, and government-sponsored chaplains were appointed to state legislatures, military groups, and state prisons, asylums, and hospitals. Prayers were offered at the commencement of each session of many state legislatures and at city council meetings; various forms of aid to religious groups were afforded by state as well as local governments, and subsidies were given to Christian missionaries on the frontier.[94]

In view of the religious and political landscape that existed by the end of the nineteenth century, it is scarcely surprising that Justice David Brewer, writing for a unanimous United States Supreme Court in the 1892 case *Church of the Holy Trinity v. United States*, declared that upon viewing "American life as expressed by its laws, its business, its customs, and its society, we find everywhere a clear recognition … [that] the form of the oath universally prevailing, concluding with an appeal to the Almighty; the custom of opening sessions of all deliberative bodies and most conventions with prayer; the prefatory words in all wills, 'In the name of God, Amen;' the laws respecting the observance of the Sabbath … add a volume of unofficial declarations to the mass of organic utterances that this is a Christian nation."[95]

2.2. God in Today's America

At the beginning of the 21st century, American citizens continue saluting the flag with the words "one nation, under God," recognize the phrase "In God We Trust" as the national motto; tolerate the existence of a chaplain in "[e]very state legislature

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[94] WITTE, John, "From Establishment to Freedom of Public Religion," Emory University School of Law, Research Paper No. 04-1, 2003, p. 505-508.
[95] Church of the Holy Trinity v. United States, 143 U.S. 457 (1892), p. 471.
http://supreme.justia.com/us/143/457/case.html (viewed May 22, 2007)

as well as Congress" who is "paid for with public tax monies," and a President, who annually declares a National Day of Prayer.[96] The government is still sponsoring various messages of religious nature, such as presidential speeches, the reciting of the Pledge of Allegiance, or Ten Commandments monuments on municipal property. And most citizens do not object.

Indeed, nearly 125 years after the philosopher Friedrich Nietzsche first famously declared that "God is dead,"[97] reports and polls in America seem to suggest the opposite. In fact, Americans are, and continue to be, a people with a strong religious strain, and the existence of God is one of the few things almost all Americans consistently agree upon.[98] According to a recent polling, 96% of the public says they believe in God or some form of Supreme Being.[99]

More than half of Americans say they attend religious services at least once a month, and for most of them, faith remains an integral part of daily life, with approximately six-in-ten Americans saying that religion is "very important" in their own lives.[100] Moreover, it seems that large majority of Americans want their

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[96] LEVY, Leonard W., *The Establishment Clause: Religion and the First Amendment*, New York: Macmillan Publishing Company, 1986, p. xiv (observing that despite the language of the Constitution, "religion saturates American public life").

[97] *Gott ist todt! Gott bleibt todt! Und wir haben ihn getödtet!* (a quote from The Madman (section 125) http://atheism.about.com/library/weekly/aa042600c.htm (viewed May, 21, 2007)

[98] BERG, Thomas C., *The State and Religion in a Nutshell*. Minnesota: West Group, 2004; p. 1.

[99] Pew Forum on Religion and Public Life, April 4, 2006: http://pewresearch.org/pubs/15/god-is-alive-and-well-in-america (viewed April 29, 2007), non-paginated.

Over 70% of Americans believe in Hell, over 80% in Heaven and 72% say there is Life after Death. See Baylor Religion Survey, 2006, www.baylor.edu/content/services/document.php/33304.pdf (viewed May 1, 2007), pp. 3-4.

[100] The Pew Research Center Survey Report 2002, p. 2.
http://people-press.org/reports/display.php3?ReportID=167 (viewed on April 27, 2007)

More than half of Americans say they attend religious services at least once a month, and about four-in-ten report doing so at least once a week. 59 percent of Americans said religion plays a very important role in their lives, compared to Great Britain at 33 percent, Canada at 30 percent and Germany at 21 percent. France and the Czech Republic reported the lowest levels of religiosity in Europe, both at only 11 percent. (Ibid., p. 2)

According to recent polls, 58.9% of Americans pray at least once a day (31.2% even several times a day), 20% pray at least once a week (14.2% several times a week), and only 10.3% say that they never pray. See General Social Survey 2004: http://www.thearda.com/quickstats/qs_24.asp (viewed May 1, 2007), non-paginated; More than three in four Americans continue to believe that the Bible is the "actual word of God" and 42% of the public seems to accept the creationist account of the origins of

government and its officials, at least to some extent, to reflect and be guided by religious faith and principles. In a recent Gallup poll, more than 65 per cent said they would be reluctant to vote for an atheist for president,[101] and an analysis of the last two presidential contests showed that religion proved to be a much better predictor than any other, with the exception of race.[102] Despite the indisputable role of religious values in many public discussions, be it same-sex marriage, stem-cell research, abortion, euthanasia, or the death penalty, the proper place of religion in American public life has not yet been clarified.[103]

Yet, despite the indisputable religiosity of a large portion of American society, it is important to realize that it is not solely "Protestant-Catholic-Jewish" anymore as Herbert defined it in the 1950s.

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life. See The Pew Research Center Survey Report 2002: http://people-press.org/reports/display.php3?ReportID=167 (viewed on April 27, 2007), p. 2.

[101] BERG, Thomas C., *The State and Religion: In a Nutshell*, p. 1; See also BELLAH, Robert N.: "Civil Religion in America", http://hir.hartsem.edu/Bellah/articles_5.htm, (viewed February 26, 2007), non-paginated; (Bellah noted that a cynical observer might even say that an American President has to mention God or risk losing votes, semblance of piety being one of the unwritten qualifications for the office).

[102] American Religious Identification Survey 2001, pp. 36-37; http://www.gc.cuny.edu/faculty/research_studies/aris.pdf; Political party preference of the different religious groups fluctuate; the American Religious Identifications Survey, however, suggests that in general Jews, Muslims, Buddhists and those with no religion continue to have a greater preference for the Democratic party over the Republican (56% v. 13%; 35% v. 19%; 31% v. 9%, and 30% v. 17% respectively); Evangelical or Born Again Christians and Mormons are the most apt to identify as Republicans (58% and 55%). Buddhists and those with no religion are most likely to be political independents (48% and 43%). In keeping with their theology, Jehovah Witnesses disavow political involvement.

2004 Presidential Election exit polls reported that 22 percent of voters cited "moral values" as the most important issue in their presidential choice, compared with jobs and the economy at 20 percent, terrorism at 19 percent and Iraq at 15 percent. http://www.cnn.com/ELECTION/2004/pages/results/states/US/P/00/epolls.0.html (viewed May 13, 2007), non-paginated.

[103] Some fear a secularized state, that is, a state which is independent of all religious convictions, and insist that disestablishment does not preclude a foundation of religious values. Others fear a state that is religiously partial and insist that the "wall of separation" prescribes civil neutrality toward religion as such. Each side asserts that the other misrepresents its position. The "religionists" deny that they seek to impose any particular religious conviction; the "separationists," deny that they are hostile to religion. FELDMAN, pp. 6-8.

2.3. Religious Identification: Current Trends, Advent of a Christian Nation?

Over the last two decades, there has been a sharp increase in the numbers of those identifying with other religions, many of which do not believe in the Judeo-Christian concept of God, namely Muslims, Buddhists and Hindus.[104] As there does not exist any accurate count of their numbers in the United States (the U.S. Census Bureau does not collect data on religious identification), the true size of these populations has been a matter of an on-going debate, various institutions and organizations coming up with varying estimates.[105] While they constitute only about 2% of the adult Americans, their numbers are likely to increase even more in the future.

Recent surveys also suggest that notwithstanding the high levels of religious adherence, the percentage of Christians, primarily Protestants, in the population has been dropping since 1974.[106] According to the 2001 American Religious Identification Study (ARIS), only about 76.7% of American adult population of 208 million identify

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[104] American Religious Identification Survey, 2001, estimates that in a years 1990-2000 the Muslim population increased by 109% (from 527,000 to 1,104,000), the Buddhist by 170% (from 401,000 to 1,082,000), and the Hindu by 237% (from 227,000 to 766,000). See also: Adherence, Largest Religious Groups in the United States of America: http://www.adherents.com/rel_USA.html#religions (viewed May 8, 2007), non-paginated.

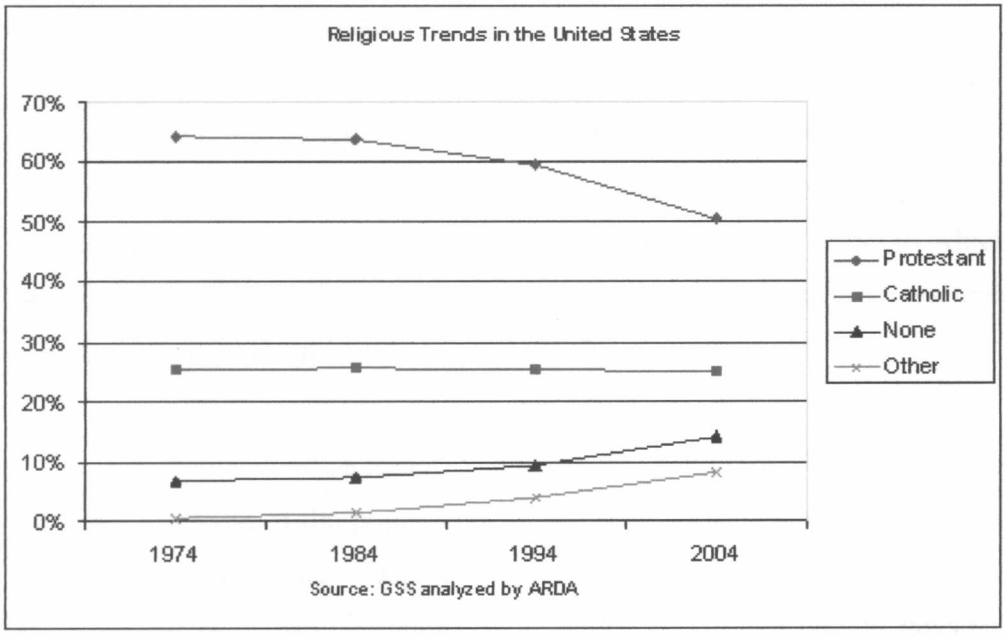
[105] Since the September 11th terrorist attacks, the media have used estimates of the Muslim population in the United States of 5-8 million, with an average of 6.7 million or 2.4 percent of the total population. Survey-based estimates, however, put the adult Muslim population in 2000 at 0.67 percent or 1,401,000, and the total Muslim population at 1,886,000. (AJC: "Estimating the Muslim Population in the United States,"
http://www.ajc.org/site/apps/nl/content3.asp?c=ijITI2PHKoG&b=843637&ct=1044159 (May 8, 2007).

The American Religious Identification Survey estimated there were 1.1 million Muslims in the U.S. in 2001 (0.4% of national population),
(ARIS: http://www.gc.cuny.edu/faculty/research_studies/aris.pdf; viewed on May 1, 2007, p. 13) and the Glenmary Research Center put the figure at 1.6 million (2000) (0.5% of national population) (http://www.glenmary.org/grc/RCMS_2000/findings.htm) (viewed May 8, 2007), non-paginated.

It is no less problematic to arrive at an accurate idea of the number of Buddhists in the United States, since it is not at all clear how to define who is and who is not a Buddhist. The U.S. State Department's International Religious Freedom Report for 2004 indicates that 2% of the U.S. population is Buddhist, which would mean a total of 5,973,446 Buddhists. (United States Department of State's International Religious Freedom Report 2004, http://www.state.gov/g/drl/rls/irf/2004/, viewed May 9, 2007, non-paginated). The same Report estimated the number of Hindus at approximately 1,478,670, or 0.5% of the total population. Ibid., non-paginated.

[106] Religious Demographic Profile: United States:
http://pewforum.org/world-affairs/countries/?CountryID=222 (viewed on May 1, 2007), non-paginated.

themselves as Christian, as opposed to 86% in 1990.[107] This decline has been especially visible among Protestants.[108] According to successive nationally representative General Social Surveys, the Protestant share of the population decreased by nearly 14% in the 30 years between 1974 and 2004, dropping from 64.3% to 50.4%, and is expected to slip to a minority position in the next few years.[109] The ARIS 2001 survey has illustrated the same trends, noting that the percentage of Protestants is already below 50%.[110]



[107] American Religious Identification Survey 2001, p. 12; http://www.gc.cuny.edu/faculty/research_studies/aris.pdf (viewed on May 1, 2007), p. 12. This includes Protestants from numerous traditions (49.8%), Roman Catholics (24.5%) and those who belong to other self-identified Christian traditions, including Mormons (1.3%), Jehovah's Witnesses (0.6%), Eastern Orthodox (0.3%) and others (0.2%). Ibid. The General Social Survey data of 2004 give slightly different numbers: about 53% of the U.S. adults consider themselves Protestant, 23.4% Catholic, 2% Jewish, and 14.4% do not adhere to any religion General Social Survey, 2004: www.thearda.com/quickStats/qs_28.asp (viewed on May 1, 2007), non-paginated.

[108] According General Social Survey, 2004, out of those who say they are Protestants, 31.6% are Baptists, 12.1% Methodists, 8.1% Lutherans, 4.2% Presbyterians, 3.7% Episcopalians, 22% say they adhere to other denomination and 18.2% to no denomination at all. www.thearda.com/quickstats/qs_29.asp (viewed on May 1, 2007), non-paginated.

[109] Ibid., non-paginated; see also The Baylor Religion Survey 2006, www.baylor.edu/content/services/document.php/33304.pdf (viewed on May 1, 2007), pp. 7-8; (The survey suggests that the decline may not be as large as indicated by the GSS because some evangelically oriented independents do not self-identify as denominationally Protestant; ibid.)

[110] American Religious Identification Survey 2001, http://www.gc.cuny.edu/faculty/research_studies/aris.pdf (viewed on May 1, 2007), p. 12.

The Protestant decline has been accompanied by a corresponding growth particularly in the number of the unaffiliated. The ARIS data indicate that the share of those who do not subscribe to any religious identification more than doubled between 1974 and 2004, from 6.8% to 14.2%.[111]

Are Americans losing their religion? The ARIS study, as well as other studies such as the General Social Survey and National Election Study, show an increase in the percentage of the population with no religion over the past quarter century and indicate growing secularization in the United States.[112] Yet, as the authors of the Baylor Religion Survey pointed out, this is not the whole truth. While more and more Americans lose their denomination identity, they are not becoming to any great extent secular.[113] Rather, the increase in the numbers of those unaffiliated seems to correspond with the growth of the spirituality movement, the effect of which has also been a shift away from denominational Christianity and its doctrines, even among members of some traditionally conservative denominations.[114]

Yet, despite being a minority, atheists do exist in the United States and account for about 3 percent of the population.[115] A 2006 national survey by researchers in the University of Minnesota's Department of Sociology identified atheists as America's "most distrusted minority, rating below Muslims, recent immigrants, gays and lesbians and other minority groups in 'sharing their vision of American society.'"[116]

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[111] Pew Forum on Religion and Public Life, *Religious Demographic Profile: United States*: http://pewforum.org/world-affairs/countries/?CountryID=222 (viewed on May 1, 2007), non-paginated.
[112] American Religious Identification Survey 2001; http://www.gc.cuny.edu/faculty/research_studies/aris.pdf (viewed on May 1, 2007), pp. 10-11.
[113] The Baylor Religion Survey, 2006: www.baylor.edu/content/services/document.php/33304.pdf (viewed on May 1, 2007), p. 12; (noting that a majority (62.9%) of Americans not affiliated with a religious tradition do believe in God or some higher power.)

The Survey was conducted by the Baylor Institute for Studies of Religion and Department of Sociology, Baylor University, 2006.
[114] GEDICK, F. M., "'Uncivil Religion': 'Judeo Christianity' and the Ten Commandments," p. 17.
[115] American Sociological Association, "Atheists Identified as America's Most Distrusted Minority:" http://www.asanet.org/cs/root/topnav/press/atheists_are_distrusted (May 20, 2007), non-paginated.
[116] Ibid., non-paginated (the survey also found that Atheists are also the minority group most Americans are least willing to allow their children to marry).

The above mentioned indicates that a significant part of Americans no longer fall within the orthodox denominational definitions of Protestant, Catholic, or Jew, that the "common" spiritual values that are hidden behind the concept of "civil religion" do no longer apply to everyone, and that – as a result – the unifying functions of "civil religion" based upon Judeo-Christian values have been weakened. Increases in the numbers of unbelievers, practitioners of non-Western religions, and adherents to postmodern spirituality now leave large numbers of Americans excluded from the mainstream society.

II. THE SUPREME COURT & ESTABLISHMENT CLAUSE

3. Introduction to the Establishment Clause Jurisprudence

3.1. Main Theories: Separation v. Accommodation

"It may not be easy, in every possible case, to trace the line of separation between the rights of religion and the civil authority with such distinctness as to avoid collision & doubts on unessential points."[117]

Letter from James Madison to Rev. Adams, 1832

The uncertainty of the Framers' intent as to the proper role of religion in the public realm[118] has resulted in two competing theories that underlie the interpretation of the Establishment Clause and serve as a starting point to the understanding of the current Supreme Court's jurisprudence: the "strict separation" theory and the "accommodation" theory.

The "separationists" argue that the interest of both the state and the individual religious liberty require a distance between government and religion.[119] Under this view, government is generally barred from aiding one religion, aiding all religions, or

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[117] Letter from James Madison to Rev. Adams (1832); quoted in DREISBACH, Daniel, *Religion and Politics in the Early Republic: Jasper Adams and the Church-State Debate*, Lexington: University Press of Kentucky, 1996, p. 120; see also http://www.churchstatelaw.com/historicalmaterials/8_7_17.asp (viewed May 7, 2007), non-paginated.

[118] See LEVY, Leonard W., *The Establishment Clause: Religion and the First Amendment*. New York: Macmillan Publishing Company, 1986, pp. 102-05 ("The history of the drafting of the [E]stablishment [C]lause does not provide us with an understanding of what was meant by 'an establishment of religion.'")

See also KIDD, Colin, "Civil Theology and Church Establishments in Revolutionary America," The *Historical Journal*, Vol. 42, Dec. 1999, pp. 1007-1026 ("It is impossible to recover a single position which adequately describes the views of the Founders: there was no unanimous understanding of the First Amendment."(p. 1008)..."The post-revolutionary debate in Virginia exhibits the difficulties in assigning to the founding generations a single understanding of the proper relationship of church and state. Patrick Henry and George Washington defended the idea of establishment; Jefferson and Madison were unequivocally committed to the absolute freedom of the religious sphere from state interference." p. 1020)).

[119] ROTSTEIN, Andrew, "Good Faith? Religious-Secular Parallelism and the Establishment Clause," *Columbia Law Review*, Vol. 93, Nov. 1993, p. 1776.

preferring one religion over another; from pressuring a citizen to profess belief or disbelief in a religion, from levying taxes to support religious institutions or activities and from participating in the affairs of any religious organizations, or permitting religious organizations to participate in government affairs.[120] The separationists invoke the metaphor of a "wall between church and state" and stress the concern of the Framers that "a union of government and religion tends to destroy government and to degrade religion,"[121] as a result of which, government and religion are to occupy strictly autonomous spheres. The separationists further claim that the state may not use religious means to achieve secular ends where nonreligious means would suffice. Thus, as Justice Brennan wrote in *Abington School District v. Schempp* in 1963, even though government may seek to convey a legitimately secular message, it may not invoke words or symbols that are essentially religious in nature if secular words or symbols would be adequate.[122]

The opponents of "separationism" generally interpret the Establishment Clause as forbidding governmental preference for one religion,[123] asserting that the support of religion is permitted, indeed, commanded by the religion clauses.[124] These so called "accommodationists" assume that church and state, although independently governed,

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[120] See Everson v. Board of Education of the Township of Ewing, 330 U.S. 1 (1947), pp. 15-16. http://straylight.law.cornell.edu/supct/html/historics/USSC_CR_0330_0001_ZO.html (viewed May 20, 2007)

[121] Engel v. Vitale, 370 U.S. 421 (1962), p. 431. http://straylight.law.cornell.edu/supct/html/historics/USSC_CR_0370_0421_ZS.html (viewed May 20, 2007).

[122] Abington School District v. Schempp, 374 U.S. (1963) pp. 280-81 (Brennan, concurring) (The Court decided 8-1 in favor of the respondent, Edward Schempp, and declared school sponsored Bible reading in public schools in the U.S. to be unconstitutional. The case was part of a string of Supreme Court cases ruling on the place of religion in public schools, and was both condemned by religious conservatives and celebrated by those who supported constitutional separation of church and state); http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=CASE&court=US&vol=374&page=203 (viewed May 7, 2007).

[123] Wallace v. Jaffree, 472 U.S. 38 (1985), p. 99 (Rehnquist, J., dissenting), http://straylight.law.cornell.edu/supct/html/historics/USSC_CR_0472_0038_ZD2.html (viewed May 20, 2007)

[124] Recognizing that history does not support the interpretation of strict separation, Chief Justice Rehnquist noted that assuming that the government must remain neutral in all aspects of religion is a "deviation from [the] intentions" of the Founding Fathers that "frustrates the permanence" of the First Amendment." See Wallace v. Jaffree, 472 U.S. 38 (1985), pp. 110 -113; Marsh v. Chambers, 463 U.S. 783 (1983), pp. 790-91 (reasoning the close temporal proximity of the First Congress' approval of the First Amendment and the appointment of chaplains could not possibly mean that they intended the First Amendment to forbid what they had just declared acceptable).

share a common history and tradition and stress that "the Establishment Clause does permit the government some latitude in recognizing and accommodating the central role religion plays in [American] society."[125] Particularly in an age when government has such a wide scope of activity as it has now, some relationship between religion and the state is inevitable. "The line of separation," they argue, "far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."[126] Chief Justice, then Justice, Rehnquist has gone so far as to opine that "nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion."[127] Accommodationist jurisprudence tends to stress the permissibility of government actions that facilitate the free exercise of religion or that "make public institutions more open to religion."[128] The proponents of this approach often rely on the historical acceptance[129] of disputed practices in seeking to find them permissible under the Establishment Clause.

To a large extent, the history of Establishment Clause jurisprudence has been a story of the struggle for dominance between the separationist and the accommodationist viewpoints. It was, however, primarily the separationist position that came to dominate the Supreme Court and set the direction of its jurisprudence.

3.2. The "Wall of Separation" Ruling and the Aftermath

For over one hundred and fifty years since the ratification of the First Amendment, the Establishment Clause lay largely dormant, unnoticed by the courts. This has changed rapidly in 1947 when in the landmark case of *Everson v. Board of Education* the Supreme Court offered its first comprehensive interpretation of the

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[125] County of Allegheny v. ACLU, 492 U.S. at 573 (Kennedy, T., concurring in part, dissenting in part), http://straylight.law.cornell.edu/supct/html/historics/USSC_CR_0492_0573_ZX2.html (May 20, 2007)
[126] Lemon v. Kurtzman, 403 U.S. 602 (1971), p. 614 (Burger, C. J., opinion of the Court), http://straylight.law.cornell.edu/supct/html/historics/USSC_CR_0403_0602_ZO.html (May 20, 2007)
[127] Wallace v. Jaffree, 472 U.S. 38 (1985), p. 113 (Rehnquist, J., dissenting)
[128] ROTSTEIN, A., "Good Faith? Religious-Secular Parallelism ...," pp. 1777-8.
[129] Lynch v. Donnelly 465 U.S. 668 (1984) (summarizing history of governmental acknowledgement of religion); Marsh v. Chambers, 463 U.S. 783 (1983), pp. 786-90 (Burger, W., opinion of the Court) http://straylight.law.cornell.edu/supct/html/historics/USSC_CR_0463_0783_ZO.html (May 20, 2007) (detailing two centuries of legislative prayers).

constitutional pronouncement of church-state relations.[130]

In an oft-quoted passage, the Court observed: "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. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the federal government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'"[131]

Although the Everson decision upheld New Jersey legislation which reimbursed parents who sent their children to parochial schools for transportation costs,[132] both majority and dissenting opinions agreed that Jefferson's metaphor should be the Supreme Court's guide in religion-related cases. For the majority, Justice Hugo Black called for an absolute separation:[133]

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[130] See Everson v. Board of Education of the Township of Ewing, 330 U.S. 1 (1947), http://straylight.law.cornell.edu/supct/html/historics/USSC_CR_0330_0001_ZO.html (May 20, 2007). The target of litigation was a program that reimbursed parents for their children's bus fare to school, not only for public school transportation but also for Catholic children who attended Catholic parochial schools. It was a suit by an ordinary taxpayer alleging misuse of his funds in paying for school bus transportation. This in itself is quite interesting, as it suggests that any person should be able to vindicate a public wrong that the government is committing. As a general matter, anybody presenting a claim has to prove a direct personal injury of the kind sufficient to give him a stake in pursuing the case diligently. In subsequent cases, the Court has made it clear that only in the context of a potential violation of the Establishment Clause is the mere fact of a taxpayer status enough to get a plaintiff into court. See FELDMAN, N., *Divided by God*, p. 172.

[131] Everson v. Board of Education of Ewing Township (1947) (Black, H. opinion of the Court); http://straylight.law.cornell.edu/supct/html/historics/USSC_CR_0330_0001_ZO.html (March 21, 2007)

[132] Denying equal transportation benefit to parents whose children attended religious schools might, according to Black, limit their free exercise. Ibid., p. 18.

[133] Hamburger and Dreisbach suggest Black's concern for the entanglement of religion and government stemmed from his long standing animus toward the Catholic Church. A nativist and

"The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable."[134] And, Justice Black continued, the Court could "not approve the slightest breach."[135]

From then on, despite much criticism from many scholars and justices alike, the concept of the "wall of separation" that was to be kept "high and impregnable" became a "standard of constitutional interpretation," part of the "unwritten" Constitution which exercises controlling authority in the reading of the First Amendment.[136] Despite the fact that the words "separation of church and state" are to be found nowhere in the Constitution, they have been used so widely and repeatedly that they began to be substituted for the actual underlying rule. Thus, gradually, they became even more familiar to the American public than did the constitutional language itself.

The *Everson* case marked the beginning of the Court's attempt to define the parameters of the Establishment Clause. It is significant for two reasons.

First, the Court for the first time applied the First Amendment Establishment Clause to the states: the provision "Congress shall make no law respecting an establishment of religion ..."[137] now in effect became "governments of any kind shall make no law ...." By incorporating the First Amendment into the Fourteenth,[138] the

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staunch Klansman for most of his life, Black saw the Church as the greatest threat to Protestant America. DREISBACH, Daniel L., *Thomas Jefferson and the Wall of Separation between Church and State*, NY: New York University Press, 2002, pp. 143-146; HAMBURGER, P.: *Separation of Church and State*, pp. 422-434.

Hamburger also noted that Justice Black was a follower of the Progressive historian Charles Beard, one of the greatest of the intellectual popularizers of scientific modernism. Ibid., p. 461.

[134] Everson v. Board of Education (1947), p. 18.

[135] Ibid.

[136] McBRIDE, James, "Religion and the First Amendment: An Inquiry into the Presuppositions of the 'Jurisprudence of Original Intention,'" *Journal of Law and Religion*, Vol. 6, 1988, p. 9.

[137] The First Amendment to the Constitution of the United States, non-paginated, www.usconstitution.net/xconst_Am1.html (viewed on April 30, 2007)

[138] The Fourteenth Amendment to the Constitution of the United States, 1791, non-paginated, www.usconstitution.net/xconst_Am14.html (viewed on April 30, 2007). The Fourteenth Amendment to the Constitution provides that "No State shall make or enforce any law which shall abridge the

Court accomplished what numerous failed amendments to the Constitution could not accomplish – to create a national law on religious liberty, governed by the federal courts, and enforceable against state and local governments.[139] By extending the Establishment Clause to the states under the Due Process Clause of the Fourteenth Amendment, a wide variety of constitutional challenges to state assistance to religion became suddenly possible. Moreover, a space was created, in which the two religion clauses of the First Amendment started to clash against each other.[140]

Second, as had been already mentioned, *Everson* introduced new strict separationist logic into the Supreme Court jurisprudence and from then on it applied this logic primarily to issues of education. In nearly forty cases, the Court largely removed religion from the public school and religious schools from state patronage.[141]

Judicial uses of the metaphor have not been without criticism and controversy. A year after *Everson*, Justice Stanley F. Reed denounced the Court's reliance on the metaphor. "A rule of law," he protested, "should not be drawn from a figure of speech."[142] Over a decade later in the first school-payer case, Justice Potter Stewart

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privileges or immunities of citizens if the United States; nor 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." (The amendment was originally designed to ensure that the contract and property or the newly freed slaves were no abridged. See PRESSER, Stephen B., "The Ten Commandments Mish-Mosh," *The American Spectator*, Bloomington, Oct 2005, p. 2).

[139] WITTE, John, "From Establishment to Freedom of Public Religion," Emory University School of Law, Research Paper No. 04-1, 2003, p. 510.

[140] According to the Supreme Court, the two religion clauses of the First Amendment "are cast in absolute terms, and either … if expanded to a logical extreme, would tend to clash with the other." See Walz v. Tax Comm'n of the City of New York, 397 U.S. 664 (1970) pp. 668-669 (Burger, J., opinion of the Court)

On the one hand, the Free Exercise mandates some governmental accommodation of religion, at a minimum in the form of exemptions for religious persons from obligations imposed by the government that burden the practice of religion.

See, e.g. Sherbert v. Verner, 374 U.S. 398 (1963), pp. 399-410 (Brennan, J., opinion of the Court), http://straylight.law.cornell.edu/supct/html/historics/USSC_CR_0374_0398_ZO.html (May 20, 2007)

On the other hand, the Establishment Clause may be interpreted to forbid any governmental assistance to religion.

See, e.g. Lemon v. Kurtzman, 403 U.S. 602 (1971), pp. 612-13 (Burger C. J. opinion of the Court), http://straylight.law.cornell.edu/supct/html/historics/USSC_CR_0403_0602_ZO.html (May 20, 2007)

[141] WITTE, John, Jr.: "That Serpentine Wall of Separation," *Michigan Law Review*, Vol. 101, May, 2003, pp. 1904.

[142] McCollum v. Board of Education, 333 U.S. 203 (1948), p. 247 (Reed, J., dissenting):

similarly cautioned his colleagues: the Court's task in resolving complex constitutional controversies, he opined, "is not responsibly aided by the uncritical invocation of metaphors like the 'wall of separation,' a phrase nowhere to be found in the Constitution.[143] Justice Thurgood Marshall warned that "the metaphor of a 'wall' or impassable barrier between Church and State, taken too literally, may mislead constitutional analysis.[144] A few months later, Chief Justice Warren E. Burger also distanced himself from the metaphor: "Judicial caveats against entanglement must recognize that the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."[145] Chief Justice William H. Rehnquist, perhaps the most vociferous critic of the "wall," objected: "It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history. [...] The Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly forty years. [...] There is simply no historical foundation for the proposition that the Framers intended to build a wall of separation [between church and state]. [...] The recent court decisions are in no way based on either the language or the intent of the framers."[146]

Everson set in motion an increasing number of Establishment Clause challenges, particularly in the 1960s. The Supreme Court stroke down as unconstitutional a "released time" program that allowed teachers to offer religious instruction in the schools;[147] reaffirmed that the U.S. Constitution prohibited the states

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"Thus, the 'wall of separation between church and State' that Mr. Jefferson built at the University which he founded did not exclude religious education from that school. The difference between the generality of his statements on the separation of church and state and the specificity of his conclusions on education are considerable. A rule of law should not be drawn from a figure of speech." http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=US&vol=333&invol=203 (viewed May 20, 2007)

[143] Engel v. Vitale, 370 U.S. 421 (1962) (Stewart, J., dissenting), pp. 445-46; http://straylight.law.cornell.edu/supct/html/historics/USSC_CR_0370_0421_ZD.html (May 20, 2007)

[144] Gilette v. United States, 401 U.S. 437 (1971) (Marshall, T., dissenting) http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=401&invol=437 (May 20, 2007)

[145] Lemon v. Kurtzman, 403 U. S. (1971) (Burger, C. G., majority opinion), p. 614; http://straylight.law.cornell.edu/supct/html/historics/USSC_CR_0403_0602_ZO.html (May 20, 2007)

[146] Wallace v. Jaffree 472 U.S. 38 (1985) (Rehnquist, dissenting); 92 – 106; http://straylight.law.cornell.edu/supct/html/historics/USSC_CR_0472_0038_ZD2.html (May 20, 2007)

[147] McCollum v. Board of Education, 333 U.S. 203 (1948) http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=US&vol=333&invol=203 (May 20, 2007)

from requiring any kind of religious test for public office;[148] ruled against state-sponsored daily nondenominational prayer in public schools;[149] prohibited state-sponsored Bible reading and recitation of the Lord's prayer in public schools,[150] etc.

4. Justifying the Wall of Strict Separation? – Thomas Jefferson Revisited

As the previous chapter suggests, Jefferson's wall metaphor has become "a shorthand expression for two radically different, passionately held visions of church-state relations in the United States, as it is considered to explain (many would argue distort) the 'religion clause' of the First Amendment."[151]

According to some, Jefferson seemed to indicate that rather than merely preventing the federal government from favoring one religious denomination over another, the purpose of the First Amendment was to block any meaningful interaction between government and religion. This was the view that prevailed in the Supreme Court in the 1940s when ruling that a "high and impregnable" "wall" must be erected between religion and government, strictly separating the two.[152]

Others believe that the Court made a mistake in employing Jefferson's wall metaphor to explain the Establishment Clause. Written thirteen years after the First Amendment was drafted by a person who was in France at the time, they argue, this

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[148] Torcaso v. Watkins, 367 U.S. 488 (1961);
http://members.aol.com/TestOath/Torcaso.htm (May 20,2007)

[149] Engel v. Vitale, 370 U.S. 421 (1962);
http://straylight.law.cornell.edu/supct/html/historics/USSC_CR_0370_0421_ZS.html (May 20, 2007)
(Notwithstanding the fact the prayer at issue was nondenominational, the Court based its holding on the general proposition, "a union of government and religion tends to destroy government and to degrade religion." See id, p. 431)

[150] School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963);
http://straylight.law.cornell.edu/supct/html/historics/USSC_CR_0374_0203_ZS.html (May 20, 2007)
(In his opinion, Justice Clark noted that a practice, in order to be constitutional, has to have a secular legislative purpose and the practice's primary effect should not advance or inhibit religion. This later became the Court's major approach to Establishment Clause jurisprudence.)

[151] HUTSON, James H.: "Thomas Jefferson's Letter to the Danbury Baptists: A Controversy Rejoined", *The William and Mary Quarterly*, Vol. 56, Oct., 1999; p. 776 (see also James HUTSON, "'A Wall of Separation': FBI Helps Restore Jefferson's Obliterated Draft," Library of Congress Information Bulletin, Vol. 57, June 1998; online edition http://www.loc.gov/loc/lcib/9806/danbury.html (viewed May 14, 2007)

[152] HUTSON, James H.: "Thomas Jefferson's Letter to the Danbury Baptists ...," pp. 775-6.

surely cannot be the authoritative interpretation of its language. Proponents of this view believe that, far from erecting a barrier between government and religion, the First Amendment permits government to patronize religion (in ways often not clearly spelled out) in the interest of improving the moral character of the citizens and the quality of public life.[153]

Given the fact that religion permeated public life throughout American history, it is in my view questionable if the "high and impregnable" wall of separation, blocking any interaction between religion and government, was indeed what Jefferson had in mind when he erected his "wall of separation." Looking more closely into Jefferson's Danbury letter may provide us with possible clues.

4.1. Jefferson, the Wall & the Danbury Baptists

Few letters in American history have been as frequently quoted or have had such a profound impact on public discourse as Jefferson's Danbury letter. In his letter, Jefferson responded to a petition from Danbury Baptists who struggled for their religious liberty in Connecticut, a Federalist bastion where Congregationalism was the established church, and they were looking to Jefferson, who was known for his commitment to religious liberty, for support of their disestablishment agenda.[154]

Jefferson saw the Danbury petition as an unexpected but welcome opportunity to "sow useful truths and principles among friends and foes alike" about his views of religious liberty, aiming to condemn "the alliance of church and state, under the authority of the Constitution," and, in particular, to explain to critics his reasons for refusing to issue presidential proclamations of days of fasting and thanksgiving, in

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[153] Ibid.

[154] Letter from the Danbury Baptists to Thomas Jefferson: http://candst.tripod.com/tnppage/baptist.htm; non-paginated; (viewed May 6, 2007). (The Baptists saw religious liberty as an inalienable right and religion an essentially private matter between an individual and his God, and they were troubled that the religious privileges of dissenters in Connecticut were treated as favors that could be granted or denied by the political authorities. No citizen, they reasoned, ought to suffer civil disability on account of his religious opinions. These were the very same themes that Jefferson expressed years before in his Statute of Virginia for Establishing Religious Freedom).

contrast to his Federalist predecessors George Washington and John Adams.[155] President Jefferson had been under Federalist attack, being portrayed as an enemy of religion, for refusing to issue these proclamations, and was therefore eager to address this topic and to explain his stance.[156]

In his reply, Jefferson reflected his commitment to religious freedom, rejecting any government restraint in matters of conscience and belief, encouraged New England Baptists in their long-standing position that church and ministry should be maintained by purely voluntary contributions, and attacked his political opponents and their system of government support for religion: "Believing with you that religion is a matter which lies solely between Man & his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only & not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof, 'thus building a wall of separation between Church & State.'"[157]

Jefferson thereby erected the famous "wall of separation" that has become a persistent theme of modern church-state analyses. The Danbury Baptists did not, however, take notice of the letter they received from Jefferson. They sought disestablishment only and did not want to be falsely accused of being the advocates of

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[155] Letter from Thomas Jefferson to Levi Lincoln, 1 January 1802; quoted in DREISBACH, Daniel L., *Thomas Jefferson and the Wall of Separation Between Church and State,* New York: New York University Press (2002), pp. 43-44; see also http://candst.tripod.com/tnppage/levi.htm (viewed May 6, 2007); non-paginated.

[156] Federalist preachers had routinely used fast and thanksgiving days to criticize Jefferson and his followers, going so far in 1799 as to suggest that a Philadelphia yellow fever epidemic was a divine punishment for Republican godlessness. (HUTSON, J., "'A Wall of Separation': FBI Helps Restore Jefferson's Obliterated Draft," http://www.loc.gov/loc/lcib/9806/danbury.html (May 14, 2007).

Interestingly, in the final draft of his Danbury letter, after being advised by his Attorney General, Lincoln, Jefferson did not explicitly mention the issue of "fastings and thanksgivings", for fear of "offending Republican friends and Federalist foes alike" (DREISBACH, *Thomas Jefferson and the Wall of Separation Between Church and State*, pp. 44-45)

[157] Letter from Thomas Jefferson to Messrs. Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, a Committee of the Danbury Baptist Association in the state of Connecticut, 1 January, 1802, (quoted in: DREISBACH, „Sowing Useful Truths and Principles, *Journal of Church and State*, Vol. 39, 1997, p. 1); online: http://www.loc.gov/loc/lcib/9806/danpre.html (viewed May 6, 2007).

separation, a common charge used during this time to discredit religious dissenters.[158] Even though the Baptists "celebrated the President who had done so much to ensure religious liberty, they assumed that all human endeavors, including government, rested ultimately in the hands of a higher power."[159] A separation between church and state conflicted with much of what they sought and was therefore not acceptable.

Even Jefferson, after writing to the Danbury Baptist Association in 1802, did not apparently use the term again. He continued to denounce the union of church and state, but he seems not to have expressly urged separation.[160]

Jefferson's letter was published in a Massachusetts newspaper shortly after being sent to the Baptists and then fell into oblivion for the next half a century.[161] It did not reappear until 1878 when the Supreme Court opined in *Reynolds v. United States* that the Danbury letter "may be accepted almost as an authoritative declaration of the scope and effect of the (First) amendment thus secured."[162] It was, however, not until Justice Hugo Black invoked it in his majority opinion in 1947, that Jefferson's Danbury address has become a touchstone for how the First Amendment should be interpreted and his "wall of separation" a symbol of an absolute separation, a cornerstone of the entire church-state jurisprudence.[163]

The meaning of Jeffersonian "wall of separation" has been widely discussed in

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[158] DREISBACH, Daniel L., *Thomas Jefferson and the Wall of Separation between Church and State,* New York: New York University Press, 2002, pp. 159-163.
[159] Ibid., p. 179.
[160] HAMBURGER, P., *Separation of Church and State,* p. 181.
[161] WITTE, J., "'A Wall of Separation': FBI Helps Restore Jefferson's Obliterated Draft...," http://www.loc.gov/loc/lcib/9806/danbury.html (viewed on May 14, 2007); (The letter was put back into circulation in an edition of Jefferson's writings, published in 1853, and reprinted in 1868 and 1871).
[162] Reynolds v. United States, 98 U.S. 145 (1879), p. 164. (Waite, J., opinion of the Court) http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=US&vol=98&invol=145 (viewed May 22, 2007)
[163] *Everson v. Board of Education*, 330 U.S. 1 (1947); pp. 16-18. http://straylight.law.cornell.edu/supct/html/historics/USSC_CR_0330_0001_ZO.html (viewed May 20, 2007)
According to Barbara A. PERRY, "Justice Hugo Black and the Wall of Separation between Church and State," (*Journal of Church and State*, Vol. 31, Winter 1989, pp. 55-72) "Justice Hugo L. Black, the foremost jurisprudential interpreter of the metaphor in the Supreme Court's modern era, is arguably responsible for the public's familiarity with the "wall" doctrine." Ibid., p. 55.

academic circles and is still a matter of an ongoing debate among scholars. I will try to identify a representative sample to outline some of the predominant interpretations.

4.2. Interpreting the Danbury Letter

Daniel DREISBACH[164] argues that rather than to separate the church and the civil government, the primary function of Jefferson's "wall" was to separate national and state governments on matters concerning religion.[165]

Jefferson – Dreisbach argues – was passionately devoted to federalism and understood the First Amendment as a guarantee that the federal government ("Congress") could make no law respecting religion, for such matters were left to the states that remained unaffected by the First Amendment. Indeed, at the time of the ratification of the First Amendment, each state was free to define the content and scope of civil and religious liberties, and structure church-state arrangements according to its own constitution, declaration of rights, and statutes. The ratification itself did not have any legal effect on church-state arrangements in the states and altered nothing in matters regarding federal involvement with religion. The fact that some states retained their religious establishments well into the nineteenth century only proves this point.[166]

Jefferson himself seems to validate this interpretation in his Second Inaugural Address, delivered in March 1805: "In matters of religion, I have considered that its free exercise is placed by the constitution independent of the powers of the general

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[164] American University, Washington D. C., Staff Directory, http://spa.american.edu/listings.php?ID=57 (May 22, 2007)

[165] This view is also shared by James Hitchcock, professor of history at St. Louis University, writing and lecturing on contemporary church matters. See James Hitchcock Column, "The Myth of the 'Wall of Separation,' January 5, 2005; http://wf-f.org/JFH-MythWall.html (April 5, 2007) (believing the wall was merely intended to prevent the federal government from interfering with the various states in matters of religion, at a time when some states still maintained official churches).

[166] DREISBACH, D., *Thomas Jefferson and the Wall of Separation between Church and State*, pp. 1-4, pp. 58-70.

Vermont did not disestablish its state church until 1807; Connecticut until 1818; New Hampshire until 1819; and Massachusetts until 1833. See STOKES A. P. & PFEFFER, L., *Church and State in the United States*, p. 77.

[i.e., federal] government. I have therefore undertaken, on no occasion, to prescribe the religious exercises suited to it; but have left them, as the Constitution found them, under the direction and discipline of State or Church authorities acknowledged by the several religious societies."[167]

According to this interpretation, Jefferson placed the federal government (including the executive branch) on one side of his wall and state governments and churches on the other. It was for this reason, Dreisbach points out, that Jefferson refused to issue a proclamation decreeing a day "of public[k] and solemn thanksgiving and prayer to Almighty God" as President, while he did not object to do the same as a governor of Virginia.[168]

Therefore, Dreisbach argues, the Danbury letter – although reflecting Jefferson's commitment to religious freedom – was not primarily a general pronouncement on the relationship between church and state, as it was later interpreted by the Court, but rather, it was a statement about the legitimate jurisdictions of the federal and state governments on matters of religion. Limited state cooperation with religious institutions, Dreisbach believes, was perceived by Jefferson as desirable if it advanced freedom of religious belief and expression.[169] The "word 'church,' rather than 'religion,' in Jefferson's restatement of the First Amendment emphasized that the

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[167] Second Inaugural Address of President Thomas Jefferson , March 4, 1805, non-paginated, http://www.yale.edu/lawweb/avalon/presiden/inaug/jefinau2.htm (viewed May 6, 2007)

[168] DREISBACH, "A New Perspective on Jefferson's Views on Church-State Relations: The Virginia Statute for Establishing Religious Freedom in Its Legislative Context," *The American Journal of Legal History*, Vol. 35, Apr.1991, pp. 187-97.

This fact that the national government did not have any jurisdiction in religious matters has been widely recognized and acknowledged also by the 19th century Supreme Court. Writing for a united Court in Barron v. Baltimore (1833), Chief Justice John Marshall declared that the liberties guaranteed in the Bill of Rights "contain no expression indicating an intention to apply them to the state governments." See Barron v. Baltimore, 32 U.S. 243 (1833), p. 250, http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=32&invol=243 (viewed May 15, 2007)

Specifically addressing religious liberty in the Constitution in another case a few years later, the Supreme Court ruled unanimously that "the Constitution makes no provision for protecting the citizens of the respective States in their religious liberties; this is left to the state constitutions and laws: nor is there any inhibition imposed by the Constitution of the United States in this respect on the states." Bernard Permoli v. Municipality of the City of New Orleans, p. 609, http://www.churchstatelaw.com/cases/permoli.asp (May 20, 2007).

[169] DREISBACH, D., "A New Perspective on Jefferson's Views on Church-State Relations: The Virginia Statute for Establishing Religious Freedom in Its Legislative Context," p. 194 (citing *The Papers of Thomas Jefferson*).

constitutional separation was between ecclesiastical institutions and the civil state," not between religion and government.[170]

Philip HAMBURGER[171] argues that the Danbury letter (and the First Amendment) does not deal with separationism at all. According to Hamburger, virtually no American during the Founding Era, especially not the evangelical dissenters who often allied with Jefferson, favored a strict separation of church and state.[172] They did oppose government's legally establishing one religion at the expense of all others; but "separation" of church and state was universally feared as a measure that would deprive government of the moral foundation needed to create and maintain a good society.[173] Hamburger reads the Danbury letter as evidence of Jefferson's abiding anticlericalism – his desire to separate clergy from the state and the political process.[174]

In the history of separation, Hamburger argues, Jefferson was but a passing figure, less important for what he wrote than for the significance later attributed to it. The First Amendment, as Hamburger understands it, was a demand for "a religious liberty that limited civil government, especially civil legislation, rather than for a religious liberty conceived as a separation of church and state."[175]

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[170] DREISBACH, Daniel L., *Thomas Jefferson and the Wall of Separation between Church and State*, NY: New York University Press, 2002, pp. 192-204.

[171] Columbia Law School Full Time Faculty: http://www.law.columbia.edu/fac/Philip_Hamburger (viewed May 22, 2007) (Philip Hamburger's scholarship focuses on constitutional law and its history. His publications include *Separation of Church and State*, Cambridge, Mass.: Harvard University Press, 2002).

[172] This view is supported also by Prof. Dreisbach. See DREISBACH, D., *Thomas Jefferson and the Wall* ..., pp. 176-189.

[173] See HAMBURGER, Philip, *Separation of Church and* State, pp. 97-163.

[174] To prove his point he quotes pieces of Jefferson's correspondence: "[I]t would be better for the clergy to stick to their specialty of soulcraft, rather than interfere in the specialty of statecraft." Religion is merely "a separate department of knowledge", Jefferson wrote, "alongside other specialized disciplines like physics, biology, law, politics, and medicine. Preachers are the specialists in religion, and are hired by churches to devote their time and energy to this specialty." Therefore, "[w]henever preachers, instead of a lesson in religion, put them off with a discourse on the Copernican system, on chemical affinities, on the construction of government, or the characters or conduct of those administering it, it is a breach of contract, depriving their audience of the kind of service for which they are salaried." See Letter from Thomas Jefferson to P. H. Wendover, March 13, 1815, quoted in HAMBURGER, *Separation of Church and* State, pp. 152-55.

[175] HAMBURGER, P., *Separation of Church and State,* p. 107.

John WITTE, Director of the Center for the Study of Law and Religion at Emory University, Atlanta, sees in the letter Jefferson's explicit concern for the protection of individual conscience.

Individuals were to be assured of their "natural, inalienable right of conscience, which could be exercised freely and fully to the point of breaching the peace or shirking social duties."[176] At the same time, Witte points out, Jefferson did not advocate separating politics and religion, nor did he propose abolishing federal religious activity altogether.[177]

James HUTSON, the chief of the Manuscript Division at the Library of Congress, where Jefferson's handwritten draft of the letter is held, concluded that President Jefferson "regarded his reply to the Danbury Baptists as a political letter, not as a 'dispassionate theoretical pronouncement'[178] on the relations between government and religion."[179] Rather than "disseminating Jefferson's views on church-state relations,"[180] the letter was drafted to reassure Baptist constituents that Jefferson was indeed a friend of religion (and thus to cement this growing group of New Englanders to the Republican Party) and to strike back at the Federalist–Congregationalist establishment in Connecticut for shamelessly accusing him to be an infidel and atheist in the recent campaign.[181]

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[176] WITTE, John, Jr.: "That Serpentine Wall of Separation," *Michigan Law Review*, Vol. 101, May, 2003, pp. 1896-7. See also Letter to the Danbury Baptists, http://www.loc.gov/loc/lcib/9806/danpre.html (May 22, 2007), non-paginated; ("Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties." Ibid.)

[177] WITTE, J., "That Serpentine Wall of Separation," p. 1897.

[178] DREISBACH, D., *Thomas Jefferson and The Wall...*; p. 30.

[179] HUTSON, James, "'A Wall of Separation': FBI Helps Restore Jefferson's Obliterated Draft," *Library of Congress Information Bulletin*, Vol. 57, June 1998, http://www.loc.gov/loc/lcib/9806/danbury.html (viewed May 14, 2007), non-paginated.

[180] DREISBACH, D., *Thomas Jefferson and The Wall ...*, p. 43.

[181] During the Presidential campaign against incumbent John Adams, leaders of Adams's Federalist Party charged that Jefferson was an immoral, deist, Jacobin infidel, bent on severing government from its necessary religious roots and essential clerical alliances. Leaders of Jefferson's Republican party countered that Jefferson was a Christian, albeit of an unusual sort, who saw separation of church and

Hutson drew this conclusion after an FBI lab in 1998 uncovered phrases Jefferson had deleted from his original draft that would have upset the pious Baptists. Because of the political context of the letter, Hutson argues, the letter loses much of its credibility, and should not, therefore, be viewed as the ultimate text on the relationship between government and religion.

Hutson's argument got much publicity and was addressed by leading church-state scholars in a 1999 *William and Mary Quarterly* forum. While some supported Hutson's claim that the Supreme Court had erected a higher, less permeable wall than the one constructed by Jefferson,[182] others argued in favor of the contemporary understanding of the "high and impregnable" barrier.[183]

This disagreement among the different scholars over the meaning of the Danbury letter and the "wall of separation" has made explicit the wider conflict over the role of religion in the public sphere. It has also made explicit that there seems to be no agreement or "right" answer as to the precise definition of Jefferson's wall.

Yet, when searching for the strict separation introduced by the Supreme Court in 1947 in the Danbury letter, it is, I believe, not necessary to search for the right answers, but for the wrong ones. As the Danbury letter does not seem to provide a definite answer, it may be wise to follow the advice of James Hutson to go beyond the Danbury letter, and to look for the "wall" or the commitment towards the "wall" elsewhere.[184]

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state as essential to the protection of religious liberty. See WITTE, "The Serpentine Wall of Separation," p. 1893; Buckley, T., "Reflections on a Wall," p. 796.

[182] See e.g. DREISBACH, Daniel L., "Thomas Jefferson and the Danbury Baptists Revisited," *The William and Mary Quarterly*, Vol. 56, Oct., 1999, pp. 805-816. See also BUCKLEY, Thomas E., "Reflections on a Wall," *The William and Mary Quarterly*, Vol. 56, Oct., 1999, pp. 795-800.

[183] KRAMNICK, Isaac & MOORE, R. Laurence, "The Baptists, the Bureau, and the Case of the Missing Lines," *The William and Mary Quarterly*, Vol. 56, Oct. 1999, pp. 817-822. See also GAUSTAD, Edwin S.: "Thomas Jefferson, Danbury Baptists, and 'Eternal Hostility,'" *The William and Mary Quarterly*, Vol. 56, Oct. 1999, pp. 801.

[184] This approach has found much common ground among contemporary historians. E.g. Professor BUCKLEY argues that the best way to understand what Jefferson considered proper in the relationship between government and religion is to look at the way he operated as chief executive, important reason

4.3. Looking Beyond the "Wall"

Taking into account some of his statements on religion[185] and his anti-clerical rhetoric following the presidential elections of 1800, it is hardly surprising that Jefferson was often considered to be an enemy of religion and an advocate of strict separation between state and church matters.[186] But – as Jefferson correctly pointed out – "[i]t is in our lives and not in our words that our religion must be read."[187] And his own practices as a statesman, particularly as president, shed a different light on the issue.

As an elected officeholder, Jefferson seems to have continuously breached the "wall" that he supposedly erected. Two days after recommending in his reply to the Danbury Baptists "a wall of separation between church and state" he appeared at church services in the U.S. House of Representatives that he continued attending for the remainder of his two administrations.[188] There is no doubt that his going to church helped to offset the negative impression created by his refusal to issue religious proclamations and prevented the erosion of his political base in God-fearing areas like New England.[189] Jefferson also allowed various congregations to use federal office buildings to hold their own services and endorsed the use of federal funds to build churches and to support Christian missionaries working among Indians.[190]

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being that Jefferson never systematically elaborated his views as far as religion and government were concerned. See BUCKLEY, Thomas E., "Reflections on a Wall," *The William and Mary Quarterly*, Vol. 56, Oct., 1999, pp. 795-800.

[185] See e.g. JEFFERSON, *Thomas, Notes on the State of Virginia*, pp. 284-85 http://etext.virginia.edu/toc/modeng/public/JefVirg.html ("It does me no injury for my neighbor to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg.") (May 18, 2007).

[186] Historian Fred C. LUEBKE noted that while Jefferson was always unsympathetic to organized religion, his anticlerical attitudes sharpened and hardened during the 1800 election. See Fred C. LUEBKE, "The Origins of Thomas Jefferson's Anti-Clericalism," *Church History*, Vol. 32, 1963, p. 353.

[187] CHURCH, Forrest (ed.), *The Separation of Church and State: Writings on a Fundamental Freedom by America's Founders*, Boston: Beacon Press, 2004; p. 45.

[188] HUTSON, J., "'A Wall of Separation': FBI Helps Restore Jefferson's Obliterated Draft," http://www.loc.gov/loc/lcib/9806/danbury.html (viewed May 14, 2007).

[189] A Philadelphia newspaper, for example, informed its readers on Jan. 23, 1802, that "Mr. Jefferson has been seen at church, and has assisted in singing the hundredth psalm."
HUTSON, J., "Thomas Jefferson's Letter to the Danbury Baptists: A Controversy Rejoined," p. 780.

[190] Ibid.

Thomas E. BUCKLEY[191] argued along the same lines, noting that Jefferson consistently employed religious rhetoric in public pronouncements and writings[192] that appealed to pious citizens who thought it necessary to cultivate religious morality and acknowledge God in the public.[193] If Jefferson had intended to banish prayer or Christianity from the public sphere, it is more than likely he would not have used religious language himself.[194]

The paradox between Jefferson's "wall" (often presented by the strict separationists as a proof of his intentions to keep religion out of government) and his conduct when it came to religion was addressed by numerous scholars who went on to great length to interpret his views on church and state.[195] They did, however, agree

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[191] Thomas E. Buckley is a Professor of American Religious History at the Jesuit School of Theology, Berkeley. See J.S.T. Berkeley, Faculty: http://www.jstb.edu/faculty/bios/buckley.html (May 22, 2007).

[192] Jefferson did not consider it in any way improper or contrary to his principles to make numerous references to deity even in his *Virginia Act for Establishing Religious Freedom*. He did clearly differentiate between the clergy and religion as such, and did not have any problem with the later.
See The Virginia Act for Establishing Religious Freedom online:
http://religiousfreedom.lib.virginia.edu/sacred/vaact.html (viewed May 5, 2007).

[193] Jefferson's First Annual Message is a good example of this: "Whilst we devoutly return thanks to the beneficent Being who has been pleased to breathe into them the spirit of conciliation and forgiveness, we are bound with peculiar gratitude to be thankful to Him that our own peace has been preserved through so perilous a season, and ourselves permitted quietly to cultivate the earth and to practice and improve those arts which tend to increase our comforts." (First Annual Message of President Thomas Jefferson, December 8th, 1801, online at http://www.presidency.ucsb.edu/ws/print.php?pid=29443 (viewed May 14, 2007)

[194] See BUCKLEY, Thomas E., "Reflections on a Wall," pp. 795-800.

[195] Despite having said much on the subject, Jefferson himself never articulated a comprehensive, systematic theory of American church-state relations. See e.g. HEALEY, Robert, "Jefferson and the Church-State Wall: A Historical Examination of the Man and the Metaphor," *Brigham Young University Law Review*, Vol. 1978, 1962, pp. 138-40; ADAMS, Arlin M. & EMMERICH, Charles J., "A Heritage of Religious Liberty," *University of Pennsylvania Law Review*, Vol. 137, 1989, pp. 1598-99.

Even the Virginia Act for Establishing Religious Freedom, considered by Jefferson himself as one of his lifetime accomplishments for which he wished to be remembered, does not mention the establishment or disestablishment of religion, nor do the provisions say much about the place of religion in society. Rather than advocating strict separation between religion and civil government in the modern sense, the bill seems to be a sound and persuasive affirmation of the individual's right to worship God, or not, according to the dictates of conscience, free from governmental interference or discrimination.
The Virginia Act for Establishing Religious Freedom online:
http://religiousfreedom.lib.virginia.edu/sacred/vaact.html (viewed May 5, 2007), non-paginated;
See also CHURCH, Forrest (ed.), *The Separation of Church and State: Writings on a Fundamental Freedom by America's Founders,* Boston: Beacon Press, 2004; pp. 72 – 77. (Together with his authorship of the Declaration of Independence and the founding of the University of Virginia, Jefferson selected the authorship of the Act to be memorialized on his gravestone. Interestingly, the gravestone does not mention other notable acts of service, such as his two terms as president of the United States. Ibid.)

that despite being anti-clerical, Jefferson was not himself a "godless man" and driving religion out of the public sphere was not something he, or any of his contemporaries, would ever attempt to bring about.[196]

The one spiritual constant, running throughout Jefferson's entire adult life is "reverence for the principle of untrammeled religious liberty."[197] Examining Jefferson's record and his commitment towards religious liberty, it is "undisputable that he believed that religion almost always exists in greater purity without the support of government, that only voluntary faith is authentic, and that government nurture destroys true religion."[198]

Yet, whatever his exact thoughts and beliefs might have been, his public actions in themselves are a telling commentary on his own understanding of religion, the church and the state, and these actions suggest one thing: the "high and impregnable" "wall of separation" that the 20th century Supreme Court attributed to him is nowhere to be found.

5. Current Standards of Establishment Clause Jurisprudence

The Supreme Court consistently applied the strict separationist approach based on the "high and impregnable" "wall of separation" introduced in *Everson* to all Establishment Clause cases until the 1970s. Yet, as the justices began to challenge the excessive dependence of the Court on the "wall of separation" metaphor and advocated the need for another principle to "govern" the Establishment Clause jurisprudence, the Court has gradually drafted three different standards (so called "tests") to determine whether or not a law meets constitutional muster.

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[196] At times identified as a Unitarian, at times as "a sect unto myself," his exact religious views remain unclear. See e.g. CHURCH, Forrest (ed.), *The Separation of Church and State: Writings on a Fundamental Freedom by America's Founders,* Boston: Beacon Press, 2004, pp. 45-48. See also KRAMNICK, I. & MOORE, L.: "The Baptists, the Bureau, and the Case of the Missing Lines," *The William and Mary Quarterly*, Vol. 56, Oct. 1999, pp. 817-822.

[197] HUTSON, J., "Thomas Jefferson's Letter to the Danbury Baptists: A Controversy Rejoined," p. 790.

[198] DAVIS, Derek H., "Jefferson's Letter to the Danbury Baptists: The Original Meaning of the Wall of Separation Metaphor," *Liberty*, Jan.-Feb., 1997, pp. 12-18.

5.1. Lemon Test

The landmark case of *Lemon v. Kurtzman* (1971) followed the strictly separationist logic of *Everson*.[199] Yet, while doing so, the justices distanced themselves from the "wall" metaphor[200] as a standard for judging Establishment Clause cases and drafted what came to be known as the *Lemon* test.

The test consists of three parts (in the scholarly literature frequently labeled as "prongs"), all of which must be met in order for a statute or policy to be held constitutional. First, a statute or policy must have a secular legislative purpose. Second, its principal or primary effect must be one that neither enhances nor inhibits religion. And finally, the statute or policy must not foster excessive government entanglement with religion.[201]

The *Lemon* test was significant, as it based the Supreme Court's doctrine on concrete standards, rather than on the vague idea of a "wall." It did not, however, constitute any major shift in the Supreme Court's Establishment Clause jurisprudence. The Court used the *Lemon* test to strike down other government programs of assistance to private schools,[202] and from 1971 to 1992 applied its principles in all but

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[199] Lemon v. Kurtzman, 403 U.S. 602 (1971), p. 614 (Burger, C. J., opinion of the Court) (The Court ruled that a state's reimbursement of private schools for certain costs, as well as its payments of a salary supplement to private school teachers, involved excessive entanglement of church and state). http://straylight.law.cornell.edu/supct/html/historics/USSC_CR_0403_0602_ZO.html (May 22, 2007)

[200] "Judicial caveats against entanglement must recognize that the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." See ibid., p. 614 (Burger, C. J., majority opinion).

[201] Ibid., pp. 612-613.

[202] E.g. see: Aguilar v. Felton, 473 U.S. 402 (1985) (The Court overturned New York City's policy of sending public school teachers into parochial schools to teach secular subjects; it acknowledged that the purpose of the law was secular, but held that the possibility of religious advancement and entanglement made it unconstitutional), http://www.law.cornell.edu/supct/html/historics/USSC_CR_0473_0402_ZS.html (May 22, 2007);

Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985) (The Court rejected Michigan's "shared time" program in which the public school system financed classes for nonpublic school children (as it was seen as promoting religion), http://www.law.cornell.edu/supct/html/historics/USSC_CR_0473_0373_ZC1.html (May 22, 2007);

Wallace v. Jaffree,472 U.S. 38 (1985) (The Court stroke down an Alabama law authorizing teachers to set aside one minute at the start of each day for a moment of "silent meditation or voluntary prayer," holding that the statute endorsed religion). http://straylight.law.cornell.edu/supct/html/historics/USSC_CR_0472_0038_ZS.html (May 22, 2007);

one of its thirty-one Establishment Clause decisions, including all public school cases.[203]

Despite being widely recognized as a standard for judging Establishment Clause cases, the *Lemon* test has never been binding and has not gained the support of the majority of the Court. This became obvious in the 1980s, when two of the Supreme Court justices, namely Sandra O'Connor and Anthony Kennedy, came up with their own alternative tests.

5.2. Endorsement Test

In a concurring opinion in the 1984 *Lynch* case, which allowed a nativity scene to be included in a city's Christmas display, Justice O'Connor,[204] often the swing-vote on the Court, called for a further "clarification" of Establishment Clause jurisprudence and began applying what she called the "endorsement" test.[205]

She argued that the Establishment Clause "prohibits government from making adherence to a religion relevant in any way to a person's standing in the political

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Wolman v. Walter, 433 U.S. 229 (1977) (prohibiting the state of Ohio to offer educational materials to non-public schools or their students, or subsidize class field trips by providing transportation), http://supreme.justia.com/us/433/229/case.html (viewed May 22, 2007);

Meek v. Pittenger, 421 U.S. 349 (1975) (prohibiting loans of instructional materials and equipment, as well as auxiliary services to nonpublic elementary and secondary schools and to the children attending these schools), http://supreme.justia.com/us/421/349/case.html (viewed May 22, 2007);

Committee for Public Education v. Nyquist, 413 U.S. 756 (1973) (prohibiting New York legislation of providing grants to non-public schools that served large numbers of low-income students in order to help with the maintenance of school facilities and to the parents of these students for the purpose of tuition reimbursement), http://supreme.justia.com/us/413/756/case.html (May 22, 2007);

Levitt v. Committee for Public Education, 413 U.S. 472 (1973). (striking down a New York statute that reimbursed religious schools for teacher-prepared tests), http://supreme.justia.com/us/413/472/case.html (viewed May 22, 2007).

[203] The exception was the case Lee v. Weisman, 505 U.S. 577 (1992), p. 603 (Blackmun, J., concurring), http://straylight.law.cornell.edu/supct/html/historics/USSC_CR_0505_0577_ZC.html (May 22, 2007).

[204] In July 2005, Justice Sandra O'Connor announced her intention to retire effective upon the confirmation of her successor. She was replaced by Justice Samuel Alito, who received his confirmation on January 31, 2006 (tilting the Court to the right). O'Connor is currently the only living retired Justice of the Supreme Court. See http://usinfo.state.gov/dhr/Archive/2006/Jan/31-90165.html (viewed May 22, 2007)

[205] Lynch v. Donnelly, 465 U.S. 668 (1984), pp. 668-688 (1984) (O'Connor, J., concurring), http://straylight.law.cornell.edu/supct/html/historics/USSC_CR_0465_0668_ZC.html (May 22, 2007)

community."[206] Therefore, rather than asking whether a government activity has a secular purpose, the Court should ask "whether the government intends to convey a message of endorsement or disapproval of religion."[207] If the government is found to be conveying such a message, the practice in question should be deemed unconstitutional, as "[e]ndorsement sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[208] According to Justice O'Connor, it was important to focus on the impact of specific rituals and policies on the "nonadherents of benefited creeds" to prevent them from feeling inferior. [209]

In determining what constitutes endorsement and what does not, Justice O'Connor relied upon the perspective of an "objective observer"[210] who should be more informed and "aware of history and context" than one casually passing through the place in which the allegedly unconstitutional practice occurs.[211]

The notion of the "objective observer" (sometimes also referred to as a "reasonable" observer) is, however, flawed, as it is clear that his viewpoint cannot be but perspective-dependent (like the "advancement of religion" in the Lemon test). A finding for or against a government action can be supported, depending on whether the action is viewed from the perspective of the accommodated majority or from the perspective of the outsider who does not share the majoritarian beliefs. This has become obvious in the few subsequent cases where the majority relied on the "endorsement" test.

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[206] Ibid., p. 687.
[207] Ibid., p. 691.
[208] Ibid., p. 688.
[209] LOEWY, Arnold H., "Rethinking Government Neutrality towards Religion under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight," *North Carolina Law Review*, Vol. 64, 1986, p.1051.
[210] Wallace v. Jaffree, 472 U.S. 38 (1985), p 76 (O'Connor, J., concurring), http://straylight.law.cornell.edu/supct/html/historics/USSC_CR_0472_0038_ZC1.html (May 22, 2007)
[211] Capitol Square Review & Advisory Board v. Pinette, 515 U.S. 753 (1995), http://www.law.cornell.edu/supct/html/94-780.ZC1.html (viewed May 10, 2007), non-paginated.

Under Justice O'Connor's "endorsement" analysis, the Supreme Court found (in a 5-4 decision) the display of a crèche in a Christmas display in *Lynch v. Donnelly* permissible, as it did not "communicate a message that the government intends to endorse Christian beliefs,"[212] but prohibited (again by a 5-4 vote) another similar display of a crèche five years later.[213]

The "endorsement" test was used once again in 1995, when in a 7-2 decision, the Court permitted the display of an unattended cross in the Ohio Capitol Square by the Ku Klux Klan, because it was erected by a private entity rather than by the government, and so a reasonable observer would not conclude that the government was sending any religious message.[214]

Rather than clarifying the Establishment Clause jurisprudence, O'Connor's test seems to have added a considerable degree of confusion into the Supreme Court's First Amendment cases.

5.3. Coercion Test

Justice Anthony Kennedy, a loud critic of O'Connor's "endorsement" test, devised what came to be known as a "coercion" test. In a crèche case of *County of Allegheny v. ACLU* (1989), Kennedy argued that the Establishment Clause is violated only when a statute or practice coerces an individual to believe a particular doctrine.[215] From his point of view, any practice that does not aid religion in such a way that would tend to establish a state church and does not coerce people to support religion against their will is permissible.

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[212] Lynch v. Donnelly, 465 U.S. 668 (1983), p. 692 (1984)
[213] County of Allegheny v. American Civil Liberties Union, 492 U.S. 573 (1989), http://straylight.law.cornell.edu/supct/html/historics/USSC_CR_0492_0573_ZO.html (May 10, 2007).
[214] Capitol Square Review & Advisory Board v. Pinette 515 U.S. 753 (1995), http://www.law.cornell.edu/supct/html/94-780.ZC1.html (viewed May 10, 2007), non-paginated.
[215] County of Allegheny v. ACLU, 492 U.S. 573 (1989), pp. 655-679 (Kennedy, J., concurring and dissenting opinion), http://straylight.law.cornell.edu/supct/html/historics/USSC_CR_0492_0573_ZX2.html (May 22, 2007)

The Supreme Court utilized Kennedy's "coercion" test in 1992 in *Lee v. Weisman*,[216] to find unconstitutional the practice of including invocations and benedictions in the form of "nonsectarian" prayers at public school graduation ceremonies.[217] Rather than applying the *Lemon* test, the majority of the Court relied on the "coercion" test and held that "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise to act in a way which 'establishes a [state] religion or religious faith or tends to do so.'"[218] Writing for the Court and relying on his coercion test, Justice Kennedy expressed a fear that a graduating student would feel such peer pressure from the fellow graduates that he/she might feel there was no choice but to stand and participate in the prayer.[219] This forced acceptance, or lack of an appropriate alternative, signified the coercive nature of the prayer policy.[220] Thus, in a five-to-four decision, the Supreme Court held the prayer unconstitutional because it coerced students to pray.

The case has several interesting aspects. It produced three opinions with different approaches to the Clause – none of which mentioned *Lemon*, the main legal test controlling Establishment Clause claims.[221] The Court decided the case on Justice Kennedy's coercion-based theory, but it did not indicate which of the tests articulated by the Court now governs Establishment Clause jurisprudence.

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[216] Lee v. Weisman, 505 U.S. 577(1992), p. 599 (striking down Rhode Island's policy of inviting clergy to offer invocation and benediction prayers during graduation ceremonies in public schools) (Kennedy, J., opinion of the Court) (Lee v. Weisman was the first case where a majority of the justices relied on a different test than the *Lemon* test).
http://straylight.law.cornell.edu/supct/html/historics/USSC_CR_0505_0577_ZS.html (viewed on May 20, 2007)

[217] Rabbi Leslie Gutterman delivered a prayer referring to God, recognizing the legacy of America, thanking for its unique destiny, for minority rights, praising nation's diversity, including its religious diversity. Ibid., pp. 577-580.

[218] Ibid., p. 587 (quoting *Lynch*, 465 U.S. 668 (1984), p. 678)

[219] Ibid., p.593.

[220] Ibid. p. 598 (describing the injury incurred by a dissenter who has the perception that she is being forced by the state to pray in a manner against her conscience)

[221] Justices Blackmun, Stevens, O'Connor, and Souter concurred with Justice Kennedy's conclusion that the prayers were coercive but embraced Justice O'Connor's endorsement test. Chief Justice Rehnquist and Justices White, Scalia, and Thomas dissented. They embraced Justice Kennedy's coercion test but did not think the students were in any way coerced to pray.

The case has also had interesting repercussions for the concept of civil religion. Justice Kennedy, writing for the majority, noted that "[p]recedents caution us to measure the idea of a civic religion against the central meaning of the Religion Clauses of the First Amendment, which is that all creeds must be tolerated and none favored. The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted."[222]

It is clear that the "high and impregnable" wall that Justice Black constructed on the foundations of the Jeffersonian "wall," has – in the 1980s and especially in the 1990s – started to crumble, as the Supreme Court based its jurisprudence on other more concrete standards. The notion of the wall stayed but it was lowered to make it more receptive to real-world church-state controversies.

The Lemon test set forth in *Lemon v. Kurtzman,* which has served as the doctrinal keystone of Establishment Clause analyses for more than two decades, certainly lent some clarity and consistency to what otherwise would have been an unclear area of law. The "endorsement" and "coercion" tests have made the Supreme Court's approach towards the various First Amendment cases more flexible, but at the same time also more inconsistent.[223] Yet, while often more obscuring than

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[222] Lee v. Weisman, 505 U.S. 577 (1992), p. 590 (Kennedy, J., opinion of the Court) http://straylight.law.cornell.edu/supct/html/historics/USSC_CR_0505_0577_ZO.html (May 22, 2007)

[223] Academics have commented at length on the inconsistency and incoherence of the Supreme Court's Establishment Clause jurisprudence. See Phillip E. JOHNSON, "Concepts and Compromise in First Amendment Religious Doctrine," (*California Law Review*, Vol. 72, 1984) ("Doctrinally, First Amendment religion law is a mess." (p. 839)); Stephen D. SMITH, "Separation and the 'Secular': Reconstructing the Disestablishment Decision," (*Texas Law Review*, Vol. 67, 1989) ("In a rare and remarkable way, the Supreme Court's Establishment Clause jurisprudence has unified critical opinion: people who disagree about nearly everything else in the law agree that Establishment doctrine is seriously, perhaps distinctively, defective." (pp. 955-6)); Mark TUSHNET, "The Constitution of Religion," (*Conn. L. Rev.*, Vol. 18, 1986) ("The constitutional law of religion is 'in significant disarray;'" (p. 701)); Kevin D. EVANS, "Beyond Neutralism: A Suggested Historically Justifiable Approach to Establishment Clause Analysis" (*St. John's Rev.*, Vol. 64, 1989) (describing Establishment Clause jurisprudence as "an area of constitutional law plagued by inconsistency" (p. 99)); Leonard W. LEVY, *The Establishment Clause: Religion and the First Amendment*, (New York: Macmillan Publishing Company, 1986) ("We live in an imperfect constitutional universe cluttered with ambiguities, mysteries, and inconsistencies." (p. xxi)); see *also* Wallace v. Jaffree, 472 U.S. 38 (1985), p. 112 (Rehnquist, J., dissenting) (asserting that current Establishment Clause jurisprudence "has produced only consistent unpredictability";

illuminating, these standards do provide concrete guidelines to be applied to religion-related challenges. They do, however, provide little help in solving the puzzle of public religion.

http://straylight.law.cornell.edu/supct/html/historics/USSC_CR_0472_0038_ZD2.html; May 22, 2007).

III. THE SUPREME COURT & CIVIL RELIGION

6. Supreme Court's Approach Towards Civil Religion Cases

"There may be some support, as an empirical observation, [...] that there has emerged in this country a civic religion, one which is tolerated when sectarian exercises are not."[224]

Justice Anthony Kennedy, Lee v. Weisman, 1992

The entrenchment of religion in American public life has been termed a "*de facto* establishment of religion prevailing throughout the land."[225] It has taken a variety of forms, from government sponsored enactments of practices that carry religious significance or have historical roots in religion (such as declaring Thanksgiving Day or authorizing National Day of Prayer) to adoption of symbols or precepts carrying some religious significance as part of the emblems of civic life.[226]

The ambiguous character of civil religion, however, makes it especially difficult to classify in Establishment Clause terms. The concept has been largely absent from the judicial lexicon,[227] which would suggest that the same standards and tests should be used in cases challenging symbols of public religion as in the remaining cases. Given the fact, that the Supreme Court doctrine was based to a large extent on strict separationism, it is highly unlikely that an application of the same tests and standards that made prayers and moments of silence in schools unconstitutional would hold civil religion practices such as legislative prayer permissible. Perhaps for this reason, when confronted with challenges concerning expressions and practices of civil religion, the Court created a new and problematic answer – a so called

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[224] Lee v. Weisman 505 U.S. 577 (1992), p. 589 (Kennedy, J, opinion of the Court), http://straylight.law.cornell.edu/supct/html/historics/USSC_CR_0505_0577_ZO.html (May 3, 2007).
[225] DeWOLFE HOWE, Mark A., *The Garden and the Wilderness*, Chicago: University of Chicago Press, 1965; p. 17.
[226] LUPU, Ira, "Developments in the Law – Religion and the State," *Harvard Law Review*, Vol. 100, 1987, p. 1651.
[227] MIRSKY, Jehudah, "Civil Religion and the Establishment Clause," *Yale Law Journal*, Vol. 95, May, 1986, p. 1241.

"acknowledgement" exception to the Establishment Clause.[228]

6.1. The Birth of "Acknowledgment" Exception

The Supreme Court deviated from its methodological application of *Lemon* for the first time in *Marsh v. Chambers* (1983),[229] when it affirmed the constitutionality of a state legislature's opening its sessions with an ecumenical prayer by a Christian minister. It has brought to light a tension in Establishment Clause jurisprudence between the constitutionally suspect character of a number of traditional public practices and the widespread acceptance of a religious element in much of American public life.

In *Marsh*, a taxpayer and state legislator challenged the Nebraska legislature's practice of opening each session with a prayer by a publicly funded chaplain.[230] The United States Court of Appeals for the Eighth Circuit applied the *Lemon* test and held the chaplaincy practice violated all three prongs of *Lemon*.[231] According to its ruling, the legislature's practice of appointing the same minister for sixteen years, publishing his prayers, and funding this practice through public funds promoted a particular religion and led to entanglement. The Court of Appeals, therefore, prohibited Nebraska from engaging in any aspect of its established chaplaincy practice.[232]

The Supreme Court faced a dilemma. By conventional indicia of establishment as understood in terms of the *Lemon* test, legislative prayer is indeed questionable, as

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[228] MIRSKY, Jehudah, "Civil Religion and the Establishment Clause," *Yale Law Journal,* Vol. 95, May, 1986, p. 1243.

[229] Marsh v. Chambers, 463 U.S. 783 (1983) (Burger, C. J.., opinion of the Court) http://straylight.law.cornell.edu/supct/html/historics/USSC_CR_0463_0783_ZO.html (viewed May 20, 2007)

[230] Ernest Chambers was a member of the Nebraska state legislature who objected to its chaplaincy policy on three grounds: (1) the state funding of a chaplain violated the Establishment Clause; (2) the legislature had employed the same chaplain, a Presbyterian, for 16 years, creating a preferential treatment for one religion over others; (3) the chaplain's prayers were distinctly Judeo-Christian in content, showing a preference for one tradition over others. Marsh v. Chambers, 463 U.S. 783 (1983), pp. 783-784, Syllabus.

[231] Ibid. p. 786 (repeating the conclusions of the Eight Circuit Court)

[232] Ibid., p. 786.

it's obvious that by choosing among different denominations a clergy who would lead the prayer, the government is clearly advancing religion (especially the particular denomination which the minister represents) and making preference for one religion over another. Yet, how could something that has been done so respectably for so long be unconstitutional?

Faced with the task of making judicial sense of public rituals and symbols of a religious nature, the Court looked to history for guidance. This time, however, the Court looked in an entirely different direction than in 1947.

The Court focused on legislative prayer's long history, stretching back to the First Congress,[233] and emphasized that Framers did not intend for the Establishment Clause to forbid employing legislative chaplains.[234] Justice Burger noted that members of the First Congress voted to appoint and pay a chaplain for each chamber of Congress in the same week as they approved the draft of the First Amendment, arguing the close temporal proximity of these two acts of Congress could not possibly mean they intended the Establishment Clause to forbid what they had just declared acceptable.[235] Clearly, he argued, "the men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress."[236] In the same manner, Burger argued, "it has also been followed consistently in most of the states, including Nebraska, where the institution of opening legislative sessions with prayer was adopted even before the State attained statehood."[237]

Justice Burger concluded that "[i]n light of the unambiguous and unbroken

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[233] Marsh v Chambers, 463 U.S. 783 (1983), p. 790 ("[H]istorical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress - their actions reveal their intent.")
[234] Ibid., pp. 790-91 (citing several Supreme Court cases construing the meaning the Framers intended to give to the Establishment Clause).
[235] Ibid., p. 791.
[236] Ibid. p. 789
[237] Ibid., p. 789.

history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society." "To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion [but] ... simply a tolerable acknowledgement of beliefs widely held among the people of this country...." Finally, quoting the opinion of Justice Douglas from a 1952 case of *Zorach v. Clauson,*[238] Burger concluded that "'we are a religious people whose institutions presuppose a Supreme Being.'"[239]

Thus, on appeal, the Supreme Court reversed the Eighth Circuit decision by choosing to ignore entirely the *Lemon* test. In what was to become an important precedent, the Court demonstrated that history can be used as a means for altering the "religiousness" of certain practices and symbols.

6.2. Exception Turning into a Rule?

Following *Marsh*, the Court applied a similar theory to a pair of cases in the 1980s, *Lynch v. Donnelly*[240] and *County of Allegheny v. ACLU.*[241] The subject of both of these cases were religious public displays – both involving the image of a crèche – but the Supreme Court reasoning carried over to historical religious expressions.

In *Lynch v. Donnelly,* a case upholding the inclusion of a Nativity scene in the annual holiday display of Pawtucket, Rhode Island, the Court took the "acknowledgment exception" even further. Chief Justice Burger, again writing for the majority, disposed briefly of the *Lemon* test by referring to it as more of a guideline

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[238] Zorach v. Clauson, 343 U.S. 306 (1952), p. 313 (Douglas, J., opinion of the Court) http://straylight.law.cornell.edu/supct/html/historics/USSC_CR_0343_0306_ZO.html (May 20, 2007)
[239] Marsh v Chambers, 463 U.S. 783 (1983), p. 792
[240] Lynch v. Donnelly, 465 U.S. 668 (1983) (justifying the inclusion of a crèche in a holiday display as a sufficiently secular recognition of a national holiday) (Burger, C. J., opinion of the Court) http://straylight.law.cornell.edu/supct/html/historics/USSC_CR_0465_0668_ZO.html (May 20, 2007)
[241] County of Allegheny v. ACLU, 492 U.S. 573 (1989) (finding that a crèche, when displayed alone in the grand stairway of a courthouse, is an endorsement of religion) (Blackmun, J., opinion of the Court) http://straylight.law.cornell.edu/supct/html/historics/USSC_CR_0492_0573_ZO.html (May 20, 2007)

than a test.[242] He then examined the question at hand in light of the "unbroken history of official acknowledgment by all three branches of government of the role of religion in American life."[243] Noting that "our history is pervaded by expressions of religious beliefs,"[244] and that the Nativity scene appeared in what was clearly just a holiday display placed in a city park among several other Christmas decorations, he considered it sufficiently secular to pass Establishment Clause scrutiny.[245]

Justice O'Connor recognized the problematic nature of the acknowledgment exception and took pains in her concurring opinion to distinguish "acknowledgement" of religion from an impermissible "endorsement" of religion.[246] She argued that public religion is a response to a genuine need for the solemnization and elevation of certain public moments, for the creation of a public language that can express and accommodate the abiding values and commitments shared by most, if not all, members of American society. Although Justice O'Connor recognized, in a way that the Chief Justice did not, the dangers inherent in the "acknowledgment" exception, the importance of public solemnification did, according to her, adequately justify the result in *Lynch.*[247]

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[242] Lynch v. Donnelly, 465 U.S. 668 (1984), p. 679.

[243] Ibid. p. 676 (Justice Burger argued that the history is full of official references to the "value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders." He noted that beginning in the early colonial period, a "day of Thanksgiving was celebrated as a religious holiday to give thanks for the bounties of Nature as gifts from God. President Washington and his successors proclaimed Thanksgiving, with all its religious overtones, a day of national celebration and Congress made it a National Holiday more than a century ago." He pointed out that "by Acts of Congress, it has long been the practice that federal employees are released from duties on these National Holidays, while being paid from the same public revenues that provide the compensation of the Chaplains of the Senate and the House and the military services." He then concluded that "Government has long recognized - indeed it has subsidized - holidays with religious significance.")

[244] Ibid. p. 677 (Justice Burger referred to the statutorily prescribed motto 'In God We Trust,' "which Congress and the President mandated for the American currency," to the language "One nation under God," as part of the Pledge of Allegiance to [the American] flag, to the permanent presence of Moses with the Ten Commandments in the courtroom itself, and to "countless other illustrations of the Government's acknowledgment of [the American] religious heritage and governmental sponsorship of graphic manifestations of that heritage.")

[245] Ibid. p. 685

[246] Lynch v. Donnelly, 465 U.S. 669 (1984), pp. 687-94 (O'Connor, J., concurring) http://straylight.law.cornell.edu/supct/html/historics/USSC_CR_0465_0668_ZC.html (May 20, 2007)

[247] Ibid. (O'Connor, J., concurring)

By making an "acknowledgment" exception, the Court did not solve the problem of how to deal with public religion cases – relying more on intuition and a devotion to the status quo than on reasoned analyses. Moreover, the Court did not make any suggestion as to when the acknowledgment transforms into an impermissible endorsement.

When addressing another crèche case in *County of Allegheny v. ACLU* a few years later, the Court noted that the crèche, placed alone in a stairway, was not sufficiently secular to guard it from Establishment Clause scrutiny. The grand staircase on which the crèche sits is the "main" and "most beautiful part" of the building, Justice Blackmun held for the majority of the Court. "No viewer could reasonably think that [the crèche] occupies this location without the support and approval of the government."[248]

The disparity between *Lynch* and *Allegheny* is obvious: in some situations, a crèche is secular, but in other situations, it is not, depending very much on the Supreme Court justices and their perceptions, when examining the placement and the surroundings of such objects. These cases illustrate the internal inconsistency of this "secularization" approach.

The Court has employed the "acknowledgment" exception selectively on a case-by-case basis. While upholding public prayer in legislatures (declaring the opening a legislative session with a prayer has become "part of the fabric of our society"),[249] the Court has struck down the same in schools (noting that although religion has enjoyed a close relationship with American history and government, requiring the recitation of Bible passages in public schools is unconstitutional),[250] thus depicting certain practices and invocations as American symbols of national or

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[248] County of Allegheny v. ACLU, 492 U.S. 573 (1989), pp. 599-600, http://straylight.law.cornell.edu/supct/html/historics/USSC_CR_0492_0573_ZO.html (May 20, 2007)
[249] Marsh v Chambers, 463 U.S. 783 (1983), p. 792 (Burger, C. J., opinion of the Court), http://straylight.law.cornell.edu/supct/html/historics/USSC_CR_0463_0783_ZO.html (May 23, 2007)
[250] School District of Abington Township, Pennsylvania v. Schempp, 374 U.S. 203 (1963), pp. 212-24 (Clark, J., opinion of the Court), http://straylight.law.cornell.edu/supct/html/historics/USSC_CR_0374_0203_ZO.html (May 22, 2007)

historical importance that have been secularized, rather than as rituals of religious significance.[251] No clear formula for determining when a practice or symbol is sufficiently secular to avoid an Establishment Clause violation has, however, been established.

The Court employed its "acknowledgment" exception, without even attempting to examine the constitutionality of the symbols and practices through the lens of the established doctrinal tests. The question was, however, answered by other courts.

7. The Case of the Pledge of Allegiance

In June 2002, in *Newdow v. United States Congress*, a three-judge panel of the Ninth Circuit Court of Appeals held in a split decision (2-1) that the phrase "under God" violates the First Amendment's prohibition of government sponsorship of religion, and banned therefore California's policy requiring the recitation of the Pledge of Allegiance in public school classrooms.[252] The majority opinion stated: "The Pledge, as currently codified, is an impermissible government endorsement of religion because it sends a message to unbelievers 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'"[253]

The ruling set off an explosion of religiosity and patriotism. Senators passed a unanimous resolution (99-0) "expressing support for the Pledge of Allegiance" and

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[251] Ibid., p. 303 (Brennan, J., concurring) ("[W]e have simply interwoven the motto ['In God We Trust'] so deeply into the fabric of our civil polity that its present use may well not present that type of involvement which the First Amendment prohibits.")

[252] The San Francisco-based Ninth Circuit Court of Appeals is the largest federal appeals court in the U.S., covering nine states (Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington), plus Guam and the Northern Mariana Islands. Its judges are responsible for about 55 million Americans and more than a third of the nation's land – far more than any of the other 10 federal appellate regions. The Court has a reputation for liberal activism and has the highest rate of reversal by the Supreme Court of any of the circuits. See Brad KNICKERBOCKER, "One 9th Circuit Appeals Court, Under God," http://www.csmonitor.com/2002/0808/p02s01-usju.html (viewed May 12, 2007), non-paginated.

[253] See Newdow v. United States Congress, 292 F.3d 600 (2002), p. 608; (Goodwin, A., Circuit Judge, opinion of the Ninth Circuit Court; quoting Lynch v. Donnelly, 465 U.S. 668 (1984), p. 688 http://www.constitution.org/usfc/9/newdow_v_us.htm (viewed May 4, 2007), non-paginated.

condemning the court's decision[254] and over one hundred Members of the House of Representatives, mostly Republicans, gathered on the steps of the Capitol, reciting the Pledge and singing "God Bless America."[255] Also President G. W. Bush condemned the ruling as "ridiculous."[256] Yet, despite the public opinion outburst[257] following the ruling, the reasoning of the Ninth Circuit Court seems to have been in perfect accord with the tests and standards announced and applied by the Supreme Court to a whole range of Establishment Clause cases.

7.1. Ninth Circuit and the Pledge

The Ninth Circuit's justices went to great length to analyze the case from all doctrinal perspectives, applying the three-prong *Lemon* test, the "endorsement" test, and the "coercion" test respectively and concluded that the Pledge violates each of the three tests.[258]

Turning first to the "endorsement" test, the majority found the federal law's inclusion of "under God" in the Pledge, as well as the school district's recitation policy, to be endorsements of religion. The court rejected the notion that the phrase was merely a description of the historical importance of religion in the United States or an acknowledgement that many Americans believe in God. Instead, the court found the Pledge's statement that the United States is "under God" to be a "profession of a religious belief, namely, a belief in monotheism."[259] The majority stated that the

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[254] CNN Archives, "Senators call Pledge decision 'stupid,'" http://archives.cnn.com/2002/ALLPOLITICS/06/26/senate.resolution.pledge/index.html (viewed May 2, 2007), non-paginated.
[255] CNN Archives, "Lawmakers blast Pledge ruling," http://archives.cnn.com/2002/LAW/06/26/pledge.allegiance/ (viewed May, 2, 2007), non-paginated.
[256] Ibid., non-paginated.
[257] According to ABC News/Washington Post public opinion polls conducted on June 26-30, 2002, only 14% of respondents supported the Ninth Circuit Court ruling, while 84% opposed it. 89% of respondents thought that the phrase "under God" should remain part of the Pledge, while only 10% wanted it removed. http://www.undergodprocon.org/pop/ReligSurvey.htm (viewed May 16, 2007)
[258] Newdow v. United States Congress, 292 F.3d 600 (2002), (9th Cir. 2002), http://www.constitution.org/usfc/9/newdow_v_us.htm (viewed May, 4, 2007)
[259] Ibid., p. 607.

Pledge takes a position with regard to a fundamental religious question, whether God exists, in contravention of the principle of government neutrality toward religion.[260]

"The school district's practice of teacher-led recitation of the Pledge aims to inculcate in students a respect for the ideals set forth in the Pledge, and thus amounts to state endorsement of these ideals. Although students cannot be forced to participate in recitation of the Pledge, the school district is nonetheless conveying a message of state endorsement of a religious belief when it requires public school teachers to recite, and lead the recitation of, the current form of the Pledge."[261]

When examining the Pledge through the lens of the coercion test, the Ninth Circuit relied heavily on *Lee v. Weisman*,[262] in which the Supreme Court struck down a graduation prayer as coercive even though students were not required to pray along. The panel concluded – just as in the prayer case of *Lee* – that the policy of reciting the Pledge places students in the "untenable position" of "participating in an exercise with religious content."[263] As the Court observed with respect to the graduation prayer in that case, "[W]hat to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy."[264]

Turning finally to the *Lemon* test, the Ninth Circuit panel first found that the federal law violated the test's "purpose" prong.[265] In assessing the purpose of the words "under God" in the Pledge, the Ninth Circuit focused specifically upon the 1954 Act, which added the words to the Pledge of Allegiance, and concluded that the "sole purpose" for including the words "under God" in the Pledge was to advance

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[260] Ibid.

[261] Ibid. (The panel went on to say, [a] profession that we are a nation 'under God' is identical, for Establishment Clause purposes, to a profession that we are a nation 'under Jesus,' a nation 'under Vishnu,' a nation 'under Zeus,' or a nation 'under no god,' because none of these professions can be neutral with respect to religion. Ibid.)

[262] Lee v. Weisman, 505 U.S. 507 (1992), pp. 580-599 (Kennedy, J., opinion of the Court).

[263] Newdow v. United States Congress, 292 F.3d 600 (2002), p. 608 (quoting Lee v. Weisman, p. 592).

[264] Ibid.

[265] Since the law failed the "purpose" prong, the panel did not apply the test's other prongs. Ibid., p. 611.

religion.[266] The panel cited the House Report on the 1954 Act, which included the statement: "The inclusion of God in our Pledge therefore would further acknowledge the dependence of our people and our Government upon the moral directions of the Creator. At the same time it would serve to deny the atheistic and materialistic concepts of communism with its attendant subservience of the individual."[267] The Ninth Circuit conceded that even though the school district's recitation policy itself did have a secular purpose, namely fostering patriotism, the policy had the impermissible effect of promoting religion, and was therefore unconstitutional.[268]

The ruling was extremely important as it indirectly but openly called into question other forms and expressions of public religion, such as the use of "In God We Trust" on the nation's currency, the public singing of patriotic songs like "God Bless America," or religious practices such as prayers at presidential inaugurations.[269]

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[266] Ibid., p. 610. (quoting H.R. Rep. No. 83-1693, pp. 1–2 (1954)).
[267] Ibid. (quoting H.R. Rep. No. 83-1693, pp. 1–2 (1954)).
[268] Ibid., p. 611.
[269] Michael Newdow, the same person who sued to have the words "under God" removed from the Pledge of Allegiance, has filed a suit in the U.S. Ninth Circuit Court of Appeals in 2004 to bar the planned recitation of a prayer at the presidential inauguration on January 20, 2005. He argued that the use of prayer at a government ceremony is a violation of the Establishment Clause of the First Amendment, claiming that, among other things, the Rev. Franklin Graham's prayer at President Bush's 2001 inauguration was an unconstitutional endorsement of religion.
(First Amendment Center, "Pledge plaintiff loses bid to revive inaugural - prayer lawsuit," Feb. 24, 2004, http://www.firstamendmentcenter.org/news.aspx?id=12751, April 26, 2007, non-paginated).

Reverend Graham ended his prayer at Bush's inauguration by saying: "May this be the beginning of a new dawn for America as we humble ourselves before you and acknowledge you alone as our Lord, as Savior and our Redeemer. We pray this in the name of the Father, and of the Son, the Lord Jesus Christ, and of the Holy Spirit. Amen." (Ibid.)

U.S. District Judge John D. Bates ruled that Michael Newdow had raised very important and complicated questions about the Constitution's promise of separation of church and state. But he concluded that it was not likely Newdow could prove that hearing religious references during the inauguration ceremony would cause him irreparable damage: "Here, Newdow lacks any of the indicia of a personal connection found in other prayer or public-display cases. Certainly the Presidential Inauguration is a national event, but it is only held once every four years. In order to come in contact with the allegedly offensive prayers, Newdow must either watch it on television or make a special trip to Washington to observe the prayers in person. He can also avoid the prayers by not watching the television, or by not making the trip to Washington. But, under either scenario, he does not have the necessary personal connection to establish standing. Newdow does not come in regular contact with the inaugural prayers, nor is he forced to change his typical routine to avoid them." (See Michael Newdow v. George W. Bush, Memorandum opinion, U.S. District Court for the District of Columbia, January 14, 2005, https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2004cv2208-20, pp. 11-12).

In a decision issued on January 14, 2005, U.S. District Court Judge John Bates rejected Newdow's legal challenge saying "there is a strong argument, that at this late date, the public interest would best be served by allowing the 2005 inauguration ceremony to proceed on January 20 as planned." The court

7.2. The Aftermath of the Ruling & Implications for the Future

The ruling was followed not only by a huge wave of protest but by a whole sequence of events. On August 9, 2002, the U.S. Department of Justice filed an appeal, requesting a rehearing of the case before an eleven judge panel (rather than only a three judge panel) of the Ninth Circuit Court of Appeals.[270] In what the Associated Press called "a slap at the Ninth U.S. Circuit Court of Appeals," Bush signed into law on November 13, 2002, bill S. 2690 "reaffirming references to God in the Pledge of Allegiance and the national motto." The bill – in fact a show of support with no legal weight – was approved unanimously in the Senate, with only five "no" votes in the House.[271]

Following many petitions to reconsider the *Newdow* ruling, in February 2003, 15 of the 24 justices of the Ninth Circuit Court of Appeals issued a ruling, in which they rejected the Bush administration's request to reconsider its decision. The court said it would not allow the strident public disagreement with its original decision to influence the ruling. "We may not - we must not - allow public sentiment or outcry to guide our decisions," Judge Stephen Reinhardt wrote in the 46-page opinion. "It is particularly important that we understand the nature of our obligations and the strength of our constitutional principles in times of national crisis."[272]

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continued: "That would be consistent with the inclusion of clergy prayer in all presidential inaugurations since 1937, and with the inclusion of religious prayer or reference in every inauguration commencing with the first inauguration of President George Washington in 1789. To do otherwise, moreover, would at this eleventh hour cause considerable disruption in a significant, carefully-planned, national event, requiring programming and other adjustments. The material change requested by Newdow in an accepted and well-established historical pattern of short prayers or religious references during Presidential inaugurations, based on this last-minute challenge, is not likely to serve the public interest, particularly where Newdow's ability to proceed with this action remains in doubt and there is no clear evidence of impermissible sectarian proselytizing." (See Michael Newdow v. George W. Bush, Memorandum opinion, U.S. District Court for the District of Columbia, January 14, 2005, https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2004cv2208-29, p. 48).

[270] Legal Updates: Constitutionality of the Pledge of Allegiance, http://www.legis.state.ia.us/GA/79GA/Interim/2002/legup/usdc.htm (viewed May 22, 2007)

[271] Reaffirming references to God, Humanist, Jan-Feb, 2003, http://findarticles.com/p/articles/mi_m1374/is_1_63/ai_96417180 (viewed May 16, 2007)

[272] Ninth Circuit Court of Appeals rejection to rehear the Newdow case, http://caselaw.lp.findlaw.com/data2/circs/9th/0016423p.pdf (viewed May 16, 2007) (Consequently, the administration, the state, the school districts, as well as Michael Newdow appealed the decision to the next higher authority, thus setting the stage for its hearing in the U.S. Supreme Court).

In the following March, by the vote 94-0, the U.S. Senate Resolution 71 expressed its disapproval with the ruling and with the decision of the Circuit Court not to reconsider the case.[273] A similar House Resolution 132, asking for the nullification of the ruling, was passed by the House of Representatives in May,[274] and others were to follow. The Senate Liberties Restoration Act (August 2003) called for the restoration of religious liberties such as displaying the Ten Commandments, Pledge of Allegiance, and "In God We Trust" motto, The House Safeguarding Religious Liberties Act (September 2003) declared that among those powers reserved to the States and their political subdivisions are the powers to display the Ten Commandments, to recite the Pledge of Allegiance, and to recite the national motto on or within property owned or administered by them.[275]

Eventually, in October 2003, the U.S. Supreme Court agreed to hear the case. In *Elk Grove Unified School District v. Newdow*,[276] all eight of the attending Supreme Court justices ruled against Michael Newdow, even though for different reasons.[277] Five of them (Stevens, Kennedy, Souter, Ginsberg, and Breyer) decided that – because of custody issues – he did not have a legal standing to bring the case on his daughter's behalf, and thus avoided the larger constitutional question.[278] The three other justices (Rehnquist, O'Connor, and Thomas) granted Newdow legal authority but ruled against

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[273] Senate Records on the Resolution expressing the support for the Pledge of Allegiance, http://thomas.loc.gov/cgi-bin/bdquery/z?d108:SE00071:@@@L&summ2=m& (viewed May 16, 2007)
[274] Congressional Actions on the Pledge of Allegiance (2001-2007), http://www.undergodprocon.org/pop/congress.htm (viewed May 16, 2007)
[275] Congressional Actions on the Pledge of Allegiance (2001-2007), http://www.undergodprocon.org/pop/congress.htm (viewed May 16, 2007)
[276] Elk Grove Unified School District v. Newdow, 542 U.S. 1 (2004), (Stevens, J., opinion of the Court); http://supct.law.cornell.edu/supct/html/02-1624.ZS.html (May 16, 2007), non-paginated.
[277] Justice Antonin Scalia excused himself, upon petition by Newdow, because he publicly stated his opposition to the Ninth Circuit Court's ruling in January when he said that issues like the Pledge should be settled by lawmakers rather than judges. See Center for Individual Freedom, Freedom Line, http://www.cfif.org/htdocs/freedomline/current/in_our_opinion/justice_antonin_scalia (May 22, 2007)
[278] Elk Grove Unified School District v. Newdow, 542 U.S. 1 (2004), (Stevens, J., opinion of the Court), http://supct.law.cornell.edu/supct/html/02-1624.ZS.html (viewed May 16, 2007), non-paginated.

him on the constitutional question, as they considered the words "under God" a pure "patriotic exercise" that is in no way unconstitutional.[279]

The Supreme Court unanimous decision to preserve the term "under God" in the Pledge of Allegiance was issued on Flag Day, June 14, 2004, exactly fifty years since Congress added the words "under God" to the Pledge.

For most Justices in the majority, this result avoided a very difficult problem: it was politically impossible to strike down the Pledge, and legally impossible to uphold it.[280] By overturning the Ninth Circuit's opinion on purely technical grounds, however, the Supreme Court ignored the central and broader question of whether the presence of the words "under God" in the Pledge of Allegiance violates the Establishment Clause of the First Amendment of the Constitution. It is more than likely that new legal challenges questioning the constitutionality of the Pledge will appear in the Supreme Court again sooner or later.

Perhaps in anticipation of this happening, there have been several attempts, both in the House and the Senate, to propose an amendment to the Constitution that would protect references to God in the Pledge of Allegiance and elsewhere, and to pass a so called Pledge Protection Act that would bar federal courts from ruling on constitutional issues arising from the Pledge.[281] The 2007 Pledge Protection Act (H.R. 699), introduced to the first session of the 110th Congress, aims at amending the federal judicial code to deny jurisdiction to any federal court, and appellate jurisdiction to the Supreme Court, to hear or decide any question pertaining to the interpretation of the Pledge or its validity under the Constitution.[282] The bill was referred to the House Committee on the Judiciary, and then to the Subcommittee on

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[279] Elk Grove Unified School District v. Newdow, 542 U.S. 1 (2004), (Rehnquist, O'Connor, Thomas, concurring); http://supct.law.cornell.edu/supct/html/02-1624.ZC.html (viewed May 16, 2007), non-paginated.

[280] The Pew Forum on Religion & Public Life Supreme Court Upholds 'Under God' in Pledge of Allegiance, http://pewforum.org/press/index.php?ReleaseID=25 (viewed May 16, 2007)

[281] Congressional Actions on the Pledge of Allegiance (2001-2007), http://www.undergodprocon.org/pop/congress.htm (viewed May 16, 2007)

[282] 2007 Pledge Protection Act: http://www.undergodprocon.org/pdf/2007_Pledge_Protection_Act.pdf (viewed May 16, 2007)

the Constitution, Civil Rights and Civil Liberties, where, as of May, 2007, it awaits review.[283]

The *Newdow* case, like any other, demonstrated the current dilemma concerning religious symbols and expressions in the public square. By avoiding the real constitutional question and overturning the Ninth Circuit Court's decision on technical grounds, the Supreme Court once again indicated that the constitutionality of certain religious practices was questionable. By proposing amendments and legislation to protect the Pledge and other symbols from the jurisdiction of the courts, the lawmakers have only drawn attention to this problem.

8. Justifying the Special Approach?

When confronted with an Establishment Clause challenge, the Supreme Court has been distinguishing between symbols that have religious content and symbols that have become "secularized" or are devoid of religious meaning. Cases involving government-adopted symbols have generally turned on the question of whether the symbol was religious in nature,[284] or was expressive of primarily secular values, notwithstanding some religious references.[285]

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[283] GovTrack.US (information about the status of federal legislation): Pledge Protection Act of 2007 http://www.govtrack.us/congress/bill.xpd?bill=h110-699 (viewed May 16, 2007) (The majority of introduced legislation never makes it out of the committees)

[284] A finding that a symbol's content is religious is ordinarily sufficient to strike down its adoption by government. See Estate of Thornton v. Caldor, Inc. 472 U.S. 703 (1985) (striking down as preferential to sabbatarian religions a law prohibiting employers from forcing employees to work on their chosen sabbath), http://www.law.cornell.edu/supct/html/historics/USSC_CR_0472_0703_ZO.html, (viewed May 22, 2007) (Burger, C. J., opinion of the Court), pp. 704-711;

but see Anderson v. Salt Lake City Corp., 475 F.2d 29 (10th Cir. 1973) (upholding the public display of a monolith depicting the Ten Commandments and other religious insignia.), http://www.belcherfoundation.org/anderson.htm (viewed May 22, 2007) (Murrah, J., opinion of the circuit court), non-paginated.

[285] See Aronow v. United States, 432 F. 2d 242 (9th Cir. 1970) (upholding the use of the motto "In God We Trust" on national currency, coinage, and official documents as patriotic rather than religious); http://www.aclj.org/media/PDF/InGodWeTrustSummary.pdf (viewed May 23, 2007), pp. 1-3.

See also McGowan v. Maryland, 366 U.S. 420 (1961) (upholding Sunday closing laws, concluding that they had lost their religious significance),

http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&vol=366&invol=420 (viewed May 22, 2007), (Warrren, C. J., opinion of the Court), non-paginated.

On the premise – whether correct or not – that they possess a "patriotic or ceremonial character" with little sectarian or theological import,[286] or recognize customs no longer exclusively connected with their religious roots,[287] elements of the state-sponsored civil religion are regarded as permissible by the courts.

When analyzing this phenomenon, most modern scholars have assumed that the majority of religious practices and expressions constituting public religion do not cause any harm and, in the grand constitutional scheme, seem to be rather unimportant.[288] Yet, they are visible and invoke Establishment Clause issues –

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[286] See Aronow v. United States, 432 F. 2d 243 (9th Cir. 1970) (The Court ruled that it is "quite obvious that the national motto and the slogan on coinage and currency 'In God We Trust' has nothing whatsoever to do with the establishment of religion. Its use is of patriotic or ceremonial character and bears no true resemblance to a governmental sponsorship of a religious exercise."), http://www.aclj.org/media/PDF/InGodWeTrustSummary.pdf (viewed May 23, 2007), p. 3.

[287] See Lynch v. Donnelly, 465 U.S. 668 (1984), p. 709; (Brennan, dissenting) (noting that Christmas has "traditional, secular elements" that may be celebrated by the state); http://straylight.law.cornell.edu/supct/html/historics/USSC_CR_0465_0668_ZD.html (May 22, 2007).

[288] See e.g., ROTSTEIN, Andrew, "Good Faith? Religious-Secular Parallelism and the Establishment Clause," (*Columbia Law Review*, Vol. 93, 1993, pp. 1763-1806) (describing references to the deity in the national motto, the judicial invocation, and the Pledge of Allegiance as "hollow gestures – an accepted part of civic life, with only a literary or historical connection to theology as such;" ibid. pp. 1772-73);

LEVY, Leonard W., *The Establishment Clause: Religion and the First Amendment* (New York: Macmillan Publishing Company, 1986) (recognizing the technical unconstitutionality of references such as God save the United States and this honorable Court' and the motto 'In God We Trust', but (as they are of "trifling significance") labeling them as "silly suits" and arguing that one should "let sleeping dogmas lie," ibid., pp. 176-85);

MARSHALL, William P., "We Know It When We See It: The Supreme Court and Establishment," (*Southern California Law Review*, Vol. 59, pp. 495-550, 1986) (suggesting that the Establishment Clause leaves untouched vestiges of the nation's "de facto establishment" of religion, such as the Thanksgiving and Christmas holidays and mottos and emblems containing religious references; ibid., p. 509);

SULLIVAN, Katheen M., "Religion and Liberal Democracy" (*University of Chicago Law Review*, Vol. 59, 1992, pp. 195-223) (arguing that "we need not melt down the national currency to get rid of 'In God We Trust'" since it is at most a de minimis endorsement, although suggesting that use of "under God" in the Pledge of Allegiance "is a closer question"; ibid, p. 207).

There are also contrary (and less frequent) views: LOEWY, Arnold H., "Rethinking Government Neutrality towards Religion under the Establishment Clause: The Untapped Potential of Justice O'Connor's Insight," (*North Carolina Law Review*, Vol. 64, 1986, pp. 1042-1121). (Having analyzed the invocation "God save the United States and this Honorable Court" and the addition of "under God" to the Pledge of Allegiance, Professor Arnold Loewy concluded that neither could survive scrutiny under that test; ibid., pp. 1055-60).

LUPU, Ira, "Developments in the Law – Religion and the State," (*Harvard Law Review*, Volume 100, 1987, pp. 1606-1781) (Professor I. Lupu argues that references to God on coins, in the Pledge of Allegiance, or in ceremonies at government functions are unconstitutional because the "are inevitably discriminatory in both intent and effect, as they are successfully designed to conjure an image of a transcendent, Judeo-Christian God," p. 1653).

blurring the line between the constitutional and unconstitutional.

The Supreme Court justices have used various arguments to justify the constitutionality of different elements of "public religion" in the public sphere.

8.1. Reasoning of the Court

"In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society," Chief Justice Burger noted when addressing the constitutionality of the legislative prayer. "To invoke Divine guidance on a public body entrusted with making the laws is not," he opined, "an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country."[289] Similarly, in *Lynch,* Burger recalled "the unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789" to justify the inclusion of a crèche in a holiday display.[290]

Justice O'Connor justified religious symbols in public life because they "serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society. For that reason, and because of their history and ubiquity, those practices are not understood as conveying government approval of particular religious beliefs."[291]

In the same manner, Justice Brennan has characterized these practices as "uniquely suited to serve such wholly secular purposes as solemnizing public

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[289] Marsh v. Chambers, 463 U.S. 783 (1983), p. 792 (Burger, C. J., opinion of the Court), http://straylight.law.cornell.edu/supct/html/historics/USSC_CR_0463_0783_ZO.html (May 22, 2007)
[290] Lynch v. Donnelly, 465 U.S. 668 (1984), p. 674 (Burger, C. J., opinion of the Court), http://straylight.law.cornell.edu/supct/html/historics/USSC_CR_0465_0668_ZO.html (May 22, 2007)
[291] Lynch v. Donnelly, 465 U.S. 668 (1984), p. 693 (O'Connor, concurring), http://straylight.law.cornell.edu/supct/html/historics/USSC_CR_0465_0668_ZC.html (May 22, 2007)

occasions, or inspiring commitment to meet some national challenge in a manner that simply could not be fully served in our culture if government were limited to purely non-religious phrases. He further opined that such practices are "probably necessary to serve certain secular functions, and that necessity, coupled with the 'unbroken history of official acknowledgement of religion,' gives those practices an essentially secular meaning."[292]

Justice Brennan has further maintained that ceremonial deism has been so longstanding, commonplace, and associated with civil government that it has lost its religious meaning: "The truth is that we have simply interwoven the motto ["In God We Trust"] so deeply into the fabric of our civil polity that its present use may well not present that type of involvement which the First Amendment prohibits. This general principle might also serve to insulate the various patriotic exercises and activities used in the public schools and elsewhere which, whatever may have been their origins, no longer have a religious purpose or meaning."[293] Addressing the Pledge of Allegiance, the reference to God "may," according to Justice Brennan, "merely recognize the historical fact that [the American] Nation was believed to have been founded 'under God.'"[294] The national motto and the references to God contained in the Pledge of Allegiance are "protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content."[295]

It seems that as long as a challenged government practice has been exercised historically, or is no more dangerous than those practices exercised historically, it is not perceived by the Court as an unconstitutional establishment, endorsement, or promotion of religion. Rather, it is merely an "acknowledgement,"[296] "reminder,"[297]

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[292] Ibid., pp. 716-717 (Brennan, dissenting), http://straylight.law.cornell.edu/supct/html/historics/USSC_CR_0465_0668_ZD.html (May 22, 2007)
[293] Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963), p.303 (Brennan, J., concurring), http://supreme.justia.com/us/374/203/case.html (viewed May 23, 2007)
[294] Ibid., p. 304 (Brennan, J., concurring),
[295] Lynch v. Donnelly, 465 U.S. 668 (1984) , p. 716 (Brennan, dissenting) http://straylight.law.cornell.edu/supct/html/historics/USSC_CR_0465_0668_ZD.html (May 20, 2007)
[296] Ibid., p. 714 (Brennan, J., dissenting).
[297] Ibid., p. 685. (Burger, C. J., opinin of the Court), http://straylight.law.cornell.edu/supct/html/historics/USSC_CR_0465_0668_ZO.html (May 23, 2007)

or "recogni[tion]"[298] of "the role of religion in American life,"[299] or "our religious heritage."[300]

Other arguments frequently used to justify the "special" approach of the Court when addressing symbols and practices of civil religion have included their wide social acceptance, their role in fulfilling a social function by providing the necessary social glue (thus cementing the communal symbolic life of American society) and their harmlessness even to religious minorities and atheists. Yet, it all depends on one's perspective.

8.2. Questioning the Applicability of the "Special" Approach

The reasoning of the Court when it comes to expressions of public religion is questionable. The fact that a practice was embraced by the Founders, or has endured for decades or centuries, does not in itself immunize it from constitutional scrutiny. Justice O'Connor expressed this view in her *Allegheny* concurrence: "Historical acceptance of a practice does not in itself validate that practice under the Establishment Clause if the practice violates the values protected by that Clause, just as historical acceptance of racial or gender based discrimination does not immunize such practices from scrutiny under the Fourteenth Amendment."[301]

Justifying the constitutionality of religious practices on the bases of their "solemnization" function, can be equally flawed, as the same would apply also to school prayers and formal church services during public events; practices that the Court – despite their long history and traditions involved – declared unconstitutional.

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[298] Abington Sch. Dist. v. Schempp, 374 U.S. 203 (1963), p. 304 (Brennan, J., concurring), http://supreme.justia.com/us/374/203/case.html (viewed May 23, 2007);
Engel v. Vitale, 370 U.S. 421 (1962), p. 450 (Stewart, J., dissenting), http://straylight.law.cornell.edu/supct/html/historics/USSC_CR_0370_0421_ZD.html (May 23, 2007)

[299] Lynch v. Donnelly, 465 U.S. 668 (1984), p. 674 (Burger, C. J., opinion of the Court) http://straylight.law.cornell.edu/supct/html/historics/USSC_CR_0465_0668_ZO.html (May 23, 2007)

[300] Ibid., p. 686.

[301] County of Allegheny v. American Civil Liberties Union, 492 U.S. 573 (1989), p. 630 (O'Connor, J., concurring), http://straylight.law.cornell.edu/supct/html/historics/USSC_CR_0492_0573_ZC.html (viewed May 23, 2007)

In light of what we know about religion in early America and actions of the Founding Fathers or the Framers pertaining to religion, there is little doubt that any of them would find the present practices such as invocations of God troubling.

Yet, despite the widespread religiosity, the Americans of today are different in their religious composition and habits from the inhabitants of the thirteen states who 220 years ago took upon themselves to "form a more perfect union."[302] As I have shown above, nearly one hundred percent of the nation's citizens at the time of the founding were Christians,[303] most of them Protestants.[304] Established churches existed in ten of the thirteen colonies,[305] blasphemy and Sabbath laws were in place nearly everywhere.[306] In sharp contrast, today Christians comprise less than 80 percent of American population and the percentage of Protestants dropped to less than 50%.[307] Millions of Americans do not believe in God or the Judeo-Christian concept of God and the "common" spiritual values hidden behind the concept of "civil religion" do no longer apply to a significant portion of the population, one that is likely to increase in the years to come.

The Supreme Court has recognized many times that the Constitution is not a static document frozen in time. Were it not the case, African-Americans would still be subjected to Jim Crow laws and segregated schools, women would not be entitled to the protections of the Equal Protection Clause, etc. As a result, practices that seemed permissible at the time of the founding cannot be permissible now. As Brennan put it in the *Marsh* case in 1983, "[O]ur religious composition makes us a vastly more diverse people than were our forefathers… In the face of such profound changes, practices which may have been objectionable to no one in the time of Jefferson and

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[302] The Constitution of the United States, 1787
www.usconstitution.net/xconst.html (viewed on April 30, 2007)
[303] STOKES, A. P. & PFEFFER, L., *Church and State in the United States*, p. 39.
[304] CURRY, T. J., *The First Freedoms*..., p. 218.
[305] STOKES, A. P.: *Church and State in the United States*, p. 274.
[306] CURRY, T. J., *The First Freedoms*..., p. 190.
[307] American Religious Identification Survey 2001,
http://www.gc.cuny.edu/faculty/research_studies/aris.pdf (viewed on May 1, 2007), p. 12.

Madison may today be highly offensive to many persons, the deeply devout and the nonbelievers alike."[308]

Even conservative scholar Robert Cord, an advocate of an "originalist" interpretation of the Establishment Clause recognizes the profound changes that had taken place in American society since the founding of the U.S.: "The religious pluralism that now exists in the United States has as a consequence made the historic prohibitions of the Establishment Clause more delimiting of governmental actions. Today, because of the present religious diversity in the nation, public-sponsored activities that were nondiscriminatory in the past can no longer be reconciled with the First and Fourteenth Amendments' ban against placing any purely sectarian activity identified with one religious tradition into a preferred position."[309]

While the practices and expressions of civil religion can be perceived as innocuous and cause little harm to be real threat to religious liberty, they do remain coercive, or at least exclusive, for those who do not share their ideals, who do not believe in God, while living in a "nation under God."

The state-sanctioned presence of religion in public sphere may pressure those who don't adhere to the accommodated beliefs to conform to the beliefs of the majority, or send message of exclusion from the community, despite the fact that these are neither intended nor even perceived by the majority. This feature was well characterized by Professor Tribe in his article for the Harvard Law Review: "When the government dons religious robes, those vestments are least visible to those who wear the same colors." [310]

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[308] Marsh v. Chambers, 463 U.S. 783 (1983), p. 817 (Brennan, J., concurring), http://straylight.law.cornell.edu/supct/html/historics/USSC_CR_0463_0783_ZD.html (May 22, 2007)
[309] CORD, Robert L.: *Separation of Church and State: Historical Fact and Current Fiction,* New York: Lambeth Press, 1982, p. 165.
[310] TRIBE, Laurence H., "Constitutional Calculus: Equal Justice or Economic Efficiency?" *Harvard Law Review,* Vol. 98, January 1985, p. 611.

It is only two years ago, when in one of the recent *Decalogue* cases, Justice Scalia conceded that government cannot invoke the blessings of "God," or even say his name, "without contradicting the beliefs of some people that there are many gods, or that God or the gods pay no attention to human affairs."[311] Nevertheless, this contradiction is of no constitutional moment, Scalia argued, because the historical understanding of the Establishment Clause permits government wholly to ignore those who do not subscribe to monotheism:

"[W]ith respect to public acknowledgment of religious belief, it is entirely clear from our Nation's historical practices that the Establishment Clause permits th[e] disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists."[312]

Given that the principle of minorities' protection from majoritarian impulses has widely been considered as one of the central tenets of the First Amendment, this conclusion is indeed striking – and alerting.

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[311] McCreary County v. ACLU, 125 S. Ct. 2722 (2005), p. 2753 (Scalia, J., dissenting opinion joined by Rehnquist, C.J., & Thomas, J.). http://straylight.law.cornell.edu/supct/html/03-1693.ZD.html (viewed on May 22, 2007), pp. 2752-2753. (The Supreme Court ruled on June 27, 2005, in a 5-4 decision, that a government-sponsored display of the Ten Commandments in two Kentucky county courthouses was unconstitutional. Interestingly, the similar case of Van Orden v. Perry - was handed down the same day with the opposite verdict – upholding a display of the Ten Commandments on the grounds of the Texas State Capitol (also with a 5 to 4 decision). The "swing vote" between these two cases was Justice Stephen Breyer.

Both *Decalogue* cases were handed down less than two years after the Court denied review in a divisive, high-profile case involving placement of a Ten Commandments monument in the Alabama state courthouse by then-Alabama Chief Justice Roy Moore.

[312] McCreary County v. ACLU, 125 S. Ct. 2722 (2005), p. 2753 (Scalia, J., dissenting opinion joined by Rehnquist, C.J., & Thomas, J.). http://straylight.law.cornell.edu/supct/html/03-1693.ZD.html (viewed on May 22, 2007)

CONCLUSION

The primary objective of my thesis - as the title suggests – was to examine the compatibility of the widespread religious expressions and practices in American public sphere with the principle of strict separation that has become the basis for the Supreme Court's Establishment Clause jurisprudence. A compatibility of the "high and impregnable" "wall of separation" with Jefferson's "wall" was also examined.

It is undisputable that religion and God permeate American history and culture: the national motto "In God We Trust" is imprinted on the U.S. currency; the phrase "one Nation under God" is proclaimed by countless schoolchildren every day; the United States has a statutorily mandated Prayer Day; the House of Representatives and many state legislatures open sessions with an invocation by a chaplain who is paid by the government; the various branches of the military keep their own chaplains on the payroll; Supreme Court sessions open with "God save the United States and this Honorable Court;" witnesses in American courts have for centuries taken oaths on the Bible; Presidents since George Washington have issued proclamations of Thanksgiving, etc.

Yet, the fact that religion was part of the fabric of the American nation from its early days was ignored by the Supreme Court, when defining the standards according to which constitutional challenges concerning religion were to be judged. The doctrine pronounced and employed by the Court in its First Amendment cases was based on one persistent theme: the "wall of separation" that was to be kept "high and impregnable." Invoked in a majority opinion by the Chief Justice Hugo Black in the first landmark case of *Everson v. Board of Education* supposedly on the bases of Jefferson's "wall," it became a symbol for an absolute separation between church and state.

This approach resulted in what many commentators saw as a gradual removal of religious expression from the public square. Supreme Court held prayers and

moments of silence in public schools unconstitutional, outlawed the reading of Scripture or religious texts, banned the housing of Bibles and prayer books, and proscribed teaching theology or creationism in public schools. At the same time, states were prohibited to provide salary and service supplements to religious schools, to lend them state-prescribed textbooks, to allow tax deductions or credits for religious school tuition, etc.

Without evaluating the good or bad aspects of these rulings, it is unquestionable that they set a new course in the existing church-state relations and imposed considerable limitations on what had been a complex interplay between religion and the public sphere.

The short historical excursion designed to verify the Supreme Court's justification for the "high and impregnable" wall in the works of the architect of the "wall of separation," Thomas Jefferson, was to a great extent revealing. Confronted by a variety of diverse opinions and interpretations of the "wall of separation" itself, it is not at all clear what Jefferson's wall was actually supposed to separate, if it was a solid wall or a porous barrier. Searching in vain for a commitment towards a "high and impregnable" wall when examining Jefferson's public actions and writings, everything seems to suggest that the wall between church and state – as understood by Jefferson – was indeed much lower and more permeable than the one later attributed to him. Present throughout his writings is a strong commitment towards the principle of federalism and religious liberty. Yet, despite his lifetime devotion to freedom of conscience it is unlikely that he would deem the First Amendment with its "wall of separation" appropriate to protect religious rights in the states, for this would have dangerously undermined what he considered as the primary protector of civil and religious liberty, namely federalism.

Thus, when the Supreme Court justices embarked on their unenviable task to define the boundaries between the permissible and the impermissible in church and state relations, they based their jurisdiction upon a metaphor that was not at all as clear

and straightforward as they would have hoped. Moreover, the metaphor did provide little practical guidance for the application of First Amendment principles to real-world church-state controversies, and its uncritical use by the justices injected inflexibility into Supreme Court's church-state debate.

In an attempt to define a uniform approach according to which the constitutionality of religion-related cases should be assessed, the Supreme Court has come to apply the so called *Lemon* test that has served as a doctrinal keystone of Establishment Clause analyses for more than two decades. Built upon the concept of the "wall of separation," *Lemon* did not constitute any major shift in the Supreme Court's Establishment Clause jurisprudence and certainly lent some clarity to what would otherwise be an unclear area of law. The "endorsement" and "coercion" tests that have emerged in the 1990s have made the Supreme Court's approach towards the various First Amendment cases more flexible, but at the same time also more inconsistent.

These concrete guidelines did, however, provide little help in solving the puzzle of public religion. When confronted with cases challenging the constitutionality of various religious expressions and practices of public religion, the Court has been facing a serious dilemma. The Establishment Clause jurisprudence, based largely on a doctrine of secularity, indicated there was a substantial likelihood that certain religious expressions would not meet the criteria of the three doctrinal tests and would be deemed unconstitutional as a result.

To ensure that these religious expressions would not be held unconstitutional if subjected to existing constitutional scrutiny, the Court has adopted an alternative approach. Rather than applying the existing analytical framework, it chose to ignore the tests and standards and instead, sought a justification for the constitutionality of the practices in question in American history, deeming them secularized, or diluted of any significant religious value. In this unprecedented manner, the Court has essentially defined its own "wall of separation," preventing historical religious practices and

expressions from being struck down by current Establishment Clause jurisprudence. While justifying some religious practices and expressions, such as legislative prayers by publicly funded chaplains or the phrase "One Nation under God" in the Pledge of Allegiance as references to history and national heritage, the Court has struck down seemingly similar religious practices – such as prayers and moments of silence in schools – on the ground that they violate the Court's established doctrinal tests. This internal inconsistency of the Supreme Court's approach towards religious expressions was caused in part by the absence of a clear formula for determining when a practice is to be deemed sufficiently secular to avoid an Establishment Clause violation and by a lack of consensus among justices themselves, as to what role religion should play in the public square. The Establishment Clause jurisprudence has thus evolved into an inconsistent analysis based on an arbitrary determination of the "religiousness" of various practices.

While recognizing that certain practices and expressions of public religion do differ from the expressions of sacral religion, the Supreme Court has not yet figured out a standard by which to judge these expressions and distinguish between them. If it gave a legal recognition to the concept of civil religion – which it had not done – a legal definition of civil religion would also be necessary. The Court would then face a problem analogous to the one formulated in its obscenity cases: "We can't define it, but we know it when we see it."[313]

The "immunization" of certain religious expressions and practices from the established doctrinal tests has saved the Court from answering the difficult question of whether these expressions are constitutional under the current scrutiny or are not, and should be outlawed as a result. The cases examined in my thesis proved that the question itself is not quite as difficult, provided we examine the practices through the lens of the established doctrine. What is, however, difficult is the answer. Taking into account the widespread religiosity among American citizens including the President,

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[313] Slate, The Law, Lawyers and the Court, "How the Courts have forsaken both God and the Constitution," by Avi Schick and Shaifali Puri, October 5, 2006, http://www.slate.com/id/2151035/ , non-paginated (viewed May 23, 2007)

and the many efforts, both in the House and the Senate, to propose an amendment to the Constitution that would protect references to God, it is clear that a decision aiming to exclude religion from the public realm would be highly unfavorable and politically almost impossible. It is, therefore, more than likely that the current approach of the Supreme Court towards civil religion cases will continue.

What will, however, also continue – as American nation becomes more diverse and shifts further away from Christianity and other organized religions – is the rise in the numbers of those who feel alienated or excluded from the community that attaches such a weight to its religious practices and symbols.

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[314] The exact links to the individual court cases discussed in the thesis are to be found in the footnotes. As these are rather extensive, I have deliberately chosen not to list them in the bibliography.

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RESUMÉ

První dodatek Ústavy Spojených států amerických mj. stanovuje, že „Kongres nesmí vydávat zákony zavádějící nějaké náboženství nebo zákony, které by zakazovaly svobodné vyznávání nějakého náboženství [...]". Jádrem sporu se stala především první část dodatku, tzv. zaváděcí klauzule (Establishment Clause). Zatímco stoupenci doslovné interpretace zastávají názor, že Kongres nesmí založit státní církev, ale může náboženství podporovat, preferují jiní širší interpretaci, tj. úplný zákaz zasahování státu do náboženských záležitostí. Ústavní soud se ve svém prvním velkém případě souvisejícím se zaváděcí klauzulí (*Everson v. Board of Education*, 1947) jednomyslně vyslovil pro interpretaci širší. Ve svém rozsudku se odvolal na Thomase Jeffersona a jeho „dělící zeď" (wall of separation), zábranu či bariéru mezi církví a státem, jež má dle výroku soudu zůstat „vysoká a nedobytná". Myšlenka „dělící zdi", jíž Jefferson použil v dopise baptistům z Danbury (1802), byla přijata jako komentář k prvnímu dodatku Ústavy, který – přes množství odpůrců – značně přispěl k vytlačení náboženských projevů z veřejné sféry.

Předložená práce je postavena na paradoxu existence již zmíněné „vysoké a nedobytné"„dělící zdi" mezi církví a státem na straně jedné a četných náboženských praktik a symbolů v americké společnosti na straně druhé. Modlitba před zasedáním Kongresu, prezidentem vyhlašovaný Den modliteb či četné odkazy na Boha jsou pouze některé z příkladů toho, co někteří označují jako americké veřejné náboženství.

Hlavním cílem mé práce je prověřit slučitelnost těchto náboženských projevů a praktik s principem tzv. striktní separace, který se stal základem soudní interpretace prvního dodatku. Problematika je rozdělena do tří částí. První, úvodní část pojednává o fenoménu amerického veřejného náboženství. Druhá část poukazuje na standardy a postupy Ústavního soudu v případech souvisejících s prvním dodatkem a ptá se, zda byly založeny na „správném" předpokladu, tj. zda „dělící zeď" vytyčena Jeffersonem byla skutečně tak „vysoká a nedobytná", jak ji později interpretoval Ústavní soud. Třetí, poslední část analyzuje na základě existujících soudních standardů ústavnost různých náboženských symbolů a praktik, které tvoří součást amerického „veřejného náboženství", a postup soudu, jakým se snaží jejich slučitelnost s Ústavou ospravedlnit.