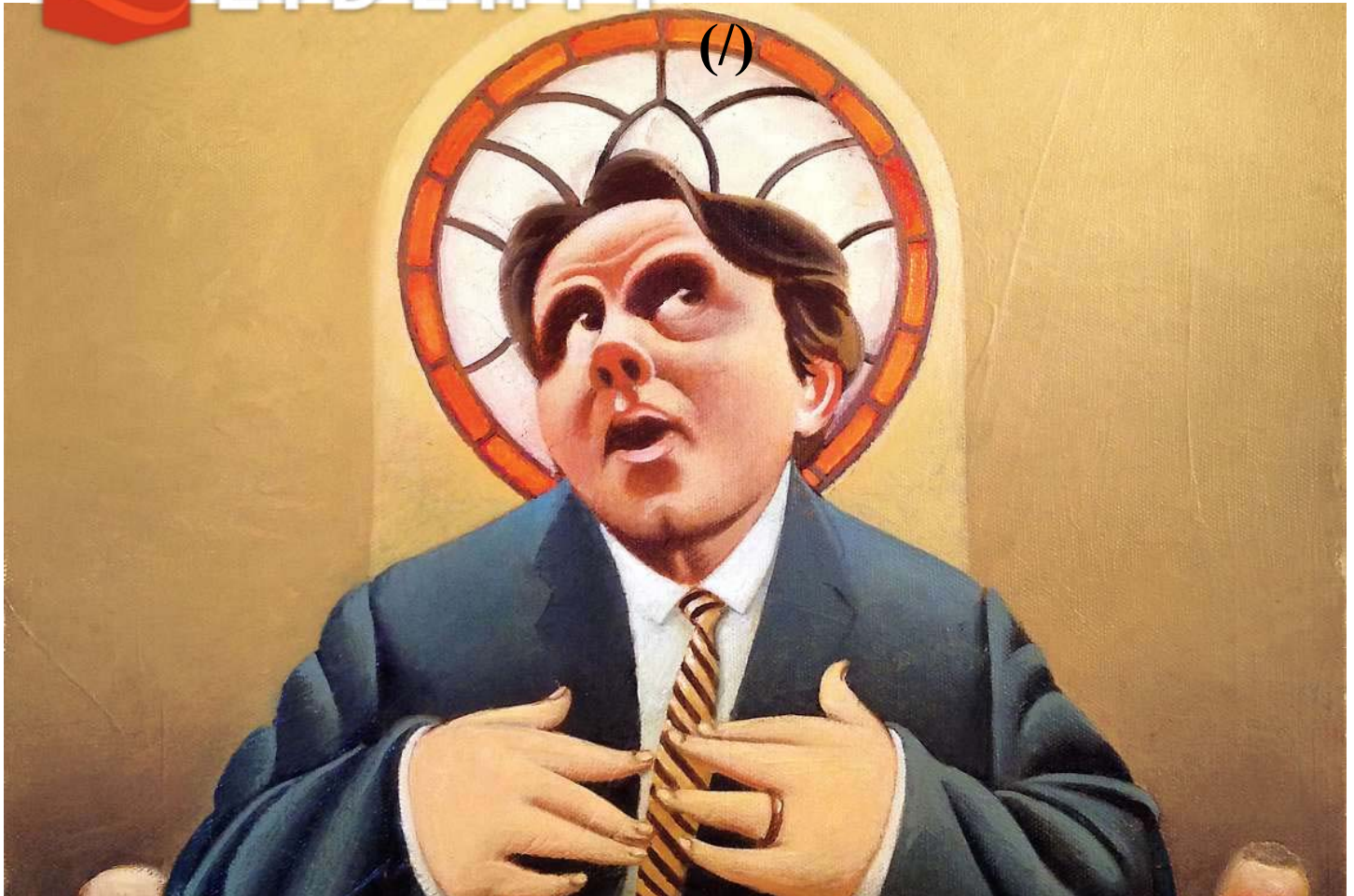




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**March/April 2014**



**Powerless Prayer**  
(<http://www.liberty-magazine.org/article/powerless-prayer>)

Despite the First Amendment's ban on government establishments of religion, opening government meetings with prayer is a longstanding tradition in many American communities.

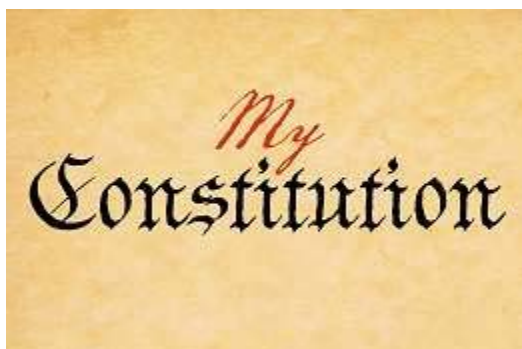


**A Divine Project**



## **(<http://www.liberty-magazine.org/article/a-divine-project>)**

The wall between church and state.



## **My Constitution (<http://www.liberty-magazine.org/article/my-constitution>)**

A personal musing on religion and the Constitution.



## **Clause and Effect (<http://www.liberty-magazine.org/article/clause-and-effect>)**

Charles Pinckney, Religious Liberty, and the United States Constitution.



## **Back to the Future (<http://www.liberty-magazine.org/article/back-to-the-future>)**

Some decisions turn out to be epic. They may seem relatively small and inconsequential in the scheme of things at the time, but, later, when...



## **Holy Land Blues (<http://www.liberty-magazine.org/article/holy-land-blues>)**



In the hostile atmosphere of Israel/Palestine, liberty and tolerance are losers all around, and religion is part of the unpleasant mix.



## **The Right to Wrong Hair (<http://www.liberty-magazine.org/article/the-right-to-wrong-hair>)**

This story illustrates how hair can have religious and cultural significance.

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# Powerless Prayer

[libertymagazine.org/article/powerless-prayer](http://libertymagazine.org/article/powerless-prayer)

Published in the [March/April 2014](#) Magazine  
by [K. Hollyn Hollman](#)

Despite the First Amendment's ban on government establishments of religion, opening government meetings with prayer is a longstanding tradition in many American communities. Indeed, in *Marsh v. Chambers* (1983) the U.S. Supreme Court upheld chaplain-led prayers before the Nebraska state legislature after a Nebraska lawmaker challenged the prayers as an unconstitutional advancement of religion. The Court held that the prayers were "simply a tolerable acknowledgement of beliefs widely held" and comparable to the U.S. Congress's prayer practice, which dates to the Founding era. Since *Marsh*, legislative prayer, at least at the state and national level, has been a largely accepted, but little understood anomaly in religious liberty law.



Demonstrators hold placards outside the U.S. Supreme Court as it hears arguments in the case of *Town of Greece, NY v. Galloway*, November 6, 2011.

Generally, the First Amendment protects religious liberty by preventing the government from interfering with the free exercise of religion and by prohibiting the government from sponsoring or advancing religion, or giving preference to one religion over another. While the *Marsh* decision upheld opening prayers in a state legislature and cited with approval the practice in Congress, the Court relied almost exclusively on historical tradition and provided scant legal reasoning for its conclusions or their application to other church-state issues. In fact, it seems that when *Marsh* is mentioned in establishment clause cases, such as ones dealing with religious displays on government property, it is simply to illustrate that America's "separation of church and state" is not absolute and that no single test captures the full breadth of the establishment clause. In one example, Associate Supreme

Court Justice Stephen Breyer cited Marsh in his concurrence upholding a Ten Commandments monument on the Texas State capitol grounds to note that “the Establishment Clause does not compel the government to purge from the public sphere all that in any way partakes of the religious.”

While it is certainly true that the First Amendment does not prohibit all religion in the public square—and indeed, protects individual expressions of religion—government-led religious exercises in official government meetings are not easily characterized as mere passing acknowledgments of religion or historical tradition. In *Lee v. Weisman* (1992), a case invalidating prayer at public school graduations, the Supreme Court succinctly described the danger to religious liberty that applies in the legislative prayer context as well: “If citizens are subjected to state-sponsored religious exercises, the state disavows its own duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people.”

Rev. Patrick Mahoney of the Christian Defense Coalition prays outside the U.S. Supreme Court as it hears arguments in the case of *Town of Greece, NY v. Galloway*, November 6, 2013.



In fact, disputes often arise over the boundaries

and basis of the Marsh decision, particularly regarding the selection process for prayer-givers and whether the content of the prayers must be “nonsectarian” to avoid promoting a single religious perspective. Although not dispositive, the Court in Marsh noted that the state chaplain’s prayers were typically “nonsectarian,” reflecting more inclusive Judeo-Christian values consistent with “the American civil religion.” That factor has become significant to the lower courts trying to reconcile prayers in a government meeting with the establishment clause principle that government may not favor any one religion over another. Growing religious diversity and the expectation that one’s rights of citizenship are not contingent upon one’s participation in a religious exercise increasingly pose difficult questions for a practice whose justification is more grounded in tradition than in protecting religious freedom for all. Marsh also indicated that even permissible legislative prayers could be carried too far, cautioning that such prayer opportunities should not be “exploited to proselytize or advance any one, or to disparage any other, faith or belief.”

Now, three decades after Marsh, the Supreme Court has returned to the issue of prayers at government meetings to decide whether a practice of mostly Christian, clergy-led prayers at local

government meetings violates the establishment clause. The case, *Town of Greece v. Galloway*, which was argued in early November and will be decided by June, gives the Court a chance to revisit the practice of official prayer in a government forum.

The current lawsuit began when two residents of Greece, New York, a suburban town outside of Rochester, challenged their town board's practice of inviting local clergy to give a prayer during its monthly meetings. The meetings provide the sole forum for Greece citizens to observe and participate in the work of their local government. Meetings typically involve swearing in of town employees, special recognitions and honors for citizens, and resident petitions for government action. Unlike in Congress or in most state legislatures, citizens attend these local government meetings to interact with and influence their government officials about specific issues that affect their lives.

The town's prayer practice began in 1999, following the election of a new town supervisor who chose to replace the board's previous tradition of opening meetings with a moment of silence by making prayers part of each month's official agenda. At the beginning of the meetings, after the Pledge of Allegiance, an invited clergyperson typically faces the citizens (who face the town board and other town officials) and leads them in prayer, often asking attendees to join in. Unlike in most state legislatures and Congress, the town offers no guidelines to prayer-givers explaining the purpose of the prayers to solemnize the proceedings or the need to use inclusive language and avoid proselytizing or advancing any one religion or disparaging others as Marsh instructed. The record, which includes videotaped recordings of the proceedings for several years, shows that most of the prayers were explicitly Christian and were often offered on everyone's behalf, with a request for citizen participation.

The plaintiffs, represented by Americans United for the Separation of Church and State, sued the town, arguing that they and other citizens who are nonreligious or adherents of non-Christian religions are put in the position of either participating in a religious practice invoking beliefs they do not share or appearing to show disrespect. While the district court ruled for the town, the plaintiff residents successfully appealed to the U.S. Court of Appeals for the Second Circuit. On appeal they argued that the Greece prayer-givers (often honored as "town chaplain of the month") and prayers were overwhelmingly Christian and offered in a setting in which adults and children were pressured to participate.

The Second Circuit held that the "totality of the circumstances" indicated that the town had affiliated itself with a single religion, in violation of Marsh. Quoting Marsh, the court observed that "we need not 'embark on a sensitive evaluation' or 'parse the content of a particular prayer,' . . . to recognize that most of the prayers at issue here contained uniquely Christian references." Moreover, the town's position—that it would accept volunteers of any faith—was undercut by its failure to ever announce such an all-comers policy and by its reliance on a select few recurrent volunteers, which "virtually ensured a Christian viewpoint." The participation of a few individuals from other faiths in the year the litigation began could not overcome the fact that the town's prayer practice overwhelmingly associated the town with Christianity alone.

The U.S. Supreme Court granted the town's petition for review, providing an opportunity to clarify the basis and boundaries of Marsh. The town of Greece argued that its practice simply followed Marsh, and that Marsh is fully consistent with the establishment clause, rather than a constitutional outlier. The town argued that the establishment clause does not require that the state be neutral toward religion but "was designed to prohibit the establishment of a national religion" and prohibit "compelling the payment of taxes to support a favored religion or by compelling obedience to the tenets of a particular faith." This narrow view of no establishment welcomes prayer practices that advance Christianity in a government forum. While the town acknowledged that Marsh does not allow

prayers that proselytize or disparage other religions, it argued that it would be unconstitutional censorship for the government to exercise any control over the content of prayers offered on its behalf by local clergy.

The plaintiffs (now respondents) argued that Marsh did not allow prayer in a coercive environment, such as where citizens attend in order to interact directly with their representatives, and did not approve the kind of overtly, exclusively Christian prayers that were common at town board meetings in Greece. Both factors, they argued, distinguished the facts in Greece from those upheld in Marsh (and, by extension, in Congress), and thus require finding an establishment clause violation. At the very least, respondents argued, the town must have a policy that instructs those who give prayers to avoid using sectarian references or asking attendees to join the prayers.

At oral arguments the Court seemed to struggle with finding a principle, as opposed to simply historical tradition, that would support the prayer practice in Congress but avoid the kind of faith-specific and coercive prayer practice that makes religion appear relevant to one's political rights. While both sides were wary of the government's involvement in religious practices, neither offered a simple solution. The town offered no rational basis beyond history to support its "anything goes" proposition and rejected the notion that the government was responsible for the prayers, much less that they must be inclusive. The respondents, on the other hand, argued that, under Marsh, the government's religious expression must be "nonsectarian."

Though it was not argued explicitly, the option of avoiding prayers in the forum altogether or having a moment of silence presented obvious and superior alternatives for ensuring that the government protects the liberty of conscience and religious freedom of all.

**Author: [K. Hollyn Hollman](#)**



# A Divine Project

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 [libertymagazine.org/article/a-divine-project](http://libertymagazine.org/article/a-divine-project)

Published in the [March/April 2014](#) Magazine  
by [Elijah Mvundura](#)

In *Wallace v. Jaffree* (1985) the late Chief Justice William Rehnquist wrote that the “wall of separation between Church and state” was a “metaphor based on bad history, a metaphor” that “should be frankly and explicitly abandoned.” The history Rehnquist was referring to is of the formulation of the metaphor by Thomas Jefferson and the deliberations surrounding the religious clauses of the First Amendment. In America the church-state debate has revolved mainly around the U.S. Constitution. Marginal to the debate is the church’s foundational text, the Bible.

This is anomalous. The church was born of the Word, separate and distinct from any national or political institution. As Jean-Jacques Rousseau (1712-1778) perceptively pointed out, “Jesus came to establish a spiritual kingdom on earth; this kingdom, by separating the theological system from the political, meant that the state ceased to be a unity, and it caused those intestine divisions which have never ceased to disturb Christian peoples.”<sup>1</sup> Again, as Pierre Manent stressed, the unique trajectory of Western society “is understandable only as the history of answers to problems posed by the Church, which was a human association of a completely new kind.”<sup>2</sup>

Disestablishment or separation of church and state was the American Founding Fathers’ solution to the theologico-political problem. But it’s a solution, to paraphrase Karl Marx, which they did not make just as they pleased, under circumstances they had chosen, but under circumstances directly found, given, and transmitted from the past.<sup>3</sup> The direct circumstances were the sheer multiplicity of religious sects, which made establishment of any one church problematic. The near past was the English Civil War, which cast a long shadow over colonial America’s social and political thought. The distant past was the Protestant Reformation, which shattered the unity of Christendom, producing numerous sects and religious wars. The far distant past was the gospel, which inspired the Reformation. And the gospel, as we know, is deeply rooted in the Hebrew Bible and the history of ancient Israel.

If the Bible is the primary text for those who have aspired to build a divinely ordered society or Christian nation, then it is paradoxical that they have blithely overlooked the founding principles of the nation of Israel instituted at Sinai, principles which have a distinctively modern ring. “The Mosaic Code,” as Max I. Dimont acutely observed, “laid down the first principles for the separation of church and state.”<sup>4</sup> First, following the advice of his father-in-law, Moses selected judges to preside “over thousands, hundreds, fifties and tens”; and to bring difficult cases to him (Exodus 18:17-27).<sup>5</sup> Then following God’s word, he instituted the priesthood under Aaron and his sons separate from his civil leadership (Exodus 28:1). All in all, there was at Sinai a separation of judicial, priestly, and political offices that uncannily mirrors the separation of powers by the American Founding Fathers 3,000 years later.

And the separation of priestly and political offices remained sacrosanct even after the establishment of the monarchy. Saul, Israel’s first king, and Uzziah, king of Judah, were deposed for officiating as priests (1 Samuel 13:4-14; 2 Chronicles 26:16-18). In fact, the Mosaic code had limited the monarchy by subjecting it to God’s Law (Deuteronomy 17:14-20). Thus, Nathan’s rebuke of David (2 Samuel 12:1-14) and Elijah’s of Ahab (1 Kings 21) were pointed repudiations of royal absolutism. Apparently,

the temptation to absolutize or sacralize the monarchy was present in Israel. The prophets challenged this. Emerging at different times in Israel's history, speaking for God, while standing separate from the altar and the throne, they fearlessly condemned and checked idolatric practices that threatened to erase the distinction between the religious and the political, the sacred and the profane.

To be sure, the tension between the religious and the political, in particular the alliance of the altar and the throne in leading Israel into apostasy, is what caused the prophets to divorce the fate of the nation of Israel from the divine purpose in history. As they said, in spite of the Babylonian captivity, a faithful remnant will survive and consummate the divine purpose in history.<sup>6</sup> And the captives that returned from Babylon did jettison political and ethnic aspects of their identity. Calling themselves the remnant, they organized themselves as a religious community (Ezra 3:8; 9:13; Haggai 1:14). This shift from a politico-ethnic to religio-ethical identity was of epochal significance. It set ethical monotheism on its world-transforming career, earning Jews the ire of pagan elites.

The crux is that ethical monotheism subverted the "peace of the gods," the ideological basis of Greco-Roman imperialism. That is why in antiquity Jews gained notoriety as "a race remarkable for their contempt for the divine powers."<sup>7</sup> Yet they won so many converts and sympathizers that Seneca (Nero's tutor) fulminated, "The customs of this detestable race have become so prevalent that they have been adopted in almost all the world. The vanquished have imposed laws on the conquerors."<sup>8</sup> This vituperation explains Roman prohibition of Jewish proselytizing and violent response to aggressive Christian evangelizing.

This sharp conflict between the Greco-Roman and the Judeo-Christian must be underscored, because it has often been understated or ignored. But as Leo Strauss argued, given this sharp conflict or "radical disagreement," as he put it, "a closer study shows that what happened, and has been happening in the West for many centuries, is not a harmonization but an attempt at harmonization. These attempts at harmonization," which Strauss averred, "were doomed to failure,"<sup>9</sup> go to the heart of the Church-State debate, because in the emperor cult or in Caesar's role as the pontifex maximus (chief priest), the Greco-Roman tradition united priestly and political roles, which, as we have seen, were separate and distinct in ancient Israel.

And the emperor cult did not unite just the political and the religious, but the human and the divine. In other words, it united and embodied in Caesar what the gospel united and incarnated in Christ. To be sure, the God-man Christ fused (without con-fusing) in His person what paganism con-fused mythically and personified in the figure of the divine king, the priest-king, or the pontifex maximus. Significantly, in contrast to the man-god Caesar, the God-man Christ, by "taking the very nature of a servant" (Philippians 2:7), united heaven and earth, the human and the divine, not at the top of the human pyramid, but at the bottom, just like any other ordinary human. "He was," as Marcel Gauchet acutely observed, "the perfect counterpart to the imperial mediator, only at the opposite pole."<sup>10</sup>

The God-man's servanthood inverted the Roman hierarchy, flattened it. This sowed the seeds of human equality. As Paul memorably put it, "There is neither Jew nor Gentile, neither slave nor free, nor is there male or female, for you are all one in Christ Jesus" (Galatians 3:28). The story of how the seed ideas of equality, freedom, humanitarianism, science, democracy, and capitalism reside in the gospel has been told differently by such greats as Hegel, Tocqueville, Nietzsche, Max Weber and most recently by Marcel Gauchet, René Girard, and Charles Taylor. But the story has not received its due, partly because of the failure or unwillingness to grasp the "radical disagreement" between the Greco-Roman and the Judeo-Christian, in particular the Greco-Roman foundations of the medieval church-state.

Besides inheriting the Roman legal-administrative apparatus, the medieval church-state embraced the Neoplatonic Great Chain of Being. According to its classic formulation in the mystical theology of Pseudo-Dionysius, the celestial hierarchy of angels paralleled the ecclesiastical hierarchy. Descending from God to the least inanimate object, it connected God, angels, humans, and nature in a single all-embracing cosmos. Again, as said, the hierarchy of angels arranged under one head: God, mirrored the clerical hierarchy arranged “under one supreme pontiff. . . . There was therefore, strictly speaking, a single church of angels and of men.”<sup>11</sup>

The unnoticed scandal is that while taken as Christian, as a replication of the divine order, the medieval hierarchy was in fact a replication of the pagan hierarchy or a reconstruction of the pyramid that Christ had inverted and flattened. Then again, by conjecturing celestial intermediaries of angels and saints, the medieval church-state displaced Christ as the “only mediator between God and mankind” (1 Timothy 2:5), diluted his exclusive redemptive-mediatorial role, and diminished his unqualified pre-eminence in creation over every cosmic power, as expressed in Colossians 1:15-20; 2:18.

Again, we must recall that the construction of the medieval church-state would not have been possible without a radical shift, effected by the Church Fathers, from the temporal-eschatological dualism of the gospel to the spatial-ontological dualism of Greek philosophy. As it is, temporal-eschatological dualism forecloses giving any substantial structure to the kingdom of God on earth. As Gauchet duly stressed, “For Christians, mediation has occurred definitively in the person of the Word incarnate. This is an event that will never have a truly substantial structure. . . . [No person or institution can ever or should] occupy this intersection of the human and the divine. The Son of Man occupied this space historically, and it must remain unoccupied among humans until the end of history.”<sup>12</sup>

As we know, Martin Luther’s recovery of the doctrine of justification by faith and “the priesthood of all believers” shattered the medieval hierarchy. By positing an unbridgeable chasm between the Holy God and the wretched sinner, Luther’s “theology of the cross” swept away the whole sacramental system: clerical mediation, celestial hierarchy, purgatory, pilgrimages, and a host of other rituals and pieties. In short, Luther restricted mediation to Christ alone. This restriction displaced the throng of angels, saints, and magical intermediaries in the medieval universe.

Accordingly and significantly, “with nothing remaining ‘in between’ a radically transcendent God and a radically immanent human world except”<sup>13</sup> this one mediator, Christ, a mechanically, causally ordered universe progressively came into view through the cumulative discoveries of Copernicus, Kepler, Galileo, and Newton.<sup>14</sup> Breakdown of the medieval hierarchical universe also destabilized the political and social hierarchies underwritten by the Great Chain of Being. They became much more difficult to justify in the face of irrepressible egalitarian-democratic ethos inadvertently unleashed by the Protestant Reformation.

This was particularly so in England and the Netherlands, where the victory of Protestantism liberated lay conscience from clerical mediation. But it was in America where, unfettered by traditional hierarchies, the Protestant credo of unmediated access to God inspired a religious revival—the Great Awakening—that helped midwife the American Revolution and underwrite an egalitarian-liberal democracy. This unusual alliance between “the spirit of religion and spirit of freedom” is what greatly amazed Alexis de Tocqueville in the 1830s, a French aristocrat who wrote the most fêted book on American democracy.

“The religious atmosphere of the country,” he wrote, “was the first thing that struck me on arrival in the United States. The longer I stayed in the country, the more conscious I became of the important

political consequences resulting from this novel situation.” For whereas, “In France, the spirits of religion and of freedom [were] almost always marching in opposite directions.” In America they were “intimately linked together in joint reign over the same land”<sup>15</sup> What made this “intimate link” and “joint reign” so novel is that church and state were separated institutionally. However counterintuitively, separation instead of weakening religion actually made it powerful.

The reason, in Tocqueville’s view, was that separation “restricts [the church] to its own resources, of which no one can deprive it.”<sup>16</sup> And these resources, we must stress, are spiritual rather than material, religious rather than political. “Not by might nor by power, but by my Spirit, says the Lord Almighty” (Zechariah 4:6). Paul made the same point. “For though we live in the world, we do not wage war as the world does. The weapons we fight with are not weapons of the world” (2 Corinthians 10:3, 4).

Given how the church has often used “the weapons of the world” and how the gospel has often been, in Tocqueville’s words “mingled with the bitter passions of this world,”<sup>17</sup> the wall separating church and state ceases to be a mere metaphor. In fact, given the historical impact of the Bible on Western society, how it separated what paganism united and how these separations define democracy and modernity, the wall emerges as a divine project, the fruit of the gospel seed of human equality. As Tocqueville, describing the irresistible advance of democracy put it, those who fought for and against it were “all driven pell-mell along the same road, and all worked together [as] blind instruments in the hands of God.” And he concluded, “God does not Himself need to speak for us to find sure signs of His will; it is enough to observe the . . . continuous tendency of events.”<sup>18</sup>

Understanding that modern democracy—its liberation of the individual from hierarchical social orders, its separation of the sacred and the profane, the political and the religious—resulted not from human reason but from divine design is of first importance. It safeguards all power, church or state, from the totalitarian temptation, from the conceit, as John Adams warned, “that it is doing God’s service when it is violating all His laws.”<sup>19</sup>

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5. Scripture quotations in this article are from the *Holy Bible, New International Version*. Copyright © 1973, 1978, 1984, 2011 by Biblica, Inc. Used by permission. All rights reserved worldwide.
6. Isaiah 10:22; 37:31, 32; Jeremiah 31:7; 42:2; Ezekiel 6:8; 14:22; Joel 2:32; Micah 2:12; 5:7, 8; Zephaniah 3:13.
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10. Marcel Gauchet, *The Disenchantment of the World: A Political History of Religion*, trans. Oscar Burge (Princeton, N.J. Princeton Univ. Press, 1997), p. 119.
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16. *Ibid.*, p. 299.
17. *Ibid.*, p. 297.
18. *Ibid.*, p. 12.
19. John Adams, in Reinhold Niebuhr, *The Irony of American History* (Chicago: Univ. of Chicago Press, 2008), p. 21.

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# My Constitution

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 [libertymagazine.org/article/my-constitution](http://libertymagazine.org/article/my-constitution)

Published in the [March/April 2014](#) Magazine  
Opinion, by [Ralph Filicchia](#)

On the desk beside me is a booklet titled *The Constitution of the United States*, with an impressive picture of George Washington on its cover. In the forefront of the booklet are a number of quotations by Washington, an introduction to the booklet, and in the rear an index, a page with dates to remember from 1775 to 1791, and added quotes from Adams, Madison, Franklin, and Daniel Webster. It is published by the National Center for Constitutional Studies.

I value this booklet and the words it holds as my last line of defense against a government that can lose its moorings, or be infiltrated by those who do not revere its constitutional precepts and wish to bypass them for their own purposes. This possibility exists at the present time more blatantly than at any time in our recent history, and that has many Americans very concerned.

But is it possible they are being overly concerned? A quote from George Washington found in the booklet: “The power under the Constitution will always be in (with) the people. It is entrusted for certain defined purposes, and for a certain limited period, to representatives of their own choosing; and whenever it is executed contrary to their (the people’s) interest, or not agreeable to their wishes, their (the people’s) servants (politicians) can, and undoubtedly will, be recalled.”

It seems the first president believed that true power belonged to the people and not the politicians, and that the people had the right to “throw the bums out” when they felt it was necessary—which could be before their next election, which should make us wonder why this doesn’t happen more often. Nothing would better dispel the idea held by many of our elected officials in Washington that they are part of some divinely protected ruling class who always know what is best for us.

Too many times in recent history the American people have seen their cultural norms overthrown by courts that have decided that something is suddenly unconstitutional. Some years back high school football games in Texas were oftentimes preceded by a word of prayer over the public-address system. One man complained that this was a breach of the constitutional separation of church and state. The courts agreed. The prayers were stopped.

Can you read the First Amendment and see where this prohibits a brief prayer before a football game? No you cannot! Of course the question hinged on whether the prayer was government organized or required. Was it really! Remember the words of George Washington previously quoted: “The power under the Constitution will always be in (with) the people.”

At the present time there are many who fear their Constitutional right to own firearms might be taken away bit by bit by the federal government or the courts. But stop and think. Every one of those *servants* in government took an oath to uphold the Constitution of the United States. The Constitution is not under them—they are under the Constitution. If you want to officially change the Constitution, then call a Constitutional Convention and amend it. Otherwise, keep your hands off it and don’t start playing games with it.

In a free society you should not need a federal or state law allowing you to own a firearm any more than you need a federal or state law allowing you to own an automobile, lawn mower, or TV set. What

you personally own or do not own is not inherently the government's business.

Some evangelical clergymen are upset at the prospect of being unable to preach against the sin of homosexuality because of hate crime laws. Again, stop and think. Although the term "a wall of separation between church and state" cannot be specifically found in the Constitution, the basic idea is a good one and has served us well. Simply stated, all it means is that the church cannot get involved in affairs of state, and that the state cannot get involved in the affairs of the church. The two are separate.

If this is understood, then what are these clergymen worrying about? If a preacher (the church) cannot write legislation for the state, or a speech for the president on foreign affairs, then by what right can the state (politicians) write a sermon for the preacher? What he says from the pulpit of his church is his business, not theirs.

"Oh, but wait a minute. His sermon is demeaning and discriminatory against a certain group of people."

Answer: "So what? The same would be true if he preached against robbing banks or swindling investors. Are you then telling me he can't preach against stealing because it discriminates against thieves?"

"But we have laws—"

Answer: "Hold it. When it comes to moral behavior I have my laws to guide me, and if there is a separation of church and state you have no right to nullify them. Plus, what I preach is also protected by my First Amendment rights."

I could go on, but the point should be obvious. It would be unconstitutional for the state to prevent the church from preaching against the sin of homosexuality. Therefore the evangelical preachers, if they stand up for their rights instead of caving in, should have nothing to fear.

One last quote from George Washington, also found in the booklet: "Towards the preservation of your government, ... it is requisite ... that you resist with care the spirit of innovation upon its principles, however specious the pretexts. One method of assault may be to effect, in the forms of the Constitution, alterations which will impair the energy of the system, and thus undermine what cannot be directly overthrown."

Isn't it amazing that a warning of misguided activism can come from a Founder of our country over 200 years ago who had the prescience to understand what could take place in the minds of those not fully dedicated to the preservation of the Republic as it was originally founded? These individuals are the termites who, with little fanfare, eat at the vitals of our Constitutional Republic so they may, in the process, change the direction and meaning of the documents that keep and protect us, and the values we cherish.

If the government governs with the consent of the governed, then we would be fools to let anyone get away with messing with our Constitution for their own ends. Speak up loud and clear!

**Editor's note:** There are important religious freedoms at play in some of these prayer cases (see the article by Hollyn Hollman in this issue). However, it is important to always reference the basis of any claim and keep true to the guarantee of individual rights and the sovereignty of the people enshrined in the Constitution.

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# Clause and Effect

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 [libertymagazine.org/article/clause-and-effect](http://libertymagazine.org/article/clause-and-effect)

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by [Martin Surridge](#)

The history of how the nation's Founders empowered American religious freedom has been well documented over centuries of legal arguments, court proceedings, public discussions, and historical analyses. Lectures on the importance of Jefferson's letter to the Danbury Baptists, or the significance of the First Amendment's establishment and free exercise clauses are commonplace enough today, while it is taken for granted that both the federal and state governments grant far-reaching, unconquerable religious freedoms.

However, the story of one particular piece of legal framework, the nation's first constitutional protection regarding religious freedom, prior even to that of the Bill of Rights, has had a much greater impact and a more fascinating history than many might realize.

Tucked away within Article VI of the United States Constitution is a vital clause, the importance of which has become nearly as forgotten as the unheralded Founder who included it in the document and introduced it to the world more than 225 years ago. Without the addition of the "no religious test" clause, introduced by Charles Pinckney of South Carolina, the nature of the United States government and very essence of American life could have been profoundly different.

Pinckney, a lieutenant in the Revolutionary War, was captured by the British and held as a prisoner of war before eventually making a name for himself as a senator, a congressman, and the governor of South Carolina. He remains one of our least known Founders, and his defining moment may be even less well known. Even though Pinckney's constitutional contribution of the "no religious test" clause is almost certainly his most important accomplishment, many biographical sketches of him—including those on South Carolina's Information Highway Web site, the U.S. Army Web site, and the Biographical Directory of Congress Web site<sup>3</sup>—fail to mention this fact.

For those of us yet to commit the Constitution to memory, the third paragraph of the sixth article is as follows:

"The Senators and Representatives before mentioned, and the members of the several state legislatures, and all executive and judicial officers, both of the United States and of the several states, shall be bound by oath or affirmation, to support this Constitution;"—so far so good, but it was the following 21 words that changed the course of world events and set the United States apart from every other civilization in human history—"but no religious test shall ever be required as a qualification to any office or public trust under the United States."<sup>4</sup>

Until the ratification of the United States Constitution, and the implementation of a brand-new system of republican rule that it created, every form of government around the world, those that existed at time of ratification and even those during the thousands of years before, all required leaders to belong to a particular religious belief system. Heads of state and government, dating from colonial Britain and Spain all the way back to Ancient Egypt and Mesopotamia, had always adhered to a specific state-ordained faith. From the highest echelons of power, religious intolerance could flow down freely with such a dynamic. But the historical current was about to be reversed.

Charles C. Haynes, director of the Religious Freedom Education Project at the Newseum and a senior scholar at the First Amendment Center, explained the significance of this moment in a piece written for *Civitas: A Framework for Civic Education*.

“At the time of the Constitutional Convention in 1787,” Haynes wrote, “most of the colonies still had religious establishments or religious tests for office. It was unimaginable to many Americans that non-Protestants—Catholics, Jews, atheists, and others—could be trusted with public office. . . . Remarkably, the ‘no religious test’ provision passed with little dissent. For the first time in history, a nation had formally abolished one of the most powerful tools of the state for oppressing religious minorities.”<sup>5</sup>

This clause would prohibit formal litmus tests of religion from being applied to candidates for federal office, yet its scope was not applied to state governments until later. During the centuries that followed, the presence of the clause within Article IV would give the courts the legal authority to abolish religious tests in every state, with judicial decisions made during “1868 in North Carolina, 1946 in New Hampshire, and 1961 in Maryland. . . . Maryland had required since 1867 ‘a declaration of belief in God’ for all officeholders. When the U.S. Supreme Court struck down this requirement in its 1961 decision in *Torcaso v. Watkins*, freedom of conscience was fully extended to include nonbelievers as well as believers.”<sup>6</sup>

Was Charles Pinckney, a planter and lawyer from Charleston, truly attempting to undo millennia of discrimination and usher in a new age of freedom? Maybe not, especially given that Pinckney’s other notable contribution to constitutional liberty was the inclusion of the notorious fugitive-slave clause in Article IV. So, what was his motivation? Rob Boston, director of Communications at Americans United for Separation of Church and State, wrote in *Church and State* magazine that Pinckney’s passion for religious liberty “might [have derived from] something as simple as his study of America’s then-foe, Great Britain. During one speech, he blasted the British system of state-established religion for disenfranchising millions.

“Pinckney was also a strong supporter of Thomas Jefferson,” Boston wrote, “and might have been influenced by the Virginian’s strong pro-religious freedom bent.”<sup>7</sup>

Boston also cited church-state scholar Anson Phelps Stokes, who asserted in his 1950 three-volume *Church and State in the United States* that “during the Constitutional Convention, Pinckney showed more interest in religious liberty than any member except Madison.”

However, the Library of Congress has also pointed out that a likely reason for the inclusion of the religious test clause was simply “to defuse controversy by disarming potential critics who might claim religious discrimination in eligibility for public office.”<sup>8</sup>

Whether or not Pinckney was so selfish as to include a constitutional clause that would silence his opposition in future political fights is uncertain. However, let us not forget that this was a politician and plantation owner that, while debating the merits of the privileges and immunities clause in Philadelphia, commented that “some provision should be included in favor of property of slaves,” and moved “to require fugitive slaves and servants to be delivered up like criminals.”<sup>9</sup> He also threatened to withdraw South Carolina from the convention if slavery was formally addressed in any way at all. Pinckney’s strong defense of slavery was unsurprising given that he was a member of the Deep South gentry and a plantation owner where 40 men, women, and children were enslaved.<sup>10</sup> Pinckney’s support of slavery went so far as to see him protest the Missouri Compromise after he was elected to the House of Representatives almost 30 years after ratification.<sup>11</sup>

Such deep and long-lasting resistance to even the most partial abolitionist efforts may seem unusual

for such a champion of constitutional freedoms, but this paradoxical nature would also have been present in other Southern Founders, including George Washington and Thomas Jefferson.

Such was the contradictory life of Charles Pinckney. A National Park Service inventory of Pinckney's Snee Farm plantation, from 1787, the very same year as the Constitutional Convention, can afford us a glimpse into the lives of slaves who would never know the meaning of Pinckney's contributions to freedom. While the 29-year-old delegate to the Constitutional Convention remained stubbornly undeterred by the initial efforts to ignore adoption of his no religious test clause, Cyrus—an enslaved carpenter, who was Pinckney's most expensive acquisition—would have been carving and cutting wood back in South Carolina, fully aware of the power of his master's stubbornness. As Pinckney continued his political maneuverings, once again introducing the proposal on the full floor, Jack the field slave would likewise have been repeating his own tasks in his master's rice and indigo fields, again and again. And when Pinckney's proposal was seconded by Gouverneur Morris and adopted by the other delegates, expanding the reaches of American legal freedom from that point forward, enslaved shoemaker Congaree Ned would have been able to look toward the fence line knowing exactly which post constrained the limits of his freedom.

From its inception onward, the no religious test clause has been fraught with contradictions. Even if one were to overlook the hypocrisy and double standards of Pinckney himself, there is the small matter of how six states still have language in their constitutions requiring a belief in God in order to take public office. Arkansas, Mississippi, North Carolina, Pennsylvania, Tennessee, and Texas have provisions that have yet to be singled out and struck down by federal courts, whereas those of Maryland and Pinckney's home state of South Carolina were specifically overruled. While these unenforced laws may only remain on state books and contradict the federal government merely in a symbolic way, it is the pro-religious nature of American attitudes toward political candidates that poses the most significant problem. Public opinion demonstrates how despite the presence of the no religious test clause, most voters take religion into account when deciding who to support on Election Day.

When former U.S. Representative Barney Frank (D-Mass.) casually and humorously admitted that he was an atheist on *Real Time With Bill Maher* back in August, the news was that the 16-term retired congressman had divulged yet another personal secret, and had waited until after he was out of office when voters couldn't hold his lack of religion against him. Frank had come out as gay in 1987 and served openly while in Congress, but had waited until his retirement to admit his atheism. Covering the story for *Politico Magazine*, Jennifer Michael Hecht, in an article titled "The Last Taboo," pondered the question "Was it really harder to come out as an atheist politician in 2013 than as a gay one 25 years ago?"<sup>12</sup>

Hecht believes that it is more difficult, and she strengthened her argument by pointing to the total absence of self-described atheists in Congress, in addition to a recent Gallup poll that "found (once again) that atheists are the least electable among several underrepresented groups. Sixty-eight percent would vote for a well-qualified gay or lesbian candidate, for example, but only 54 percent would vote for a well-qualified atheist"—and Muslims did not fare much better, polling at only 58 percent.<sup>14</sup> Hecht argues that since approximately "6 percent of Americans say they don't believe in a higher power", according to a 2012 Pew Report, "at least 15 million Americans are without any elected officials to represent their point of view" and that "atheism is still as close as it gets to political poison in American electoral politics."

Rob Boston lamented the contradiction of the no religious test clause, writing that "today, Pinckney barely rates a mention among the founding fathers. And, sadly, many Americans don't appreciate his handiwork. In fact, Americans seem to have imposed a de facto religious test for public office. Voters

seem most comfortable with candidates who embrace a faith that is considered part of the mainstream.”<sup>15</sup>

“Thus, we find ourselves in a curious situation,” Boston continued. “The Constitution mandates no religious test for public office, yet much of the voting public seems to want one that says that at the very least, a candidate must believe in God and be willing to incorporate religious rhetoric in public pronouncements.”

Pinckney and his fellow Founders were right to fear the idea of the religious test; what they didn't know was that the questions on the test wouldn't be asked by the judges of the United States, but by its pollsters.

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# Back to the Future

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 [libertymagazine.org/article/back-to-the-future](http://libertymagazine.org/article/back-to-the-future)

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by [Céleste Perrino-Walker](#)

Some decisions turn out to be epic. They may seem relatively small and inconsequential in the scheme of things at the time, but, later, when they are weighed on the scales of time and consequence, they turn out to be important benchmarks. We rarely foresee these decisions; they don't often stand out in any way; instead they pass quietly without notice.

So it was for Kwasi Opuku-Boateng who worked as a grain inspector for the California Department of Food and Agriculture. He had acquired a temporary position and wanted to secure a permanent one. Then Opuku-Boateng applied for several positions, one of which was plant quarantine inspector, never dreaming that this would one day land him a place in history. A question on the application form asked if the applicant had a religious objection to sitting for an examination on Saturday. Although Opuku-Boateng responded affirmatively to the question, he later received notice of his examination date . . . scheduled on a Saturday.

When he received the notice, he immediately called the contact person listed, Diane Sheff, and she made arrangements for him to take the test on a Sunday instead. When he was later interviewed by Sheff and a man named Chuck Gray, he assumed that they were well aware of his inability to work on Sabbath because he had needed special accommodation to take his examination on a Sunday. During the interview neither Sheff nor Gray mentioned working hours or Opuku-Boateng's religious beliefs. Gray's main concern, which he put to Opuku-Boateng later over the phone, was whether or not he had a preference for any particular station assignment. Opuku-Boateng assured him that he did not—even when Gray cautioned him that some assignments had less desirable living accommodations than others. Opuku-Boateng's only concern was that the station be close to a Seventh-day Adventist church.

## The Problem Begins

On October 18, 1982, Opuku-Boateng was given the position of plant inspector at a border inspection station in Yermo, California. He was to report to work on November 2. Elated, he moved his family to Yermo. On October 28 he and the local Adventist pastor toured the facility, where Opuku-Boateng saw his new work schedule and realized with a shock that he was slated to work on November 14, a Saturday. He informed the acting supervisor, William Whitacre, that because of his religious beliefs he was unable to work from sundown on Friday to sundown on Saturday. He was told that unless he was willing to work on Saturdays his appointment wouldn't be processed.

What followed was a brief tennis match of proposals, refusals, and counterproposals between local Seventh-day Adventist church representatives and the state in an attempt to accommodate Opuku-Boateng and allow him to keep his newly acquired position. By November 8, 1982, it was all over but the shouting. Howard Ingham, a program supervisor for the department, notified Opuku-Boateng that the appointment for his position would not be made because he could not frequently work from sundown on Friday to sundown on Saturday.

The appointment process was terminated, and Opuku-Boateng suddenly found himself without either

the job he was looking forward to or the job he'd left behind. He had little choice but to file a complaint with the Equal Employment Opportunity Commission. The district director determined that the state had made no effort to accommodate Opuku-Boateng's religious beliefs and that there was reason to believe they had violated Title VII in refusing to hire him. In the end they gave him a right-to-sue letter, and the legal foray began.

## **The Crux of the Matter**

Title VII of the Civil Rights Act of 1964 is an employee's protection against discrimination by an employer on the basis of religion: religion in this case including belief as well as all aspects of religious observance and practice. Cases are determined based on two criteria: the employee must first present a prima facie case for religious discrimination. This consists of proving that they have a sincerely held religious belief, that they notified the employer of the religious belief, and that they suffered an adverse employment action. If they can do that, the burden rests on the employer to prove that it did everything reasonable in its power to accommodate the employee's religious beliefs and practices.

Opuku-Boateng methodically fulfilled every obligation required of an employee to make a case of religious discrimination. Because officials at the Department of Food and Agriculture had considered several options in an attempt to find a solution to Opuku-Boateng's refusal to work on Saturdays, they felt that they had done their best to find accommodations for his religious beliefs. Claude Morgan, an attorney for the Church State Council who represented Opuku-Boateng initially, disagreed with them. "I contacted the State Department of Agriculture and spoke with a woman in the department who was their Equal Employment Opportunity officer. Her perspective was that they should be able to accommodate Kwasi, but each time they came up with an idea, the site manager down at the inspection station basically said, 'No, we're not going to do that.' There's no question at all that he flatly refused to work with the possible solutions."

## **Round One**

The court, however, did not see it that way. It ruled against Opuku-Boateng in favor of the state, asserting that while Opuku-Boateng had, in fact, established a prima facie case of religious discrimination, the state had also demonstrated that they could not possibly have accommodated his religious beliefs without undue hardship on the rest of the staff at the facility. This was to become the most scrutinized aspect of the case.

"It was a test of the obligations of the state of California and by inference other states as well," Morgan says. "I think that makes it especially significant because a lot of the cases have been litigated against private employers. This is one that specifically looks at the duty of the state. The cases involving religious discrimination have shifted somewhat over the years as the U.S. Supreme Court has handed down rulings that clarified the limits on what kind of duties the Civil Rights Act imposes on employers. This is one case in which the line between duty to accommodate and undue hardship was meticulously litigated. We were pressing continually to try to establish that the state hadn't made any effort to accommodate. I think that the fact that it was such a contested issue in the case makes it an important precedent for litigants, both for Sabbathkeepers, or any employee with religious beliefs, and employers who are looking for guidance as to what their obligations are."

## **Round Two**

Opuku-Boateng appealed the district court's decision to the Ninth Circuit Court of Appeals. The case was brought before three judges, who ultimately overturned the original decision and found in favor

of Opuku-Boateng. Their judgment was based on their disagreement with the district court's determination that the state had met its obligations to try to accommodate Opuku-Boateng's religious beliefs. They asserted that at the very least the state should have retained him as a temporary employee until another position opened up in which his inability to work on Sabbath would not be a problem, or some of the proposed accommodation measures could be tested to determine whether or not they would rectify the problem. In their opinion the state had not gone nearly far enough in earnestly trying to accommodate Opuku-Boateng's need for a single 24-hour period off each week. Their ruling stated: "The scheduling of shifts was not governed by any collective bargaining agreement, and the proposed accommodation would not have deprived any employee of any contractually established seniority rights or privileges, or indeed of any contractually established rights or privileges of any kind." Ultimately, they decided, the state had made halfhearted attempts to find the necessary accommodation but no concentrated effort to really find an equitable solution.

In the federal circuit courts there are presently two different accommodation tests: the partial accommodation test and the complete accommodation test. Some courts hold with one test, and some with the other. There is a significant difference between the two. "The complete accommodation test ensures that the accommodation totally eliminates the conflict between the employee's religious beliefs and the employment requirements," Andrew J. Hull explained in an article for the Regent University Law Review. "The partial accommodation test does not necessarily eliminate this conflict. Rather, the test only demands that the accommodation be 'reasonable' in light of the circumstances, even if this requires a compromise of the employee's religious beliefs.

"Many of the federal circuit courts hold to the complete accommodation test. But in 2008, the Fourth and Eighth Circuits both embraced the partial accommodation test. These two decisions mark a definitive split among the circuits over the protection afforded to employees to exercise their religious beliefs within the workplace."<sup>2</sup>

The Ninth Circuit adopted the complete accommodation test that led to a final decision entered on May 19, 1997, a grueling 14 long years after the process had begun, not quite rivaling Jarndyce v. Jarndyce for longevity, but quite possibly setting a record all the same. "We'd been beaten down so long," said Morgan. "It was a situation where you know you're right, but you're not sure anyone is ever going to acknowledge it."

## **The Long Night**

Opuku-Boateng could have given in to discouragement at any moment during the long trial process, but he didn't. Although he no longer stood to regain his position, he continued to press on in the hopes that his struggle would help others who faced religious discrimination on the job.

The capacity for patience and hope during this unrelenting, tedious waiting period is not to be taken lightly. In fact, it's a testament to the tenacity not only of the lawyers involved in the case, but of Opuku-Boateng himself. "It was quite an ordeal for him and his family," Morgan says. "He was out of work; he changed careers a couple times. Some people get angry and belligerent and have tantrums over the injustice they've suffered. Kwasi was very stable about the whole thing. 'Well,' he'd say, 'I just want to do what we can to work it all out, and we'll hope that if it doesn't help me, it will at least correct the situation so this won't happen to someone else.' Every time we discussed going forward with the appeal, Kwasi and his wife would pray about it, and then he'd tell me to go ahead. He kept saying 'Let's not give up; let's keep trying.' I have the highest regard for Kwasi's Christian perspective and the spirit that he maintained throughout this whole process."

Sabbatarians and others with strong religious convictions owe a debt of gratitude to Kwasi Opuku-Boateng and to his relentless legal counsel for their unflinching efforts to secure justice on his



behalf, a justice that couldn't benefit him but would continue to benefit others. When the verdict was given in Opuku-Boateng's favor, Lee Boothby, who represented him, said, "The State of California was shocked and filed a petition for review by the United States Supreme Court, which turned down the appeal and thus, the Ninth Circuit decision is good law and held in favor of Kwasi and in favor of the need to accommodate religious beliefs."<sup>3</sup> And so an ordinary decision on an ordinary day became forever immortalized in legal history, providing a beacon of hope for all those who would come behind.

"Kwasi's case is one of the most unique cases I've ever worked on in all my years in religious liberty," Morgan says, "and I think it's one of the most unique cases I've come across either through involvement or through research. He went through a long, convoluted, and very taxing ordeal to get to this verdict."

"The importance of this case, from a legal perspective, is enormous," says Alan Reinach, who has served as executive director of the Church State Council, the organization that first took on the case, for the past 20 years. "In most cases where employers fail to provide religious accommodations, the employer makes little or no effort to provide an accommodation. Because the facts were so well developed in Kwasi's case, and because the State of California made minimal efforts to accommodate, the precedent puts all employers on very shaky ground unless they make much more substantial efforts to accommodate than the state did for Kwasi. We have settled literally dozens of cases after demonstrating that a company's efforts were no better than those of the state in Kwasi's case. Moreover, Kwasi's case has been cited literally hundreds of times, and is certainly the leading case in the Ninth Circuit, covering 11 Western states, and a large slice of the American populace."

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**Author: Céleste Perrino-Walker**

# Holy Land Blues

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 [libertymagazine.org/article/holy-land-blues](http://libertymagazine.org/article/holy-land-blues)

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by [Reuel S. Amdur](#)

In the hostile atmosphere of Israel/Palestine, liberty and tolerance are losers all around, and religion is part of the unpleasant mix. Let us begin with the Palestinian scene. We have, in effect, two Palestines: Gaza and the West Bank; and the ruling faction of each wants to represent both. To understand more of their mutual hostility, it is necessary to remember the 2006 legislative elections won by the Hamas group. President Mahmoud Abbas, of the Fatah group, Hamas' opposition, refused to relinquish power to Hamas. Hamas then seized power in Gaza, leaving Fatah in control of the West Bank. Since then, each party in power has engaged in imprisoning and mistreating opponents from the other faction.

While the voters did favor Hamas over Fatah, political observers have widely viewed that choice as a reaction to corruption in Fatah. However, Hamas' ideology is openly anti-Semitic, not just anti-Israel. The fact of Palestinians giving their votes to such a movement indicates, at the very least, an openness to acceptance of such bigotry.

Among the nonsense put forth by Hamas is the tying of Jews to the French and Russian revolutions, Freemasonry, and the Protocols of the Elders of Zion. That work is a forgery concocted by the tsarist secret police, purporting to be an account of a Jewish conspiracy to take over the world. While the hoax has been thoroughly exposed, with plagiarized sources fully documented, it reappears from time to time. Adolf Hitler and the Nazis used it, for example.

So what is happening now in Gaza? Hamas is imposing its brand of rigid, ideologically ultra-conservative Islam. It has legislated to eliminate all "non-Islamic" schools and to require segregation of the sexes in schools beginning at age 10. A Hamas official recently ordered a Catholic to remove his cross. Hamas is dictating what women can wear and do. For example, no jeans, no riding on the backs of motorcycles, mixed gatherings are frowned upon. Unfortunately, Hamas is linked historically and ideologically to the Muslim Brotherhood.

There are yet more extreme religious elements in Gaza—forcing closure of music shops and making life generally unpleasant for Christians and some other minorities. For example, mobs there recently burned down a Christian bookstore.

In the West Bank, under Fatah, religious tolerance is much more evident. Christians are active even within government and opposition, though their portion of the population is in decline. Fatah has also chosen a Jew, Uri Davis, to be a member of its Revolutionary Council. (On his marriage to a Muslim woman, Uri converted to Islam.) Another Jew, Ilan Halevy, was a long-time member of the Palestine Liberation Organization. At the time of his death he was honored by Abbas. Neither of these things could be imagined under Hamas in Gaza.

On the other hand, there are limits to toleration in the West Bank. Sharia is acknowledged as a source of law. Ahmadis, a dissident sect of Islam, are viewed by their more heterodox coreligionists as apostates, and some of their marriages have been annulled. Walid Husayin went beyond the bounds when he was caught blogging atheism and attacking Mohammed, accusing him of being a sex maniac. He was taken into custody and held without charge. Eventually he was able to make his way

to France and to freedom. Many Muslims said he should have been killed, and had he been in Gaza he most likely would have been.

The West Bank also has its Muslim extremists, who have attacked Christian villages. As well, Jewish fanatics, a small minority of settlers in the West Bank, seeking to clear all non-Jews from the Holy Land, are actively engaged in attacking Muslims, destroying their crops, and harassing their children.

In the West Bank, and more so in Gaza, freedom of expression and opposition are constrained. Journalists are harassed, and demonstrations severely limited, if not harshly suppressed.

Israel is a much more open society, and as a result its flaws are more visible. There one finds widespread prejudice and discrimination against Palestinians, with a small minority resorting to vandalism and violence. A 2012 poll by Dialog, a survey company, found that a third of Israelis would ban Palestinians in Israel from voting in national elections. As well, 59 percent favored giving preference to Jews in public sector hiring. More than 40 percent wanted separate schools and housing.

Such widespread prejudice provides the ground from which violent acts can blossom. Back on February 25, 1994, Baruch Goldstein, a doctor in the Israeli military, entered a mosque in Hebron during prayer and opened fire with an automatic weapon, killing 29 and wounding 125 before he was overwhelmed and killed. Of course officials and the overwhelming majority of Israelis reacted with horror and denounced the atrocity. Yet, at his funeral, Rabbi Israel Ariel called him a “holy martyr,” and Rabbis Dov Libor and Yitzhak Ginsburg called him a saint. His tomb is a place of pilgrimage for like-minded extremists.

Consider the reaction to a similar atrocity in the United States. Wade Michael Page armed himself and attacked a gurdwara in Wisconsin in 2012, killing six Sikhs before being wounded by police. He then committed suicide. His grave is not a shrine. No clergy of any faith call him a saint or a martyr.

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Housing is a major problem for Palestinians. Almost all land in Israel is owned either by the state or by the Jewish National Fund, which is dedicated to serving only Jews. As well, because they



are hampered by authorities when seeking building permits, much Palestinian construction is done without. These houses are in danger of being demolished by the authorities. Ownership of houses is

also an issue in some cases. In Jerusalem some Palestinians have been evicted because it is alleged that the house they were in had been occupied by Jews before they were driven out in 1948. At the same time, Jewish residents of property of Palestinians driven out during past hostilities are not treated similarly. More openly discriminatory, a large number of rabbis issued a decree forbidding, under threat of ostracism, the sale or rental of housing or other real estate to non-Jews. In another example of housing discrimination, the government adopted a law permitting local communities to screen would-be newcomers for cultural fit. You can guess who would not fit.

Most Israeli Palestinians are Muslim, and mosques are the object of attacks. Some are marked with graffiti or burnt. Korans and other religious literature have also been burned. Christians have also been the object of hostility, with churches also covered with graffiti or burned. There have been cases of clergy walking in Jerusalem being spat upon by children and young adults.

The most serious religious persecution in Israel is reserved for Messianic Jews, those who accept Christ but still claim to be Jews. The fact that their ideology is consistent with that of the settlers in wanting a Greater Israel does not save them from harassment. Ultra-Orthodox Jews interrupt their religious services and hold demonstrations outside their homes. In one instance, a 15-year-old Messianic Jew was injured by a bomb delivered to his house in a Purim basket.

Sadly, in all three of these jurisdictions, there are problems of discrimination and prejudice. Religious extremism and intolerance are factors. And in the two Palestinian territories, these problems are augmented by a general lack of civil liberties.

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# The Right to Wrong Hair

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 [libertymagazine.org/article/the-right-to-wrong-hair](http://libertymagazine.org/article/the-right-to-wrong-hair)

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As so often with these cases, it could appear like much ado about nothing, or about only a little. *Arocha v. Needville Independent School District* was no exception. On the surface, prima facie, it was simply a case of dress code compliance for a 5-year-old in a public school kindergarten. Hardly epochal stuff, yet the principle behind it has been one that, for centuries, folks have died for, a principle that goes to the core of religious liberty itself.

Depending upon how far back you want to go, one could start this story in the sixteenth and seventeenth centuries, with the first European settlers coming to North America and beginning the protracted, painful, and violent process of uprooting the natives. For the present purposes, however, it can begin in the latter half of the twentieth century, with Kenney Arocha, a Native American of mixed Spanish-Apache blood (DNA confirmed). Though his family stressed their Mexican roots over their Native American ones (all in order to better blend in), Kenney remembers very well his grandfather and uncles, who all wore long hair and who talked so fondly of their Apache culture. As a child, Kenney's hair was kept long too, a sacred symbol of life, of his own distinct life. He was told by his grandfather and uncles that it should be cut only to mark life-changing events, such as the death of a loved one.

However, before the first day of kindergarten, his mother took him to the barber for a buzz cut. He screamed and cried because this went against what his grandfather and uncles had told him. When his mother said that it was because he had to go to school, and that it was expected, he acquiesced (what else could the child do?).

That incident, though, pretty much ended Kenney's interest in his Native American heritage. That is, until he met his future wife, Michelle Betenbaugh, an Anglo who encouraged Kenney to rediscover his roots, which he did. For starters, he hasn't cut his hair since meeting her 10 years ago. He keeps it, according to Apache tradition, in two long braids. When he needed brain surgery a few years back, he pleaded with the doctors not to shave his head. They agreed.

Then their son, Adriel (known in the case as A.A.), was born. Kenney and Michelle had decided to raise him according to Kenney's American Indian religion and identity in a way that would make him proud of his ancestry. And, of course, part of that religious heritage was his hair. Five-year-old A.A. has never had one of his thick and wavy locks cut. He keeps it in two 13-inch-long-braids, one on each side of his head. The child knows how important this is. His hair, he says, "tells me how long I have been here."

All was well until A.A. began kindergarten in Needville, Texas.

Needville, population 2,609 (2000 census), was founded by August Schendel, a German immigrant who purchased a 160-acre tract of land from a railroad in 1891. In 1892, Schendel established a general store in an area he named after himself, Schendelville. When applying for a post office, he tried to use the name "Needmore" because, he said, everybody seemed "to need more things." Unfortunately, "Needmore" had been already taken, so Schendel settled for "Needville," and so it is. Needville is located on State Highway 36 in Fort Bend County, just southwest of Houston. It's a small

Texas town that promotes itself with the slogan: "Needville, where thousands live the way millions wish they could."

It's kind of an old-fashioned place that's glad to be that way. A few feed-supply stores, along with a family owned hardware store, sit downtown. The Albert George Branch Library of Fort Bend County Libraries sits on Gene Street. The Creekside Farmers' Market is open every Thursday on the campus of Creekside Christian Fellowship, where local growers sell their produce directly to the consumer. Besides fresh vegetables and herbs, you can get goat cheese and milk, locally roasted coffee, and natural grass-fed beef, chicken, and lamb.

Curtis Rhodes, the Needville Independent School District superintendent, grew up in the area. He was a graduate of Needville High School in 1983. His father and grandfather had been superintendents. He married a woman born and raised in Needville and, though they left for a while, they returned to raise their kids.

Though aware that some people might think their town a bit "backwards," he's not all that concerned. "Backwards isn't all that bad," he said, "when you become the parent."

Life's fairly quiet there, though in 2007 an arsonist set a fire that destroyed two Needville High School buildings. A 16-year-old student and football player at the school confessed to the crime.

Kenney and his wife were drawn to the area after her family bought land in Needville in 2008. They intended to build a home and a small farm on the property. Of course, part of the process involved enrolling 5-year-old Adriel in kindergarten, braided hair and all.

Adriel Arocha

## Slippery Slope?

Perhaps anticipating problems, Michelle Betenbaugh e-mailed the school in November 2007 to ask about what



documentation she'd need to ensure that her son, in keeping with his religious and cultural tradition, could keep his hair long when he was enrolled next fall. The school had never responded. When in May of 2008 she emailed then school principal Jenna Sniffin, she was told that "[o]ur dress code in Needville does not allow boy's hair [sic] to touch their ears or go below the collar. Long hair is not allowed." Not, apparently, even for religious reasons.

That June, Kenney, Michelle, and A. A. met with Principal Sniffin and Superintendent Rhodes, and were pretty much told that the boy would have to comply with the dress code, and that exemptions would not be allowed for any religious beliefs. The family appealed to the Needville Independent School District (NISD) board, which stood firm.

“A school district is a reflection of the community,” said Rhodes. “We’ve consistently been very conservatively dressed, very conservatively disciplined. It’s no secret what our policy is: You’ll cut your hair to the right point. You’ll tuck in your shirt. You’ll have a belt.”

This sentiment was echoed by the public at the first board hearing. One attendee told the board, “We don’t have a lot of the problems here that they do in larger school districts, and I am thinking that if we allow this—I’m going to go with the word belief—that it’s going to set a dangerous precedent, that it’s going to just be one thing after another, after another. I’ve worked in law enforcement for a long time to see that, what some of these things can result in. . . . I really hope that you decide to keep the dress code the way it is now, that I don’t think the wishes of the entire community, that our beliefs, should be superseded by someone else’s. I don’t think that that’s fair, that one should absolutely control the whole.”

Eventually, a compromise, of sorts, was reached: A.A. could come to school but his hair had to be “in a tightly woven single braid down his back with the hair behind his ears, out of his eyes and the braid tucked into the collar of his shirt.”

For the family, this was unacceptable.

“Asking a five-year-old,” said his mother, “to keep a foot of hair shoved down his shirt is not just humiliating, it is impractical and unhygienic in Houston’s sweltering climate.”

When A.A. showed up for school with his hair in two long braids outside his shirt, he was within a few days put in In-School Suspension (ISS), the harshest discipline the law allows for a child his age. What it means, basically, is that A.A. is separated from the rest of the class, being forced to sit alone in another room under adult supervision (the school actually hired a retired teacher to sit with him). This 5-year-old spent seven hours a day segregated from the rest of his school mates, all because of his hair.

## **Court Ruling**

Fairly early on in the process, his parents got legal help. When the school refused to allow him to wear his hair according to Native American tradition, the Texas ACLU sued the school district, arguing that it was violating the child’s religious rights.

“NISD is trying to force our client and parents to choose between practicing and expressing his religion and identity, and obtaining a public education,” said Fleming Terrell, an attorney for the Texas ACLU. “But Texas law and the First Amendment prohibit the district from forcing parents and students to make this choice.”

This isn’t, of course, the first time courts have had to wrestle with the question of what to do when a child’s religious expression conflicts with public school policy and norms. The most famous, or infamous, case was *Gobitis*, when in 1940 the Supreme Court of the United States ruled that public schools could compel students—in this case, Jehovah’s Witnesses—to salute the American flag and recite the Pledge of Allegiance despite the students’ religious objections to these practices. The decision led to a wave of persecution against Jehovah’s Witnesses across the country. Within a mere three years, however, the Supreme Court—realizing its mistake—reversed this decision.

In early 2009 the U.S. District Court for the Southern District of Texas ruled in favor of the plaintiffs. U.S. District judge Keith Ellison said that the school policy “violates not only Adriel Arocha’s free exercise rights, but also his rights to free expression and his parents’ due process rights.” The court ruling permanently stopped the NISD from forcing A.A. to wear his long hair in a tight braid stuffed down his shirt at all times. Instead, he can wear it as any proud Native American would.

“By standing up for their rights, this child and his parents achieved an important victory not just for themselves but for all Texas school children, whatever their religion,” said Lisa Graybill, legal director for the ACLU of Texas. “Schools must accommodate student religious beliefs in their dress codes—and that applies equally to Catholic students’ right to wear a rosary or Jewish students’ right to wear a yarmulke as it does to our American Indian client’s right to wear his braids.”

Though the courts always have to balance out the needs of the school district with the individual expression of religious freedom, in this case the school district’s arguments weren’t deemed enough to infringe upon this 5-year-old’s religious practices. Hence, the Arochas won—not just for themselves but for all Americans who cherish their free exercise rights.

Yes, it was a victory, not like Sitting Bull’s at Little Bighorn to be sure but, still, a victory. Of course, though the Native Americans won that battle in 1876, no one should forget who, ultimately, won the war. And that’s an analogy that anyone who cares about religious freedom in this country must never forget.

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