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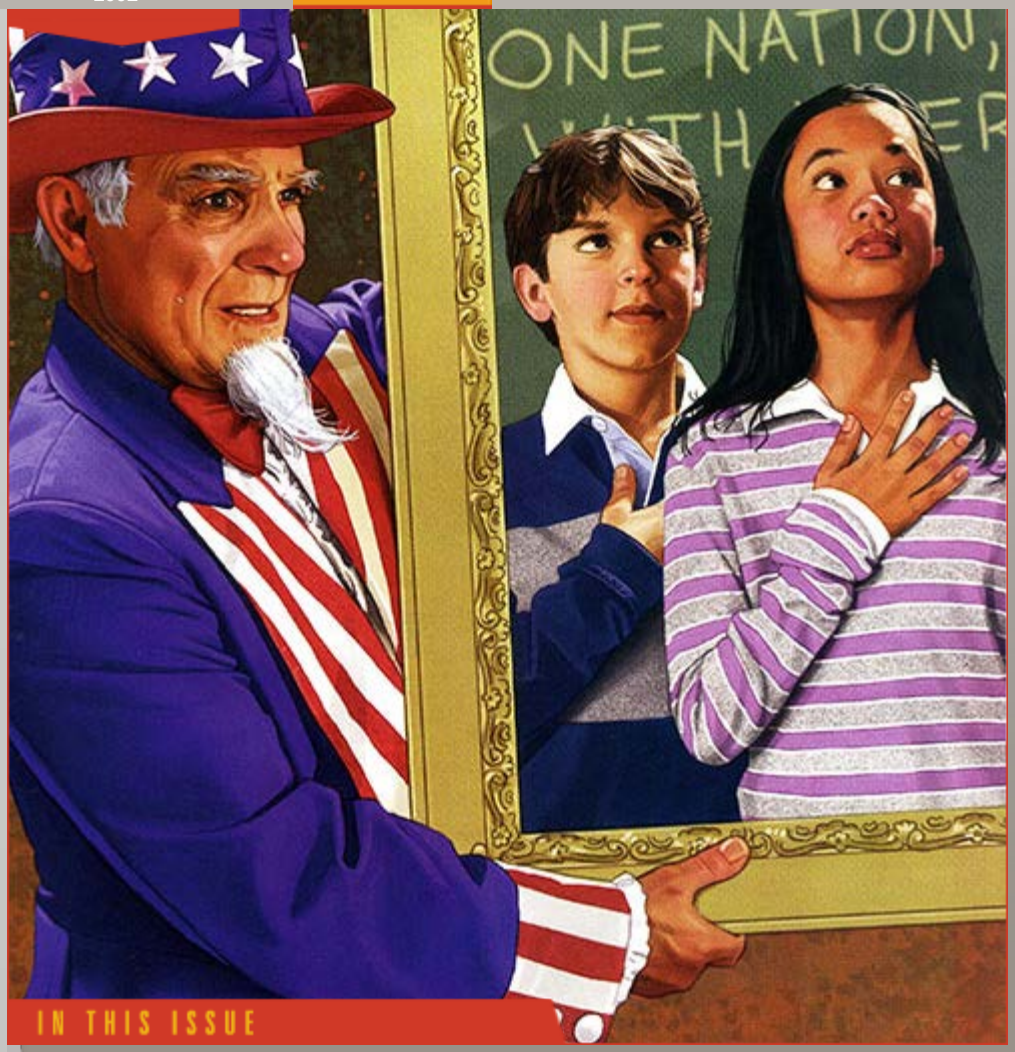

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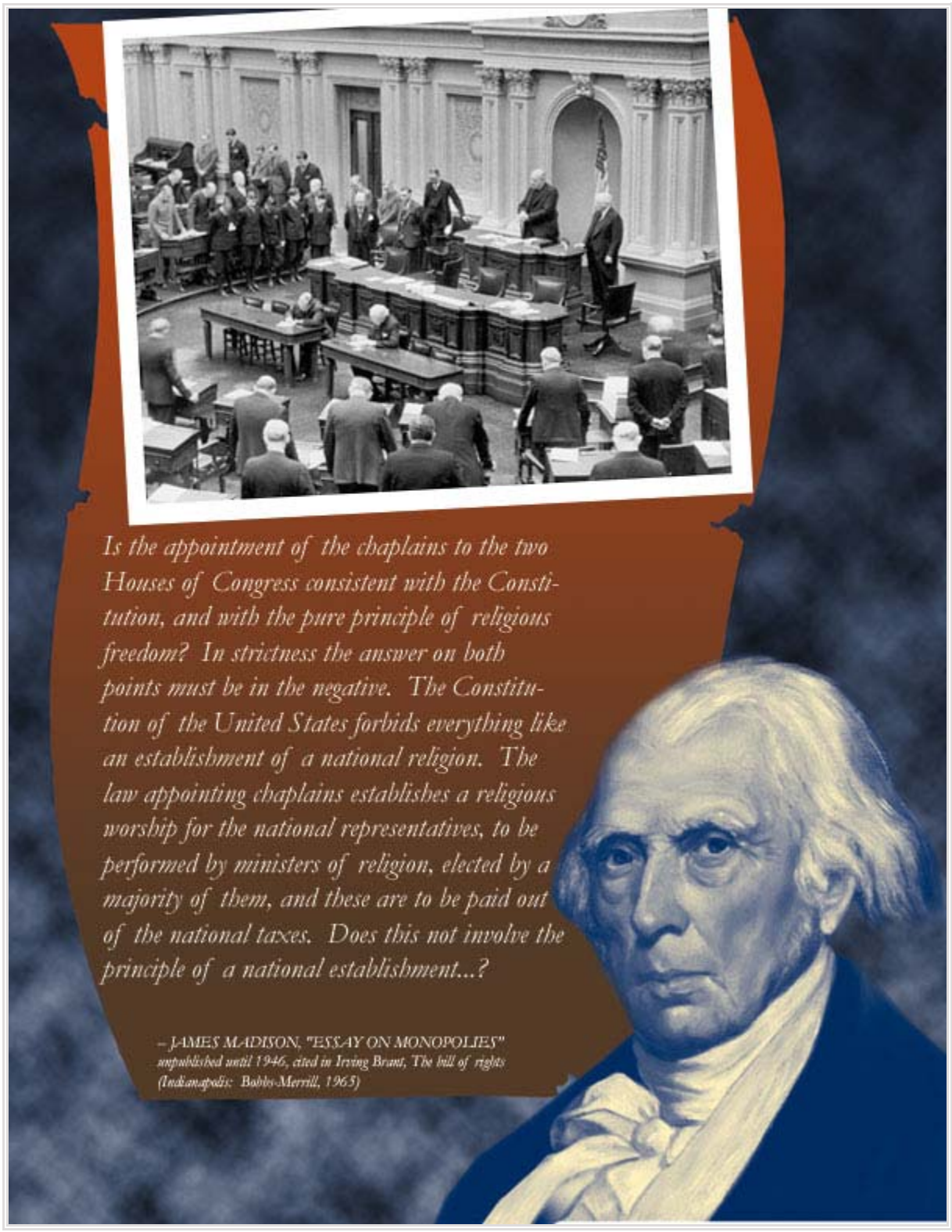

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Bad Argument Bad History

Many People Would Agree, On First Amendment Principles, That The Funneling Of Tax Money, Either Directly Or Indirectly, To Religious Education Is A Bad Idea. Now, It's One Thing When People Use A Good Argument To Defend A Bad Idea. Or Even When People Use

BY: WINSTON E. GREELEY

BAD Argument BAD History

By Winston E. Greeley
Illustration By Peter Bennett

Many people would agree, on First Amendment principles, that the funneling of tax money, either directly or indirectly, to religious education is a bad idea. Now, it's one thing when people use a good argument to defend a bad idea. Or even when people use a bad argument to defend a good idea. In the case of vouchers, however, some now are using a bad argument to defend a bad idea.

At a symposium (in May 2000) sponsored in Washington, D.C. by the Council for American Private Education (CAPE), celebrating the seventy-fifth anniversary of *Pierce v. Society of Sisters*' Leonard DeFiore, president of the National Catholic Educational Association, said that implicit in the Supreme Court's recognition of the right of parents to educate their children, as expressed in *Pierce* is the responsibility of government to *support* that right. "Fundamental rights and duties are meaningless," he said, "if the powerless can't exercise them." At the same conference, Burt Carney, director of legal and legislative issues for the Association of Christian Schools International, argued that the "next logical step" after Pierce was for the government to provide some assistance to parents who choose alternative schools for their children.

A newsletter, put out by CAPE talking about the seventy-fifth anniversary of *Pierce*, argued that issues in *Pierce* "can be heard in debates about school choice today, and private schools are still defending themselves against those who believe, as did Oregonians in the 1920s, that the best schools for America are public schools." The paper claimed that the *Pierce* decision has implications "even today as judges and lawmakers grapple with current issues involving the right of parents to choose a child's school."[1]

Robert Louis Mizie, superintendent for the Catholic schools for Portland, asserted (in another publication) that the issue of school "choice" in *Pierce* creates the constitutional ambiance for the question of school "choice" that religious education faces today. "Against this backdrop," he wrote, "the landmark case of *Pierce v. Society of Sisters*–in its seventy-fifth anniversary—is a historic and poignant reminder about the almost catastrophic loss of choice for Catholic schooling and other forms of private education in the United States. . . . I believe we can truly appreciate why Pierce is a landmark case for parental choice, especially today."[2]

Really, now? Is Pierce somehow dispositive in the parochaid cases? Did this U.S. Supreme Court decision set any controlling precedent for ongoing voucher disputes? Is indeed "the next logical" step, after Pierce, tax money for religious education? Or, instead, are these claims examples of the kind of bilious logic (such as "*All golden mountains are mountains; all golden mountains are golden; therefore, some mountains are golden*") that comes from those who wear square hats in square rooms?

A short history of *Pierce v. Society of Sisters* provides the answer.

The Oregon Compulsory Education Act

The time was the early 1920s, and the United States was still reeling from the First World War (with more than 320,000 American causalities, including more than 116,000 dead). Meanwhile, fresh in Americans' minds was the 1917 Bolshevik Revolution. A Communist regime, founded on an ideology that breathed sour warnings of world dominion, took the secular throne in Moscow, and Americans, rightly so, cast a wary, fearful eye eastward. Meanwhile, nativism, anti-Catholicism, and anti-immigration sentiments, holdovers from the previous century, though infesting some locales more than others, remained part of the American landscape.

Against this background, Oregonians in 1922 passed one of the more egregious laws in the history of the American democratic experiment. Dubbed the Compulsory Education Act, this statute required that parents send school-age children to public schools, or else. The law stated: "Any parent, guardian or other person in the State of Oregon, having control or charge or custody of a child under the age of sixteen years and of the age of eight years or over at the commencement of a term of public school of the district in which the said child resides, who shall fail or neglect or refuse to send such child to a public school for the period of time a public school shall be held during the current year in said district, shall be guilty of a misdemeanor and each day's failure to send such child to a public school shall constitute a separate offense." The duly, democratically instituted act warned that any parent, guardian, or person having control of a child between those specific ages who failed to comply with "any provision of this section . . . shall be guilty of a misdemeanor, and shall, on conviction thereof, be subject to a fine of not less than $ 5, nor more than $ 100, or to imprisonment in the county jail not less than two nor more than thirty days, or by both such fine and imprisonment in the discretion of the court."

Today, when private education (religious and secular) is deemed as fundamental as free speech, freedom of the press, and gun rights, it's hard to understand how such a bill could have been *proposed* in twentieth-century America, much less passed (by about a 14,000-vote spread). Proponents, however, led by the democratic candidate for governor, Walter Pierce (who was swept into office in the same electoral paroxysm that passed the school bill), played on xenophobia and some rather amateur notions of patriotism.

Pierce, who had the backing of the Ku Klux Klan (not just for the bill but for the governor's job) argued that act was needed to protect the nation against destructive outside influences such as "bolshevists, syndicalists, and communists." Further, he warned that without this bill, "it is not only a possibility but a certainty that within a few years the great centers of populations in our country will be dotted with elementary schools which, instead of being red outside, will be red on the inside" (ironically enough, it was the Bolsheviks, the Reds themselves in Russia, who early on took away the right of parents to give their children a religious education, a fact that opponents of the bill repeatedly mentioned).

In short, the public schools, Pierce claimed, were needed to fight Communist and other bad influences in America (another ironic twist in light of today's public school controversies).

An advertisement, for instance, in an Oregon newspaper urging citizens to vote for the act played, along with other things, the egalitarian-democracy card. Arguing that the public school typifies the spirit of the United States, it said the public school "receives and treats all alike; wealth does not count, poverty does not hinder. The knowledge and the books are there for ALL." The ad stressed that besides teaching children reading, writing, and arithmetic, the public school was the best place for children to learn the principles of good citizenship. "Much to be pitied are those deprived of that splendid training in American life and American thought." It continued: "There is only one really American schoolroom, that its the PUBLIC schoolroom" and "there is only one typically American school, and that is the American PUBLIC SCHOOL." It warned about "vicious, un-American elements that hate the public school" and, in a direct reference to the impending election, declared that any politician who "departs one inch from the old idea that the public school is the SCHOOL OF AMERICA, and the ONLY school" is "a traitor to the spirit of the United States, and your vote should tell him so." Another full-page ad proclaimed that only those who believed "the rights of the church should take precedence over the rights of the state," or that "their children are too good to be educated alongside your children" were against this bill; in contrast, all "red-blooded men and women" were for it.

Oregonians Fight Back

Of course, not all citizens of Oregon in the 1920s were small-minded bigots; maybe just the "red-blooded" majority who voted for the Compulsory Education Act. Many citizens, for various reasons, opposed it. Religious groups in particular were concerned, because the bill would have, in the end, shut down their K-12 schools.

That, of course, was the point. As unabashed KKK involvement indicated, anti-Catholicism played heavily in the drama; it might have even been the major catalyst (along with anti-Communism) behind the legislation. Any attempt to shut down Catholic schools *alone* would have, even in 1920s Oregon, instantly failed. So instead the plan was *If we can't shut down some private schools, then—under the veneer of democracy, patriotism, and equality—let's shut down them all*.

Religious groups, either independently or together, fought back. An advertisement paid for by the Non-Sectarian and Protestant Schools Committee in the *Oregonian* (days before the vote) urged citizens not to vote for the "School Monopoly Bill," because it was a blatant attack on basic parental rights. Catholics urged Oregonians to vote against the bill, arguing (interestingly enough in light of the present debate over "choice") that "not one cent of public money goes to the support of any private or parochial school in this State, or ever had, or ever can, under the plain prohibition of the Constitution and laws."

Seventh-day Adventists, in opposing the proposal, stated that "we are not all certain that a man educated in the public school is more intelligent than if he were educated in a private or sectarian school, nor have we heard any convincing argument that a person is necessarily more patriotic if educated in a public school than if he were educated in a school not supported by public taxation."

The Jewish League for Preservation of American Ideals feared that "this menacing law is in itself but a single step in the direction of abridging our dearest religious rights" and that "honor, patriotism, and freedom demand that you vote NO on the Compulsory School Bill next Tuesday."

Pierce v. Society of Sisters

Even before the Compulsory Education Act (which excited considerable interest outside Oregon as well) passed, questions about its constitutionality had been raised. For instance, about a week before the vote, a full-page ad in the *Oregonian* listed the names, city by city, of about 200 Oregon lawyers who believed that the act was unconstitutional. After the vote, the bill was immediately challenged in court. Two groups, the Sisters of the Holy Names of Jesus and Mary, and the Hill Military Academy, sued—and the United States District Court in Oregon struck down the bill as an unconstitutional infringement upon property rights and the rights of parents. Governor Pierce appealed to the U.S. Supreme Court, and in a decision that made national news, the justices in June 1925 unanimously voided the law, saying that it "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."

Though a rather tepid, even uninspiring, tome, the majority opinion stated that while the state does have a responsibility to regulate all schools, to supervise and inspect them, and to be sure that nothing "manifestly inimical to the public welfare" was taught there, the act went way beyond that reasonable goal, entering where the state should not be able to go without good reason. "Rights guaranteed by the Constitution," it said, "may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not a mere creature of the state."

Besides infringing upon parental rights, the Oregon law had another component that got the High Court's thumbs down. "Appellees . . . have business and property for which they claim protection. These are threatened with destruction through the unwarranted compulsion which appellants are exercising over present and prospective patrons of their school." In other words, *Pierce v. Society of Sisters* was also a business decision.

Pierce and the Current School "Choice" Debate

Today in America, with more than 6 million students in about 27,000 K-12 private schools (about one fourth of all K-12 educational institutions in the States) *Pierce* seems from another epoch. The basic issue, the right to private (including religious) education, has long been resolved, once and for all.

Thus all that the current voucher disputes have in common with *Pierce* is that both deal with private education—period. *Pierce* dealt with protection of a fundamental right itself, *as a right*. It had nothing to do with funding the exercise of that right. As quoted above, even the Catholics involved in the dispute stressed that "not one cent of public money goes to the support of any private or parochial school in this State, or ever had, or ever can, under the plain prohibition of the Constitution and laws." Those words (written by those who were there) show that whatever *Pierce* involved, it didn't involve tax money going to religious education, despite the contorted claims that this case stands as the precursor to vouchers and other forms of government aid to religious education.

The logic of their argument, in fact, that because *Pierce* protected the right to private religious education, the government should now fund it, is like saying that because Roe protected the right to abortion the government should fund "the termination of pregnancies"; or because the Second Amendment guarantees the right of gun ownership, the government should buy everyone a Glock; or because *Griswold* protected the right to contraceptives, Uncle Sam owes everyone a condom.

The free exercise clause of the United States Constitution would demand, at the very least, the right of parents to send their children to religious schools; that's what *Pierce* affirmed. The establishment clause, at the very least, would seem to demand that other people shouldn't be forced to pay for that religious education.

Winston E. Greeley has been an observer of church-state issues for many years. He writes from "Mortgage Acres," Maryland.

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[1] *Cape Outlook*, No 256, (June 2000).

[2] Robert Loius Mizia, "Prejudice and Educational Choice: 75th Anniversary of Pierce v Society of Sisters," *Momentum*, April/May, 2000, pp. 17-19.

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Letters

LETTERS

No Time for Sabbath

I just wanted to let you and your readers know that while it is wonderful Major Davis had his Sabbath issue resolved, such is not always the case in the military.

I am a 2nd class petty officer in the engine room aboard the U.S.S. Nimitz, with a similar outstanding record. My Navy career will come to an end on July 15, because I refused to stand watch on the Sabbath. I had been accommodated while in port, and it hadn't been made clear that when we went out to sea, I would be expected to work on the Sabbath (with some time given to me to attend services).

I had informed my command from the day I checked aboard of my strict interpretation of Sabbath observance, but in the end, after I attended captain's mast and received a suspended reduction in rank, it was decided that I would be given a general discharge. I simply have faith that this is what the Lord wants and feel that perhaps He hardened the captain's heart like Pharaoh's.
Morgan Caffey, e-mail

A poignant letter from a serviceman faithful to his principles and suffering as a result. There is a largely untold story of faithfulness by servicemen and women, who stand fast in a context in which individual liberties are somewhat more restricted than in civilian life. Liberty will be covering more of their stories in the future. In fact, with the military buildup that is likely to see its culmination in some action against Iraq, we may be heading also into more cases of conscience issues, including noncombatency and pacifist cases. . Editor.

Churches and Zoning

DECLARATION OF PRINCIPLES

The God-given right of religious liberty is best exercised when church and state are separate.

Government is God's agency to protect individual rights and to conduct civil affairs; in exercising these responsibilities, officials are entitled to respect and cooperation.

Religious liberty entails freedom of conscience: to worship or not to worship; to profess, practice, and promulgate religious beliefs, or to change them. In exercising these rights, however, one must respect the equivalent rights of all others.

Attempts to unite church and state are opposed to the interests of each, subversive of human rights, and potentially persecuting in character; to oppose union, lawfully and honorably, is not only the citizen's duty but the essence of the golden rule–to treat others as one wishes to be treated.

The Supreme Court has already decreed, in several instances, that we have rights—but those rights may not be used to infringe upon the same, or similar, rights of others. From a planning perspective, it's based on the same philosophy: delineating between a single-family yard sale and a full-blown commercial flea market—a matter of scale. When one person's freedom—of whatever—begins to encroach severely on equally important freedoms of multitudes of others, it's time to decide whose freedom has priority.

When the "Dover amendment" was passed, mega churches didn't, for the most part, exist. In my part of this fine country, the neighborhoods don't object to churches in general, nor to their location within properly infrastructured residential areas—with one caveat. Once a church passes a certain size (current numbers being bandied about are based on sanctuary seating exceeding 500 or so), it is no longer a "neighborhood" church. It has transformed into a regional entity, and its primary thrust—despite its roots—much more closely resembles a business. That being the case, mega churches belong in business or at least office-zoned areas.

I don't believe, nor do I think anyone could realistically argue, that the framers of the Constitution intended—in their guarantee of freedom of religion—that the body of a church would have the rights to usurp the "life, liberty, and pursuit of happiness" of multitudes of others. When a church decides to locate a building that occupies 60,000 square feet in the center of a marginally infrastructured single-family neighborhood—evidently not giving a whit about the impact it may have on surrounding land values or lifestyle—it is the point of ceasing to becoming one of the moneychangers.

NORM FLOYD
Planning Commission Member

Little Rock, Arkansas.

The principle of religious liberty surely has not changed so much that we can ever justify the exclusion of churches and religion from our communities. However, our society is under stress, and the shifting demographics and decentralization of much social activity can produce an anomaly such as a mega church of "out-of-towners" in a small community. Even so, laws and principles should hold sway over protective tendencies and prejudice. Editor.

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Under God Freedom

The Timing Was At The Very Least A Guaranteed Attention-getter: One Week Before This Year's Fourth Of July Celebrations, The Ninth Circuit Federal Court Of Appeals Ruled That Recitation Of The Pledge Of Allegiance To The Flag Of The United States Of Ameri

BY: REVEREND DR. C. WELTON GADDY

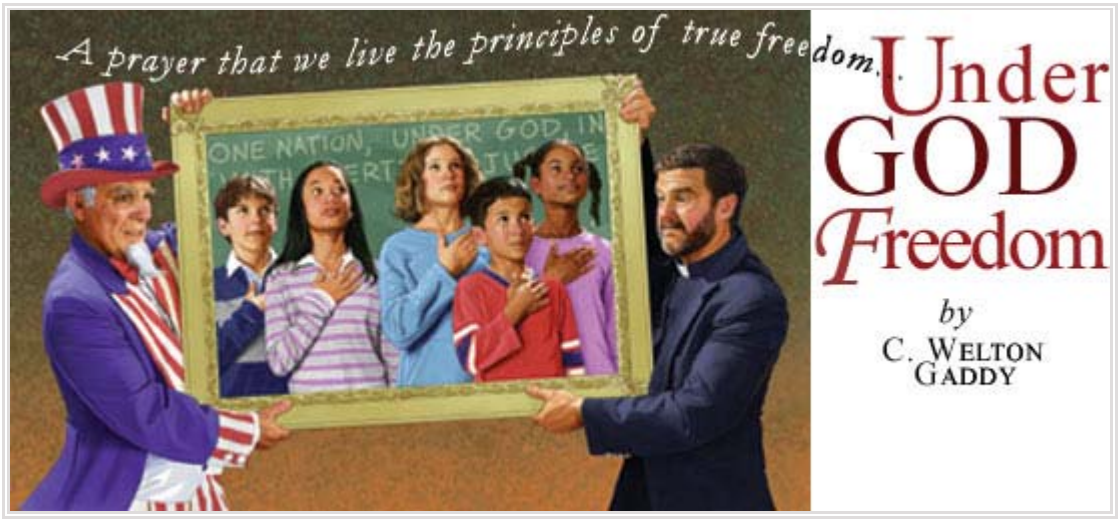

Illustration By Don Stewart

The timing was at the very least a guaranteed attention-getter: one week before this year's Fourth of July celebrations, the Ninth Circuit Federal Court of Appeals ruled that recitation of the Pledge of Allegiance to the Flag of the United States of America in public school classrooms constitutes an unacceptable state endorsement of religion. Reactions were immediate and loud, and they were almost universally negative. Emotion trumped reason. Attempts to understand the ruling fell away before effusive denunciations of the court even by leaders at the highest levels of the nation. Senate majority leader Tom Daschle (D–S. Dak.) called the decision "just nuts." President George W. Bush labeled the ruling "ridiculous."

Clearly this is no ordinary court ruling? Do the words "under God" in the Pledge of Allegiance represent a boast of special national status, a prayer for divine blessing, a declaration of personal faith-based patriotism, or a mantra of civil religion? Can there really be an establishment of theistic religion in a nation whose Constitution prohibits the establishment of a national religion? And does the religious integrity of the nation stand or fall with the legal status of a religious reference in a civic, patriotic statement?

Frankly—as a Christian minister who values religion, gives thanks regularly for the principle of religious liberty, and supports interfaith cooperation in public life as the best way into a meaningful future—I found most of the public reaction to the Ninth Circuit Court's decision to be as disturbing as the decision itself.

Legal Concerns Related to Liberty

The California-based federal court's decision was hardly the first time that the judiciary has ruled on the legality of the recitation of the Pledge by public schoolchildren. In *West Virginia v. Barnette*,[1] a court overturned a precedent decision of just three years (*Minersville School District v. Gobitis*),[2] in deciding that public schools could not compel students to participate in flag salute ceremonies that

violated their religious liberty.

Of course, in *Newdow v. U.S. Congress*, the most recent case decided by the Ninth Circuit, the issue was not a *compulsion* for students to recite anything. Mr. Newdow wanted his daughter to be able to join her classmates in a recitation of patriotism that did not force her simultaneously to make a confession of theistic belief endorsed by the state—a reasonable interest, as he saw it, when viewed from the perspective of the Constitution's guarantees related to religious freedom.[3]

Indeed, what *was* going on here?
The different judicial decisions reached in the *Gobitis and Barnette* cases were largely because of the different historical contexts in which the respective cases were heard. A letter from Justice Frankfurter to Justice Stone—who dissented from the *Gobitis* decision —would seem to indicate that while a majority of the Court may have been inclined to favor individual rights as expressed in an exemption from the required flag salute ceremony (as was later decided in *Barnette*), given the United States's entry into World War II at that particular point in history, the Court, instead, permitted the school authorities additional leeway in their "judgment as to the effect of this exemption in the particular setting of our time and circumstances."[4]

Actually, it is important to understand the historical context for all such judicial decisions. In 1954, at the height of McCarthyism, Congress added the words "under God" to the Pledge as a means of distinguishing the United States from "godless" Communist nations and seeking divine favor.

Now, in 2002, our nation again finds itself in a "war" against enemies who are not always readily apparent. Once more, as in 1954, we are wary of "the enemy within." The mixture of grief, fear, and firm resolve that marked our nation's response to the horrific events of September 11, 2001, has produced a level of patriotism unparalleled in recent history. Flag-waving is the order of the day. The words "In God We Trust" have been printed on everything from billboards to pizza boxes. The melodic words of "God Bless America" are being sung in virtually every public religious and civic gathering. Vocal patriotism is a form of protest against terrorism.

Within this particular patriotism-laced historical moment, questioning the words "under God" in the Pledge of Allegiance to the United States flag—a primal symbol of patriotism itself— gave the appearance of a softness on terrorism and a weakness in patriotism. The perspective was emotional rather than rational—but nevertheless real. Little wonder, then, that members of Congress rushed to the steps of the Capitol, where they recited the Pledge in unison. The next day, both chambers of Congress set aside the business of the nation to go on record as opposing the Ninth Circuit's decision. The U.S. Senate approved a bill 90-0 reaffirming the flag pledge and the national motto of "In God We Trust," while the House passed a resolution (416-3) protesting the ruling. During the debate, senators went so far as to compare the Ninth Circuit's decision to the *Dred Scott* and *Plessy v. Ferguson* cases, as well as to suggest "blackballing" the Ninth Circuit justices—a Republican appointee of President Nixon and a Democrat named by President Carter—who concurred in the decision. The United States Department of Justice promised to appeal the ruling on the Pledge.

I appreciate impassioned patriotism and identify myself as a compassionate patriot. I wave the flag with devotion to the Constitution and pray (as well as sing) for a blessing on the nation. At the same time, however, also as acts of patriotism, I raise critical questions about the nation and offer constructive criticism for the good of the nation. As in other forms of love, patriotism requires working to correct what is wrong as well as strengthening what is right in the nation.

My concerns with the Ninth Circuit Court's decision on the Pledge of Allegiance and the public's instantaneously negative reactions to it grow out of an abiding love for my nation and a profound appreciation for the constitutional principles that enable religion to play such a free and vital role.

Yes, the decision of the Ninth Circuit Federal Court was a difficult one. In legal, constitutional truth, the nation has a Pledge that stands in violation of its Constitution. But the decision was far from extreme. The written explanation of the *Barnette* decision remains pertinent: "The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds."5

The decision of the Ninth Circuit Court rested solidly on previous rulings by the Supreme Court—the High Court's rulings on the relationship between church and state and the differing standards developed by the Courts in evaluating challenges under the establishment clause.

After the landmark case on the establishment clause, *Everson v. Board of Education* (1947), the Supreme Court devised various "tests" to be used in subsequent cases to determine when there is an unconstitutional establishment of religion. The recent decision by the Ninth Circuit methodically demonstrated how the 1954 insertion of the words "under God" into the Pledge fails all of these established tests:

* The Lemon test (*Lemon v. Kurtzman*—1971) is a three-prong test requiring that a policy must have a "secular purpose"; its primary effect must be neutral; and it must not promote an "excessive entanglement" between government and religion.

* The *endorsement* test (*Wallace v. Jaffree*—1985) considers a policy a violation of the Constitution when the policy makes some people feel as "outsiders" and others as "insiders" because of the government's sending a signal that a religion or particular religious belief is favored or preferred.

* The *coercion* test (*Lee v. Weisman*—1992) allows for a "recognition" or an "accommodation" of religion, but bars any form of coercion that forces citizens to support or to participate in any religion or religious exercise.

Clearly, the Ninth Circuit's decision on the Pledge of Allegiance was laced with caution. Relying heavily on precedents established by the Supreme Court, the Ninth Circuit made no new assertions regarding the issue in question.

Will the decision of the Ninth Circuit stand? Most prognosticators answer that question with a vigorous "No." The dynamics of the current moment seem to reenforce that opinion. Look, though, at what is at stake here.

Given the careful reasoning of the Ninth Circuit, based on clear precedents set by the Supreme Court over the years, a reversal of this decision by the Supreme Court will unravel a half century's worth of jurisprudence concerning the establishment clause. In a zealousness to protect assertions of patriotism entangled in religious language, all precedent regarding the proper relationship of church and state might be done away with in one broad stroke.

The United States is now the most religiously pluralistic nation in the world. Today the religious liberty clauses in the Constitution—the "no establishment" clause and the "free exercise" clause—are more important than ever. Here is a legally guaranteed provision by which the nation can benefit from the spiritual wisdom of many different religions without those religions warring against each other and without any one particular religion and government falling into an unholy institutional alliance.

Religious Concerns Related to Integrity

Legal concerns aside, allow me to address the issue from the perspective of a Christian minister. In the wake of the controversial ruling by the Ninth Circuit Court in California, I have found the analysis of the ruling as deeply disturbing as the emotional reactions to the ruling.

More than one legal analyst has suggested that the words "under God" in the Pledge of Allegiance present no problem because the reference to divinity is generic—a patriotic term, not a religious one. Such a conclusion is not justified by a look at the legislative history of the 1954 act that inserted the words "under God" into the Pledge. Clearly the language was intended to establish the nation's position on the question of theism.

"At this moment of our history the principles underlying our American Government and the American way of life are under attack by a system whose philosophy is at direct odds with our own. Our American Government is founded on the concept of the individuality and the dignity of the human being. Underlying this concept is the belief that the human person is important because he was created by God and endowed by Him with certain inalienable rights which no civil authority may usurp. The inclusion of God in our pledge therefore would further acknowledge the dependence of our people and our Government upon the moral directions of the Creator. At the same time it would serve to deny the atheistic and materialistic concepts of communism with its attendant subservience of the individual."[6]

Our Constitution has been interpreted so as not to favor religion over nonreligion. And yes, an atheist would assume that the words "under God" in the Pledge of Allegiance to the Flag represent an impermissible state endorsement of religion. No lesser constitutional expert than Justice Kennedy recognized this possibility in his dissent in the *Allegheny* case over two decades ago: "By statute, the Pledge of Allegiance to the Flag describes the United States as 'one nation under God.' To be sure, no one is obligated to recite this phrase, . . .but it borders on sophistry to suggest that the reasonable atheist would not feel less than a full member of the political community every time his fellow Americans recited, as part of their expression of patriotism and love for country, a phrase he believed to be false."[7]

Strangely, in the minds of many, but unquestionably for the welfare of all, the rights of an atheist and the rights of a theist, like the rights of a Christian Baptist minister like myself, are intertwined; so is the integrity with which each of us holds a religious or nonreligious conviction. How can the name of God not be a religious term? In many religious traditions, including my own, the name of God is to be

held in such reverence that it is better never to speak the name aloud than to use God's name in a manner that manipulates or otherwise abuses holiness.

The secularization of the name of God points to a politicization of religion that is every bit as dangerous as attempts at the religiofication of government.

Concerns for the Future

A few evenings ago at dusk, I went again to spend time at the Jefferson Memorial. I read once more the moving words of this founder of our nation who understood so clearly that religion is a matter of free will, not forced confessions. I embrace Jefferson's unwavering opposition to tyranny and relentless advocacy for religious liberty both as a patriot of this nation and as a religious believer.

The scenario that has unfolded in the wake of the ruling by the Ninth Circuit Court underscores the importance of a new and honest national dialogue on the institutional relationship between religion and government, the proper role of religion in the life of the nation, and the meaning of civil religion as well as its relationship to the varied particular religious traditions that populate this nation. Nothing less is at stake here than the legal principle of religious liberty.

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Reverend Dr. C. Welton Gaddy is executive director of the Interfaith Alliance and the Interfaith Alliance Foundation, Washington, D.C.

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[1] *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

[2] *Minersville v. Gobitis*, 310 U.S. 586 (1940).

[3] *Newdow v. U.S. Congress et al.*, Appeal from the U.S. District Court for the Eastern District of California (2002).

[4] Justice Frankfurter to Justice Stone, May 27, 1940: "A *Qualified* Plea for Judicial Self- Restraint."

[5] *Barnette*.

[6] H. P. Rep. No. 83-1693, pp. 1, 2 (1954), reprinted in 1954 U.S. C. C. A. N. 2339, 2340.

[7] *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 672 (1989).

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Drama Queen

BY: FIONA FAEHEY

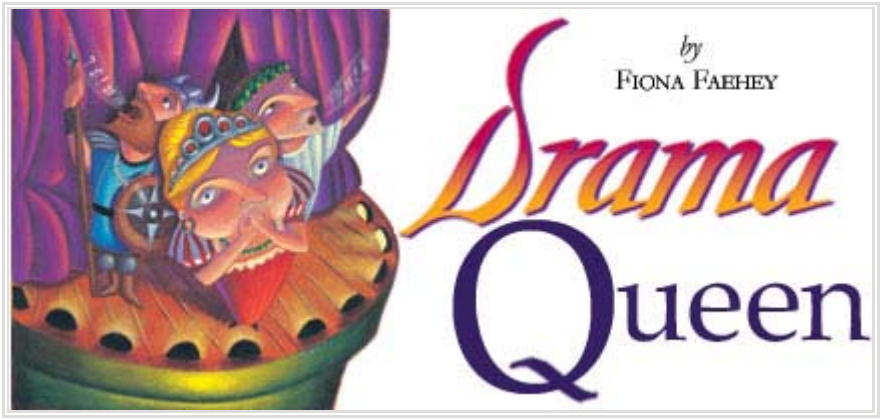

Illustration By Will Terry

If a student swears in acting class, does God hear? * Apparently not, according to University of Utah acting professors. Or, if He does, it doesn't count because, hey, it is *acting*, after all. It's not like she means it. Right? Well . . . * Christina Axson-Flynn, a member of the Church of Jesus Christ of Latter-day Saints, doesn't see it that way; a fact she made clear during an audition, in March 1998, when she applied for acceptance in the University of Utah Actor Training Program (ATP). Her parents, Michael and Jane Flynn, are both professional actors; her interest in acting naturally arose from their involvement. Four professors were present at Axson-Flynn's audition: Sandy Shotwell, Barbara Smith, Jerry Gardner, and Sarah Shippobotham. Axson-Flynn performed two monologues during the course of the audition. * When she was through the professors asked Axson-Flynn if there was anything she felt uncomfortable acting. Axson-Flynn replied, "I do not take the name of God in vain. I do not take the name of Christ in vain. And I do not say the four-letter expletive beginning with the letter f."[1] At this, the professors informed her that sometimes it was necessary to use those words when performing. Axson-Flynn explained that she would rather not be admitted into the program if she was going to be required to use language that violated her conscience and her religious ideals.

Naturally, when her acceptance letter arrived in April 1998, Axson-Flynn assumed it signified that she would not be required to use the language she had specifically identified as objectionable during her interview. She began the ATP program in August 1998 not anticipating any problems. In September she was asked to perform a monologue called *Friday*, in which were two offensive words. She omitted the words and performed the monologue satisfactorily. The omission was not even noticed.

The trouble began in October when Professor Smith asked Axson-Flynn to perform a scene called "Quadrangle." The dialogue contained religiously offensive words, which Axson-Flynn pointed out to the professor.

"I said that there were some words in there that were concerning me, and that this was going to be an issue. And she asked me why I didn't have a problem performing them in the monologue *Friday*. And I said, 'I didn't perform them. I omitted them. And no one even noticed.' And she got quite upset by that. She said my behavior was not acceptable. She said that I would have to change. And she said that I would have to get over it, as far as my hang-ups on language. 'Get over it' were her exact words."[2]

Professor Smith said Axson-Flynn could still be a "good Mormon" and use religiously offensive language when she was performing. Further, Professor Smith said, if she did not use the offensive language and perform the dialogue, she would be choosing to take no credit for the assignment. Axson-Smith opted to take no credit. Professor Smith encouraged her to think about her decision during the weekend, but after the weekend Smith relented, calling Axson-Flynn and telling her that she could remove the religiously offensive language and receive a grade on the assignment.

When she attended a semester review of her work in December, professors Shotwell, Shippobothom, and Smith informed Axson-Flynn that allowances would no longer be made for language and that she would be required to use the religiously offensive language she objected to. She was specifically told to "change her views" and "modify her values." If, they said, she did not comply by the end of the academic year, she would be removed from the acting program.

Axson-Flynn requested a meeting with the department chair, Xan Johnson, and told him how frustrated she was that she would be asked to use language that offended her because it violated her religious principles. But Johnson took no action.

Later, Axson-Flynn was asked by her professors to meet with some Mormon girls who chose to use the language Axson-Flynn objected to when they were acting. The professors explained that meeting with the girls would help her "get over" her reluctance to use that language.

The new semester began in January and with it came consistent reminders by her professors that she would not be able to remain in the program if she did not comply with the language requirement. In desperation, Axson-Flynn approached Professor Shotwell once more to ask if she would be forced to leave the program if she refused to comply regarding the language.

"Recognizing that she would not be permitted to complete the program, Axson-Flynn went to Shotwell's office in a final attempt to resolve the matter. Axson-Flynn stated: 'This is what I understand. If I do not—and this is what you said—modify my values by the end of the semester, I'm going to have to find another program. Is that right?' Shotwell responded: 'Yes. We talked about that, yes.' At this point, Axson-Flynn informed Shotwell that she would leave the ATP, because it was clear that she would fail unless she altered her religious convictions. She told Shotwell: 'I don't want to go, but I am not going to change.' Shotwell replied: 'Well, neither are we.'"[3]

Before allowing her to leave, Professor Shotwell required Axson-Flynn to speak to her classmates and publicly explain her decision to leave. Axson-Flynn walked into a classroom before her fellow classmates and explained her decision to them, reiterating that she was leaving the program because she would not use the offensive language that violated her religious beliefs and conscience. She told them that she could live with herself if she never became a great actress, but she could not live with herself if she violated her integrity.

Curiously enough, it was Alex Koritz, the opinion desk editor of *The College Times*, at the Utah Valley State College, where Axson-Flynn entered after leaving the University of Utah, who took umbrage with Axson-Flynn's position. "There is a definite distinction between playing a role on stage and living one's personal life. An actor acts. He plays the role of a fictional character. Fictional, meaning 'not real, fake, pretend.' Sympathizers of Axson-Flynn must ask themselves, what is worse: playing a character who uses profanity, or playing a character who is a murderer or thief. Moral priorities have seemingly been overlooked on this issue."[4]

On the surface this seems like a reasonable argument. Why doesn't Axson-Flynn object to portraying characters and conduct she finds distasteful or even immoral? She didn't make any objection to a vast majority of classroom exercise, never refused to play an assigned role, and willingly performed scripts that involved her portrayal of characters whose actions she personally disapproves of. One role required her to portray a college student who had a brief affair and an abortion.

When asked in her deposition whether playing this role was objectionable from a religious standpoint, Axson-Flynn responded, "No. I guess you would say, But it talks about abortion. Yes. But that's representational. I didn't have to get an abortion onstage to play Danielle. But I would have had to say the f word. You know, if they had said to play Danielle you have to get a real abortion on stage, of course I would have had a problem playing Danielle. But this is representational."[5]

This distinction is crucial. Unlike most morally objectionable behavior, you can't "act" taking the name of the Lord in vain or using religiously offensive language. You can "act" a murderer or a thief without being one. You cannot "act" taking the Lord's name in vain without actually doing it. Actors who are in a scene in which they are making love are not, in reality, making love. However, an actor who takes the Lord's name in vain is simply a person pretending to be someone else taking the Lord's name in vain. Any way you cut it, it's still taking the Lord's name in vain.

In contrast to playing an objectionable role, however—where an actor need only *pretend* to engage in the offensive conduct—portraying a character who says "God" irreverently or uses the f-word *requires use of those words.* As one theologian has explained: "Unlike sins such as murder, which a person can describe without committing, to use words profanely is to commit the sin—God's name is no less used in vain by putting it in quotes" (Robertson McQulikin, *An Introduction to Biblical Ethics* [rev. ed. 1995], p. 164).[6]

This element makes all the difference and is, essentially, what makes forced compliance a violation of the free exercise of religion. A brief filed by a group of theologians points out: "The sin is in the actual statement of the words, it matters not whether she is playing a role. She cannot divorce herself from herself merely to satisfy the requirements of an acting class."[7]

Neither are these views limited to the Church of Jesus Christ of Latter-day Saints. The amici curiae who contributed to the brief are made up of theologians and scholars of religion from a variety of religious traditions. They argue, "It is hard to see how the invocation of deity in blessing on students can be unlawful, but the invocation of deity in cursing is acceptable, and indeed can be forced on unwilling students. If the state cannot require a student to say, 'God bless you,' how can it require students to utter 'G-d damn you'? Principles of constitutional law, and common sense, say that it cannot."[8]

The *Daily Utah Chronicle* reported on the results of the first act of this drama. "The curtain closed on Act 1 of Christina Axson-Flynn's religious discrimination lawsuit against the Actor Training Program August 3 (2001). After almost two months of deliberation, U.S. District Judge Tena Campbell sided with the University of Utah on its motion to dismiss."[9]

In addition, "Campbell called the Actor Training Program 'facially neutral' in its education. Since no religious groups are offered exemptions from the curriculum, none are being discriminated against, she ruled."[10] The University of Utah would undoubtedly agree with her assessment. Their mission statement reads, in part: "The right of free inquiry is zealously preserved; diversity is encouraged and respected; critical examination and creativity are promoted; and intellectual integrity and social responsibility are fostered."[11]

One has to wonder, why were ATP professors so insistent that Axson-Flynn vocalize words that violated her conscience and deeply felt religious beliefs if prejudice was not a motivator? Axson-Flynn's entire objection is exceedingly narrow. She will not say "God" or "Jesus Christ" irreverently, and she will not say, as she put it, the four-letter expletive beginning with the letter f. She never asked to be excused from playing a role. She did not ask professors to change their curriculum. She did not demand that other students modify their language or behavior in her presence. Why, then, couldn't she be accommodated? "I wasn't asking for the whole [ATP] to omit every personally offensive word to me. I was asking that I didn't have to [use such words] in the classroom."[12]

University defendants claim that actors must swear in order to make a living these days. It just ain't so, claim professional amici who filed a brief in support of Axson-Flynn. "It is undoubtedly true that roles exist in which the actor is called on to use the words at issue in this case. But the ATP, and specifically the First Year Acting course, fails to recognize such roles are in no sense mandatory and that alternative career paths exist for actors who do not wish to involve themselves in productions in which such language is required. Indeed, as noted in Axson-Flynn's brief in opposition to summary judgment, Axson-Flynn's own parents have enjoyed successful acting careers while remaining true to their religious beliefs.

"In addition to this evidence, we can attest, based on our broad experience in the profession that one can achieve success as an actor without taking on roles in which the character uses obscenities, profanity, or other offensive language. This is confirmed by the fact that family entertainment industry contributes billions of dollars to the economy, and there is a continuing surge in family-friendly programming efforts reflected in the increase of networks and network divisions devoted to these programs. The value the entertainment industry places on this type of programming is reflected in the recent purchase by Walt Disney Company of Fox Family Worldwide, Inc., in a deal valued at approximately billion."[13]

Good, clean entertainment is undoubtedly big business indeed when 48 of America's biggest companies, heavyweights like McDonald's Corporation, Wal-Mart, Verizon Communication, the Coca-Cola Company, Kraft Foods, Inc., among others, all members of the Association of National Advertisers, Inc., join forces as the Family Friendly Programming Forum (FFPF) to promote family-friendly television programs that parents and children can enjoy together. It's a sure bet none of the programs the FFPF supports with its advertising will contain any of the words Christina Axson-Flynn objects to using. Considering the fact that the Dove Foundation commissioned a study of 2,400 feature-length films shown in theaters between 1988 and 1997 that showed that G- rated films yielded the highest gross profit (million in contrast to R-rated films, which earned an average of million),[14] it seems that the ATP might do better requiring *all students* to delete offensive language.

Axson-Flynn's case has been appealed at the Tenth Circuit. According to Attorney James McConkie, they are simply waiting for a date to argue it. And the curtain will rise on Act 2 during which one has to hope that Christina Axson-Flynn will break a proverbial leg, in the theatrical and legal sense.

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[1] Deposition of Christina Axson-Flynn, p 20.

[2] *Ibid*., pp. 50, 51.

[3] Opening brief for appellant, *Christina Axson-Flynn v. Xan Johnson et al.*, p. 12.

[4] Alex Koritz, "Viewpoint: The Show Must Go On," *The College Times*, no. 22, Feb. 16, 2000).

[5] Deposition of Christina Axson-Flynn, p 68.

[6] Opening brief for appellant, p. 44.

[7] "Student Actor Who Refused to Swear Asks Court to Reinstate Suit," Associated Press, Mar. 1, 2002.

[8] Brief of amici curiae, Rabbi Michael J. Broyde, J. Budziszewski, Rabbi Shalom Carmy, Louis Dupr

NOVEMBER / DECEMBER 2002

The Great Pledge Debate

The 24-hour-a-day, Seven-day-a-week Cable Channels Treated It Like The Death Of A Celebrity, A Major Natural Disaster, Or The Verdict In The O. J. Simpson Case. Even Though It Was Only A 2-1 Decision By A Federal Appeals Court Holding That A 1954 Act Of C

BY: JOHN W. WHITEHEAD

The 24-hour-a-day, seven-day-a-week cable channels treated it like the death of a celebrity, a major natural disaster, or the verdict in the O. J. Simpson case. Even though it was only a 2-1 decision by a federal appeals court holding that a 1954 act of Congress that added the words "under God" to the Pledge of Allegiance was unconstitutional. This 29-page ruling provided fodder for nearly a week of seemingly continuous television coverage.

The decision reported by a panel of the ninth Circuit Court of Appeals on June 26 in *Newdow v. U. S. Congress* was written by semiretired Judge Alfred T. Goodwin, a Richard Nixon appointee, who while before the decision had seemed in good health, was immediately described by conservative pundits as "senile."

All Goodwin's decision said was that the l954 alteration

We recited the words to the Pledge of Allegiance in grade school, hands over our hearts, eyes trained on the red, white, and blue. We were told to stand at attention, remembering all those who fought and died for our freedoms. As we grew older, we recited the words by rote.

However, a federal appeals court ruling has forced us to pay closer attention to the Pledge of Allegiance and the oath we're asking Americans —particularly school-aged Americans—to observe.

Published in 1892 as a patriotic salute for schoolchildren, the Pledge of Allegiance went through several slight revisions before Congress made it official in 1942. One year later, the U.S. Supreme Court made it a voluntary pledge for schoolchildren.

of the *Pledge* originally written by educator and Baptist preacher Francis Bellamy in 1892 violated the First Amendment's establishment clause and rendered its recitation in public schools unconstitutional. The man who brought the case was Michael A. Newdow, an emergency room physician as well as a California attorney. Newdow has an 8-year-old daughter who he felt could become an outcast, or at least a second-class citizen in her second-grade classroom, if she did not recite the Pledge.

In many ways this was a quintessential example of what scholars call "strict construction," an effort to narrowly apply the original and obvious intent of the Constitution's drafters. It also represented a rigorous application of precedent to a current fact pattern, without regard to the judges' sense of the propriety of the earlier decisions. A central command of the First Amendment is that "Congress shall make no law respecting an establishment of religion."

In l954 Congress added "under God" to the original pledge. It thus converted a purely secular affirmation of patriotism into a pronouncement of a religious creed. It unambiguously asserted that God, not multiple gods, had an active interest in the affairs of the nation. This is, of course, a view held by the vast majority of Americans. However, it is hard to argue with a straight face that it is not a law about religion that officially announces a theology for the country. So understood, it is just what the framers had in mind in proscribing such actions.

The court's majority recognized immediately that there could be no "secular purpose" for its inclusion. Even the briefest review of the history of the addition shows that it was the product of hard lobbying by Christian advocacy groups, and served the additional purpose, noted by many congressional supporters, of sending a signal that the United States was readily distinguishable from nations adhering to "godless communism." This change happened in the heyday of the McCarthy era.

The decision also explains how it is a natural extension of the l962 Supreme Court ruling prohibiting government-promoted prayer in public schools. Judge Goodwin took on directly the notion that no schoolchildren were forced to say the Pledge. (As an aside, from l940 until l943 when it reversed itself, the Supreme Court had actually permitted public schools to require that all schoolchildren, including religious objectors, recite the "secular" version.)

Even without compelled recitation, the 1962 case established that schoolchildren could not be forced into the unpleasant choice of either standing next to those who were participating in a religious observance or leaving the classroom every day and facing the notoriety or worse that comes from such departures. Judge Goodwin wrote, "Even without a recitation

By 1954, when the words "under God" were tacked onto it, the country was in turmoil. It was the cold war era, and Senator Joseph McCarthy was stirring up a vehement anti-Communist sentiment in the country. Americans viewed the Soviet Union as a godless monster that had infiltrated our society.

The nation was in the midst of an identity crisis. We had just fought the war to end all wars with the hope that the world could live in peace. But now America was thrown immediately back into the ugly face of another world war threat. Who could save us? The answer from many was "God." Thus in the heat of the politics of the day, President Dwight D. Eisenhower, recognizing the nation's need for a Supreme Being to provide strength and comfort, remarked:

"In this way we are reaffirming the transcendence of religious faith in America's heritage and future; in this way we shall constantly strengthen those spiritual weapons which forever will be our country's most powerful resource in peace and war."

But 50 years later our world is still in turmoil, with terrorism threatening our security and sense of well-being. Following the terrorist attack of September 11, the call for the belief and protection of a Supreme Being once again emerged as a part of the national ethos. However, in a society permeated with political correctness and saturated with the multiplicity of faiths, the effort to acknowledge a Supreme Being in an official capacity is an uphill struggle. And the Ninth Circuit Court of Appeals' 2-1 ruling that the Pledge of Allegiance is unconstitutional because it acknowledges that we are "one nation under God" is just the latest—but far from the last—challenge.

Even the news that the same judge who wrote the majority opinion soon placed the ruling on hold indefinitely cannot diminish the impact of the original decision. Surely such a ruling couldn't have come as a surprise to many people. After all, it has been a long time coming, one more step in a series of efforts to remove religion from public life.

We've traveled a long and winding road since the America of "God, apple pie, and the American dream." The U.S. Supreme Court removed prayer from public schools in the early sixties. *Time* magazine went so far as to declare on its cover that God was dead in 1966. Now Ten Commandments plaques are being torn down from courthouses across the country. And separationist groups continue to be on the warpath to cleanse our society of any mention of God.

requirement for each child, the mere fact that a pupil is required to listen every day to the statement . . . has a coercive effect."

The reaction from the political world was painfully predictable. Although public opinion polls showed that about 1 in 10 Americans supported the ruling, the Senate's swift rebuttal of opposition came in the form of a 99-0 vote of support for the "under God" version. Neither senators, nor their House colleagues (save three) even bothered to acknowledge an iota of support for the First Amendment interest here. Indeed, the day after the ruling, congresspersons arrived in hordes to be visible on C-SPAN as they recited the Pledge at the start of their session. Curiously, when the Pledge was routinely uttered the day before, the number of members present barely hit double digits.

Judge Ferdinand F. Fernandez was the dissenter at the Ninth Circuit, characterizing the "under God" phrase as, at most, a "picayune" threat to the First Amendment and claimed its tendency to "bring about a theocracy or suppress somebody's beliefs" was "so minuscule as to be *de minimus*."

Fernandez opined that he could accept its characterization as "ceremonial deism" (a phrase used by Supreme Court Justice William Brennan to describe the "In God We Trust" inscription on coins) but suggested even that conclusion gave the Pledge's religious phrase more weight than it deserved. Fernandez viewed the only injury or affront Newdow bemoaned was that people wouldn't "feel good" as the phrase was recited around them.

Fernandez's dismissal of the significance, as well as the construct of "ceremonial deism," demonstrates not only constitutional myopia, but also a regrettable misunderstanding of genuine religious conviction. For those to whom God matters most, the suggestion that the word "God" can ever be uttered in any way that does not implicate an act of significance is insulting and borders on blasphemy. Conversely, the invocation of God or gods to those who are wholehearted rationalists is an affront to the very fabric of meaning in their universe. The majority succeeded quite cleverly in debunking the Fernandez-Brennan thinking by noting that for establishment purposes, a profession that we are "under God" is, in their words, "identical . . . to a profession that we are a nation 'under Jesus,' a nation 'under Vishnu,' a nation 'under Zeus,' or a nation 'under no god.' Would anyone seriously suggest that America's current Christian majority would not go apoplectic were anyone to suggest those alternatives? I suspect bouts of shortness of breath would occur if there were even a Pledge that acknowledged that we were a "nation under God or gods, if any, depending on the beliefs of each individual."

Yet this particular Pledge of Allegiance case, arising out of one parent's belief that his child should not have to listen to her classmates voluntarily recite the Pledge, is about more than the mention of God in a patriotic ritual. It goes to the heart of the debate about our nation's spiritual heritage—and its future.

This country has been traveling a wandering path around the issue of religion for some time now. We're still a society desperately searching for an identity—at least a spiritual one—and, especially in the wake of the terrorist attacks, we're on the verge of a nervous breakdown. But the American people can provide the cure, if only they will decide once and for all what they want this country to be.

If we want to recognize that this is a country with a spiritual heritage, that our Founders built our nation—and our laws—on a religious foundation, then our institutions should reflect that.

The Declaration of Independence states in no uncertain terms that our rights come from God—that men are "endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the Pursuit of Happiness." In a sense, the basic framework of our country has grown out of this concept of God-centered rights. But take God out of the equation, as so many have tried to do, and we are left with a nation whose freedoms stem from nothing more than the whims of those in power. This is something that the framers of our Constitution abhorred and something that, as history has shown us with empires that cleanse religion from their midst, is to be feared.

The Founders put their lives on the line for the freedoms enshrined in our Constitution because they believed they had an innate and God-given right to such freedoms as those of speech, religion, and assembly.

Yet the faith of our forebears is far different from the watered-down, politically correct rhetoric offered up as religion today or that brand of religious hucksterism broadcast on television. So this ruling should surprise no one. Perhaps the court was only stating a truth we have come to understand and refused to admit: that this is not one nation under one God, but one nation under many gods.

This decision challenges our national identity, our spiritual heritage, and the validation of our innate rights. But in today's diverse society, it is a legitimate challenge that must be debated and decided.

Of all the images that played endlessly on those cable networks, none was as disturbing as Newdow's answering machine tape which had recorded the words of an anonymous caller noting that although the caller wouldn't do it personally, Newdow would be killed. What comfort it must be to our enemies in the Middle East to know that some in the United States also agree that clashes with religious orthodoxy should lead to assassination.

If I were allowed to question Judge Fernandez now, I'd really like to know if it is possible for something that is "picayune" to lead to a furor unlike that generated by any decision by any court in recent memory. It's a shame that the rancor made it hard to focus attention on the real bottom line of this decision: Can liberty of conscience be held captive to the legislative enactments of a majority?

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Barry W. Lynn is executive director of Americans United for Separation of Church and State, a Washington, D.C.-based watchdog group that monitors religious liberty concerns. Lynn is a longtime civil liberties attorney, as well as an ordained minister.

We know our past: it is the history of people escaping persecution, fleeing to a new land primarily in search of religious freedom.

We know our present: it is the unfolding story of a nation still coming to terms with who and what it is and who and what it stands for.

What we do not know, however, is our future. That remains to be decided.

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NOVEMBER / DECEMBER 2002

A Separationist Silver Lining

A Week Before The Supreme Court's Ruling In The Cleveland Voucher Case, *Zelman V. Simmons-Harris* (2002), I Was Coleading A Seminar On Religious Liberty. My Friend And Fellow Instructor Told The Group That If The Court Upheld Tuition Vouchers For Pr

BY: BARRY HANKINS

Illustration By Ralph Butler

A week before the Supreme Court's ruling in the Cleveland voucher case, *Zelman v. Simmons-Harris* (2002), I was coleading a seminar on religious liberty. My friend and fellow instructor told the group that if the Court upheld tuition vouchers for private religious schools, the establishment clause of the First Amendment would be effectively dead. But before signing onto my friend's analysis, it would be prudent to take a brief look at the ruling itself, just to see what church-state separationists might salvage.

PRINTABLE VERSION

The first thing worth noting, as Chief Justice Rehnquist did in his majority opinion, is how carefully the Cleveland program was tailored. Unlike the *Nyquist* decision of 1973, in which a New York program was designed to aid exclusively private school students, most of whom were in sectarian schools, the Cleveland program was geared for students trapped in low-performing public schools. It offered them four options for transferring out of the public school for which they were zoned. They could attend a public community school, a public magnet school, a private nonreligious school, or a private religious school. If they wanted to stay in their zoned schools, they could request state-funded tutoring. Rehnquist and his four allies—Scalia, Thomas, Kennedy, and O'Connor—concluded that this program was indeed designed to give children and their parents educational options and that the individuals, not the state, made the choices about where tuition dollars would be spent.

If there is a separationist silver lining in this case, it is that Rehnquist once again resurrected the *Lemon* test. First fashioned in *Lemon v. Kurtzman* (1971), the test formerly had three prongs: (1) a government action must have a secular purpose; (2) the primary effect of the law or program must be to neither advance nor inhibit religion; and (3) the law or program must not create an excessive entanglement between church and state. *Lemon* was used rather routinely throughout the seventies, but it began to fall into disuse during the late 1980s, much to the glee of conservatives such as Scalia, Thomas, and Rehnquist. After ignoring *Lemon* in several cases, the Court decided to use Lemon in a 1993 case, prompting Justice Scalia to complain in dissent that "like a ghoul in a late-night horror movie" the *Lemon* test has come back to haunt us.[1]

While not actually citing *Lemon* by name, Rehnquist did cite *Agostini v. Felton* (1997) to say that the Court continues to ask whether government aid has a secular purpose and whether it has the effect of aiding religion, essentially the first two prongs of Lemon. In her concurring opinion, O'Connor said explicitly, "A central tool in our analysis of cases in this area has been the *Lemon* test."[2] She then pointed out that in Agostini the Court had folded the entanglement prong into the primary effect prong, thus creating a two-legged *Lemon* test.

While there can be little doubt that the Cleveland voucher program had the secular purpose of improving educational opportunities for

students, the real question concerned primary effect. As Justice Souter emphasized in his dissent, 82 percent of the participating private schools were religious and 96 percent of the students who took the private school option chose religious schools. In short, this gives the appearance that the primary effect of the voucher program was to advance religion via religious schools. Rehnquist, however, stated flatly, "The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school."[3] Rehnquist then countered that when calculations include all children who chose nontraditional options (community schools, magnet schools, or tutoring) the percentage of participating students in religious schools falls from 96 to under 20 percent. Moreover, the Court reasoned that the primary effect of the program in its entirety was not to advance religion but to broaden educational opportunities for the students of Cleveland.

While this will not satisfy very many separationists (it certainly didn't convince Justices Souter, Breyer, Ginsberg, or Stevens), one might take heart that things could have been worse. The Court could have used the case to abandon Lemon altogether in favor of an equal treatment test alone. Equal treatment holds that all the establishment clause requires is that the state treat all religious groups equally; in other words, that there be no discrimination in funding, and that the state not favor religious groups over secular ones or vice versa. Clearly, there were elements of equal treatment in the Cleveland case. All private schools, whether religious or secular, were treated the same, and the state provided no incentive for choosing private or public schools. In fact, as Rehnquist pointed out, there were actually disincentives for parents to choose private schools because only a portion of private school tuition is covered by a voucher, while the state picks up the full tab for community schools, magnet schools, and tutoring.

Also heartening was that the Court apparently retained two important longstanding distinctions in funding cases. First, the Court emphasized the importance of indirect funding of religious entities. This went hand in hand with the Court's emphasis on individual choice. The actual payment for private school tuition goes to the parent, who then endorses the check over to the school of choice. It will be interesting to see if this will also be a stipulation for the constitutionality of government funding of faith-based organizations. Second, the Court did not erase the distinction it has made historically between primary and secondary schools on the one hand and higher education on the other. Some voucher proponents point out the apparent inconsistency between 18-year-old seniors in religious high schools who, until now, could not receive tuition support, and 18-year-old freshmen in religious colleges who can. Rehnquist did not address this distinction, which may mean that the Court will continue to keep the parameters more strictly defined for aid to the usually more sectarian elementary and secondary religious schools.

All told, the Cleveland voucher decision was not surprising. As both the majority opinion and Justice O'Connor's concurrence emphasized, the decision is consistent with precedent set in the *Mueller* (1983), *Witters* (1986), and *Zobrest* (1993) cases, all of which upheld some form of state funding for students in private sectarian schools. Justice O'Connor argued plausibly that the Cleveland case was not inconsistent even with *Everson*, the 1947 case that first utilized the "wall of separation" metaphor and established the "no aid to religion" criterion. That may seem farfetched at first glance, until one recalls that *Everson* upheld state-funded bus fare reimbursement for students attending parochial schools. Apparent inconsistency has been part of establishment clause jurisprudence from the very beginning, and it will always be a primary feature. These cases are too complex for easy solutions that will satisfy all observers.

With this in mind, let us give the last word to the ever-moderate O'Connor: "The support that the Cleveland voucher program provides religious institutions is neither substantial nor atypical of existing government programs. While this observation is not intended to justify the Cleveland voucher program under the establishment clause, . . . it places in broader perspective alarmist claims about implications of the Cleveland program and the Court's decision in these cases."[4]

In other words, while the establishment clause has been weakened, and the wall of separation lowered, neither is dead, and *Lemon*, like a ghoul in the night, still lurks in the shadows.

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[1] *Lambs Chapel v. Center Moriches School District* (1993).

[2] In writing this piece I used the preliminary draft of the opinion downloaded from www.Findlaw.com. O'Connor's quote can be found at "O,Connor, J., concurring," 7.

[3] "Opinion of the Court," 17.

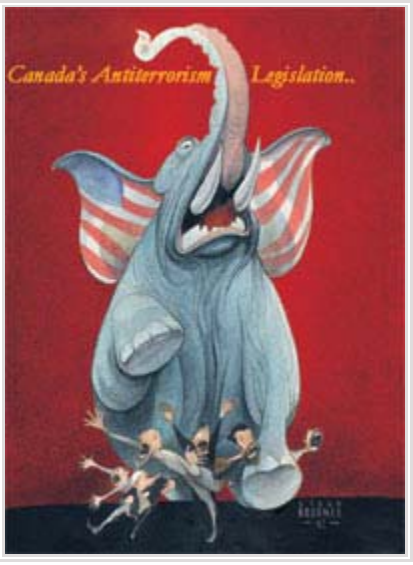
[4] "O,Connor, J., concurring," 7.

NOVEMBER / DECEMBER 2002

Northern Slight &The Panic Of 9/11

Former Canadian Prime Minister Pierre Trudeau Once Likened Living Next Door To The United States To Sleeping With An Elephant—no Matter How Friendly The Elephant Is, You Can't Help Feeling Its Every Twitch And Grunt. Canadians Are Familiar With Thi

BY: MARIANNE BEASLEY



Former Canadian prime minister Pierre Trudeau once likened living next door to the United States to sleeping with an elephant—no matter how friendly the elephant is, you can't help feeling its every twitch and grunt. Canadians are familiar with this "sleeping with the elephant" syndrome—everything that happens in the U.S. inevitably impacts Canada.

On September 11, 2001, the elephant was roused from sleep by terrorist attacks on Washington, D.C., and New York City. Nothing in the world has been the same since—and for America's bedfellow to the north, the changes have been swift and striking. As accusations swirled that Canada was a haven for anti-American terrorist groups and that Canadian borders were too permeable, too insecure, the Canadian government took action, introducing the tough new antiterrorism law, Bill C-36.

Bill C-36 redefines terrorism according to the United Nations antiterrorism conventions and creates new offenses under the Criminal Code of Canada: it is now an offense to provide funding to any group designated a "terrorist" group, to facilitate the activities of a terrorist group, and to knowingly conceal or harbor a terrorist. The new bill also gives law-enforcement agencies stronger investigative tools, including greater freedom to use electronic surveillance, and the possibility of using "preventive arrest" to detain a person who police suspect is about to commit an act of terrorism.[1]

Images of the crumbling World Trade Center towers are still seared into our collective memory. Passengers feel a little more apprehension climbing on board commercial airliners. And Canadians, many of whom spent several days hosting and caring for airline passengers stranded in Canadian cities in the days following September 11, are not likely to soon forget the impact terrorism can have on the lives of ordinary people. Nobody in Canada would disagree that we need to be protected against terrorism, and that the government needs to pass laws that will protect us.

But within hours of the announcement of Bill C-36's proposed legislation, voices were rising in protest all around Canada. Many civil libertarians felt that protection against terrorism was being won at the expense of Canadians' civil liberties. And members of many minority groups, particularly Arab and Muslim Canadians, felt that the impact of these new laws would be disproportionately felt within their communities.

"Enacting Bill C-36 will result in a legacy that all Canadians will regret," wrote a large group of Muslim-Canadian organizations and other concerned citizens' groups, in an open letter to the prime minister. "Bill C-36 starts off on the wrong foot by using imprecise and overly broad definitions that will catch innocent people in the net meant for terrorists. Furthermore, the Bill's extraordinarily broad powers can be used in secret, resulting in the potential for a wholesale violation of civil rights."

The open letter, signed by such groups as the Canadian Arab Federation, the Canadian Muslim Civil Liberties Association, the Coalition of Muslim Organizations (representing more than 140 different groups), the World Sikh Organization, and the United Church of Canada, among others, goes on to warn that Bill C-36 could become an instrument of institutionalized racism. "The current social climate, coupled with religious and racial profiling, will result in religious and racial minorities suffering a disproportionate share of the Bill's significant impact. While those wrongfully charged, arrested and imprisoned may be vindicated in the fullness of time, the stigma, shame and humiliation that come with wrongful accusations will have devastating effects on families, reputations, friendships, businesses and jobs."[2]

In fact, some Islamic groups in Canada believe this has already begun to happen. Despite protests and concerns, Bill C-36 became law

in December 2001. One month later, in January 2002, the Canadian Islamic Congress reported on its Web site that a young Ottawa family had suffered "abuse" as a direct result of the new legislation.

Royal Canadian Mounted Police and Ottawa police officers raided the family's home at about 7:00 a.m. on January 22, in a search that lasted more than five hours. The couple's two daughters, aged 3 years and 18 months, were frightened. According to the CIC Web site, when relatives arrived to take the children away, "police even insisted on searching the crying children's jackets and boots before they were allowed to leave. The officers confiscated computer and telephone files, as well as Islamic religious books."[3]

Faisal Joseph, the CIC's legal counsel, is quoted as saying, "As a result of the new antiterrorism legislation Canadian Muslims are today considered guilty until proven innocent, by some authorities. . . . We are aware of several factual incidents whereby Muslims are being wrongfully interrogated, and victimized on the basis of unsupportable innuendo and faulty suspicions. This is typical of a police state. Our Muslim community does not deserve to live in fear of these abuses in their own country."[4]

The Ottawa *Citizen*, reporting on the same incident, said that during the search "officers confiscated a computer hard drive, various religious books and downloaded call records from the home telephone. Officers also listened to, but didn't confiscate, several audiotapes containing Islamic stories for the children," but no charges were laid at the end of the search. An RCMP spokesperson confirmed that a search warrant was issued, but refused to comment further as the investigation was ongoing.[5] The family, who did not wish to go public with the incident, were apparently told by the RCMP that while they were not personally under suspicion, they knew someone who was suspected of terrorist involvement.[6]

This is exactly the kind of incident that Bill C-36's detractors fear. Nobody wants to leave Canada wide open for terrorist activity, but many Canadians fear that the government has gone too far in the opposite direction, throwing out cherished Canadian civil liberties in the quest for security.

The government argues that the bill's opponents are being unreasonable. "The additional powers of preventive arrest and investigative hearings in Bill C-36 . . . have . . . been carefully designed to ensure they meet the requirements of the *Charter of Rights and Freedoms*," a Department of Justice information Web site claims. The Justice Department goes on to point out that "the current provisions in C-36 are in keeping with and, in some ways, significantly more restrained, than those proposed by other countries," including the United States and the United Kingdom.

In yet another open letter to Prime Minister Jean Chrétien, the British Columbia Civil Liberties Association spoke for many civil libertarians when it said that while "we are not opposed in principle to significant and powerful anti-terrorism measures in response to recent events . . . we strongly suspect that failure to find an appropriate balance between these measures and respect for fundamental rights and freedoms will threaten the legitimacy of the fight against terrorism and may undermine important aspects of it."[7]

Canadians as well as Americans recognized on September 11, 2001, that our world had changed. Part of that change has inevitably meant that many of the freedoms we once took for granted have been curtailed. The question hangs like a cloud of dust and smoke over the Bill C-36 debates: How much liberty are we willing to sacrifice in return for security? If we sacrifice too little, will terrorists strike again? If we sacrifice too much, have they already won?

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[1] Department of Justice Canada, "Highlights of Anti-Terrorism Act." Online: http://canada.justice.gc.ca/en/news/nr/2001/doc27787.html.

[2] Defense of Canadian Liberty Committee. "Open letter on Bill C-36 from a large group of Muslim Canadian organizations." Online: **http://www.canadianliberty.bc.ca/liberty-vs-security/muslimcanadian.html**.

[3] "More Canadian Muslims Victimized Under New Anti-Terrorism Law: RCMP and City Police Inflict Surprise Raid on Young Ottawa Family," Canadian Islamic Congress *Friday Bulletin*, Jan. 24, 2002. Online: **http://www.canadianislamiccongress.com/index.jsp**.

[4] Ibid.

[5] Siri, Agrell, "RCMP 'Violation' Leaves Muslim Family Terrified: No Charges After Six-Hour Search Under Anti Terror Law," Ottawa *Citizen* Jan. 27, 2002.

[6] Agrell, "Watchdog Needs Teeth to Oversee Anti-terror Law: Chairwoman: Complaints Commission Lacks Authority to Impose Checks on RCMP, Heafey Says," Ottawa *Citizen*, Feb. 3, 2001, p. A11.

[7] British Columbia Civil Liberties Association, "An Open Letter to Prime Minister Jean Crétien Re: Bill C-36. Online: **http://www.bccla.org/othercontent/01c36openletter.html**.

NOVEMBER / DECEMBER 2002

Editorial - For Such A Time As This

Since 9/11 2001 We Have Each Been Caught Up In The Sense Of Crisis, A World In Jeopardy, And The Forces Of History Turning Once Again. Here In North America We Live In The Knowledge That Our Towers Of Invulnerability Have Fallen...they Were Always Vulnera

EDITORIAL

For Such a Time as This

Since 9/11 2001 we have each been caught up in the sense of crisis, a world in jeopardy, and the forces of history turning once again. Here in North America we live in the knowledge that our towers of invulnerability have fallen...they were always vulnerable, but the two way mirrors we put on the exterior were often around the wrong way for us to see out, and we smiled at our reflection of security.

And now it seems that the very concept of freedom itself is up for debate. The question of how much freedom, and how much security, has become a seesaw syllogism pivoting upon the urgency of rooting out the enemy within. Not a good climate for ensuring the continued application of religious liberty: after all religion, we now remember, is perhaps the most dynamic factor in human activity.

In writing this editorial I am led to reflect on just how integral religious conviction was to the establishing of *Liberty* magazine itself. This issue identifies itself as the last for volume 97–and we are rushing upon 100 years since the very first issue in 1906.

Back then the world was so much simpler and the threats easier to identify–right! Well, yes and no. I am struck by how similar the situation was in many respects and how always relevant the message of this magazine.

Any student of history can easily point to an underlying political and social instability in those early years of the last century and show how it presaged the butchery of the Great War and the cataclysm of the Second World War. And as I look back to religious liberty issues just after the century began I see similar agitation to what we see today. As today, there was an attempt to legislate religious uniformity as a bulwark against external threat. For example, the International Reform Bureau, led by a Reverend W.F. Crafts, sought a constitutional amendment declaring the United States officially a "Christian" nation. There was also a powerful lobby urging passage of Sunday legislation.

Which brings me to the raison d'etre of *Liberty* magazine. In such a situation Seventh- day Adventists could not keep silent. And they did not. Pastors, leaders and individual members spoke up and challenged the tendency to a state mandated faith. They testified before congress and they argued their position forcefully through the pages of *Liberty*. Yes, the church had published a religious liberty journal some years earlier; but a lull in the pace of external events, coupled with a contentious debate within Adventism over the nature of religious liberty activism, had muted its voice. Now in 1906 events demanded the church be engaged. Events that went to the very heart of what Adventism is all about.

Liberty magazine takes great pains to defend the rights of conscience and religious exercise of all faiths. That is a stance we intend to continue. It is a constitutional right here in the United States. More importantly, it is a solid Biblical principle. God allowed Adam and Eve the freedom to disobey. The New Testament reveals a God so committed to persuasion that He sends His own son to reveal the Way to salvation. Even when unbelievers acted violently toward Him the message

remained one of persuasion via love and logic. Nothing in my Bible justifies an Inquisition, legislated morality, and other actions against unbelievers.

But this does not fully explain why in 1906 Seventh-Day Adventists began to publish *Liberty*. That explanation is found in our sense of the Apocalyptic as it relates to what all Christians hold as the Gospel Commission–Jesus' command to go out and spread the message of His coming kingdom.

I have a great series of lectures put out by a well known secular company that specializes in recording top level university lectures. It's titled "Apocalypse Now, Apocalypse Then: Prophecy and the Modern World." In the course, the lecturer shows what many know to be true but have not thought of what it means: a sense of Apocalyptic has imbued the American experiment from the beginning. Many early settlers believed this nation had a destiny to usher in the end of the age; some even intending it to establish a temporal millennium (hence the plethora of utopian communities here in the new world). Actually read the words to the "Battle Hymn of the Republic" and you get of sense of all implied in the shared apocalyptic. It lives to this day in such cues as President Reagan's "evil empire" and "Armageddon" comments and the firestorm reaction to the court ruling on the Pledge of Allegiance.

Seventh-Day Adventists share much of this sense of the apocalyptic with other Christians. After all, we arose out of various fundamentalist groups in New England, and a revival of apocalyptic interest there in the mid 1800s. Today much of that broad base of apocalypticism has been gathered toward the views best expressed in the "*Left Behind*" series by Tim Lahaye and Jerry Jenkins. Under the rubric of a once obscure and barely biblical concept known as the Rapture these and similar books posit a world racing toward a final battle with evil.

Perhaps reflecting longstanding U.S. insularity, they tend to find the evil antichrist in either a United Nations gone bad or a vaguely Balkan type of world strongman.

It has become all too easy for many well intentioned Christians in the United States to accept this cardboard cutout form of the apocalyptic delivered in the Bible's Book of Revelation.

Just how easily this could create a blindside to the allure of a Godly state holding back evil by civil power was on display at a recent Washington gathering to honor the Reverend Moon and the paper he founded. His speech deviated far from any orthodox Christian view and was upheld as endorsed by the spirit world. Then he lauded the United States as "a city set on a hill," "the second Israel," and God's instrument to bring righteousness and peace to the world. How neatly he hijacked the fine aspirations and goals of a country often used by God as it acted correctly, but never the theocracy the image implies!

Seventh-Day Adventist have studied the Bible diligently; taking the understanding of earlier expositors and fitting the sense of apocalyptic into the jigsaw of fulfilled prophecy and current events. We do see America as a great and grand experiment in the protection of liberty of conscience. But we know that no nation, even ancient Israel, is intrinsically moral and it is dangerous to conflate Godliness with any state system.

Nowhere in the Revelation of John is the situation more relevant to us today in America than chapter 13. There the reader is introduced to a "lamblike" power–a new state that appears "out of the earth." Then that power changes its very nature and becomes one that compels all to worship a false god. This was the prophetic indication that so alarmed early Seventh-Day Adventists as they saw evidence that the United states might be ready to compel a certain type of worship. But they were not and are not fatalists. Prophecy is predictive but not independent of human response. It is our obligation to work to maintain "free exercise" of religion and faith in this still new world. It is our obligation to delay all efforts at compelling compliance to any particular faith view. It is our obligation to give a moral cast to the whole religious liberty question, and not let it drift into a legally relativistic tone that might sacrifice religious liberty for state security as easily as we have already given up certain rights of privacy and association.

Around 2500 years ago Esther (or more properly Hadassah), daughter of a people exiled to Persia found herself chosen as the queen to King Ahasuerus. The kingdom was at peace and she and her people seemed secure in their adopted freedom. But plans were afoot. A noble named Haman intended to massacre all of them...no doubt citing they and their religion as a danger. The Queen's cousin heard of the plot and urged her to risk all by going to the king and begging his aid.

His words surely are relevant today. "If you keep silent" he said, "relief and deliverance will rise...from another quarter." We cannot afford to presume that God's purposes will be thwarted and religious freedom irreparably harmed if we do nothing. It's bigger than that. Esther's cousin then put the question that demanded an action response: "Who knows whether you have not come to the kingdom for such a time as this?" Esther 4:14, R.S.V. Adventists felt they had in 1906. As we look into 2003 and the challenges to continued religious *liberty*, I cannot but be convinced that *Liberty* and the American apocalyptic have come to a certain moment of Truth.