



A MAGAZINE OF RELIGIOUS FREEDOM

LIBERTY

SUBSCRIBE NOW \$7.95
SIX ISSUES ONLY
GIFT SUBSCRIPTIONS AVAILABLE

JOIN THE FIGHT FOR FREEDOM
DONATE NOW

[HOME](#)

[ABOUT US](#)

[ARCHIVES](#)

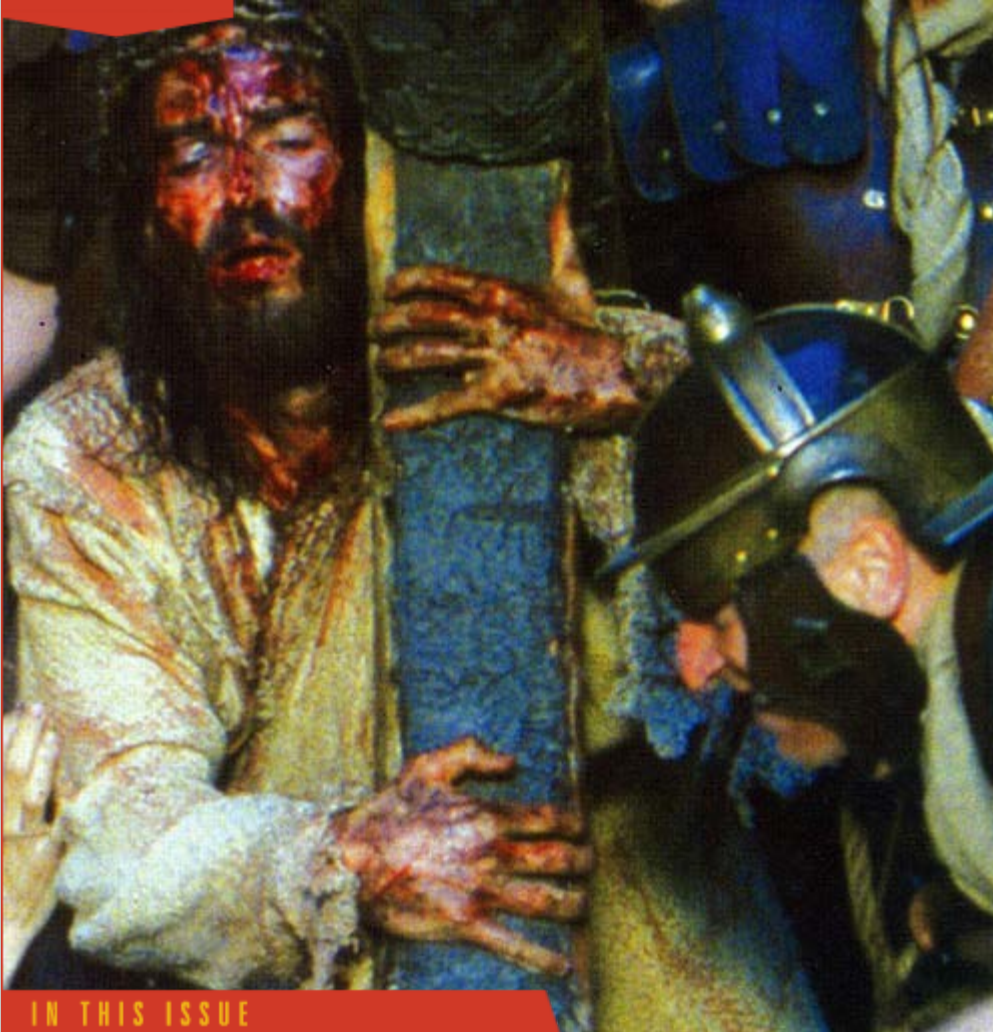
[SUBSCRIBE](#)

[EDITOR'S BLOG](#)

[IN THE MEDIA](#)

MARCH / APRIL 2004

[CONTACT US](#)



IN THIS ISSUE

March/April 2004 Cover

Tax-Tutored Theologians - Part I

Can a Book Harm Religious Freedom?

Religious Tests & Civil Society

Forbidding Passion

Editorial - A Divine Imperative

Scholarship & History

NEW! LIBERTY ROUND TABLE

Read ongoing discussions on current religious liberty issues presented by leaders in the field. [Read Now](#)



EDITOR'S BLOG

School prayer has been a matter of serious contention for decades. In 1962 the ...[Read More](#)



LIFEQUEST LIBERTY

Podcast: Join Charles Mills and Lincoln Steed as they look at our religious liberty. [Listen Now](#).



CAMPAIGN RESOURCES

Watch campaign videos and download resources to promote the Religious Liberty Offering. [More Info](#).



SUPPORT LIBERTY

Your donation will help us in our pursuit to maintain the religious freedoms we enjoy.



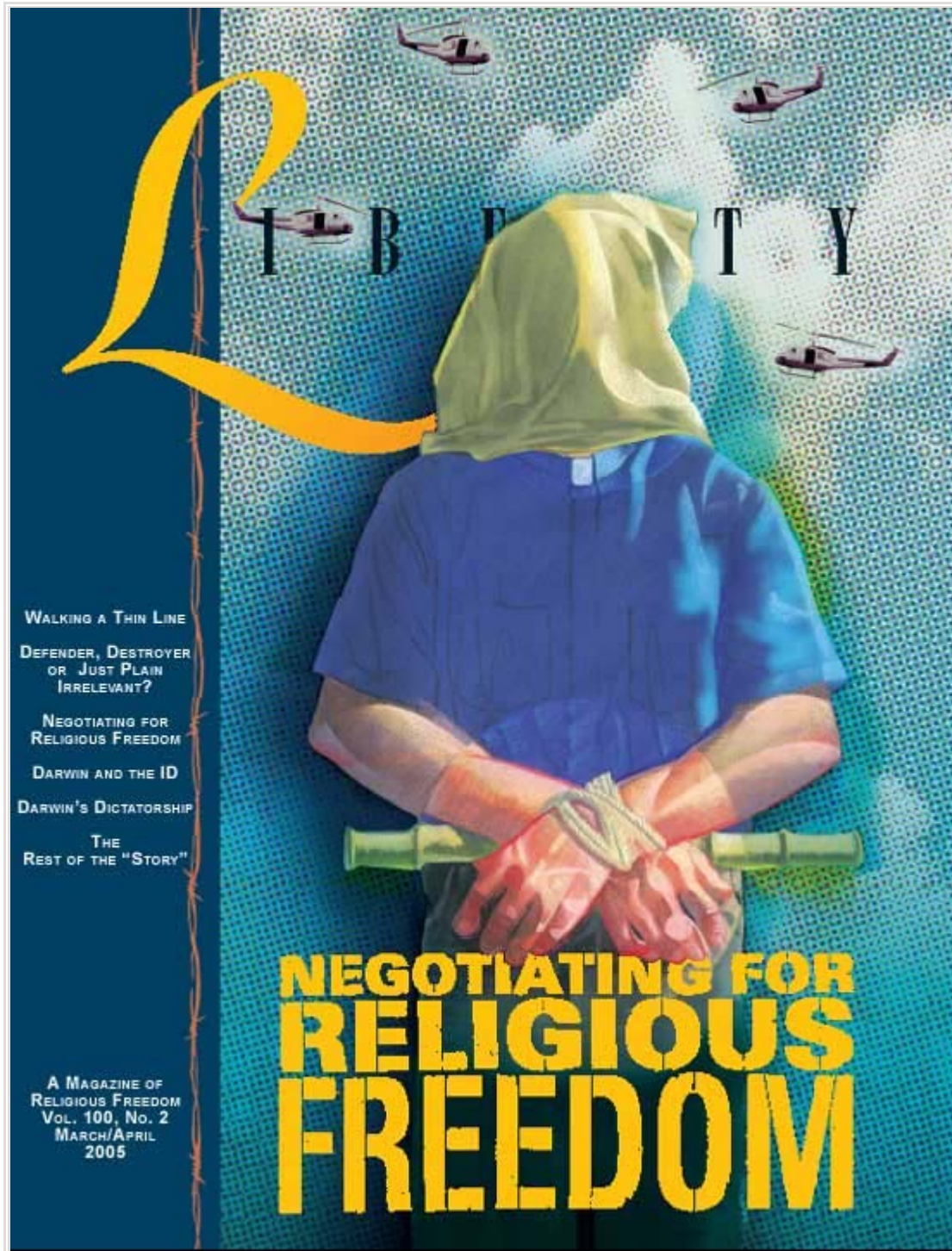
ARCHIVES

View and search previous issues of *Liberty*



MARCH / APRIL 2004

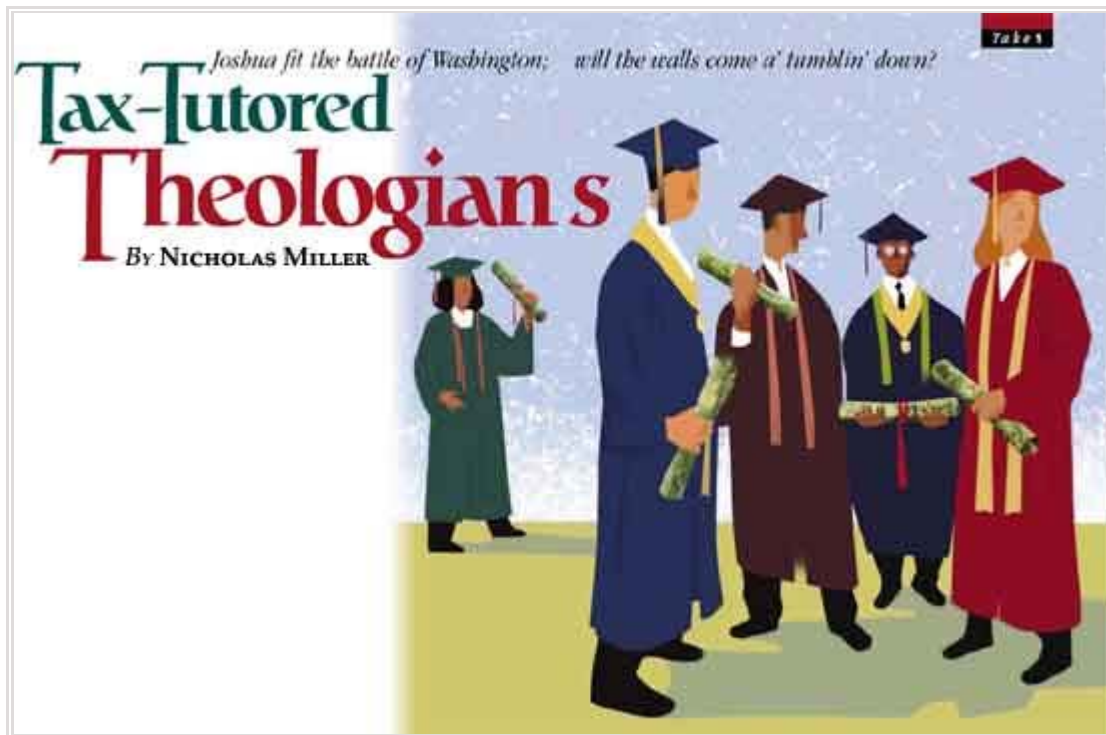
March/April 2004 Cover



MARCH / APRIL 2007

Tax-Tutored Theologians - Part I

What Is The Cost Of Discipleship? It Cost Joshua Davey \$2,500 When He Decided To Declare A Major In Pastoral Studies.



What is the cost of discipleship? It cost Joshua Davey \$2,500 when he decided to declare a major in pastoral studies.

Joshua won a Washington State scholarship based on academic achievement and financial need to pursue almost any field of study—including religion if he studied it from a dispassionate academic view at a place such as the University of Washington. But he would lose the scholarship if he chose to major in religion at a college that taught religion from a viewpoint of faith—such as the Assemblies-of-God-affiliated Northwest College, where Joshua was enrolled.

What is the cost of discipleship? It cost Joshua Davey \$2,500 when he decided to declare a major in pastoral studies.

Joshua won a Washington State scholarship based on academic achievement and financial need to pursue almost any field of study—including religion if he studied it from a dispassionate academic view at a place such as the University of Washington. But he would lose the scholarship if he chose to major in religion at a college that taught religion from a viewpoint of faith—such as the Assemblies-of-God-affiliated Northwest College, where Joshua was enrolled.

The question is: in taking Joshua's scholarship away, was Washington state merely avoiding state sponsorship of religion—or was it guilty of invidious religious discrimination?

In answering this, a federal appeals court ruled that the state was guilty of religious discrimination, and struck down the exclusion of theology students from the program. This decision was at odds with a decision of the Washington State Supreme Court. Thus, the United States Supreme Court has agreed to hear the case.

The High Court's ruling could create a sea change in the area of voucher law, making religious institutions not only eligible for vouchers, but *requiring* states to give vouchers to religious institutions if they provide them to secular organizations. For this reason, the case has attracted more than a dozen friend-of-the-court-briefs, representing scores of religious and civil rights groups across the country.

But despite the strong feelings on both sides of the dispute, Joshua's case seems a particularly difficult one for people to decide which



side they are on. The right result seems to change depending on how the case is framed.

Thought of in terms of improper state support of religion, it seems to be a case at the center of the Constitution's prohibition against state funding of the church. What is more of a religious calling than that of the ministry? And how can one more directly support organized religion than to financially support those who preach and teach it, or are training to do so?

The founders strongly opposed tax funds going to ministers or teachers of religion. James Madison wrote his famed *Memorial and Remonstrance Against Religious Assessments* as a challenge to a bill to provide funds to all teachers of religion. Madison's arguments were so well received that not only was the bill defeated, but impetus was created to pass an opposing bill by Thomas Jefferson that explicitly prohibited tax funds from going to ministers.

Jefferson's bill, which became the Virginia Act for Establishing Religious Liberty, stated: "To compel a man to furnish contributions of money for the propagation of opinions which he disbelieves . . . is sinful and tyrannical, and even forcing him to support this or that teacher of his own religious persuasion, is depriving him of . . . liberty."

VA. CODE ANN.

MARCH / APRIL 2007

Can A Book Harm Religious Freedom?

BY: MARK KELLNER

The question has an almost obvious answer: Yes, a book can, given enough circulation and acceptance, harm religious freedom. Adolf Hitler's *Mein Kampf*, the literary "work" of a frustrated artist and World War I veteran, remains a perverse inspiration to those who cherish hatred. Its publication prepared the way for the National Socialists in Germany, leading to 12 years of terror in Europe and the death of millions.

On a far smaller scale, and with a decidedly different purpose, another book has, in recent years, gained an audience—and fueled controversy. Its authors, two Americans, advocate a rather limited view of religious freedom, with sections of the book's introduction talking about "the value of intolerance" and "responsible religious freedom".

The book, first published in 1999 and reprinted three times since by evangelical Christian publishers Harvest House, of Eugene, Oregon, is called *Encyclopedia of Cults and New Religions*. The authors, John Ankerberg and John Weldon, claim a joint total of nearly 100 books in print, in English and Spanish, on a wide range of religious topics, but dealing principally with the subject of religions that they believe "oppose" Christianity in some basic fashion. Mr. Ankerberg¹ is a popular television host: at his Internet Web site, www.ankerberg.com, he claims his television "program can be seen each week by a potential viewing audience in excess of 99 million people" in North America.

Mr. Weldon is a former associate of the late Walter R. Martin, who was a noted religion researcher and founder of the Christian Research Institute. He has been closely associated with Mr. Ankerberg for many years, and has been featured several times on the Ankerberg television programs.

Books written by Messers. Ankerberg and Weldon get a wide airing—they are prominently featured in Christian bookstores, are discussed on various evangelical radio and television programs, and are the subject of "gift offers" from various Christian ministries. As one might expect, Mr. Ankerberg promotes these books in his own venues, such as his Web site.

Among the books authored by the duo, the *Encyclopedia of Cults and New Religions* has drawn particular attention. Unlike many of the estimated 80,000 new books published annually in the United States, ECNR, as it will be called here, has gone into at least four printings. And, unlike most of the books birthed from American presses each year, it has drawn a major libel lawsuit, one which seeks \$136 million in damages.²

Mr. Ankerberg in particular holds himself forth as a defender of evangelicalism. He claims ordination as a Baptist minister, and that he was once a church pastor. Many of his weekly television programs attempted a Phil Donahue-like discussion of so-called alternatives to Christianity, with Mr. Ankerberg often debating people who represented different new religions and philosophies, such as José Silva of *Silva Mind Control* and televangelist Garner Ted Armstrong, who died in September of 2003.

But in ECNR Mr. Ankerberg and Mr. Weldon posit a view of religious pluralism that to many Christians—and particularly evangelicals—could have some unintended consequences. The introductory chapter of ECNR suggests that so-called cults represent "a worldwide problem," as well as a particular threat to the United States. Citing the American Family Foundation (whose 2002 conference on dealing with cults included guest observers from the People's Republic of China), Ankerberg and Weldon reflect on the threat of cults in Europe as leading to problems in America.

"We pay for what we tolerate, whether it be crime, drug use, murderers or not disciplining our kids," the authors write.³ "The worse the thing tolerated, the higher the price imposed."⁴

Then, to justify their call to intolerance further, the authors generalize that these religions are characterized by everything from murder to rape, prostitution and child molestation.⁵

The authors declare, "Tolerance is not always a virtue,"⁶ citing a syndicated column by George F. Will on the death penalty to buttress their claim.

Declaring that "cults themselves have become tolerated, even praised by many,"⁷ the two writers ascribe a "virtue" to *their* stance: "The reasons for our 'intolerance' of cults and new religions—why we are critical of them—are more soundly based than our critics are willing

to concede."⁸

The scenario then proposed by Ankerberg and Weldon is fraught, I believe, with serious consequences for believers of all faiths. The authors state they support "freedom of religion" but only when it is "responsible."⁹

"Christian leaders should call for and institute a national discussion over how we protect legitimate religious freedoms and simultaneously protect ourselves from 'freedom of religion,'" is their breathtaking proposal.¹⁰

In other words, because so-called cults and new religions have lured people away from what Ankerberg and Weldon consider to be a better way, the authority of the church—and perhaps even the state—must be brought to bear. Remember that

Suggesting that leaders of any one faith should promote the legal exclusion of so-called minority religions could well lead to a slippery slope in which no one's expression is safe.

these authors begin their argument citing the work of European and French "anti-sect" leaders as justification for their own efforts. (Ironically, the United States Supreme Court is now citing foreign judicial decisions in its rulings, despite the assertion by Associate Justice Antonin Scalia that such overseas opinions have little or no bearing on American law.¹¹)

The authors, it seem, particularly hold to a notion that since America is a nation with philosophical and political roots in a Judeo-Christian tradition, that tradition must be appealed to as the basis of American religious freedom.

"In other words," they state, "the First Amendment only works as long as the nation accepts Christian principles. If it does not, then it gets what it gets—all kinds of religious evils protected by the very amendment by which God intended to bless the nation."¹²

The constitutional exegesis employed by Mr. Ankerberg and Mr. Weldon in this statement may well dwarf that of the numerous religious crackpots who've hung obscure theories on even-more obscure passages in Scripture over the years. While many Americans believe that God had a hand in the birth and growth of the United States, few would, I believe, suggest that the First Amendment was designed solely to protect Christians!

This hypothesis is fraught with consequences and calamities. Which flavor of Christianity was God seeking to protect with the First Amendment? Where is the declaration that non-Christian religions were to be unprotected? Was, for example, George Washington's famous letter to the Touro Synagogue just a hoax, or a bid for votes?

Those who have made even a cursory study of the history of religious freedom in the United States would likely conclude that freedom of religion being guaranteed to all is why this country has, by and large, been a bastion of both free expression and the rights of the minority. Suggesting that leaders of any one faith should promote the legal exclusion of so-called minority religions could well lead to a slippery slope in which no one's expression is safe.

Indeed, as Edwin S. Gaustad, an emeritus professor of history at the University of California at Riverside, wrote in a 1995 article: "As Thomas Jefferson observed in 1816, even if we have laws that provide for religious liberty, they lose much of their effectiveness if 'we are yet under the inquisition of public opinion.' When efforts are made to marshal public opinion against any religious group, but especially against one that is unfamiliar and politically powerless, then 'free exercise' becomes a mockery. If in that effort to arouse public passion, statements are made which are malicious, inflammatory and even libelous, then the chilling effect upon religious liberty is compounded."¹³

Clearly there are valid concerns about the actions and practices of some groups. But if someone commits a crime—whether it's fraud, theft by deception, or even causing physical harm to another person—there are plenty of current laws governing such actions. Where some would argue that "cult crime" legislation is the way to go, the prosecution, in Japan, of the Aum Shinrikyo sect's leader and his followers over the 1994 sarin gas attack, shows otherwise. People were tried for—and convicted of—a variety of crimes, including murder, without "special" legislation needed.

The concerns expressed by both John Ankerberg and John Weldon in their *Encyclopedia of Cults and New Religions* may be troubling to parents, pastors, and educators. But the antidote would seem to lie in better education and guidance for children and adults, not the provision of liberty for some and its denial to others.

Mr. Ankerberg's spiritual forefather, the Baptist Roger Williams, knew what it was like to face—and flee—persecution for his beliefs. Would we really want to return to that kind of society?



Mark Kellner is a freelance author in Rockville, Maryland. He writes a weekly column in the *Washington Times* and is the author of "God on teh Internet."

1 Both Mr. Ankerberg and Mr. Weldon claim to hold doctorate degrees, although many of their book-cover biographies omit the names of the schools where such degrees were earned.

2 Living Stream Ministry, the local churches, and 96 local church congregations filed that lawsuit after attempts to negotiate and mediate differences with Harvest House and the two authors failed. (See Mark A. Kellner, "Local Church Fights for Evangelical ID Card," *Christianity Today*, February 2003.) The points of contention in that action are not the concern of this article. For information about their lawsuit, the Local Church has set up an Internet Web site, www.localchurch-vs-harvesthouse.com.

3 John Ankerberg and John Weldon, *Encyclopedia of Cults and New Religions* (Eugene, Oreg: Harvest House Publishers, 1999), p.xix.

4 *Ibid.*

5 *Ibid.*, p. xxv.

6 *Ibid.*; p. xix.

7 *Ibid.*

8 *Ibid.*

9 *Ibid.*, p. xxvii.

10 *Ibid.*

11 See Joan Biskupic, "Supreme Court Citing More Foreign Cases," *USA Today*, July 8, 2003, 9A; online at <http://www.usatoday.com/usatonline/20030708/530392928s.htm>.

12 Ankerberg/Weldon, p. xxix.

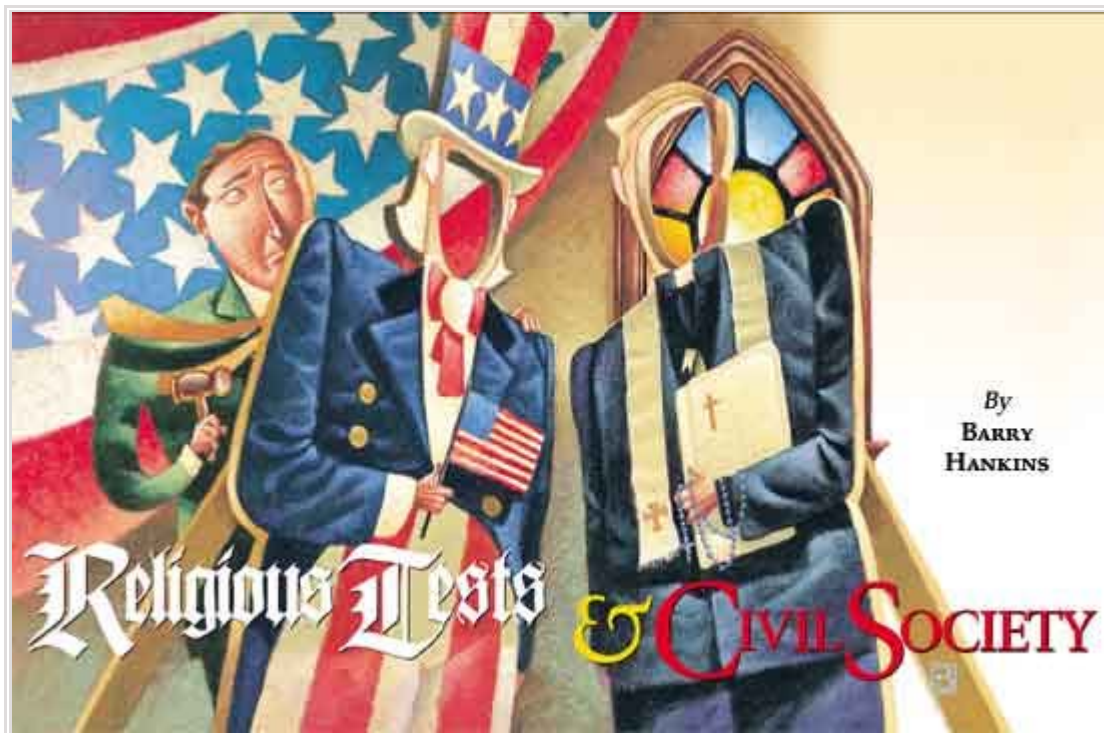
13 Edwin S. Gaustad, "The Testimony of Edwin S. Gaustad, Ph.D.," published in *The Experts Speak* (Anaheim, Calif.: Living Stream Ministry, 1995); online at <http://www.contendingforthefaith.com/summary/experts/gaustad.html>.

MARCH / APRIL 2007

Religious Tests & Civil Society

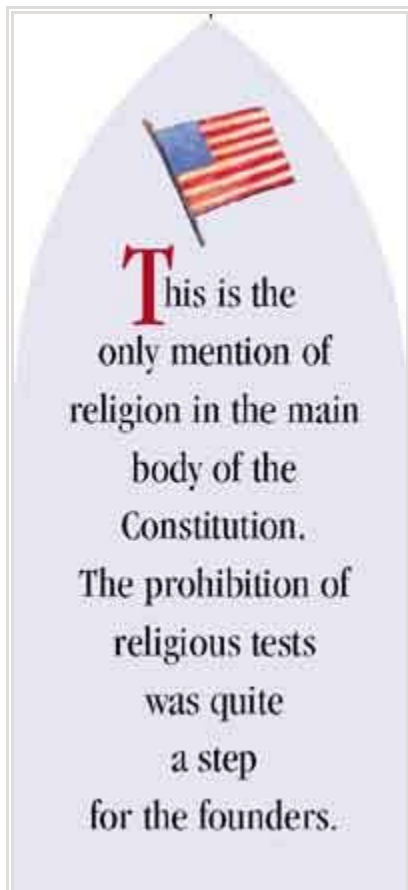
In July Of Last Year Advertisements Appeared In The Newspapers Of Rhode Island And Maine Showing A Courtroom Door With A Sign Reading "Catholics Need Not Apply." The Ads Had Been Placed By An Organization Called The Committee For Justice (CFJ), Which Is L

BY: BARRY HANKINS



In July of last year advertisements appeared in the newspapers of Rhode Island and Maine showing a courtroom door with a sign reading "Catholics Need Not Apply." The ads had been placed by an organization called the Committee for Justice (CFJ), which is led by C. Boyden Gray, former White House counsel to President George H. W. Bush. The ads claimed, "Some in the U.S. Senate are attacking Bill Pryor for having 'deeply held' Catholic beliefs to prevent him from becoming a federal judge. Don't they know the Constitution expressly prohibits religious tests for public office?" William Pryor is Alabama's attorney general and had been nominated by President George W. Bush for a seat on the Eleventh Circuit Court of Appeals. Subsequent to the CFJ ads, the *Washington Post* published an editorial entitled "Beyond the Pale" (July 26, 2002), which called the CFJ's claims "wildly inappropriate." Just where is the line between appropriate probing of public figures' political or judicial views and an inappropriate and possibly unconstitutional religious test for office?

The prohibition against religious tests for office could not be clearer. It appears in Article VI of the United States Constitution and reads, "no religious test shall ever be required as a qualification to any office or public trust under the United States." This is the only mention of religion in the main body of the Constitution. The prohibition of religious tests was quite a step for the founders. Test oaths were common during the Colonial and early national periods of American history. In 1778 a Puritan minister summed up what seemed to be the prevailing consensus when he said that oaths induce "the fear and reverence of God and the terrors of eternity." He went on to say they impose "the most powerful restraints upon the minds of men."¹ Indeed, a prohibition against religious tests for officeholders was unprecedented in Western civilization.² All but two of the original 13 states had religious tests for office. Some of the oaths were quite broad, requiring only a belief in God or in Christianity, while Delaware's, for example, was more specific, requiring belief in the Trinity. Dissenters from the Quakers, Baptists, Moravians, Jews, and some other groups condemned the oaths as a violation of liberty of



conscience.³

Article VI of the U.S. Constitution does not apply to states, however, so the oaths remained in place in many states for a long time. Even today some state constitutions retain test oaths. The Massachusetts state constitution, for example, has an oath that reads, "I _____ do declare that I believe the Christian religion, and have a firm persuasion of its truth." A later amendment replaces that oath with a general oath swearing allegiance to the commonwealth of Massachusetts "so help me God." The amendment then provides that Quakers, because of their prohibition against swearing oaths, can replace the word "swear" with "affirm" and omit the words "so help me God." The Texas constitution contains this puzzling oath: "No religious test shall ever be required as a qualification to any office . . . ; nor shall any one be excluded from holding office on account of his religious sentiments provided he acknowledge the existence of a Supreme Being." As one can see, the same sentence proscribes religious oaths, then requires officeholders to hold a belief in a Supreme Being. In the 1980s the notorious atheist Madalyn Murray O'Hair attempted to challenge the Texas test oath, only to be rebuffed by the courts because she lacked standing to sue. The oath had never been applied to her, and she was not even running for office. These and other state religious tests for office are unenforced and unenforceable because of two U.S. Supreme Court cases, one in 1961 and another in 1978.

The first of these was *Torcaso v. Watkins* (1961). Torcaso was appointed notary public but was denied his commission because he would not affirm belief in God as was required by the Maryland state constitution. He challenged Maryland's test oath on First and Fourteenth Amendment grounds. The Fourteenth Amendment forbids states from denying individuals liberty without due process of law. Through the doctrine known as incorporation the Supreme Court has used the liberty component of the due process clause to make most of the rights in the Bill of Rights applicable to the states. The reasoning is that to deny a person his or her right to free exercise of religion, free speech, or other fundamental rights is to deny that person's liberty. The First Amendment's free exercise clause was first applied to the states in

Cantwell v. Connecticut (1940); then the establishment clause was incorporated in *Everson v. Board of Education* (1947). In *Torcaso*, rather than consider whether Article VI of the U.S. Constitution applied to state officers, a unanimous court used the First Amendment's free exercise clause, made applicable to the states via the Fourteenth Amendment, to strike down Maryland's religious test oath and by implication those in other states as well. Justice Hugo Black wrote for the majority, "This Maryland religious test for public office unconstitutionally invades the appellant's freedom of belief and religion and therefore cannot be enforced against him."⁴

The second case involving a religious test for office was *McDaniel v. Paty* (1978). By 1976 Tennessee was the only state that still banned ministers from serving in the state legislature, a practice that had existed in various places since the days of Puritan Massachusetts in the seventeenth century. Tennessee's prohibition was extended to candidates for the state constitutional convention, which was scheduled to meet in 1977. When Baptist minister Paul McDaniel attempted to run for a position on the state constitutional convention, a challenger, Selma Cash Paty, sued to keep Pastor McDaniel off the ballot. The U.S. Supreme Court, with one member not participating, ruled unanimously that the Tennessee provision was unconstitutional.⁵

Although the Supreme Court has invalidated state religious tests for office, some scholars believe that Article VI of the U.S. Constitution was merely a federalist jurisdictional maneuver intended only to leave the issue of religious test oaths to the states. Evidence for this position is that many of the same individuals who supported Article VI also supported the continuation of religious tests at the state level. As the Supreme Court noted 15 years before the *Torcaso* case, however: "The test oath is abhorrent to our tradition," and this is the view that has prevailed at all levels.⁶ The consensus on the unconstitutionality of test oaths apparently led Committee for Justice leaders to believe they had a strong charge against Democrats. The CFJ believed that if it could show that Democrats were using a religious test against William Pryor, public opinion would turn, and Pryor's nomination might succeed. Moreover, if successful in convincing people that Democrats were anti-Catholic, the CFJ could drive a wedge between Catholics and the Democratic Party. This explains why the ads were placed in heavily Catholic states.

The issue at the center of all this is, of course, abortion. Routinely, candidates for federal judgeships are queried about *Roe v. Wade* (1973). The abortion issue often appears to be a litmus test liberal senators apply to conservative nominees, but in fact roughly 140 Bush nominees had been confirmed before Pryor's nomination, and many oppose abortion but were still able to garner some Democratic votes. The question often turns on how often and how strongly a nominee has spoken out on abortion and whether a candidate's opposition is firmly rooted in religious conviction. Pryor is on record as saying that *Roe v. Wade* is "the worst abomination of constitutional law in our history."⁷ At the same time, however, as attorney general he advised his state to enforce its own abortion regulations only insofar as they were consistent with *Roe v. Wade*. Still, the fact that Pryor is Catholic and strongly opposed to abortion

leads some Democrats to question whether he can set aside his religious views and fairly administer the law.

The CFJ ads seem to be based on the following reasoning or something like it: Democrats oppose Pryor because he has deeply held religious beliefs about abortion; Pryor's deeply held religious beliefs about abortion come from his Catholic faith; therefore, Democrats are anti-Catholic. This line of reasoning was not completely new. Senators Orrin Hatch (R-Utah), Rick Santorum (R-Ohio), and majority leader Bill Frist (R-Tennessee) have been floating the religious test argument for some time, while back in March 2002 more than three dozen members of the U.S. House of Representatives sent a letter to the Senate Judiciary Committee asking that members repudiate the liberal lobby People for the American Way and other groups that were making religion an issue in their attempt to derail the nomination of Charles Pickering. Pickering, a former president of the Mississippi Baptist Convention, was accused of promoting religion from the bench. The letter to the Senate Judiciary Committee reminded senators of Article VI of the Constitution and charged, "Many of those opposing Judge Pickering's nomination are in effect arguing that a religious person is unqualified to serve in the federal judiciary because he cannot be trusted to separate his personal religious beliefs from his official duties."⁸ In June 2003, roughly the time the Pryor hearing began, the Catholic League registered its concern that there was a "quasi-religious test" being applied to Catholics. Catholic League director William Donohue acknowledged that while those who oppose Pryor were not guilty of applying a *de jure* (in law) religious test, they are guilty of applying a *de facto* (in fact) religious test. Donohue said that a *de facto* test "is every bit as unconstitutional as a *de jure* application."⁹

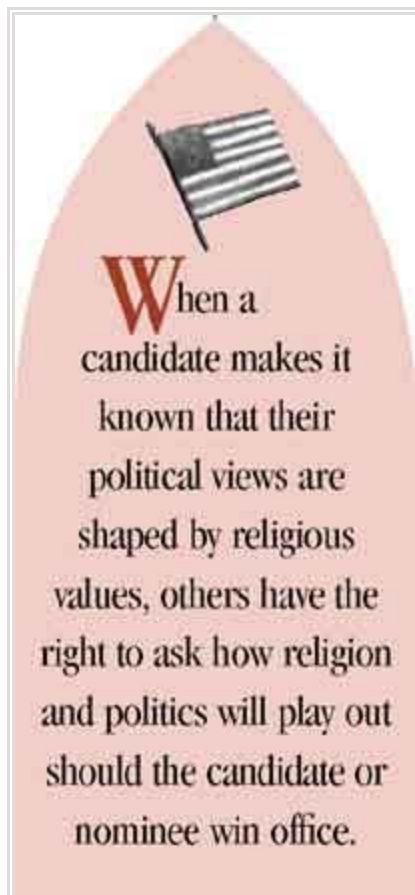
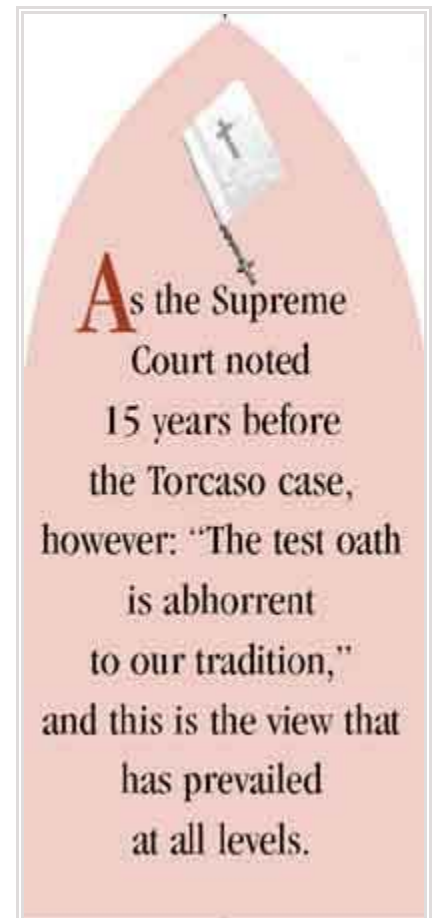
The charge that Democrats are applying a *de facto* anti-Catholic religious test for office is particularly ironic considering that Patrick Leahy, the senior Democrat on the judiciary committee, is Catholic. In addition to being labeled as opposed to his own church, Leahy was also called an "anti-Christian bigot" by a representative of the Traditional Values Coalition. The charge aired on CNN while Leahy was at Sunday morning Mass.¹⁰ Also ironic is the fact that while Pryor adheres to Catholic teaching on abortion, he does not follow church teaching on capital punishment, while for Leahy the reverse is true. Finally, the Republicans, not the Democrats, first brought up the issue of

religion in Pryor's hearing. Judiciary committee chairman Hatch in his opening remarks twice made reference to Pryor's religion. Leahy, the ranking Democrat on the committee, said nothing of religion, instead referencing Pryor's "record of ideological rigidity and extremism in a number of areas crucial to the fair administration of justice."¹¹

Do the actions of the Democrats amount to an unconstitutional religious test for office, as Republicans charge? This depends on whether one is a strict constructionist in constitutional interpretation who believes that we should adhere to the original intent of the founders, or one who believes in the organic view, whereby we attempt

to apply the living spirit of the Constitution to issues unforeseen at the time the Constitution was written. The authors of Article VI were primarily concerned about actual laws that barred from office those who could not ascribe to some government-approved religious belief. In our present case there is no law saying that Catholics cannot be judges, and one can be reasonably sure that a pro-choice Catholic would have little trouble being confirmed, especially by the pro-choice Catholic Democrats in the Senate. By the standards of original intent, there is no religious test. If one adheres to the organic view, however, a case can be made that the spirit of Article VI is being violated when religion is injected into confirmation hearings. If it is true that Democrats will not confirm nominees who have deeply held religious beliefs that shape their judicial views, then there is a religious test occurring on at least an informal level.

The most significant irony of all this is that Republicans tout original intent, by which standard there is no religious test taking place, yet they say there is. Many Democrats, by contrast, espouse the organic view, or the living spirit of the Constitution, by which standard there is a religious test occurring, but they say there isn't. Both sides would do well to acknowledge that their opponents have something important to say. Republicans want Democrats to know that people cannot be required to compartmentalize themselves so that their religious values never instruct their political positions. It is unjust to insist that believers act as if their faith



does not matter in public affairs, because to do so is to insist that people of all faiths adhere to the view that religion is merely a private matter, which is a view held by only some religious people. Democrats, on the other hand, believe Republicans should acknowledge that if candidates for various government positions form their political views on the basis of their religious values, others should feel free to oppose those political views without fear of being labeled anti-religious; otherwise people of faith would have a privileged position.

Unfortunately, the Pryor nomination process degenerated into one side implying that all public figures must accept the belief that religion is a private matter, while the other side insisted that it is acceptable to form one's political views on the basis of faith but an act of anti-religious prejudice for others to criticize or question those views. Faith and politics cannot always be separated into airtight compartments. To insist that a person is ineligible for office merely because they have deeply held religious views would be at least a de facto religious test, but when a candidate makes it known that their political views are shaped by religious values, others have the right to ask how religion and politics will play out should the candidate or nominee win office.



Barry Hankins is associate professor of history and church-state studies at Baylor University, Waco, Texas.

1 Quoted in John Witte, Jr., *Religion and the American Constitutional Experiment: Essential Rights and Liberties* (Boulder, Colo.: Westview Press, 2000), p. 46.

2 Daniel L. Dreisbach, "The Constitution's Forgotten Religion Clause: Reflections on the Article VI Religious Test Ban," *Journal of Church and State* 38 (Spring 1996): 263.

3 *Ibid.*

4 *Torcaso v. Watkins*, 367 U.S. 488 (1961).

5 *McDaniel v. Paty*, 435 U.S. 618 (1978). See Robert Miller and Ronald Flowers, *Toward Benevolent Neutrality: Church, State, and the Supreme Court*, fifth ed. (Waco, Tex: Baylor University Press, 1996), p. 736. The 1946 case was *Girouard v. United States*.

6 Quoted in Miller and Flowers, p.736. The case was *Girouard v. United States* (1946).

7 Quoted in *Washington Post*, Apr. 11, 2003, p. A26.

8 "House Members Urge Senators to Repudiate Religious Tests for Judges," press release, Republican Study Committee, Mar. 13, 2002.

9 "Religious Test Applied to Bill Pryor," news release, Catholic League for Religious and Civil Rights, June 9, 2003.

10 Eleanor Clift, "Using Catholicism," *Newsweek* (Web exclusive), Aug. 8, 2003.

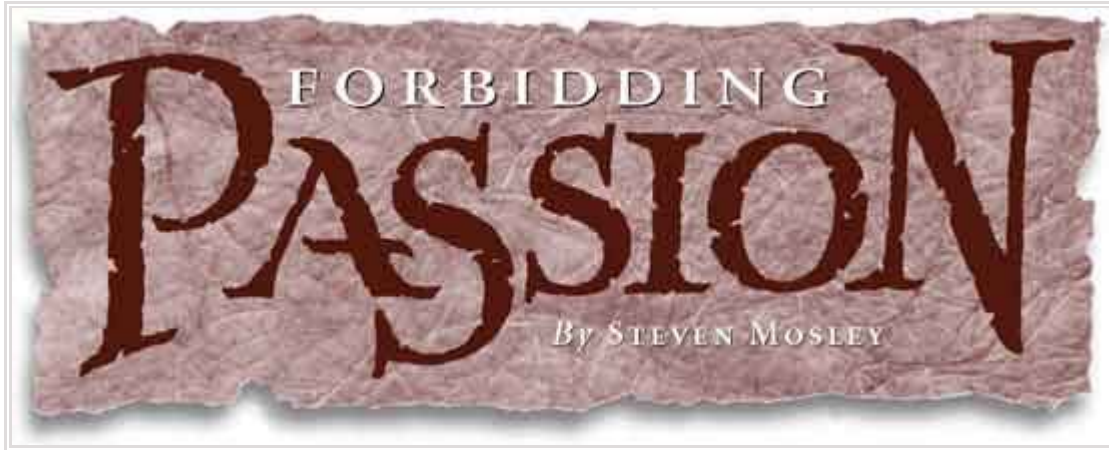
11 Statements of Senator Orrin Hatch and Senator Patrick Leahy, Senate Judiciary Committee, Nomination Hearing, June 11, 2003.

MARCH / APRIL 2007

Forbidding Passion

What Is Likely The Most Controversial Movie Of This Year Doesn't Come With The Usual Suspects. It Doesn't Feature Some Searing Inside Look At Crime Or Crackheads; It's Not About Kinky Sex Or Twisted Relationships. It's About A 2,000-year-old Itinerant Rab

BY: STEVEN MOSLEY



What is likely the most controversial movie of this year doesn't come with the usual suspects. It doesn't feature some searing inside look at crime or crackheads; it's not about kinky sex or twisted relationships. It's about a 2,000-year-old itinerant rabbi named Jesus. And yet Mel Gibson, the man behind *Passion*, and a man with extraordinary Hollywood pull, has had a very difficult time getting his film distributed. No one wanted to touch it for some time—too hot to handle for major studios.

The Passion of the Christ is violent, to be sure. It takes viewers so close to the sufferings of Jesus during His last 12 hours that they almost feel the blood splatter on them. In early screenings many people sobbed unashamedly through much of the movie.

But that's not what almost squelched the project before it could reach theaters. The problem was this: the bad guys were identified. The bad guys were intolerant, oppressive religious leaders. And in this instance they happened to be Jewish. That unleashed a firestorm of indignation—immediately after select audiences previewed a rough cut of the film last summer. It stirred up passions around the world.

Rabbi James Ruden, in the Los Angeles *Times*, called the movie "radioactive material." The New York *Times* attacked Gibson's octogenarian father, a man unfortunately given to revisions of history and Holocaust denial. This was offered evidently to prove the apple didn't fall far from the tree.

Writing in *Esquire*, Kim Masters told readers Gibson would not be able to find a studio to distribute the movie.

The U.S. Conference of Catholic Bishops weighed in against it, then apologized for attacking a film that is still unreleased.

I asked Paul Lauer, marketing director for *The Passion*, whether the people behind the film were surprised by the reaction. "Mel expected some degree of controversy," he said, "but the anti-Semitic accusation—that was not at all expected." Mr. Lauer referred to the strong belief in Hollywood that a filmmaker has a right to express his artistic vision. "This is a right that has been battled for fiercely by some of the same people who are trying to keep this film from coming out. It's a very strange twist."

The Anti-Defamation League issued a press release stating that Gibson's film was "replete with objectionable elements that would promote anti-Semitism." What elements? "The unambiguous depiction of Jews as the ones responsible for the suffering and crucifixion of Jesus"; the "exploitation" of "New Testament passages . . . to weave a narrative that does injustice to the Gospels, that oversimplifies history, and that is hostile to Jews and Judaism."



Well, to be sure, anti-Semitism remains a big problem in our world—just as many other brands of bigotry do. And even the Catholic Church has admitted that medieval Passion plays often fueled hatred against Jews by making the Temple priests especially loathsome. So it's certainly legitimate to ask if *The Passion* follows in that tradition. Does Mel Gibson's movie treat the Jewish characters in this story unfairly? Does it turn them into caricatures? A few details from the film suggest otherwise.

The film does show Jewish authorities plotting against Jesus and pushing the Roman governor Pilate for a crucifixion. But it also pictures an interesting argument among members of a Jewish governing body called the Sanhedrin. At midnight Jesus is dragged before the high priest, who argues for His execution. Several other priests, however, object, saying that this is not a legitimate trial and that they have no authority or right to do such a thing. Eventually they walk out of the meeting in protest.

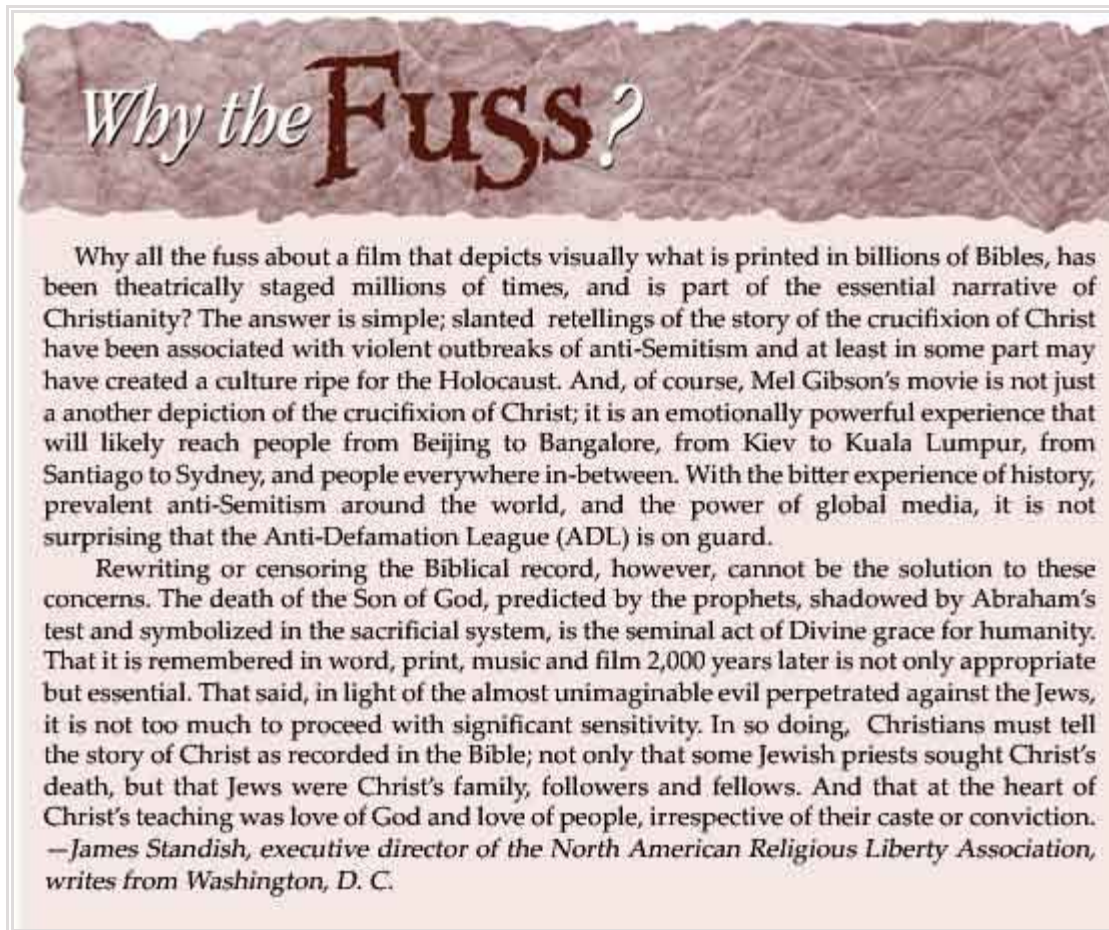


It's certainly reasonable to assume that there were Jewish higher-ups at the time who spoke out passionately against the irregularities of Jesus' trial. There were figures like Nicodemus who were sympathetic to Jesus. There were voices of moderation like that of Gamaliel who would later, as Acts tells it, counsel his peers to stop harassing the apostles for proclaiming their faith. But the fact is that none of the four Gospels specifically portray anyone in the Sanhedrin walking out in protest at the time of Jesus' trial. That is a dramatic element *The Passion* adds. And its addition shows Jewish leaders at the time in a more favorable light—not as caricatures.

The ADL has charged: "The film relies on sinister medieval stereotypes, portraying Jews as bloodthirsty, sadistic, and money-hungry enemies of God who lack compassion and humanity."

Yes, *The Passion* does show Jewish leaders working to get rid of the Man they perceived as their rival and enemy. It shows them offering money to Judas to betray his Master with a kiss. And it shows a Jewish mob before Pilate demanding that Jesus be crucified. None of this is an invention of the movie, of course. All of the Gospels lay out these events in their straightforward narrative.

But the movie shows a very different Jewish population once it moves out into the streets of Jerusalem. As Jesus stumbles along under the burden of His cross, people express sympathy; many are weeping. And in one of the more imaginative scenes in the movie, Jesus'



Why the Fuss?

Why all the fuss about a film that depicts visually what is printed in billions of Bibles, has been theatrically staged millions of times, and is part of the essential narrative of Christianity? The answer is simple; slanted retellings of the story of the crucifixion of Christ have been associated with violent outbreaks of anti-Semitism and at least in some part may have created a culture ripe for the Holocaust. And, of course, Mel Gibson's movie is not just another depiction of the crucifixion of Christ; it is an emotionally powerful experience that will likely reach people from Beijing to Bangalore, from Kiev to Kuala Lumpur, from Santiago to Sydney, and people everywhere in-between. With the bitter experience of history, prevalent anti-Semitism around the world, and the power of global media, it is not surprising that the Anti-Defamation League (ADL) is on guard.

Rewriting or censoring the Biblical record, however, cannot be the solution to these concerns. The death of the Son of God, predicted by the prophets, shadowed by Abraham's test and symbolized in the sacrificial system, is the seminal act of Divine grace for humanity. That it is remembered in word, print, music and film 2,000 years later is not only appropriate but essential. That said, in light of the almost unimaginable evil perpetrated against the Jews, it is not too much to proceed with significant sensitivity. In so doing, Christians must tell the story of Christ as recorded in the Bible; not only that some Jewish priests sought Christ's death, but that Jews were Christ's family, followers and fellows. And that at the heart of Christ's teaching was love of God and love of people, irrespective of their caste or conviction.

—James Standish, executive director of the North American Religious Liberty Association, writes from Washington, D. C.

painful journey is followed by a group of women moving down a street parallel to His, hurrying from one connecting street to another, catching glimpses of their beloved Master. These were Jewish people who felt this Man's sorrow very deeply.

The movie also has an interesting take on the man Roman soldiers forced to carry Jesus' cross after He collapsed. He is identified in the Gospels as Simon of Cyrene. Cyrene was a city in North Africa, and scholars have debated this individual's ethnic background, some picturing him as a Black man. But in *The Passion* he is portrayed as a Jew, a man mistreated by the Roman soldiers as a Jew—just as they were abusing the hero of the story as a Jew.

It is the Roman soldiers who are the bloodthirsty sadists of the movie. Their flogging of Jesus is perhaps the most physically wrenching scene ever put on film. When these soldiers drive Him through the streets and Jesus drops under the weight of the cross, the viewer almost feels crushed beneath Him. It is the Romans who coldly pound spikes through His limbs at the place of crucifixion. Gibson heightens the violence of that event by having the soldiers flip the cross over—with Jesus attached to it. They then flatten the ends of the spikes against the wood.

The ADL has protested that *The Passion* inaccurately portrays "Jews physically abusing Jesus before the crucifixion." Yes, the Temple guards do arrest Jesus in the Garden of Gethsemane; there's a scuffle; He's tied up and dragged away. At one point Jesus stumbles off a bridge and must be pulled up by the ropes attached to Him.

This may well be a more violent arrest than anything specifically depicted in the Gospels. But it pales before the gory abuse of the Romans. If any group has cause to worry about being caricatured, it's their descendants. But of course people understand that crucifixion was indeed a gruesome, violent ordeal in the first century. And fortunately most of us have sense enough not to hate the Italians because their imperial ancestors practiced that form of execution.

It seems quite a stretch to paint this movie as anti-Semitic, as something that will ignite hatred and bigotry. The good guys are Jewish. The bad guys are Jewish. The hero is Jewish. What exactly is the problem?

Critics have tried to back up their objections to the movie with claims that it distorts the Gospels. Paula Friedrichson, one of a group of Catholic and Jewish first-century scholars who examined a draft of the screenplay, wrote this: "That script . . . represents neither a true rendition of the Gospel stories nor a historically accurate account of what could have happened in Jerusalem, on Passover, when Pilate

was prefect and Caiaphas was high priest."

Quite a claim. Where exactly does the movie go astray? Critics have been pretty sketchy. What the average viewer sees is a rendition of events clearly laid out by Matthew, Mark, Luke, and John. They've never been portrayed so graphically before, but they're there. Matthew is well acquainted with the tense standoff when Temple officials came to arrest Jesus. Mark knows all about His interrogation before the high priest. Luke can talk about the mockery Jesus endured while hanging on the cross. John remembers the Roman soldiers breaking His legs.

But what many of The Passion critics have done instead is to claim that Mel Gibson's opinions are out of bounds, that they're so dangerous that they don't belong in the marketplace of ideas.

The movie does take some cinematic liberties. It imagines details here and there to color the story. It even pictures a shadowy, sinister, androgynous figure who pops into this and that scene as an embodiment of evil. But none of these elements do violence to the Gospel narrative.

What the critics come back to, over and over, is the claim that *The Passion* is historically inaccurate and anti-Semitic because it makes the Jews responsible for Jesus' death.

What the critics come back to, over and over, is the claim that *The Passion* is historically inaccurate and anti-Semitic because it makes the Jews responsible for Jesus' death.

Well, the fact is that a group of intolerant, oppressive religious leaders of that time did indeed plot against Jesus. Historians seem to agree on that. And those leaders happened to be Jewish. Jewish people sometimes do bad things, just like Brazilians and Mongolians and Swedes sometimes do bad things. But what those who came down hard on *The Passion* seem to believe is that in order to fight against bigotry, we must never portray Jewish people doing really bad things.

ADL national director Abraham Foxman referred to a Catholic Church pamphlet on combating anti-Semitism and interpreted it to suggest: "Correct Catholic teaching of the passion is one that portrays the Jews accurately, sensitively, and positively." In a letter to Mel Gibson, Foxman maintained: "The church understands that only teachings which promote understanding and reconciliation toward the Jewish people can represent religious truth and the word of God."

Reconciliation and understanding are the best of goals. After all, that was the whole point of Jesus' Passion, according to the New Testament. He died to bring reconciliation and forgiveness to all humanity. But does that mean we should never picture people doing bad things? Is reconciliation dependent on us pretending that particular people or particular groups are sinless? Isn't the opposite true?

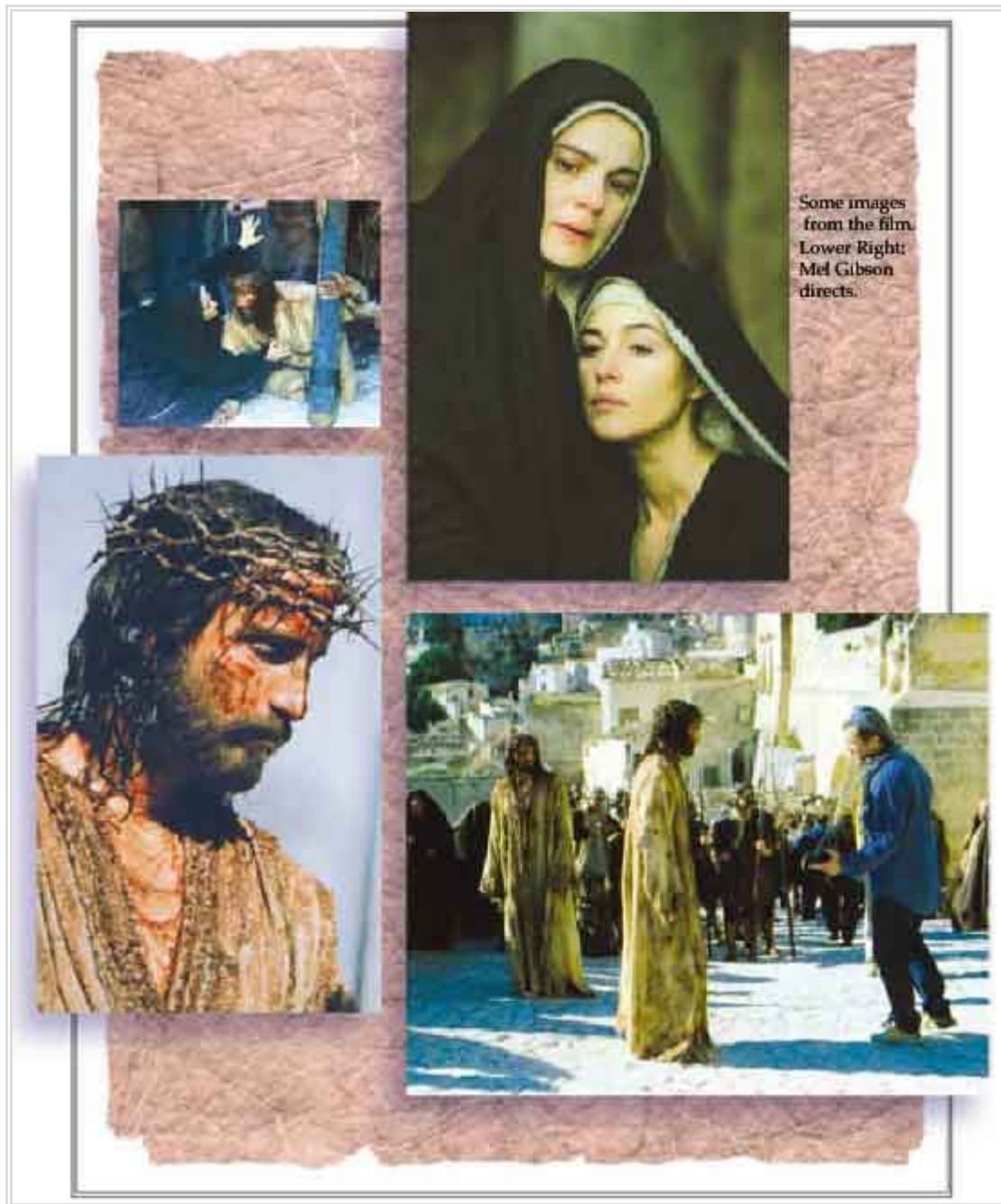
Sometimes human beings scream bloody murder. And you just can't portray that in a sensitive, positive light. Sometimes we're cruel. Sometimes we're intolerant. And that's not just a problem for people with certain well-defined prejudices. That's a problem for every individual born on this planet. No one is immune. No one can claim to be without fault because they belong to a victim class. Blacks can be racist. Women can be oppressors. Jews can be intolerant. But what Foxman seems to suggest is that only facts that picture Jewish people doing good things can possibly be "religious truth" or "the word of God."

There is a lot more going on behind the passion against *The Passion* than a protest against anti-Semitism or historical inaccuracy. The real issue is that Mel Gibson, a practicing Catholic, has expressed religious beliefs that others simply don't agree with. He wanted to convey "the full horror of what Jesus suffered for our redemption." He even told Charisma News: "I hope the film has the power to evangelize. Everyone who worked on this movie was changed."

As a director, Gibson has made the sufferings of Christ more visceral and compelling than any filmmaker in history. Few people will walk away from this movie without being deeply affected. And some will disagree with its content. Many individuals do not believe that Jesus' Passion, played out in Palestine 2,000 years ago, has anything to do with their spiritual well-being or eternal destiny. And an honest and fair response might be to say, "I don't buy the whole atonement thing," or "I just don't see Jesus as the Messiah," or "I think the Gospel writers made a lot of it up."

People have a right to their opinions. In America they have an inalienable right. But what many of *The Passion* critics have done instead is to claim that Mel Gibson's opinions are out of bounds, that they're so dangerous that they don't belong in the marketplace of ideas. Instead of simply disagreeing, they want to forbid.

As just one example, take this message sent in to the Urban Legends Web site: "I believe in free speech, but not when it fosters hatred and gives our enemies ammunition to perpetuate the greatest crime of the century and the continued persecution of Jews . . . We will not tolerate this additional insult."



By this individual's reasoning, you can never vividly portray a wrong done by any specific group of people because that might lead to their persecution. Would anyone take seriously the claim that we should never discuss what the Nazis did to the Jews because that might foster hatred of Germans?

Gibson's movie does identify some bad guys in the story. But the truth is that according to Gibson's own faith, we're all the bad guys. We're all complicit in the death of Christ as human beings desperately in need of God's pardon. That matters infinitely more than who happened to be among the heavies as the drama of the atonement played out.

What Gibson hopes to accomplish is to "inspire, not offend. . . to create a lasting work of art and engender serious thought among audiences of diverse faith backgrounds."

According to Paul Lauer, that has already started to happen. He told me about an early screening in Houston attended by a very eclectic mix of rabbis, priests, and ministers. "In follow-up meetings," Lauer said, "there was a tremendous amount of discussion and debate. Even though there are different ways people receive the film, the dialogue it has generated has been extremely positive for that community, for these different bodies of believers."

In many other places, however, the passions aroused by *The Passion* have shown how easily it is to fracture the ideal of religious liberty and freedom of expression. If this movie can be branded as something evil that fosters hatred and persecution, imagine what else may be forbidden; imagine how narrowly the politically correct may choose to define what is "sensitive and positive" communication.

We've come a long way from the wisdom of Gamaliel, who, in advising his less-tolerant colleagues to leave the apostles alone, said in effect: "If this is of human origin, it will fail. If it's from God, you won't be able to stop it" (Acts 5:38, 39, paraphrased).

*Steven Mosley, an author and television producer, lives in Westlake Village, California. His latest book is *Secrets of Jesus' Touch*.*

MARCH / APRIL 2007

Editorial - A Divine Imperative

BY: LINCOLN E. STEED

A Divine **IMPERATIVE**

EDITORIAL

They brought Jesus before the Roman Governor in the great judgment hall early Friday morning. Before the end of that same day Jesus would be nailed to a cross and lifted up as a common criminal before a jeering mob and distraught followers.

But Governor Pilate did not yet see that conclusion to the day. He likely was more interested in discovering what it was about this Man that had provoked first the adulation of the crowds and then the betrayal by one of his own into the hands of the implacable.

The charge against Jesus was calculated to offend the Romans. Curiously, Pilate treated it as more of an intellectual question. "Are you a king?" he asked. Caesar, of course, could not allow self proclaimed kings to assert authority in his domain.

The answer was quite plain, but in a context that disarmed the bureaucrat. "My kingdom is not of this world," answered the Christ. "If my kingdom were of this world, then would my servants fight....To this end was I born, and for this cause came I into the world, that I should bear witness unto the truth. Every one that is of the truth heareth my voice." John 18:36,37.

No threat there! Rather the proclamation of an alternate universe...another value system altogether.

"What is truth?" shot back the governor, professing not to know. He clearly knew what Jesus was talking about. It was enough for him to go out to the accusers and say "I find in him no fault at all". And it resonated with the philosophical discourse of the time that sought to divine the centrality of existence; to prioritize values. It cut through the legal, imperial values of Rome and spoke to the inner definitions it had always grappled with.

Pilate was moved. And then the system bit back. "You are not Caesar's friend if you let this man go".

So did Pilate let go of principle and embrace expediency.

But what is truth? Jesus used the term, no doubt, as shorthand for a knowledge of the divine. After all, he claimed to be "the way, the truth, and the life". Jesus took the concept out of the realm of the philosophical and made it a divine imperative.

In an earlier address, Jesus said that his followers could know the truth, "and the truth will set you free." As vassals of an overbearing occupying power they wanted freedom so badly they could taste it. Jesus simultaneously offered freedom to his followers and assurance to the questioning Roman that it was not a political freedom.

It seems to me we are in the same relationship to the state when we talk about religious freedom.

Religious freedom cannot be something that a state gives, since it is not of "that" world. It belongs to the world of the inner man; the bridge to the transcendent.

So much of the discussion of religious liberty in this part of the world centers around the Constitutional guarantees of religious liberty. Perhaps because of that we seem sometimes to conflate the two. But surely we dare not argue that religious freedom exists only under

a U.S. type constitution! It might be one of the more enabling human instruments for the practice, or not, of any religion, but it is human and not the source of the religious liberty itself. Not even with the accompanying Bill of Rights acknowledgment of inherent (see created/God-given) rights.

And it is fine to call for democratic renewal around the world, under the assumption that religious freedom will naturally flow from that change. However, such a simplistic assumption may be misguided. Already the outlines of a new Afghan constitution show it seriously lacking in the religious freedom area; and it seems likely that the soon to be drafted Iraqi constitution will similarly play religious favorites and miss the point of the exercise. And there are many fine democracies still struggling to implement true religious freedom; it's a list that includes new democracies and some old ones like France (where "sects" are restricted and religious attire newly forbidden).

I see many approaches to religious liberty, even as some miss the point. There is the aforementioned Constitutional approach. And here the cast is curious. There are secularists, often opposed to religion, who use the Constitution as a tool to chase religion from public life. There are political religionists who seek to substitute legal mandate for an appeal to the heart. And there are people of faith who see security in maintaining the constitutional dynamic of a separation between church and state.

Some pursue religious liberty from a human rights point of view. Some promote religious liberty, hoping to gain particular advantage for their own faith. Others in an even more problematic approach, seek particularly to want to restrict faith activity that differs from their own. And there are others who accept the principle of religious liberty for all, but are prepared to give away that right to the state under any number of special circumstances; be it security needs or conflict with public interest.

We mustn't allow religious liberty to become so esoteric that it can be clouded by a "What is truth," riposte. Religious liberty as we see it exercised has many aspects, even many mechanisms to enable it to function. What this magazine must proclaim is the transcendence of true religious liberty. It cannot be tied to any nation, system of governance, culture grouping or sectarian agenda. It comes from the one God, given with the gift of life: it is the gift that defines us as his creation and describes his way of interacting with his creatures. Who would dare define it otherwise? Anything less is just another human construct—subject to trial and error, vision and revision.

Lincoln E. Steed

Editor

Liberty Magazine



Recognition
The
2003 Liberty Awards
Banquet was a
Success

Come and
make 2004 Liberty
Awards Banquet memorable

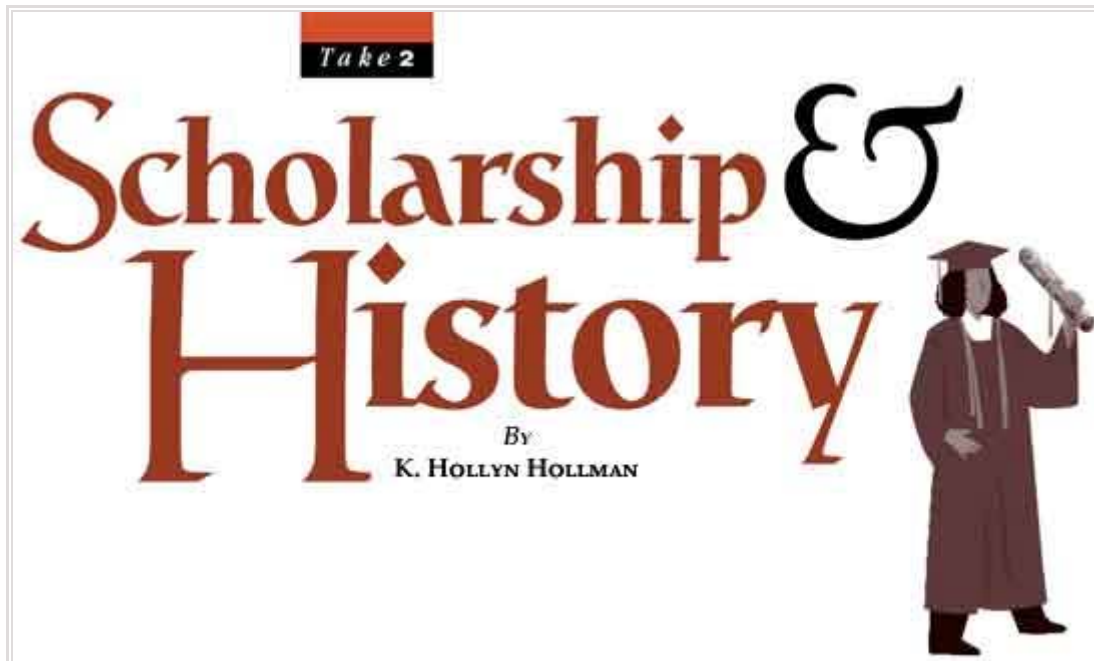
APRIL 7, 2004
Russell Senate Caucus Room
6:30pm-9pm
RSVP only call 301-680-6691

MARCH / APRIL 2007

Scholarship & History

"To Preserve Freedom Of Conscience For All Its Citizens In Matters Of Religious Faith And Belief, Washington's Constitution Limits The Involvement Of Government. It Limits Both The Ability To Regulate Religious Activities And To Fund Religious Activities.

BY: K. HOLLYN HOLLMAN



"To preserve freedom of conscience for all its citizens in matters of religious faith and belief, Washington's constitution limits the involvement of government. It limits both the ability to regulate religious activities and to fund religious activities." With that statement, Narda Pierce, attorney for the State of Washington, began oral arguments in one of the most significant church-state cases of recent years. During the next half-hour, Ms. Pierce worked continuously to return to her main themes—the state's longstanding interest in religious freedom, the narrow way that interest was protected in the context of the state's Promise Scholarship program, and the lack of any religious animus associated with the state's constitution. Most of the advocate's time, however, was spent simply trying to respond to the justices, whose rapid-fire questioning suggested complexities not easily resolved. Attorneys for the opposing counsel and the U.S. government faced equally demanding questions.

In *Locke vs. Davey*, the Supreme Court is asked to decide whether a state's college scholarship program that excludes theology majors violates the federal constitution, specifically the free exercise clause of the First Amendment. The case was brought by Josh Davey, a student studying for the ministry at an Assemblies of God-sponsored college near Seattle. He is represented by Jay Sekulow of Pat Robertson's American Center for Law and Justice.

The import of the case may extend well beyond the parties. If Davey has his way, the case will also have a major impact on the law regarding government funding of religion in general.

Promise scholarships are awarded to in-state students graduating from high school who meet certain requirements. A student must meet academic criteria (certain class rank or score on college admissions test), income criteria (a set percentage below state's median income), and enrollment criteria (enrolled at least half-time in an accredited postsecondary institution in Washington, not using the scholarship to pursue a theology degree).

The state relies on the school to designate whether the student is pursuing a degree in theology. Scholarship students are not restricted from taking religion courses or even using their scholarship to major in religion where that major does not amount to a course of training



for the ministry.

Recipients of Washington Promise scholarships may attend any accredited post-secondary institution in the state. Based upon past court rulings, we know that the program, even without the exclusion of theology majors, would be upheld as permissible under the federal establishment clause. But here the Court is being asked to hold that the federal free exercise clause requires the state to fund religious instruction when it pays for secular instruction, despite the state's own constitutional provisions that prohibit it.

Oral arguments demonstrated that the case is about much more than the alleged discriminatory denial of a subsidy, which had been the focus of most press accounts. The danger of a broad ruling in favor of Davey and the importance of the state's interests became more evident.

Justice O'Connor, who provided the swing vote in support of the Court's 2002 decision to uphold a voucher program in Cleveland, Ohio, voiced concern about making such funding mandatory on the states. Counsel for Davey admitted that the rule he was proposing would have a "major impact" on voucher programs and would affect the law in a number of states that have similar religious freedom provisions in their state constitutions.

The lack of flexibility in the rule proposed by Davey's attorney was also problematic to Justice Ginsburg. She kept asking him if he could identify some space between what the federal establishment clause law permitted and what the free exercise clause required in which states can make policy. Sekulow admitted that the rule he proposed would require treating private religious institutions the same as private secular ones.

The questions in this area demonstrate a basic lesson in federalism. While the federal Constitution defines minimum substantive rights, state law generally may provide greater protections. As stated at the outset, Washington's constitution provides more stringent anti-establishment and free exercise protections than the First Amendment. Specifically, it prohibits use of public money "for or applied to any religious worship, exercise or instruction, or the support of any religious establishment." This section is based on the statement that "absolute freedom of conscience in all matters of religious sentiment, belief and worship, shall be guaranteed to every individual"

According to an 1891 opinion of the state attorney general, these provisions were not "the work of the enemies, but of the friends of religion." The drafters "were unwilling that any man should be required, directly or indirectly, to contribute toward the promulgation of any religious creed, doctrine or sentiment to which his conscience did not lend full assent."

As Justice Stevens noted, the state's program only
burdens *Davey's religious practice to the extent that "he*
practices it without a **subsidy**

At the time of the state's adoption of its constitution, noted attorney Pierce, the provisions at issue were the only ones that applied to the state. The federal free exercise clause was not made applicable to the states until 1947. She argued that the scholarship program respects that concern for freedom of conscience by disallowing scholarship funds for religious training. While the particular line-drawing chosen by the state may leave it open for some inconsistent results, the program seems designed to balance principles of free exercise and no establishment. Those principles are often in tension with one another. Government should not interfere with the religious choices of individuals. Likewise, government must avoid sponsorship of religion.

Washington's attorney also addressed other points that deserve particular attention. First, it would be easy, but wrong, to equate any government-funding program with a government-created speech forum in which religious speech must be treated like other types of speech not sponsored by the government. By doing just that, the court below failed to acknowledge the state's interest in avoiding sponsorship and financial support of religion. As Justice O'Connor has noted, tax support for religion raises special establishment clause concerns. The purpose of the Promise Scholarship program was much narrower than a program designed to create a public forum.

Second, the free exercise infringement is not obvious in this case. As Justice Stevens noted, the state's program only burdens Davey's religious practice to the extent that "he practices it without a subsidy." It is important to recognize the distinction between a government

regulation that truly burdens religion and one that merely avoids sponsoring a religious practice. As Justice William O. Douglas once observed, "The fact that government cannot exact from me a surrender of one iota of my religious scruples does not, of course, mean that I can demand of government a sum of money, the better to exercise them. For the free exercise clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government."

Third, in addition to ignoring important establishment clause values (avoiding state-sponsorship of religion) and misinterpreting free exercise rights (equating paying for religious education with removing a burden on religious practice), the lower court's decision improperly equates Washington's law with hostility toward religion. It is a popular tactic in the courts, as well as in legislatures these days. Unfortunately, it misses the mark and threatens to trivialize our well-grounded constitutional tradition.

As with many church-state issues, the importance of this case is too readily overlooked by superficial treatment. Defenders of religious liberty beware.



K. Hollyn Hollman is General Counsel for the Baptist Joint Committee, Washington, D.C.
