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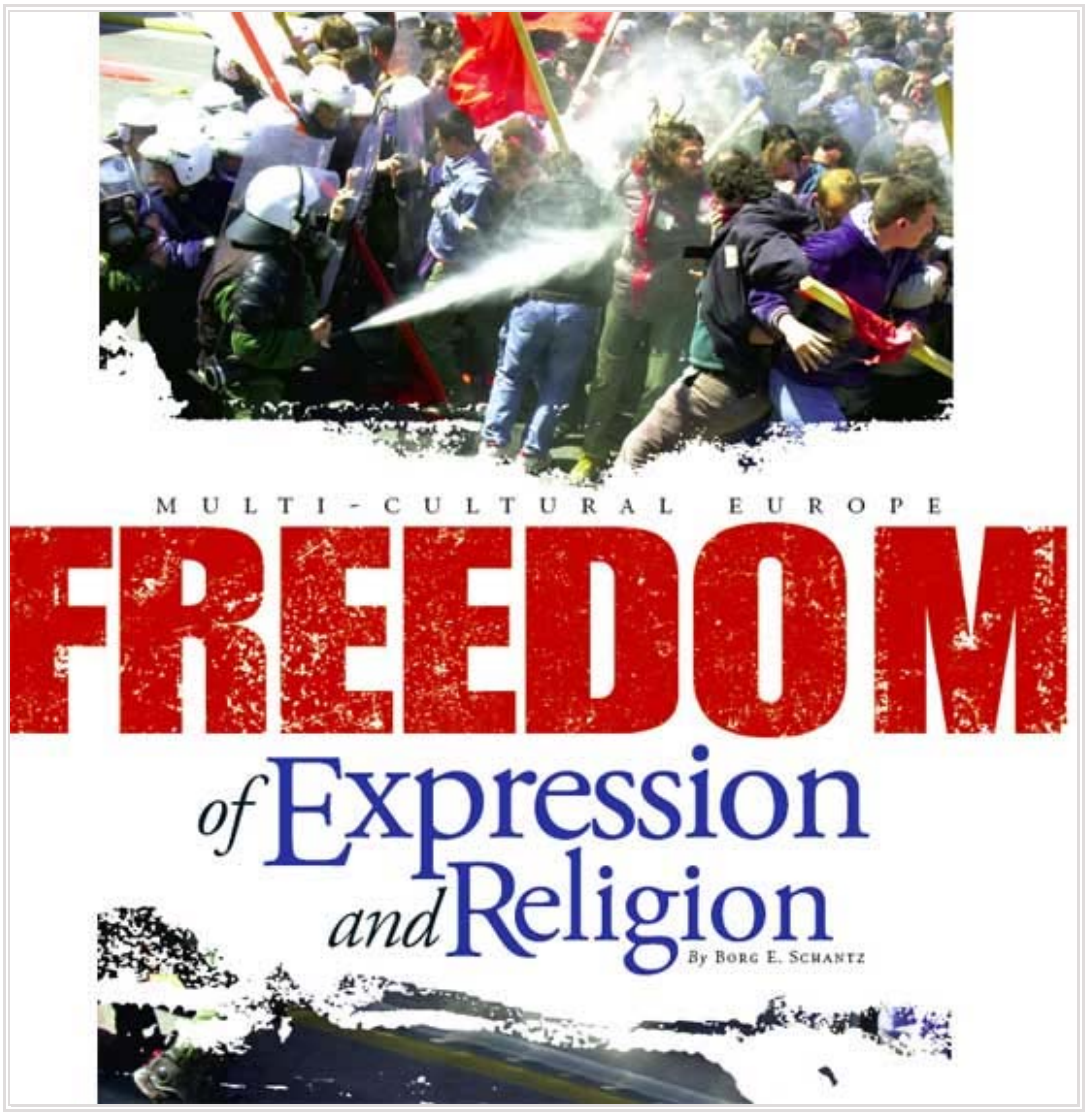
NOVEMBER / DECEMBER 2007

Freedom Of Expression And Religion

BY: DR. BORGE SCHANTZ



Twelve not very impressive drawings in *Jyllands-Posten*, a Danish newspaper, brought more trouble religiously, politically, and financially than any other event in Denmark's modern history. Some of the pictures depicted Muhammad in a derisive manner. The reaction of zealous Muslims did not take place until three months after their publications. A ban based on a far-fetched, strict interpretation of a few texts from the Koran and quotations from the Traditions (Hadith) on publishing pictures were brought out by some Muslims. Western laws on human rights and freedoms of expression were challenged.

The worldwide attention to the caricatures are explained as attempts to draw attention to what some extreme Muslims feel is their unhappy plight as immigrants in Western societies. Extreme Muslims saw in the caricatures the opportunity to get the whole Islamic world upset and involved.

It seems that some Muslims are looking for such opportunities. In England, Salman Rushdie's book *The Satanic Verses* was an issue; then Van Gogh in the Netherlands, director of the film *Submission*, was murdered. After a few months, Denmark, with the drawings in *Jyllands-Posten*, caused trouble. Later, the controversial lecture in Germany by Pope Benedict XVI was used to stir up the bones of contention.

Freedom of Expression, Press, and Speech.
These issues, especially the publication of the Muhammad caricatures, are still debated worldwide. The main issue is what does freedom of

expression in any form mean and how should it be used.

The much appreciated Western concepts of freedom of speech, press, and expressions came about gradually after centuries of many people's struggles with governments and churches in Europe.

Today, however, this much appreciated freedom granted to all citizens is questioned by the recent influx of immigrants, from nations with strict religious laws and a low view on human rights.

Muslims claim that all kinds of pictures— not only caricatures of Muhammad—are severe blasphemous transgressions of their religion. The Jyllands-Posten pictures were especially regarded as a scorn, insult, ridicule, and derision to all Muslims as Muhammad was depicted as a terrorist. People who make pictures are, according to Islamic law, "punishable on the Day of Resurrection." These radical Muslims used the freedom of the press—absent in their countries—to fight the freedom of the press in Western lands. They not only demonstrated on the streets; they traveled to various Islamic nations to upset them. They also brought the cases to courts. The various Danish courts, however, have established that the drawings are neither an expression of blasphemy nor slander. In Danish law the freedom of expression is stated as follows:

"Anyone is entitled to in print, writing and speech to publish his or hers thoughts, yet under responsibility to the courts. Censorship and other preventive measures can never again be introduced."

In other words, freedom of speech means no advanced censorship.

The intensive worldwide debate on freedom has proven to have many hidden agendas and contradicting considerations. It has revealed interesting psychological and political purposes. The issues have from all sides to a great extent have been interpreted and misinterpreted.

Human Rights in Islam

In order to understand why Muslims—even in an area where they are in a minority—should make these claims, it must be stressed that for Muslims, culture is synonymous with religion. In Islam, religion is integrated into culture and customs in such a way that it is impossible to separate the two. In such societies freedom of expression has no place.

One result of this inseparability is that faithful Muslims generally have a hard time adjusting to life in non-Islamic cultures.

For that reason they felt that the caricatures, published under Western freedom of expression laws, are hurtful attacks on Muhammad and Islam. The prophet Muhammad is highly venerated. He is the most popular name on earth, the focus and essence of their religion. He has been granted a semi-divine status. In Islamic countries, mocking him means the death penalty.

Western constitutions and declarations on human rights, blasphemy, and even racism, gave the press freedom to publish the caricatures. And the same Western laws came in handy for Muslims as they could demonstrate freely and bring their cases to courts. This would never have been allowed in Islamic countries, with their statutes and application of Shari'ah law.

Still, there were about ten independent Islamic nations that on December 10, 1948, signed the United Nations Universal Declaration on Human Rights. During the following years, other Islamic nations followed. Article 18, signed by Muslim governments, reads as follows:

"Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."

This means that officially and in theory these freedom principles have been accepted by the more than 50 Muslim nations.

However, the "freedom" declaration is interpreted by many Muslims to mean that the right to freely practice Islam anywhere, also gives them the right to be protected from non-Islamic religious propaganda, and to deal with apostates from Islam according the Shari'ah law—namely, the death penalty.

The Effects of the Affair

Perhaps history will judge that the positive aftermaths of the whole affair will outweigh the immediate negative consequences. The debate has called moderate Muslims to the forefront and formed groups of liberal supporters that are attempting to suggest reforms in Islam so it can enter the twenty-first century. Non-Muslims have discovered the importance religion has for their Muslim neighbors, workmates, and fellow students, and they accept and respect that. Many nominal Christians in secular countries have discovered the importance of their Christian religion and its positive influence on modern societies. Even in some areas there has been a slight increase in church attendance.

The sad result of the Danish crisis was the killing of innocent people in Muslim countries. Financial losses as Danish goods in Muslim countries were taken off the shelves, burning down of embassies and consulates, and a decrease in tourism to certain countries were other

negative after-effects.

However, many Muslims in our midst have found that laws and restrictions that are dictated by Islam should not be forced on and applied in non-Muslim areas.

Attempts to enforce Shari'ah law for Muslims living in Western democracies should definitely not be allowed. Religion in the West is a private matter. All amendments suggested to protect religions and persons from abuses by limiting aspects of freedom of expression should be very carefully and critically scrutinized. Such amendments from another time in history, in a new situation and different context, could in the hands of the wrong people be misinterpreted and used against established political parties or Christian churches.

Self-censorship, but not Self-defense?
The various laws guaranteeing freedom of expression, press, and human rights will probably not be changed, altered, or even adapted to local situations. On these premises rest our well-established rights to form political parties and religious traditions.

Media ownerships can decide what is published. Self-censorship in some cases can and should be practiced to avoid offences and stirringas up trouble. However, the actual reasons for applying self-censorship are very significant. Self-censorship as strict self-defense by artists, editors, authors to dodge personal harm could be regarded not only as cowardice but also a denial of a founding principle for a free society.

The same applies on the personal level in associations between people of different religions. Self-censorship is a valuable tool, not only to keep communication going, but also as a basic principle for coexistence in local society. However, in such situations it must be made clear what persons stand for, while at the same time respect is shown for the other person's religious convictions and practice.

Voltaire put it this way: I "do not agree with what you have to say, but I'll defend to the death your right to say it."

It is a duty for anyone to stand up for various human rights. These rights are not only the foundation of societies but also the cement that keep it together. Fundamentalists on all sides are generally hard to reason with. They will not accept that public peace is more important than personal convictions. They are always in a minority, but in Islam, they have great influence.

Human Rights in the Daily Lives
A Christian involved in the debate should always be prepared to stand up for the general principles of freedom that are guiding his or her country. Christians should also be prepared to accept that people have the right to expose their religion and special brand of Christianity to criticism, mockery, and ridicule. Such contention should be accepted with Christian grace.

Personal attacks have no place. But courteous dialogues on issues are in place. The persons who feel obliged—even dictated—to publicly fight for an introduction of foreign laws, cultures, and customs from his or her home country must understand that "when in Rome, do as Romans do." What one does in privacy is another matter. The whole process of standing on the treasured principles of human rights while at the same time respecting and accepting other people's differing viewpoints and attitudes requires skills where a good amount of wisdom, patience, tact, and courage are involved. It is really a question of finding the balance where on one side attempts are made to uphold the significant and cherished principles of human rights and freedom of expression, while on the other side efforts are made so that the exercise of this liberty does not unnecessarily infringe on people's right to religious liberty and upset people of other faith or convictions.

Dr. Borge Schantz writes from Bjaeverskove, Denmark. An educator, he has spent many years in the Middle East.

NOVEMBER / DECEMBER 2007

The Point Of Vanishing Interest

BY: LINCOLN E. STEED

Oh, I admit it—my sense of humor sometimes runs to the ironic. And I blame my Australian origins for sometimes getting pleasure out of sarcasm (my wife keeps me in line here; she's always telling me that humor does not work that way in the United States). But all of that said I keep going back to a book of humor I picked up in a used bookstore years ago. It's called "Parkinson's Law, and Other Studies in Administration" and I note it was first printed in England in the 1950s. I always get a laugh out of reading it, but such is its humor, I can never be quite sure when it is trying to be funny or merely creating humor from the absurdities of everyday things.

That said, I want to pass on a summary of its chapter titled "High Finance—or The Point of Vanishing Interest."

"People who understand high finance," author Parkinson observes, "are of two kinds: those who have vast fortunes of their own and those who have nothing at all. . . .But the world is full of people who fall between these two categories, knowing nothing of millions but well accustomed to think in thousands, and it is of these that finance committees are mostly composed. The result is a phenomenon that has been observed but never yet investigated. It might be termed the Law of Triviality. Briefly stated, it means that the time spent on any item of the agenda will be in inverse proportion to the sum involved.

Hint here: I intend to comment on the *Hein vs Freedom from Religion Foundation* case.

The author goes on to outline a typical board meeting:

First item: New Atomic Reactor. Treasurer briefly outlines the engineering report and the cost of $10,000,000. Most of the committee has no real knowledge of reactors. Two do. The first questions the choice of contractors and is told it is late in the day to deal with that. The other distrusts the round figure, questions the overly large contingency fund, and knows something troubling about the firm hired for the job. But he would have to begin by explaining what a reactor is to the unknowing committee members. He decides on a no comment.

In two and a half minutes the item is passed.

Next item: bicycle shed for the clerical staff--$2350.

Now a sum of $2350 is within everyone's comprehension. And everyone can envision a bicycle shed.

An acrimonious debate follows over the sum of money, the type of roofing material, the need for a shed at all. Forty five minutes later it is approved for $2050—a saving of $300. Committee self-satisfied.

The author then notes that debates get longer down to $50 and abruptly shorten at $20. He muses about whether even smaller items will take longer to approve; concluding that there must be a "point of vanishing interest. "He guesses (obvious irony here) that point must be "the sum the individual committee member is willing to lose on a bet or subscribe to charity."

I enjoy reading the book. I don't get any pleasure from observing such human foibles worked out in front of me in public life.

Liberty magazine exists to promote Religious Liberty as a Divine Principle. To that end we appeal to the best laws of man to uphold the right of all to worship freely. The United States Constitution claims to recognize such inalienable rights, and the history of the Republic shows pursuit of high ideals of civil and religious freedom.

How can we keep silent as basic principles are fading; even as there is glib talk about protecting our way of life?

What I see in regards to religious liberty is this same inversion of priorities. There is much celebration of the little freedoms and daily exceptions but a blithe acceptance of the most far-reaching changes and abridgments of liberty.

Take the *Hein* case. In this issue of Liberty there are two well written articles treating on the recent decision of the Supreme Court. The article by Alan Reinach tries to cry alarm and warn of worse to come. The article by Richard Garnett is logical and calm. He explains correctly that the challenge to the White House Faith Based initiative was dismissed because the court denied standing to the Freedom from Religion Foundation. I can see why they denied standing (after all, it would be a lynching offence for the Justices to give way to an organizatoin dedicated to eradicating any public expression of religion. And equally unthinkable to the current trend would be a retreat on the Unitary theory of power.) But is that all there is here?

Let's cut to the chase. We're not talking about any old bicycle shed. We are really talking about the dismantling of the entire church state compact envisaged by Protestants in the New World. Indeed we are on the cusp of a total rethinking of the "we the people" model. We are sliding the rods into the most reactive situation and it gets little more than murmurs from most. I believe it's time for more than the two and a half minute nod here.

I know we live post 9/11. I absolutely believe the West is facing an existential threat to its dominance from both third world factory floor and radical mosque. And I hear the daily mantra for the need to balance freedom and security (a mantra, by the way, that forgets the type of security totalitarian systems provide). But I remember how the Faith Based Initiative began.

FBI was the single boldest step ever taken to challenge First Amendment assumptions about separation of church and state. It was not done innocently. It was done specifically to fund and empower churches. Once upon a time that was called Establishment of religion. James Madison and his peers were rather emphatic about that.

Adding to the effrontery of this landmark challenge was THE BIG LIE. The big lie has it that religion is losing out to secular humanism. The big lie is that Christian America is disempowered. Jerry Falwell and D. James Kennedy went to their graves knowing that the Christian empowerment movement had succeeded in shaping the contemporary political landscape! As we go into the 2008 election season religion talk by candidates is as expected as baby kissing. Everywhere religious forces are challenging opposing views on origins, immigration, foreign policy and even movies and video games. Listen to shortwave radio or read the foreign press and you'll find uniform amazement at the degree of empowerment of religious factions here. (Correction. Strike "amazement" and substitute "fear" or "horror"—words we might apply to the rise of Islamic fundamentalism in the Middle East.)

At the risk of too much repetition I will re-state my analysis of religion in America today. It echoes a line from the Bible that speaks of "having a form of religion, but lacking the power thereof." It is not political empowerment that Christian America lacks. It is true spiritual power and integrity.

It is a false faith that does not cry out because others are tortured. It is a false faith that thinks it can advance any sort of freedom by the sword. It is a false faith that imagines capitalism is somehow part of the Sermon on the Mount and a release from any obligation toward the downtrodden. It is a false faith that seeks to substitute legal agendas for changed hearts.

Are we really at the point of vanishing interest? God help us if, as at seems, we are.

Lincoln E. Steed

Editor,
Liberty Magazine

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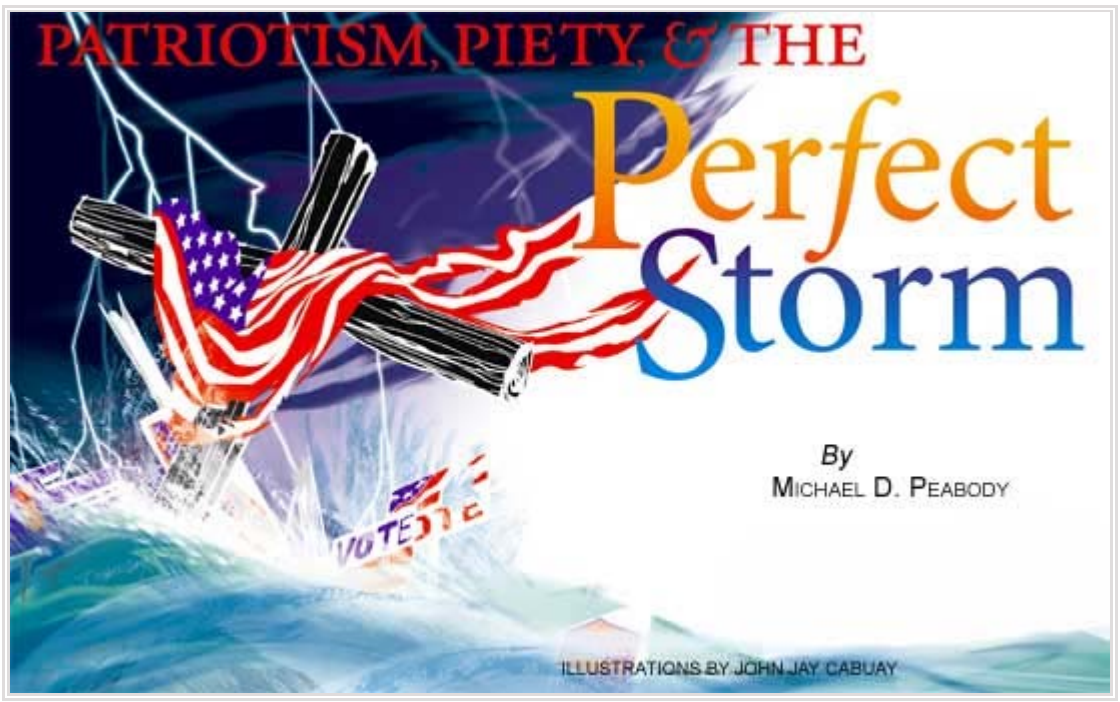
Patriotism, Piety & The Perfect Storm

BY: MICHAEL D. PEABODY



Smart advertisers understand the value of tapping into the celebrity of famous sports and entertainment figures in order to build instant credibility and brand recognition. Athletic gear manufacturer Nike would slip off the radar screen without the purchased endorsement of legendary athletes like Michael Jordan, whose shoes made him fly. Would-be members of Congress solicit the personal endorsement of former presidents and mayors of large cities, and governors seek celebrities who can breathe fresh air into stale initiatives.

But as credible and well-spoken as celebrities can be, there is always the risk that a celebrity will make a mistake that can sink a political career. In spite of what publicists would have you believe, celebrities are human after all and they live under the microscope of a curious society that salivates for the latest scandal.

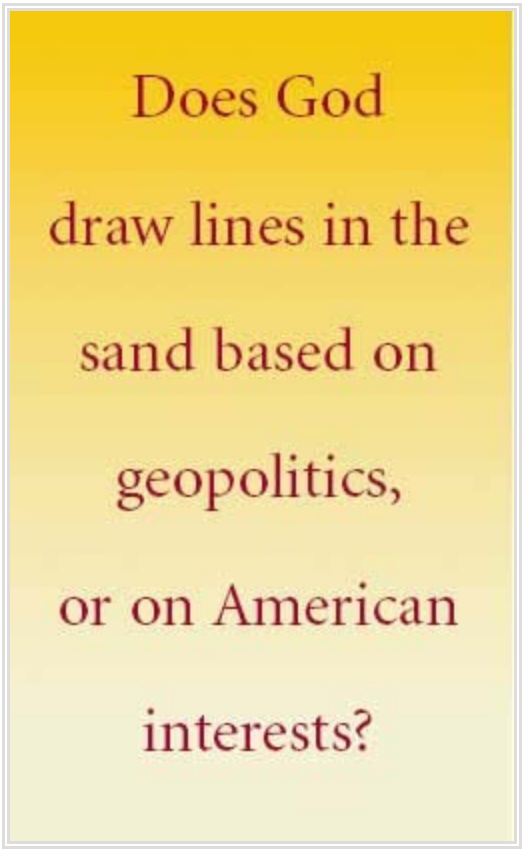
Given these high stakes, what is a politician to do? He or she can roll the dice with a famous personality, or in the alternative, can take a well-calculated, low-risk leap of faith and claim the endorsement of God, who by most accounts has a spotless record.

Of course, this changes the rules of the game dramatically. If God is endorsing candidate A, He is certainly not endorsing candidate B. The endorsee is lifted on angels' wings while the opponent is instantly demonized as conscientious voters are reminded of the eternal consequences of knowingly making the wrong decision. Thus, candidate A can march to victory, pausing only to adjust his halo, while candidate B expends his resources trying to pull himself out of the very public pits of campaign hell.

Christianity is America's most popular religion, which one can join at some level through mere intellectual assent, so the tactic of invoking this faith can be used effectively by those who have not otherwise set foot in a church for twenty years. Yet rapid conversions and enhanced piety magically appear the weekend before an election when media cameras capture candidates dressed in their Sunday best, replete with spotless families and large Bibles as they greet the minister at the door.

In the game of modern politics, laying claim to God's endorsement, and backing this up with a rally to righteousness, is the rhetorical equivalent of simply pulling out a gun and shooting the opponent. By and large, this is a first come, first served proposition as the first one to lay claim to God becomes the new king of the hill. This fact is not lost on the current presidential contenders from both major parties who are scrambling to be the first to lay solid claim to God's blessing as they approach the 2008 election.

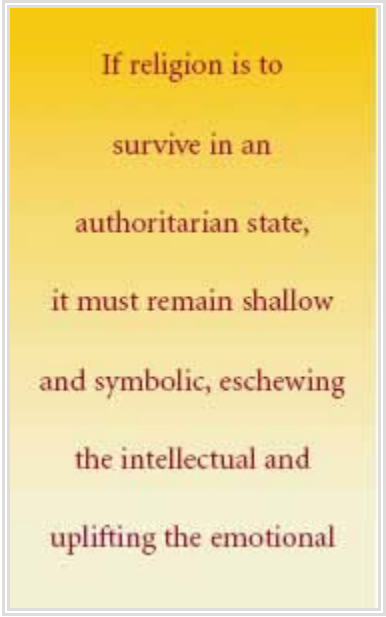
Aside from potential future retribution for misusing God's name, there are few earthly drawbacks to claiming to have "God's seal of



approval." It costs nothing more than a few carefully chosen words to establish credentials as being God's favorite, and it presents a nearly irrefutable argument.

In a larger sense, this largely ceremonial, flag-waving faith has come to exemplify a marginal civic religion that dons the outer garb of piety to cloak policies that might contravene actual Christian values. In some circles, primarily inhabited by the disaffected who question the incompatibility of the outer piety and inner apostasy, this is known as hypocrisy. In others, the resulting cognitive dissonance has drastically negative results.

A while back, a friend who leans heavily to the right asked me whether I thought God supported the United States in the War on Terror. Knowing the nature of the question, I sensed that I was walking into a shabbily constructed minefield, so I decided to up the ante with a few questions of my own. Can a Christian feel patriotic toward his native Iraq or toward her North Korean homeland? Does God draw lines in the sand based on geopolitics, or on American interests? Bottom line, would God drive a Chevy or a Hyundai?



This is not to say that love of country is misguided. I love my country and its people. During the Olympics, I hope that my country's team will win all the gold medals, and my heart swells with pride when I hear our national anthem. When I vote, I make the best decision I can, but that does not mean that an all-knowing God would agree with my vote, which is certainly not infallible. Invoking the name of God in order to support my predetermined goals is not sufficient to secure His blessing.

Speaking in the midst of a devastated economy, linked by many to a lack of national pride and moral resolve, Adolf Hitler struck a chord when he invoked God's name and called the audience to reflect upon their spiritual duty. "I am convinced that men who are created by God should live in accordance with the will of the Almighty. . . . Thus it is that we. . . , too, have in the depths of our hearts our faith. We cannot do otherwise; no man can fashion world history or the history of peoples unless upon his purpose and his powers there rests the blessings of this Providence."

Looking back at that day in June 1937, it was certainly the right time to call upon God. At that time few Germans supposed that the charismatic man who stood before them, uttering phrases that sung praises to their sense of religious and national pride, would unleash and justify their most evil impulses. Hitler had wrapped himself in the nation's flag and spoken to their Christianity, and though he may not have followed that faith himself, it was a tool he used to persuade and launch his nation on a hellish path.

Throughout history, invoking the name of God to endorse evil policies has succeeded as ruthless dictators have learned to embrace the outer semblances of faith. After all, what harm could such a great Christian do?

As they speak inspiring words of faith, dictators foster an environment that so associates them with the faith of the nation that they are soon seen as religious leaders. Through pithy religious phrases, they appeal to those whose faith is blind to theological realities and who have unquestioning loyalty. Although an intelligent underground might oppose them, they can count on idealistic nationalists and pietistic religionists to crush this opposition at the core, and appeal to the unbridled passions of anti-intellectualism and populism and artfully claim that they govern by "gut feelings."

Nationalism that rejects questioning and a shallow religion can fuse and inevitably lead a nation to disaster. After it is all over, those who manage to survive will take years to figure out why otherwise peaceful people could feel justified in doing such evil things. Even then, only a few will grasp the truth that the moribund beast arose from the blind, rapid merger of religion and nationalism.

It is easy to think that the real threat to freedom can come from religious nationalism's counterpart of atheistic socialism. But the machine of atheism is much harder to maintain and will eventually run out of energy. This is because, however small it is, religion is a central component to the thought patterns of most people. People have an innate hunger for some kind of faith, and draconian methods validate the very faith they are intended to crush.

I have long felt that one of the main reasons that so many communist nations failed was because they early on targeted the faith of the religious. Had they embraced the outward signs of the faith and gradually, imperceptibly, morphed it to their ends, they could have gained the support of the large number of marginal believers who would have begun to see the work of the politburo as consistent with that of God. Only the intellectually vigorous would remain in opposition, and they could easily be disposed of openly and with the blessing of the majority who would view them as criminals.

Instead, through persecution, communist dictators created a religious vacuum which ultimately became a fatal flaw. Despite its storied attempts to foist atheistic patriotism on the people, the Soviet Union was unable to sustain itself, and its residents clamored for the exit when the Iron Curtain fell. Had the U.S.S.R. wrapped the same authoritarian aims in the gradually modified religion of Mother Russia, it might have lasted. But in the absence of a faith, the secular state was doomed.

In contrast, those nations that have embraced the symbols of religion, carefully choosing only those elements that support their aims, opportunistic thugs become saints, and those who question them are viewed by the majority as both unpatriotic and unholy. Kamikaze pilots turn their planes into guided missiles at the bequest of a divine emperor, and terrorists are convinced to detonate themselves in the name of Allah.

The unholy alliance of nationalism and religion is so powerful that those whose dual passions have merged can outlast economic deprivation, military defeats, and untold hardship until their bleeding hands scratch at the threshold of death.

For authoritarian dictators, of course, the downside to all this talk of religion is the fact that thoughtful faith can lead to introspection and a longing for moral clarity rather than simplistic flag waving and misguided populist instinct. If religion is to survive in an authoritarian state, it must remain shallow and symbolic, eschewing the intellectual and uplifting the emotional. A would-be dictator finds his greatest strength in associating unquestioning faith with clueless obedience to fabled patriotic prerogative.

Americans may not be facing immediate threats from kamikaze pilots, or even suicidal bombers for that matter, but couple the current escalating trends of natural disasters, popping sounds from economic bubbles, and fears of terrorism with the claimed divine endorsement of nationalistic religion that is long on emotion but intellectually weak and a perfect storm awaits offshore. This deadly combination of urgent nationalism and claimed godly endorsement has illuminated the destructive course of nations throughout history, and there is a dull arrogance in suggesting that we would respond otherwise.

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NOVEMBER / DECEMBER 2007

Seeking Redress

BY: ALAN REINACH

". . . to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.. . . "—Virginia Statute for Religious Freedom

James Madison's famous tract opposing the appropriation of tax dollars for teachers of religion, known simply as the "Memorial and Remonstrance," criticized the idea that the Civil Magistrate may "employ Religion as an engine of Civil policy."[1] In the most unflattering terms, Madison described tax support for religion as "an unhallowed perversion of the means of salvation."[2]

Now consider the 2007 term of the United States Supreme Court, and the Court's deliberation about whether taxpayers can challenge executive branch spending for religion, in *Hein v. Freedom From Religion Foundation, Inc.*[3] According to news reports, it was an obscure decision about an arcane legal principle regarding the doctrine of "standing to sue." The Court opinions brush aside important constitutional issues by rejecting the idea that taxpayers have any right to challenge executive branch spending on religion as a violation of the establishment clause. Yet, to Justice David Souter, writing in dissent, the Court's ruling threatened to "melt away" the establishment clause,[4] while the ACLU described the decision as granting the executive branch "license" to violate the Constitution.[5]

To understand the real significance of this Supreme Court decision, the factual background is essential. Shortly after taking office as president, George W. Bush asked Congress to approve his "faith-based initiative" to ensure that religious organizations are not discriminated against when government funds the provision of social services. While Congress dutifully passed the desired legislation, it languished before the Senate. So President Bush issued a series of executive orders establishing offices in various executive branches. The program became known as the "Faith-Based and Community Initiatives." All of these agencies administer funds allocated by Congress, and distribute them in various government programs.

Enter the Freedom from Religion Foundation, which bills itself as "the largest group of atheists and agnostics in North America."[6] This organization has filed numerous lawsuits challenging First Amendment rights to public religious displays, such as monuments of the Ten Commandments. The foundation filed a lawsuit in Wisconsin, calling into question several aspects of the Faith-Based Initiative. In a lower court decision, the district judge held that the funding of MentorKids U.S.A. violated the establishment clause, while approving funding of a nonsectarian program run by Emory University. That decision was not appealed.

MentorKids U.S.A. is a Christian organization established to mentor the children of inmates. It recruits Christians who are expected to share their faith with the kids, introduce them to the Bible, and engage them in Bible study.[7] MentorKids U.S.A. said that it used government funds only for recruitment, and not for religious purposes. The court rejected the claim that recruiting Christians to proselytize children is permissible under the First Amendment.

The issue that went to the Supreme Court dealt primarily with whether the foundation could challenge the Bush administration's use of tax dollars to conduct conferences where it promoted the Faith-Based Initiative to the religious community. The district judge said no, but the Seventh Circuit U.S. Court of Appeals, in a divided ruling, said yes.[8] Richard Posner, one of the most prominent conservative judges in the nation, wrote the opinion for the appellate court.

Posner reviewed the legal precedent, including a 1968 Supreme Court decision, *Flast v. Cohen*, holding that taxpayers can challenge congressional appropriations for religious schools on establishment clause grounds.[9] Getting to the heart of the matter, Posner reasoned that "the essence of an establishment of religion is government financial support."[10] Then Posner addressed the question whether the rule should be different when the decision to fund religion is made by the executive branch rather than Congress. He insisted that "the difference cannot be controlling." [11] Supreme Court justice Souter, writing in dissent, later observed that the Court opinions failed to explain why there should be such a distinction between spending by Congress or the executive branch. After all, the executive branch can only spend funds allocated by Congress.

Posner seemed to argue that respect for the separation of church and state required the courts to review executive branch spending on religion, for he theorized a situation where the Secretary of Homeland Security "decided to build a mosque and pay an Imam a salary to preach in it because the Secretary believed that federal financial assistance to Islam would reduce the likelihood of Islamist terrorism in the United States." In other words, Posner rejected the notion that the executive branch ought to have unfettered discretion to "make religion an engine of civil policy," to borrow James Madison's phrase.

The Supreme Court plurality ducked the establishment clause entirely.[12] Justice Alito's opinion defended limiting taxpayer standing to decisions by Congress, but only Kennedy and Roberts joined him. Justice Scalia argued that *Flast v. Cohen* should be overturned, and that taxpayers should not have any right to enforce the establishment clause against either Congress or the executive branch.[13] Justice Kennedy wrote separately, and took pains to remind both Congress and the executive branch that they had an obligation to obey the establishment clause, whether or not such obedience could be enforced in the courts.

Kennedy's observation brings to light one of the fatal flaws in the Court's decision. There is an ancient legal maxim that there is no right without a remedy. If someone has a property right, for example, then the courts must be able to fashion a remedy to protect that right. Inadvertently, perhaps, the Supreme Court has now decided that no individual American has any rights protected by the establishment clause, for if there were such a right, there would be a remedy. The Court's decision clearly indicated that there would be no remedy for establishment clause violations that occur when the executive branch decides to spend money on religion.

The decision seems ominous, but it is not surprising. Indeed, it is consistent with an earlier decision eviscerating the free exercise clause. In 1990, the Court ruled in *Employment Division v. Smith*[14] that no one can assert a free exercise right against laws that are "facially neutral" and "generally applicable" regardless of how severely they may effectively infringe on one's religion. In other words, as long as Congress drafts its laws in such a way that they appear to apply evenly to everyone, it doesn't matter whether the laws actually restrict religious freedom.

The *Hein* decision has the same practical result. As long as Congress doesn't allocate money directly for religion, the executive branch can divert the funds for religious purposes with impunity. Only Congress has any authority to rein in the president. No American can challenge the spending in the Court under the establishment clause.

American Jewish Congress president Richard S. Gordon responded to the decision, saying:

"Little. . . in practical experience indicates that such public officials are inclined to pay much mind to the separation of church and state. Although it purports to be only a decision about who may sue, and not what the Constitution permits, the practical effect of today's decision is that the Establishment Clause means only what the Executive Branch says it means. That is no security for religious freedom at all."[15]

Consider the immediate impact of the decision on MentorKids U.S.A. Although the Wisconsin court decision still stands, MentorKids U.S.A. remains free to reapply for federal funding in the other 49 states, so that it can continue to recruit Christians to minister to children of inmates. A federal agency will have authority to determine whether such grants should be approved as consistent with the establishment clause. It is doubtful that agency bureaucrats will be motivated to closely examine grant applicants' representations that they will not use the funds for religious purposes.

In 2002, the Supreme Court decided that state funding of religious schools by means of "school vouchers" was constitutional, relying on the program's subterfuge that funds were given to the parents, not directly to the schools.[16] However, the Court refused to reverse decades of decisions denying any government the power to fund religious schools directly. The *Hein* decision has now created a mechanism for the federal government to fund religion directly, without fear of judicial restraint. Should the Department of Education, for example, adopt new regulations for the distribution of school funding that requires the inclusion of religious schools, it would be up to Congress to enact more restrictive rules; no citizen could file a legal challenge.

Ironically, Justice Alito's decision invoked the doctrine of "the separation of powers." He argued that the Constitution imposes strict limits on the power of courts to decide actual cases or controversies, and that establishment clause violations do not cause the sort of injuries a court can adjudicate. Of course, Alito fails to explain why this logic would not require overturning *Flast v. Cohen*.

Justice Alito's argument turns the very purpose of the separation of powers upside down. "The nation subscribes to the original premise of the framers of the Constitution that the way to safeguard against tyranny is to separate the powers of government among three branches so that each branch checks the other two."[17] Despite the obvious premise that the separation of powers must be accompanied by the power of each branch to provide a check and balance for the other two, Justice Alito held that the Supreme Court lacks the power to determine whether the executive branch has violated the establishment clause in some cases. Although the principle has not been applied to a wide variety of other establishment clause cases, it is difficult to see why a citizen ought to have more right to

challenge a public display of a crèche or the Ten Commandments than to challenge government funding of religion.

How far the Supreme Court has strayed from the passionate defense of liberty championed by her Founding Fathers! The Declaration of Independence was a catalog of "usurpations" by the "executive branch," King George. The intentional weakness of the Articles of Confederation was a deliberate response to the fear of accumulated central authority. Yet today, in the *Hein* decision, the Supreme Court endorsed the idea that the executive branch requires no oversight in respect to the separation of church and state, and recommended to all Americans that we can safely trust our government to "do the right thing."

Thomas Jefferson insisted that one's financial support of religion should be entirely voluntary, and that coerced taxpayer support of religion is "sinful and tyrannical." A federal judge has already determined that one Faith-Based Initiative funded program was in violation of the First Amendment. Whether other programs share similar constitutional infirmities, the courts will never determine. Sadly, the Supreme Court has turned a blind eye to a fundamental establishment clause value.

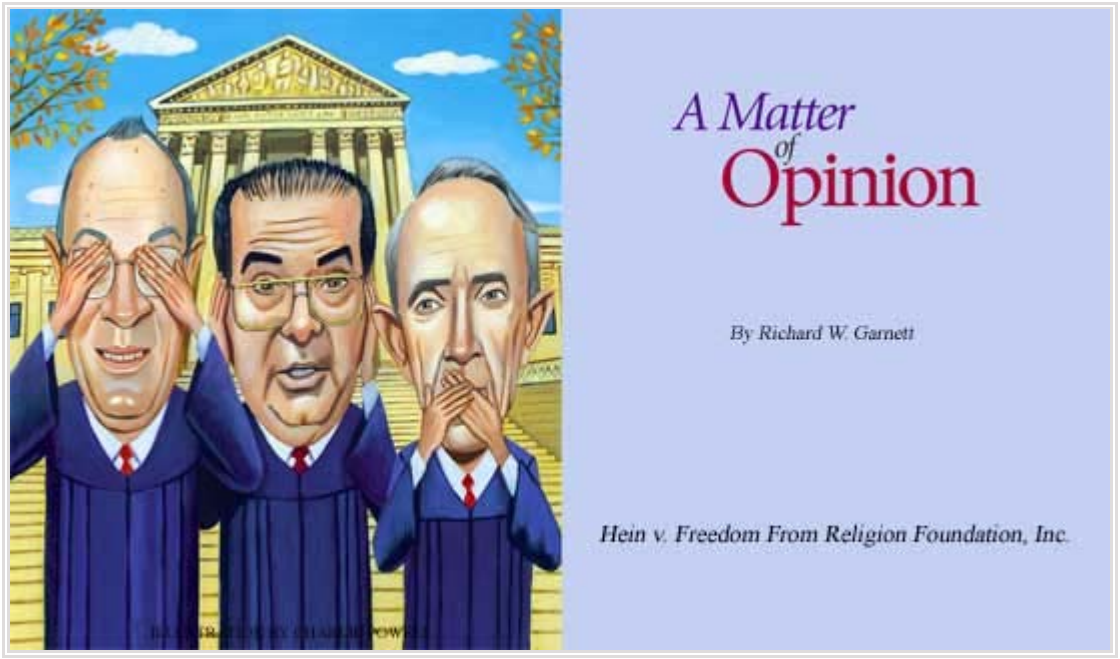
Alan Reinach, an attorney, writes from Thousand Oaks, California. He heads the Department of Public Affairs and Religious Liberty for the Pacific Union of the Seventh-day Adventist Church.

1 James Madison, "Memorial and Remonstrance Against Religious Assessments" (1785), www.churchstate.org/article.php?id=97
2 Ibid.
3 ___U.S. ___, 127 S.Ct. 2553, 75 USLW 4560, June 25, 2007.
4 Ibid.
5 See www.aclu.org/scotus/2006term/heinv.free-domfromreligionfoundation/28714prs20070228.html
6 See Freedom From Religion Foundation website: www.ffrf.org
7 "Judge Blocks Federal Faith-Based Grant; Evidence Showed MentorKids USA Did Religious Work," Pioneer Press, January 15, 2005, p. B3.
8 Freedom From Religion Foundation, Inc. v. Chao, 447 F.3d 988 (D. Wis. 2006).
9 Flast v. Cohen, 392 U.S. 83 (1968).
10 Quoting Walz v. Tax Commission of City of New York, 397 U.S. 664, 668 (1970).
11 Freedom From Religion Foundation, Inc. v. Chao, supra, p. 10.
12 Justice Alito's opinion is known as a "plurality" opinion because there were only three justices who signed on: Justices Alito, Kennedy, and Roberts. In such a case, the outcome is controlling precedent, but not the logic or reasoning of the decision. Justices Scalia and Kennedy issued separate opinions. Justice Souter's dissent was joined by Stevens, Ginsburg, and Breyer.
13 The American Center for Law and Justice filed an amicus brief asking that Flast v. Cohen be overturned, because it had led to too many cases invoking the wall of separation between church and state. Apparently, this organization would like the wall of separation to disappear entirely.
14 494 U.S. 872 (1990).
15 "AJ Congress: House and Senate Should Correct Supreme Court Decision Threatening Church State Separation," http://news.corporate.findlaw.com/prnewswire/20070626/26jun20071915.html
16 Zelman v. Simmons-Harris, 536 U.S. 639 (2002). In fact, the parents receive a "voucher," not cash. The schools redeem the vouchers, and receive funds directly from the state.
17 "Teaching With Documents: Constitutional Issues: Separation of Powers," National Archives Web site: www.archives.gov/education /lessons/separation-powers/

NOVEMBER / DECEMBER 2007

A Matter Of Opinion

BY: RICHARD W. GARNETT

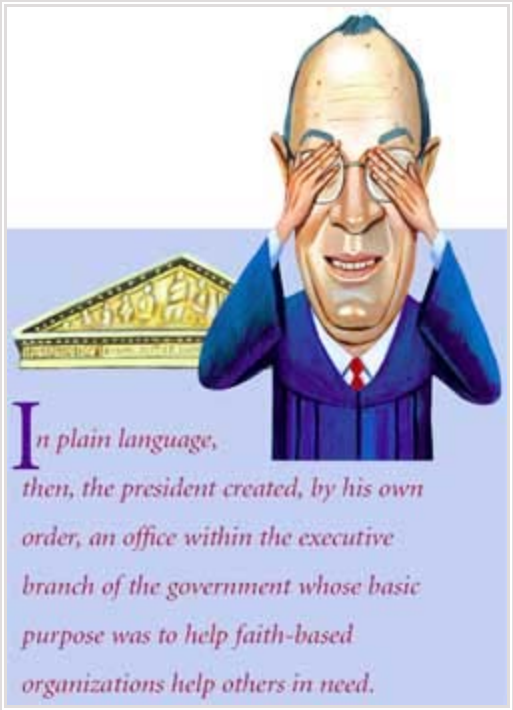


As we all learned—or should have learned—in school, the Constitution of the United States created a new, national government of limited, divided powers. Of course, the Constitution was and is not perfect. Still, it is worth remembering and celebrating the Founders' insight and creativity. Theirs was a bold, innovative experiment. Those who designed and ratified the Constitution firmly believed that the best way to safeguard the liberties of individuals and local communities was to pay close attention to the structure and design of the federal government and, in particular, to separate that government's power among three coequal branches.

Now, it might be tempting to think that basic civics-course observations like these are fine for history classes, and well and good for museum exhibits, but not particularly relevant to our contemporary debates. However, as the Supreme Court's recent decision in a closely watched case called *Hein v. Freedom From Religion Foundation, Inc.* illustrated, questions about the distinct roles and limited powers of the several branches of government remain on the front burner.

In January 2001, President Bush issued an "executive order" creating the White House Office of Faith-Based and Community Initiatives. The mission of this new office included making sure that "private and charitable community groups, including religious ones. . . have the fullest opportunity permitted by law to compete on a level playing field[.]" A specific goal for the office was to reduce and cut through the bureaucratic red tape and unnecessary regulatory barriers that, the Bush administration believed, unfairly limited the ability of these groups to access federal program funds. Although these groups were not to use public money for—quoting from another executive order— "inherently religious activities, such as worship, religious instruction, or proselytization", and were not to "discriminat[e] against beneficiaries or potential beneficiaries. . . on the basis of religion[,]" the president insisted that no charitable organization "should be discriminated against on the basis of religion. . . in the administration or distribution of federal financial assistance under social service programs." In plain language, then, the president created, by his own order, an office within the executive branch of the government whose basic purpose was to help faith-based organizations help others in need. What's more, the new office and its activities were funded not by any law enacted by Congress specifically for that purpose, but out of "general Executive Branch appropriations."

The Freedom From Religion Foundation, Inc. is an association "opposed to government endorsement of religion." The foundation and several of its members believed that some of the new office's activities—in particular, organizing conferences at which, they objected, religious organizations were "singled out as being particularly worthy of federal funding"—violated the establishment clause of the First Amendment. In their view, these conferences were—as Justice Alito put it, in his opinion—"designed to promote, and had the effect of promoting, religious community groups over secular ones." And so, the foundation and its members filed a lawsuit in federal court, contending that the office's activities violated the Constitution.



Now, questions involving the use of public funds by or in religious institutions and schools are difficult ones, and have been the subject of dozens of famous Supreme Court decisions during the past 60 years. To make a long story short, the Court's current position appears to be that it is not necessarily an unconstitutional "establishment" of religion for government to fund, as part of an evenhanded public program, the nonreligious activities of a religious organization. And so, for example, the Court ruled a few years ago, in the case of *Zelman v. Simmons-Harris*, that it was not unconstitutional for Ohio to allow low-income students in Cleveland to use publicly funded scholarships to attend religiously affiliated schools. Whether the Faith-Based Initiatives Office's conferences and other activities crossed the hazy line that separates permissible evenhandedness toward religion from illegal endorsement is a question about which expert lawyers and scholars disagree.

Even after *Hein*, they still do. This is because, by the time the case reached the Supreme Court, *Hein* was not really about the constitutionality of the Office's conferences at all. The case did not address, and so did not resolve, the question whether the foundation's constitutional complaints were justified; instead, the justices considered whether or not the foundation and its members had "standing" to bring that complaint in federal court. The trial court concluded that they did not, but the court of appeals decided otherwise. And, this disagreement led to the first church-state decision of the newly constituted Roberts Court.

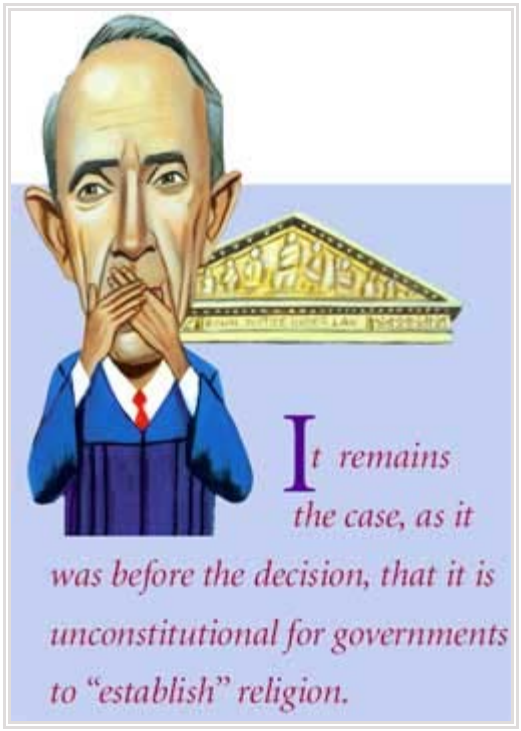
What, exactly, is the doctrine of "standing"? Some commentators and journalists, in their discussions of *Hein*, seemed frustrated with the concept, regarding it as a distracting and typically arcane or achaic lawyer's technicality. In fact, though, it is a rule that is closely connected to bedrock separation-of-powers principles and foundational features of the Constitution's design.

The Constitution does not give the federal courts the power to answer constitutional and other legal questions—even important ones—in the abstract. Under our Constitution (some other nations' constitutions are different), the courts' function is not to offer constitutional advice, or to unravel law-school hypotheticals, or to review for constitutionality all the various activities of the other branches of government. As Justice Alito put it in *Hein*, our courts are "courts of law", not "general complaint bureaus." It is not enough that someone has an objection to a particular policy, or even a good argument that the policy violates the Constitution. Instead, the federal judiciary's "judicial power" extends to "cases" and "controversies" involving real parties with an actual stake in the dispute—in other words, with "standing."

And so, when the foundation and its members sued the administration in federal court, they argued that they had "standing" because they pay federal taxes and oppose the use of tax dollars to advance, promote, and endorse religion. In most cases, this is not enough. That is, the mere fact that a person pays taxes is usually not enough to permit a person to object to government programs and policies in federal court. If it were enough, the theory goes, then taxpayer lawsuits would undermine the constitutional design, with its liberty-protecting separation of powers, by dramatically expanding the judiciary's reach at the expense of the two politically accountable branches of government. To have "standing," a plaintiff must allege an "injury" that is traceable to the defendant's conduct. Feeling that the government is misusing one's tax dollars—a widespread feeling, to be sure—is not a sufficiently concrete "injury" to warrant the federal courts' involvement.

Almost 40 years ago, however, in a case called *Flast v. Cohen*, the Supreme Court created a narrow exception to the no-taxpayer-standing rule in establishment clause cases. In *Flast*, the taxpayer-plaintiffs challenged the distribution of federal funds to religious schools under the Elementary and Secondary Education Act of 1965, insisting that this assistance violated the First Amendment. The justices decided that, in cases like this, objections to Congress's exercise of its power under the Constitution to tax and spend were enough to establish the required standing. This exception was appropriate, they reasoned, because—as James Madison's famous "Memorial and Remonstrance" illustrates—the framers had been particularly and specifically worried that the tax-and-spend power would be used to support religion, or to favor one religion over another.

In *Hein*, though, the challenged activities of the Faith-Based Initiatives Office had not been funded by Congress, but instead created and funded by the executive branch. Accordingly, the trial court dismissed the case. The court of appeals, though, stated that, under *Flast*, taxpayers could challenge a program or policy of the executive branch so long as it was "financed by congressional appropriation." In that court's view, the justification offered in *Flast* for taxpayer standing to challenge acts of Congress applied with equal force in cases like *Hein*. On the other hand, Judge Ripple warned in his dissenting opinion that the decision was a "dramatic expansion" of the *Flast* exception, one that increased the power of the courts and threatened the separation of powers.



The Supreme Court, by a close vote of 5-4, reversed the court of appeals' decision. Justice Alito—joined by Justice Kennedy and Chief Justice Roberts—avoided the controversial question whether *Flast* was correctly decided. It was enough, in their view, to decide *Hein* by keeping *Flast's* "narrow exception" narrow, and applying it only to spending that results directly from "congressional action," not "executive discretion." These justices were unmoved by the objection that the "injury" to an objecting taxpayer—that is, the use of "funds exacted from taxpayers" in support of religion—is the same whether the money is spent on the order of Congress or the say-so of the president. The *Flast* exception exists in serious tension with the separation of powers, they insisted, and they saw no reason to increase the tension by enlarging the exception. Members of Congress and executive officials, no less than federal judges, have an obligation to the Constitution, and so if the executive's discretionary use of federal funds violates the establishment clause, Congress—but not the Court—has the right and duty to step in.

Justices Scalia and Thomas agreed that the foundation and its members lacked standing, but wrote separately to criticize the "utterly meaningless distinctions" on which their colleagues in the majority relied. If *Flast* is good law, they explained, then it should apply to cases like *Hein*. However, they insisted, *Flast* was quite wrong, and impossible to reconcile with the Constitution's text and structure. It should therefore be rejected, and not artificially narrowed or distinguished.

Justice Souter dissented, writing for himself and three other justices. He focused on the injury that, in his view, is done to a taxpayer's conscience when the government spends public funds in a way that violates the establishment clause. As James Madison wrote, "[t]he Religion. . . of every man must be left to the conviction and conscience of every man." Coerced support of religion through taxation, the dissenting justices believed, insults this conviction and burdens this conscience, and inflicts an "injury" that is sufficient for "standing" purposes.

Reactions to *Hein* have been mixed. Some, like Justice Scalia, chided Justice Alito for being too timid about rejecting *Flast* and its unjustifiable expansion of the judicial power. Other critics agreed with Justice Scalia that the distinction between executive spending and congressional appropriations was vague and illogical—the *New York Times* called it "cockeyed" and "flimsy"—and worried that the ruling would limit Americans' ability to vindicate the First Amendment's commands and open the door to a range of unconstitutional presidential support of religion. President Bush, on the other hand, hailed the decision as a "substantial victory for efforts by Americans to more effectively aid our neighbors in need of help."

Those Americans who are committed to religious freedom under law, and who believe that a distinction between religious institutions and those of government is a crucial safeguard for that freedom, should not regard *Hein* with alarm. It remains the case, as it was before the decision, that it is unconstitutional for governments to "establish" religion. If anything, *Hein* would seem to reinforce the insight that is at the heart of the church-state separation, namely, that freedom is best preserved when powers are distinguished and divided.

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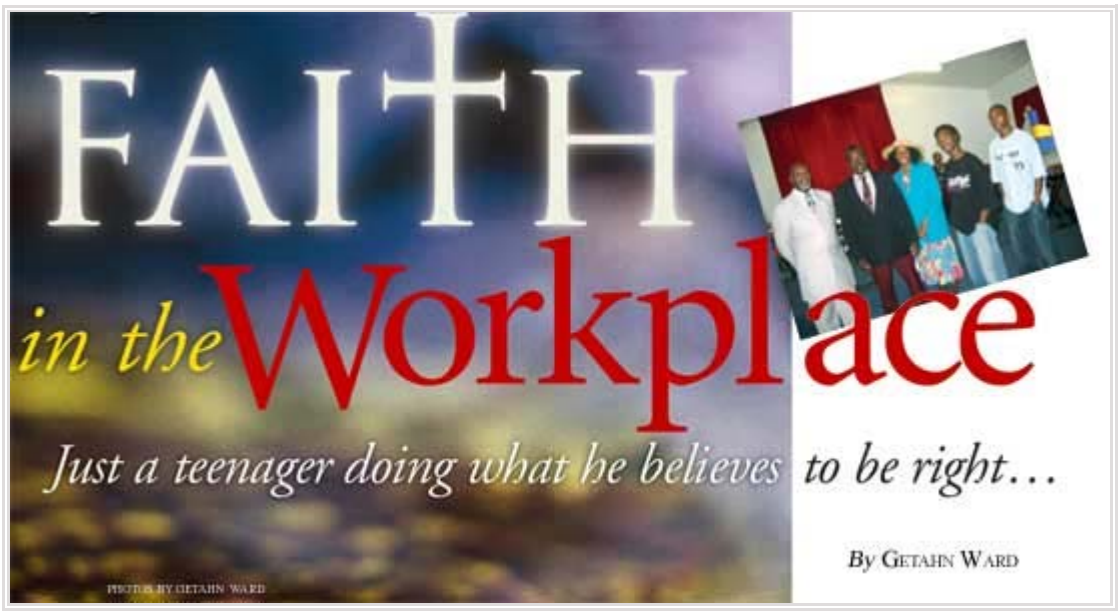
NOVEMBER / DECEMBER 2007

Faith In The Workplace

BY: GETAHN WARD



In a lot of ways, Terrence McGarr is your average teenager transitioning into young adulthood. He loves music and sports and is working two jobs as he prepares to start college this fall.

But growing up in a home where the religious belief forbids certain kinds of work between sunset on Friday to sunset on Saturday also makes him different. It meant missing out on the Friday night lights as a member of his Nashville high school's football team. And according to a complaint filed by the Equal Opportunity Employment Commission, it cost McGarr his job.

Left to Right: Pastor Bishop Luther Hill Jr. of Sabbath Day Church of God, Demas McGarr, Linda McGarr, Terrence, and Timothy McGarr.

Seafood restaurant chain Captain D's LLC stands accused of violating civil rights laws for firing McGarr after he declined to show up for work at 5 p.m. on New Year's Eve in 2005. McGarr claims that managers at the location where he had worked as a crew member knew he couldn't report to work before 6 p.m. when they hired him. But Nashville, Tennessee-based Captain D's counters that McGarr didn't ask for reasonable accommodation of his alleged religious beliefs as required by law and that the company would have faced a hardship in accommodating them.

The case playing out in Nashville federal court is among a growing number that allege discrimination on religious grounds that the EEOC has taken up. Last year, 2,541 cases were filed, up 8.6 percent from 2005 and up 83 percent from 15 years ago.

Christine Saah Nazer, a spokeswoman with the EEOC, said more religious diversity in the workplace nationwide, especially because of a growing immigrant population, is probably the key driver of the increase in religious bias filings. "As more people bring religion into the workplace, employers are dealing with religious accommodation issues more frequently," Nazer said.

One of the biggest spikes have been in alleged employment discrimination against Muslims, Arabs, and people of or that are perceived to be of Middle Eastern descent. That has been part of a backlash that has seen more than 1,000 such charges filed in the aftermath of the terrorist attacks of September 11, 2001.

Todd McFarland, associate general counsel for the General Conference of Seventh-day Adventists in Silver Spring, Maryland, said that he is aware of up to 20 cases that are currently in litigation that involve members of the Adventist church that lost their jobs because they couldn't work on the Sabbath. "We're moving to a 24/7 society and there's more hostility now toward religion for various reasons

than it had been in the past," McFarland said.

McGarr's case has to do with a requirement that employers accommodate religious beliefs of workers except to the extent doing so would create an undue hardship. That could include if it would cost the employer more than an insignificant amount of money or if it places a substantial burden on other workers.

Robert Covington, a recently retired Vanderbilt University law professor, said a 1977 Supreme Court ruling in a case that involved Trans World Airlines and an employee who because of his faith couldn't work from sunset on Friday to sunset Saturday made it difficult for workers claiming discrimination to win such cases. "The idea is a reasonable accommodation is one that's not absolutely cost-free but very low-cost to the employer," he said.

Kevin Sharp, an attorney with law firm Drescher & Sharp, P.C., in Nashville, who represents plaintiffs in similar cases, doesn't believe the bar for what constitutes undue hardship is that low.

Sharp questioned whether Captain D's exhausted reasonable alternatives for accommodating McGarr's beliefs, including scheduling employees in a way such that overtime pay wouldn't be required to cover the hours that he wasn't available to work.

Terrence playing the drums with Michael Banks who handles the film and video for the church.

McGarr said during his first three months at the restaurant, managers didn't schedule him to work before 6 p.m. on Saturdays, something that experts said if proven could make Captain D's claim of hardship from accommodating his beliefs less credible.

"They knew 100 percent, and would even tease me about my religion," McGarr said about his supervisors, countering Captain D's statement that it wasn't clearly aware of his beliefs.

Growing up in Nashville, McGarr remembers learning at an early age about values of hard work and honoring the Sabbath.

Lessons his father, Delmas McGarr, a masonry contractor, taught his five sons included never to sit down while on the job, said Terrence, now 19. "It shows you're not committed to the job," he said. "There's always something to do on the job."

The family attends Sabbath Day Church of God in Christ in Nashville, an independent church whose members, similar to Seventh-day Adventists, observe sundown Friday to sundown Saturday as a time for worship and rest from work toward making a living.

On many Saturday mornings, the younger McGarr can be found playing the drums during services at Sabbath Day. He hopes to start college this fall, majoring in the recording industry with plans to become a music producer. His dedication to observing the Sabbath is evident in the design of the schedule for his two current jobs—with a restaurant and in the electronics department of a retailer—such that he doesn't work on the seventh day.

McGarr knows a lot about such sacrifices. In his junior year at Maplewood High School, the wide receiver/cornerback on the school's team played junior varsity football Tuesday nights but sat out of the games on Friday nights because of the timing.

"It made me question myself—why am I playing football?" McGarr recalled. "I know it was something I wanted to do, but I wasn't able to do it like everybody else. Even though I sometimes feel like I missed out on a lot because of that, at other times I feel like maybe that was the way it was supposed to go for me."

Most cases such as the EEOC complaint involving McGarr are settled or resolved before going to trial. About 10.2 percent of the 2,541 charges of religious discrimination received by the EEOC last year resulted in a settlement with about $5.7 million in monetary benefits obtained for those that filed the charges and other aggrieved individuals. Overall, the EEOC concluded in 64 percent of instances that no discrimination had occurred, although the accusers could still file a lawsuit with the courts.

In its response to the EEOC's lawsuit, Captain D's said that McGarr failed to take advantage of opportunities that it offers to prevent and correct any discriminatory conduct. It said that the matter should be heard by an arbitrator according to terms of an agreement between McGarr and the company. It's unclear when that agreement was entered, but companies have been known to include language in employee handbooks to protect themselves from future lawsuits. Whether that agreement is enforceable would depend on reasonableness of circumstances when it was entered, said Covington, the retired law professor.

If Captain D's wants to initiate arbitration proceedings, it could file a motion to dismiss the case and to force arbitration, said Sharp, the lawyer with Drescher & Sharp, P.C., in Nashville.

Terrence (second from right) and fellow members of the Sabbath Day Church of God in Christ in Nashville, Tennessee.

Ronald Roberts, a spokesman with Captain D's, declined to comment on the case, as did Sally Ramsey, the EEOC's lawyer.

The EEOC complaint seeks monetary and other damages for McGarr. He's looking forward to that, but also is hoping that the outcome sends a message to Captain D's. "Hopefully they won't do anybody else like that that's keeping the Sabbath."

Getahn Ward is a freelance writer based in Nashville, Tennessee.

NOVEMBER / DECEMBER 2007

What Does Separation Of Church And State Really Mean?

BY: JOHN BAMBENEK

The much-bandied about phrase "separation of church and state" means different things to different people. To those from the secular humanist persuasion, it means that the state can make no public acknowledgment of religion, have no religious displays, recognize no tax exemptions for churches, and goes so far as to regulate even religious expressions of private individuals in the public arena out of line. One also hears that any attempt by others to "moralize" or use any religious values to argue for a policy should be silenced.

On the other hand, there are those who believe the matter is simply that the government should not establish an official state church, or that a church should not be anointing officials in the government. Other than that, people should believe and practice how they see fit. Both sides couch their arguments on constitutional theories, some involving Thomas Jefferson's "Wall of Separation" letter.

To consider this issue, it is important to look at the historical situation of the framers and what they intended. To recap, they were declaring independence from the king of England. There is one important title for the monarch of England that is relevant to this issue—Supreme Governor of the Church of England." Not only was the Church of England the official state religion (and still is), but the king himself was the head of that church. This ensured that his political reach not only extended in the public realm, but from the pulpit. The hierarchy of the church was subservient to the king. This led to abuses in both directions—those by the church and those by the government.

The founders did not declare independence from England because they wanted to set up a secular state. They declared independence because of a long train of abuses and usurpations of government power against its people. They were concerned about matters of tyranny, not theology. The Boston Tea Party was about taxes (and thus enshrined in American tradition the fine art of complaining about taxes), not about Baptists throwing Presbyterians' Bibles into the Atlantic. The Declaration itself made liberal use of religion in general, as did the founders in their public statements. Even in Jefferson's "Wall" letter, he expresses religious sentiment and asks for prayers. It's obviously clear; it isn't religious expression they are worried about.

The choice of phrase is important, "separation of church and state." Jefferson doesn't say separation of religion and state. He is talking about *institutional* separation. Ireland's official church is the Roman Catholic Church, as is Poland's. In England, it's the Church of England. These aren't religions in general but specific religious institutions. No nation has "Christianity" as the official state religion for a very good reason. The reason is that there's about 50,000-some odd flavors that run the gamut from the Mormons to the Unitarians. Some Christians say Jesus established a hierarchical church, others say He was a social activist, still others say He was an anarchist. Saying Christianity is the official state religion would border on effective meaninglessness. It wasn't the ideas that the founders were afraid of, which is why they were perfectly free praying together and expressing religious sentiment in public documents and speeches. Institutional corruption and tyranny were their concerns.

The results of institutional mingling of churches and governments are quite clear in history and it hasn't been beneficial for the state or

the church. However, this is a far cry from divining an intent that projects the idea that "religion is all that's wrong with the world" upon the founders. There was a camp among the founders who believed that a free society required a religious people and yet still continued to allow free association between the various churches.

However, the crowd pushing separation most vigorously is also the crowd that's trying to regulate certain religious beliefs out of existence. Pharmacists aren't allowed to express their religious sentiments about abortion and retain their jobs. The argument is that they shouldn't take the job if they don't follow a predefined ethical construct approved by the government. Catholic hospitals are consistently fighting attempts to force them to provide abortions despite their clear religious teaching. Catholic Charities of California is required to recognize "gay marriage" despite their own beliefs. Schoolchildren (a.k.a. individual citizens not to be confused with government officials) are told that they aren't allowed to pray or have Bible studies on school property. In one case, schoolchildren were threatened with federal prison if they dared utter a prayer on their own volition during a graduation ceremony. The IRS has investigated churches for preaching against abortion. In short, the wall of separation is growing to enforce a certain religious orthodoxy and not protect the free expression of religion that was also mentioned in the First Amendment.

The irony of setting up such a system where beliefs are regulated to some level of appropriate orthodoxy on issues such as abortion is that the sword cuts both ways, depending on the whims of government. When right wing churches complained about IRS harassment, the left wing told them to stop talking about abortion instead. However, when an antiwar sermon brought the IRS, the left wing cried foul. The problem with state regulation of religion is that its regulation will serve its own interests, usually on sale to the highest bidder. The founders were rightly concerned about this abuse, which is why in the same breath of saying the state should establish no official religion, it should also in no way restrict reasonable expressions of religion.

Contrary to the opinion of some, the First Amendment doesn't require regulating religion into hiding; it requires that church and state remain institutionally separate. The mere expression of the word "God" in a speech does not a theocracy make.

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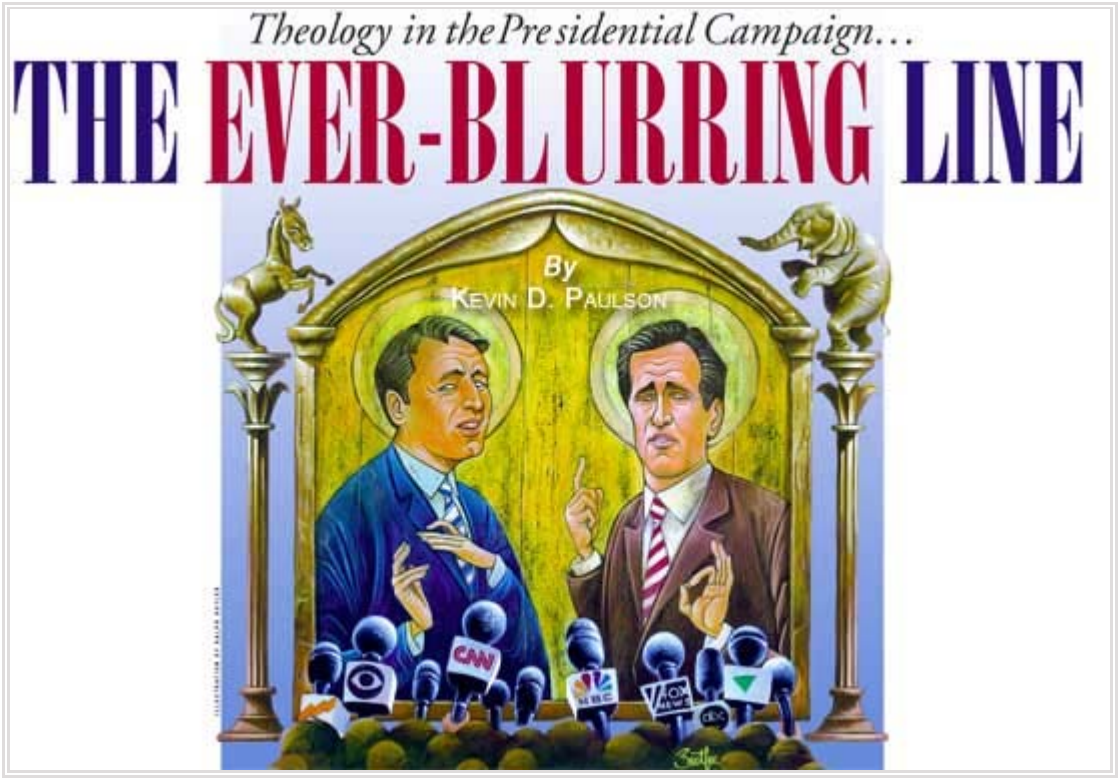
NOVEMBER / DECEMBER 2007

The Ever-Blurring Line

BY: KEVIN D. PAULSEN



The 2008 presidential season is not only starting earlier than any in U.S. history; it is also setting a new record for the raising of issues that are largely, if not purely, theological.

Recently on NBC's *Meet the Press*, former North Carolina senator John Edwards was asked, "Do you believe homosexuality is a sin?" On June 4, 2007, CNN's Paula Zahn asked the same question of New Mexico governor Bill Richardson and Connecticut senator Chris Dodd. Neither was asked whether they believed the practice or proclivity in question was wrong, or immoral. At least by certain standards, wrongness and immorality might be defined by means other than religion. But to ask a politician about sin is to deliberately interject theology into civic conversation.

Sin, according to the Bible, is the transgression of the law of God (John 3:4). How to define God's law, as well as deviation from it, is a purely theological question. To ask a seminary or pastoral candidate such a question is one thing. But should a political candidate, in a country whose Constitution forbids religious tests for public office, be asked such questions in a strictly political context?

Also on June 4, 2007, Senator Edwards was asked by CNN's Soledad O'Brien what was the biggest sin he had ever committed. I couldn't help thinking how even I, as a pastor, have never been asked such a question! Maybe Nathaniel Hawthorne's "The Minister's Black Veil" also gives a model for political rectitude!

In their April 2007 debate at the Ronald Reagan Presidential Library, the Republican candidates for president were asked if they believed in evolution. I noted with interest that the question was not whether creationism as well as evolution should be taught in the public schools—a divisive political issue in much of the country just now. Rather, the issue was whether the candidates personally believed in the theory of evolution. The answer given by Senator John McCain, affirming his belief in evolution, yet declaring his sense of God's presence while hiking the Grand Canyon, likewise raised the issue of whether politicians now feel constrained to define what God's role may or may not have been in the process of natural origins.

In a later debate, former Arkansas governor Mike Huckabee was asked by CNN's Wolf Blitzer whether he believed the earth was

created in six literal days, 6,000 years ago. As in the previous exchange, the question was not what public policy should be toward the teaching of the origin of life, but rather, what a candidate for public office believes regarding biblical interpretation and chronology.

Also noteworthy in the April Republican debate was a question to former Massachusetts governor Mitt Romney, as to whether he agreed with the Catholic bishops excluding certain politicians from Communion. Quite rightly, Romney replied that such a decision belonged solely in the hands of the bishops, representing as they do a private institution. But Romney's regard for such privacy didn't seem to extend to his relationship with his own wife. On the evening of May 13, 2007, when interviewed by CBS's *60 Minutes*, Romney was asked whether he and his wife had had premarital sex—a question many would consider much more private than a church's policies regarding a public ceremony like Communion. But without hesitation, Romney answered the question, assuring all that he and his wife had indeed been chaste before marriage.

The theological quotient was even more pronounced in the August 19, 2007, debate among the Democratic presidential candidates at Drake University in Iowa. One online viewer asked the candidates to "define their belief in a personal God," and also asked their understanding of the power of prayer, whether it can prevent natural and other disasters. All but one of the candidates—former Senator Mike Gravel of Alaska—proceeded to affirm the importance of God and prayer in their lives, and the extent to which they believed such power could influence personal or other events in the world.

Appropriately, in this writer's view, CNN's Paula Zahn asked on her own show the evening of May 14, 2007, whether we will soon hear candidates being asked whether they believe in such doctrines as the immaculate conception. Just how far, Zahn asked, is theology going to be permitted to define American politics? On *the following hour that same night, Sojourners* editor Jim Wallis wondered aloud whether future Congresses might find themselves engrossed in exegetical debates over the book of Leviticus.

If the early skirmishes are any clue, the 2008 election could well chart the extent to which an unofficial theological standard will henceforth be permitted to measure the beliefs of those seeking political office in the United States.

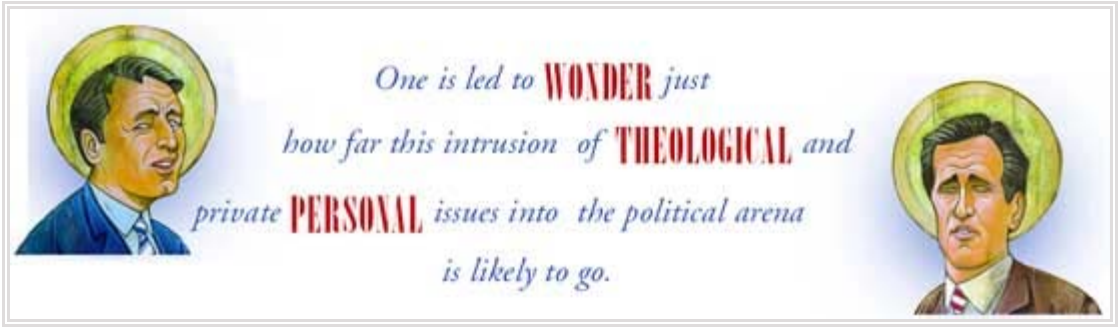
The Constitution

The words of the U.S. Constitution on this subject are very clear. Article VI, clause 3 declares:

"No religious Test shall ever be required as a Qualification for any Office or public Trust under the United States."

"Required," of course, seems in context to refer to civil law codifying religious standards for political candidates. Enactments of this sort are less the focus of this article than the unofficial expectations of the public. Whatever the Constitution or civil legislation might say, will the questions of voters or the media end up establishing a de facto religious test for public office?

A recent *Time* magazine article explored this issue with the following questions: "What does the Constitution mean when it says there should be no religion test for office? It plainly means that a candidate can't be barred from running because he or she happens to be a Quaker or a Buddhist or a Pentecostal. But Mitt Romney's candidacy raises a broader issue: Is the substance of private beliefs off-limits? You can ask if a candidate believes in school vouchers and vote for someone else if you disagree with the answer. But can you ask if he believes that the Garden of Eden was located in Jackson County, Mo., as the Mormon founder taught, and vote against him on the grounds of that answer?"[1]



Of course, the First Amendment also protects free speech, which means reporters and voters have the right to ask candidates any question they wish. The problem arises when candidates fail to draw lines regarding which questions they will or will not answer. In the present writer's view, the best answer to the question Senator Edwards was asked regarding homosexuality and sin would have been, "How sin is defined is a strictly religious, theological question. This interview is not for a position in some church organization or ministry, but for a public office. What I believe about sin and righteousness is a personal conviction, between God and me and the religious community in which I hold membership. As president of the United States, I must be president to those of every faith and of none. Accordingly I cannot apply my convictions to the sphere of civil law in such a way as to restrict the choices of those who don't share my

beliefs."

And in the present writer's view, the best answer Mitt Romney could have given to the question regarding his and his wife's premarital chastity would have been, "None of your business. That is between me, my wife, and God." Sadly, such regard for personal privacy has practically disappeared from the vocabulary of public servants and political aspirants these days.

Where Will It End?

One is led to wonder just how far this intrusion of theological and private personal issues into the political arena is likely to go. Is a candidate's sexual history, before and after marriage, fair game for prying and probing, subject to all the sleuthing and attempted verification made necessary by rumor and contrived tales? Will candidates feel themselves constrained to answer whether they believe in the Trinity, the virgin birth of Christ, or His bodily resurrection? Will we one day hear presidential candidates arguing over different beliefs regarding the inspiration and authority of the Bible? Will mainstream public opinion, despite the Constitution, craft for itself an unwritten code of moral and religious orthodoxy for those seeking political office?

As a conservative Christian pastor who is both a biblical creationist and a biblical moralist, I feel deeply the pain of those who find their faith and convictions battered constantly by societal trends and intellectual scorn. But I must nevertheless remind myself that the same God who declared amid Sinai's thunder, "Thou shalt not commit adultery" (Exodus 20:14), also declared in the person of His Son Jesus Christ, "My kingdom is not of this world" (John 18:36). It does us well to remember that the latter statement, made to the Roman governor Pontius Pilate, was offered in answer to Pilate's question regarding the charge that Jesus sought to establish an earthly kingdom (John 18:33; Luke 23:2, 3). This was all that mattered to Pilate, as a Roman official, in this particular exchange. Theological disputes between Jesus and the Jewish authorities were no concern of Pilate's. But if Jesus intended to establish His principles through the acquisition and use of civil power, it would indeed be a matter of which the Romans would take note.

How Faith Informs Politics

When candidates are asked the extent to which their faith informs, or will inform, their judgment as political leaders, we need to stop and consider the most basic purpose of civil government.

Government exists for the purpose of making and enforcing laws. The whole notion of governing requires the existence of laws. Laws, by their very nature, compel the compliance of citizens, as is recognized by all—from traffic speeders to tax evaders—who are caught violating such laws. This compulsion invariably involves the infliction of penalties on lawbreakers, without which the law has no meaning.

When, therefore, a politician is asked how his or her religion will inform judgments made while in office, the effect of such faith on the politician's personal conduct—marital fidelity, personal finances, etc.—is not the real issue. Rather, the issue is whether such faith will influence the laws that one, as a political leader, is responsible for enacting or rendering judgment upon. This inevitably raises the issue of whether such a one will use civil power to force the convictions of one's faith on the public, many of whom do not share that faith. What this means, in simple terms, is that to speak of faith "informing" politics is to speak of the extent to which faith will be enforced on society—those of all faiths and of none—through civil law.

The argument will be raised, of course, that laws against murder, theft, rape, perjury, racial injustice, and other practices can also be informed by faith. And certainly this is true. But laws that prevent the infliction of physical harm on people or their property against their will, lie on a different plane from those which affect consentual, abstract convictions or choices. The first set of laws are the proper domain of civil government, whether or not faith informs such decisions. All ideas, of course, have power, and the decision of America's founders to protect free speech, a free press, and the free exercise of religion represented a choice by the state not to restrain the power, influence, and acceptance of such ideas. If and when such ideas result in physically destructive conduct directed at others or their possessions, that is one thing. But protecting the unfettered commerce of ideas or consentual practices is what American constitutional liberty is all about.

The Disconnect

Following the 2004 presidential election, C-SPAN hosted a discussion that included conservative Christian writer Nancy Pearcy, a strong advocate of the Religious Right and its religio-political agenda. Pearcy spoke at length of the "disconnect" between the personal convictions and policy statements of candidates who, like John Kerry and Rudy Giuliani, oppose abortion personally while refusing to codify such opposition through civil law. Such thinking was tarred by Pearcy as intellectual schizophrenia, adding further to the perception of "flip-flopping" hung on Senator Kerry during the 2004 campaign. The notion was clearly conveyed that if a candidate's personal convictions are genuine, they would indeed be part of such a one's political agenda.

I can't think of many ideas more dangerous, and absurd, than this one. If I, as a Seventh-day Adventist, held public office, should my convictions on the sacredness of the seventh-day Sabbath be viewed as phony if I refused to sponsor legislation that closed all businesses on Saturday? Is my belief in orthodox Adventist doctrine insincere because I refuse to enact such teachings through civil law? Are convictions genuine only if one seeks to force them on others? What Pearcy dismisses as some strange "disconnect" is in fact

the guarantor of liberty—the wall of separation between the "garden of the church" and the "wilderness of the world," of which Roger Williams spoke so long ago.[2] Without this wall, we are back in medieval Europe and Puritan New England.

Where the Buck Stops

In the end, politicians can't stop voters or the media from asking whatever questions they wish. But they can draw the line, rebuilding the wall between church and state, by simply refusing to answer certain questions. It is they who need to steadfastly refrain from addressing certain issues, declaring them off-limits for political conversation. This is the only place, in a society of free speech and a free press, where the buck must stop.

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1 Nancy Gibbs, "The Religion Test," Time, May 21, 2007, p. 40.
2 Leonard W. Levy, The Establishment Clause: Religion and the First Amendment (New York: McMillan Publishing Co., 1986), p. 184.
