

## ARTICLE

### CHRISTIANITY AND THE FRAMERS: THE TRUE INTENT OF THE ESTABLISHMENT CLAUSE

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*“Our Constitution was made only for a religious and moral people. It is wholly inadequate to the government of any other.”*<sup>1</sup>

#### I. INTRODUCTION

There was a time not long ago, and well within the lifetime of a late middle-aged American, where prayer in school was not uncommon. School plays during the holidays had Christmas music and themes, Christmas trees were called just that, and Good Friday was not just good because school was closed. Nativity scenes and Ten Commandment monuments were regularly seen in public locations, and no one considered the words “under God” in the pledge, “In God we Trust” on coin, or the National Day of Prayer to be matters of controversy. Religion, and specifically Christianity, was part and parcel of every day public life.

Without question, the historical place concerning the influence of Christianity and the modern day impact of the Judeo-Christian ethic on the nation have been under attack for some time. In recent years, the attacks on religion in the public square have become more overt and widespread.<sup>2</sup>

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1. President John Adams, Address at West Point (Oct. 11, 1798).

2. For example, a variety of stories covering religious issues over the past few years have reported, *inter alia*, the holding of a high school graduation at a Connecticut mega-church is unconstitutional. Nathan Black, *Graduations at Conn. Church Ruled Unconstitutional*, THE CHRISTIAN POST (June 1, 2010, 10:49 AM), <http://www.christianpost.com/news/graduations-at-conn-church-ruled-unconstitutional-45382/>. Another example concerns lawsuits against the National Day of Prayer. Caroline Shively, *President Intends to Recognize Nat’l Day of Prayer, Despite Lawsuit*, FOX NEWS (Apr. 16, 2010), <http://politics.blogs.foxnews.com/2010/04/16/president-intends-recognize-natl-day-prayer-despite-lawsuit>. In another instance, senior citizens were told they could not pray before a meal. *Senior Citizens Told They Can’t Pray Before Meals*, TIFTON GAZETTE (May 8, 2010), <http://tiftongazette.com/local/x1989607915/Senior-citizens-told-they-cant-pray-before-meals>. A Christian evangelical group that works to improve the lives of underprivileged children for twenty years has been prohibited from conducting Bible study classes in public housing projects in Tulsa. James Osborne, *Evangelical Group Banned From Tulsa Housing Projects, Chapter Leader Says*, FOX NEWS (June 8, 2009), <http://www.foxnews.com/story/0,2933,525424,00.html>. Finally, school officials in Florida

Because of the ever-changing culture, one can observe great changes in the public's view of religion's place in open society. Some view religion as divisive. Others hold the more widely accepted view that religious matters should neither be imposed nor supported by those in the public arena.<sup>3</sup> Further still, the idea that Christianity would be celebrated, publicized, or promoted in the public arena, has become an increasingly foreign concept to the average American. Based on today's culture, it would seem absurd to suggest that the United States is a "Christian" nation.<sup>4</sup> On April 4, 2009, *Newsweek* declared on its cover "The Decline and Fall of Christian America." Jon Meachem, editor of the newsweekly, noted that: "This is not to say that the Christian God is dead, but that [H]e is less of a force in American politics and culture than at any other time in recent memory."<sup>5</sup>

It might surprise most Americans to know that the United States Supreme Court found the United States to be a "Christian nation" in the case of *Holy Trinity Church v. United States*.<sup>6</sup> Specifically, the Court found that the nation was a "Christian Nation" as an essential element when

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have been threatened with imprisonment for leading a prayer before luncheon dedicating a school building. Katie Tammen, *School officials may be jailed for prayer*, NEWS HERALD (Aug. 5, 2009, 5:14 PM), <http://www.newsherald.com/articles/high-76368-administrators-pensacola.html>. These stories simply scratch the surface of the ongoing disputes over religion's place in America.

3. In the past few years, several Atheists produced best selling books. See RICHARD DAWKINS, *THE GOD DELUSION* (2006); CHRISTOPHER HITCHENS, *GOD IS NOT GREAT: HOW RELIGION POISONS EVERYTHING* (2007).

4. A recent Harris Interactive Poll found the following: A little more than a third of Americans believe all the text in the Old Testament or all the text in the New Testament represent the Word of God, however, a slightly larger percentage believed in UFO's (36%). Other relevant findings included: 80% believe in God and 71% that Jesus is God or the Son of God; 68% believed in the survival of the soul after death; Hell (62%), the Virgin birth (61%), the devil (59%), and Darwin's theory of evolution (47%). *Poll: Belief in UFOs Matches Belief in OT, NT as Word of God*, FREWARE BIBLE BLOG (Dec. 12, 2008), <http://www.freewarebible.com/blog/?p=276>. A poll conducted by researchers at Trinity College in Hartford, Connecticut, surveyed 54,000 people between February and November of 2008. The survey showed that the percentage of Americans identifying themselves as Christians dropped to 76% of the population, down from 86% in 1990. Barry A. Kosmin & Ariela Keysar, *American Religious Identification Survey 2008—Summary Report* (Mar. 2009), available at [http://www.americanreligionsurvey-aris.org/reports/ARIS\\_Report\\_2008.pdf](http://www.americanreligionsurvey-aris.org/reports/ARIS_Report_2008.pdf)

5. Jon Meachan, *The End of Christian America*, NEWSWEEK (Apr. 4, 2009). Mr. Meachem's article relied on an American Religious Identification Survey where the percentage of self-identified Christians fell by ten percentage points since 1990, from eighty-six to seventy-six percent. *Id.*

6. *Holy Trinity Church v. United States*, 143 U.S. 457 (1892).

arriving at its decision. Justice David Brewer, writing for a unanimous Supreme Court, found that a Federal law prohibiting the employment of foreign workers was not intended to cover a minister who was from England.<sup>7</sup> In its decision, the Court spent over half of its discussion supporting its analysis that Congress could not have intended the legislation that prohibited the hiring of foreign workers to include ministers by tracing how the United States was a Christian nation. The Court noted that “But, beyond all these matters, no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people. This is historically true. From the discovery of this continent to the present hour, there is a single voice making this affirmation.”<sup>8</sup>

The Court traced the impact of Christianity on the nation starting with Columbus. It proceeded through the various charters that established the separate colonies. It then considered and reviewed the nation’s founding documents. The Court declared that “There is no dissonance in these declarations. There is a universal language pervading them all, having one meaning. They affirm and reaffirm that this is a religious nation. These are not individual sayings, declarations of private persons. They are organic utterances. They speak the voice of the entire people.”<sup>9</sup>

The Court further concluded that the evidence of the United States being a Christian nation went well beyond just the founding documents of the country. It was manifest in how the nation carried on its affairs. The Court then summed up the totality of Christianity’s impact on the nation by stating:

If we pass beyond these matters to a view of American life, as expressed by its laws, its business, its customs, and its society, we find everywhere a clear recognition of the same truth. Among other matters note the following: The form of 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 of all wills, “In the name of God, amen;” the laws respecting the observance of the Sabbath, with the general cessation of all secular business, and the closing of courts, legislatures, and other similar public assemblies on that day; the churches and church organizations which abound in every city, town, and hamlet; the multitude of

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7. *Id.*

8. *Id.* at 465.

9. *Id.* at 470.

charitable organizations existing everywhere under Christian auspices; the gigantic missionary associations, with general support, and aiming to establish Christian missions in every quarter of the globe. These and many other matters which might be noticed, add a volume of unofficial declarations to the mass of organic utterances that this is a Christian nation.<sup>10</sup>

Notwithstanding, to the modern secularist, the notion of America being described as a “Christian nation” is foolhardy. In the secularist view, the nation was established with a new and unique form of government, one in which organized religion was intended to play no role.<sup>11</sup> The modern secularist’s general position is that with all matters concerning government and any entity that receives public financial support, church and state are to

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10. *Id.* at 471 (emphasis added). Some secularists argue that this part of the opinion was merely dicta and not essential to the holding of the case. However, the issue before the Court was whether congressional legislation that clearly intended to limit the hiring of foreign workers was also intended to deny the hiring of a foreign pastor by a Christian church. The statute at issue provided exceptions for “professional actors, artists, lecturers, singers, and domestic servants” but not preachers. *Id.* at 458-59. To reach its decision, it was essential for the Court to trace the country’s Christian roots, from Columbus through the Constitution. The view that the Court’s statement—that the United States was indeed a Christian nation—was central to the decision was later supported by Justice Kennedy:

The Court overrode the plain language, drawing instead on the background and purposes of the statute to conclude that Congress did not intend its broad prohibition to cover the importation of Christian ministers. The central support for the Court’s ultimate conclusion that Congress did not intend the law to cover Christian ministers is its lengthy review of the “mass of organic utterances” establishing that “this is a Christian nation,” and which were taken to prove that it could not “be believed that a Congress of the United States intended to make it a misdemeanor for a church of this country to contract for the services of a Christian minister residing in another nation.

Pub. Citizen v. U.S. Dep’t of Justice, 491 U.S. 440, 474 (1989) (Kennedy, J., concurring) (quoting Holy Trinity Church v. U.S., 143 U.S. 457, 471 (1892)).

11. To support this position, secularists point to the writings of some of the Founding Fathers. They also look to language in the First Amendment, which states in part that “Congress shall make no law respecting an establishment of religion,” otherwise known as the Establishment Clause, as evidence of the Framers’ secular intent. In addition, they point to the some of the nation’s founding documents, which they argue testify that the Framers intended a “wall of separation” between the State and religion. See *About the Foundation FAQ*, FREEDOM FROM RELIGION FOUNDATION, <http://www.ffrf.org/faq/about-the-foundation/why-is-the-foundation-concerned-with-state-church-entanglement/> (last visited Mar. 28, 2011); *Frequently Asked Questions About Americans United*, AMERICANS UNITED FOR SEPERATION OF CHURCH AND STATE, <http://www.au.org/about/faqs/> (last visited Mar. 28, 2011).

be, and must remain, permanently separate.<sup>12</sup> Even if one were to argue about the past religious history of the country, secularists point out that modern America is now too pluralistic on religious and moral questions, and that the public interest is best served by the government remaining completely neutral on religious questions and totally separate from religious activities.<sup>13</sup> Therefore, one could surmise that no one could now accurately and intelligently describe the United States as a “Christian nation.”<sup>14</sup>

While one may accurately contend that most aspects of Christianity have been effectively taken out of large areas of modern “public life,” there is still evidence of state support for religion. For example, “In God we Trust” still appears on our coins,<sup>15</sup> oaths of office still invoke the “help” of God, and in 2001, President Bush established the White House Office of Faith-Based and Neighborhood Partnerships by executive order.<sup>16</sup> And yet, to the

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12. Organizations such as the Freedom from Religion Foundation, Americans United for Separation of Church and State, People for the American Way, and the American Civil Liberties Union have all worked tirelessly to achieve a complete separation between government and religion. See Press Release, ACLU, ACLU and Americans United Demand Connecticut School District Stop Holding Graduation at Christian Church (Nov. 18, 2009), <http://www.aclu.org/religion-belief/aclu-and-americans-united-demand-connecticut-school-district-stop-holding-graduation>; see also *Does v. Enfield Sch. Dist.*, 716 F. Supp. 2d 172, 201 (D. Conn. 2010) (granting the ACLU’s motion for preliminary injunction and stating that holding a public high school graduation ceremony at a church violates the Establishment Clause).

13. See Press Release, ACLU, *supra* note 12.

14. President Barack H. Obama, during a news conference in a March 2009 visit to Turkey, stated, “One of the great strengths of the United States is . . . we have a very large Christian population—we do not consider ourselves a Christian nation or a Jewish nation or a Muslim nation. We consider ourselves a nation *of citizens who are bound by ideals and a set of values.*” Michael Lind, *America is not a Christian nation*, SALON.COM (Apr. 14, 2009 6:43 AM), [http://www.salon.com/news/opinion/feature/2009/04/14/christian\\_nation](http://www.salon.com/news/opinion/feature/2009/04/14/christian_nation) (emphasis added).

15. “In God we Trust” has been the subject of litigation. See *Aronow v. United States*, 432 F.2d 242, 243 (9th Cir. 1970) (stating that the use of the phrase “is of patriotic or ceremonial character and bears no true resemblance to a governmental sponsorship of a religious exercise”); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 17-18 (2004) (holding that a non-custodial parent does not have standing to bring suit on behalf of his daughter to challenge the constitutionality of using “under God” in the Pledge of Allegiance as an impermissible government endorsement of religion).

16. Exec. Order No. 13199, 66 Fed. Reg. 8499 (Jan. 29, 2009). Faith-based organizations are eligible to participate in federally administered social service programs to the same degree as any other group, although certain restrictions have been created. Faith-based organizations may not use direct government funds to support inherently religious activities such as prayer, worship, religious instruction, or proselytization. Any inherently religious activities that these organizations may offer must be offered separately in time or

mild frustration of some religious conservatives, courts have recently noted that these public statements of recognition of God have no religious significance whatsoever. Rather, they represent mere cant or “ceremonial deism” that are deemed to have lost their fundamental religious character due to their longtime, customary use.<sup>17</sup>

The courts have played a tremendous role in removing religion from areas of the nation’s public life that have any relationship to the government. To varying degrees, court decisions have banned religious expression in public schools,<sup>18</sup> at public parks or buildings,<sup>19</sup> or any other entity<sup>20</sup> that might find any tangential taxpayer support. Many of these court

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location from services that receive federal assistance, and faith-based organizations cannot discriminate on the basis of religion when providing federally supported services.

17. *Lynch v. Donnelly*, 465 U.S. 668, 716 (1984) (Brennan, J., dissenting) (using the term “ceremonial deism” for the first time and stating that certain religious expressions have lost their religious content because of their rote repetition in a secular context). *See also Nedow*, 542 U.S. at 41 (O’Connor, J., concurring) (“[O]ur continued repetition of the reference to ‘one Nation under God’ in an exclusively patriotic context has shaped the cultural significance of that phrase to conform to that context. Any religious freight the words may have been meant to carry originally has long since been lost.”).

18. *See Lee v. Weisman*, 505 U.S. 577, 587 (1992) (holding that the government may not coerce students to participate in a religious exercise and that an invocation at a public school graduation ceremony violates the Establishment Clause); *Edwards v. Aguillard*, 482 U.S. 578, 585-86 (1987) (holding that a statute requiring the teaching of creation science and banning the teaching of evolution is unconstitutional because it is based entirely on a desire to advance a particular religious belief); *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985) (holding that requiring a period of silent prayer is unconstitutional if it is motivated entirely by a desire to advance religion and lacks any secular purpose); *Chamberlin v. Dade Cnty. Bd. of Pub. Instruction*, 377 U.S. 402, 402 (1964) (per curiam) (invalidating a Florida statute requiring regular recitation of the Lord’s Prayer and daily Bible reading); *Engel v. Vitale*, 370 U.S. 421, 424 (1962) (holding that requiring students to recite a specific prayer at the beginning of the school day was entirely inconsistent with the Establishment Clause).

19. *See ACLU v. Schundler*, 168 F.3d 92, 107-08 (3d Cir. 1999) (holding that a holiday display including religious symbols does not violate the Establishment Clause if it is part of a larger holiday display); *Allegheny Cnty. v. ACLU*, 492 U.S. 573, 598-600 (1989) (holding that the inclusion of religious symbols depends upon the setting and that an entirely religious display would violate the Establishment Clause); *Lynch*, 465 U.S. 668, 671, 687 (1984) (holding that the inclusion of a crèche as one element of a holiday display does not violate the Establishment Clause if other secular elements are included).

20. *See McCreary Cnty. v. ACLU*, 545 U.S. 844, 860 (2005) (holding that the display of the Ten Commandments in a county courthouse violates the Establishment Clause); *Stone v. Graham*, 449 U.S. 39, 41-42 (1980) (stating that requiring the posting of the Ten Commandments on the walls of public school classrooms is undeniably aimed at advancing religion and is unconstitutional). *Contra Van Orden v. Perry*, 545 U.S. 677, 690 (2005)

decisions limiting religion in the public square have simply failed to apply the Framers' intent correctly concerning the Establishment Clause for a variety of reasons, and all have left a lasting legacy removing Christianity from public view. A common feature of many of the decisions concerning religion's place in American society has been an increasing failure to appreciate fully what our Founding Fathers intended to accomplish with the Establishment Clause as it relates to religious expression in the public square. The failure of the courts to apply the Framers' original intent in their decision making process goes deeper than just having an inadequate understanding of that intent. It is critical to understand that beneath every decision made by the Founding Fathers concerning religion's place in society, and particularly concerning the Establishment Clause, was an underlying goal that was energized and motivated by their particular view of man and the world.

Instead, secularists have been increasingly empowered by the courts' failure to recognize, acknowledge, and appreciate the nuanced religious goals of our Founding Fathers concerning religion's place in the public square. We are now in a situation where secularists, in attempts to remove all aspects of religion from public life, can point to an ever-growing body of case law for support.<sup>21</sup> What has been lacking from many court decisions that analyze the Establishment Clause's relation to the proper place of religion in public affairs is an accurate review of the life, times, personal history, philosophy, and beliefs of the Founding Fathers.<sup>22</sup> In our modern society, there has become a general ignorance concerning what exactly our

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(holding that a passive display of the Ten Commandments is permissible because of its historical significance).

21. These court decisions have now been translated into wide ranging political principles which serve to severely limit any religious expression that might have any relationship, no matter how tangential, to public support. Secular principals, supported by court decisions, and embodied by the phrase "separation of Church and State," are now confirming the ever-increasing popular view that the United States was, is, and should be a secular society. Furthermore, secularists look to build an ever increasing and enlarging "wall of separation" between the State and Church.

22. See PHILLIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* 5 (2002) (discussing the historical basis and development of Church and State separation). Dr. Hamburger is a professor of law at Columbia University whose provocative and brilliant treatise will certainly be used as a reference by courts in future Church and State relation cases. His work is an incisive historical look at the Establishment Clause. Dr Hamburger intricately explores the view that before the early 19th century, few argued for religious liberty in terms of "Separation of Church and State." To the contrary, advocates for religious liberty rejected that phrase, seeking rather to establish religious liberty via disestablishment of State religion, not "Separation" as the term has become popularly known and used today.

Founding Fathers were attempting to achieve with respect to religion in general, and Christianity in particular. Until and unless we, as a nation, begin to pay proper respect to what the Framers intended to accomplish, the courts will continue to misconstrue the Establishment Clause, and the nation will arrive at a place completely devoid of any public expression of religion in any form. This article attempts to explore what the Framers intended to accomplish with the Establishment Clause. It will also detail where the courts have incorrectly applied their reasoning on issues concerning the place of religion in the public square, and what should be the way forward in light of our increasingly diverse religious culture. Finally, this article will determine the correct place for religion within the public square.

## II. PHILOSOPHICAL BACKGROUND OF THE FRAMERS

Most of the Founding Fathers had what could be accurately described as a typical colonial education. This education took place at home and at church run schools. The basic texts were the Bible and the New England Primer.<sup>23</sup> While the style of education of the Framers differed depending upon the region from which they came, it is certain that Bible reading was a universal and essential aspect of that education.<sup>24</sup> As the Founding Fathers went on to higher education, certain political thinkers and philosophies tended to dominate the political landscape of that era. Accordingly, these early political writers had a great influence upon the Framers and their influence can be seen in the Framers' writings and in the nation's founding documents.

As noted, the Bible was a book read by all of our Founding Fathers<sup>25</sup> as part of their educational backgrounds. Other than the Bible, the most quoted

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23. THOMAS A. BAILEY ET AL., *THE AMERICAN PAGEANT* 335 (Patricia A. Coryell ed., 11th ed. 1998). In 1783, Noah Webster published the first speller, which emphasized patriotic and moral values while teaching correct spelling and grammar. It is reported that Webster's Speller sold over twenty-four million copies and quickly became a standard text in American schools.

24. *Id.* at 95. Puritan New England, largely for religious reasons and consistent with the Calvinist belief that one should be able to read and interpret the Scriptures, was more zealously interested in education than any other colonial region. The Massachusetts Act of 1642 and 1647 made education compulsory and required villages with more than fifty homes to establish a school and hire a teacher. Throughout the colonies, a large percentage of schools were established by the Congregational Church, which stressed the need for Bible reading by the individual worshippers.

25. Donald Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 AM. POL. SCI. REV. 192 (1984) (referencing a study



source used by our Founding Fathers to support their writings was Baron Charles Montesquieu, who was cited by the Framers in 8.3% of their writings.<sup>26</sup> Montesquieu was a conservative Catholic whose main work, *Spirit of the Law*, stressed some of his most basic tenets.<sup>27</sup> Montesquieu declared that a government based on Christianity is superior because Christianity promotes a more moderate form of government.<sup>28</sup> Montesquieu

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of thirty thousand writings of the Framers and finding that of all the quotations, the Framers' primary source was the Bible). The book of the Bible quoted most often was Deuteronomy, which deals with the law of God that governed the Jewish nation, and was written by Moses. Since most of the writings of the Framers were political writings dealing with the formation of government, the use of the book of Deuteronomy is self-evident. *See also* DVD: Institute on the Constitution: Uncovering the Foundations: The American Vision of Law and Government (Eidsmoe 1995).

26. Eidsmoe, *supra* note 25.

27. Beastrabban, *The Bible, Judaism and Christianity and the Origins of Democracy: Part 2*, BEASTRABBAN'S WEBLOG (July 6, 2008, 1:22 PM), <http://beastrabban.wordpress.com/2008/07/06/the-bible-judaism-and-christianity-and-the-origins-of-democracy-part-2/>. There is no doubt that St. Augustine heavily influenced Montesquieu. St. Augustine's work *City of God* was and still is a tour de force. St. Augustine had developed concepts that led to a separation of Church and State more fully than anyone to that point in history. St. Augustine had a negative view of Government. While St. Augustine accepted that State power derived from the people, he denied that justice or fairness would be its ultimate outcome. St. Augustine asserted that justice derived from God and lay beyond the state. Accordingly, man's duty to God superseded his duty to any earthly power. JOHN EIDSMOE, INSTITUTE ON THE CONSTITUTION: STUDY GUIDE 22-23 (1995) (accompanying DVD series Eidsmoe, *supra* note 25). Montesquieu acknowledged that all law must come from God. However, because man has free choice, he may make his own law; but, all man-made law must be in conformity with God's law. Montesquieu argued that all the planets follow the "Laws of Nature" to the letter; but, man, due to his sinful nature, cannot run his own affairs in the same clockwork-like manner. Montesquieu attributed this deficiency in man's abilities to the finite and sinful nature of man. For example, see *Romans* 13:1-4:

Obey the rulers who have authority over you. Only God can give authority to anyone, and he puts these rulers in their places of power. People who oppose the authorities are opposing what God has done, and they will be punished. Rulers are a threat to evil people, not to good people. There is no need to be afraid of the authorities. Just do right, and they will praise you for it. After all, they are God's servants and it is their duty to help you.

28. Beastrabban, *supra* note 27. The early Church served as an indicator of the type of government with which Christianity was consistent. For example, membership in the early Church was open to everyone, regardless of gender, wealth or nationality. The establishment of a Church hierarchy contained elements of democratic institutions in the election of its Bishops and even laypersons during the early church period. However,

although the early Church recognized that human society required authority, philosophers and theologians such as St. Augustine and Theodoret believed

indicated Islam is more in conformity with a totalitarian form of government, whereas Protestant Christianity follows along the lines of a republican form of government.<sup>29</sup> Montesquieu felt that due to the sinful nature of man, the power of government must be limited.<sup>30</sup> The best way to limit the power of government was to develop a system of government which separated the powers of government into a legislative, executive, and judicial branch.<sup>31</sup> Montesquieu was the first person to articulate the idea of separation of powers within government as a way to ensure liberty.<sup>32</sup> He demonstrated that without a governmental separation of powers, man's sinful nature would result in a tyrannical form of government, because those that ruled would seek and eventually accumulate absolute power.<sup>33</sup>

After Montesquieu, the Framers most often quoted Sir William Blackstone, who accounted for 7.3% of all the quoted material used by the Framers.<sup>34</sup> His most famous work, *Commentary on the Common Law of England*, was said to have sold more copies in the colonies than it did in England.<sup>35</sup> Blackstone repeatedly stressed that judges had the responsibility

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that the sole rightful purpose for such authority was to maintain order and promote harmony and tranquility. As rulers derived their authority ultimately from God, individuals motivated solely by a desire to rule, rather than promote justice, had no rightful authority.

*Id.*

29. Eidsmoe, *supra* note 25. Montesquieu indicated that Catholicism was more in line with a monarchical form of government, which makes some sense given the nature of the Church during the period of time in which he lived. However, the early Church had developed many democratic principals, to include the idea that freedom should be limited in the interest of ensuring equality for all. The concepts of free will and choice, associated with original sin, were not foreign concepts to the early Church, and provided a basis by which the Framers developed their concepts of consent.

30. EIDSMOE, *supra* note 27, at 23.

31. *Id.* See also JOHN R. WHITMAN, AMERICAN GOVERNMENT: WE ARE ONE 97 (1987).

32. WHITMAN, *supra* note 31, at 97.

33. EIDSMOE, *supra* note 27, at 23.

34. *Id.* Blackstone, who lived from 1723-1780, was a law professor and a conservative Anglican.

35. *Id.* Blackstone's main contribution to the American legal system was his systemization of the English common law. His commentaries on the laws of England served as the backbone for many of the colonial legal and judicial systems. MELVIN I. UROFSKY, A MARCH OF LIBERTY: A CONSTITUTIONAL HISTORY OF THE UNITED STATES 75 (1988). During the colonial period, many judicial proceeding could be settled by appealing to Blackstone. Sir William Blackstone essentially cataloged British Common Law into four volumes that had consistent themes. Book I covered the "Rights of Persons," a sweeping examination of British government, the clergy, the royal family, marriage, children, corporations and the "absolute rights of individuals." *Id.* Book II, on the "Rights of Things," should more

to apply the existing law to a matter before them and not make law outside of that framework to justify a decision.<sup>36</sup> Judges were to simply apply the law that God had made and the legislature had codified.<sup>37</sup> He felt that the law must be in accordance with the Law of Nature and the Revealed Law, which Blackstone described as that law which is found in the biblical Scriptures.<sup>38</sup> This theme, that man's law must conform to God's law, is seen repeatedly in the works of those writers upon which our Founding Fathers placed great reliance.

John Locke was the third most cited philosopher by the Framers. He lived from 1623-1704.<sup>39</sup> He was a Christian and Biblicist, though slightly unorthodox.<sup>40</sup> He wrote many works, frequently quoting the Bible in many of his volumes.<sup>41</sup> In his *Two Treatises on Civil Government*, he quoted from the Bible eighty-four times, primarily from the Old Testament book of Genesis.<sup>42</sup> In that work, Locke developed the concept of the "social

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properly have been called the "Rights that People Have in Things." *Id.* It begins with the observation that "[t]here is nothing which so generally strikes the imagination and engages the affections of mankind, as the right of property." *Id.* In hundreds of pages of arcane analysis he then disproves the point. Book III covers "Private Wrongs," today known as torts. *Id.* Book IV covers "Public Wrongs," crimes and punishment, including offenses against God and religion. *Id.*

36. EIDSMOE, *supra* note 27, at 24.

37. UROFSKY, *supra* note 35, at 75-76 (stating that Blackstone introduced the concept of *stare decisis* to the American colonies, the concept of the moral aspect to law, and that "[l]aw is that which commands what is right and prohibits that which is wrong").

38. EIDSMOE, *supra* note 27, at 23-24. Blackstone stated that both forms of law came from God. Blackstone argued that there existed at all times a higher law than the law of man, which he referred to as the Law of Nature. Eidsmoe, *supra* note 25. Thomas Jefferson was directly quoting Blackstone when, in writing the Declaration of Independence, he spoke of the "laws of nature and Nature's God." Blackstone explains that while God's law was revealed through nature, man's total depravity and evil character made him fallible and unable to correctly interpret God's law as shown in nature. Accordingly, Blackstone reasoned that God inspired the writing of His law in the Holy Scriptures to act as a guidepost. Therefore, he described God's written law as the Revealed Law. Blackstone argues that since fallible man cannot correctly interpret Nature's law, that the Revealed Law takes precedence, because it is knowable, ascertainable and clearer. Blackstone concludes that upon these two foundations, the Law of Nature and the Revealed Law, all human law depends and all law must act in accordance therewith.

39. EIDSMOE, *supra* note 27, at 24

40. *Id.*

41. Eidsmoe, *supra* note 25.

42. *Id.*

compact.”<sup>43</sup> Locke stressed two concepts that became very important to the framers: the concepts of Natural Laws and natural rights; and the doctrine of consent. Natural rights were categorized into three parts: life, liberty, and property.<sup>44</sup> Locke also articulated a clear doctrine of consent that would limit the power of governmental institutions’ to the consent of the governed. He argued that consent of the governed would guarantee the concepts of representative government.<sup>45</sup> Locke felt that it was important to establish a line of demarcation between the State and the Church. He stated, “I esteem it above all things necessary to distinguish exactly the business of civil government from that of religion and to settle the just bounds that lie between the one and the other.”<sup>46</sup> Locke’s influence on the Framers can be found extensively in the Declaration of Independence. It was in that document that Thomas Jefferson discussed at length natural rights and the social compact, which formed the colonies’ justifications to the world to break with Great Britain.<sup>47</sup>

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43. *Id.* Locke stressed that in a state of nature, man has no government. However, due to man’s sinful and finite nature, he cannot operate in anarchy. Humans need some organization or something to restrain their sinful nature. Accordingly, man needs to establish government to ensure that the depraved nature of man is restrained. To establish government, people enter into a pact in which individuals give up a certain amount of their personal liberties to government, which then in turn protects those same citizens from the tyranny of others who might infringe upon the liberties of all. Thus the development of the “social compact,” the basic concept of which is that “we the people” give certain individual freedoms to the government, and in return, government will have the strength to protect its citizens from those who would impose tyranny. In *Civil Government*, Locke quotes extensively from Genesis chapter nine where God makes a pact with Noah prior to the flood. It is from Locke’s study of the Book of Genesis that he forms the foundation for his writings on the social compact between man and government.

44. Locke’s foundations for natural rights was explicitly Biblical. As found in the Ten Commandment’s, God’s command that “Thou shalt not kill,” conveyed an individual right to life. In the Mosaic Law there were prohibitions against stealing property and kidnapping; this embodies a right to personal liberty. Finally, in the Ten Commandments, the commandment “thou shalt not steal” clearly conveys a right to property ownership. These natural rights were part of the social compact between government and its people. Governments had the obligation to ensure that these natural rights were protected.

45. WHITMAN, *supra* note 31, at 96.

46. John Locke, *A Letter Concerning Toleration*, in 35 GREAT BOOKS OF THE WESTERN WORLD 2 (Hutchins 1952).

47. Eidsmoe, *supra* note 25. Several individuals influenced the Framers. Hugo Grotius, 1583-1645, is known as the father of international law. He was a Dutch Reformed theologian and a statesman. Grotius stressed that God’s law higher in priority than the law of men. His writing stressed firmly the laws of nations and the concept of international law. Samuel von Pufendorf, 1632-1694, argued that the law of nature is the basis for international law, and

Nearly all the writers during this early colonial period stressed Natural Law and the law of nature's God as a higher law than that of man's law. Furthermore, God revealed this law through different ways. One way is through the Holy Scriptures, better known as revealed law. Another way is through nature itself. Even in areas of the world where revealed law did not exist, the people still had an innate knowledge of right and wrong.<sup>48</sup> The consensus view was that God revealed right and wrong through the human conscience. However, the nature of man is inherently evil, and eventually perverts the law that God reveals through nature.<sup>49</sup> Thus, since the human conscience can be overcome, there remained a need for some control to contain man's evil nature. Furthermore, these political philosophers stressed the need for a system of separation of powers so that the power of government could be restrained from becoming tyrannical.<sup>50</sup>

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therefore, the law of nature applies to non-Christian nations as well. Emmerich de Vattel, 1714-1767, a German diplomat and son of a Protestant minister, stressed the concept that all must live according to God's law and that all nations must live on an equal footing. This concept furthered not only the equality of nations, but to the Framers, the equality of man. EIDSMOE, *supra* note 27, at 25.

48. Eidsmoe, *supra* note 25. This was view that the Framers ascertained from Biblical principals. This concept is best illustrated by the Apostle Paul in his letter to the Romans:

Those people who don't know about God's Law will still be punished for what they do wrong. And the Law will be used to judge everyone who knows what it says. God accepts those who obey his Law, but not those who simply hear it.

Some people naturally obey the Law's commands, even though they don't have the Law. This proves that the conscience is like a law written in the human heart. And it will show whether we are forgiven or condemned.

*Romans 2:12-15* (Contemporary English Version).

49. This concept that man's nature is evil can be seen throughout the Bible. For example, *Romans 1* states:

For God's wrath is revealed from heaven against all godlessness and unrighteousness of people who by their unrighteousness suppress the truth, since what can be known about God is evident among them, because God has shown it to them. From the creation of the world His invisible attributes, that is, His eternal power and divine nature, have been clearly seen, being understood through what He has made. As a result, people are without excuse. For though they knew God, they did not glorify Him as God or show gratitude. Instead, their thinking became nonsense, and their senseless minds were darkened. Claiming to be wise, they became fools.

*Romans 1:18-22* (Holman Christian Standard).

50. EIDSMOE, *supra* note 27, at 25. These men, among others, were a highly representative sample of the political thinkers upon whom the Framers placed great reliance. There were also some political writers of that day who were not Christians, including Voltaire and Jean Rousseau of France, David Hume of Scotland, and Thomas Hobbes of

Of all of the early political scientists and philosophers, who could be called the true author of this great republic? To start, one would need to look to the person whose thoughts and concepts held the greatest influence upon the political scientists that most influenced the Framers. This search leads to John Calvin,<sup>51</sup> the humble reformer from the shores of Lake Geneva, who was best able to put into modern practical thought the varying concepts that came from the likes of St. Augustine, Theodoret, and other varying biblical authorities. The puritans who left for the shores of Massachusetts during the reign of James the First could be said to be his children. George Van Droph, one of the leading scholars of American history during the 1800s, calls Calvin the “Father of America.”<sup>52</sup> “He who would not honor the memory and respect the influence of Calvin, knows little of the origin of American liberty.”<sup>53</sup>

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England. Eidsmoe, *supra* note 25. Jean Jacques Rousseau, (1712-1778) is often spoken fondly of in school textbooks, but was utterly rejected by the Framers. He was an atheist who rejected the concept of sin, the need for redemption, and stressed the overall goodness of man. Rousseau blamed human institutions for existence of evil. Clearly this point of view clashed with the general consensus of the Founding Fathers, that man’s nature was sinful and inherently evil, and it was this nature that must be restrained by government, whose own powers were separated and restrained by a series of checks and balances. However, the Framers were aware of these men and their writings, and they were either rejected or cited in the negative by the Framers. For example, David Hume, an agnostic, was dismissed by John Adams as a learned fool. ZOLTÁN HARASZTI, JOHN ADAMS & THE PROPHETS OF PROGRESS 214 (1964). Adam’s even stated that Hume was worse than the French radicals, Voltaire and Rousseau. *Id.*

51. EIDSMOE, *supra* note 27, at 25.

52. *Id.*

53. *Id.* One might think, “what does Calvin have to do with liberty?” When one thinks of a Calvinist, a stern disciplinarian certainly would come to mind. *Id.* One might also find a Calvinist as a person who might try to regulate the lives of others based on a moral code in an effort to deny practices that others might consider enjoyable. *Id.* There is much in Calvinism, however, which lends itself to the concepts of liberty. *Id.* First, Calvin believed in the total depravity of human nature. *Id.* In his view, humans are sinful and need to be restrained by civil government. *Id.* Second, because all humans are totally depraved, rulers are also sinful and cannot be trusted with unlimited power. *Id.* Therefore, there is a need for balance to restrain human nature. *Id.* The necessary balance is one in which government would have the power to govern, but would still be restrained to prevent tyranny. *Id.* These principles became the foundation for our form of government. *Id.* The original emphasis for the development of our educational system was derived from Calvinist principles. *Id.* The belief that every citizen needed to be able to read and interpret the Scriptures as a basis of all knowledge and understanding provided the impetus for the first systems of state education and help to establish the country’s first colleges and universities. The importance of the ability to read the Holy Scriptures served as the foundation for universal education in Protestant countries throughout Europe, and especially, the New England states. *Id.*

The Calvinists believed government has such power only as God granted to it through the people.<sup>54</sup> Mr. Jefferson stated this principle succinctly in the Declaration of Independence:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. —That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed . . .<sup>55</sup>

When government goes beyond these limited powers, Christians have a duty to resist.<sup>56</sup> The colonists used a slogan during the Revolution, which they borrowed from the Calvinists, to reiterate this point: “Rebellion against tyrants is obedience to God.”<sup>57</sup>

The concepts developed by the aforementioned political scientists greatly influenced the Framers. Our system of government developed as a natural extension of those writers’ concepts of natural law, separation of powers, and the social compact between citizens and government. These concepts are overwhelmingly based on Christian biblical principles, gathered from both the Old and New Testament Scriptures, and were developed by men who were practicing, devout Christians. It is ironic that some of the greatest political thinkers that ever lived were educated using a book that, for all practical purposes, has been eliminated from the public square. Those who put our nation on its course would scarcely recognize the strange and winding road we have followed to get where we are now.

### III. THE RELIGIOUS AND POLITICAL BELIEFS OF THE FRAMERS

For most of the early colonists who lived prior to 1740, the choice of religious practice remained narrow, compared to what England allowed.<sup>58</sup>

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54. *Id.*

55. THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776).

56. See Eidsmoe, *supra* note 25, at *Lecture 3: The Religious Beliefs of the Founding Fathers*. The Pope and early church leaders often asserted their authority in running church affairs and resisted governmental authorities interfering with such affairs. The early church directly contradicted and attacked the idea of absolutism by declaring that the state was subordinate to God and the church.

57. *Id.*

58. See JOHN M. MURRIN, *Religion and Politics in America from the First Settlements to the Civil War*, in RELIGION AND AMERICAN POLITICS: FROM THE COLONIAL PERIOD TO THE 1980s 19, 25 (Mark A. Noll ed., 1990).

However, the pattern of a lack of religious choice would change irrevocably in large part due to the First and Second Great Awakenings, which occurred both before and after the American Revolution from 1775-1783.<sup>59</sup> These events had the effect of creating the most important denominational reshuffling in American history.<sup>60</sup> In denominational terms, this shift meant that the three prevailing branches prior to 1740—Congregationalists in New England; Anglicans in the South; and the Quakers and their sectarian German cousins in the Delaware Valley—would lose influence to three newcomers:<sup>61</sup> the Baptists, Methodists, and to a lesser extent, the Presbyterians.<sup>62</sup>

Because of the widening diversity in the religious marketplace, the Framers who came to Philadelphia in the summer of 1787 had a varied religious background. Furthermore, before and just after the Revolutionary War, the Christian churches in America had seen a revival that was unparalleled in Europe. Indeed, one of the important reasons for America's commitment to religious freedom was in large part to protect the diversity of churches on the American landscape at that time. So as the leaders began to create what became our present form of government and its institutions, they brought religious as well as political differences to the bargaining table. The 1787 Constitutional Convention in Philadelphia included members from the following church backgrounds:<sup>63</sup> twenty-eight Episcopalians, eight Presbyterians, seven Congregationalists, two Lutherans, two Dutch Reformed, two Methodists, two Roman Catholics, three Deists,<sup>64</sup> and one of an unknown religious preference.<sup>65</sup>

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59. *Id.*

60. *Id.*

61. *Id.*

62. *Id.*

63. See Eidsmoe, *supra* note 27, at 16 (citing DR. M. E. BRADFORD, A WORTHY COMPANY: BRIEF LIVES OF THE FRAMERS OF THE UNITED STATES CONSTITUTION (1982)).

64. "Deism" is belief in a God who created the universe and established physical and moral laws for the operation of the universe, but then withdrew from the universe. Deists believe God does not intervene in human affairs, but rather, lets the universe operate on its own according to those physical and moral laws God established. Deists agreed with Christians in emphasizing the Law of Nature as the Law of God. See EIDSMOE, *supra* note 27, at 16.

65. See EIDSMOE, *supra* note 27, at 16. Benjamin Franklin was not considered a Christian in the traditional sense. In 1790, just about a month before he died, Franklin wrote a letter to Ezra Stiles, president of Yale University, who had asked him his views on religion:



While the Framers were diverse in their religious practices, they shared certain political beliefs. Many of the beliefs have roots in Christianity and repeat many of the same themes discussed earlier. There was a consensus view among the Founding Fathers that God, by His providential care, governs the universe and the affairs of men.<sup>66</sup> They believed that God revealed Himself to man through the Holy Scriptures and through nature, reason, and conscience.<sup>67</sup> They believed in human reason, which was given

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As to Jesus of Nazareth, my opinion of whom you particularly desire, I think the system of morals and his religion, as he left them to us, the best the world ever saw or is likely to see; but I apprehend it has received various corrupting changes, and I have, with most of the present dissenters in England, some doubts as to his divinity; though it is a question I do not dogmatize upon, having never studied it, and I think it needless to busy myself with it now, when I expect soon an opportunity of knowing the truth with less trouble.

Benjamin Franklin (March 9, 1790), in NORMAN COUSINS, "IN GOD WE TRUST:" THE RELIGIOUS BELIEFS AND IDEAS OF THE AMERICAN FOUNDING FATHERS 42 (Norman Cousins ed., 1958).

66. See EIDSMOE, *supra* note 27, at 17-19. George Washington represented the majority view and had a strong religious bent. ROBERT L. MADDOX, SEPARATION OF CHURCH AND STATE: GUARANTOR OF RELIGIOUS FREEDOM 37 (1987). He believed that God, Providence, the Author of the Universe, etc. had control of the affairs of men and nations. *Id.* He stated that it was impossible to "rightly" govern without God and the Bible. *Id.* Throughout Washington's life, "he never wavered on the importance of religious liberty." *Id.* Washington's position concerning education was quite revealing. On May 12, 1779, in a speech before the Delaware Indian Chiefs, Washington declared what students would learn in American schools: "above all [is] the religion of Jesus Christ." George Washington, Speech to Delaware Chiefs, in NORMAN COUSINS, "IN GOD WE TRUST:" THE RELIGIOUS BELIEFS AND IDEAS OF THE AMERICAN FOUNDING FATHERS 55 (Norman Cousins ed., 1958). Washington wrote to a group of church leaders, defending the lack of religious language in the constitution, saying:

I am persuaded . . . that the path of true piety is so plain as to require little political direction . . . To the guidance of the ministers of the gospel the important object is, perhaps, more properly committed. It will be your care to instruct the ignorant, and to reclaim the devious, and, in the progress of morality and science, to which our government will give every furtherance, we may confidently expect the advancement of true religion, and the completion of our happiness.

George Washington, Reply to Ministers and Elders Representing the Massachusetts and New Hampshire Churches (Oct. 28, 1789) in NORMAN COUSINS, "IN GOD WE TRUST:" THE RELIGIOUS BELIEFS AND IDEAS OF THE AMERICAN FOUNDING FATHERS 60 (Norman Cousins ed., 1958).

67. Eidsmoe, *supra* note 25, at *Lecture 3: The Religious Belief of the Founding Fathers*. Samuel Adams, often referred to as the "Father of the American Revolution" and the last of the Puritans, also held this view. EIDSMOE, *supra* note 27, at 19. Governor Samuel Adams

to man by God as a means of apprehending and understanding objective truths.<sup>68</sup> They all agreed on the imperfection and sinfulness of human nature and that governmental theory must account for this depraved nature to secure basic liberty for mankind.<sup>69</sup> They believed that God ordained earthly

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called the State of Massachusetts to fast with the following statement that best summarizes his views throughout the course of his life:

I conceive that we cannot better express ourselves than by humbly supplicating the Supreme Ruler of the world that the rod of tyrants may be broken to pieces, and the oppressed made free again; that wars may cease in all the earth, and that the confusions that are and have been among nations may be overruled by promoting and speedily bringing on that holy and happy period when the kingdom of our Lord and Saviour Jesus Christ may be everywhere established, and all people everywhere willingly bow to the scepter of Him who is Prince of Peace.

Samuel Adams, Fast Day Proclamation (March 20, 1797), in 4 THE WRITINGS OF SAMUEL ADAMS 407 (Harry Alonzo Cushing ed., 1908).

68. Eidsmoe, *supra* note 25, at *Lecture 4: The Founding Fathers' Five Fold Formula*. John Adams was a Unitarian, who, like his contemporaries at the convention, valued religion for not only itself, but also for its benefits to society. See MADDOX, *supra* note 66, at 34. The that religion served as the underpinning for a just and moral government and society was shared by many of the Framers. *Id.* at 37. Though Adams felt no compulsion to develop a theory of church and state, his commitments were certainly in the direction of non-interference by government in a person's religious life and he would certainly have urged churches to fight their own battles concerning moral and religious questions, rather than asking government for help. *Id.* at 38. In a letter Adams described his view on how Christianity impacted the nation:

The General Principles on which the fathers achieved independence, were the only principles in which that beautiful assembly of young gentlemen could unite, and these principles only could be intended by them in their address, or by me in my answer.

And what were these General Principles? I answer, the general principles of Christianity, in which all those sects were united; and the General Principles of English and American liberty, in which all these young men united, and which had united all parties in America, in majorities sufficient to assert and maintain her independence.

Now I will avow that I then believed, and now believe, that those general principles of Christianity are as eternal and immutable as the existence and attributes of God . . .

Letter from John Adams to Thomas Jefferson (June 28, 1813), in 13 THE WRITINGS OF THOMAS JEFFERSON: MEMORIAL EDITION 293 (Albert Ellery Bergh ed., 1905).

69. See Eidsmoe, *supra* note 25, at *Lecture 4: The Founding Fathers' Five Fold Formula*. Alexander Hamilton was a Calvinist who believed that strong government was needed to restrain the sinful impulses of the masses. *Id.* Author of fifty-four of the eighty-five Federalist papers, he left an indelible mark on the nation as the country's first Secretary of the Treasury. DR. M.E. BRADFORD, A WORTHY COMPANY: BRIEF LIVES OF THE FRAMERS

governments to restrain sin; that the Law of God was supreme over the law of man; and that man's law must be consistent with God's law.<sup>70</sup>

The Framers believed that the Law of God is revealed through Scriptures and through the Law of Nature, and that human law must conform to the Law of God as it related to securing life, liberty, and property.<sup>71</sup> The Framers believed that international law or the Law of Nations, as it was referred to in that day of age, must also conform to the Law of Nature and Nature's God.<sup>72</sup> The Founding Fathers also believed that government is formed by a social compact with its citizens, where the government only has limited delegated powers given to it by the people through their compact with the government.<sup>73</sup> The Framers agreed that human nature, being inherently evil, would cause rulers to usurp more power until they became tyrannical, unless prevented by a separation of powers. The

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OF THE UNITED STATES CONSTITUTION 49 (1982). Hamilton was an economist and political philosopher who believed in the depravity of man, a view consistent with his Calvinist upbringing. He laid plans to establish the Christian Constitutional Society, but these plans were cut short by his death at the hand of John Burr. *Id.* at 47. He reaffirmed his faith in Christ on his deathbed. *Id.* Alexander stated:

I have examined carefully the evidence of the Christian religion; and, if I was sitting as a juror upon its authenticity, I should unhesitatingly give my verdict in its favor . . . I can prove its truth as clearly as any proposition ever submitted to the mind of man.

SARAH KNOWLES BOLTON, FAMOUS AMERICAN STATESMEN 126 (New York, Thomas Y. Crowell & Co. 1888).

70. Eidsmoe, *supra* note 25, at *Lecture 4: The Founding Fathers' Five Fold Formula*. Chief Justice, John Jay, certainly reflected the mainstream point of view concerning the view of the fallen nature of man; and as a jurist, he gave great thought to the subject. EIDSMOE, *supra* note 27, 19. Jay was the founder and President of the American Bible Society. *Id.* He was the first Chief Justice of the Supreme Court. *Id.* He also wrote and co-authored some of the Federalist papers with James Madison and Alexander Hamilton. DR. M.E. BRADFORD, A WORTHY COMPANY: BRIEF LIVES OF THE FRAMERS OF THE UNITED STATES CONSTITUTION 47 (1982). John Jay stated:

By conveying the Bible to people thus circumstanced we certainly do them a most interesting act of kindness. We thereby enable them to learn that man was originally created and placed in a state of happiness, but, becoming disobedient, was subjected to the degradation and evils which he and his posterity have since experienced.

John Jay, Annual Address to the American Bible Society (May 13, 1824), in NORMAN COUSINS, "IN GOD WE TRUST:" THE RELIGIOUS BELIEFS AND IDEAS OF THE AMERICAN FOUNDING FATHERS 379 (Norman Cousins ed., 1958).

71. See EIDSMOE, *supra* note 27, at 24-26.

72. Eidsmoe, *supra* note 25, at *Lecture 4: The Founding Fathers' Five Fold Formula*.

73. *Id.*

Framers concluded that such a system of checks and balances would work best by separating governmental power into legislative, executive and judicial branches.<sup>74</sup> Finally, the Founding Fathers understood that because human nature includes greed and envy, a free enterprise economy was the best way to develop a national economy.<sup>75</sup>

Clearly nothing mentioned above was a universally held belief amongst all the Framers. There were points of heated disagreement at the convention. But these heated disagreements were political in nature, and not on the moral questions of man's nature or of the Nature of God. Rather, the arguments that did exist among the Framers were centered on how to implement these aforementioned moral principals into a form of governance. The central theme is that these moral principles, on which the overwhelming majority of the Framers based their worldviews and moral references, were founded on Christian biblical teachings. These Christian biblical principles are at the center of our republican form of government and are manifest in the writings of our Founding Fathers.

#### IV. SEPARATION

The Framers, being men of strong Christian faith, who believed that the laws of man must conform with the laws of God, sought to strengthen Christian-based institutions by getting government out of their way. However, by separating the state away from the church, did the Framers intend to form a secular society, creating as Mr. Jefferson described over a dozen years later a "wall of separation" in which religion, particularly Christianity, should play no role in publicly supported locations or functions? Or was there another goal in mind, one in which the Framers intended to assist and promote the Christian church in its crucial role of underpinning the morals of a democratic society? The Framers strongly believed that the ultimate success or failure of this new constitutional republican form of government would be based upon its citizens' ability to uphold it. Further still, this new government would need to draw its strength from its citizenry.

In order to understand the Framers' intent with respect to religion in the public square, one must understand the nature of the colonial community and the times in which the Framers lived. The Framers brought to Philadelphia not only their personal religious and political beliefs, but also

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74. *Id.*

75. *Id.*

the knowledge of the events concerning Christianity during and immediately after the Revolutionary War with Great Britain.

During the Revolutionary War, ardent Christian support of the war effort led in some cases to the compromising of the Christian faith itself.<sup>76</sup> “The righteousness of the American cause often loomed as ‘another god’ in competition with the God of traditional Christianity.”<sup>77</sup> “Wholehearted Christian support of the patriot effort [undercut] Christianity” and its message, thereby decreasing the Christian church’s effectiveness at delivering its core message of redemption from sin through Christ.<sup>78</sup> This compromise was problematic because many ardent believers joined their faith securely to the “all or nothing” identification of the Patriot position as the Christian position. Identifying the revolution as a “holy war” demeaned the importance of faith in God by replacing it with a secular purpose: independence from England.<sup>79</sup>

Notwithstanding the negative impact that the Revolutionary War had on the Christian church, the Constitution’s effect on the Church was an explosion of fervor and faith that resulted in the second Great Awakening.<sup>80</sup> One should not be surprised by this result, as “it is easy to show the basic compatibility between important Christian convictions and the central features of the Constitution.”<sup>81</sup> The rejuvenation of the Christian church during the period after the enactment of the Constitution occurred because of the influence of Calvin and his progeny. Calvin’s influence can be seen,

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76. See MARK NOLL, *ONE NATION UNDER GOD* 47-49, 51-52 (1988).

77. *Id.* at 51-52.

78. *Id.* at 52.

79. *Id.* Political differences translated into religious antagonisms. Because of this intense participation, the vitality of Christianity declined during the war. However, after the war, when involvement in political affairs was less intense, the Christian faith enjoyed significant growth and increased diversity. The role of Christianity in the political process that led to the Constitution was quite different from the role the church played during the revolutionary war. Christian rhetoric and organized political action by Christians was largely absent just prior to and during the Convention, at least in comparison to the great amount of overt Christian attention to the war with Britain. Furthermore, the structure of the new constitutional government enhanced an environment in which Christian belief and practice flourished. In contrast, during the Revolutionary War period, overt Christian political action led to the subversion of the faith and its effectiveness in focusing on its mission to preach the Gospel and salvation through a risen Christ. *Id.* at 47-49, 51-52.

80. The Second Great Awakening occurred from 1780 to 1830, reflecting a period of great religious revival and widespread Christian evangelism and conversions. 3 John Findling & Frank Thackery, *What Happened? The Encyclopedia of Events that Changed America Forever* 1 (2011)

81. NOLL, *supra* note 76, at 68.

for example, in the system of checks and balances established by the Constitution, which coincide nicely with the Christian teachings that the nature of man is inherently depraved and sinful. Humans are fallen and need to be restrained in the pursuit of power. This view of man influenced the Framers to form what was considered at that time a unique system of government.

Another aspect of this aforementioned nexus needs greater explanation. The Constitution is, for all intents and purposes, a secular, political document, based on certain Christian principles developed over the course of time. This development can be traced through a series of important Christian political writers who drew their concepts from biblical principles and who greatly influenced the Founding Fathers, who integrated those concepts into our Constitution.<sup>82</sup>

Obviously, the Framers were forming a government, not a theocracy.<sup>83</sup> In that day and age, however, this goal was a virtue. “The Constitution was ‘secular,’ not in the sense of repudiating religion, but in the sense of being ‘of this world.’”<sup>84</sup> The Framers recognized that government was not religion, and that the purpose of government was to promote justice and fairness. They also recognized that in Europe, political tyranny often arose through the agency of state religion or religious persecution by agents of the

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82. Notably, while the Declaration of Independence mentions the word “God” or “Creator” multiple times, “God” is not mentioned in the Constitution, except a single reference in Article VII which states: “In the year of our Lord,” a reference to Jesus Christ. Compare THE DECLARATION OF INDEPENDENCE (U.S. 1776), with U.S. CONST. art. VII. The Declaration of Independence and the Constitution should be read together. The Declaration sets forth the basic ideas and principles upon which the nation is founded, but is silent as to the means to implement them. Eidsmoe, *supra* note 25, at *Lecture 5: 1776–1789: From Independence to the Constitution*. Implementation of these ideas and principles is left to the Constitution. *Id.* As an interesting side note, the French decided to re-number their years beginning with the year of the French revolution in 1789. *Id.* Obviously, the Framers chose not to follow the French lead. *Id.*

83. See NOLL, *supra* note 76, at 69. Occasionally one hears accusations that Christian conservatives seek to establish a theocracy. Clearly, the constitutional form of government that was established in this country is not by any definition a theocracy. A theocracy is defined as a “[g]overnment of a state by the immediate direction of God . . . or the state thus governed.” BLACK’S LAW DICTIONARY 1478 (3d ed. 1933). See generally Eidsmoe, *supra* note 25, at *Lecture 9: An Overview of the Constitution: The Bill of Rights, the First Amendment*. That our country was “[o]ne Nation under God,” however, is a view that all of the Framers would have approved. *Id.*

84. NOLL, *supra* note 76, at 69.

government.<sup>85</sup> Further, they knew very well that in Europe, state-supported churches attempted to suppress religious diversity to maintain their monopolies. As a result, these state-supported European churches, in the opinion of the Founding Fathers, lost their fervor for evangelizing a lost world in favor of maintaining their favored state status. “It was an entanglement that, as the founders saw it, always harmed religion and always tempted authorities to exert more power than by nature and the command of God they possessed.”<sup>86</sup>

Centuries of religious strife in Europe had left an indelible mark on the mind of the Framers.<sup>87</sup> They were loath to discuss religious issues for fear

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85. *Id.* While the Framers avoided the issue of establishing a national church akin to what many European nations had done, most of the separate states had their own sponsored church. *Id.* This fact motivated the Framers to keep the national government out of the way of religion in deference to the separate states who had already established, for the most part, a favored church at the expense of others. *Id.* This same sentiment led the Baptist minority in Danbury, Connecticut to write a letter to Thomas Jefferson, whose response is now famous for having uttered the words therein “separation of church and State.” MADDUX, *supra* note 66, at 27-29.

86. NOLL, *supra* note 76, at 69. Modern historians have noted that Christian expansion in the early United States occurred most dramatically after believers turned from reliance upon overt political means to the organization of voluntary societies. *See* FRED J. HOOD, REFORMED AMERICA, THE MIDDLE AND SOUTHERN STATES, 1783–1837 118 (1980). Lyman Beecher, leader of Connecticut Congregationalists, came to the same conclusion in 1818 after that state severed its ties with his church. He regarded it as a blessing because the church could be more energetic about its proper tasks of proclaiming the gospel and doing deeds of mercy. Madison indicated that, in Virginia, religion flourished in greater purity without the aid of government. These statements, however, stood not for the withdrawal of religion from public life, but rather the much more specific separation of the institutions of the state from the institution of the church. *Id.*

87. *See* MADDUX, *supra* note 66, at 37. The Framers were well aware of the European models concerning state-supported religion. Official government support and funding of Christianity in Europe had been a blight upon the Christian message and had the effect of harming Christianity. NOLL, *supra* note 76, at 65. Government sponsorship of the church had the ultimate effect of corrupting the church. For example, the practice of letting Bishops buy their positions in the Holy Roman Empire led to resentment among the people. MARVIN PERRY, A HISTORY OF THE WORLD 336 (1985). The piety and greed of the clergy ultimately stimulated the Protestant reformation under Martin Luther, and later Calvin. *Id.* at 336-39. Furthermore, the Framers knew that the church was used as to suppress the political and religious freedom of those whose opinions were unpopular with the ruling class. European history is replete with such examples, including the trial and execution of Mary, Queen of Scots, the Spanish inquisition, the trial of Galileo, and the persecution of the Huguenots. *Id.* at 376. Often, the church was used to justify wars, including the war between Philip of Spain and England in 1558, not to mention the Crusades. *Id.* Certainly the framers must have reached the obvious conclusion that state-supported bishops, state-sponsored ecclesiastical courts, and religious tests for public office had all subverted the natural rights of life, liberty

that the Convention would founder on religious dissension.<sup>88</sup> Their goal was to keep government a healthy distance from the church, while ensuring that the church itself was involved in public affairs. The use of national churches in Europe to suppress political and religious freedoms, and the increasing diversity of religious, Christian practice within the various colonies (because of the First Great Awakening) created a consensus among the Founders to avoid conflict on religious issues.<sup>89</sup> Nevertheless, critically important to the analysis of religion's role in modern America, which has become completely lost in the modern discussion, is that all of the Founding Fathers welcomed the influence of religion on public life.<sup>90</sup> Simply put, they wanted the influence of the church to remain an indirect force in guiding public policy rather than an institutionalized agency participating directly in governmental affairs.<sup>91</sup>

The history leading up to the convention and the First Amendment division of church and state also included a strong tradition that opposed religious establishment for Christian, rather than political, reasons.<sup>92</sup> Roger Williams, who was expelled from the Massachusetts Bay Colony in 1630, and who eventually founded Rhode Island, was barred in part because he argued that churches were corrupted by power when they allied themselves

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and property. NOLL, *supra* note 76, at 65. For example, Madison, in his *Memorial and Remonstrance Against Religious Assessments*, argued against a bill which would establish a tax to pay ministers or teachers of the Christian religion:

Because it will destroy that moderation and harmony which the forbearance of our laws to intermeddle with Religion, has produced amongst its several sects. Torrents of blood have been spilt in the old world, by vain attempts of the secular arm to extinguish Religious discord, by proscribing all difference in Religious opinion. Time has at length revealed the true remedy. Every relaxation of narrow and rigorous policy, wherever it has been tried, has been found to assuage the disease.

James Madison, *Memorial and Remonstrance Against Religious Assessment* (June 20, 1785), available at [http://press-pubs.uchicago.edu/founders/documents/amendI\\_religions43.html](http://press-pubs.uchicago.edu/founders/documents/amendI_religions43.html).

88. MADDUX, *supra* note 66, at 129. The Framers realized that the First Amendment would still allow state-supported churches to continue. They did not wish to affront them. See generally Eidsmoe, *supra* note 26.

89. See NOLL, *supra* note 76, at 65. "The Founders thought a strict separation between the institutions of the church and the government was essential for the general health of the nation, and the specific promotion of virtue in the population." *Id.*

90. *Id.* at 51-52.

91. *Id.* at 67. See also MURRIN, *supra* note 58, at 25.

92. NOLL, *supra* note 76, at 65.



with the state.<sup>93</sup> Williams's viewpoint concerning the corrupting influence that government had on the Christian church had become generally accepted by the time of the Constitutional Convention in 1787.<sup>94</sup> The opposition to the church being recognized as part of the state manifested itself not only in the First Amendment to the Bill of Rights, but also in Article VI, clause 3 of the Constitution, which bans religious tests for political office.<sup>95</sup> The religious test ban was resoundingly criticized during

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93. *Id.*

94. *Id.* at 66. It should be noted that many devout Christians stood for the proposition of religious liberty and the removal of state supported religion. For example, "Thomas Jefferson's statute for religious freedom in Virginia, which was passed in 1785 . . . made the kind of sharp break between the institution of church and state that the First Amendment would later follow." *Id.* It began with the famous words, "Whereas Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burdens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion". *Id.* During debate on this law an amendment was proposed to add the words "Jesus Christ" to the language already there, "the holy author of our religion." *Id.* Virginia deists opposed the measure, but so also did several members who, in the words of James Madison "were particularly distinguished test for political office." *Id.* Of organized religious groups, only the Roger Williams Baptists subscribed to the view that religious tests were abhorrent to the concepts of liberty. In their view, they denounced these tests as a "[p]ropane intervention in the sacred relationship between God and man." Gerard V. Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine That Has Gone of Itself*, 37 CASE W. L. REV. 674, 687 (1987). The argument of these Christians, as Madison summarized it, was "that the better proof of reverence for that holy name would be not to profane it by making it a topic of legislative discussion and . . . making his religion the means of abridging the natural and equal rights of all men, in defiance of his own declaration that his Kingdom is not of this world." NOLL, *supra* note 76, at 66. Christians in Virginia opposed a governmental religion on the grounds that a governmental recognition of Jesus Christ would be a corruption of Christianity. It should not go unnoticed to the reader, however, that during the constitutional period, it was taken for granted that the practice of religion would include the exertion of indirect, rather than overt, influence on public policy. *Id.* at 67. Finally, the debate centered on how best to serve the interest of the Christian church, rather than the concept of a complete "wall of separation." *Id.* at 65. In any event, the debate encompassed whether there should be a state interference in the church, rather than church interference in public affairs.

95. U.S. CONST. art VI, cl. 3. The ban on religious tests came in spite of most groups supporting such tests for office. Only the Baptists, such as Roger Williams, subscribed to the view that religious test were abhorrent to the concepts of liberty. They denounced these tests as a "profane intervention in the sacred relationship between God and man [and] inspired by Jesus' general condemnation of oaths." Bradley, *supra* note 94, at 687. Nevertheless, like most critiques of church-state practices, this was a theological, rather than political, objection. *Id.* at 688. Thomas Jefferson was the most articulate of those individuals who opposed religious tests. *Id.* Jefferson's opinions, however, like those of the Baptists, were not the mainstream point of view. *Id.* Most people believed that a man's belief in God, and

ratification debates by both Federalists and Anti-Federalists alike. The Federalists simply did not consider it discriminatory to limit the holding of public office to good Christians. Anti-Federalists—who argued in favor of recognizing Christianity as the nation’s official religion—viewed the lack of such a test nearly the same way the Federalists did.<sup>96</sup> Notwithstanding these critiques, because the separate states would still be allowed to establish their own religions, and the Framers’ understanding that Article VI would prevent any one denomination from gaining power over another by means of a religious test for federal office, the religious ban included in Article VI garnered enough support and was passed.<sup>97</sup>

Lastly, a final factor moving the Framers to divide the institutions of government and church was the growing awareness among the Founding Fathers, in part due to the First Great Awakening, that America had become more pluralistic in its practice of the Christian faith.<sup>98</sup> In moving government away from specific religious requirements, the Framers were

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of a future state of rewards and punishments, was profoundly relevant to his fitness for public office. *Id.* Irrespective of the majority view toward religious tests, not even Thomas Jefferson rejected the proposition that the state ought to foster and encourage Christianity, if for no other reason than a belief that the Church was an effective instrument in maintaining societal morals and social control. *Id.* Notwithstanding this popular support, Article VI, clause 3 of the Constitution was passed with little debate by a great majority of the delegates. *Id.* One explanation as to why the Framers were not concerned with religion in general was that the project they were working on was unrelated to it; they were establishing a republican form of government, not deciding a theological debate. *Id.* at 691-92. Another factor may have to do with the Founding Fathers’ vision of the future pluralistic society in which we now live, as exhibited by the expansion of Protestant churches after the Great Awakening. Also immensely important to the overall analysis is that the Framers were fully aware that the thirteen separate states, most of which at that time had a sponsored church, would still be allowed to maintain their own state sponsored church if they so chose. *Id.* at 693.

96. See Bradley, *supra* note 94, at 709-10. The Federalists eventually supported the clause after Anti-Federalists started to suggest worst-case scenarios that could theoretically happen if the clause failed to pass. The Anti-Federalists suggested that the Pope could become president, or hordes of pagan immigrants might take over government. The logical conclusion was that the test was needed to protect the country from that potentially disastrous result. Another suggestion was that there was a need for recognition of a national religion, preferably Protestant. Because of these exaggerated scenarios, the Federalists began to see the religious ban for the self-protective measure it was. They realized that the use of a general test would cause more harm than good, and could eventually be used against them. *Id.*

97. See NOLL, *supra* note 76, at 67-68.

98. *Id.*

establishing that government was of *all* the people—regardless of what religion they might profess.<sup>99</sup>

“In sum, the Founders’ desire to put some distance between the institutions of Church and State reflected a desire to respect not only religion, but also the moral choices of citizens.”<sup>100</sup> The Establishment Clause was, however, never intended to be used as a provision to remove religion from public life.<sup>101</sup> To the contrary, in the context of the times during which these constitutional conventions took place, these provisions were aimed more at “purifying the religious impact on politics” than at removing it from the public square entirely.<sup>102</sup> Put another way, the issue for the Founding Fathers in the early republic was not separation of religion and public life—as we describe and define the problem today—but rather “a question of critical distance.”<sup>103</sup> That distance was lost during the Revolutionary War, and the result was harmful to both Christianity and its message.<sup>104</sup> The proper distance was reestablished during the period just after the enactment of the Constitution; a distance the Constitution itself is partially created. As a result, Christianity flourished and the nation experienced a second period of exponential growth in Christian churches and denominations.<sup>105</sup>

The Constitution and Bill of Rights had the effect of restoring a certain distance between religion and politics, but this distance had little to do with modern questions of whether a state is establishing religion.<sup>106</sup> While the First Amendment is an important gauge of what that distance ought to be, it should be noted that Thomas Jefferson’s view that there should be a complete and strong wall of separation between government and religion

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99. *Id.*

100. *Id.*

101. *Id.* at 68.

102. *Id.*

103. *Id.* at 74.

104. *Id.*

105. *Id.* The result of taking away nationally sponsored churches was to increase the number of options individuals had when deciding which denomination within a particular religion they wished to practice. Beyond that, it had energized many of the faiths. For example, Catholicism, which faced general decline in Europe throughout the nineteenth-century, experienced great growth during this period in the United States. American Catholics, as a body, tended to be more loyal to the Pope in early America. Both traditional and evangelical religions were able to thrive in America, unlike anywhere else in the world at that time. See MURRIN, *supra* note 58, at 35.

106. NOLL, *supra* note 76, at 73.

made him a “lonely radical of his day.”<sup>107</sup> Justice Story, author of the early American era’s most influential commentaries on the Constitution, held a more typical view on how best to interpret the Establishment Clause and the distance it created between Church and State.<sup>108</sup> Justice Story believed that:

[T]he promulgation of the great doctrines of religion . . . can never be a matter of indifference to any well ordered community . . . Indeed, in a republic, there would seem to be a peculiar propriety in viewing the Christian religion, as the great basis, on which [the government of the United States] must rest for its support and permanence, if it be, what it had been deemed by its truest friends to be, the religion of liberty.<sup>109</sup>

In Story’s commentary on the Constitution, he laid out his understanding of the First Amendment. In his view, the general—if not universal—sentiment at the time of the adoption of the First Amendment was “that Christianity in general ought to receive encouragement from the State.”<sup>110</sup> Any attempt to level all religions or to hold them in utter indifference would have met with universal indignation, if not universal hostility.<sup>111</sup>

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107. *Id.* See also HAMBURGER, *supra* note 22, at 144-89. James Madison’s views on this topic were far closer to reflecting the mainstream Framer’s view and overall colonial thought. He asserted that voluntarily supported religious activities may and should take their place in public life.

108. NOLL, *supra* note 76, at 73. It cannot be said that Justice Story was a great ally in the Christian cause; like Jefferson, Justice Story was a Unitarian.

109. *Id.* at 73-74.

110. *Wallace v. Jaffree*, 472 U.S. 38, 104 (1984).

111. *Id.* In *Wallace*, Justice Rehnquist noted the following from Thomas Cooley, who was as widely respected as a legal authority as Justice Story. Cooley stated in his treatise entitled *Constitutional Limitations* that aid to a particular religious sect was prohibited by the United States Constitution, but he went on to say:

“But while thus careful to establish, protect, and defend religious freedom and equality, the American constitutions contain no provisions which prohibit the authorities from such solemn recognition of a superintending Providence in public transactions and exercises as the general religious sentiment of mankind inspires, and as seems meet and proper in finite and dependent beings. Whatever may be the shades of religious belief, all must acknowledge the fitness of recognizing in important human affairs the superintending care and control of the Great Governor of the Universe, and of acknowledging with thanksgiving his boundless favors, or bowing in contrition when visited with the penalties of his broken laws. No principle of constitutional law is violated when thanksgiving or fast days are appointed; when chaplains are designated for the army and navy; when legislative sessions are opened with prayer or the reading of the Scriptures, or when religious teaching is encouraged by a general

Justice Story felt that while the government should not favor one church over another, it was permitted to promote religion in general. Through such general promotion, government could help the moral structure of society upon which a strong representative republic would depend.

#### V. HISTORICAL MISINTERPRETATION BY THE COURTS

The Framers' first goal at the Constitutional Convention was the formation of a republic based on certain principles consistent with the Founding Fathers' Christian beliefs.<sup>112</sup> In perhaps a less obvious manner, however, the Framers also sought to strengthen the character of America's citizenry—something essential to the survival and success of the new Republic. This was to be accomplished by strengthening the nation's moral character through strong Christian churches.<sup>113</sup> To better accomplish this goal, the Framers developed a solution that would eliminate direct governmental support for any one particular sect, while overtly acknowledging the importance of religion for society and democracy. Stronger churches had the direct benefit of a more moral society, and consequently a stronger society. The Founding Fathers believed that a moral society was a necessity for a strong country. Moreover, they believed that government should encourage churches—specifically Christian churches—to take an active role in public affairs. Therefore, it was the Framers' indirect purpose to reinforce American society through strengthened churches by ensuring that government did not interfere in the affairs of religion.

Given this history, one should wonder how we arrived at the increasingly secular society that is reflected in modern day life within the United States.

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exemption of the houses of religious worship from taxation for the support of State government.”

472 U.S. 38 at 105 (quoting JOSEPH STORY, 2 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 470-72 (5th ed. 1891)). Later in the opinion, Rehnquist continues quoting Cooley:

[t]his public recognition of religious worship, however, is not based entirely, perhaps not even mainly, upon a sense of what is due to the Supreme Being himself as the author of all good and of all law; but the same reasons of state policy which induce the government to aid institutions of charity and seminaries of instruction will incline it also to foster religious worship and religious institutions, as conservators of the public morals and valuable, if not indispensable, assistants to the preservation of the public order.

*Id.* at 106.

112. NOLL, *supra* note 76, at 64.

113. *Id.*

One's search can start and stop with the Supreme Court, which has established an ever-increasing wall of separation between public and religious institutions. Although Thomas Jefferson, in his letter to the Connecticut Baptists, was the first to plant the idea of a "wall of separation," he did not invent the phrase.<sup>114</sup> Rather, that distinction goes to Roger Williams, the pesky Puritan turned Baptist.<sup>115</sup> Jefferson, who was President at the time of his letter to the Danbury Baptist Association, was taking political heat for failing to call the nation to prayer and fasting.<sup>116</sup> Jefferson wrote:

Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that the act of the whole American people which declared that their legislature should make no law respecting an establishment of religion, or prohibiting the free exercise thereof, thus building a *wall of separation* between Church and State.<sup>117</sup>

Jefferson clearly broke with precedent by refusing to pray. While Jefferson's religious views as an adult are the subject of some debate, one should note that he was raised Anglican.<sup>118</sup> The reason for his views (as expressed to the Danbury Baptists) had much to do with Jefferson's prejudice toward the clergy of organized religion. Jefferson believed that the average American was suppressed by clergy and needed to be

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114. See MADDOX, *supra* note 66, at 28. The Danbury Baptist Association comprised twenty-six churches in Connecticut.

115. *Id.*

116. *Id.* at 26. Jefferson would later recognize the radical nature of the letter he wrote to the Danbury Baptist. His response was to deflect the potential political fallout by attending church services being held in the House of Representatives two days after issuing the letter to the Danbury Baptist, a practice he would continue for the next seven years. See HAMBURGER, *supra* note 22, at 162.

117. MADDOX, *supra* note 66, at 28-29 (emphasis added). See also 16 THOMAS JEFFERSON, WRITINGS OF THOMAS JEFFERSON 281-82 (Monticello ed. 1982).

118. MADDOX, *supra* note 66, at 29. Jefferson was a member of the officially established church in Virginia, the Anglican Church. *Id.* Prior to his election as president, religion was important to him, and he never spoke out against it. *Id.* As he grew older, however, he developed a different attitude, becoming more Unitarian in his theology. *Id.* Faith, belief in God and immortality, and service to his fellow human beings remained part of his worldview. *Id.*

liberated.<sup>119</sup> Mr. Jefferson wrote little on religion between 1786 and his election in 1800; but from his election until his correspondence with the Danbury Baptists, he wrote more letters with religious content than he had in his entire life.<sup>120</sup> Without exception, each of these letters contained criticism of the clergy.<sup>121</sup> Jefferson saw the Danbury petition as an opportunity to promote his views—something he was eager to do. He was disappointed at the lack of response from the public, whom he had hoped to persuade to accept his point of view as expressed in the letter.<sup>122</sup> While some papers in New England published the letter, the Danbury Baptists essentially ignored it.<sup>123</sup> The Baptists, not seeking the separation of Church and State, considered this view a radical departure from what they believed was proper.<sup>124</sup> They simply sought disestablishment of the recognized Connecticut church so one religion would not be favored above all others.<sup>125</sup>

While Jefferson had many motivations, he did not make official proclamations calling for prayer and thanksgiving like his predecessors, Washington and Adams, because he believed he lacked the constitutional authority to do so.<sup>126</sup> Does this mean that Jefferson's analysis of his constitutional authority to call the nation to prayer was more accurate than Washington or Adams, who did on regular occasions call the nation to prayer and fasting? Furthermore, consider, as an ambassador to France, Jefferson did not attend the Constitutional Convention.

The Framers' general consensus that government should encourage religion, particularly Christianity, for the good of society, which they understood was accomplished best by getting government out of the way,

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119. See HAMBURGER, *supra* note 22, at 147.

120. *Id.* at 147-48.

121. *Id.*

122. *Id.* at 159.

123. *Id.* at 164.

124. *Id.* at 165. To avoid being accused of supporting the separation of religion and government, the Baptists chose to hold onto the letter without publishing it. *Id.* at 144.

125. *Id.* at 144.

126. When considering Jefferson's personal views toward organized religion during his presidency, one must keep in mind his rigid political ideology, as exhibited by his strict constructionist views of his constitutional powers as President. As an ardent Anti-Federalist, his view of his constitutional authority was considerably narrower than most, as manifested in his initial reaction that a constitutional amendment was necessary to complete the Louisiana Purchase in 1803. But for James Madison encouraging Jefferson to be more flexible in his views toward the purchase of lands west of Mississippi, who knows what the future course of this nation might have been. See MADDOX, *supra* note 66, at 26.

conflicts with Jefferson's "wall of separation" analysis.<sup>127</sup> If the Framers ever envisioned a wall at all, it would be a wall that limits government control of the church, not vice versa. In that circumstance, government would remain passive regarding where and when religion entered the public sphere, or received indirect government assistance. Former Chief Justice William Rehnquist's dissent in *Wallace v. Jaffree*<sup>128</sup> specifically addressed this very issue, and laid out his views on both constitutional interpretation of the Establishment Clause and the proper role of government with respect to issues of Church and State. He stated:

It is impossible to build sound constitutional doctrine upon a mistaken understanding of constitutional history, but unfortunately the Establishment Clause has been expressly freighted with Jefferson's misleading metaphor for nearly 40 years. Thomas Jefferson was of course in France at the time the constitutional Amendments known as the Bill of Rights were passed by Congress and ratified by the States. His letter to the Danbury Baptist Association was a short note of courtesy, written 14 years after the Amendments were passed by Congress.

. . . .

There is simply no historical foundation for the proposition that the Framers intended to build the "wall of separation" that was constitutionalized in *Everson*.<sup>129</sup>

Rehnquist continued:

But the greatest injury of the "wall" notion is its mischievous diversion of judges from the actual intentions of the drafters of the Bill of Rights. . . . [N]o amount of repetition of historical errors in judicial opinions can make the errors true. The "wall of

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127. Washington used a metaphor that was probably more appropriate than Jefferson's "Wall of Separation" analysis. Washington described the First Amendment as having "[e]stablish[ed] a textual barrier against spiritual tyranny and religious persecution." See generally EIDSMOE, *supra* note 27. Washington realized the importance of religion in society. He therefore sought to protect the church from the state and not vice versa. The term "Separation of Church and State" may be found nearly verbatim in the former constitution of the Union of Soviet Socialist Republics. KONSTITUTSIJA SSSR (1977) [KONST. SSSR] art. 52 [USSR CONSTITUTION], available at <http://www.constitution.org/cons/ussr77.txt>.

128. 472 U.S. 38 (1984). An Alabama law authorized teachers to set aside one minute at the start of each day for a moment of "silent meditation or voluntary prayer." Sometimes the teacher called upon a student to recite prayers. Relying on *Lemon v. Kurtzman*, the Court ruled 6-3 that the law was unconstitutional.

129. *Id.* at 92, 106.



separation between church and State” is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned.<sup>130</sup>

The phrase “wall of separation” penned by Jefferson went unnoticed for 150 years until it resurfaced in *Everson v. Board of Education*.<sup>131</sup> In a 5-4 decision, the Supreme Court held that the Establishment Clause did not prohibit a New Jersey law that used tax funds to pay bus fares for parochial schools students. The Court stated:

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<sup>132</sup>

In that case, Justice Black concluded: “The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here.”<sup>133</sup>

Many court decisions in the mid-twentieth century concerning religion reflected underlying anti-Catholic bias that encouraged separating state support, no matter how indirect, from religion.<sup>134</sup> Justice Black had his own

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130. *Id.* at 107. Rehnquist concluded:

The Framers intended the Establishment Clause to prohibit the designation of any church as a “national” one. The Clause was also designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others. Given the “incorporation” of the Establishment Clause as against the States via the Fourteenth Amendment in *Everson*, States are prohibited as well from establishing a religion or discriminating between sects. As its history abundantly shows, however, nothing in the Establishment Clause requires government to be strictly neutral between religion and irreligion, nor does that Clause prohibit Congress or the States from pursuing legitimate secular ends through nondiscriminatory sectarian means.

*Id.* at 113.

131. 330 U.S. 1 (1947).

132. *Id.* at 15.

133. *Id.* at 18.

134. In his book on the separation of church and state, Dr. Hamburger traces the roots of the nation’s anti-Catholic bias to the mid-nineteenth century, linking it to the rise of liberal

personal issues with Catholicism. He was a former member of the Ku Klux Klan and a Baptist who renounced the Klan, but never its anti-Catholic bias. Earlier in his career he represented a Methodist minister who shot and killed a Catholic priest for performing the wedding of the Methodist minister's daughter to a Puerto Rican.<sup>135</sup> Justice Black had serious reservations about Catholic schools and felt that Catholics were "looking towards complete domination and supremacy of their particular brand of religion," and were "powerful religion sectarian propagandists."<sup>136</sup>

Nevertheless, Jefferson's "wall" became well established in *Lemon v. Kurtzman*.<sup>137</sup> During the twenty-four intervening years between *Everson* and *Lemon*, a series of cases dealing with religion set the stage both politically and socially that led to the *Lemon* analysis. In the 1962 case of *Engel v. Vitale*,<sup>138</sup> the Supreme Court struck down New York's school prayer law. The Court held that state officials may not compose an official state prayer and require its recitation in the public schools at the beginning of each school day—even if the prayer was denominationally neutral and pupils who wished to do so could remain silent or be excused from the room while the prayer was being recited.<sup>139</sup> Justice Black, writing for a unanimous court held that public school prayer violated the Establishment Clause:

Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause . . . . The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment

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Protestantism (e.g., Unitarianism) and the concern that the Catholic Church's assertion of theological authority was incompatible with the freedom that Protestantism defined as individual independence and personal authority. See HAMBURGER, *supra* note 22, at 193-251.

135. STEVE SUITTS, HUGO BLACK OF ALABAMA: HOW HIS ROOTS AND EARLY CAREER SHAPED THE GREAT CHAMPION OF THE CONSTITUTION 361-62 (2005).

136. GEOFFREY R. STONE, RICHARD ALLEN EPSTEIN & CASS R. SUNSTEIN, THE BILL OF RIGHTS IN THE MODERN STATE 121 (1992).

137. 403 U.S. 602 (1971).

138. 370 U.S. 421 (1962).

139. The offending prayer read: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." *Id.* at 422.

of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not.<sup>140</sup>

The Court provided a brief explanation of what it believed the Framers were attempting to accomplish by placing the Establishment Clause in the First Amendment:

When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. But the purposes underlying the Establishment Clause go much further than that. Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion. The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs.<sup>141</sup>

The Supreme Court also noted that the Framers were keenly aware that national churches in Europe were used to persecute religious minorities as another motivation for the Establishment Clause. The Court noted ironically, and yet hopefully, that its ruling would not “indicate a hostility toward religion or toward prayer.”<sup>142</sup> While pointing out that many of the Framers were men of deep-seated faith who believed in the power of prayer, the Court stated that even a prayer as innocuous of the one being used in New York would be considered an establishment:

It is true that New York’s establishment of its Regents’ prayer as an officially approved religious doctrine of that State does not amount to a total establishment of one particular religious sect to the exclusion of all others—that, indeed, the governmental endorsement of that prayer seems relatively insignificant when compared to the governmental encroachments upon religion which were commonplace 200 years ago.<sup>143</sup>

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140. *Id.* at 430.

141. *Id.* at 431.

142. *Id.* at 434.

143. *Id.* at 436.

Notwithstanding, the ruling was incredibly broad in its scope and breadth. No matter one's view of the issue of school prayer, the result suggested a move towards the removal of any religious references in public schools. That decision created a values vacuum that has never been adequately filled.<sup>144</sup> The seamlessness of the decision is particularly interesting—it is devoid of any degree of nuance, and it lacks consideration of the fact that our Founding Fathers would never have considered such an innocuous prayer the type of establishment they sought to prohibit with the First Amendment. The logic of this decision could easily be transformed to find any number of other things done in public that might run afoul of the Establishment Clause, to include the national motto, the pledge, or prayers that open up Congress or other government institutions. If the logical basis of this decision would fail as to these areas of public expressions of religion, might that same logic be incorrect concerning the type of prayer forbidden here for school children? Essentially, the Court found that children, unlike adults, would be too oppressed or persuaded by such an innocuous statement of public religion, and that the protections of the Establishment Clause were necessary to shelter them. Ironically, the same young ears that are too impressionable to hear an innocuous non-denominational prayer are now taught amazingly complex issues, many without parental consent and often adverse to their religious values. These include, for example, subjects dealing with homosexuality, evolution, and sexual education that, depending on how the subject is presented, could do more damage to religious minority rights than the twenty-two word prayer struck down in *Engel*.<sup>145</sup>

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144. For example, the illegitimacy rate in 1962 was below eight percent. In 2007, that rate is 33.8%. Crime rates have also risen. Other problems have occurred and worsened in spite of trillions of tax dollars being spent in the War on Poverty. While no one would argue a direct casual link between eliminating prayer from school and increasing rates of illegitimacy, crime and other societal ills, the increases in these categories are still breathtaking and alarming. It certainly serves as strong evidence that the Framers' view of religion as the bulwark of a strong republic was accurate.

145. For an example of the flip side of this issue, on February 23, 2007, Massachusetts U.S. District Judge Mark L. Wolf dismissed a civil rights lawsuit brought by David Parker on behalf of his five-year-old child. *Parker v. Hurley*, 474 F. Supp. 2d 261 (D. Mass. 2007), *aff'd*, 514 F.3d 87 (1st Cir. 2008). Parker objected to his child being taught in kindergarten about the homosexual lifestyle without his consent or the opportunity to have his child opt out of the instruction. *Id.* at 263. Judge Wolf found that the school district's actions were reasonable, and that the district had an obligation to teach young children to accept homosexuality. *Id.* at 275. The petitioner was provided three options if he objected: place his child in private school, home school his child, or elect members of the school board who agreed with his views. *Id.* at 264.

Shortly after *Engel*, the Court followed up with related issues in *Abington School District v. Schempp*<sup>146</sup> and *Chamberlin v. Public Instruction Board*.<sup>147</sup> In *Schempp*, the Supreme Court declared unconstitutional a Pennsylvania law that stated: “At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon written request of his parent or guardian.”<sup>148</sup> *Murray* (decided with *Schempp*) found a requirement of the Baltimore school board that the Lord’s Prayer be recited prior to the beginning of the day’s classes unconstitutional.

Interestingly, in his majority opinion, Justice Clark cites the dissent in *Everson* that would have invalidated the provision of public aid to students attending Catholic schools. To support the proposition that in “the relationship between man and religion, the State is firmly committed to a position of neutrality,”<sup>149</sup> Clark stated that “the effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers’ expense.”<sup>150</sup> In citing this broad statement from the

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146. 374 U.S. 203 (1963).

147. 377 U.S. 402 (1964). In *Chamberlin*, the Court found a Florida statute requiring devotional Bible reading and prayer recitation in public schools unconstitutional. The Supreme Court also ruled during this time on other Establishment Clause cases leading up to *Lemon*. See, e.g., *Bd. of Educ. v. Allen*, 392 U.S. 236 (1968) (upholding the constitutionality of a New York state law requiring the state to provide textbooks to all school children in grades seven through twelve, regardless of whether they attended public or private schools); *McGowan v. Maryland*, 366 U.S. 420 (1961) (holding that Sunday closing laws are not unconstitutional); *Torcaso v. Watkins*, 367 U.S. 488 (1961) (striking down a Maryland test for public office that required belief in God).

148. *Schempp*, 374 U.S. at 205. “The appellees Edward Lewis Schempp, his wife Sidney, and their children, Roger and Donna, are of the Unitarian faith and are members of the Unitarian church in Germantown, Philadelphia, Pennsylvania . . . .” *Id.*

149. *Id.* at 226.

150. *Id.* at 216 (quoting *Everson v. Bd. of Educ.*, 330 U.S. 1, 26 (1947) (Jackson, J., dissenting)). Justice Clark further cited the dissenters in *Everson*:

The [First] Amendment’s purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.

*Everson* dissent, Justice Clark essentially endorsed a complete and total separation between religion and the public square.

This was a bridge too far for some of the justices. Of note was the following admonition from Justice Goldberg's concurring opinion (joined by Justice Harlan):

It is said, and I agree, that the attitude of government toward religion must be one of neutrality. But untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.<sup>151</sup>

In *Lemon v. Kurtzman*, decided in 1971, the Supreme Court put forward a three-part test, which is used to determine whether Jefferson's "wall of separation" has been breached. A state law (1) must have a secular legislative purpose, (2) its primary effect must be one that neither promotes religion nor inhibits religion, and (3) the statute must not foster "an excessive entanglement with religion."<sup>152</sup> Currently, in cases involving church and state issues concerning the Establishment Clause, the *Lemon* analysis is the proper test, if for no other reason than because it is the method by which the Court analyzes Establishment Clause cases. Based on the *Lemon* analysis, a series of inconsistent results have come from the courts, but the general trend has been to exclude religion, and specifically Christianity, from the public square.

For example, in 1980 the Supreme Court ruled that a Kentucky statute requiring the posting of a copy of the Ten Commandments, purchased with private contributions, to the wall of each public school classroom was an unconstitutional establishment of religion with no secular legislative

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*Id.* at 217 (quoting *Everson*, 330 U.S. at 31-32 (Rutledge, J., dissenting)).

151. *Id.* at 306.

152. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). *Lemon* was actually a series of three cases, including *Earley v. DiCenso*, 400 U.S. 901 (1970) and *DiCenso v. Robinson*, 316 F. Supp. 112 (D.R.I. 1970). The Supreme Court ruled unanimously that the state statutes providing support to private and parochial schools were an unconstitutional entanglement with religion. *Id.* at 615. The Pennsylvania law paid the salaries of teachers in parochial schools, and assisted the purchasing of textbooks, and other teaching supplies. *Id.* at 606. In Rhode Island, the State paid fifteen percent of the salaries of private school teachers. *Id.*

purpose.<sup>153</sup> Given this standard as explained in *Stone*, the Court had seemingly built an impregnable wall that could not be scaled by anything that remotely looked like state support of religious expression in any form, no matter how indirect. In 1985, the Supreme Court held that an Alabama statute authorizing a one-minute period of silence in all public schools “for meditation or voluntary prayer” was an unconstitutional establishment of religion.<sup>154</sup> In 1987, the Supreme Court found Louisiana’s “Creationism Act” that forbade the teaching of the theory of evolution in public elementary and secondary schools unless accompanied by instruction in the theory of “creation science” to be facially invalid because the statute lacked a clear secular purpose.<sup>155</sup>

Some decisions using the *Lemon* analysis found support for some religious expression when the issue was the ability to exercise one’s religion. This was especially clear concerning free access to public facilities by religious groups to practice religion under the Free Exercise Clause consistent with federal statutes that prohibited discrimination against religious viewpoints and speech.<sup>156</sup> In 1983, the Supreme Court found that the Nebraska Legislature’s chaplaincy practice did not violate the Establishment Clause.<sup>157</sup> In 1984, the Supreme Court held in *Lynch v.*

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153. *Stone v. Graham*, 449 U.S. 39 (1980). *See also infra* note 185.

154. *Wallace v. Jaffree*, 472 U.S. 38 (1985). *See supra* note 111 for a further discussion of this case.

155. *Edwards v. Aguillard*, 482 U.S. 578 (1987).

156. In free exercise cases, the Supreme Court has been far more willing to support the ability of citizens to practice religion using public facilities, in part due to Federal legislation allowing for equal access for all groups, including religious groups. It is here that one sees a merging of the right to free exercise with the right to free speech and assembly. *See Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819 (1995) (finding a University of Virginia rule that did not allow student activity funds to be used by student groups wanting to promote a religious viewpoint unconstitutional); *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (finding a New York Statute preventing school boards from allowing schools to be used after hours for religious activities unconstitutional); *Bd. of Educ. of the Westside Cmty. Sch. v. Mergens*, 496 U.S. 226 (1990) (finding a violation of the equal access act where the Nebraska school district denied permission to a group of students who wanted to form a Christian Club in their high school because the club could not have a faculty sponsor); *Widmar v. Vincent*, 454 U.S. 263 (1981) (holding that a University of Missouri at Kansas City rule that its facilities could not be used by student groups for purposes of religious worship or religious teaching violated the Free Exercise Clause); *Wisconsin v. Yoder*, 406 U.S. 208 (1972) (holding that Wisconsin Law requiring mandatory attendance in schools until sixteen years of age violated Amish Students’ right to free exercise of religion).

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

*Donnelly* that an annual Christmas display in a park owned by a nonprofit organization did not violate the Establishment Clause.<sup>158</sup> In *Agostini v. Felton*, the Court upheld a statute that provided public tutors for students attending private schools,<sup>159</sup> overruling *Aguilar v. Felton*,<sup>160</sup> which held a similar New York program to be an excessive entanglement. Other than twelve years time, the only thing that had changed between *Agostini* and *Aguilar* was the cost of complying with *Aguilar*.<sup>161</sup> Neither case seriously discussed whether the statute violated the Framers' view of the Establishment Clause. These two cases showed that the *Lemon* analysis had subsumed the Establishment Clause itself. Rather than defining whether a religion was established, the Court embroiled itself in a hypertechnical analysis of whether the statute created excessive entanglement with religion. This approach is far afield from the Framers' intent.

The *Lemon* analysis seemingly met its apparent Waterloo in *County of Allegheny v. ACLU Greater Pittsburgh Chapter*.<sup>162</sup> In *Allegheny*, the ACLU and seven local residents filed suit seeking permanently to enjoin the county from displaying a nativity scene, and the city of Pittsburgh from displaying a menorah on the grounds that the separate displays violated the Establishment Clause.<sup>163</sup> The Supreme Court's inconsistent 5-4 plurality

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

159. *Agostini v. Felton*, 521 U.S. 203 (1997).

160. *Aguilar v. Felton*, 473 U.S. 402 (1985).

161. The Court accepted respondent's argument that there were no substantial changes in the circumstances between *Agostini* and *Aguilar*. The only thing that changed was the ever-shifting attitudes of the justices who used *Lemon* as a vehicle to reach a predetermined result rather than a tool of constitutional analysis. Justice Souter's and Justice Ginsburg's dissents criticize the majority for arriving at an opposite conclusion in spite of similar facts twelve years apart. *Agostini*, 521 U.S. at 240 (Souter, J., dissenting); *id.* at 255 (Ginsburg, J., dissenting).

162. *Cnty. of Allegheny v. ACLU*, 492 U.S. 573 (1989). The decision was a fractured 5-4 decision with concurrences and dissents coming from within the majority. The majority consisted of Justice Blackmun (parts III-A, IV, V), joined by Justices O'Connor, Brennan, Marshall, Stevens. Justice Kennedy authored the dissent, joined by Justices Rehnquist, White, and Scalia, which would have found both the crèche and the menorah constitutional. Since Justice Alito replaced Justice O'Connor, it is likely that the decision concerning the crèche is ripe for reversal. The vote was 6-3, finding the holiday display including a menorah constitutional. Justices Stevens, Brennan, and Marshall would have invalidated both the menorah and the crèche calling for a complete separation. Justice O'Connor wrote a separate opinion concerning the crèche, joined by Justices Brennan and Stevens.

163. *Id.* at 587-88.



decision resulted in the menorah display being found constitutional, and the crèche being found an unconstitutional establishment of religion.<sup>164</sup>

The Court found that the city of Pittsburgh's combined holiday display of a Chanukah menorah, a Christmas tree, and a sign saluting liberty did not have the effect of conveying an endorsement of religion.<sup>165</sup> Nevertheless, the Court held the county's crèche display to be an unconstitutional establishment because the crèche angel's words endorsed "a patently Christian message: Glory to God for the birth of Jesus Christ."<sup>166</sup> Justice Blackmun noted that "[t]he government may acknowledge Christmas as a cultural phenomenon, but under the *First Amendment* it may not observe it as a Christian holy day by suggesting that people praise God for the birth of Jesus."<sup>167</sup>

Justice Kennedy summarized the majority opinion conclusions as "an unjustified hostility toward religion, a hostility inconsistent with our history and our precedents[.]"<sup>168</sup> Justice Kennedy stated, "Speech may coerce in some circumstances, but this does not justify a ban on all government recognition of religion."<sup>169</sup> Quoting former Chief Justice Burger, Justice Kennedy said:

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164. *Id.* at 621.

165. *Id.* at 620. Justice O'Connor's concurring opinion justified the City of Pittsburgh display as meeting constitutional muster by stating:

In setting up its holiday display, which included the lighted tree and the menorah, the city of Pittsburgh stressed the theme of liberty and pluralism by accompanying the exhibit with a sign bearing the following message: "During this holiday season, the city of Pittsburgh salutes liberty. Let these festive lights remind us that we are the keepers of the flame of liberty and our legacy of freedom." . . . This sign indicates that the city intended to convey its own distinctive message of pluralism and freedom. By accompanying its display of a Christmas tree—a secular symbol of the Christmas holiday season—with a salute to liberty, and by adding a religious symbol from a Jewish holiday also celebrated at roughly the same time of year, I conclude that the city did not endorse Judaism or religion in general, but rather conveyed a message of pluralism and freedom of belief during the holiday season.

*Id.* at 635 (O'Connor, J., concurring) (citations omitted).

166. *Id.* at 601 (majority opinion).

167. *Id.* (emphasis added). Justice Blackmun makes his prejudice known later in the opinion when critiquing Justice Kennedy's dissent when he states: "The history of this Nation, it is perhaps sad to say, contains numerous examples of official acts that endorsed Christianity specifically." *Id.* at 604.

168. *Id.* at 655 (Kennedy, J., concurring in judgment in part and dissenting in part).

169. *Id.* at 661.

The general principle deducible from the *First Amendment* and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.<sup>170</sup>

Justice Kennedy concluded with this stinging rebuke to the majority:

The approach adopted by the majority contradicts important values embodied in the Clause. Obsessive, implacable resistance to all but the most carefully scripted and secularized forms of accommodation requires this Court to act as a censor, issuing national decrees as to what is orthodox and what is not. What is orthodox, in this context, means what is secular; the only Christmas the State can acknowledge is one in which references to religion have been held to a minimum. The Court thus lends its assistance to an Orwellian rewriting of history as many understand it. I can conceive of no judicial function more antithetical to the *First Amendment*.<sup>171</sup>

The five justices in the *Allegheny* majority decision, Blackmun, Marshall, Brennan, Stevens, and O'Connor, came from the liberal wing of the Court, many of whom have been replaced by more conservative justices. It is reasonable to believe that the holding and reasoning of *Allegheny* would fail to survive a second look by the Supreme Court should it be challenged in the future, given the present Court makeup. For those who think *Allegheny* is inconsistent with the Framers' intent, it is also appropriate to ask whether *Allegheny* should be overtly challenged by engaging in the same type of conduct found unconstitutional in that decision.

The decision in *Allegheny* led the George H. W. Bush administration to argue that the *Lemon* test should be abandoned in issues involving whether there was governmental promotion of religion in *Lee v. Weisman*.<sup>172</sup> In *Weisman*, a Jewish parent in Providence, Rhode Island challenged the local school district's policy of including a prayer in its graduation ceremonies.

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170. *Id.* at 662 (quoting *Walz v. Tax Comm'r of the City of N.Y.*, 397 U.S. 664, 669 (1970)).

171. *Id.* at 678-79 (1989) (emphasis added).

172. 505 U.S. 577, 587 (1992).

At the disputed graduation, a rabbi gave an invocation where he thanked God by stating:

God of the Free, Hope of the Brave: For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You. . . .

For the liberty of America, we thank You. . . .

For the political process of America in which all its citizens may participate, for its court system where all may seek justice we thank You. . . .

For the destiny of America we thank You. May the graduates of Nathan Bishop Middle School so live that they might help to share it.

May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled.

AMEN[.]<sup>173</sup>

The same rabbi also gave the benediction where he stated: “O God, we are grateful to You for having endowed us with the capacity for learning which we have celebrated on this joyous commencement. . . . We give thanks to You, Lord, for keeping us alive, sustaining us and allowing us to reach this special, happy occasion.”<sup>174</sup> The Bush administration agreed with the school board, which argued that the prayer did not demonstrate a religious endorsement.<sup>175</sup>

In a 5-4 decision, the Supreme Court ruled that the graduation prayer violated the Establishment Clause.<sup>176</sup> In a decision authored by Justice

173. *Id.* at 581-82.

174. *Id.* at 582.

175. *Id.* at 583-84.

176. *Id.* at 599. The vote in the majority included Justice Kennedy, joined by Justices Blackmun, Stevens, O’Connor, and Souter, with a concurrence by Justice Blackmun, joined by Justices Stevens, and O’Connor, and a second concurrence by Justice Souter, joined by Justices Stevens and O’Connor. *Id.* at 580. The dissent was written by Justice Scalia, and joined by Justices Rehnquist, White, and Thomas. *Id.* at 580. Justice Kennedy is purported to have changed his vote during deliberations. *Lee v. Weisman*, FIRST AMENDMENT CENTER, [http://www.firstamendmentcenter.org/faclibrary/case.aspx?case=Lee\\_v\\_Weisman](http://www.firstamendmentcenter.org/faclibrary/case.aspx?case=Lee_v_Weisman) (last visited May 1, 2011). It appears what impacted him was the fact that the principal had written a pamphlet on composing prayers during public occasions. *See Weisman*, 505 U.S. at 588. Justice Kennedy wrote:

Through these means the principal directed and controlled the content of the prayers. Even if the only sanction for ignoring the instructions were that the rabbi would not be invited back, we think no religious representative who valued his or her continued reputation and effectiveness in the community

Kennedy, the Supreme Court refused to reverse the standard it established in *Lemon*, and extended the *Engel* prohibition against school prayer to graduation ceremonies.

The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the *Establishment Clause*. It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which “establishes a [state] religion or religious faith, or tends to do so.” . . . The State’s involvement in the school prayers challenged today violates these central principles.

That involvement is as troubling as it is un denied. A school official, the principal, decided that an invocation and a benediction should be given; this is a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur.<sup>177</sup>

Justice Kennedy’s majority opinion found that such a prayer offered at a graduation ceremony subjected students to harm by impermissible peer pressure.

The undeniable fact is that the school district’s supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion. . . . [F]or the dissenter of high school age, who has a reasonable perception that she is being forced by the State to pray in a manner her conscience will not allow, the injury is no less real. . . . It is of little comfort to a dissenter, then, to be told that for her the act of standing or remaining in silence signifies mere respect, rather than participation. What matters is that . . . a reasonable dissenter

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would incur the State’s displeasure in this regard. It is a cornerstone principle of our *Establishment Clause* jurisprudence that “it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government,” . . . and that is what the school officials attempted to do.

*Id.* at 588 (citations omitted) (emphasis added).

177. *Id.* at 587 (alteration in original) (citations omitted).

in this milieu could believe that the group exercise signified her own participation or approval of it.<sup>178</sup>

For the dissenters, this logic was nonsense. Justice Scalia wrote:

The history and tradition of our Nation are replete with public ceremonies featuring prayers of thanksgiving and petition.

...

From our Nation's origin, prayer has been a prominent part of governmental ceremonies and proclamations. . . .

....

This tradition of Thanksgiving Proclamations—with their religious theme of prayerful gratitude to God—has been adhered to by almost every President. . . .

In addition to this general tradition of prayer at public ceremonies, there exists a more specific tradition of invocations and benedictions at public school graduation exercises.<sup>179</sup>

But one of Justice Kennedy's arguments, arguing that having to listen to a prayer at a graduation ceremony would injure a dissenter by signifying his approval of such a prayer, was—to quote Justice Scalia—"ludicrous":

[A] student who simply *sits* in "respectful silence" during the invocation and benediction (when all others are standing) has somehow joined—or would somehow be perceived as having joined—in the prayers is nothing short of ludicrous. We indeed live in a vulgar age. But surely "our social conventions," . . . have not coarsened to the point that anyone who does not stand on his chair and shout obscenities can reasonably be deemed to have assented to everything said in his presence. . . .

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The deeper flaw in the Court's opinion does not lie in its wrong answer to the question whether there was state-induced "peer-pressure" coercion; it lies, rather, in the Court's making violation of the *Establishment Clause* hinge on such a precious question. The coercion that was a hallmark of historical establishments of religion was coercion of religious orthodoxy and of financial support *by force of law and threat of penalty*.<sup>180</sup>

178. *Id.* at 594.

179. *Id.* at 633-35 (Scalia, J., dissenting).

180. *Id.* at 637, 640 (citations omitted) (emphasis added).

The Jefferson wall may have seen its first cracks in 2005 in a pair of Supreme Court 5-4 decisions on the posting of the Ten Commandments on public property. The Court found a Texas display constitutional while at the same time found a Kentucky display unconstitutional. The key in both decisions centered upon whether the display adhered to a secular purpose, reflecting a wrong-headed strict adherence to the *Lemon* analysis. In *Van Orden v. Perry*,<sup>181</sup> the Court held that the Texas governmental display of the Ten Commandments did not cross the line into impermissible proselytizing. In *McCreary County v. ACLU*,<sup>182</sup> involving Ten Commandments displays on the walls of two county courthouses, the Court found that public officials sought to advance religion, and were not motivated by a secular purpose in establishing the courthouse display.<sup>183</sup>

Justice Breyer was the swing voter in both cases. In *Van Orden*, Justice Breyer was persuaded by the length of time the Texas display had been standing. Justice Breyer reasoned in his plurality opinion that:

[A] further factor is determinative here. As far as I can tell, 40 years passed in which the presence of this monument, legally speaking, went unchallenged (until the single legal objection raised by petitioner). . . . Hence, those 40 years suggest more strongly than can any set of formulaic tests that few individuals, whatever their system of beliefs, are likely to have understood the monument as amounting, in any significantly detrimental way, to a government effort to favor a particular religious sect . . . .<sup>184</sup>

Justice O'Connor voted to find both displays unconstitutional. Justice Alito has since replaced Justice O'Connor, whose views would seem to favor

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181. *Van Orden v. Perry*, 545 U.S. 677, 681 (2005).

182. *McCreary Cnty. v. ACLU*, 545 U.S. 844, 850-51, 881 (2005).

183. *But see* *ACLU v. Grayson Cnty.*, 591 F.3d 837 (6th Cir. 2010), *reh'g denied*, 605 F.3d 426 (6th Cir. 2010), in which the Sixth Circuit Court of Appeals allowed Grayson County's courthouse to keep a display that included the Ten Commandments. *Grayson*, 591 F.3d at 841. The display, located on the second floor of Grayson County's courthouse, is titled "Foundations of American Law and Government" and includes the Ten Commandments, Magna Carta, Mayflower Compact, Declaration of Independence, Bill of Rights, Preamble to the Kentucky Constitution, Star-Spangled Banner, National Motto, and a picture of Lady Justice. *Id.*

184. *Van Orden*, 545 U.S. at 702 (Breyer, J., concurring in judgment).

such displays in spite of the public official's motivations.<sup>185</sup> This is another example of a holding that is ripe for challenge.

For the most part, the courts have applied *Lemon* by essentially eliminating any and all references of God and religion in most public fora when the issue before the court concerned whether the activity in question involved government action reflecting an establishment of religion.<sup>186</sup> In its place, a philosophy of Secular Humanism has developed, as forewarned by Justice Goldberg in *Schempp*,<sup>187</sup> that can be found especially prevalent in the public schools. Further still, the courts may be protecting secularism under the guise of neutrality, because secularists deem it to be a philosophy and not a religion.<sup>188</sup> Evolution, which denies the creation of man by God, shall be taught exclusively as fact, without challenge, as it is deemed acceptable science and has the absence of religious influences. Any attempts to give equal time to scientific theories supporting Intelligent Design have thus far been denied on a basis that such theories are not based in science, but on religious faith, and are therefore an unconstitutional endorsement of religion by government.<sup>189</sup> In states that have recognized homosexual marriage, that lifestyle is taught to students as early as elementary school, notwithstanding the religious views of parents that might run counter to that curriculum.<sup>190</sup>

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185. See, e.g., Pamela Harris, *Pleasant Grove v. Sumnum and the Establishment Clause: Giving with One Hand, Taking with the Other?*, 46 WILLIAMETTE L. REV. 677, 685-86 (2010) (discussing Justice Alito's Establishment Clause views in a recent case involving religious monuments on government property); Kelly S. Terry, *Shifting out of Neutral: Intelligent Design and the Road to Nonpreferentialism*, 18 B.U. PUB. INT. L.J. 67, 100-04 (2008) (discussing Justice Alito's record on the Establishment Clause while on the Third Circuit).

186. For an excellent discussion of the development of law concerning church and state issues in school, see Brian Heady, Note, *Constitutional Law: What Offends a Theist Does Not Offend the Establishment Clause*. *Smith v. Board of School Commissioners*, 827 F.2d 684 (11th Cir. 1987), 13 S. ILL. U. L.J. 153 (1988).

187. *Sch. Dist. Of Abington Tp., Pa. v. Schempp*, 374 U.S. 203, 306 (1963).

188. *Id.* at 171-72.

189. See *Edwards v. Aguillard*, 482 U.S. 578, 581-82 (1987) (invalidating a statute requiring public schools to give balanced treatment to evolution and creation science); *McLean v. Arkansas Bd. of Educ.*, 529 F. Supp. 1255, 1256, 1274 (E.D. Ark. 1982) (invalidating a law mandating a balanced treatment of evolution and creation).

190. On February 24, 2007, a Massachusetts federal judge ruled that schools can compel children to learn about homosexuality against the wishes of their parents. *Parker v. Hurley*, 474 F. Supp. 2d 261, 263-64 (D. Mass. 2007). U.S. District Judge Mark L. Wolf dismissed a civil rights lawsuit, ordering that it is reasonable for public schools to teach young children to accept homosexuality. *Id.* The plaintiff had been arrested when he protested the school's

Religious values are excluded, but values that run counter to religion, and specifically Christianity, can be taught without regard to the views of the parents. Consider further, for example, that in Santa Rosa County, Florida, school officials were threatened with imprisonment for leading a prayer before a luncheon dedicating a school building, where no students were even in attendance.<sup>191</sup> If the courts can so easily ban religious expression, those same courts could conclude that a resurrected “Fairness Doctrine” requires Christian broadcasters to offer alternative viewpoints.<sup>192</sup> Certainly, the Framers would have a difficult time recognizing the landscape of American society and culture that our court system has systematically imposed upon the American people based on a narrow and incorrect interpretation of the Establishment Clause.

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refusal to notify him when his six-year-old kindergartner was going to be taught about homosexuality. *Father Faces Trial Over School's "Pro-Gay" Book*, WORLD NET DAILY (Aug. 4, 2005, 1:00 AM), <http://www.worldnetdaily.com/index.php?pageId=31618>. In April 2006, the same school used the book *King and King*, to teach about homosexual romances and marriage to second-graders and again refused to provide parental notification. *Parker*, 474 F. Supp. 2d. at 266. Judge Wolf found that

In essence, under the Constitution public schools are entitled to teach anything that is reasonably related to the goals of preparing students to become engaged and productive citizens in our democracy. Diversity is a hallmark of our nation. It is increasingly evident that our diversity includes differences in sexual orientation. . . .

....

. . . An exodus from class when issues of homosexuality or same-sex marriage are to be discussed could send the message that gays, lesbians, and the children of same-sex parents are inferior and, therefore, have a damaging effect on those students.

*Id.* at 263-64, 265.

191. Katie Tammen, *School Officials May Be Jailed for Prayer*, NEWSHERALD.COM (Aug. 4, 2009, 5:14 PM), <http://www.newsherald.com/articles/high-76368-administrators-pensecola.html>. “Principal Frank Lay and Athletic Director Robert Freeman face[d] criminal contempt charges for ‘willfully violating the court’s temporary injunction order’ after they prayed at a school function, according to a court order of contempt.” *Id.* The violation was brought to the attention of the court by the ACLU, which alleged: “Lay encouraged Freeman to lead a prayer before a meal at the dedication of a new field house during a school-day luncheon.” *Id.*

192. Mallika Rao, *Christian Broadcasters Nervous About Fairness Doctrine*, CROSSWALK.COM (Aug. 8, 2008), <http://www.crosswalk.com/news/christian-broadcasters-nervous-about-fairness-doctrine-11580296.html>. “If the Fairness Doctrine were to be reinstated by Congress, broadcasters would be legally forced to follow the old protocol: one-third of the airtime given to one opinion must be offered free-of-charge to opponents.” *Id.* This is of particular concern to Christian broadcasters whose specific goal is to preach the gospel.



## VI. CONCLUSION

In *Religion and the State*, written in 1941, the author made a statement, which became a warning to all for our present age:

As our government extends its control over the economic activities of its citizens, are we sure that this increasingly powerful modern state may not enlarge its control over other social concerns? How far, for instance, may the state go in molding the ideas of youth, without coming into conflict with . . . the churches?<sup>193</sup>

The *Lemon* analysis is inconsistent with the Framers' intent for the Establishment Clause and should be abandoned. The *Lemon* analysis does more to harm the religious constitutional rights of Americans than it does to protect those who it purports to protect from the intrusion of public religious expression. The American people would be better served if the Court would reconsider its analysis in *Weisman* and adopt the view that was espoused by the dissent. The Court needs to reconsider who it is trying to protect and from what it is protecting those people by keeping religious expression limited to the private property of the church and home. The Court need not treat religious expression as though it represented the equivalent of some type of existential threat to "dissenters."

Beyond that, we have developed a society that now assumes being in the mere presence of religious speech signifies acceptance. This becomes a pernicious assumption that one has a right to be free from religion. Public expression of religion should not be forced from view and treated similarly to hate speech, pornography, or provoking words threatening the general welfare and public peace. The courts should consider whether this nation is actually better off based on the past fifty years of Establishment Clause jurisprudence that has replaced public religious expression with absolute secularism and Judeo-Christian religious morals with a subjective morality in the guise of secularism and faux neutrality.

The Framers believed that churches would mold America's social values with the indirect and subtle encouragement of government, rather than with the government's overt support for one specific creed. The Framers viewed the Establishment Clause as limiting government action only and not the actions of individuals, whether or not they were in the government's employ, or whether the religious speech occurred on the government's land. The Establishment Clause was supposed to be a shield against overt

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193. EVARTS B. GREENE, RELIGION AND THE STATE 2-3 (1941).

government action to prop up one religious sect at the expense of all others, rather than a sword to remove all religious expression from public view. Somehow, though, encouragement of religious expression became unconstitutional. Since *Engel*, individual expressions of religion in the public square have been essentially eliminated in the view that such individual actions created a view of favoritism toward one religion or another.

One should not mince words. The impact of removing religion from public view has been devastating to the nation. It is a plain and open fact that since *Engel* and other court decisions that have removed religious expression from the schools and public square, the loss of religious expression has been inversely proportional to the rise in anti-social behavior. The past fifty years have seen increased rates of illegitimacy, crime, abortions, divorce, and the general coarsening of society, along with a rise in other anti-social activities related to these behaviors (e.g., dropout rates in school, increase in drug use, and greater rates of cohabitation versus marriage).

One might immediately declare that this is an outlandish use of *post hoc, ergo propter hoc*,<sup>194</sup> which is faulty logic. While there are always a myriad of complex reasons to explain the rise of any type of specific anti-social activity, there is always a core underlying cause, which has a point of inception. With the rise of secularism, assisted by court decisions that promoted neutrality at the expense of religious expression, there has been an increasing belief that all morality is a subjective value. This view of subjective morality holds that moral issues should not and cannot be imposed by government, as all views and actions have equal value and claim. One could also describe this as a rise of moral relativism that became ascendant in the vacuum created by the courts' limitation of religious values in the public arena. Moral relativism, which has become the de facto position of our government and society, would be a foreign concept to the Founding Fathers who believed in an objective moral code with universal truths. Our Framers believed that this universal moral code was ascertainable and understandable by society, and to be embodied in both law and public practice. If morality is subjective and there are no universal truths, it will inevitably lead to a society that provides for abortion on demand at any age, euthanasia, a removal of all age of consent laws, the elimination of governmental recognition of marriage, and of laws dealing with moral issues proscribing prostitution, gambling, adultery, and

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194. Latin for "after this, therefore because of this." BLACK'S LAW DICTIONARY 1205 (8th ed. 2004). This is a fallacy "assuming causality from sequence." *Id.*

eventually even child pornography. “A bridge too far,” one would declare. Yet already in Rhode Island, minors as young as sixteen can engage in adult entertainment and legalized prostitution.<sup>195</sup>

A ship of state with no moral anchor will float wherever societal currents carry it. The Jefferson wall as resurrected in *Everson* and carried forward by those jurists who believe in a complete and total separation of religion from government is a historical mistake. This mistake found its way not only into our constitutional jurisprudence, but into the public lexicon as well. People speak freely of the “wall of separation between church and state” as though these words were firmly planted in the First Amendment. Thus, fixing the problem involves more than just correcting the inaccurate legal analysis of the cases discussed here, but a complete education of an ill-informed society. More importantly, those who are studying law need to properly understand what our Founding Fathers intended concerning the Establishment Clause and the church’s role in public affairs.

If our nation is to stop its increasing slide into moral decay, the courts will have to restore the original intent of our Founding Fathers and move away from the concept that neutrality is required. Stopping this slide requires liberating the nation from the tyranny of the *Lemon* analysis, and accepting the view that religious expression has a place in the public square no less equal than any other expression. This means overruling decisions that preclude prayers at public school graduations, moments of silence at the beginning of a school day, and allowing cities to offer religious displays during religious holidays. Religious displays in public locations should be permissible regardless of a lack of secular purpose. Students should be able to sing songs that have religious roots during holiday periods without fear that a court will find an establishment of religion. Ten Commandment monuments should be permitted regardless of location or intent. Crosses at government cemeteries should not be subject to *Lemon*-like scrutiny. The judicial mountains have declared that the Establishment Clause requires a

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195. Amanda Milkovits, *Minors in R.I. Can Be Strippers*, PROVIDENCE J. (July 21, 2009, 11:44 AM), [http://www.projo.com/news/content/teen\\_dancers\\_07-21-09\\_Q6F39ID\\_v80.3985e27.html](http://www.projo.com/news/content/teen_dancers_07-21-09_Q6F39ID_v80.3985e27.html)

Providence police recently discovered that teen job opportunities extend into the local adult entertainment world while they were investigating a 16-year-old runaway from Boston. . . . That’s when the police found that neither state law, nor city ordinance bars minors from working at strip clubs. . . . With the age of consent at 16 in Rhode Island, the police worry that teenage strippers could take their business to the next level and offer sexual favors—and it wouldn’t be illegal.

*Id.*

secular society, only to see the nation lose its way in a sea of moral uncertainty, unrecognizable to those who authored the very clause. It is far past time for the experiment in judicial revisionism to end in favor of original intent for the sake of the nation.

This article ends at the point where our nation began. The Framers believed the aforementioned truths to be “self evident.”<sup>196</sup> They believed in an objective moral code where God “endowed” all “with certain unalienable Rights.”<sup>197</sup> When objective morality consistent with the Law of God is taken out of the equation and replaced with the subjective moral code of earthly institutions, absolutely any moral depravity can and will go. This lesson has been seen throughout all history, including our modern times. Consider ancient Rome’s moral code, which was determined by the predilections of whoever was emperor at the time. An individual’s civil rights, life, and liberty were subservient to the whims of the subjective moral code of the emperor, who was a god unto himself. In modern times, one need only look to Nazi Germany, Stalin’s Soviet Union, or to recent events in Bosnia, Rwanda, and Darfur to see the subjective morality of these leaders play out to devastating effect. These examples suggest that when a society rejects the objective moral code—one espoused in our own Declaration of Independence—and, by default, creates an absence of God, those societies will be subsumed by depravity. If one believes that it could not eventually happen here, one might consider the fifty-three million abortions,<sup>198</sup> the fourteen million arrests in 2008,<sup>199</sup> the fifty percent divorce rate,<sup>200</sup> and the thirty-six percent illegitimacy rate.<sup>201</sup> We are a nation that is

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196. THE DECLARATION OF INDEPENDENCE para. 2 (1776).

197. *Id.*

198. According to statistics maintained by the Guttmacher Institute, there have been 53.3 million abortions in the United States since *Roe v. Wade* in 1973. *Abortion Statistics*, NAT’L RIGHT TO LIFE COMM., [http://www.nrlc.org/factsheets/FS03\\_AbortionInTheUS.pdf](http://www.nrlc.org/factsheets/FS03_AbortionInTheUS.pdf) (last visited Apr. 1, 2011).

199. *Table 29: Estimated Number of Arrests*, FBI (Sept. 2009), [http://www2.fbi.gov/ucr/cius2008/data/table\\_29.html](http://www2.fbi.gov/ucr/cius2008/data/table_29.html). According to the FBI, the list of crimes in 2008 include the following: Violent Crimes: 1,382,012; Property Crimes: 9,767,915; Murder: 16,272; Rape: 89,000; Robbery: 441,855; Aggravated Assault: 834,885; Burglary: 2,222,196; Larceny-theft: 6,588,873; Vehicle Theft: 956,846. *2008 Crime in the United States*, FBI (Sept. 2009), <http://www2.fbi.gov/ucr/cius2008/index.html> (click on either “Violent Crime” for statistics on murder, rape, robbery, aggravated assault, and violent crime in general, or “Property Crime” for statistics on burglary, larceny-theft, motor vehicle theft, and property crime in general).

200. *Divorce Statistics*, DIVORCE STATISTICS, <http://www.divorcestatistics.org> (last visited Apr. 9, 2011) (citing report that forty-five to fifty percent of first marriages in America end in divorce).

sleepwalking toward the abyss. We are standing at the cliff, arrogantly refusing to see that the road we have traveled has taken us from our roots. No nation is guaranteed tomorrow, and the great ones fall from within long before they fall. If this nation is to survive, we must, as a people, acknowledge the importance of religion in the life of the nation.<sup>202</sup>

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201. The U.S. illegitimacy rate was 36.8 percent, according to data reported by the National Center for Health Statistics in its recent report, "Births: Preliminary Data for 2005." Brady E. Hamilton et al., *Births: Preliminary Data for 2005*, CTRS. FOR DISEASE CONTROL AND PREVENTION, NAT'L CNTR. FOR HEALTH STATISTICS, <http://www.cdc.gov/nchs/data/hestat/prelimbirths05/prelimbirths05.htm> (last updated Apr. 6, 2010).

202. The following book, while not cited, was supplemental in the formulation of this paper: JAY ALAN SEKULOW, *WITNESSING THEIR FAITH: RELIGIOUS INFLUENCE ON SUPREME COURT JUSTICES AND THEIR OPINIONS* (Margaret Hammerot ed., 2006).

