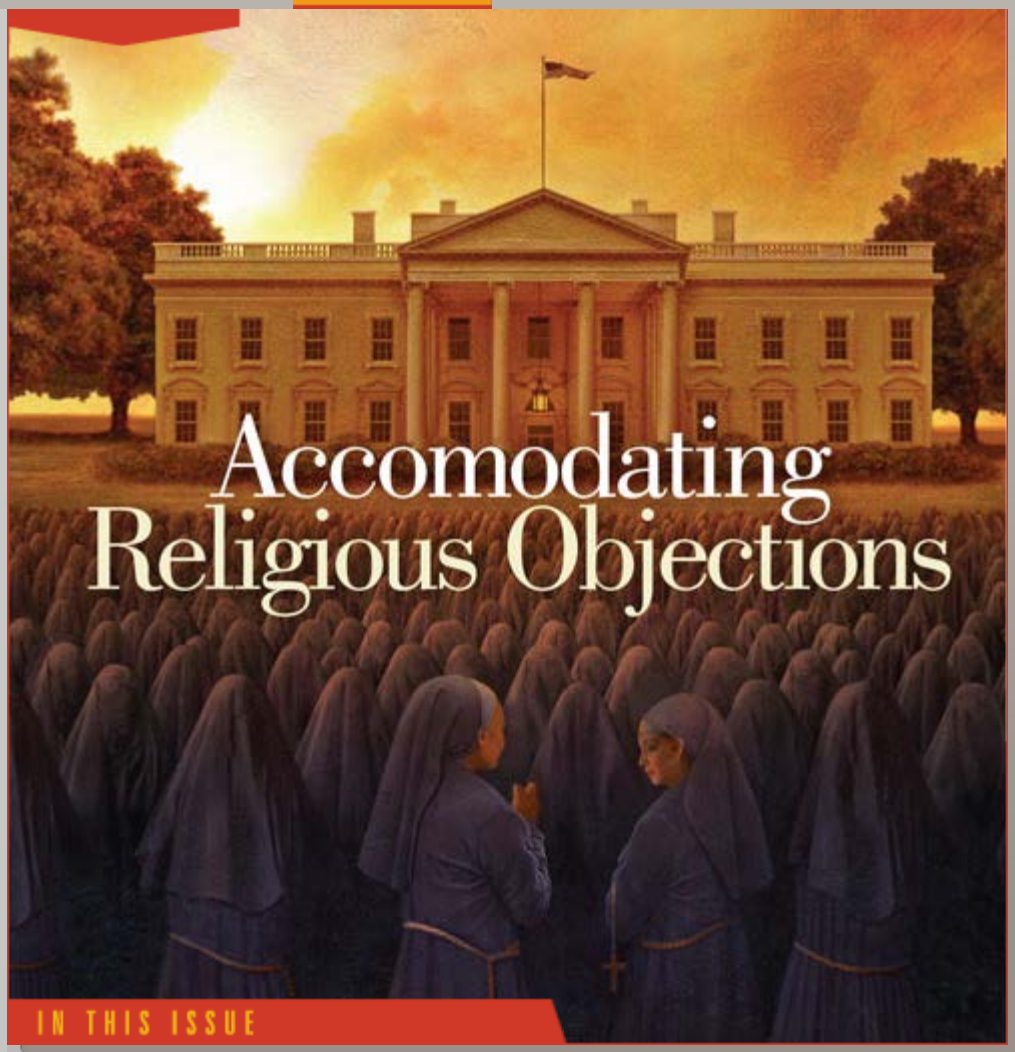
A MAGAZINE OF RELIGIOUS FREEDOM
LIBERTY



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MAY / JUNE 2012

Showing The Flag

Editorial

BY: LINCOLN E. STEED

I have become convinced that unless a certain historic awareness becomes a present preoccupation, then a once-great republic is destined for the worst of old ages—a certain dementia that combines lack of energy with violent irrationality.

I thought about this dynamic in the long months taken up with the primaries that precede the presidential election. It is always a time when ambitious men and women say things they mean only to gain advantage by. However, I am as much troubled that in saying these palpably dangerous things, the candidates (reasonably intelligent people, one presumes) obviously expect such things will appeal to significant numbers of their fellows as truth.

One candidate opined loudly that a separation of church and state is not to be found in the Constitution. It was demagoguery designed to appeal to a willful faction. Years ago there was what was titled the Know-Nothing Party: it is always dangerous to care so little for established models of governance.

Another candidate threatened to set the dogs to those judges who offend on matters of church and state. He would have judges brought before legislators to explain their actions, with the threat of removal if their views remained objectionable to the agenda of the house. Someone with so little respect for the separation of powers between branches of government would likely have even less for the separation of the powers of church and state!

Yet another candidate, with at least a memory of things past, spoke of a 1960 speech by a young presidential candidate named John F. Kennedy. That candidate's prospects seemed troubled because many people in what had once been a pervasively Protestant America suspected that a Catholic candidate would destroy the First Amendment.

To his audience at the Greater Houston Ministerial Association that day in 1960 John Kennedy imagined an America of religious freedom. "I believe in an America," he said early on in the speech, "where the separation of church and state is absolute; where no Catholic prelate would tell the president—should he be Catholic—how to act, and no Protestant minister would tell his parishioners for whom to vote; where no church or church school is granted any public funds or political preference, and where no man is denied public office merely because his religion differs from the president who might appoint him, or the people who might elect him.

"I believe in an America that is officially neither Catholic, Protestant nor Jewish; where no public official either requests or accepts instructions on public policy from the pope, the National Council of Churches, or any other ecclesiastical source; where no religious body seeks to impose its will directly or indirectly upon the general populace or the public acts of its officials, and where religious liberty is so indivisible that an act against one church is treated as an act against all."

It was a bravura performance and no doubt played a big role in Kennedy's eventual campaign victory. And whatever other faults may be perceived in his all-too-short presidency, his practical separation of church (his church included) and state was exemplary. It was so marked that in the earliest days of the 2012 presidential election (way back in 2011, actually) a statement from the Catholic bishops opined that they had made a great mistake in not holding Kennedy to the dictates of his church—a mistake they would not repeat. One has to wonder whether the candidate who recently invoked that speech was really more concerned with the present expectations than the past models when he said that the speech made him want to throw up.

I look at those two paragraphs from the 1960 speech and wonder how far we have come. It was a grand call to freedom of religion as attained through a First Amendment separation. But what do we have today?
"An America where the separation of church and state is absolute"? The principle has not yet been overthrown, but it has some mighty pious detractors. Some of the most religious mock the concept as erroneous and indeed unconstitutional. Maybe one day they will move beyond even worrying about correcting the Constitution? One hopes not, for freedom's sake.

"Where no Catholic prelate would tell the president . . . how to act"? One can only hope the recent statement from his church leaders today about Kennedy was bluster. We cannot afford such a dynamic. The dance of power in Iran between an ayatollah and their president has the world on edge. It should be a warning to us.

Where "no Protestant minister would tell his parishioners for whom to vote"? Sounds quaint, doesn't it? Voter guides and ministerial endorsement are routine and fly high and unharmed by tax-exempt requirements.
"Where no church or church school is granted any public funds or political preference"? How the world has changed! Any public funds! How would church schools survive today without government money? We are way beyond that sort of concern. The real battle now is to discern distinct religious identity in these increasingly secular institutions. Our educational practice has evolved, but not toward true faith integrity. Was it really only a bare decade ago that the faith-based initiative crossed the line in the sand and began funding church outreach? Of course there was a short-lived fiction that the money was only for church-run secular programs. What we are now waiting for is the imposition of civil nondiscrimination standards on the recipients of the aid money. Oh, wait, I guess we saw the tip of that iceberg with the health-care contraception mandate!

"Where no religious body seeks to impose its will directly or indirectly upon the general populace or the public acts of its officials"? It might be hard to divine this dynamic in Rome's private dealings behind diplomatic doors, but it was certainly on display during the recent kerfuffle about health-care provision of contraceptive measures. While we must beware of the state forcing a compromise on matters of conscience, the dance just as surely involves a church ready to project its view back through public policy. And it must also be recognized that many of the leading Protestant political factions today are just as unseemly and direct in efforts to impose their will on politicians and the public.

Kennedy laid out a clear vision. But it is one that we seem to have embraced in the negative. He mentioned his record a few words later, citing "my declared stands against an ambassador to the Vatican, against unconstitutional aid to parochial schools." Both points sound quaint today. "This is the kind of America I believe in," summed the candidate idealistically. What he was invoking was not just historic—it was a Protestant vision of religious freedom and of a civil state that upheld those values. How ironic that one of the most Protestant restatements of American religious liberty should be given by a Catholic candidate!

It remained to a candidate in this presidential season, and another Catholic, to make a troubling observation on the changed religious dynamic in the United States. At a 2008 address to students at Ave Maria University in Florida, Senator Rick Santorum said that "Protestantism in this country . . . is in shambles; it is gone from the world of Christianity as I see it." I don't think he was being presumptuous—I think he has seen a certain undeniable reality. We don't want a return to the religious wars of Europe that followed the Reformation, but we surely need a return to the vigorous Protestant self-awareness that once cherished separation of church and state as the surest way to protect a new and vibrant republic.

Lincoln E. Steed is the editor of *Liberty*.

MAY / JUNE 2012

Accommodating Religious Objections

BY: ALAN BROWNSTEIN

Anyone who has kept up on current events knows about the proposed Department of Health and Human Services (HHS) regulations that were announced in January. Designed to implement parts of the Affordable Care Act (ACA), they required employers to include contraception services in the health insurance plans they offered their employees. The primary objection to the regulations involves their application to religious organizations that are opposed to the use and provision of contraceptive services as a matter of faith and doctrine. The regulations did contain an exemption for some religious employers, but it was extremely narrow in its scope and would not apply to religious hospitals, universities, and charities.

In response to the regulations' critics, President Obama offered a compromise solution. Under his new proposal, religiously affiliated employers will not be obligated to provide contraceptive coverage to their employees; instead, their health insurance companies will be required to provide the coverage directly to women at no charge. The cost of providing insurance coverage for contraceptive services would thus be shifted away from faith-based institutions that object to the mandate on religious grounds, to health insurance companies serving the populations at issue. Proponents of the compromise argue that because the provision of contraceptive services often reduces other policy costs incurred by health-care insurers, the cost of the shift to insurance companies would be minimal.

President Obama's proposed compromise was satisfactory to some interest groups, but other ideological voices, including both liberal and conservative politicians, criticized the plan, albeit from opposite perspectives. The New York *Times* editorialized that "it was dismaying to see the president lend any credence to the misbegotten notion that providing access to contraceptives violated the freedom of any religious institution."[1] The U.S. Conference of Catholic Bishops, on the other hand, claimed that the proposal "continues to involve needless government intrusion in the internal governance of religious institutions, and to threaten government coercion of religious people and groups to violate their most deeply held convictions.[2]"

The Right Framework

We believe there is a serious religious liberty interest at stake in disputes like these. Religious institutions have an understandable desire, one worthy of respect, to use their own resources (public funds and facilities present a separate question) to advance and promulgate their faith—and not to support activities that violate their religious beliefs. Indeed, there is arguably something particularly intrusive and unsettling about the government forcing religious institutions to take action to use their own resources in a way that undermines their beliefs.

This affirmative commandeering of religious organizations to further the state's purposes is, for some people, even more intrusive and burdensome than a law that ties religious institutions' hands by forbidding them from engaging in conduct that their faith obliges them to perform.

The burden on religious liberty is thus a critical element in evaluating the unfolding HHS regulations, but it is not the only concern that needs to be taken into account. The public interest underlying the contraceptive access aspects of the ACA must be considered as well. We do not doubt the importance of contraceptive access to the public health of our society, nor do we doubt the value of the mandated insurance coverage to individual women. If religiously affiliated organizations such as hospitals, universities, and charities are exempt from the regulations' requirements, a large class of women might be denied health benefits that other women receive, and that the state and the medical community strongly believe should be available to them. That is no small cost.

Finally, there is one other factor to consider. Some, though not all, religious exemptions provide benefits of secular material value to exempted institutions, in addition to protecting the institutions' religious liberty. Typically these secular benefits are a consequence of relieving religious individuals and institutions of duties and obligations that other similarly situated persons or organizations must obey.

Some easy examples may help to clarify this point. Religious pacifists who are exempt from military conscription as conscientious objectors are relieved of having to violate their religious commitments, but they are also relieved of a physically dangerous duty that other individuals must fulfill. When an employee's observance of the Sabbath is accommodated by their employer, the employee also gets to spend prized weekend time off with their family, while their coworkers may have to work more weekends to substitute for their absence. When religious institutions are exempt from regulations that require the expenditure of funds—for example, regulations requiring that facilities must be

accessible to the disabled—the exempted institutions save money that can be used for other purposes. Thus, persons can certainly support exemptions for religious individuals and institutions in the name of religious liberty while questioning the fairness of allowing the beneficiaries of these accommodations to retain the accompanying secular benefits as well.

In sum, we suggest that religious accommodations in disputes such as this one should try to accomplish three goals. First, they should protect religious liberty to the extent that it is feasible to do so. Second, they should mitigate or spread the costs of protecting religious liberty so that they do not fall disproportionately and heavily on any individual or group. Third, they should promote basic fairness and avoid the privileging of religion by limiting the secular benefits religious individuals and institutions obtain as a result of any exemption they receive.

Resolving the Exemption Issue With Win/Win Approaches

Let us now consider how this analysis might apply to the HHS regulations mandating contraceptive services, with which our column opened. To begin with, we would exempt religious organizations from any duty to comply with the mandate when the organizations are operating programs with their own funds. If a religious organization operates a government-funded program, however, the mandate should remain in force.

The distinction we make here, between privately and publicly funded programs, is grounded in our basic unease about government's commandeering of the resources of religious institutions to serve its own goals. Religious organizations have a religious liberty right to challenge government regulations that require them to use their own resources in violation of their religious commitments in order to further the state's secular objectives.

Religious organizations do not, however, have a religious liberty right to use the government's resources in order to further the organizations' religious commitments when doing so would undermine the state's public policy goals.

Religious Liberty as a Public Political Good

Next, we think the government should take appropriate steps to spread the cost of the religious accommodation to the general public, rather than having it fall much more heavily on the members of a smaller class. The most obvious and natural way to accomplish this goal would be for the federal government to use its own resources to provide health insurance coverage for contraceptive services for those women who are unable to receive the benefits of the HHS mandate because they happen to be employed by institutions who invoke the religious exemption discussed above.

It may be that President Obama's proposal to shift the cost of contraceptive services to health-care insurers also achieves this cost-spreading goal to some extent, although we do note that it does so by imposing on the health-care providers directly, and in a way that seems historically unusual. (We are not aware of many examples in which the government directs a commercial enterprise to offer a service for free.)

So while we must think more about the compromise that President Obama offered before deciding whether it is acceptable, our key point here is that the government's obligations do not end when it exempts religious institutions from regulations that unacceptably interfere with or burden their religious liberty. The government also owes a duty to those people who suffer burdens or lose benefits as a consequence of the state's protecting religious liberty—and that duty requires the government to mitigate and spread these costs as much as possible.

The justification for spreading the cost of religious accommodations is straightforward. Fundamental rights such as religious liberty are public political goods that define the very nature of our community. We recognize, of course, that, in any given case, freedom of religion may be of much more value to certain individuals or groups than others. But the utility of these rights to particular individuals in specific situations should not lead us to ignore the intrinsic public value of living in a free society.

When the government incurs costs to acquire or protect public goods, it is appropriate for the community as a whole to share in the costs of its doing so—rather than leaving the cost to fall on a narrow class whose interests are sacrificed to the greater good. (That is the reason the Constitution prohibits "takings" for public use without "just compensation.")

The government expenditures and cost-spreading we propose to make rights meaningful are not unique to the public good of religious liberty—they often are present in the free speech context as well. Governments spend substantial sums, for example, to provide adequate police forces to maintain order during large political demonstrations, or to protect small groups of unpopular speakers. In accepting these expenses as the price to be paid for living in a society committed to freedom of speech, we recognize implicitly that these costs may be allocated appropriately to the general taxpaying public. We suggest that a similar analysis applies to religious liberty.

Adjusting the Equities

Finally, we reach the third factor that is often overlooked in religious accommodation disputes. As a condition for receiving an exemption from the HHS contraceptive services mandate, religious organizations should agree to dedicate whatever funds they save from not having to provide the otherwise-required contraception coverage to some other public service, identified by the government, that is consistent with their beliefs. Remember, the justification behind the exemption for faith-based organizations is religious liberty. It does not extend to the cost savings that result from being freed from the burden of complying with legitimate regulations relating to public health goals, or any other

permissible governmental objective.

Here again, our proposal is grounded on uncontroversial precedent. Our society has long accepted the legitimacy of requiring conscientious objectors, exempt from military conscription, to perform some kind of alternative service that is consistent with the dictates of their faith. This obligation is not a penalty imposed on religious pacifists. It is an equitable rule that recognizes that, in the name of religious liberty, the conscientious objector has been relieved of a serious material burden that has been imposed on a broad class of individuals. Accordingly, it is fair and just to require them to accept some other, comparable, civic obligation that does not require the violation of their religious beliefs.

We see no material difference between alternative service for those who are exempt from military service for religious reasons and alternative expenditures for public services by religious institutions that are exempt from costly regulatory mandates on religious liberty grounds.

We recognize that calculating and reallocating secular cost savings can be challenging and imprecise. But such imprecision should not prevent us from doing the best we can under the circumstances. Alternative service for conscientious objectors does not, and cannot, replicate the risks and burdens of military service. In these cases, perfect calibration in redirecting secular windfalls may be less important than achieving sufficient equities to demonstrate our recognition of the problem and our commitment to mitigating it.

The framework we describe in this article certainly won't resolve all disputes about religious accommodations that will arise now and in the future. Those debates are as old as our country. This framework does, however, lead us to think about these issues in a principled manner, rather than relying on compromises that depend primarily on the political power of competing adversaries.

Certainly, our proposed framework protects religious liberty far more than the original HHS regulations did, and it also provides health insurance coverage for far more women than would receive benefits if all religious organizations burdened by these regulations were simply exempted from the mandate. President Obama's compromise proposal seems, in some ways, to be a step in the right direction, although important questions as to how it will be implemented remain to be resolved. The compromise resonates with two of the principles we advocate: (1) it reduces state interference with the ability of religious institutions to follow the dictates of their faith, and (2) it mitigates and spreads the costs of the accommodation so that they do not fall exclusively on women who are employed by exempt religious institutions. Granted, its placement of the burden on insurance companies does raise issues of its own. But it may not be a bad beginning, even if it isn't quite yet a complete solution to the problem.

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1 http://www.nytimes.com/2012/02/11/opinion/the -freedom-to-choose-birth-control.html.
2 http://www.usccb.org/news/2012/12-026.cfm.

MAY / JUNE 2012

Mandate Tests Faith

BY: ASMA T. UDDIN

Under the Affordable Care Act (ACA) of 2010,[1] all employer health-care plans must provide—at no cost to the employee—certain preventive services for women.[2] The inclusion of contraceptives—including abortion-causing contraceptives—in this mandated coverage has caused a public uproar, with religious groups opposed to contraception and/or abortion decrying the violation of their religious freedom.

The ACA is a United States federal statute signed into law by President Barack Obama on March 23, 2010. In an attempt to provide universal health-care coverage, the law reforms certain aspects of private and public health insurance programs, increases insurance coverage of preexisting conditions, and gives insurance access to more than 30 million Americans previously without it.

One provision of the ACA mandates that health plans "provide coverage for and shall not impose any cost sharing requirements for . . . with respect to women, such additional preventive care and screenings . . . as provided for in comprehensive guidelines supported by the Health Resources and Services Administration." However, when the Department of Health and Human Services (HHS) published an interim final rule on July 19, 2010, it had not yet defined "contraceptive preventative services for women"; instead, it delegated that decision to the Health Resources and Services Administration (HRSA), a division of HHS. HRSA, in turn, directed a private policy organization, the Institute of Medicine (IOM), to suggest a list of recommended guidelines describing which preventive drugs, procedures, and services should be covered by all health plans.[3]

Simultaneously, HHS also accepted public comments to the 2010 interim final rule until September 17, 2010. A number of groups filed comments warning of the potential conscience implications of requiring religious individuals and groups to pay for certain kinds of health care, including contraception, sterilization, and abortion.

Despite the stated concerns of these religious entities, on July 19, 2011—one year after the first interim final rule was published—the IOM issued its recommendation that preventive services include "the full range of Food and Drug Administration-approved contraceptive methods [and] sterilization procedures."[4] FDA-approved contraceptive methods include birth-control pills; prescription contraceptive devices, including IUDs; Plan B, also known as the "morning-after pill"; and ulipristal, also known as "ella," or the "week-after pill"; and other drugs, devices, and procedures.

On August 1, 2011, 13 days after the IOM issued its recommendations, HHS, the Department of Labor, and the Department of Treasury promulgated the interim final rule. On that same day, HHS issued an amended interim final rule (the mandate), adding an exemption for "religious employers."

Separate from the issue of contraception, as mentioned above, included in "FDA- approved contraceptive methods" are the drugs Plan B and ella. Many religious individuals and organizations that have conscientious objections to abortion object to the use of Plan B and ella because they believe, and scientific evidence supports their belief, that these drugs constitute abortifacients. That is, Plan B and ella can prevent a human embryo, which these religious groups understand to include a fertilized egg before it implants in the uterus, from implanting in the wall of the uterus, causing the death of an embryo.

It was precisely these sorts of concerns that were articulated by religious groups in their public comments before the mandate was issued. While most of the other provisions of the mandate were unobjectionable for religious groups, the provision on contraceptives and abortifacients alone generated several hundred thousand comments. These voluminous comments, however, did not yield the sort of broad protections for conscience rights that these groups were hoping for. Instead, the HHS created an exceedingly narrow religious exemption—one that is narrower than any other religious exemption in federal law.[5] Under the regulations, the only organizations religious enough to receive an exemption are those that meet *all* of the following criteria:

(1) its purpose is the inculcation of religious values,
(2) it employs "primarily" persons who share its religious tenets;
(3) it serves "primarily" persons who share its religious tenets; *and also*
(4) it qualifies under the IRS code as a church or religious order and has more than 50 employees.[6]

This exemption is of little solace to religious employers for two primary reasons. First, because the regulation merely states that HRSA "may establish exemptions,"[7] it is possible that the federal government will decide not to provide any religious exemptions at all.

Second, HRSA has this discretion with respect to only a vanishingly small class of religious employers. Under this definition, most, if not all, religious colleges or universities would not qualify for any exemption, because these institutions exist not just to inculcate religious values, but also to teach students. The nature of many religious institutions is in fact to serve those outside their community, conditioning their help on a person's need rather than their chosen faith. As many Christian objectors to the mandate have made clear, not even Jesus' ministry would qualify for the exemption, as He served both Christians and non-Christians. No homeless shelter, soup kitchen, or adoption agency would qualify, because these organizations exist to serve anyone in need, not just those that profess a certain religious creed.[8] And few, if any, of these organizations qualify as a church or religious order under the tax code.

Religious organizations—in particular, the Roman Catholic Church—and individuals vociferously voiced their concerns about the new mandate. On January 20, 2012, the administration announced that, while it would not expand the exemption from its abortion-drug mandate to excuse religious schools, colleges, hospitals, and charitable service organizations from compliance, it would extend the deadline for religious groups who do not already fall within the existing narrow exemption. This meant that such religious groups would have one more year to comply with the mandate or drop health-care insurance coverage for their employees altogether and incur a hefty fine.

This accommodation was deemed insufficient by religious objectors to the mandate, as it did nothing to address the substance of their concerns. After a firestorm of opposition from across the political and religious spectrum arose following the administration's January announcement, the president held a press conference on February 10, 2012, to announce a second compromise. But this compromise also did not change any of the provisions of the August 2011 mandate, nor did it make any changes to the mandate's narrow religious exemptions.

Instead, for nonexempt religious organizations the president made two promises. First, enforcement of the mandate would be delayed by a year so that they could get their houses in order to comply with the mandate. And second, the president promised that in a rule yet to be developed, insurance companies—not the religious employers themselves—would be forced to pay for the abortion-inducing drugs, sterilization, and contraception.
The problems with this proffered compromise are many. First, it is unlikely that insurance companies will offer these services for free; religious employers would still ultimately be paying for these services against their conscience, with the costs spread through higher insurance premiums for their employees. Although some argue that insurance companies would cover these services for free because it helps their bottom line, such an argument is tenuous at best—after all, if that were the case, insurance companies would have arguably already provided contraception for free. Moreover, the provision of these so-called free contraceptives still depends on the religious employer purchasing insurance for its employees. While they might not be paying for the drugs, they are still facilitating their use by employees. Religious organizations should not be forced to turn a blind eye to the inclusion of something in their insurance plan that violates their conscience.

Second, hundreds if not thousands of religious organizations have self-insured plans, in which the religious organization is the "insurance company." The new compromise—if promulgated—offers them nothing. Ironically, many religious organizations chose self-insurance to avoid state contraception mandates.

Third, it is still unclear whether, even under the new proposal, nonexempt religious organizations (for-profit organizations, individuals, or nondenominational organizations) will have their religious liberty protected at all. The president's plan only reinforces how the government's policy intends to treat different religious groups and individuals differently, which is unconstitutional.

If an employer with moral objections to the HHS mandate is not covered by the administration's compromise solution, the employer's final alternative is to stop providing health-care benefits altogether. But this too places religious employers in an unacceptable double bind: either they must pay for contraception, sterilization, and abortion-inducing drugs, or they must stop providing their employees with health care and pay a stiff civil penalty. The first option forces religious employers to violate their moral convictions. The second option forces them to pay steep fines for exercising their religion and creates enormous hardships for their employees, some of whom have very limited means to purchase health insurance on their own. And the burden does not end there. Without employer health plans, many religious institutions would find themselves at a serious competitive disadvantage vis-à-vis other employers. Some religious institutions could find that without a group health plan, they could not attract sufficient staff and would be forced to close their operations altogether.

The fines imposed on religious employers that refuse to violate their consciences are significant. For example, a charitable organization with 100 employees will have to pay the federal government $140,000 per year for the "privilege" of not underwriting medical services it believes are immoral.[9]

Given these coercive burdens on the religious freedom of organizations and individuals that hold religious beliefs against contraception and/or abortion, the Becket Fund for Religious Liberty has brought several lawsuits. In response the Obama Administration has asked the courts to dismiss the cases based on the announcement of a promise to possibly change the mandate in the future.[10]

Government Funds a Factor

Proponents of the mandate argue that religious groups must provide these services—whatever their religious convictions—because they receive federal funding. It would be one thing if the mandate required religious organizations to choose between their convictions and federal funding. But this mandate is much worse: It applies with full force to every religious school, hospital, and soup kitchen, even if every single dollar of funding comes from private donations. It is simply a red herring to say that the mandate is somehow tied to the receipt of federal funding.

Even in cases in which the religious organization opposing the mandate is receiving federal funds, it is not true that these organizations are required to act in contravention of their consciences. Religious organizations regularly partner with the government in projects that serve the public—projects that in many cases would not succeed but for the help of these organizations. A diverse society should welcome contributions from all people—there is a strong need to serve the poor and others in need, and the government should not be in the business of turning down help when it disagrees with someone's religious beliefs.[11]

A robust exemption from the HHS mandate would be a workable way for the federal government to advance both its interest in women's health and its commitment to respecting the legitimate autonomy and convictions of religious institutions.

In particular, expanding the existing "religious employer" exemption into a "religious institution" exemption would eliminate the conflict entirely. Specifically, the exemption should be expanded to include nonprofit charitable religious institutions other than churches and religious orders. It should also exempt nonprofit and for-profit institutions that have religious leadership and identity, but that do not necessarily hire, teach, or serve predominantly people of their own faith tradition. In addition, the exemption should be expanded to cover individuals and nondenominational organizations as well as student health plans to accommodate religious colleges and universities.

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1 The Affordable Care Act is actually two laws: The Patient Protection and Affordable Care Act, Public Law 111-114 (Mar. 23, 2010), and the Health Care and Education Reconciliation Act, Public Law 111-152 (Mar. 30, 2010).
2 42 U.S.C. § 300gg-13(a) (4).
3 In developing its guidelines, IOM invited a select number of groups to make presentations on the preventive care that should be mandated by all health plans. These were IOM, the American Congress of Obstetricians and Gynecologists (ACOG), John Santelli, National Women's Law Center, National Women's Health Network, Planned Parenthood Federation of America, and Sara Rosenbaum. No religious groups or other groups that oppose government-mandated coverage of contraception, sterilization, abortion, and related education and counseling were among the invited presenters.
4 Institute of Medicine, *Clinical Preventive Services for Women: Closing the Gaps* (July 19, 2011).
5 Until now, federal policy has generally protected the conscience rights of religious institutions and individuals in the health-care sector. For example, for 25 years Congress has protected religious institutions from discrimination (based on their adherence to natural family planning) in foreign aid grant applications. For 12 years Congress has both exempted religious health plans from the contraception mandate in the Federal Employees' Health Benefit Program and protected individuals covered under other health plans from discrimination based on their refusal to dispense contraception because of religious belief.
The HHS mandate is not only unprecedented in federal law, but also broader in scope and narrower in its exemption than all of the 28 states' comparable laws. Almost half the states do not have a state contraception mandate at all, so there is no need for an exemption. Of the states that have some sort of state contraception mandate (all less sweeping than the federal one here), 19 provide an exemption. Of those 19 states without an exemption, only three (California, New York, and Oregon) define the exemption nearly as narrowly as the federal one, although the federal exemption is still worse because of the regulation's discretionary language that the government "may" grant an exemption. Moreover, religious organizations in states with a mandate—even those where there is no express exemption—may opt out by simply self-insuring, dropping prescription drug coverage, or offering ERISA plans. The federal mandate permits none of these alternatives, and therefore is less protective of religious liberty than any of the states' policies.
6 76 Federal Register 46623 (Aug. 3, 2011).
7 76 Federal Register 46626 (Aug. 3, 2011).
8 The only other exemption available under the ACA is for "grandfathered" plans. However, here too the law is terribly misleading. Under the new regulations, any one of a number of changes, *even if immaterial*, will cause a plan to lose its grandfathered status. Thus, although President Obama promised throughout the health-reform debate that "if you like your health plan, you can keep it," religious organizations will soon be forced to abandon health plans that reflect their deepest convictions unless they: (1) stopped modifying their health-care plans nearly a year and a half before the HHS mandate was announced; *and* (2) henceforth avoid any triggering condition. These conditions, of course, may have already been violated, will become increasingly difficult to meet, and in any case are unacceptable.
9 See National Federation of Independent Business, "The Free Rider Provision: A One-Page Primer," available online at http://www.nfib.com/advocacy/item/cmsid/51820.
10 The lawsuits, each of which make the same claims, are on behalf of (1) Belmont Abbey College, a Catholic liberal arts college founded by Benedictine monks; (2) Colorado Christian University, an interdenominational Christian college; (3) Eternal Word Television Network (EWTN), a television network that serves to spread Catholic teachings; and (4) Ave Maria University, a Catholic university dedicated to transmitting authentic Catholic values to students.
11 The White House Office of Faith-based and Neighborhood Partnerships has recognized that, with the exception of a few restrictions, faith-based organizations are eligible to participate in federally administered social service programs to the same degree as any other group.

MAY / JUNE 2012

An Open Letter To America: Say Not The Struggle Nought Availeth

Opinion

BY: STEVEN V. THULON

"Say not the struggle nought availeth, the labour and the wounds are vain, the enemy faints not, nor faileth, and as things have been, things remain. If hopes were dupes, fears may be liars; it may be, in yon smoke concealed, your comrades chase e'en now the fliers, and, but for you, possess the field. For while the tired waves, vainly breaking, seem here no painful inch to gain, far back through creeks and inlets making, came silent, flooding in, the main. And not by eastern windows only, when daylight comes, comes in the light, in front the sun climbs slow, how slowly, but westward, look, the land is bright" (Arthur Hugh Clough, 1819-1861).

Job losses. Ineffective economy. Strange relationships between our government, big media, big finance, and big business. Unimaginable, unprecedented government debt. The threat of frightening inflation. An ever-weakening dollar. America losing its AAA credit rating. This messy list is long enough to significantly affect anyone reading this, their children, and their grandchildren. The talking heads are out in force saying anything we want to believe. No matter which way we look, things don't look very good in America these days. It's hard to find a silver lining even for die-hard optimists.

For what looks to be a looming economical and political crisis in America, none the likes of which we have seen before, we can't place all of the blame on Uncle Sam. Yes, the government has let us down in so many costly ways—and continues to do so. Corporate corruption and greed have us paying a high cost, too—all the while government leaders and agents have shown themselves to be either complicit with the corruption, or stand idly by like Shultz in *Hogan's Heroes*, seeing and doing nothing, either way participating by commission or omission for their own short-termed and short-sighted personal advancement, enrichment, or political safety. Easily, these leadership failures share part of the blame.

These in the popular news sectors are not doing what they are supposed to be doing. There is not much reporting going on in the main media centers unless it is hacking away at some left- or right-wing agenda—partisanship is alive and well in the media; and many of us are entertained by a good fight. The personalities in the news media seem to be off-task as they take their competitors to task, incite and fan feuds between individuals, then report on the reportage, incestuously—feeding the drama to keep it going as long as people tune in, buy the rags, and Google the stories—all the while crooks are stealing America blind, and the government is growing larger, preoccupied with grabbing up more power to itself left and right. The recent collaboration between the current administration and ABC News was unprecedented and appears strikingly similar to the status quo tactics of nations in which any freedom to debate politics and policy is not allowed—in which the press is just another arm of the government. Not helping and becoming more irrelevant, yet increasingly in bed with interests each day, the media shares part of the blame.

And "the people" just want to be saved. Somebody (else) *do* something! Seems we're to blame too. It's all very organic: Altogether it is becoming a prelude to a perfect storm for the end of our way of life as we have come to know it—and we, the people, will be both responsible and pay handsomely for the demise of our own republic if it happens.

We are a republic in America. Just because we freely elect our representatives does not mean that the body politic is incapable of making mistakes. It appears that we, the people, have made mistakes. We keep putting people into public office even when they have proved they are not helping but hurting America. We put them there in office; we can take them out as well. This outputting or inputting of our elected leaders is always possible, of course, as long as we retain our constitutional liberties, i.e., our rights to gather, speak, bear arms, etc. These are a few of the liberties that Americans have died to sustain.

I do believe it is possible to lose these liberties for what appear at the time "expedient circumstances." We, the people, can voluntarily vote ourselves as individual citizens into weaker positions, granting more power to our "savior," the government. We trust them with this, our most "sacred" commodity, and give it up—and it does not come back in equal measure. We adopt these losses of liberty in trade for illusions, and at great peril. History has shown us time and time again what happens when the government gets too big and powerful—where the complete loss of personal liberty follows close behind.

Abraham Lincoln asked for resolve in his Gettysburg Address in order that the ones who died fighting for a better America should not have died in vain—these dead bodies, the appalling delivery pains of our nation giving birth to a new, inclusive freedom that the government of the people, by the people, and for the people shall not perish from the earth. If we still have a government of the people, by the people, and for the people, then we, the people, have contributed to putting us where we are now—and we will be the ones to put it right again.

Be an involved constituent. Most politicians want to get reelected. It's easy to say, "Ah, things will be OK," and be content to do nothing in the interest of the direction America will take.

This generation cannot coast into a better tomorrow. We must let our representatives and senators know how we feel about specific state and national policies early in the debate phase, especially if it is an important one or an issue of constitutional importance.

Avoid form letters—though we are likely to get one in response to ours. Write them a letter, not an e-mail. They have to respond to a letter if we are one of their constituents. Public outrage in the form of letters has changed the course of legislation in the recent past (immigration and port ownership). Writing letters to the editor in local papers is a good way to infect the forum.

As parents, engaging our children in discussions of current events, the principles, blessings and responsibilities of liberty is a way to pass the torch on. Of course, running for public office is a bold way to effect change, and can often affect the direction or subjects of dialogue.

During the exclusive ABC News segment, featuring our current presidential administration's agenda, America appeared to speak with their remote controls and tuned out for the most part as ABC News showed much lower viewership numbers than expected—ABC is asking for an investigation into the Nielsen Rating. Involvement can sometimes be as easy as turning the channel. There are many other accessible ways for us to be involved citizens, as well.

Tipping points occur in funny ways and cannot always be "caused," per se, just by willing it so. Sometimes, though, we are catalysts if we throw in and actively engage in our sphere of influence. We do not always have a measurable impact on other people or society; but when we do, we want that impact to be in favor of liberty. Even if we do not care about these realities, we leave our unique imprint on society as strongly or as weakly by what we choose to do as by what we choose not to do.

Things were not that different way back in Plato's day when he wrote these straightforward words of warning: "The price good men pay for indifference to public affairs is to be ruled by evil men." This is to say that as messy as it seems now, it can get messier—and we, the people, will plot the course and determine this leg of America's journey as it becomes a part of history; and do it we will, as individuals first.

Whether we like it or not, our representatives are reflections of us—the collective—yet a collective of individuals. Our republic begins with and is built upon the individual. John Quincy Adams addresses us from his grave: "Posterity: you will never know how much it has cost my generation to preserve your freedom. I hope you will make good use of it." John Quincy Adams points to "we, the people" as the source of power, and holds us accountable for the future of the American republic.

Yes, we did—left, right, middle—get ourselves into this current mess. Yes, some may be more to blame than others, and we are more than disappointed with some of the leaders we elected. The world is becoming an increasingly dangerous one. Yesterday set the stage for today; today sets the stage for tomorrow. America's best days may still be ahead of us. That, of course, will depend on us. History says democracies have a termination point. The little things we do as individuals eventually affect the collective. The real effect of this can make a big difference in defense of our liberty if what we do as individuals, and subsequently as a collective, is consistently aligned squarely with liberty in mind.

Let it never be said that this generation failed our children, stood by and left America to perish on our watch for lack of effort. We've been asked if we can create positive change; and we have answered, "Yes, we can." Maybe we're answering the wrong question. The better question is will we turn America back to better days? If we take responsibility, we will turn "Yes, we can" into "Yes, we will!"

Steven V. Thulon writes from Troy, Illinois.

MAY / JUNE 2012

Church State Separation: Religion 101

BY: CLARK B. MCCALL

Thomas Jefferson observed: "It does me no injury for my neighbor to say there are 20 gods or no God. It neither picks my pocket nor breaks my leg."

Many Americans today seem to disagree with Jefferson's political philosophy that religious belief should not be an issue in judging a candidate's fitness to be president. This public perception led George Bush in the 2000 campaign to declare that his favorite political philosopher was Jesus Christ. Al Gore also announced that he decided important questions with the letters WWJD," which he said meant "What would Jesus do?"

Leading candidates today such as Rick Perry and Mitt Romney seem compelled to bring personal religious faith into the foreground of their campaigns. As a presidential candidate, Governor Rick Perry held a huge prayer rally for thousands at which he read from the Bible. Candidate former Massachusetts governor Mitt Romney echoed John F. Kennedy from 1960 when he promised: "No authorities of my church—or any other church, for that matter—will ever exert influence on presidential decisions."

When religious leaders talk about electing the right kind of religious person to public office, we wonder if they are aware of Article VI of the Constitution, which says: "No religious test shall ever be required as a qualification to any office or public trust under the United States."

Perhaps the greatest danger imposed by those who would mix religion with political policy is the failure to recognize that the principle of church and state separation is inherent to the spirit of Article VI. This doesn't mean that a candidate's religious principles are not to affect the morality of the secular laws he'd support. "Thou shalt not steal" is one of the Ten Commandments. The principle inherent in this commandment would also apply to the secular laws that protect the freedoms of a nation's citizens.

I believe some who refer to the separation of church and state as a "myth" may confuse its intent with secular efforts to ban such traditions as Nativity scenes, "under God" in the Pledge of Allegiance, and "In God We Trust" on our coinage. There is one word that would delineate genuine separation designed by our Constitutional forefathers from the innocent religious expressions of religion in our national traditions. That word is "coercive." Webster defines "coerce" as "to restrain or dominate by negating individual will." There's nothing in a Nativity scene or in "under God" in the pledge that is coercive.

If there is one religious personal qualification I would want to see in a presidential candidate, it would be their ability to discern the genuine meaning of church and state separation that is intrinsic to our Constitution. This will help keep our nation from imposing the doctrines of a church or a religious group that the state has no right to legislate. I believe we need to remember that the great religious persecutions of the past were not the result of bad people trying to make other people bad, but by the attempts of good people to make others good by the laws of the state.

Clark B. McCall, a pastor of the Seventh-day Adventist Church, lives in Merced, California. He first wrote this essay for his column in a local newspaper.

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A Series Of Unfortunate Events

The Strange Career Of Bronx Household Of Faith

BY: KIMBERLEE WOOD COLBY

Thirty years ago, the Supreme Court issued its landmark decision in *Widmar v. Vincent*,[1] holding that the free speech clause protects citizens' religious speech, including religious worship. Such an unremarkable proposition should have been greeted by good-natured agreement that free speech and religious liberty principles—indeed, pluralism itself—require nothing less than full protection for citizens' religious speech.

Instead, three decades later, citizens in New York City have taken to the streets because their city—which claims to celebrate its diversity—has banned religious groups from weekend access to public school facilities otherwise available to community groups, if school officials deem the citizens' speech to be a "religious worship service." Last June, in *Bronx Household of Faith*,[2] a federal appellate court gave its blessing to this overt discrimination.

How the Second Circuit in *Bronx Household* departed from Widmar and other Supreme Court precedent is relatively easy to explain. Why New York City has abandoned the grand American experiment of pluralism, as *Bronx Household* illustrates, is the more perplexing puzzle.

Widmar Holds That Worship Is Protected Speech

Understanding the *Widmar* decision is key to understanding the recent *Bronx Household* decision. Justice Lewis Powell wrote the nearly unanimous decision in *Widmar* for a majority that included Justices William Brennan and Thurgood Marshall. Only Justice Byron White dissented. The bone of contention between Justice White and his fellow justices was whether religious worship was less protected than other religious speech. By an 8-1 margin, the Court ruled that religious worship was protected speech.

In *Widmar*, approximately 100 student organizations met on the campus of the University of Missouri at Kansas City. In 1977 the university adopted a new policy that prohibited use of buildings or grounds "for purposes of religious worship or religious teaching" by student groups.[3]

Only one group refused to agree to the new policy. A group of evangelical Christian students called "Cornerstone," which had met for a number of years on campus, would not pretend that their meetings did not include religious worship and religious teaching. For their honesty, the students were banned from meeting on campus.

The *Widmar* Court held that the university violated the students' free speech and expressive association rights and that the establishment clause did not justify the university's censorship. The Court ruled that the university had "discriminated against student groups and speakers based on their desire to use a generally open forum to engage *in religious worship and discussion. These are forms of speech and association protected by the First Amendment*."[4]

Alone in dissent, Justice White framed the "sole question" as the "application of the regulation to prohibit regular religious worship services in university buildings."[5] Using the terms "religious worship" and "religious services" interchangeably,[6] Justice White insisted that the majority's proposition that religious worship is like other religious speech was "plainly wrong."[7]

Characterizing Justice White's dissent as "a novel argument,"[8] Justice Powell surgically dissected its premise that religious worship was not protected speech. Using four discrete reasons, he rebutted the dissent's "attempt [at] a distinction between the kinds of religious speech explicitly protected by our cases and a new class of religious 'speech acts,' constituting 'worship.'"[9]

For starters, the distinction lacked "intelligible content" because the dissent could not explain "when singing hymns, reading scripture, and teaching biblical principles cease to be singing, teaching, and reading—all apparently forms of 'speech,' despite their religious subject matter—and become unprotected 'worship.'"[10] Nor did the dissent explain why religious worship should be less protected than "religious speech designed to win religious converts," which was clearly protected by the First Amendment.[11]

But most important, a distinction between "religious worship" and "religious speech" was not "within the judicial competence to administer."

Government officials would have to "inquire into the significance of words and practices to different religious faiths, and in varying circumstances by the same faith."[12] The Court saw this as creating "entanglement" with religion that the establishment clause prohibited, particularly because it would be "an impossible task in an age where many and various beliefs meet the constitutional definition of religion."[13] The establishment clause would also be violated by the government "[monitoring] group meetings to ensure compliance with the rule."[14] In its 1995 *Rosenberger* decision, the Supreme Court reiterated Widmar's reasoning in rejecting the Rosenberger dissent's premise that university officials could distinguish between expression of religious viewpoints and "evangelistic speech."[15]

High Court Rejection

The *Widmar* decision laid the foundation for two subsequent Supreme Court decisions that held unconstitutional New York school district policies denying access to religious community groups. In *Lamb's Chapel*,[16] the Supreme Court held that a New York school district violated a church's free speech rights when it refused to allow the church use of a school auditorium in the evening to show a film series about family values while allowing other community groups access to discuss family values. This was viewpoint discrimination, a particularly egregious free speech violation.

In *Good News Club*[17] the Supreme Court ruled that school officials must allow a religious community group access after school to meet with elementary-age children to learn Bible stories, verses, religious songs, and prayers. Again the dissent argued that the group's religious speech was unprotected because it was an "evangelical service of worship."[18] But this argument was rejected by Justice Antonin Scalia, whose concurrence recited Widmar's four specific grounds for rejecting "an approach that suffers such a wondrous diversity of flaws."[19]

In *Lamb's Chapel* and *Good News Club*, the Supreme Court reversed opinions by the same Second Circuit judge who wrote the first appellate decision in *Bronx Household*.[20] Both times the Supreme Court rejected New York school officials' worn argument that the establishment clause justified exclusion of religious community groups. The Supreme Court rejected the Second Circuit's microscopic line-drawing among religious purpose, instruction, worship, and "other" religious speech. Indeed, in *Good News Club* the Supreme Court voiced frustration with the Second Circuit majority for its "incredible" and "remarkable" failure even to cite *Lamb's Chapel*.[21] But to no avail.

"Slicing and Dicing"

The "Methuselah" of religious liberty litigation, *Bronx Household* has spanned 17 years and spawned four separate Second Circuit opinions. Since 1994 the New York City Board of Education has "sliced and diced" religious speech to discriminate against churches while ostensibly keeping its policy within Supreme Court boundaries.

In 1997, in the first *Bronx Household* appellate decision, the Second Circuit upheld the board's denial of *Bronx Household*'s request to use a school on Sundays for worship services. While allowing broad access for community groups generally, the written policy prohibited access for "religious services or religious instruction" while allowing access for "discussing religious material or material which contains a religious viewpoint."[22] Ignoring *Widmar*'s teaching that government officials should not distinguish between religious worship and other religious speech, the Second Circuit discounted *Widmar* as involving a university rather than a middle school.[23] But are middle school officials really more capable of implementing this forbidden distinction than university officials?

The Supreme Court criticized the 1997 *Bronx Household* decision four years later in Good News Club. The Court explained that it had granted certiorari to address a circuit conflict "on the question whether speech can be excluded from a limited public forum on the basis of the religious nature of the speech."[24] According to the Court, the circuit split pitted three cases permitting exclusion of religious speech (the Second, Fifth, and Ninth circuits) against two prohibiting exclusion (the Eighth and Tenth circuits). *Bronx Household* was the Second Circuit decision branded as on the wrong side of the split.

In light of this negative treatment of the 1997 decision, *Bronx Household* decided to reapply, but again access was denied. In 2003 the Second Circuit agreed with the church that *Good News Club* required it to find the board's ban likely to be unconstitutional.[25]

But taxpayers funded nine more years of litigation as the board continued its fight. A change in the panel of judges that heard the third and fourth appeals rewarded the board's resistance. In 2011 the Second Circuit ignored its 2003 decision and reverted to its 1997 reasoning.

In the 2011 round the city unveiled yet another policy. This time its policy permitted all religious speech except "for the purpose of holding religious worship services, or otherwise using a school as a house of worship."[26] The Second Circuit conceded that "prayer, religious instruction, expression of devotion to God, and the singing of hymns,"[27] and possibly even "religious worship,"[28] were not excluded from public property, but nonetheless insisted that "religious worship services" could be prohibited.

The Second Circuit asserted that a religious worship service is a type of activity, an event rather than expression, going so far as to analogize a worship service to a livestock show.[29] But it is patently clear that if a religious worship service is anything, it is an *expressive activity*. Singing, reading Scripture, praying, and sermonizing are simply words, and more words—at least to the agnostic government required by the establishment clause.

Perhaps even more troubling, the Second Circuit based its analysis on a mystical understanding of a worship service as "an act of organized religion that *consecrates the place in which it is performed, making it a church*."[30] The Court provided no rational explanation for its

theological premise. Of course, its observation is unsupported by empirical observation. National cemeteries are not churches even though funeral services occur on a daily basis. Beautiful as it is, Yellowstone National Park is not a cathedral despite worship services held regularly in its campgrounds. Nor does an aircraft carrier become a church because regular worship services occur on its decks. Public property remains temporal despite the presence of worship services for an hour a week. Citizens who attend religious worship services may choose to believe that their rituals consecrate property; but judges may not make such theological pronouncements.

In discussing whether a distinction between religious worship services and other religious speech triggered an entanglement issue, remarkably, the Second Circuit did not even discuss *Widmar*.[31] In his excellent dissent, Judge John Walker relied heavily on *Widmar*[32] and observed that the majority "[reached] several conclusions that directly contradict controlling Supreme Court precedent."[33]

It is common knowledge that the Supreme Court does not take cases simply to rein in a rogue circuit. Presumably the Court denied *certiorari* on December 5, 2011, because it believed that most judges will faithfully apply *Widmar*, *Rosenberger*, *Lamb's Chapel,* and *Good News Club*.

But that is cold comfort for the religious citizens of New York City who have held several public protests in hopes that the city will rethink its policy. *Bronx Household* has alienated religious communities who contribute greatly to their fellow citizens' welfare. But the greatest loss is the city's stubborn refusal to honor authentic religious diversity and pluralism.

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1 *Widmar v. Vincent*, 454 U.S. 263 (1981)
2 *Bronx Household of Faith v. Board of Education, of New York City*, 650 F.3d 30 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 816 (Dec. 5, 2011).
3 454 U.S. at 265, note 3.
4 *Ibid*. at 269, (italics supplied).
5 *Ibid*. at 284, note 1 (White, J., dissenting).
6 *Ibid*. at 284, note 2. "The majority's entire argument turns on this description of religious services as speech" (White, J., dissenting).
7 *Ibid*. at 284, (White, J., dissenting).
8 *Ibid*. at 269, note 6.
9 *Ibid*.
10 *Ibid*.
11 *Ibid*.
12 *Ibid*.
13 *Ibid*. at 272, note 11.
14 *Ibid*.
15 *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 844-846 (1995) (university violated religious student group's free speech by denying it equal funding).
16 *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993).
17 *Good News Club v. Milford Central School*, 533 U.S. 98 (2001).
18 *Ibid*. at 138.
19 *Ibid*. at 127 (Scalia J., concurring).
20 *Lamb's Chapel v. Center Moriches Union Free School District*, 959 F.2d 381 (2d Cir. 1992); *Good News Club v. Milford Central School*, 202 F.3d 502 (2d Cir. 2000); *Bronx Household of Faith v. Community School District*. No. 10, 127 F.3d 207 (2d Cir. 1997).
21 533 U.S. at 109, note. 3.
22 127 F.3d at 210.
23 *Ibid*. at 213.
24 533 U.S. at 105, 106. See *Bronx Household*, 650 F.3d at 61, note 7 (Walker, J., dissenting). ("It would not have been unreasonable for the [Supreme] Court to have expected that its *Good News Club* decision would end this case as well.")
25 *Bronx Household of Faith v. Board of Education of the City of New York*, 331 F.3d 342 (2d Cir. 2003) (granting preliminary injunction for church).
26 *Bronx Household of Faith v. Board of Education of the City of New York*, 650 F.3d. 30, 35, note 4 (2d Cir. 2011).
27 *Ibid*. at 36;. at 38. ("Similarly, SOP § 5.11 prohibits use of school facilities to conduct worship services, but does not exclude religious groups from using schools for prayer, singing hymns, religious instruction, expression of religious devotion, or the discussion of issues from a religious point of view.")
28 *Ibid*. at 36, note 6.
29 *Ibid*. at 37, 38.
30 *Ibid*. at 45 (italics supplied); at 41. ("When worship services are performed in a place, the nature of the site changes. The site is no longer simply a room in a school being used temporarily for some activity. The church has made the school the place for the performance of its rites. . . . The place has, at least for a time, become the church.")
31 *Ibid*. at 46, 47.
32 *Ibid*. at 56, 57 (Walker, J., dissenting).
33 *Ibid*. at 60 (Walker, J., dissenting).

MAY / JUNE 2012

What "Secular" Really Means

BY: J. BRENT WALKER

Secular" is not a bad word, as many religious people and some politicians believe. In fact, it is a good word and, properly understood, is useful to describe our political culture and church-state configuration.

The December 17, 2011, Metro Section of the Washington *Post* contained two articles that illustrate what I mean. One was a full-page obituary of Christopher Hitchens. The Brit turned denizen of the United States since 1982 was an acerbic contrarian, proud atheist, "secularist on steroids," and no-holds-barred critic of all that is religious. The other, on the religion page, was an article about a class on the study of secularism at the Jesuit-controlled Georgetown University, taught by Jacques Berlinerblau (a self-professed "Jewish atheist") with a focus on church-state relations.

Can the word "secular" carry the weight of how the term is used in both of these contexts? I think it can, but we must always be clear about what we mean. In his helpful book *Divided by God,* Noah Feldman, a Harvard law professor, talks about a "strong secularism." This kind of secularism—atheistic, antireligious, and almost always intolerant—would banish religion to the backwaters of privatized faith. We have seen this form of secularism in the past with people such as Clarence Darrow, Robert Ingersoll, and H. L. Mencken. Their intellectual heirs today would be the likes of Richard Dawkins, Sam Harris, and, yes, Hitchens. These "new atheists" have gained a lot of popularity over the past several years.

Of course, this kind of secularism and those that espouse it are entitled to robust constitutional protection (free speech, free press, etc.) and enjoy the full panoply of rights and privileges associated with living in the United States. They should not have their patriotism questioned or political viability impugned because of their lack of religious conviction. However, this brand of hard-edged secularism is worthy of our stringent critique. It erroneously treats all religion—good religion and bad religion—the same. It thinks that all religion is bad. It often comes off as narrow-minded, intolerant, and intellectually arrogant.

The other kind of secularism, what Feldman calls "legal secularism," is a friendly form of secularism embraced by many people of faith who simply believe, as I do, that government and our legal institutions should be secular in the sense of being nonreligious or religiously neutral.

Secularism of this ilk is not a threat to religion but an essential mechanism to ensuring its liberty.

This is the way Professor Berlinerblau understands the term and how he teaches his course. According to the Washington *Post* article, Professor Berlinerblau tells his students his goal is "to disentangle atheism from secularism." The article points out that he has his students read Martin Luther and John Locke, for whom, according to Berlinerblau, the word "secular" is not about personal religious belief but about the relationship between church and state.

This version of secularism has informed not only the Reformation (Luther) and the Enlightenment (Locke), but Baptist thought, at its best, as well. Indeed, this is what Roger Williams was getting at when he argued that the magistrate had no authority over the souls of his subjects. More recently, J. M. Dawson, the Baptist Joint Committee's (BJC) first executive director, defended the use of the word in articles, speeches, and even his 1964 autobiography. Although acknowledging "secular" sometimes connotes atheistic humanism and materialism, Dawson argued that "when one says ours is a secular state or that our public schools form a secular system, he means they are outside church control, simply that."

This is the sense in which we at the BJC continue to employ the word. Using "secular" to mean "religiously neutral" is very much a part of the fabric of our constitutional and political system. The First Amendment's no establishment and free exercise clauses require the government to be neutral toward religion, not taking sides in matters of faith, but leaving it to voluntary, individual decisions and private religious associations.

One of Berlinerblau's students, described as a conservative Catholic from Long Island, New York, learned his lesson well. After taking the class, he proudly declared himself a "secularist," telling the Washington *Post*: "[Secularism] does not mean abandoning any notion of religiosity; it's saying you're in favor of toleration and liberty of conscience and of allowing others to have the same rights in terms of government as you."

I think this student got it exactly right. Secularism, properly understood, is not a bad word. While our government must not be hostile to religion, it should not try to help it either. Our government must remain religiously neutral and, in that sense, properly be described as "secular."

J. Brent Walker is executive director of the Baptist Joint Committee for Religious Liberty. He first wrote these works as a reflection in *Report From the Capital*.

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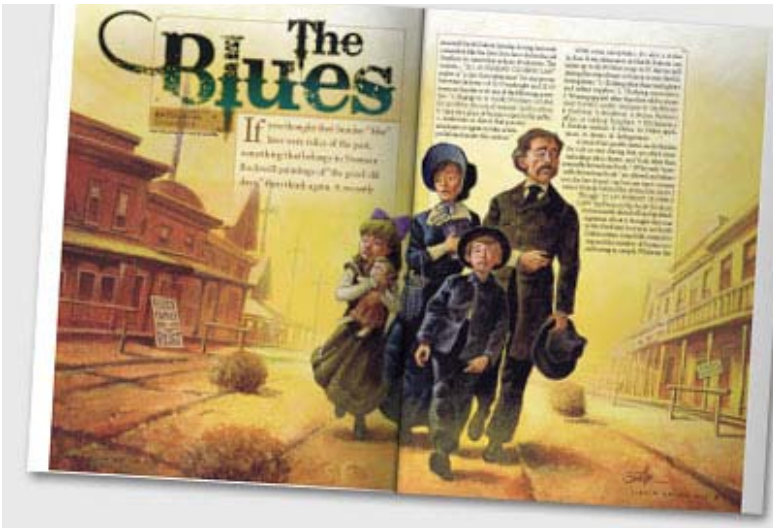
The Blues

BY: CLIFFORD GOLDSTEIN



If you thought that Sunday "blue" laws were relics of the past, something that belongs in Norman Rockwell paintings of "the good old days," then think again. A recently enacted North Dakota Sunday-closing law reads somewhat like the Jim Crow laws did in the old South in its somewhat archaic absolutism. The statute—"12.1-30 SUNDAY CLOSING LAW" makes it "a class B misdemeanor" for any person between the hours of 12:00 midnight and 12:00 noon on Sunday to do any of the following activities: "a. Engage in or conduct business or labor for profit in the usual manner and location. b. Operate a place of business open to the public. c. Authorize or direct that person's employees or agents to take action prohibited under this section."z

With some exceptions, it's also a crime (a class B misdemeanor in North Dakota can mean up to $1,000 fine or up to 30 days in jail) during the stated hours to buy or to rent the following items: "1. Clothing other than work gloves and infant supplies. 2. Clothing accessories. 3. Wearing apparel other than that sold to a transient traveler under emergency conditions. 4. Footwear. 5. Headwear. 6. Home, business, office, or outdoor furniture. 7. Kitchenware. 8. Kitchen utensils. 9. China. 10. Home appliances. 11. Stoves. 12. Refrigerators. . . . "

A total of 44 specific items are forbidden for sale or rent during that specified time, including radios, dryers, and "tools other than manually driven hand tools." (Why only "manually driven hand tools" are allowed and others not, the law doesn't say, but one must assume some rationale behind the distinction exists.)

Though "12.1-30 SUNDAY CLOSING LAW" had been on the books for years, it was recently dusted off and updated. Agitation about it brought the issue to the forefront last year in North Dakota when some folks wanted to expand the number of businesses not having to comply. Whatever the outcome of the present dispute, the question of Sunday blue laws does present an interesting example of how, even after a few centuries, church-state separation continues to be a challenge to the American experiment.

A Secular Day?

When the issue started, Christopher Dodson, executive director of the North Dakota Catholic Conference, said that the law was not religious but secular, and had nothing to do with enforcing a religious day of rest upon anyone.

"The purpose of North Dakota's Sunday closing law," Dodson wrote, "is not to impose times of worship. Nor is it to demand adherence to religious doctrine." Rather, according to Dodson, the law was to "preserve the common good by ensuring that society is not overtaken by work and profit."

Dodson went on to argue that "Sunday closing laws are not about honoring the Sabbath day. They are about honoring people and families."

The argument itself is not new; it has been around for more than 100 years. The question remains, however—how valid is it? Though proponents of Sunday-closing laws often use that argument, and the U.S. Supreme Court has accepted it too—a closer look at the facts shows just how dubious the whole concept of a "secular Sunday law" really is.

Religious Laws

No one, of course, disputes that in the old days, both in Europe and America, Sunday laws were nothing but religious, and overtly so. The whole purpose was to help people keep the fourth commandment (Exodus 20:8), which said: "Remember the sabbath day, to keep it holy" (that the commandment specified that the *seventh day*, Saturday, not the *first day*, Sunday, should be kept holy is a sore point, part of a long debate that's not our direct concern here).

Though laws varied from state to state and community to community, they were often strict, and unequivocal about their purpose.

A 1610 Virginia Sunday law read: "Every man and woman shall repair in the morning to the divine service and sermons preached upon the Sabbath day [Sunday], and in the afternoon to divine service, and catechizing, upon pain for the first fault to lose their provision and allowance for the whole week following; for the second, to lose the said allowance and also be whipt; and for the third to suffer death."

Though, over the years, especially after the establishment of the nation itself, Sunday laws didn't force people to attend church, they

expressly did what they could to keep people from engaging in activities that seemed to violate the principles of Sabbathkeeping, pretty much what's at the heart and soul of all Sunday blue laws, even today. For instance, this 1893 Delaware law reads: "If any person shall perform any worldly employment, labor or business on the Sabbath day [Sunday] (works of necessity and charity excepted), he shall be fined four dollars; and on failure to pay such fines and costs shall be imprisoned not exceeding twenty-four hours."

Violation of Church-State Separation

Almost from the start, people were opposed to Sunday-closing laws, seeing them as a violation of the establishment clause, in that they were imposing religious dogma through the force of law. One pivotal example occurred in 1888, when New Hampshire senator H. W. Blair introduced Senate Bill 2983, which was "TO SECURE TO THE PEOPLE THE ENJOYMENT OF THE FIRST DAY OF THE WEEK, COMMONLY KNOWN AS THE LORD'S DAY, AS A DAY OF REST, AND TO PROMOTE ITS OBSERVANCE AS A DAY OF RELIGIOUS WORSHIP."

The bill was designed, Blair said, simply to "make efficient the Sunday rest laws of the States, and nothing else." In other words, it was written to protect state blue laws from being challenged on constitutional grounds.

The bill, however, never went anywhere for a number of reasons, not the least of which was its overtly religious nature. A bill seeking to promote Sunday's "OBSERVANCE AS A DAY OF RELIGIOUS WORSHIP" is as about as over-the-top sectarian as one could get. Thus, even before Blair's bill died on the vine, blue law aficionados had to find another way to keep their laws intact.

Certain Religious Vestiges

"Sunday- law proponents learned from these skirmishes," says church-state specialist lawyer Warren Johns. "They learned that the stronger the religious rationale advanced for creating the establishment, the stronger were the constitutional arguments available to opponents. Consequently the reformers made an effort to cultivate the support of labor on the basis that a federal blue law would serve a public-welfare purpose and promote the interests of the laboring man."

Thus, the term *secular Sunday* was hatched, and suddenly Sunday-closing laws were being rewritten or introduced in ways that sought to remove the religious language from the bills, however much the laws themselves, and what they prohibited, remained the same. Even worse, the United States Supreme Court, in 1961, had handed down four decisions (in one day) that firmly established the constitutional rationale for Sunday-closing laws.

How? Because, according to the High Court, they were secular, not religious, in nature, and as such do not violate the establishment clause.

In one of the cases the High Court said that "granted the Sunday laws were first enacted for religious ends; they were continued in force for reasons wholly secular, namely, to promote a universal day of rest and to ensure the health and tranquillity of the community. . . . Even if Sunday laws retain certain religious vestiges, they are enforced today for essentially secular objectives which cannot be effectively achieved in modern society except by designating Sunday as the universal day of rest."

Thus, the secular Sunday now had the support of the highest court in the land, which helps explain how—50 years later—Christopher Dodson, of the North Dakota Catholic Conference, could argue as so vigorously and confidently that "the purpose of North Dakota's Sunday closing law is not to impose times of worship. Nor is it to demand adherence to religious doctrine. The purpose of the law is to preserve the common good by ensuring that society is not overtaken by work and profit." Many have bought in to this logic. It is behind recent similar Sunday family rest day laws in Europe. It is the logic that Pope Benedict XVI advances in *Caritas in Veritate*, his solve-all analysis for what ails the world.

Faulty Argument

Despite having the imprimatur of the Supreme Court, Sunday-closing laws are still, no matter how the legislation is written, basically religious in nature, and thus should have been deemed unconstitutional.

For starters, the idea of one day of rest in seven is, essentially, a religious idea. It's no coincidence, either, that Sunday—and not Tuesday, or Wednesday, or any other day—is commonly designated as the "Lord's day" and is the day that folks seek to regulate, especially during the hours that most people go to church. In a dissent to one of the Supreme Court rulings, a justice wrote: "We have then in each of the four cases Sunday laws that find their source in Exodus, that were brought here by the Virginians and the Puritans, and that are today maintained, construed, and justified because they respect the views of our dominant religious groups and provide a needed day of rest."

Wrapping the law in secular language does nothing to change boots-on-the-ground aspect of the law, which is to keep shops and businesses closed during the time many people go to church. Had Sunday-closing laws been Tuesday-closing laws, or Monday-closing laws, a secular argument could perhaps be made for their secular character (though, again, the whole idea of one day in seven has religious underpinnings in and of itself).

Also, what evidence suggests that Sunday laws bring about all these purported secular benefits to begin with? American society is radically different today than in times past, and a Sunday law might not have the anticipated moral effect. In inner cities, for example, where unemployment is high and the family often devastated, who wants gangs of bored teenagers—unlikely to be in church anyway—wandering the streets because all the shops are closed?

Family Rest Day

Despite some notable exceptions, such as the North Dakota statute, Sunday laws in the United States have, for the most part, gone the way of segregated toilets. Meanwhile, in Europe, the push for more and stricter Sunday laws has been given some recent impetus by the Vatican, which is actively promoting what is now called the *Family Rest Day*.

And, of the seven-day week, which day is the family to rest?

Guess.

Speaking in the context of the forces that threaten family life, Benedict XVI wrote that "it is necessary to promote reflection and efforts at reconciling the demands and the periods of work with those of the family and to recover the true meaning of the feast, especially on Sunday, the weekly Easter, the day of the Lord and the day of man, the day of the family, of the community, and of solidarity."

It's one thing for a church to seek to promote reverence and worship and church attendance; that's, after all, part of what churches are all about. What becomes problematic, however, is churches seeking the secular state, which has the power of civil law behind it, to help promote those goals. In the end, whether called Family Rest Day or "12.1-30 SUNDAY CLOSING LAW," Sunday laws are nothing but religious laws designed to promote the teaching of the dominant religion through the power of the secular state. Thus put, I think it is clear that they have no place in a nation that prides itself on religious freedom and the separation of church and state.

Clifford Goldstein, a previous editor of *Liberty* magazine, is a much-published author and in-demand speaker.

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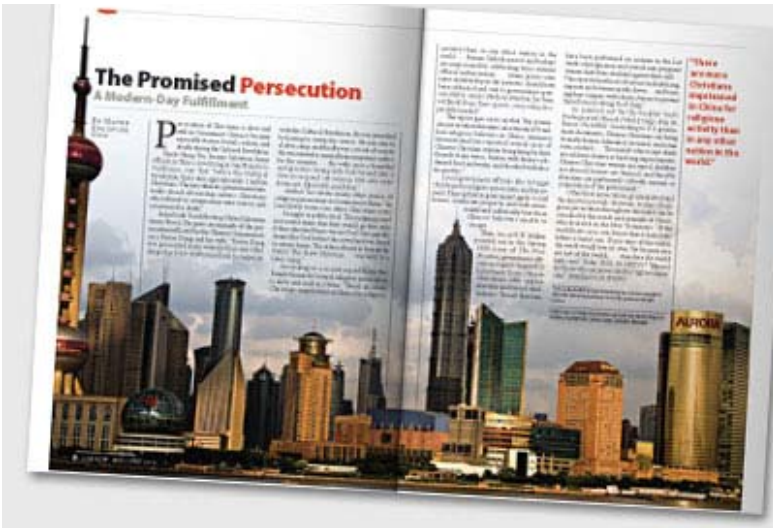
The Promised Persecution


The Promised Persecution
A Modern-Day Fulfillment

BY: HAVEN GOW

Persecution of Christians is alive and well in Communist China; it became especially vicious, brutal, sadistic, and deadly during the Cultural Revolution.

Check-Hung Yee, former Salvation Army official in China, now living in San Francisco, California, says that "before the Cultural Revolution, there were approximately 1 million Christians. The new atheistic government eventually closed all worship centers. Christians who refused to compromise were sent to jails or tortured to death."

In his book *Good Morning China* (Salvation Army Press), Yee gives an example of the persecution inflicted by the Chinese Communists on a Pastor Dong and his wife. "Pastor Dong was persecuted more severely than any other clergy due to his stubborn refusal to cooperate with the Cultural Revolution. He was punished by having to sweep the streets. He was sent to a labor camp, and finally was cast out of society. He was viewed as mentally incompetent, useless for the country. . . . His wife, once a beautiful and gracious young lady, had turned into a slow-to-respond old woman. Her eyes were downcast, filled with much fear."

Author Yee relates many other stories of religious persecution in Communist China. "In [one] little town, two other Christians were . . . brought to public trial. The judging panel instructed them that they would go free only if they admitted there was no God. One quickly denied his God before the crowd and was freed to return home. The other refused to betray the Savior. The brave Christian . . . was sent to a labor camp."

According to a recent report from the Family Research Council, religious persecution is alive and well in China: "There are more Christians imprisoned in China for religious activity than in any other nation in the world. . . . Roman Catholic priests and bishops are imprisoned for celebrating Mass without official authorization. . . . Many priests who reject membership in the 'patriotic' church have been abducted and sent to government-sponsored labor camps. Medical attention has been withheld from these priests, even when desperately needed."

The report goes on to say that "the systematic persecution threatens an estimated 70 million religious believers in China. Amnesty International has reported several cases of Chinese Christian women being hung by their thumbs from wires, beaten with heavy rods, denied food and water, and shocked with electric probes."

Local government officials like to target Christians for religious persecution and harassment. They authorize government agents to raid homes, confiscate property, and indiscriminately and sadistically beat those Chinese believers unable to escape.

Then, too, as R. H. Mullen pointed out in the Spring 1995 issue of *The First Freedom*, government officials and agents targeted for harassment those Chinese Christians who oppose abortion and forced sterilizations: "Forced abortions have been performed on women in the last weeks of pregnancy, and several non-pregnant women have been sterilized against their will. . . . The reported methods of torture include hanging men and women upside down . . . and burning their tongues with electric batons to prevent them from invoking God's help."

As pointed out by the booklet *God's Underground Church* (World Help, Box 50, Forest, VA 24551): "According to U.S. government documents, Chinese Christians are being brutally beaten, beheaded, tortured, and some even crushed. . . . Thousands who escape death are sold into slavery or face long imprisonment. Chinese Christian women are raped, children are abused, homes are burned, and forcible abortions are performed—all with consent or cooperation of the government."

Often these persecutions go unreported and the injustice prevails. However, victims of religious persecution throughout the world can be consoled by the words and example of Christ, who declared in the New Testament: "If the world hates you, you know that it hated Me before it hated you. If you were of the world, the world would love its own. Yet because you are not of the world, . . . therefore the world hates you" (John 15:18, 19, NKJV).* "Blessed are those who are persecuted for righteousness' sake" (Matthew 5:10, NKJV).

Haven Gow is a TV/radio commentator and writer who teaches religion to children at Sacred Heart Catholic Church, Greenville, Mississippi.

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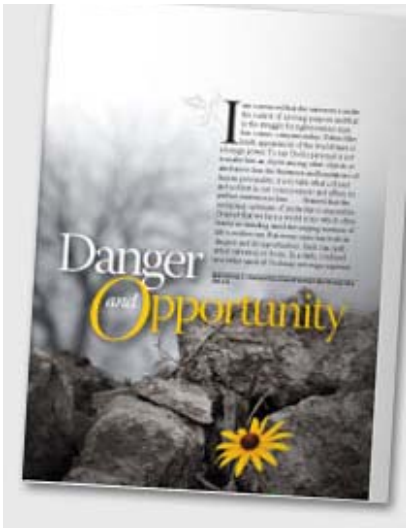
Danger And Opportunity



BY: MARTIN LUTHER KING, JR.

I am convinced that the universe is under the control of a loving purpose and that in the struggle for righteousness man has cosmic companionship. Behind the harsh appearances of the world there is a benign power. To say God is personal is not to make him an object among other objects or attribute to him the finiteness and limitations of human personality; it is to take what is finest and noblest in our consciousness and affirm its perfect existence in him. . . . Granted that the easygoing optimism of yesterday is impossible. Granted that we face a world crisis which often leaves us standing amid the surging murmur of life's restless sea. But every crisis has both its dangers and its opportunities. Each can spell either salvation or doom. In a dark, confused world the spirit of God may yet reign supreme.

Martin Luther King, Jr., *A Testiment of Hope*, ed. James M. Washington (New York: Haprer Collins, 1986), p.40