

LIBERTY



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Fusion

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Published in the [September/October 2010](#) Magazine
by [Hugo Black](#)

Zealous watchfulness against fusion of secular and religious activities by Government itself, through any of its instruments but especially through its educational agencies, was the democratic response of the American community to the particular needs of a young and growing nation, unique in the composition of its people.

Justice Hugo Black, for the majority, in *McCollum v. Board of Education*(1948), 333 U.S. 203. 215, 216.

Author: [Hugo Black](#)



Religious Dialogues

libertymagazine.org/article/religious-dialogues

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by [Borge Schantz](#)

In the field of international relations, the use of the word *dialogue* pops up increasingly in news reports and articles. Dialogue is assumed to be a great help in a multipolitical, religious world. It is invoked in order to solve the manifold and increasing challenges and problems that arise in communities and nations. People from various cultures, nations, religions, and linguistic groups meet in dialogue. Dialogue is stressed as a way to move toward the supreme answer to tensions, discords, and threats of all kinds. It is said to lead to cooperation between parties in a dispute.

The word dialogue has its root in the Greek and has the simple meaning of "a conversation between two or more people."¹ In ancient Greece, however, the philosopher Plato understood dialogue as the endeavor to reach a truth not known. For him and the Greek mind, the conversation (dialogue) will bring the partakers in the right direction to a truth.²

The concept in modern use is expanded and changed to cover dialogue as an exchange of ideas or opinions on a particular issue, especially of political or religious character in order to reach an amicable settlement or in some cases an agreement. Put in other words, dialogue has the main purpose of creating an irenic atmosphere and solving problems in all kinds of settings, on all levels of society. People meet to share their perspectives and experiences about difficult issues with the purpose of not only building deeper understanding of contentious issues but also helping resolve conflicts. Dialogue is therefore not only about understanding and learning. It is also about judging, weighing, or making decisions, based on convictions, proof, and arguments.

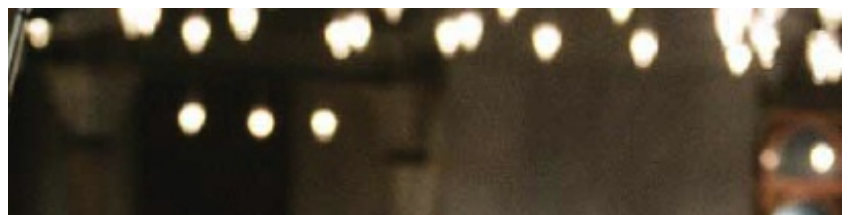
Dialogue or Debate

For these reasons most—if not all—reported dialogues are really debates or discussions. Since a dialogue originally had the aim at seeking common understanding, listening to each other enlarges the possibility for change of one's own viewpoint and a temporary suspending of one's beliefs. Debates are to prove the other part to be wrong, win the arguments, stress one's own point of view, defend assumptions to be truth, criticize opponent's positions, and search for differences and weaknesses in the opponent's arguments.³

It is easy to see that in the modern use and applications of the term as used in reports and the media many dialogues today should really be termed debates. However, because of a need to be politically correct in sensitive situations, words such as *debate*, *discussion*, and *confrontation* are not ideal. They are replaced with milder terms.

Dialogs Between Religious Groups

I want to address dialogue between religious groups. Western nations are currently accepting a comparatively high number of immigrants—refugees and job-seeking people—with various cultures and representing different world religions.



The new citizens arriving in Europe and North America can be classified in three different religious groups: Christians, Muslims, and adherents to Asian religions. In North America, Christians from South and Central America are the majority. In Europe the main group are Muslims. Immigrants from the Far East are a minority on both continents. Adherents of all three branches of world religions find their way to the two continents.

Immigrants from Christian countries do not present any major clash of culture and customs. An upbringing in a nation with Christian traditions helps them in the process of settling into these new environments.

The Asian immigrants have religious backgrounds in Hinduism, Buddhism, and related religions. Generally their frame of beliefs is more of a philosophical system with religious characteristics. Their gods are not revealed as central conceptions. Focus is on a self-realization directed to the inner man. The stress is generally not on lifestyle elements that might cause tensions, even problems, with the culture and customs of their chosen host nations.



With the Muslim immigrant the situation is somewhat different. Islam is a prime example of the unique influence holy books (Koran and hadith), with their multitude of laws and regulations, have on the lifestyles of the adherents. A comprehensive law-system puts the same importance on matters as worship, rituals, politics, and laws that deal with murder, rape, theft, and other criminal acts. The law also has detailed rules for trade, property rights, and inheritance. The sharia is rather detailed in matters we would classify as belonging to private life and family relations. Sharia has strict rules for worship and rituals in connection with Islam.

These strict religious rules go way beyond the personal way of life and will also serve as guidelines for the society in which the Muslim can better live up to the Islamic ideals. This will in several areas bring the faithful believer into a dissonance with any Western society, both on national and local levels. Tensions can often be cleared with a little flexibility. But rights are often demanded in a provocative and aggressive way. Dialogues are in place and understanding of the central issue is growing. A strict adherence to the rules of Islam is no doubt guaranteed by the doctrine that admission to the Muslim paradise is tied in obedience to the rules. What perhaps is the greatest obstacle to coexistence is that Muslims believe that their law is the basic law for all humankind. For that reason the Muslims are to strive to have their law introduced in all countries.⁴

These sharia-based worldviews, formalities, and attitudes create tensions, even opposition, in Western settings. They necessitate negotiations and dialogues, which take place at community, national, and international levels. To this must be added that forums also are taking place on a religious/theological stratum. The general principles and arguments set forth in this article will mostly be applicable to the religious/theological dialogue.

Deities, Divine Laws, and Dialogue

The foregoing observations are based on my experience of employment on four continents, where I have been active in dialogues between various Christian traditions, Muslims and Christians, as well as Christians and African Traditionalists. In recent decades I have particularly observed the dialogues on a West-European platform. These dialogues are in the context of a growing Muslim population putting forth their demands to live their lives according to Islamic rules and regulations. I have also been made acquainted with various international dialogues in which Christians and Muslims attempt to find similarities and points of agreement between their two monotheistic religions.

Dialogues on political, communal, and international affairs can proceed in a democratic way, when parties have agreed on procedures, and be solved amicably. New situations can often lead people and parties to agree on another way of doing things.

However, in a religious dialogue, in which both parties are faithful to their convictions, there are issues that cannot be solved even by the highest degree of flexibility. They are beyond the give-and-take business. In such dialogues, matters are complicated—as regulations for the daily life and rules for rituals generally have their origin with the deities. They are from the Omnipotent and as divine *absolutes* they cannot be negotiated, changed, or even questioned. To this must be added that obedience to the divine laws is in the case of most religions a condition for admission to a blessed state after death. This makes full conformity to the divine laws necessary and attractive.

It could be claimed that in the Muslim/Christian dialogue the Christians generally have more room for flexibility and conformity. In Christianity, divine laws and regulations are condensed to the brief and direct precept in the Ten Commandments explained, interpreted, and applied by Jesus Christ both in words and in deed. Examples from the lives of Bible characters, from both the Old and the New Testaments, can bring further instructions as how to put the rules into practice. There is room for certain compromises when chosen and accepted biblical absolutes are not touched. To this must be added that in the late Middle Ages eras with Reformation, Renaissance, and Enlightenment, many Christian traditions undertook an understanding of principles that granted freedom of speech and religious liberty to people of other faiths.

However, the detailed Islamic laws collected in sharia, in minute detail, give rules on how the individual should live and act. Muslims believe it covers all commands and wishes from Allah and is the condition for living a life that is acceptable for salvation. No interpretations or adaptations are allowed. What is the rule in Saudi Arabia is also the rule in Switzerland.

Knowledge and Terminology

Dialogues between representatives of two different religions or even diverging factions in the same religious group can have at least two valid reasons.

Dialogue can be called to solve matters relating to the smooth running of the local society, and revolve around cases in which obedience to religious rules might collide with established traditions and practices of neighbors belonging to another religion. Included in such a dialogue might be days with public religious festivities, architecture and sites of places of worship, classroom schedules and subjects, and school vacations.

The other reason is more academic. A dialogue can be a grand opportunity to share understanding and explore greater knowledge and promote communication. People who are appointed to be partakers in such dialogues should ideally prepare themselves for the meeting by gaining knowledge of the beliefs, rituals, and history of the religion held by persons on the other side of the table. These studies should especially seek to find out the untouchable absolutes and the negotiable alternatives, as well as discover the religious alternatives that in some regional circumstances are negotiable.

In these exchanges of views where there is a search for similarities as well as dissenting points, participants have to be appreciative of terminologies. Similar words in religious terminology can mean quite different things and cover dissimilar concepts. For instance, the word *Eucharist* (Communion) does not mean the same to Roman Catholics as it does to Lutherans. In a dialogue between the two traditions the term has to be defined. Similarly, the word Allah (Arab word for deity) is used both in the Islamic Koran and in Arabic translations of the Bible. However, the word itself calls forth different conceptions in the minds of Muslims in the mosques and the Christians in the Assyrian churches in Iraq.

Linguistic anthropology deals with what are called false friends. False friends are pairs of words in two languages or dialects that look and sound similar but differ in meaning. Take, for instance, the word gift in English and German. In English it is a term for an "object that is given." However, in German the word means "poison." Even in the same language the words can be false friends. To "table a motion" means in England to place an item on the agenda, while in the United States it means exactly the opposite—to remove it from consideration.⁵



False Friends in Religious Terminology

In the same way I suggest that there is a critical and dangerous "false friends" terminology that can completely misdirect both the dialogue and the reporting of meetings where Christians and Muslims are in dialogue.

Points in the agenda for the discussions often use short captions on the most important doctrines in Christianity and Islam. They can in both religions use brief headlines for things such as a belief in One God, Holy Books, Angels, Second Coming of Jesus, and Day of Judgment. To these captions could be added Heaven, Punishment of Sinners, Resurrection, Salvation, Prayer, Charity, etc.⁶

When they meet around the table, however, participants soon get into debates on the vast differences on what the headlines stand for in the two religions. On both sides of the table they believe in one God. However, the concepts covered by the brief captions are in this case vastly different. The procedures connected with the day of judgment as taught by the Christians and Muslims are hardly comparable. The events before the second coming of Jesus, the reasons for His coming, and the result of this climax of history are so contradictory that it strictly should not have the same headline. The same goes for most of the other beliefs. The captions for subjects to be discussed can be the same. However, hopefully, the debate itself will reveal that the participants have done their homework and together the parties have discussed issues, touched upon the absolutes, and dealt with alternatives and negotiable doctrines in a way that will further cooperation.

Problematic Results and Reporting

Dialogue is a very delicate process. That is especially true for the Christian/Muslim kinds. Many obstacles often strain the conversations. Confrontational communication results in discussion and debate. Obstructions include exercise of power, mistrust, external influences, distractions, poor communication conditions, and even fear of retaliation. These factors can all prevent a good result from emerging. The divine absolutes that guide both religions in their belief systems, a strong factor in culture and customs and directly responsible for the formation of lifestyles, are not up for change and adaptation. In some cases they are not even open for debate. Dialogue between Muslims and Christians can hardly result in alterations; even modification is subject to much interpretation.

Another misleading outgrowth of dialogue is an agreement made by unrepresentative groups. One faction may see their own religion through very different spectacles than the mainstream or another faction. And agreements with so-called moderates in either Christianity or Islam may be perceived by the mainlines in each as only between nominalists, liberals, or even heretics and apostates.

In the brief reports in the daily press the results of these dialogues are in many cases a list of headlines that mention that the two groups in the debates agree that both religions believe in one God, holy scriptures as the authority, paradise and hell, and so on. However, the detailed facts the captions in many cases stand for are completely different concepts in the two religions. That is deceptive to the common persons on both sides who do not claim to know the actual details of a neighbor's religious beliefs.

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1 *The American Heritage Dictionary*, 1982.

2 *Dialog og debat og kritik*. By John W. Hoerbo. Jyllands Posten, February 10, 2010.

3 http://en.wikipedia.org/wiki/Bohm_dialogue.

4 Borge Schantz, *Islam in the Post 9/11 World* (Grantham, U.K.: Autumn House, 2003). p. 36.

5 http://en.wikipedia.org/wiki/False_friend

6 Paul Marshall et al., *Islam at the Crossroads* (Grand Rapids: Baker Books, 2002), pp. 36-39.

Author: Borge Schantz

Christian Versus Muslim

 libertymagazine.org/article/christian-versus-muslim

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The previous articles in this series on religious wars examined the ferocious 13 decades from the Protestant Reformation (c. 1520) to the Peace of Westphalia (1648), in which Europe was torn asunder by wars resulting from the post-Reformation fragmenting of Christendom. However, the wars between Roman Catholic and Protestant were not the only religious wars that began in the early sixteenth century and lasted to the middle years of the seventeenth century. Alongside them, particularly in the sixteenth century, were renewed wars between Christian and Muslim, which led to an efflorescence of the ethos of "crusade."*

In the late fourteenth century and throughout the fifteenth century the Ottoman threat was localized in the Balkans. Then, in the sixteenth century came the extraordinary westward expansion of the Ottoman Empire under Selim I and Suleiman I "the Magnificent." On the southern side of the Mediterranean, Egypt, Tripoli, and Algiers all fell under the rule of the "Sublime Porte" (as the Ottoman government was known); on the northern side, its armies moved into Christendom.



Surrender of Belgrade to Suleiman I "the Magnificent," in 1521. In 1521 Suleiman besieged and captured Belgrade, site of Janos Hunyadi's talismanic victory over the Ottomans in 1456; in 1522 he besieged and captured the stronghold of the Knights of St. John on Rhodes (they moved to Malta, which remained under their government until 1798); then on August 29, 1526, Suleiman decisively defeated Louis II, king of Bohemia and Hungary, at the great battle of Mohács, killing the king and destroying his army.

Since the late fourteenth century Hungary had been the defensive wall of Latin Christendom. Now it was gone. In 1529, the Turks laid siege to Vienna. Although they were repelled, Ottoman armies thereafter were encamped on the eastern frontier of Germany and the Holy Roman Empire (whose Hapsburg ruler was also the rightful successor to Louis II as king of the rump of Hungary remaining under Christian rule). Muslim fleets ranged across the Mediterranean and even into the Atlantic, attacking the coastal regions of Italy, France, and Spain, and even (in the seventeenth century) raiding southern England and Ireland.



The two empires, Ottoman and Holy Roman, fought each other in eight wars in the 80 years following Mohács, with major hostilities in 20 of those years, including throughout 1541–1543 and 1593–1604. In the course of these wars, Ottoman armies threatened (and reduced) those parts of Hungary in Hapsburg hands, as well as Austria and Bohemia. Meanwhile, the Ottoman naval threat (which now incorporated the Barbary corsairs) remained potent, with Muslim victories outweighing famous Christian successes at Tunis (1535) and Malta (1565). In 1571 Cyprus, once a significant independent Christian kingdom, was conquered by the Ottomans (now ruled by Selim II).

The naval balance of power only shifted in the last quarter of the century, after the great victory of the Holy League at

Lepanto in 1571—the Christian fleet, largely drawn from Venice and Philip II's Spain, but including contingents from a number of Italian city-states and from France, decisively defeated the main Turkish fleet. Westerners and Ottomans alike saw the result as a manifestation of divine will. While the lost ships could be and were rapidly rebuilt, the experienced crews and soldiers could not be replaced quickly. The quality and military efficiency of Ottoman fleets significantly deteriorated; although the Turks went on to enjoy military successes after Lepanto, the decline in effectiveness of the navy and the cost of war helped induce the Ottomans to make peace with the Spanish Monarchy in 1578.

During the seventeenth century the Sublime Porte was to be persistently troubled by revolts and other internal problems, and was distracted by the threat to its eastern borders from Safavid Persia—Muslim but hostile to the claims made by the Ottoman Sultans to the Caliphate (or headship of Islam). Yet Ottoman military capability remained potent. In Central Europe, although the Austrian Hapsburgs were able to repel invasions, they could make little headway in attempting to regain territory in Hungary. Ottoman armies gave the Poles a drubbing in the early 1620s. The greatest extent of Ottoman control of the former Hungarian kingdom was actually reached in 1662, after a Turkish victory against a briefly resurgent Transylvania (the western part of what today is Romania, but historically regarded as part of Hungary).

North Africa

In the meantime, there was a renewed threat to Portugal and the Spanish Monarchy from North Africa. Even after the conquest of Granada in 1492 there had still been a good deal of contact between the Muslims of Africa and those under Spanish rule. When the Ottomans were at Spain's throat in the 1560s, the Muslim "Moriscos" in southern Spain rebelled, and they were aided by volunteers from across the straits of Gibraltar, including from the kingdom of Fez, which was not under Ottoman rule. The Morisco Revolt took three years to put down and the danger of fighting Muslims on two fronts led Philip II of Spain to an extraordinary act of repression. He ordered the resettlement of some 80,000 Moriscos, who were driven from their homes and dispersed across the Spanish kingdoms; but the problem was not solved and in 1609 Philip III took the even more radical step of expelling the Moriscos from Spain entirely, and forcibly deporting them to North Africa—one of the first examples of ethnic cleansing.

Meanwhile, the Ottoman expansion into the Barbary States, and the naval threat they posed from there, led the Hapsburgs to conduct a series of operations against the Mediterranean North African littoral. In the Maghreb, the powerful kingdom of Fez, which had been ruled by the Berber Wattasids, was conquered in the 1540s by the Arab Saadians from Marrakech; zealous Muslims, whose king claimed to be descended from the prophet Muhammad, they were committed to ongoing holy war against Christians and pagans. The result was conflict with Portugal, which had been gradually expanding in what is now Morocco since 1415—a conflict in which both sides saw their enemy in terms of religious, as well as of economic and political, rivalry and hostility.

In 1578 the youthful Portuguese king Sebastian I, who had been raised by Jesuits and believed that with God any odds could be overcome, decided to take an army to North Africa to drive the Saadians back. Sebastian and his nobles regarded their war as a crusade, and were not alone—Sebastian was able to attract volunteers from a number of European countries to his flag. But believing God would bring victory, his conduct of the campaign was almost unbelievably foolhardy and the result was one of the most crushing defeats in history at the battle of Alcazarquivir, in which Sebastian himself was killed, along with many of the country's nobles. The end result was the loss not only of Portugal's North African enclaves but also of its independence—the fatally weakened kingdom was swallowed up by Philip II of Spain and lost its independence for 80 years.

Christian Responses

For much of the sixteenth century, then, there was an immediate and direct Ottoman threat to the Hapsburg rulers of Austria (and the Holy Roman Empire) and the Spanish Monarchy (and its Mediterranean empire, though not its New World colonies), to the princes of Germany, to the Papal States, the Serene Republic of Venice and the other Italian states, and to the kings of Portugal and of Poland. What was in danger was more than just the loss of some territory. Ottoman aspirations and ambitions seemed limitless, and after the dramatic collapse of Hungary in the 1520s, the ravages of the Ottoman fleet, and the loss of Cyprus, there seemed a real prospect of a Muslim conquest of Germany, Italy, and perhaps parts of Spain. The Ottomans posed a clear and present danger to most of the chief powers of Europe.

Equally, in the conflict between Portugal and Fez, because religious as well as geopolitical factors were involved, a peaceful settlement to hostilities was impossible—both sides regarded the other as the enemies of God, with whom

there could be no compromise. In the end, a major power, Portugal (which had extensive colonies in South America and Southern Asia), was reduced to a mere possession of Spain, as a result of waging war beyond its means. But the logic of war with "the infidel" was that the normal dictates of prudent policy could be disregarded.

The potency of the Muslim threat and that from the Ottomans, in particular, was recognized all over Europe and attracted a response from much of Europe. It periodically submerged geopolitical rivalries and even Catholic-Protestant confessional hostilities. This is not to say that Christendom was united: the rivalries of the Western powers made it difficult to create effective, lasting alliances; and some states, especially the French, were prepared to ally with the Turks. One reason for Ottoman success in the sixteenth century, then, is that it faced a disunited enemy. When Christians did cooperate, they often did so very effectively. For example, when the Turks besieged Malta, the headquarters of the Knights of St. John, in 1565, it prompted Italian and Spanish cooperation, which ultimately raised the siege. The grand alliance that resulted in the Crusade of Lepanto brought a famous victory and one that was, in the long run, decisive.

The failure of Christians consistently to present a united front in response to the Islamic challenge was, to many people in Western Europe, a shame and reproach. Although the French crown never sent an army or fleet against the Ottomans in the sixteenth century, its failure to do so, and its periodic alliances with the Sublime Porte, were unpopular in France, since many of the French nobility, like their medieval forebears, believed they should crusade against the Turks, not ally with them. In 1571 the French crown considered a detailed and serious proposal to join the Holy League; though it was rejected, in the short-lived periods of peace between the bitterly contested French wars of religion, French noblemen and their followers served as volunteers in campaigns in the Mediterranean, including the Crusade of Lepanto. After peace was restored in France in 1598, a French corps joined the Holy Roman Emperor's army and served in Hungary.

Furthermore, while the Reformation created a confessional divide, many Protestants still regarded fighting Muslims as a Christian duty. Lutheran propaganda in Germany was vehemently anti-Turkish, as well as antipapal. There was an avid market in England and the Netherlands for histories of the Ottomans and of Christian resistance to them, as well as for news reports of Christian victories (and defeats) in battle with the Turks. English and Dutch writers of the 1570s and 1580s did not deride Sebastian of Portugal's disastrous "crusade" to Morocco, even though Sebastian was an avid persecutor of heretics; instead, they praised him for seeking to fight the infidel.

Protestants were not just *interested* in the struggles of Catholic Christians with Muslims; they joined them. Lutheran troops were part of the successful defense of Vienna in 1529. Hungarian and Transylvanian Calvinists initially made common cause with Catholic fellow countrymen in opposing the Turks. English volunteers, both Protestant and Catholic, served as volunteers in the Holy Roman Emperor's army in Hungary in the mid-1560s and again in the 1590s; they also served in the Spanish fleet in the Mediterranean in the 1560s, and in the Crusade of Lepanto in 1571, which served to check Ottoman maritime expansion. French Huguenots likewise joined French Catholics in the Crusade of Lepanto and in Hungary in the late 1590s. Although William of Orange, leader of the Dutch Revolt, made overtures to the Ottomans to make common cause against Spain, in 1578 he sent troops from the Netherlands to aid Sebastian in Africa, because the Muslims were still regarded the enemies of all Christians—Protestant as well as Catholic. Thus, Dutch, German, English, and Italian soldiers served the Portuguese in the Maghreb.



Later, Maurice of Nassau, William of Orange's son and successor as leader of the Dutch republic and a zealous Calvinist, was interested in helping the Turks' Christian vassal states in the Balkans in their struggle to obtain independence. In 1621 England and the Ottoman Empire engaged in a brief naval war in the Mediterranean that was warmly approved of even by Puritans, who generally opposed their government, because it had not joined the Thirty Years' War on the Protestant side. Puritans did not regard this naval war as a distraction from the serious business of fighting expansionist Catholicism, for they still saw Islam as the enemy of Christendom.

Christian-Muslim Conflict and Religious Freedom

The long series of wars between Christians and Muslims served to entrench the image of the Turk as enemy of all Christians, yet at the same time, it also served to promote a degree of religious freedom in Central Europe. This is ironic and was partly unintentional, a by-product of the intensity of the conflict between the Ottomans and the Holy Roman Emperor.

The emperors needed the financial support of Lutheran princes and the troops they could raise, in order to defend the eastern borders of the empire. In consequence, they employed Lutheran nobles as soldiers and diplomats, and allowed limited religious freedom in Bohemia and even in western Austria (around Salzburg). At one point in the late sixteenth century, the imperial ambassador in Constantinople was a Lutheran, who had his own private Protestant chaplain, alongside the officially appointed Catholic chaplain, who catered to the majority of the embassy's staff. The Protestants of Salzburg only finally lost their liberties in the 1730s—an unexpected result of a series of victories over the Turks in the late seventeenth and early eighteenth centuries that "liberated" Hungary.

The Christian reoccupation of much of Hungary was not a genuine liberation for all, because a range of Christian and semi-Christian sects had flourished there under Ottoman rule. Catholicism naturally lost its state monopoly; the Ottoman authorities, operating on the policy of "divide and conquer" (and regarding all Christians as equally misguided), at various times and in certain areas even actively encouraged Lutheran, Calvinist, anti-Trinitarian, and Greek Orthodox institutions and organizations. Calvinism was especially strong in Transylvania, which had Calvinist princes, ruling under Ottoman overlordship, in the seventeenth century; but under Ottoman pressure, the Reformed conceded religious pluralism in Transylvania—although Greek Orthodox Christians suffered official sanctions, Roman Catholics, Calvinists, Lutherans, and anti-Trinitarians all coexisted.

As Habsburg military success drove the Turks back out of Hungary, "Christianity" nominally was the victory—but only one form of Christianity. The exigencies of the titanic "clash of civilizations" between Islam and Latin Christendom gave rise to limited freedom for minorities; but on the victory of the latter, religious plurality gave way to enforced uniformity. Ironically, for some followers of Jesus Christ, Muslim government proved preferable to Christian.

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*This article draws from D.J.B. Trim, "Conflict, Religion, and Ideology," chapter 13 in Trim and F. Tallett, eds., *European Warfare, 1350-1750* (New York & Cambridge: Cambridge University Press, 2010).

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A Right to Faith?

 libertymagazine.org/article/a-right-to-faith

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by [Céleste Perrino-Walker](#)

In the "Live Free or Die" state they don't do things by halves, except when neither half agrees with the other. In a current case involving Amanda Kurowski, the 10-year-old Christian daughter of divorced parents who has been forced by a judge to stop homeschooling and attend public school, some say parental rights are the issue and others that religious freedom is at stake. Careful examination of the case reveals that while it's certainly not cut and dry, there are very crucial issues involved.

Traditionally New Hampshire has been very much in favor of and supportive of home schooling, and who could expect less from this independent state bristling with Yankee ingenuity and self-sufficiency. "The general court recognizes . . . that it is the primary right and obligation of a parent to choose the

appropriate educational alternative for a child under his care and supervision, as provided by law"¹ (N.H. Rev. Stat. Ann. § 193-A).

While New Hampshire might be all in favor of homeschool, Amanda's father, Martin Kurowski, wasn't and had been at odds with her mother, Brenda Voydatch, over the subject for years. Amanda lives with her mother, her custodial parent, in Meredith, New Hampshire, and Voydatch had been homeschooling her since first grade, a point of contention between them. Kurowski contended that his daughter wasn't getting enough socialization. He'd gone so far in the past as to petition the court hoping they'd send his daughter to public school, but the request was denied.

In an attempt to address Kurowski's concerns regarding socialization, Voydatch enrolled Amanda in a slew of extracurricular programs and activities. Besides her regular course load, which met the requirements of the local Inter-Lakes School District and included math, reading, English, social studies, science, handwriting, spelling, and Spanish, she also took piano lessons and participated in theater club to further comply with the local district's requirements. The Spanish, art, and physical education classes were taken at the public school. Outside of school she was involved in gymnastics, horseback riding, softball, and basketball. Not exactly what you'd call a social hermit.





Biased GAL—How It All Began

The situation was not ideal admittedly; the father was not happy about the school arrangements, but the mother was making concessions to address his concerns. Sounds like a compromise. In fact, if it weren't for a biased guardian ad litem appointed to protect Amanda's legal interests, she might still be peacefully homeschooling and maintaining her impressive extracurricular commitments. However, during a renegotiation of the parenting plan, the GAL, Janice McLaughlin, reported that Amanda "appeared to reflect her mother's rigidity on questions of faith," concluding that "Amanda's interests, and particularly her intellectual and emotional development, would be best served by exposure to

a public school setting in which she would be challenged to solve problems presented by a group learning situation and by the social interactivity of children her age. She also concluded that Amanda would be best served by exposure to different points of view at a time in her life when she must begin to critically evaluate multiple systems of belief and behavior and cooperation in order to select, as a young adult, which of those systems will best suit her own needs."²

The court, agreeing with her, in essence ruled that Christianity is too narrow-minded a belief system and children should be exposed to "different points of view" during their formative years and legally made it so for Amanda. But, who is the court to say whether or not a child's beliefs are too "rigid" to be allowed to homeschool? And how did religion become a determining factor in whether a child is allowed to homeschool?

"Parents have a fundamental right to make educational choices for their children. In this case specifically, the court is illegitimately altering a method of education that the court itself admits is working," said John Anthony Simmons, who is representing Voydatch. "The court is essentially saying that the evidence shows that, socially and academically, this girl is doing great, but her religious beliefs are a bit too sincerely held and must be stifled, tested by, and mixed among other worldviews. This is a step too far for any court to take."³

The truly preposterous element of the GAL's conclusion is that any 10-year-old child needs to be exposed—worse, forcibly exposed—to viewpoints other than those held by the child's own family. Exposure to varied belief systems or faiths is done by *parents*—and certainly not by the *state*—within the context of their own beliefs and not by throwing them into public school to temper the religion out of them. Her father is as free as her mother is to share his beliefs with her, if he has any.

Additionally, the GAL refused to look over home-schooling materials given to her by Voydatch because they were Christian-based, requested personal references and then refused to interview them if they were Christians, and reportedly told Voydatch that if she (the GAL) wanted Amanda in public school then she would be in public school.⁴

In the GAL's opinion, offered in her testimony, Amanda's relationship with her father was suffering, to some degree, from her religious beliefs, particularly Amanda's belief that "his refusal to adopt her religious beliefs and his choice instead to spend eternity away from her proves that he does not love her as much as he says he does."⁵

Kurowski testified that during his visits with Amanda "they rarely discuss religion, although they have, several times in the past. He believes that exposure to other points of view will decrease Amanda's rigid adherence to her mother's religious beliefs, and increase her ability to get along with others and to function in a world which requires some element of independent thinking and tolerance for different points of view."⁶ That does not sound like he's objecting to her purported lack of socialization, but to the fact that she has the same religious beliefs as her mother.

Consider the fact that after asking the courts to hold Amanda's mother in contempt for allegedly failing to consult him about home schooling, "Kurowski testified the following year that the strongly held Christian beliefs Amanda had been taught by her mother prevented the girl from enjoying her relationship with him."⁷

Simmons points out that "Mother's exposure of the child to Christianity is consistent with Father's past actions. The Father has changed *his* mind about religion and now seeks to interfere with his daughter's beliefs. The Court's assistance in accomplishing this does nothing more than favor one parent's religious views with those of the other."⁸

Enter Marital Master

"In many courts throughout the state [of New Hampshire], divorce and custody actions are heard by marital masters. A marital master is not a judicial officer within the meaning of the New Hampshire Constitution because they are neither nominated nor appointed by the Governor and Council. . . . When a marital master hears a case, he or she will make a recommendation to the court as to how the case should be decided. The recommendation is not binding upon the court and has no effect unless it is countersigned by a judge."⁹

Duly, on July 13, 2009, Michael Garner, marital master, signed a Decree on Pending Motions that was countersigned the next day by Judge Lucinda V. Sadler. In the decree, Garner observed: "The parties do not debate the relative academic merits of home-schooling and public school: it is clear that the home schooling Ms. Voydatch has provided has more than kept up with the academic requirements of the Meredith public school system."¹⁰ And that is where he should have stopped. Case closed. But, he went on: "Instead, the debate centers on whether enrollment in public school

will provide Amanda with an increased opportunity for group learning, group interaction, and social problem solving, and exposure to a variety of points of view."¹¹ Cutting through the doublespeak, the debate centers on whether enrollment in public school will soften Amanda's rigid religious beliefs (beliefs apparently shared by her mother, who was previously also her teacher) to satisfy her father, who seems worried because his relationship with his daughter has begun to suffer because of their differences of beliefs. The outcome accomplishes nothing more than leveling the "religious" playing field between the parents.

But this is not a matter for the court to become involved in. Particularly under the guise of settling a home-school/public school dispute. This is precisely the reason that no one can agree whether this is a parental rights case or a freedom of religion case. It's because Kurowski, claiming concern about Amanda's *educational* socialization and assisted by a GAL biased against religion, was able to accomplish something he had failed to do previously; his daughter is now attending public school.

Admittedly, Kurowski is not in an enviable position. He is not the custodial parent and unlike a "deadbeat dad" seems to take a genuine interest in his daughter's welfare and be concerned for her best interests. As his daughter gets older it's only natural that there will be some tension as she forges her own identity and, because of the fact that her parents disagree on religious matters, will likely agree eventually more with one parent than the other in that area. But these are matters that are faced in every family unit where there is disagreement about religion and are no cause for a judge to force a child into public school as a remedy. If Amanda's case was truly about parental rights, the court documents would have cited things such as "Unsociable kid," "Needs more diversity in education," or even "Failing all subjects; needs special educational help," indicating that clearly homeschool was not working and her father's concern about her education and socialization was valid to the court and worthy of taking action to correct. But the court documents cited nothing of the kind. They cited objections about Amanda's *religious beliefs and convictions*, and basically the fact that she had any, and those firmly held, as if that was a particular crime.

Mike Donnelly, an attorney with the Home School Legal Defense Association in Purcellville, Virginia, called the judge's ruling "unreasonable and inappropriate." He said, "The fact that the court talks about the religion of the child and says it thinks the child ought to be in public school because she needs to be socialized shows they have overstepped their authority, which is troubling. The court cannot just on its own pull opinions out of thin air."¹²

Simmons, whose request for the court to rescind its order was denied on August 31, the day before Amanda was scheduled to start school, reports that the case is being appealed to the New Hampshire Supreme Court. "Obviously we're disappointed that the court did not take this opportunity to reconsider its order; however, we are confident that as the process goes forward the Supreme Court will have an opportunity to recognize my client and her daughter's constitutional and other rights."¹³

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- 1 www.homeschoolfacts.com/states/sub_sections.php/State_Laws/new-hampshire
- 2 Decree on Pending Motion, No. 2006-M669, July 14, 2009.
- 3 NH Court Orders Home-schooled Child Into Government-Run School, www.alliancedefensefund.org/news/story.aspx?cid=5050
- 4 Motion for Reconsideration and Motion to Stay, John Anthony Simmons, Sr., Esq., August 24, 2009.
- 5 Decree on Pending Motion, No. 2006-M669, July 14, 2009.
- 6 *Ibid.*
- 7 "Court's Home Schooling Order Raises Hackles," Karen Langley, Concord *Monitor*, September 27, 2009.
- 8 Motion for Reconsideration and Motion to Stay, John Anthony Simmons, Sr., Esq., August 24, 2009.
- 9 "Court Clarifies Authority of Marital Masters," Andrew J. Piela, June 7, 2007, www.nashualaw.com/practice_areas/MaritalMasters.htm
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- 11 *Ibid.*
- 12 "Judge Says She Knows What's Best for Homeschooled Christians," James P. Tucker, Jr., September 2009, www.americanfreepress.net/html/homeschooling_183.html
- 13 Personal interview, John Anthony Simmons, October 26, 2009.

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What the Constitution Means to the Citizen

 libertymagazine.org/article/what-the-constitution-means-to-the-citizen

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The mere fact that people consider themselves civilized and enlightened is no surety of respect for human rights. The Nazi minister of justice issued a decree that "persons would be punished for acts which were not crimes when they were committed, and that a judge would have power to decide whether a defendant deserved to suffer for sins against 'the popular sense of what is right.'"

Such things could not happen here, because our Constitution is a citadel of human rights. It was adopted in 1789. Before that time, rulers had for centuries enslaved thought, shackled enterprise, and suppressed ambition. The masses were mostly peasants of the fields, and in the name of government they had been robbed by so-called "nobles" armed with battle-ax and spear.



Of the oppressed peoples of the Old World, the most robust and self-reliant came to this new continent. All they asked was land and freedom. As they became prosperous and the government attempted to despoil them, they achieved their independence. They then organized a government suitable to their sturdy, liberty-requiring character.

They made it clear to the Congress they created that its business was not to be the legislative manufacturing of economic or any other kind of straitjackets; they made it clear to the Chief Executive that he was not the master but the first servant of the state. The Constitution, like the Decalogue, includes numerous and emphatic "Thou shalt nots," and places far beyond the reach of any governmental interference certain fundamental rights essential to human life, human liberty, and the pursuit of human happiness.

The most exalted position created was that of President, and, lest its occupant might sometime be tempted to exercise ungranted powers, it was provided that, before a President enter on the execution of his office, "he shall take an oath to preserve, protect, and defend the Constitution of the United States." The framers of that document regarded an oath as something registered in heaven, and assumed that no man so honored and so sworn would violate it.

To safeguard individual rights, the framers of the Constitution created the Supreme Court, with authority to say, when the facts warranted, to the President and Congress: "Your acts are void because you are attempting to do what the Constitution declares you must not do."

That all nations have recurring periods of passion is a matter of history. In such periods individual freedom is trampled underfoot in republics as well as in monarchies. Never have human rights been more insecure than they were in France after the monarchy had been destroyed, "the rule of the people" proclaimed, and the tricolor of "liberty, equality, and fraternity" unfurled. In certain European countries where within two decades emperors have been dethroned and men from humble life have become the heads of state, the lives and liberties of countless individuals are with cruel injustice being daily denied.

History records that, during the many civil commotions in England, thousands of the best men and the purest patriots fell by the hand of the public executioner. In the "Bloody Assizes" held in Winchester in 1685, 320 men and women were sent to their deaths by the hangman or the headsman, and several hundred more were ordered to be sold into slavery in the West Indies. Lady Alice Lisle, aged seventy-one, was sentenced in the same assizes to be burned to death

because she gave shelter to a nonconformist minister and his companion who were fugitives from Monmouth's army. The charge against her was "harboring traitors." Later King James II graciously consented that the old lady be beheaded instead of burned to death. Human nature acts very much alike everywhere in periods of emotional excitement.



Protected Only by the Constitution

In October 1864, three citizens of Indiana were arrested by order of a general of the United States Army. They were brought before a military commission, tried on charges based on their opposition to war measures of the government, and were convicted and sentenced to be hanged. The charges against them were so vague that their eminent counsel, Jeremiah S. Black, said to the justices of the United States Supreme Court:

"The charge is found in this record, but you will not be able to decipher its meaning. The judge advocate must have meant to charge them with some offense unknown to the laws, which he chose to make capital by legislation of his own."

May 19, 1865, was the day set for their execution. These men had not lived in the war zone, and they never had been in the military or naval service of the United States. The only thing that saved them from death was the Constitution. They availed themselves of the right to a writ of habeas corpus, and their cases reached the Supreme Court. They contended that they had been deprived of their right to trial by jury. Though the executive department of the government, as represented by the attorney-general, demanded their execution on the military verdict, the Supreme Court declared their convictions illegal, and set them free. In that case (*Ex parte Milligan*, 4 Wall. 2) the court, speaking through Mr. Justice David Davis, said:

"No graver question was ever considered by us. . . . The founders of our government were familiar with the history of the struggle for liberty, and they made secure in a written Constitution every right which the people had wrested from power during a contest of ages. . . . Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and that the principles of constitutional liberty would be in peril, unless established by irrevocable law. . . . The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism. . . . Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln. . . . Our fathers knew that unlimited power was especially hazardous to freemen."

In other countries men are locked up indefinitely on mere official nods. In certain European countries, hundreds of thousands of men and women are today in prison without knowing what they are accused of or who put them there. Neither friends nor counsel are permitted access to them.

Our Constitution guarantees to every defendant a speedy trial. ... No punishment can be inflicted except that prescribed by law. The trial must be conducted in the spirit of fairness.

Another bulwark of individual freedom is that provision of the Constitution which reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

Here the citizen's property, as well as his life and liberty, is protected by the Constitution. Our organic law declares, "Private property shall not be taken for public use without just compensation." In *Loan Association vs. Topeka*, 87 U.S., 655-665, the Supreme Court denounced arbitrary decrees "under legislative forms," and said:

"To lay with one hand the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals, . . . is none the less a robbery because it is done under the forms of law."

In *U. S. vs. Lee*, U. S., 196, the Supreme Court uttered these words:

"No man in this country is so high that he is above the law. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it. Shall it be said that the courts cannot give a remedy when the citizen has been deprived of his property by force, his estate seized and converted to the use of the government without lawful authority, without process of law, and without compensation, because the President has ordered it and his officers are in possession?"

Many other examples might be cited showing how the Constitution upholds the rights of even the humblest citizen. These guaranties are the soul-substance of free government. They are as essential to the life of this Republic as roots are to the life of a tree.

Some persons lightly refer to proposed amendments as "a change in the rules." While a few provisions of the Constitution are merely rules which might be changed without structural damage, most of its provisions are principles which can no more be amended without fatal results to our constitutional government than the Ten Commandments could be amended without undermining the world's social order. To change by amendment the date of the Presidential inauguration from March 4 to January 20 is a change of rule that does not affect the government structure. To amend the Constitution so as to take away the judicial power of the Supreme Court or the legislative power of Congress is so to change our house of government as to make it uninhabitable by the spirit of liberty. . . .

Power Must Be Controlled

"The one assured result of historical investigation is the lesson that uncontrolled power is invariably poisonous to those who possess it. They are always tempted to impose their canon of good upon others, and they assume that the good of the community depends upon the continuance of their power. Liberty always demands a limitation of political authority."

If the power of the Supreme Court to keep the Chief Executive and Congress within those limits prescribed for them by the Constitution is taken away, our written guaranty of personal liberties would become mere "scraps of paper," to be tossed aside at the whim of President or Congress. . . .

Democracy descends to a dictatorship with ease. There is never any tarrying at some halfway place. When Thomas Jefferson, John P. Curran, and others said: "Eternal vigilance is the price of liberty," they were not indulging in mere rhetoric. What we are indifferent to, we lose. Material from which despotism may be engendered is especially abundant in times of economic stress. Depressions breed discontent, and discontent begets emotions, the heat of which is incompatible with cool, clear thinking. . . .

When people find life's burdens heavy, and long for political "messiahs," there are always those who come forward, assume a prophet's pose, claim to be divinely qualified, and begin to talk about establishing "a new social order." Each proclaims his possession of legislative "keys" to the longed-for paradise of plenty, and the idea is popularized that government is something to live not *under* but *on*. . . .

The surrender of the liberty Americans have enjoyed since independence was won and the Constitution adopted, would be a big price to pay for even certain economic security. It is too high a price to pay for a *promise*! For 150 years Americans have had a higher degree of economic security than any other people. They achieved this under a system which did not discourage industry and did not encourage indolence. Their achievements were due to no dictator, but to their own individual efforts. They belonged to a breed whose fiber was never feeble. Americans will continue to achieve the highest degree of economic security attainable by human beings only by reliance on those unamenable virile qualities which made their fathers great. . . .

The nation itself must be wisely and well organized to protect rights, and that is exactly what the American people in convention assembled did when, under the leadership of Washington and Madison and Hamilton, they organized this nation according to the plans and specifications of the Constitution they ordained.

Fortunate is our nation with its constitutional safeguards of individual rights and an independent Supreme Court to maintain them.

*From an article by Justice George W. Maxey of the Supreme Court of Pennsylvania, in the Nation's Business, October 1935. Used in *Liberty*, First Quarter 1936.

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Crucifix Conundrums

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In November 2009 the Catholic Church in Italy was faced with a "Crucifix Conundrum." Catholic crucifixes adorn every room of the public school system. In northern Italy, Soile Lautsi, a mother of two, filed a complaint against the Catholic practice, claiming it violated the secular intent of public schools in Italy and denied her the right to offer her sons a secular education. The European Court of Human Rights ruled in her favor and levied a fine of 5,000 euros (US\$7,390) to be paid to her. The court, however, stopped short of ordering the removal of all crucifixes from the public school system.¹

Catholic leaders protested vigorously against the court's ruling, as did much of the populace. The Italian government stated it will appeal the decision to the European Court of Human

Rights' Grand Chamber, whose decisions are binding.² Their central argument was that the crucifix is merely a part of the cultural heritage of Europe and not a specifically religious symbol.

The Crucifix and Catholic Theology

The crucifix fulfills a central role in Roman Catholic theology. Catholic dogma requires it to be visibly present on the altar during the service of the Mass. "The crucifix is the principal ornament of the altar. It is placed on the altar to recall to the mind of the celebrant, and the people, that the Victim offered on the altar is the same as was offered on the Cross. For this reason the crucifix must be placed on the altar as often as Mass is celebrated (Constit., Accepimus of Benedict XIV, 16 July, 1746). The rubric of the Roman Missal (xx) prescribes that it be placed at the middle of the altar between the candlesticks, and that it be large enough to be conveniently seen by both the celebrant and the people (Cong. Sac. Rit., 17 September, 1822)."³ Depicting the figure of Christ's body crucified on the Roman instrument of torture, the cross symbolizes the perpetual nature of the Mass. Believing that the bread and wine used in the service of the Mass are converted into the body and blood of Christ through the medium of the priest, referred to as transubstantiation, each Mass continues the saving act performed by Christ at Calvary.⁴

The crucifix has further theological implications beyond those associated with the Mass. A processional cross is a crucifix attached to a long, wooden pole and is carried at the front of a procession. It does not vary, in essence, from a cross of jurisdiction, except that the processional cross always faces in the direction to which the processional is going and the cross of jurisdiction faces the prelate who bears it. A cross of jurisdiction is always carried in front of the pope, since he is deemed worthy of it and since it indicates the territory claimed by his office. The jurisdictional cross carried by the pope wherever he may journey, thus indicates the Vatican's claims to global sovereignty. A legate will bear a jurisdictional cross only within the territory assigned to him and an archbishop only within the bounds of his province.⁵

Because of differences in theological perspectives regarding soteriology (teachings about salvation), a notable distinction is evident between a Roman Catholic crucifix and a Protestant symbol of the cross. While the former depicts Christ's body and must be present at every Mass to indicate the perpetual nature of Christ's death realized through the transubstantiation of the bread and wine, the latter is merely a cross, symbolizing the completed, once-for-all nature of Christ's sacrifice. Additionally, the cross, without a figure of Christ's body attached to it, symbolizes the resurrected Savior, a theme common in many, if not most, Protestant worship practices. Understanding such differences in theology



as conveyed through varying symbols of Christ's death supports the view that usage of either of the two favors a particular theological perspective.

If such differing theological views are conveyed through this crucifix-cross conundrum among Christians, how much more complex does the situation become when non-Christians are involved? Demographic statistics in Italy indicate that 90 percent of the population is Catholic (about one third practicing) and the remaining 10 percent are mature Protestant and Jewish communities with a growing Muslim community.⁶ From an Islamic perspective, the crucifix and cross were symbols used by (Christian) Crusaders' armies during the eleventh and twelfth centuries to indicate their faith in God to grant them victory in battle over their Muslim enemies.⁷ For Jewish descendants, the crucifix recalls to mind the religious institution that forced the conversion of their forefathers, referred to as "conversos," in Spain during the time of the Spanish Inquisition and in Vienna between 1550 and 1670.⁸

The Crucifix and European Culture

Most Italians, according to a Zenit news poll,⁹ are in favor of keeping crucifixes in public school rooms, arguing that they are only symbols of European culture. Defending the historical record of Christianity's European roots, crucifix proponents contend that (Roman Catholic) Christianity is woven into the fabric of European civilization. Such a position, they reason, is not based on religious bias and thus does not violate religious freedom rights of non-Christian adherents.

Indeed, Europe and its civilization owe much to Christianity. During the first centuries of their existence, Christians influenced Roman cultural norms, leading to the eventual abolition of gladiatorial and coliseum games, which pitted humans and animals in battles to the death.¹⁰ Several centuries later, if it had not been for (Roman Catholic) Christian forces, Europe would have succumbed to the Muslim onslaughts of the sixth century.¹¹ During the Black Plague, especially the years 1348- 1349, the church stood as a societal institution offering healing and hope to its dying and demoralized citizenry.¹² As European efforts at expansion, and subsequent colonialism, reached a climax, Christianity (both Catholic and Protestant) introduced biblical principles of morality designed to "civilize" the conquered natives of North, Central, and South America.¹³ Even in modern constitutional discourse, recognition is given to Christian concepts dating to the early Middle Ages that contributed to modern notions of human rights.¹⁴



The cultural-influence argument, however, overlooks several points. First, it does not take into consideration the evolving nature of civil society, especially in the light of modern democratic concepts of religious pluralism. Obviously, some citizens of Italy do not adhere to the dominant religious view, so to use the cultural-influence argument, it seems more consistent to recognize the diversity within Italian society and show respect for varying views by not using religious symbolism of a particular group. Perhaps, the dilemma facing Italian citizens using this argument is whether they wish to consider cultural influence that is enshrined in the historic past or whether to accept a cultural stance that is current and variegated.

The political structuring of society in Europe has also changed significantly over the centuries. Empires, dynasties, and monarchical rule no longer form a part of modern society that is structured on concepts of the nation-state and democratic rule. Prior to the era of modern political theory, European society was structured on a communal concept, with church and state fulfilling their respective duties. This allowed for a single, dominant religion. After the Protestant Reformation and the beginning of the era of modern political theory, not only were there various religious groups to compete with the historically dominant Roman Catholic Church, but also political theory had progressed enough to allow for a variety of religious expressions to coexist in society. From a political perspective, the idea of various religious groups having equal standing in society is founded upon the concept of nonabsolutism, or indifference. That is to say, government must be indifferent to each religious group in order to establish the principle of neutrality toward all. Government must consider each religion as nonabsolute in order to be impartial toward all. Perhaps this point is at the

very heart of the "Crucifix Conundrum" facing the Roman Catholic Church in Italy. Not willing to consider itself as a nonabsolute religious entity, it cannot cede territorial space to any other religion, or even to secularism. Since the church considers itself as a religious entity whose mission is to lead man to his ultimate end—namely, God—then it cannot remain isolated in the transcendental sphere, but instead must bridge the abyss to enter the political dimension.

Additionally, the role of globalization enters the debate. As time progresses modern technology and communication devices are increasingly penetrating all societies, producing an interwoven network of global proportions. Under these conditions, one culture influences another. As various religious groups come into contact with one another, viable solutions for their mutual coexistence must be explored. Not only does globalization bring religious adherents into contact, but it also presents a variety of church-state models for consideration. France has adopted a model of *Laïcité*, in which all religious expression in society is suppressed. The result is actually a proactive stance against religion. Italian concerns about avoiding similar conditions in their country are valid, but there are other models of church-state relations.

Globalization is also a factor: pitting concepts of Italian national sovereignty against international sovereignty. The Italian Constitutional Court denied Soile Lautsi's claim, but then the European Court of Human Rights ruled in her favor. As globalization develops, it tends to prioritize the formation of a global community at the expense of national identity and national sovereignty. Thus, one dimension of the "Crucifix Conundrum" facing Italy is this: If Italian society seeks to remain insular regarding its cultural history, then can it truly argue that it is part of the larger European community, which is becoming more democratically oriented? And, to what extent should Italy conform to the prevailing norms of the larger European society in order to remain a member of the same?

The Crucifix and Religious Freedom

Religious freedom has a variety of definitions in the modern, multireligious context of the global community. One of the underlying issues in the crucifix debate pits Roman Catholic views of religious freedom against those of the wider European community. The former view tends to argue for the freedom of the church to achieve its spiritual mission in the world. The latter view recognizes that much of Europe is drifting toward secularism, producing an attitude of religious indifference, or at least religious latitude. Such naturally opposing views inevitably result in conflict.

Whereas the former view can include a plurality of religious groups, the freedom of the church to fulfill its mission denies this societal configuration, unless the church is willing to forgo its preeminence and consider itself as one religious expression among equally valid others. This includes, at minimum, treating all religious groups as equals before the law and in the public sphere, a posture that would require the removal of the crucifix from public schools, or allowing all religious groups to post symbols of their faith in public places.

The second view, becoming more popular in European society, stresses an attitude of relativism. By viewing religion, Catholicism in particular, as merely a cultural aspect of society, it leads to disregard of religious authority and significance. It considers each individual capable of formulating and following his or her dictates of conscience. In more extreme cases, by excluding religion from public affairs, it can engender irreligious attitudes—lack of faith, and even antagonism toward all religions.

Recognizing the dangers inherent in secularism, Pope Benedict XVI wrote of Europe's need to find its soul, to rediscover its identity as a (Roman Catholic) Christian continent, while also respecting multiculturalism: "If we do not do this, we not only deny the identity of Europe, but we also deprive others of a service to which they have a right. For the cultures of the world, the absolute secularity that has been taking shape in the West is something profoundly foreign. They are convinced that a world without God has no future. And so multiculturalism itself calls us to come to our senses and to look deep within ourselves again."¹⁵

Religion versus secularism . . . a crucifix versus secular public education . . . a Crucifix Conundrum? Is there a solution? Perhaps Pope Benedict's counsel can be applied by all believers, whether Christian or not, and by looking deep within ourselves, we can strike that delicate balance between respecting the beliefs and practices of others while also maintaining the integrity of our own.

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4 "The controversy from the ninth to the twelfth century, after which time the doctrine of Transubstantiation, which teaches that Christ is present in the Eucharist by the change of the entire substance of bread and wine into His Body and Blood, was fully indicated as Catholic dogma."—*Catholic Encyclopedia* Online, "Consubstantiation," accessed on 2/10/2010 from <http://www.catholic.org/encyclopedia/view.php?id=3311>.

5 *Catholic Encyclopedia* Online, "ProceSSIONal Cross," accessed on 2/10/2010 from <http://www.catholic.org/encyclopedia/view.php?id=9655>.

6 Statistics as of 2009, accessed on 2/10/2010 from <https://www.cia.gov/library/publications/the-world-factbook/geos/it.html>.

7 The "Crusaders' Cross," so named "because it was on the papal banner given to the Crusaders by Pope Urban II the First Crusade, and was a symbol of the Latin Kingdom of Jerusalem."—"The Jerusalem Cross," http://en.wikipedia.org/wiki/Jerusalem_cross.

8 Brian Pullan, *The Jews of Europe and the Inquisition of Venice, 1550-1670* (New York: Barnes & Noble, 1983).

9 Antonio Gaspari, "In Difesa del Crocifisso, l'Italia s'e desta!" retrieved on 11/22/09 from <http://www.zenit.org/article-20273?l=italian>.

10 "Gladiatorial combats were outlawed by the Christian emperor Honorius in 407 and fights with wild beasts were banned in 523."—Accessed on 5/12/10 from <http://www.sacred-destinations.com/italy/rome-colosseum>.

11 Thomas F. Madden, ed., *Crusades: The Illustrated History* (Ann Arbor: University of Michigan Press, 2005), p. 120.

12 R. W. Southern refers to the droves of diseased citizens who flocked the churches in hope of a miraculous cure and "what an essential part these expectations played in making life tolerable for large masses of people whose only hope lay in a sign from heaven." —*Western Society and the Church in the Middle Ages* (New York: Penguin Books, 1990), pp.304-309.

13 From today's perspective, such Christian activity can rightly be deemed "genocide" and "forced relocation." However, Catholic philosophers such as Suárez and De las Casas argued for the rights of native peoples in the New World.

14 Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law, 1150-1625* (Atlanta, Ga: Scholars' Press, 1997).

15 Formerly, Cardinal) Joseph Ratzinger (Pope Benedict XVI), *Europe, Today and Tomorrow: Addressing the Fundamental Issues* (San Francisco: Ignatius Press, 2004), p. 34.

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An Empty Gesture

 libertymagazine.org/article/an-empty-gesture

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One of its least important decisions ever in the jurisprudence of ‘church and state’ is how Nathan Diament of the Orthodox Union described the Supreme Court’s decision in *Salazar v. Buono*, which is only the latest twist in a legal saga that has been going on for more than eight years. What would cause a respected member of the established religious community in Washington, D.C., to make such a statement? Well, how about a truly unimportant decision issued by a highly fractured Court? However, while the opinion itself certainly breaks no new ground, the underlying issue is as unresolved as it is well trodden. Namely, what role can religious symbols and text play in public life when the government is involved.



But first some background is in order. As the Court explained, in 1934 a group of World War I veterans constructed a cross in the middle of the Mojave Desert as a memorial to their fallen comrades on what turns out to be federal land. No official authorization seems to have been given for this cross, but over the years the cross was maintained and even replaced at times, but it continuously remained on site in some form for close to 70 years until Frank Buono brought suit.

Buono is a retired National Park Service employee who objected to seeing a cross on public land. He claimed seeing the presence of the cross on federal land “conveyed an impression of governmental endorsement of religion.” So he brought suit to have the cross removed, and in 2002 a judge agreed and ordered it removed. While the case wound its way through the appellate court system the cross was covered but allowed to remain.

This, however, was a politically unpopular decision. So Congress took several steps during the course of the litigation that can only be described as an attempt to allow the cross to remain. First, it designated this cross “as a national memorial commemorating United States participation in World War I and honoring the American veterans of that war.” This was not a minor decision, because this cross instantly became not only “a” national memorial but “the” national World War I memorial. The United States has no other World War I memorial than this cross.

However, as the case progressed it became clear this designation was not going to impede the courts. So Congress came up with another plan. If the problem was that the cross was on federal land, what if the land was no longer public? Congress authorized a land swap with a local rancher for an equal amount of private land nearby. The cross would be on private land and a corner of a rancher’s property would now be public land.

Buono’s original complaint wasn’t that he objected to seeing crosses, only seeing them on federal land. So under the “more than one way to skin a cat” legal doctrine it could be concluded that you could satisfy Buono’s concerns by either removing the cross or making the land no longer federal. After all, now that it was no longer on federal property Buono shouldn’t have had a problem any longer.

To no one’s surprise Buono was not happy with this approach. He went back to court and claimed this proposed land transfer violated his injunction requiring removal of the cross. Once again he prevailed at the trial and appellate courts. What had been a dispute about a cross was now a dispute about a land transfer involving Congress and the nation’s only World War I memorial.

At this stage the Supreme Court handed down a decision that did what may have seemed impossible: confuse the situation more. Nine justices authored six opinions. To make it more complicated eight justices felt they had enough information to resolve the dispute completely and one justice wanted to send the case back down for further proceedings. Proving that math is never the strong suit of lawyers, in eight versus one, the one won.

Four of the justices wanted to uphold the lower court's decision and stop the land transfer. Three of those judges thought the transfer would violate the establishment clause, and one justice (Breyer), who apparently did not get this memo that this was a First Amendment case, wanted to apply injunction law to resolve the conflict.

Two justices felt Buono didn't even have the right to be in court because he lacked standing (Scalia and Thomas). At oral argument Buono admitted that if the cross was removed and then the land transferred to private hands and the private individual wanted to construct a cross, that would pass constitutional muster. Chief Justice Roberts said that going through the charade of taking the cross down, transferring the land, and then putting it up was unnecessary.

This of course leaves justices Kennedy and Alito. Kennedy alone wanted the case to go back to the trial court for a determination of whether Congress's stance that the cross was a national memorial and had meaning broader than religious connotations combined with the land transfer satisfied the establishment clause concerns. Justice Alito said there was a sufficient record to decide that issue in the affirmative without sending the case back down.

All that remains after the cross was stolen, May 2010. However, before the court system could act, someone took things into their own hands. Shortly after the Court came down with its decision one person or a group of persons removed the cross in a move widely criticized by both sides of the debate. While the full impact of this theft has not been litigated, at the very least it appears as though the empty gesture of removing and then replacing the cross Chief Justice Roberts was concerned about will occur if the district court allows the land transfer.



So where does this leave us? In many ways right where we started. The fundamental problem that the Supreme Court did not address is what role religion, and religious iconography, should play in society. Does the establishment clause require society to pretend religious symbols, text and influence do not exist? Is religion some elephant in the room that everyone knows about but no one can acknowledge?

While there certainly are those who would like to see all references to religion removed from society, that is not where most of the country or the Court is. The opposite extreme is also rejected; we are not going to turn government property into a celebration of any particular religious view, no matter how popular that view is among an electorate. Yet where the middle ground is no one quite knows.

Justice Kennedy accurately noted in his opinion that the Court has refrained from making sweeping pronouncements regarding the establishment clause. However, the fundamental divide in this country needs to be addressed. The Court's ad hoc approach has left the lower courts adrift. This lack of clarity has emboldened those who would seek to use government to promote their version of religion along with those who want to see religion removed from society as a whole and want to start with public spaces.

The Court is quite rightly a conservative institution in the classic sense—slow to make changes or move. However, it has been 39 years since the Supreme Court has truly attempted to systemically address establishment clause cases in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Over time that decision has come under attack, but nothing has replaced it. It is time for the justices to try again.

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Talk of Many Things

libertymagazine.org/article/talk-of-many-things

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by [Lincoln E. Steed](#)

Sometimes things that seem impenetrable are merely wrong. Take the song “I Am the Walrus,” composed by John Lennon and released by the Beatles in 1967. Lennon purposely tried to make the language obscure to pay back a high school English class that he heard was analyzing his lyrics. He was distressed later to realize that the Walrus he was alluding to in the poem by Lewis Carroll is not the hero but the villain.

There is much rumbling of late in both the religious liberty fraternity and in conservative circles that the government has shifted on religious freedom. Rather than using the term “religious freedom,” a term that embraces a wide array of religious rights and behaviors, spokespeople have been noted to use the term “freedom of worship.” The question is whether there is intent to change—and indeed what do they mean by the newly applied term?



In the same Lewis Carroll book that contains the Walrus poem there is a curious exchange between Alice and Humpty Dumpty. They had been discussing birthday presents, and how there is only one day in the year when you might get them.

“There’s glory for you!” says Humpty.

“I don’t know what you mean by ‘glory,’ Alice said.

Humpty Dumpty smiled contemptuously. “Of course you don’t—till I tell you. I meant ““there’s a nice knock down argument for you!””

“But ‘glory’ doesn’t mean ‘a nice knock-down argument,’ Alice objected.

“When I use a word,” Humpty Dumpty said, in rather a scornful tone, “it means just what I choose it to mean—neither more nor less.”

“The question is,” said Alice, “whether you *can* make words mean so many different things.”

“The question is,” said Humpty Dumpty, “which is to be master—that’s all.”

Perhaps we are guilty of “misunderestimating” the power of words and too readily accepting that they mean the same things to each of us. Clearly, words have meaning beyond the dictionary definition. In fact, dictionaries since Samuel Johnson’s effort essentially try to report on what the words mean in popular use, not what they ought to mean.

The most casual observer of public affairs must have noticed a growing tendency to wrest language to an end rather than use it as previously understood. Whether it is the “misspoke “ of Watergate days or the “incentivize” of hopeful bureaucrats or the colorful language of military plans—the intent is more and more to obscure meaning, not to clarify. We seem to have lost sight of the simple reality that words don’t make it so—no matter what they imply or where they may misdirect you. Perhaps that is the fate of public discussion—to be buried in the code of words used, not to inform but to obscure and manipulate.

First: what are the literal differences between the two terms being suddenly noted in official statements?

Freedom of religion is guaranteed in the United States Constitution. It is spelled out by the two clauses of the First Amendment which, guarantees free exercise of faith and lack of government “establishment.” While the guarantee is absolute and people of faith have been granted an extraordinary degree of legal protection to hold and practice any faith they want, in some ways the United Nations statement is even bolder in what it specifies. In Article 18 of the Universal Declaration of Human Rights I read that “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.” That is a pretty comprehensive guarantee for an individual to have and to practice a faith. The U.S. Constitution takes the relationship between religion and the state in a radically enabling direction by proscribing what is generally known as a separation of church and state—but more on that another time.

“Freedom of worship” sounds good but is one of those Humpty Dumpty terms. The Soviet regime post Stalin had no trouble with allowing freedom of worship—times and places as specified by them. It is actually a term that implies limits on religious practice and behavior. It has been used to restrict outreach and conversion activity by faith groups not of the majority in many countries. It probably will be used to enable restrictions on public religious behavior and dress.

Which is about the best reason I can come up with to explain why a shift from “Freedom of Religion” to “Freedom of Worship” might be real and not just a part of the shifting sands of political discourse. The change has been noted after President Obama’s well-received Cairo address. Carl H. Esbeck, professor of law at the University of Missouri, in a *Christianity Today* article on the language problem, thinks “the softened message is probably meant for the Muslim world.” Maybe. There’s a fair number of them that will not easily allow freedom of worship to non-Muslims. If the change is intended it would seem more compatible with restrictions on public, nonworship religious activity. Things such as religious dress, public speech from religious organizations, and even demands for accommodation in the workplace could easily fail inclusion under simple guarantees of worship.

I cruised the Web to find out more about the shift in religious freedom language and certainly found enough to feed a certain paranoia. But any descent into the Web will do that. And the Web is hardly the place to look for purity of expression and accuracy of definitions. Enough to say that one highly placed official charged with protecting religious liberty “sees a change in lingo and that it’s not an accident.” Another official said that “this is a rhetorical shift to watch.”

But is it a proven shift? One blog site did a search of the White House Web site and found 124 mentions of “freedom of religion” and only 9 uses of the term “freedom of worship.” Really mixing it up, they went to the Bush White House archives and found the same 124 uses of “freedom of religion,” and 33 uses of the suspect “freedom of worship.” Of course, comparing the aggregate use of a term over eight years to its use in less than two is almost certainly misleading. Still, it might give us some pause before certainty.

I would put it this way. The U.S. Constitution stands, and rhetorical shifts, if they are intended, will not so easily remove protections. But, words do matter, and we should be careful how we project our values to other nations. They might react in very counterproductive ways.

I like this statement from human rights lawyer Nina Shea, a senior scholar at the Hudson Institute. “It is so critical for Western, especially American, leaders to articulate strong defense for religious freedom and explain what that means and how it undergirds our entire civilization.”

There is good reason to think that the perceived terminology change is nothing more than the shifting language of politics, and a lack of imprecision. But there is absolute certainty that we must insist on what the language does inherently mean, not because we say it is just so, but because the usage through years of battling for true religious freedom has proven it to be so.

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Justice & Religion

 libertymagazine.org/article/justice-religion

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by [David A. Pendleton](#)

On April 9, 2010, Supreme Court Justice John Paul Stevens tendered his resignation letter to the president.¹ Within hours, considerable commentary and conjecture deluged the Internet. Legal pundits and law professors agreed that the 90-year-old justice was in some respects irreplaceable. His closely reasoned opinions have helped fashion the very warp and woof of our constitutional fabric since his appointment in 1975 by President Gerald Ford.

Then on May 10, 2010, President Obama nominated Solicitor General Elena Kagan to fill the impending vacancy. While there are certainly serious ideological opponents to her, it immediately became apparent that she would be confirmed to the position. The "\$64,000 Question" on everyone's mind was how she might alter the direction of the Court. Conventional wisdom suggests that replacing a liberal-leaning justice with a liberal-leaning successor shouldn't change things.² But before entertaining further prognostications, a baseline needs to be drawn. Logically antecedent to a prediction of where the Court is going is consideration of where it has been.

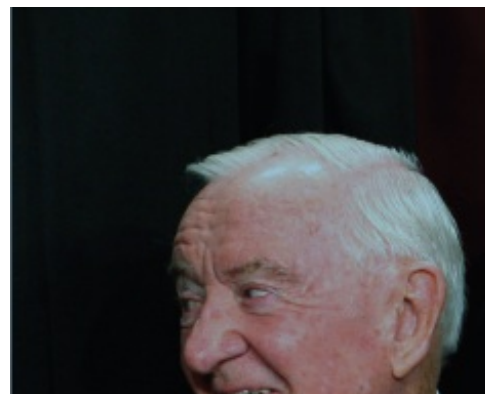
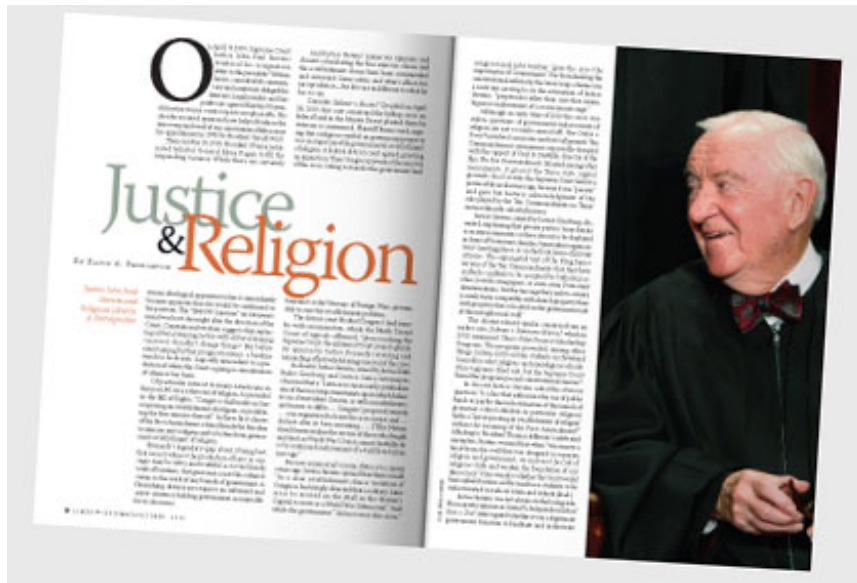
Of particular interest to many Americans in this post-9/11 era is the issue of religion. As provided in the Bill of Rights, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." In these first clauses of the First Amendment is fixed firmly the freedom to exercise one's religion and to be free from government establishment of religion.

Bismarck's legendary quip about it being best that we not witness the production of laws or sausages may be witty and truthful as to the bloody work of butchers, but ignorance is not bliss when it comes to the work of any branch of government. A flourishing democracy requires an informed and active citizenry holding government accountable for its decisions.

And Justice Stevens' numerous opinions and dissents elucidating the free exercise clause and the establishment clause have been commended and criticized. Some adore, and others abhor, his jurisprudence—but few are indifferent to what he has to say.

Consider *Salazar v. Buono*.³ Decided on April 28, 2010, this case concerned the hilltop cross on federal land in the Mojave Desert planted there by veterans as a memorial. Plaintiff Buono sued, arguing that a religious symbol on government property was an impermissible governmental establishment of religion. A federal district court agreed, granting an injunction. Then Congress prevented the removal of the cross, voting to transfer the government land beneath it to the Veterans of Foreign Wars, presumably to cure the establishment problem.

The district court blocked Congress' land transfer with an injunction, which the Ninth Circuit Court of Appeals affirmed. Upon reaching the Supreme Court, the splintered Court issued a plurality opinion by Justice Kennedy reversing and



remanding, effectively delaying removal of the cross.

In dissent, Justice Stevens, joined by Justice Ruth Bader Ginsburg and Justice Sonia Sotomayor, observed that a "Latin cross necessarily symbolizes one of the most important tenets upon which believers in a benevolent Creator, as well as nonbelievers, are known to differ. . . . Congress' proposed remedy . . . was engineered to leave the cross intact and . . . did not alter its basic meaning. . . . [T]he Nation should memorialize the service of those who fought and died in World War I, but it cannot lawfully do so by continued endorsement of a starkly sectarian message."

Because a memorial's *raison d'être* is to convey a message, Justice Stevens opined that there would "be a clear establishment clause violation if Congress had simply directed that a solitary Latin cross be erected on the Mall in the Nation's Capital to serve as a World War I Memorial." And while the government "did not erect this cross," congressional intervention "gave the cross the imprimatur of Government." Far from healing the constitutional infirmity, the land-swap scheme was a nostrum serving to, in the estimation of Justice Stevens, "perpetuate rather than cure that unambiguous endorsement of a sectarian message."



Although in early May of 2010 the cross was stolen, questions of government endorsement of religion are not so easily carried off. *Van Orden v. Perry*⁴ involved a massive six-foot-tall granite Ten Commandments monument reportedly donated with the support of Cecil B. DeMille, director of the film *The Ten Commandments*. Situated among other monuments, it graced the Texas state capitol grounds. In a 5-4 vote, the Supreme Court held it a permissible secular message, because it was "passive" and gave but historic acknowledgment of the role played by the Ten Commandments in Texas' extraordinarily colorful history.

Justice Stevens, joined by Justice Ginsburg, dissented, explaining that private parties "may donate as many monuments as they choose to be displayed in front of Protestant churches, benevolent organizations' meeting places, or on the front lawns of private citizens. The expurgated text of the King James version of the Ten Commandments that they have crafted is unlikely to be accepted by Catholic parishes, Jewish synagogues, or even some Protestant denominations, but the message they seek to convey is surely more compatible with church property than with property that is located on the government side of the metaphorical wall." This dissent echoed similar concerns from an earlier case, *Zelman v. Simmons-Harris*,⁵ which in 2002 examined Ohio's Pilot Project Scholarship Program. The program provided, among other things, tuition aid to certain students in Cleveland to enroll in select religious and nonreligious schools. Ohio taxpayers filed suit, but the Supreme Court found the program passed constitutional muster.⁶

In dissent Justice Stevens asked the obvious question: "Is a law that authorizes the use of public funds to pay for the indoctrination of thousands of grammar school children in particular religious faiths a 'law respecting an establishment of religion' within the meaning of the First Amendment?" Alluding to President Thomas Jefferson's celebrated metaphor, Stevens warned that when "we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of our democracy." (One wonders whether the Court would have upheld tuition aid for madrassa students to be indoctrinated in radical Islam and violent jihad.)

Justice Stevens was not always on the losing side. His majority opinion in *Santa Fe Independent School Dist. v. Doe*⁷ interrogated whether it was a legitimate government function to facilitate and orchestrate prayer. Prior to 1995, a prayer was said over the public-address system before football games at a public school in Santa Fe.

Presumably because of the content or tone of some prayers, Mormon and Catholic students filed suit challenging the constitutionality of such prayers, whereupon the school district changed its policy, which thereafter provided for election of the student to deliver the prayer and specified guidelines to ensure the prayers were nonsectarian and nonproselytizing.

Justice Stevens, writing for the Court, held the policy as "invalid on its face because it establishes an improper majoritarian election on religion, and unquestionably has the purpose and creates the perception of encouraging the delivery of prayer at a series of important school events."

The subtext is that prayer is too important to entrust to the government. By definition, prayer freely addresses the Almighty. When government determines *who* can pray and dictates what is prayed, it has become excessively entangled in the practice of religion. Indeed, in *Wallace v. Jaffree*,⁸ Justice Stevens opined that "individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. . . . [R]eligious beliefs worthy of respect are the product of free and voluntary choice by the faithful."

*Westside Community Bd. of Ed. v. Mergens*⁹ provided Justice Stevens an opportunity to elucidate the theme of extricating government from religious practice. This plurality decision dealt with Westside Public High School, which recognized clubs but denied the request of students to form an officially recognized Christian club. The board upheld the denial, whereupon a lawsuit was filed under the federal Equal Access Act. The Supreme Court concluded that the school violated the act.

Writing in dissent, Justice Stevens underscored the importance of asking the right question: "Can Congress really have intended to issue an order to every public high school in the Nation stating, in substance, that if you sponsor a chess club, a scuba diving club, or a French club—without having formal classes in those subjects—you must also open your doors to every religious, political, or social organization, no matter how controversial or distasteful its views may be?"

His vigorous dissent made clear that he did not think so. Indeed, he warned that the majority's interpretation of the act "leads to a sweeping intrusion by the Federal Government into the operation of our public schools . . . [and threatens to] divest local school districts of their power to shape the educational environment."¹⁰

That same year Justice Stevens joined the Court's majority opinion in the controversial and much maligned free exercise clause opinion authored by Justice Antonin Scalia, *Employment Division, Department of Human Resources of Oregon v. Smith*.¹¹ The gravamen of the case was whether peyote-smoking drug rehab counselors were entitled to religious exemptions from a state criminal law banning peyote use. The Court held that such laws would no longer be evaluated under the balancing test and compelling state interest requirement of *Sherbert v. Verner*.¹² The government could enact generally applicable criminal laws, religious exemptions to which might be constitutionally permitted but would not be required. Thus, peyote smoking was illegal—even for observant Native Americans for whom it was a sacrament.

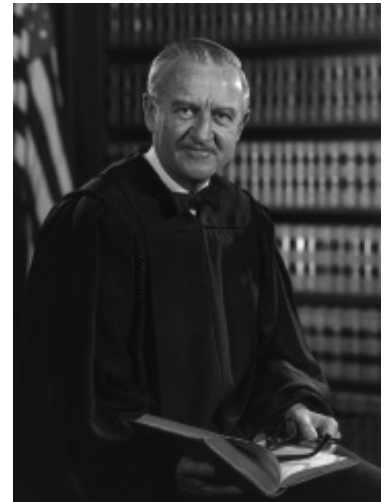
Justice Stevens agreed with the majority that while an exception for sacramental peyote use might be constitutionally permissible, it was not constitutionally obligatory. When it came to free exercise, he had faith that whether a carve-out was appropriate was best left to the democratic process.

It is not necessary to parse all of the opinions of Justice Stevens to discern a meaningful pattern. One might summarize the approach of Justice Stevens in a précis: replace complicated balancing tests with bright lines; defer to political branches for exceptions to generally applicable laws.

More specifically, what emerges from his establishment clause writings is a robust wall of separation, which forbids state subsidizing of religious institutions and practices, disfavors most tuition voucher programs for religious schools, and prohibits religious displays on government property.

As to the free exercise clause, Justice Stevens believes religious institutions have the political clout and civic sophistication to advocate their own interests in city halls, state legislatures, and Congress. So government may (but is not constitutionally obliged to) provide exemptions to neutral and generally applicable laws incidentally burdening religious conduct.

Christopher L. Eisgruber, who clerked for Justice Stevens from 1989 to 1990 and is now provost at Princeton University, has written scholarly commentary that corroborates this.¹³ Similarly, Professor Eduardo M. Peñalver of Cornell Law School, who also clerked for Justice Stevens, concurs. Those who caricature Justice Stevens as one who "hates religion" are in error, for he possessed an abiding "respect [for] religion as a powerful motivator of human action, though one that is largely able to look out for its own interests in the political process."¹⁴



Some describe Justice Stevens as gleefully enforcing the establishment clause but only lukewarmly entertaining free exercise claims. Such appraisals fall somewhere on the spectrum between oblique obloquy and candid criticism. A sincere (but mistaken) perspective is Professor Douglas Laycock's charge that, for Justice Stevens, religion is "subject to all the burdens of government, but entitled to few of the benefits."¹⁵ Professor Michael Kessler disagrees: "Far from hostility to religion, Stevens's jurisprudence reflects this deep Jeffersonian conviction that religious freedom will suffer when a majority uses the rule of law to enforce its religious preferences."¹⁶ And Brent Walker of the Baptist Joint Committee has said that Justice "Stevens has been more champion than enemy of religious freedom."¹⁷

Practical and Accurate

In his prescient book *John Paul Stevens and the Constitution*, Professor Robert Judd Sickels explains that Justice Stevens saw "the Court's accretion of imprecise tests [as making] it difficult for legislators and judges to know what is lawful and what is not." This has not been good for either government or people of faith. In fact, Sickels understands that "Stevens's views of religious establishment reflect his concern that judge-made rules be practicable as well as historically accurate." And with a nod to Ockham's razor, "[o]ther things being equal, the simpler rule is the more workable."¹⁸ Arguably Justice Stevens preferred an incremental approach to constitutional adjudication—like a judicial Georges Seurat meticulously painting a pointillist masterpiece.

While Justice Stevens has been the recipient of admiration, condemnation, and misinterpretation—and will be for the foreseeable future—his constitutional oeuvre will inform judges, instruct citizens, and illuminate the Constitution for years to come. With his unwavering commitment to the wall of separation between church and state, complemented by his appreciation for the ability of institutionalized religion to participate meaningfully in the democratic process, Justice Stevens has left a religious liberty legacy for which we can be grateful.

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1 www.talkingpointsmemo.com/documents/2010/04/justice-john-paul-stevens-resignation-letter.php?page=1.

2 "Notwithstanding the turnover, it is still a Justice Kennedy court," said Erwin Chemerinsky, dean of UC Irvine Law School, as a member of a panel discussion including the yet-to-be-nominated Elena Kagan. "Justice Kennedy has been in the majority of more 5-4 decisions than any other Justice over the last 4 years." — "Elena Kagan, Paul Clement, and Erwin Chemerinsky on SCOTUS 2009 Term," May 5, 2010, www.ocjblog.com/?p=4595.

3 559 U.S. ____ (2010). www.law.cornell.edu/supct/html/08-472.ZC.html

4 545 U.S. 677 (2005). <http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=US&invol=03-1500&vol=000>. Justice Stevens also warned that "[t]he judgment of the Court in this case stands for the proposition that the Constitution permits governmental displays of sacred religious texts. This makes a mockery of the constitutional ideal that government must remain neutral between religion and irreligion. If a State may endorse a particular deity's command to 'have no other gods before me,' it is difficult to conceive of any textual display that would run afoul of the establishment clause." Some observers wonder how this case can be reconciled with a similar case in which, voting 5-4, the Supreme Court found inappropriate a Ten Commandments display on government property. Some speculate that the *Van Orden v. Perry* case is sympathetic because the display had been there since 1961. Apparently, recently constructed religious displays on government property are verboten, but older displays will be grandfathered in.

5 536 U.S. 639 (2002). www.law.cornell.edu/supct/html/historics/USSC_DN_0000_1751_ZO.html. Government-subsidized religious instruction, Justice Stevens cautioned, may lead to religious strife, the avoidance of which was one of the reasons for the establishment clause—an interpretation influenced and confirmed by "the impact of religious strife on the decisions of our forbears to migrate to this continent, and on the decisions of neighbors in the Balkans, Northern Ireland, and the Middle East to mistrust one another."

6 The suit alleged establishment clause violations, for which the federal district court granted plaintiffs summary judgment, and which the Sixth Circuit Court of Appeals affirmed. Chief Justice William Rehnquist crafted the majority opinion upholding the Ohio tuition aid program.

7 530 U.S. 290 (2000). www4.law.cornell.edu/supct/html/99-62.ZO.html

8 472 U.S. 38 (1985). www.law.cornell.edu/supct/html/historics/USSC_CR_0472_0038_ZO.html

9 496 U.S. 226 (1990). [http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=](http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=0case&court=US&vol=496&page=226)

0case&court=US&vol=496&page=226. Examining the school policy, the federal statute, and case precedent, Justice Stevens contended that the Court should "construe the Act [such that] a high school could properly sponsor a French club, a chess club, or a scuba diving club simply because their activities are fully consistent with the school's curricular

mission Nothing in [the law] implies that the existence of a French club, for example, would create a constitutional obligation to allow student members of the Ku Klux Klan or the Communist Party [to be entitled to the school's official support]. Clearly, Justice Stevens does not equate faith clubs with the Klan or Communism. The thrust of his comments is to demonstrate the folly of so construing the Equal Access Act.

10 The summoning idea in the dissent of Justice Stevens is to defer to teachers, schools, and school districts in matters even quasi-pedagogical, rather than to Congress, especially where it is not clear that Congress intended that permitting any noncurricular clubs made all clubs thereafter constitutionally entitled to official recognition. As to religious student gatherings, Christian or otherwise, Justice Stevens sees nothing that prevents students from gathering to talk about their faith.

11 494 U.S. 872 (1990). www.law.cornell.edu/supct/html/historics/USSC_CR_0494_0872_ZS.html

12 374 U.S. 398 (1963). *Sherbert* involved a devout Seventh-day Adventist woman denied unemployment benefits after she was jobless because she would not work on her Saturday Sabbath. The rule established by the Supreme Court was that governmental actions substantially burdening religious practice must be justified by a "compelling governmental interest," else the burden will require an exemption. The *Smith* case limited *Sherbert's* heightened protection to select situations, including unemployment compensation benefits cases. It should be noted, however, that the strict scrutiny of *Sherbert* before *Smith* was described by some as "strict in theory but feeble in fact." Justice Stevens also wrote that "granting unemployment benefits is necessary to protect religious observers against unequal treatment" (concurring in *Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136 [1987].

www.law.cornell.edu/supct/html/historics/USSC_CR_0480_0136_ZC1.html).

13 Christopher L. Eisgruber, *The Next Justice: Repairing the Supreme Court Appointments Process* (Princeton University Press, 2007). *Fordham L. Rev.* 74 (2006): 2177. <http://law2.fordham.edu/publications/articles/500flspub10761.pdf>

14 Eduardo M. Peñalver, "Treating Religion as Speech: The Religion Clause Jurisprudence of Justice Stevens," *Fordham Law Legal Studies Research Paper*, No. 99 (November 2005).

15 *Id.*, referencing an article by Douglas Laycock in *DePaul L. Rev.*, 39, p.1010. See also Robert Marus, "Church-state advocates urge strong successor for Stevens" (April 9, 2010), <http://www.abpnews.com/content/view/5032/97/>

16 newsweek.washingtonpost.com/onfaith/georgetown/2010/04/the_religious_neutrality_of_justice_stevens.html

17 www.abpnews.com/content/view/5032/97/

18 *John Paul Stevens and the Constitution: The Search for Balance* (University Park, Pa.: Pennsylvania State University Press, 1988), p. 47.

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