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

[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.