LIBERTY

PROTEST RACKETEERS
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"Persecution Complex: Are Christians an Endangered Species?"

Albert J. Menendez and Edd Doerr clearly missed the mark in their attack on a supposed false "persecution complex" among Christians in America today. The point being made by John W. Whitehead ("Religious Apartheid . . ." March/April issue) and others is *not* that Christians per se are an endangered species, but that *any Christian voice in the public arena* is endangered. Most Christians today have wrongly adopted the belief that Christianity is a purely private matter that should be kept separate from work, citizenship, and education. So the marshaling of statistics regarding the numbers of people in the U.S. who call themselves Christians contributes nothing to this debate.

The real question is Should a Christian be free to raise his or her voice in the public square as a Christian without being fired, slandered, or marginalized as a fanatic? As one who has tried—in a very moderate way—to speak publicly to public issues as a Christian, I know that any but purely privatized Christianity is an endangered species and I side with Whitehead on this one.
ROGER E. OLSON, Ph.D.
Professor of Theology
Bethel College and Seminary
St. Paul, Minnesota

"Religious Apartheid: The Systematic Elimination of Christianity From American Public Life"

I have been vaguely uncomfortable with the religious apartheid theme for some time, but thanks to your recent article, I now know why. John Whitehead vainly seeks to demonstrate a parallel between Christians who suffer unjustly for their faith in America, and the systematic legal exclusion of blacks in South Africa.

The Rutherford Institute is litigating many of the cases discussed in the article, by its own admission. It would not be wasting time and resources to do so if it did not feel there was substantial legal protection and recourse for the Christians who were unfairly treated. Whatever injustice is done to Christians in America, it is not due to systematic legal exclusion, it is done in violation of the law, and there is the crucial distinction.
ALAN J. REINACH, Esq.
Westlake Village, California

It does not surprise me that the Rutherford Institute and similar groups continue to cry, in spite of substantial membership, funding, and media access, that they are oppressed minorities. What does surprise me is that any objective person listens to the cry.

Whitehead, in standard Rutherford Institute fashion, gives a parade of horribles to support his position. How real is the parade? Whitehead, though pretending to present objective facts, is playing devil's advocate. If any of those cases were as one-sided as he paints them, they would have been settled or disposed of through summary judgment by now. That they have not been so disposed of indicates that Whitehead's opposition has other sets of facts, facts Whitehead chooses not to disclose to us, facts that would make the parade far less horrible.

The Rutherford Institute and its allies are not upset about being oppressed; they are upset that they cannot use the power of the state to oppress the rest of us. We must make sure that they remain upset about that, and we shall if we continue to fiercely resist their attempts to undermine the Constitution.
KNUTE A. RIFE
Goldendale, Washington

I read with interest Mr. Whitehead's article. He states, "A judge in Fort Myers, Florida, ruled that a father instead of the mother, should be granted custody because their child was receiving a Christian education under the mother's care." This was all the more interesting because I am the attorney for the father.

I read a similar blurb awhile ago, at church, in a Rutherford Institute brag sheet, and sent a letter to the Rutherford Institute in an attempt to correct their misunderstanding. Rutherford's response was evasive. *The court's decision to change custody had absolutely nothing to do with what school the child was attending.* The court found, "This is one of the worst cases of parental alienation I have ever seen," and changed custody because the mother was again trying to delay a hearing on the

COVER ILLUSTRATION BY JIM OWENS

case, the day before trial.

It is true that the parties disputed whether the nearby public school was better than the videotaped lessons at the unaccredited Christian school, to which the mother was sending the child; when the judge changed custody, he granted the custodial parent the right to choose a school.

The Rutherford Institute filed its brief condemning the court-appointed, volunteer guardian ad litem (who is not an attorney) for the following sentence: "Joey should not be forced to live in an environment that shields him from the secular world in which he will have to live upon completing his schooling." The Institute argued that the judge cannot prefer a secular school to a religious one. I filed a response agreeing that the court should make no preference of the school on the basis of religion. However, this was a trivial point in the case. The very experienced guardian ad litem did an excellent investigation and an insightful report, and the evidence before the judge persuaded him that Joey should be in his father's custody. School was an afterthought.

Unfortunately, a headline such as "Christian Mother Alienates Child Against Christian Father and Sends Child to Inferior School" is not going to raise funds for the Rutherford Institute. Raising the specter of persecution does a much better job of it. I am very disappointed by the hypocrisy of the Rutherford Institute. I cannot help but wonder what the real stories are behind their other sensationalizations.

KINLEY I. ENGVALSON, Attorney
Fort Myers, Florida

"Elmer" Goldstein

I have long detected a bitterness bordering on outright hatred of Evangelical Christians by some *Liberty* writers with Mr. Goldstein being the most frequent offender.

It is one thing to disagree on school prayer, etc., it is quite another for Goldstein to use the term "Elmer Gantrys" to refer to those who differ with him.

The fictional Elmer Gantry, created by an anti-Christian secular writer, was a womanizer and charlatan. To imply that those who disagree with Mr. Goldstein's interpretation of church-state relations are Elmer Gantrys is a slur unworthy of anyone who claims to be a Christian.

Maybe Mr. Goldstein could at least ascribe to those who hold another view the degree of sincerity of purpose which *Liberty* claims for itself.

EARL F. DODGE, Chairman
Prohibition National Committee
Denver, Colorado

[My use of the Elmer Gantry image was to characterize the Religious Right's hypocrisy. I was not addressing specific sins.—C.G.]

Sherlock Holmes Loses One

You may recall that I wrote to you regarding the "Sherlock Holmes" article in your January/February issue. I noted that Mr. Davis had the "power" to breach his agreements with Texaco, but not the legal "right" to do so. My point was that if Davis chose to breach his agreements, he must be willing to pay the price for his newly found convictions.

I now see that the U.S. Supreme Court has refused to hear the case, which means that Texaco has won. I feel bad for Mr. Davis, but I also believe this is the right outcome of the case. No one should be able to change the rules of the game mid-stream without paying the price for their decision. As Christians, we should be the first to say that Mr. Davis must comply with his agreements, or be willing to pay the price.

CRAIG A. DUNN, J.D.
Indianapolis, Indiana

Spare the Rod, Spoil the Child

I was very disappointed to read "Spare the Rod, Keep the Kid" in the lambs and Pentameters section of your magazine. I see no reason to advocate striking children for any reason. The word discipline means to teach. I believe spanking only advocates further assault as children grow older and more aggressive in nature. I believe that peace begins at home. There are many other avenues for teaching children what is right and what is wrong. Hitting a child only teaches that child who is larger, bigger, and stronger. I believe all parents should recognize that some day their children may grow up to strike back.

ROBERT E. BLAU, Attorney
Cold Spring, Kentucky

Readers can E-Mail the editor on CompuServe #74617,263.

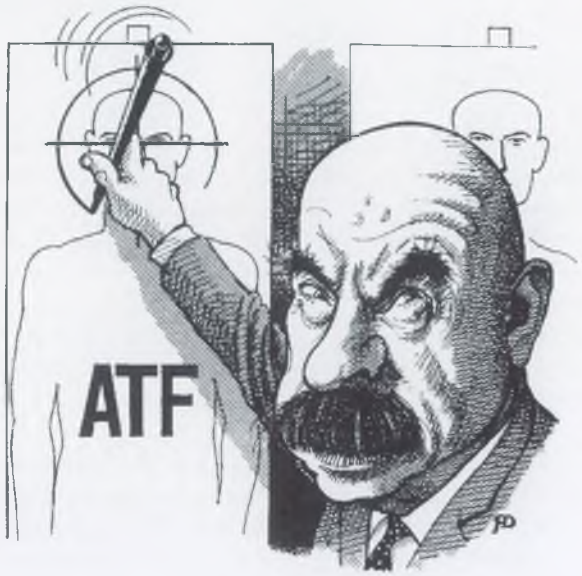
DECLARATION OF PRINCIPLES

The God-given right of religious liberty is best exercised when church and state are separate.

Government is God's agency to protect individual rights and to conduct civil affairs; in exercising these responsibilities, officials are entitled to respect and cooperation.

Religious liberty entails freedom of conscience: to worship or not to worship; to profess, practice and promulgate religious beliefs or to change them. In exercising these rights, however, one must respect the equivalent rights of all others.

Attempts to unite church and state are opposed to the interests of each, subversive of human rights and potentially persecuting in character; to oppose union, lawfully and honorably, is not only the citizen's duty but the essence of the Golden Rule—to treat others as one wishes to be treated.



PERILS OF A FREE PRESS, PART I: Oliver Wendall Holmes once said that "if there is any principle of the Constitution that more imperatively calls for attachment than any other, it is the principle of free thought—not free only for those who agree with us but freedom for the thought we hate." Of course, few care about what people think; it's what they do that has us worried. But what about speech, which sits between thought and action the way Greeks put mathematics between Forms and the phenomenal world? Does free speech cover former Watergate felon G. Gordon Liddy telling his audience how to kill ATF agents: "They've got a big target on there—ATF. Don't shoot at that because they've got a vest underneath that. Head shots, head shots"? Or what about Chuck Baker on KVOR in Colorado Springs, who recently had right-wing militia looney Linda Thompson on his show advocating an armed march on Washington to remove the "traitors" in Congress? "We have 2 million U.S. troops," she said, "half of them are out of the country. . . . All of the troops they could muster would be 500,000 people. They would be outnumbered five to one if only 1 percent of the country went up against them." Then there's KFYI in Phoenix, whose "hot talk" host Bob Mohan declared that gun control advocate Sarah Brady "ought to be put down. A humane shot at a veterinarian's would be an easy way to do it." Free speech? Nonsense. It always comes with a price.

PERILS OF A FREE PRESS, PART 2:

"Greenspan Sees Chance of Recession"—*New York Times*, June 8, 1995

"Recession Is Unlikely, Greenspan Concludes"—*Washington Post*, the same day

"Recession Risk Up, Greenspan Says"—*Baltimore Sun*, the same day

"Fed Chairman Doesn't See Recession on the Horizon"—*Wall Street Journal*, the same day

THE RESTORING RELIGIOUS SUPREMACY AMENDMENT: Instead of Bible-thumping preachers interrogating politicians on whether they have been "born-again," the smooth, affable, and "moderate" layman Ralph Reed has become the voice of the Religious Right. Instead of threatening the wrath of an offended God on politicians who didn't vote the "biblical" position on everything from a balanced budget, aid to the Contras, and lifting sanctions on South Africa, the gentle rhetoric of the Contract with the American Family has become the new manifesto. But behind Ralph Reed's boyish grin and some of the Contract's sensible positions, the New Right's agenda still represents a dangerous assault on First Amendment freedoms. The first of the Contract's 10 points, for example, is called "Restoring Religious Equality." For whom? Poor persecuted American Christians, whom else? According to the Contract, this inequality is seen in such oppressive measures as the prohibition against posting the Ten Commandments in courtrooms (of course, we don't hear the Hare Krishna crying about inequality because courtrooms don't post the utterances of A. C. Bhaktivednata Swami Prabhupada, or the Nation of Islam crying because verses from Al Koran aren't posted either). Regarding the ban on legislated prayer in public schools, another example of "the hostility of public institutions toward religion," the Contract—which calls for an amendment to bring back this equality—says that "the Religious Equality Amendment would not restore compulsory, sectarian prayer or Bible reading dictated by government officials. Instead we seek a balanced approach that allows voluntary student and citizen-initiated free speech in a non-compulsory setting. . . ." Thanks, Ralph, but we already have such an amendment; it's called the First, which guarantees Americans religious equality by not establishing any religion at all. Because children are forced to be in school by law, the government doesn't allow *any* religious exercises that might offend anyone. Every faith, no exceptions, is kept from putting pressure on anyone else to conform. That's equality. But what the Contract says is, *We have the votes, so our religious teaching, prayers, and views should be established, too bad who's offended.* That isn't equality, it's supremacy and—all boyish grins and soothing rhetoric aside—supremacy, not equality, is what the New Right really wants.

"YES!": To help combat what it calls a "pervasive anti-religious bigotry" in public schools, Pat Robertson's American Center for Law and Justice (ACLJ) recently published a 36-page pamphlet entitled *Students' Rights and the Public Schools*, which purports to help oppressed Christian students understand "what the Supreme Court and Congress

ILLUSTRATION BY RAY DRIVER

have said concerning the rights of students on the public school campuses." For example, the booklet asks, "May students distribute literature and engage in personal evangelism on school grounds?" The answer (according to the booklet) is "YES!" "Can we have student-led graduation prayer?" The answer, "YES!" "Can valedictorians, salutatorians, or honorary student speakers give speeches on religious subjects, including reading from the Bible?" The answer, "YES!" "Are official 'moments of silence' permissible under current law?" The answer, "YES!" "Do students have a right to pray together at school and participate in events like the See You at the Pole National Day of Prayer?" The answer, "YES!" "Is it constitutional to have holiday observances in public schools?" The answer, "YES!" "Can members of the community or organizations use school facilities for religious purposes?" The answer, "YES!" "Can Christmas vacation still be called Christmas vacation?" The answer, "YES!" Though some answers aren't quite the "YES!" the booklet claims they are, such as the question regarding student-led prayer, one could ask after reading the booklet, "If students have all the rights the ACLJ says that they have, then isn't all the rhetoric about the oppression of religion in school nothing but propaganda designed to open the door for the use of public schools to promote a specific sectarian agenda?" The answer, "YES!"

"AND IF YOU DON'T LIKE THAT, WE'LL SENTENCE YOU TO A WEEK OF MARRIAGE COUNSELING WITH THE REV. JIMMY SWAGGERT": For those who think that religion is being pushed out of American life, what do you do about a Kentucky court order that requires all divorcing parents with minor children to attend a divorce education seminar sponsored by the Catholic Social Services? Well, if you are Edwin F. Kagin, you sue, that's what you do. Kagin, a divorce lawyer, contended that the orders violated the Establishment Clause and filed for a motion prohibiting the judges from enforcing the mandatory attendance. The Kentucky Court of Appeals denied the motion, but the battle isn't over, nor should it be. The court is going to have to find a better way to help couples than forcing them to attend a religious seminar.

WHAT SEPARATIONISM AIN'T: No doubt, anti-separationists will have a field day with this one. According to a complaint filed in a district court, an elementary school child in Orlando was punished for reading his Bible on school property. Supposedly, 10-year-old Joshua Burton at Columbia Elementary School had his Bible confiscated when the teacher caught him reading it silently at his desk before class began. Though warned not to bring it back to school, Joshua did anyway. He and the Bible were then brought to the principle's office, where he was warned about reading it in class. When he was again caught silently, *silently!*, reading the Bible, he was placed in detention, segregated from other students, and forced to sit facing the corner for the remainder of the afternoon. When, determined to exercise his rights, he brought the Bible to class again, the principle arrived unannounced, publicly confiscated it, and took Joshua to his office where he was questioned by several adults for an hour. His parents filed suit, alleging violations of Joshua's rights under the Free Speech Clause, the Free Exercise Clause, the Establishment Clause, the Equal Protection Clause, and the Religious Freedom Restoration Act. The complaint seeks monetary, declaratory, and injunctive relief. They ought to get it too. Far from depicting separation of church and state, this story represents an absolute perversion of everything that separation of church and state stands for. Unfortunately, Joshua's trials will be paraded around as another example—along with rules forbidding legislated prayer (which *does* violate separationism)—of how separation of church and state violates religious freedom, though his story no more represents separation of church and state than the burning of Huss and Jerome did Christ's Sermon on the Mount.

LET HIM EAT PORK: The Ninth Circuit Court of Appeals ruled that Donovan Stoner, a Nevada state prisoner and member of the International Society of Krishna Consciousness, didn't have his free exercise rights violated when the prison denied him the vegetarian meals his religion mandates. According to the circuit court, inmates have the right to sufficient food to keep them in good health in accordance with the dietary laws of their faith, but a prisoner's free exercise rights can be limited in order to achieve legitimate correctional goals or to maintain prison security. The big question is, What security measures are compromised by forcing a prisoner to eat chicken instead of string beans?

"SO SUE ME!"

BY OLIVER S. THOMAS

When Preference to Rent to a "Christian Handyman" Becomes a Crime

About three years ago Beverly Schnell bought a Victorian-style house, built in 1879, in the little town of Hartford, Wisconsin. The ceiling leaked, floors were rotted, and torn wallpaper hung loosely from cracked plaster walls. She moved into the first floor and part of the second, but there was still room left over.

Then she had an idea. She would rent the extra room to a handyman, who could do the repairs. In exchange, she would reduce the rent. But renting to a stranger is risky business, so Beverly decided to look for someone, like herself, who tried to live by the commandments of Jesus.

For about $6 she ran an ad in the Hartford *Times Press:* "Apartment for rent, one bedroom, electric included, mature Christian handyman or couple." Sounds simple enough. It wasn't.

The Metropolitan Milwaukee Fair Housing Council, a private agency that receives government funds to bird-dog discriminatory ads, complained to the Wisconsin Department of Industry, Labor, and Human Relations. Beverly was accused of violating Wisconsin's fair-housing law. The complaint alleged discrimination on the basis of sex (for "handy*man*") and religion (for "Christian").

The ad police offered a deal. They would drop the case in exchange for $550.

Some people aren't for sale. Beverly Schnell is one of them.

"If you've got a case," she said, "file it."

They did. Beverly was found guilty of discrimination and saddled with fines, court costs, and attorney's fees in excess of $8,000. The case is now on appeal, but Beverly's mind is already made up.

"I'm not," she says, "going to pay."

At first glance, Beverly Schnell would not seem like the kind of person who would take on the government. But that's only a first glance. A closer look reveals a woman who has the grit and determination to stand for biblical principles, whatever the cost.

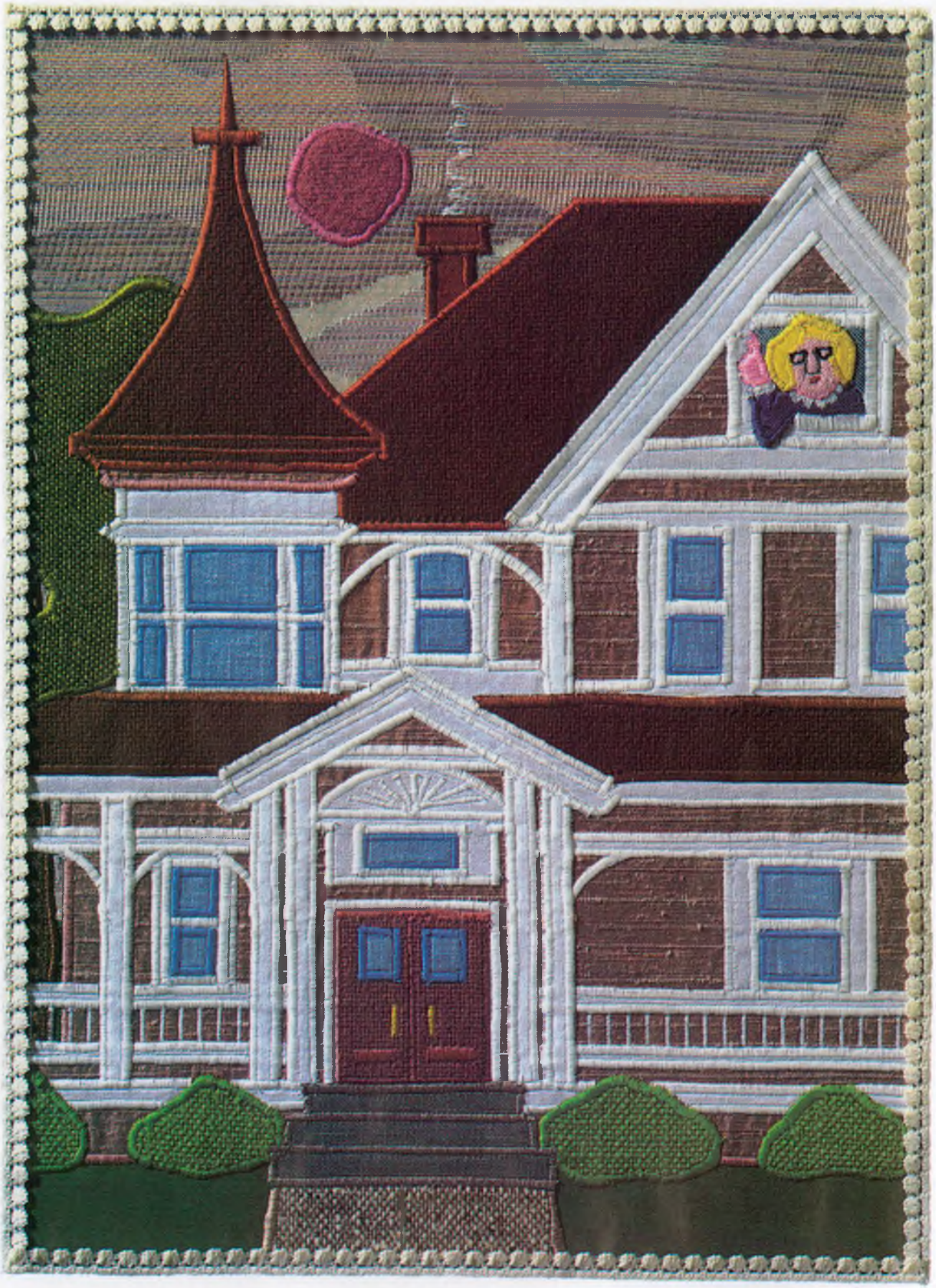
A charismatic Catholic who frequently holds Bible studies in her home, Beverly doesn't just study the Bible, she lives it, particularly Christ's admonitions to care for those in need. Over the years she has taken numerous persons into her house, including a homeless man for a year and half, and a Protestant who had a nervous breakdown and lost his job. Beverly, who has fought for the rights of the homeless, has always been interested in the little guy. She cares about animals, too.

"I've taken in as many strays," she says, "as people."

Beverly's life is not easy. Her only child,

Oliver S. Thomas resides in Maryville, Tennessee, where he preaches, teaches, practices law, and writes country music—not necessarily in that order.

ILLUSTRATION BY JERRY PAVEY



Mary Anna, moved away years ago, and so she lives by herself. In addition to daily visiting her 93-year-old mother in a nursing home (she is just too infirm for Beverly to handle by herself), Beverly runs the flower department for the local Kohl's grocery, part of a food store chain once owned by former Wisconsin senator Herbert Kohl. With her hours recently cut back to three days a week, she's struggling to make ends meet.

Up until this conflict, Beverly lived a quiet life. She paints, sculpts, and even got an A.A. degree in horticulture. She didn't really ask for this fight, but now that she's in it, she's not backing down.

Suppose a Satanist wanted to rent an upstairs apartment from someone? Should that owner be punished for stating a preference for another type of tenant?

"They got all the big guns out against me," she said, "but I'm going to stand firm."

At stake in this conflict are two important, and sometimes conflicting, interests: Beverly's rights to free association and to the free exercise of religion, and society's interests in maintaining an equal opportunity for all, which includes access to safe and affordable housing without regard to race, religion, gender, or national origin.

The law seeks to balance these interests. Absent a compelling state interest "of the highest order," Beverly is free to associate with whom she chooses, especially when they are living in the same house. She is also entitled to act in accordance with her religion absent such a compelling interest. If her religion causes her to seek the companionship of a Christian tenant, any "substantial" interference by the state must satisfy the rigors of the Religious Freedom Restoration Act, which states that the interference must (1) be in furtherance of a compelling state interest, and (2) be the least restrictive means of furthering that interest. In other words, if the state can accomplish its mission without interfering with a person's religion, it must do so.

That's good news for Beverly Schnell. The state may have a compelling interest in seeing that all citizens have an equal shot at the housing market, but it's unlikely the state has to force believers to provide nonbelievers access to their homes in order to accomplish this goal. The difference between an apartment complex and an apartment in the basement of someone's home is like the difference between Macy's and a kid selling lemonade.

The federal-fair housing law recognizes this difference. There is an exemption for "rooms or units in dwellings containing living quarters occupied or intended to be occupied by no more than four families living independently of each other, if the owner actually maintains and occupies one of the living quarters as his residence."

The so-called Aunt Sally exemption strikes a sensible balance between the interests of the individual and of society. Whole classes should not be disqualified from significant parts of the housing market. If an owner places a substantial number of units in the stream of commerce, the housing should be nondiscriminatory. On the other hand, if renting portions of the building in which the owner actually lives, the owner should be free to discriminate on any basis—provided, of course, that he or she is not living in just one unit of a large apartment building.

There is another difference, the one between speech and conduct. Beverly Schnell just ran an ad—that's it! She never actually denied an apartment to anybody, including non-Christians. By punishing her only for expressing a preference, the state comes dangerously close to becoming Orwellian "thought police."

Again, the state may decide that owners of large apartment buildings should not be entitled to express racial, sexual or religious preferences in their advertisements, but when it comes to a person's own dwelling, shouldn't a different rule pertain? Suppose a Satanist wanted to rent an upstairs apartment from someone? Should that owner be punished for stating a preference for another type of tenant?

Life is complicated, as Beverly has learned. But Wisconsin has made it more complicated than need be. Her hope is that there's enough common sense left in the state legislature to recognize law run amuck and correct it before civil rights gets a bad name.

Meanwhile Beverly sits in an unrenovated house (though she has done some painting) thinking about fines, court costs, and lawyers' fees. But even more than herself, she's thinking about the big picture.

"There's a principle here," she says. "That's why, whatever the outcome of my case, I'm going to fight to have this law either corrected or abolished. If they can do this to me, they can do it to anyone."

WALLBUILDERS *or* MYTHBUILDERS?

BY NICHOLAS P. MILLER

Historical Revisionism and the Religious Right

With charts, books, graphs, and videos, David Barton is out to remake America. For years he has been indefatigably criss-crossing the United States, hawking to millions of Americans a simple yet dangerous message, that "separation of church and state is a 'myth'." And, unfortunately, people are buying his product.

Nicholas P. Miller is an attorney residing in Washington, D.C.

ILLUSTRATION BY RAY DRIVER

"No single Religious Right figure has done more to undermine church support for church-state separation than David Barton," said Joe Conn of Americans United for Separation of Church and State. "He has done untold damage to the separationist idea. From his headquarters in Aledo, Texas, Barton has become the guru of Religious Right antiseparationism. He has turned his little home business into a full-scale antiseparationist industry, with 25 employees helping him spread his material."

A careful look at that material, however, shows that "Mythbuilders" would describe it more accurately than "Wallbuilders," for the essence of his message rests on eight historical fallacies regarding the Constitution. This article examines them all.

"No single Religious Right figure has done more to undermine church support for church-state separation than David Barton."

1. The Myth of the Explicit Constitution

In his book *The Myth of Separation*, David Barton repeats the New Right mantra that the phrase "separation of church and state" does not appear in the U.S. Constitution or the Bill of Rights, a fact he uses to try to discredit Supreme Court cases that draw on that metaphor.[1]

Of course, constitutional principles such as the "separation of powers" and "a system of checks and balances" do not appear by name in either document either, yet all legal scholars would agree that these concepts are part and parcel of the Constitution. In writing that "Congress shall make no law respecting an establishment of religion," the Founders believed these words contained the idea of "separation of church and state." Thomas Jefferson used the "wall of separation" imagery to describe the meaning of the First Amendment religion clauses. He is joined by James Madison, drafter of the Constitution and Bill of Rights, who passed Jefferson's religious freedom statute in Virginia, and whose "Memorial and Remonstrance" explicated the reasons for the wall. Older than the Framers, but with influence on the nation's ideals of religious freedom—Roger Williams, Baptist preacher and founder of Rhode Island, actually originated the "wall of separation" metaphor.[2]

To claim, as Wallbuilders does, that this doctrine is found only in the constitution of the former Soviet Union is like maintaining that baseball originated in Botswana, hot dogs are found only in Hungary, and apple pie comes uniquely from Albania.[3]

2. The Myth of the Hasty Metaphor

Wallbuilders has written a pamphlet that relegates Thomas Jefferson's views on the First Amendment to legal irrelevancy. The controversy centers on Jefferson's letter of 1802, referenced above, to the Baptists of Danbury, Connecticut, in which he described the First Amendment as "building a wall of separation between church and state." This metaphor has been referred to over the years by the Supreme Court in its church/state jurisprudence, a use criticized by Wallbuilders.

In "The Truth About Thomas Jefferson and the First Amendment," Wallbuilders Press attempts to discredit Jefferson's metaphor by noting his absence from the constitutional convention. But ideas are not constrained by geography. Jefferson's absence from the convention doesn't detract from his contributions—through his authorship of both the Declaration of Independence and the Virginia Statute of Religious Freedoms—to the ideas of the Constitution. Madison, who did work on the Constitution, and was the initial drafter of the Bill of Rights, had cooperated with Jefferson intimately on the Virginia Statute, and had ideas on church/state relations nearly identical to Jefferson's.

Wallbuilders Press describes the Danbury letter as merely "personal and private," and not "a public policy paper," though Jefferson viewed it important enough to be reviewed and approved by the U.S. attorney general. Jefferson, in writing, told the attorney general that his Danbury letter condemned an "alliance between church and state," and that it also explained to the Baptists why "I do not proclaim fast and thanksgiving days."[4] These letters are part of Jefferson's public correspondence, and certainly express Jefferson's public views on religious matters. To argue otherwise is like saying that Lincoln's Gettysburg Address was for the private consolation of only those in attendance at the burial grounds when he gave it.

Finally, Wallbuilders' pamphlet attempts to marginalize Jefferson's views on religion. It claims that Jefferson's religious views "did not represent the views of the majority of the Founders." While Jefferson's deism was somewhat exotic for colonial America, it didn't necessarily drive him to unique views on church/state relations. The "wall" metaphor, as noted above, was coined by Roger Williams, a devout Baptist who organized the government of Rhode Island around the principle of separation of the civil and ecclesiastical powers. And though Williams had been long dead by the time of the American Revolution, his church/state views were forcefully held by Baptist thought leaders who were contemporaries of the constitutional convention. Two notable examples were Baptist ministers Isaac Backus and John Leland, who were involved in the ratification of the Constitution, and who conversed with its Framers. John Leland had a crucial discussion with James Madison about the need for a bill of rights, a discussion that helped Madison decide to initially draft one.[5] No doubt devout Christians played a role in the creation of the separation ideal.

3. The Myth of the One-sided Wall

Not content in its attempts to show that the "wall" metaphor is bad history, Wallbuilders also tries to negate its effect by revising its meaning. It claims that "the 'wall' was originally introduced as, and understood to be, a one-directional wall protecting the church from the government." The wall was to stop government from interfering with religion, the argument goes, not to stop religion from involving itself in government.

A one-sided wall would be a neat feat of engineering, but it is a bad image of the Founders' intent. One of Madison's main arguments against a tax in support of all Christian religions in Virginia was that state support of religion endangered the state. He stated this idea in 1785 during the Virginia church/state controversy in his epic "Memorial and Remonstrance," which set forth the principles and reasons behind the wisdom of keeping state and church separate. Madison wrote, "What influences in fact have ecclesiastical establishments had on civil society? In some instances they have been seen to erect a spiritual tyranny on the ruins of civil authority; in many instances they have been seen upholding the thrones of political tyranny; in no instances have they been seen the guardians of the liberty of the people."[6] Only a two-way wall, one that both keeps government out of religion and religion out of government, can truly protect religion. If some religious groups are allowed to legislate religious morality or use taxes for church activities, then religious groups too small to influence the legislature will be forced either to live according to the dictates of another religion, and/or to pay money to support activities of other religions. Either way, these minority religious groups will have lost freedoms. As one constitutional scholar put it: "The wall of separation ensures the government's freedom *from* religion and the individual's freedom *of* religion. The second probably cannot flourish without the first."[7]

4. The Myth of the National Church

Another popular fiction, promoted by Wallbuilders, is that the First Amendment was meant merely to prevent the federal government from creating one national church. This position, known as "nonpreferentialism," allows government to support religion as long as it does not "prefer" one religion over another. In other words, the Constitution prevents the establishment of one religion, but not the establishment of all religions. Apart from the impracticality of establishing all religions (would most Americans support Zoroastrianism and Jainism, not to mention Satanism?),[8] the major problem with this view is that—it's wrong.

The Founders viewed government support of *any* religion, or any combinations of religions, as an establishment. As one scholar has commented: "Opponents of a general assessment [nondiscriminatory state aid to all churches] referred to it as an establishment, and at times its proponents did too." Nobody, however, "attempted to show that a general assessment constituted an essentially different kind of establishment or to differentiate it from an exclusive state preference for one religion."[9] The Founders considered support of religion, whether of one sect, or all, as an establishment of religion.

Madison's "Memorial and Remonstrance" shows that the issue was not merely that of a national church. The proposed Virginia tax that Madison wrote against would be used to fund all churches (in Virginia at the time, there were no mosques or synagogues) on a nondiscriminatory basis. Madison asks, "Who does not see that the same authority which can establish Christianity . . . may establish with the

(*continued on page 24*)

In 1991 a church sued the city of Hastings, Minnesota, claiming that the exclusion of churches from commercial and industrial areas violated its free exercise rights. Because the court found that the city's zoning ordinance did not specifically target religion, the court rejected the church's claim.[1]

By 1994, when Washington, D.C., attempted to use its zoning power to keep the Western Presbyterian Church from feeding the city's homeless (see July/August *Liberty*), the court required the city to demonstrate a compelling justification to support its burden on the church's free exercise. When the city couldn't, the court ruled for the church, ordering "the city [to] refrain, absent extraordinary circumstances, from in any way regulating what religious functions the church may conduct."[2]

What made the difference? The Religious Freedom Restoration Act.[3] Commonly known as RFRA, it was overwhelmingly passed by Congress and enthusiastically signed into law by President Clinton in November 1993. RFRA ensures that religious practice receives strong protection by requiring the government to justify, with compelling interests, any substantial burdens on religion.

Since its enactment, RFRA has been claimed in more than 100 cases. Those who have particularly benefited include Sikh schoolchildren and Jehovah's Witnesses in California,[4] Santeria prisoners in New York,[5] a Catholic school in Colorado,[6] and a Native American inmate in Missouri.[7]

Despite these favorable results, the constitutionality of RFRA is now being challenged. So far, two federal courts in have upheld the act as constitutional,[8] while one federal court has declared RFRA unconstitutional.[9]

At the heart of this controversy are the following questions: Does the Constitution give Congress the power to protect free exercise rights, as it did in RFRA? Or by passing RFRA, did Congress trespass on the powers of the judiciary or the powers of the states?

The importance of RFRA can be understood only against the background that caused it to be enacted. The First Amendment states that "Congress shall make no law . . . prohibiting the free exercise [of religion]." For more than a quarter of a century the Supreme Court had generally interpreted this "free exercise clause" to mean that the government could not burden religion in any substantial way unless it had a compelling interest for doing so. A compelling interest must be of the highest importance, such as public health or safety. The Supreme Court also required the government to advance its compelling interests in ways that placed only the most minimal restrictions on religion.

In 1990, however, the Supreme Court shocked the religious community by abandoning this "compelling interest test." In *Employment Division v. Smith*[10] the Court ruled that

Melissa Rogers is associate general counsel for the Baptist Joint Committee in Washington, D.C.

ON TRIAL

BY MELISSA ROGERS

The Religious Freedom Restoration Act (RFRA) Has Restored Free Exercise Protections. But Is RFRA Itself Constitutional?

only direct attempts of government to suppress religion (which are quite rare) would be subject to the compelling interest test. The effect of this ruling was that neutral and generally applicable laws that burdened religious practice needed only to be justified by a "rational reason." This "rational basis test" is the lowest level of scrutiny use by the courts.

Immediately Americans felt the pinch of this narrowed view of free exercise. Following *Smith*, cities subjected churches to onerous municipal regulation,[11] state officials performed autopsies on Jews and Vietnamese Hmongs in contradiction to their families' faiths,[12] and the government forced a Quaker organization to investigate employees and report illegal aliens despite the organization's religious objections.[13]

This change in the law drew a swift response. Sixty-eight religious and civil liberties organizations, including groups as diverse as the Baptist Joint Committee on Public Affairs, General Conference of Seventh-day Adventists, National Association of Evangelicals, American Civil Liberties Union, American Jewish Congress, and American Muslim Council, formed the Coalition for the Free Exercise of Religion. Its purpose: to press Congress to provide strong protection for the free exercise of all faiths.

It succeeded. Congress passed RFRA by a near unanimous vote and the president signed the bill into law. The government was again required to apply the compelling interest test to all cases in which religion was substantially burdened.

The free exercise cases decided after RFRA reveal that the act did as it was intended to do: restore broad protection to religious practice. When school officials attempted to prevent children from wearing religious garb to school, the act shielded the students' religious expression.[14] When the government threatened to

force employees to take loyalty oaths that violated their religious tenets, the employees successfully used RFRA to turn back the government's demands.[15] When a former teacher in a Catholic school's theology department asked a court to order his reinstatement, the court declined, finding that RFRA supported the school's fundamental right to select teachers of its ecclesiastical doctrine.[16]

Of course, RFRA claimants have not won every case, but that was not the aim of the law. The aim was to ensure that government interference with religious practice is tolerated only when absolutely necessary.

Now, however, RFRA's constitutionality takes center stage. Although the debate between RFRA's opponents and proponents involves a number of complex issues of constitutional law, the main arguments can be boiled down to a few basic assertions.

With RFRA, Congress absolved the Supreme Court of ultimate responsibility for broad application of the compelling interest test.

RFRA's detractors claim that the Constitution does not give Congress the power to pass laws such as RFRA. They argue that only the judiciary can alter the level of protection for free exercise rights in the way RFRA does. RFRA's opponents claim, therefore, that the act violates separation of powers, the constitutional principle requiring the three branches of government to refrain from trespassing on other branches' functions. By passing RFRA, they say, Congress wrongly intruded on the judiciary's power.

RFRA's detractors claim also that the act contradicts federalism, the constitutional principle requiring the federal government to respect the sovereignty of state governments. Because RFRA may sometimes require states to exempt religious adherents from their laws, they argue that Congress has improperly interfered with state affairs.

Both assertions are false.

Congress usurped neither the judiciary's power nor that of the states when it passed RFRA. Instead, Congress properly exercised legislative powers recognized by the Constitution and the Supreme Court.[17]

The Supreme Court's comments in *Smith* reveal that RFRA is a valid legislative response to a judicially tendered invitation rather than a rogue raid on judicial power. In *Smith* the Court recognized the legitimacy and value of granting religious exemptions from generally applicable laws, but seriously questioned the wisdom of allowing judges to do so on their own authority. Judges, who have limited investigatory powers and little accountability to the public, should not be ultimately responsible for authorizing broad use of the compelling interest test, the Court suggested.[18] The Court, therefore, invited the legislative branch to strike the proper balance between religious practice and governmental actions, implying that legislatures' broader fact-finding powers and greater accountability make them better suited for the task.

The Supreme Court envisioned that, after *Smith*, each religious group would lobby legislatures separately to secure exemptions from laws burdening religion. Although it recognized that leaving religious persons at the mercy of the legislative process might disadvantage minority religions, the Court concluded that that was preferable to allowing judges to balance the interests of religion against those of government.

Congress's response to *Smith* was astute and constitutionally sound. Congress determined that the evil targeted by the free exercise clause could be avoided only by applying the compelling interest test to all substantial burdens on religion. Accordingly, using its power to expand protection for constitutional rights, Congress passed RFRA.

With RFRA, Congress absolved the Supreme Court of ultimate responsibility for broad application of the compelling interest test. And, as one commentator has observed, Congress managed to avoid a serious danger the Court thought inevitable: "By legislating generally, for all religions, instead of case by case for particular religions, Congress [reduced] the danger that it [would] not respond to the needs of small or unpopular faiths. [Because] the Court and Congress [have cooperated] in this way, the oppression of small faiths need not be, as the Court feared, an 'unavoidable consequence of democratic government.'"[19]

RFRA, therefore, is the result of cooperation, not competition, between the legislative and judicial branches of government.

Contrary to the claims of RFRA's critics, Congress's passage of the act did not "overrule" the Supreme Court or otherwise displace the Court from its rightful station as ultimate interpreter of the Constitution. Instead, RFRA acts on the Court's acknowledgment in *Smith* that free exercise exemptions may be granted by

a legislature, even when not required by the Constitution. RFRA simply creates a right by law where the Supreme Court declined to recognize a right under the Constitution.[20] The act also adheres to the rule that Congress may enhance the protection for constitutional rights, but it may not reduce such protection.

Finally, RFRA does not trespass on states' rights. The Constitution gives states no specific power to regulate religious practice. However, the Constitution does give Congress broad latitude to prevent states from restricting certain individual liberties, including those found in the First Amendment.

As previously noted, three courts have already squarely addressed the issue of RFRA's constitutionality. In March 1995 a federal trial court in Texas struck down RFRA as unconstitutional. Yet the Texas judge's own words cast doubt on his ruling. The judge stated that he was "cautious in [his] opinion of RFRA's unconstitutionality, as there has been insufficient case law, to date, construing it." Then the judge incautiously proceeded to strike down RFRA, even though acts of Congress generally are given great deference.

Moreover, despite the fact that determination of RFRA's constitutionality requires a detailed analysis, the court confined its discussion to a few pages of text. The judge seemed to overlook key aspects of case law and legislative history when he quickly concluded that RFRA improperly intruded on the judiciary's powers.

In contrast, the federal trial courts in Hawaii and Wisconsin specifically upheld RFRA's constitutionality. In relatively lengthy opinions, the courts interpreted the act with a careful eye toward Supreme Court decisions and Congress's intentions. Citing the example of the Voting Rights Act of 1965, both courts noted that RFRA was not the first time Congress had used its powers to enhance protection for constitutional values. By passing the Voting Rights Act, Congress raised the level of protection for certain voting rights despite the fact that the Supreme Court had previously declined to do so. The Wisconsin court emphasized that RFRA does not dictate the outcome of cases; it merely imposes a higher standard of conduct on government and requires the courts to uphold that standard. For reasons similar to those already discussed, the courts found that RFRA was a valid exercise of Congress's power under the Constitution.

The Coalition for the Free Exercise of Religion expects these court decisions to be appealed and plans to file its brief supporting RFRA's constitutionality. The decision of the appellate courts in these cases will be watched closely by the religious and legal community. Depending on their outcome, RFRA's constitutionality may soon be before the Supreme Court.

Discussions of RFRA's constitutionality involve the examination of abstract legal theories, but this should not obscure the practical effect RFRA is having on countless religious Americans.[21] To them, RFRA is not an abstraction, but a guarantee that their religion will not be squelched or distorted by governmental regulation. Because of RFRA, persons like Pastor John Wimberly, defender of Western Presbyterian Church's homeless ministry, will not have to choose between "breaking the law or keeping our faith."[22]

To secure this liberty for all, RFRA's supporters will do all they can to ensure that the ringing endorsement RFRA received in the legislative and executive branches echoes through the judicial branch as well.

FOOTNOTES

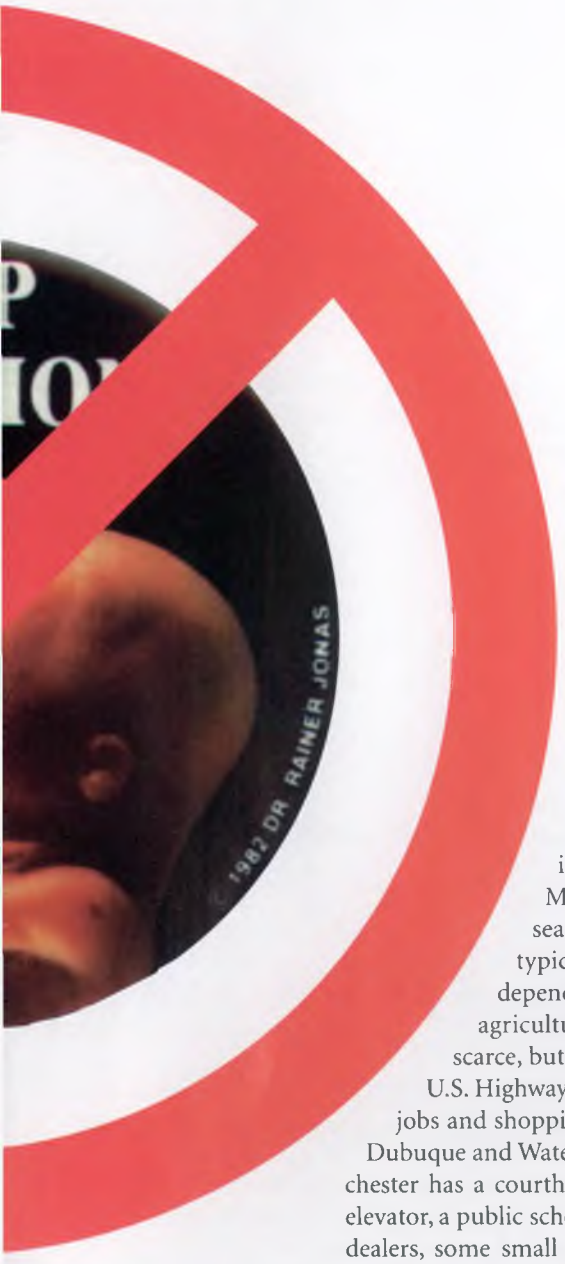
[1] *Cornerstone Bible Church v. City of Hastings*, 948 F. 2d 464 (8th Cir. 1991).
[2] *Western Presbyterian Church v. Board of Zoning Adjustment*, 862 F. Supp. 538 (D.D.C. 1994), appeal pending.
[3] 42 U.S.C. Section 2000bb (Supp. V 1993).
[4] *Cheema v. Thompson*, 1994 WL 477725 (9th Cir. 1994) (Sikh schoolchildren); *Bessard v. California Community Colleges*,867 F. Supp. 1454 (E.D. Cal. 1994) (Jehovah's Witnesses).
[5] *Campus v. Coughlin*, 854 F. Supp. 194 (S.D.N.Y. 1994).
[6] *Powell v. Stafford*, 859 F. Supp. 1343 (D. Colo. 1994).
[7] *Hamilton v. Schriro*, 863 F. Supp. 1019 (W.D. Mo. 1994).
[8] *Belgard v. Hawaii*, 883 F. Supp. 510 (D. Hawaii 1995); *Sasnett v. Department of Corrections*, No. 94-C-052-C (W.D. Wisc. 1995).
[9] *Flores v. City of Boerne*, 877 F. Supp. 355 (W.D. Tex 1995).
[10] *Employment Division v. Smith*, 494 U.S. 872 (1990).
[11] See, e.g., *Rector, Wardens and Members of the Vestry of St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990), *cert. denied*, 499 U.S. 905 (1991).
[12] *Montgomery v. County of Clinton*, 743 F. Supp. 1253 (W.D. Mich. 1990), *aff'd without opinion*, 940 F.2d 661 (6th Cir. 1991) and *You Vang Yang v. Sturner*, 750 F. Supp. 558 (D.R.I. 1990).
[13] *American Friends Service Community v. Thornburgh*, 951 F.2d 957 (9th Cir. 1991).
[14] *Cheema v. Thompson.*
[15] *Bessard v. California Community Colleges.*
[16] *Powell v. Stafford.*
[17] RFRA was enacted under the "necessary and proper clause" (Article I, Section 8 of the Constitution) and Section 5 of the Fourteenth Amendment.
[18] See Douglas Laycock, *The Religious Freedom Restoration Act*, 1993 B.Y.U.L. Rev. 221, 252-54 (1993).
[19] *Ibid.*, p. 254 (quoting *Smith*, 494 U.S., p. 890).
[20] *Ibid.*, p. 246.
[21] See Douglas Laycock, *RFRA, Congress and the Ratchet*, 56 Mont. L. Rev. 145, 145-148 (1995).
[22] Comments of John Wimberly, *Washington Post* (Mar. 3, 1994).

Though It Was a Way of Expressing Her Views, the Boss Nevertheless Warned Her to . . .

BUTTON UP!

DeAnn Supple, a devout Catholic, had made a simple religious vow. Because of her opposition to abortion, she told the Lord that she would wear a pro-life button in public at all times.

DeAnn's boss said the button antagonized customers and hurt business. He told her to take the button off at work, or else he would "let her go" as a grocery store checker.



BY DEAN L. WHITFORD

This case illustrates the common problem of the free exercise rights of an employee conflicting with the legitimate interests of an employer.

The dilemma began in DeAnn's hometown of Manchester, Iowa, a county seat of about 5,000. It's a typical Midwest town, largely dependent on the unpredictable agricultural economy. Jobs are scarce, but with the improvement of U.S. Highway 20 to four lanes, access to jobs and shopping in larger towns such as Dubuque and Waterloo has improved. Manchester has a courthouse, a town hall, a grain elevator, a public school, a few farm implement dealers, some small grocery stores, and other small businesses.

David Cole, DeAnn's boss for more than five years, runs Dave's Shurfine Foods grocery store on North Franklin Street, a main thoroughfare in Manchester. He bought the store more than 15 years ago and manages it himself. But with the increasing number of convenience stores and improved access to supermarkets in nearby cities, times are hard for small family-owned and -operated grocery stores like Dave's. Community support and customer loyalty to the hometown store are essential to survival.

DeAnn never intended to create a problem for Dave. Both are devout Catholics (members of the same parish), and he accommodated her on several occasions so she could attend Mass or special religious events. But DeAnn believes that abortion is wrong, and over the past 25 years she has raised two adopted children (who now have children of their own) as a single parent. She has been active in the Delaware County Right-to-Life and St. Mary's Respect Life organizations for the past five years. Through these groups DeAnn heard the story of Christine Wilson.

Christine, another Iowan, was fired in 1991 by U.S. West Communications in Omaha, Nebraska, after 20 years on the job because she refused to remove or cover her pro-life button, which read: "Stop Abortion—They're Forgetting Someone." The button pictures a 17-week-old baby in its mother's womb. Other employees found the button offensive, but because of her religious vow to wear the button, Christine believed she could neither remove nor cover it. Her strong stand inspired many people, including DeAnn, to make a vow to wear the same button in public.

DeAnn wore a similar button for more than six months without incident. Then two customers telephoned David Cole on August 23, 1994, to complain. They felt that the grocery store wasn't the place for her to be espousing her views, and Dave asked her to remove it.

"I operate in a small town," Dave said later, "and cannot afford to lose customers over a button."

DeAnn, however, would not violate her vow. "My motivation in wearing the button from

Dean L. Whitford is an attorney with the Rutherford Institute.

the beginning was because of my belief in the sanctity of human life," she said. "And as a Christian I believe I have the responsibility to act upon those beliefs. One of my ways of doing that is to wear the button."

Often when rights between employer and employee collide, an accommodation can respect the employer's legitimate interests and the employee's free exercise of religion. For example, where employees sincerely hold religious beliefs against working on their Sabbath, employers sometimes can avoid scheduling those employees to work that day. In fact, a federal law and some state laws require most employers to accommodate religious employees unless it would cause undue hardship. Rescheduling may cause undue hardship, for example, where it interferes with seniority systems or the need to provide essential services, such as fire and police protection or emergency health care.

Dave approached her cash register and said that he'd appreciate it if she took off the button. Otherwise, he said, "you don't have a job."

In Christine Wilson's situation, U.S. West offered to accommodate her by allowing her to post the button in her own work area or cover it while she was elsewhere in the office. Christine's religious vow, she believed, required her to wear the button so that it could be seen in public at all times. In the following lawsuit, a federal judge ruled that U.S. West did not violate federal or state law by firing Christine after she refused to remove or cover the button. Christine has appealed, but the ruling illustrates that employers expect that an employee's attire will not disrupt the workplace or turn away customers.

When the employer's interests and the employee's exercise of religion come into conflict and no accommodation can be made without undue hardship to the employer, the worker usually has two choices: relinquish the religious practice and keep the job, or hold to the religious practice and resign or be discharged.

The day after Dave told her to remove the button, she wore it to work anyway. Dave approached her cash register and said that he'd appreciate it if she took off the button. Otherwise, he said, "you don't have a job."

DeAnn explained that she would not remove the button, so Dave, feeling he had no choice, let her go. When a few weeks later DeAnn filed for unemployment benefits, a hearing officer decided that DeAnn's refusal to remove the button was *misconduct.* As a result, she was disqualified from receiving Iowa unemployment benefits. Her disqualification from receiving benefits because of her religiously motivated conduct raised the issue of whether the decision violated her right to the free exercise of religion under the U.S. Constitution.

More than 30 years ago, in a case involving the refusal of a Seventh-day Adventist to work on Saturday, the United States Supreme Court ruled that the denial of unemployment benefits imposed an unconstitutional burden on the free exercise of religion. In 1957 Adell Sherbert started working five days each week at a South Carolina textile mill. In 1959 her employer changed the workweek to six days and fired Adell after she refused to work on Saturdays.

Like DeAnn, Adell applied for unemployment benefits, but the state denied her claim, this time on the basis that she failed, without good cause, to accept suitable work. Adell had been unable to find a job that did not require her to work on the Sabbath. When the Supreme Court justices heard her case in 1963, they decided that a state cannot condition the receipt of unemployment benefits on the relinquishment of a sincerely held religious belief, and voted in her favor.

Other Supreme Court cases followed. One involved a Jehovah's Witness assigned to construct tank turrets, an instrument of war. Eddie Thomas quit his job at the Blaw-Knox Foundry and Machinery Company in Indiana because of his religious convictions against war, and the state denied his claim because he quit voluntarily "without good cause arising in connection with his work." The Supreme Court in 1981, relying on Adell Sherbert's case, overturned the denial of benefits. The Court said: "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial."

Another case involved Paula Hobbie, an employee of Lawton and Company, a Florida jeweler. Paula worked for Lawton for two and a

half years before being baptized into the Seventh-day Adventist Church. She then told her supervisor that she could no longer work on her Sabbath, from sundown on Friday to sundown on Saturday. Her supervisor worked out a schedule to accommodate her, but the general manager told Paula that she could either work her scheduled shifts or resign. When she refused to do either, she was fired. Like DeAnn Supple, Paula was disqualified from receiving benefits because the state of Florida decided that she had committed *misconduct.* The Supreme Court reversed the decision, ruling in 1987 that denying benefits burdened the free exercise of religion.

Finally, there was William Frazee, who describes himself merely as a Christian and not as a member of any particular religious denomination. When Kelly Services, of Peoria, Illinois, offered him a temporary retail position that would have required him to work on Sunday, William told Kelly that as a Christian he could not work on "the Lord's day." When he applied for unemployment benefits, his claim was denied on the basis that he refused to accept suitable work without good cause. His case went to the U.S. Supreme Court, which in 1989 held that although William was not a member of a recognized religious denomination, the denial of benefits burdened his individual, sincerely held religious beliefs in violation of the free exercise clause of the First Amendment to the U.S. Constitution.

After her claim for unemployment benefits was denied, DeAnn contacted the Rutherford Institute, which defends free exercise claims. Her call was taken by an Iowa attorney who happened to grow up on a farm less than 30 miles away from DeAnn's hometown of Manchester. With the help of a local volunteer attorney—David Hanson, of Fayette, Iowa—her case was appealed to administrative law judge Thomas Rowe. Judge Rowe held a hearing on October 24, 1994.

During the appeal hearing DeAnn testified to her sincere belief in the sanctity of human life from the moment of conception. She pointed to Psalm 139 and the teachings of the Catholic faith as embodied in *Humanae Vitae (Of Human Life),* the famous 1968 encyclical letter of Pope Paul VI. DeAnn also testified about her vow to wear the button and that she believed breaking her vow would be sin, would affect her salvation, and would require repentance.

On November 1, 1994, Judge Rowe denied her appeal, ruling that "the directive of the employer instructing the claimant to remove the pin was a reasonable directive and should have been obeyed by the claimant, notwithstanding the firm convictions of the claimant on this particular issue." He decided that DeAnn's refusal to remove the pin was insubordination, or "disqualifiable job misconduct." He concluded that DeAnn was not entitled to benefits.

DeAnn appealed the decision to the Iowa Employment Appeal Board, which ruled in her favor on January 24, 1995. The board recognized that "in this case, Supple was discharged because she wore a pin which she believed her religious beliefs required her to wear." Relying on Supreme Court decisions, the board decided that because the "misconduct" arose out of DeAnn's religious beliefs, denial of benefits burdened her free exercise of religion. Because no compelling state interest in denying unemployment benefits to DeAnn was shown, the board ruled that she should receive benefits.

"I don't feel it's fair," Dave Cole said after the board's decision. "It's just not right that they should overrule the other people who decided the case."

Dave still gets complaints about the matter—some from his fellow parishioners, who were angry that he fired her in the first place because of the button.

"It was a no-win situation," he complained. "I figure I lost five good customers because DeAnn wore the button and five good customers because I let her go."

DeAnn also testified about her vow to wear the button and that she believed breaking her vow would be sin, would affect her salvation, and would require repentance.

DeAnn's story ends with an ironic twist. Although she was out of work for nine weeks while the appeal was pending, she is now working at another job, with higher pay than at the grocery store. Interestingly enough, she found her new employment through Job Service, the same state agency that initially denied her claim for unemployment benefits!

"I guess you have to have a sense of humor," she said, with plenty of reason to laugh.

PROTEST RACKETEERS

When Protest Becomes Racketeering

BY JAMES COFFIN

Forget that the issue centers on the anti-abortion movement and the radicalism within the movement that has made it the cause people love to hate, and concentrate instead on the alarming precedent set when a law to stop racketeers is used against those acting out of religious convictions!

Even the most fervent pro-choice civil libertarian might be surprised at a Florida judge who—using the Racketeer Influence and Corrupt Organization Statute (RICO)—ordered a group of defendants, including a church and its pastor, to pay hundreds of thousands of dollars in legal fees just because they were involved in anti-abortion protests.

The American Civil Liberties Union, not exactly friends of the anti-abortion movement, has warned about the dangerous effects of RICO on civil liberties, including abortion protest. "RICO permits the kind of forfeiture," warned Robyn Blumner of the Florida ACLU, "that we have been protesting about for years."

The story began in 1989 when some members of the New Covenant church in Pompano Beach, Florida, in conjunction with Operation Rescue, began protesting in front of an abortion clinic in Boca Raton. From the beginning, the anti-abortion activities were never officially approved by any church governing board. When announcing the upcoming protests, George Callahan, the New Covenant church pastor, stressed that it wasn't a church-sponsored activity per se, but that concerned members were invited to participate. The church did, however, provide many of the leaders, the majority of participants, and the venue for organizational activities—enough to later convince the court that the church collectively, and not just individuals within the church, bore responsibility.

On March 31 the demonstrators were on a narrow public sidewalk that abutted the entrance of an abortion clinic, which was legal; when, however, they sat down and blocked access to the clinic, they were arrested and removed.

Subsequently the National Organization of Women (NOW) and the operator of the abortion clinic filed a class-action suit against Randall Terry, founder of Operation Rescue, and some 46 other defendants, including Callahan. The New Covenant church was not one of the defendants in the original suit.

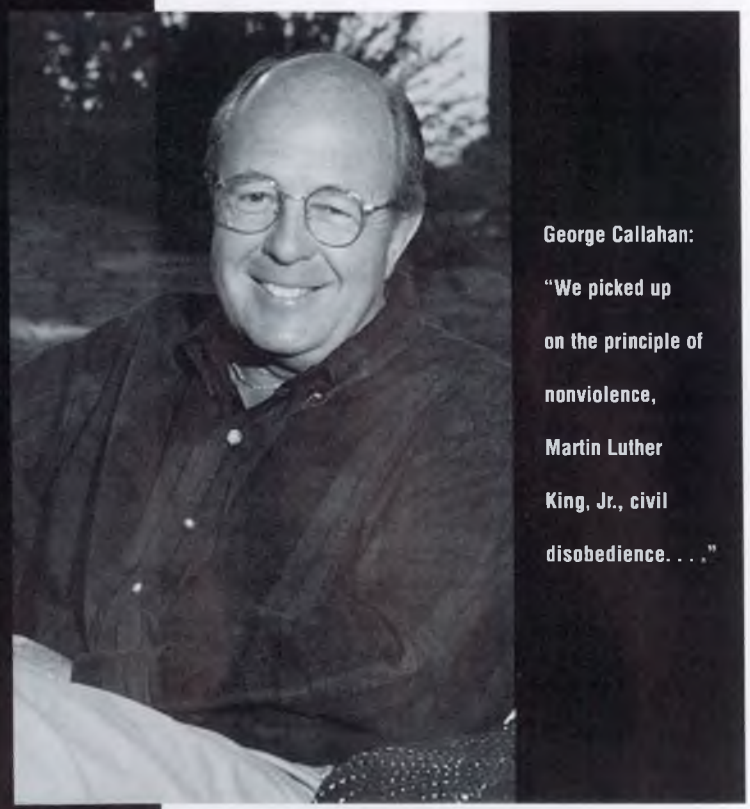
The suit sought punitive and compensatory damages, a court injunction against future blockading of the clinic, as well as claims for attorneys' fees and costs. The suit stated that the defendants had threatened health and safety, interfered with public order, and infringed on the legal right of women to obtain gynecological consultation and services, including abortions and family planning. The defendants were also accused of deliberately and illegally trespassing so as to block access to medical facilities that provide abortions, and physically and verbally intimidating and

James Coffin is pastor of the Markham Woods Seventh-day Adventist Church in Longwood, Florida.

harassing persons as they attempted to enter the facilities. The plaintiff argued that the actions of the protesters intimidated those who wished to avail themselves of the services of the abortion clinic, whether for abortions or for other gynecological reasons. Thus, the defendants impaired the clinic's ability to carry on a lawful business.

In June 1989 a restraining order was issued, limiting protest at abortion clinics. Callahan and others from New Covenant church violated the order.

Before the trial the operator of the abortion clinic withdrew as a plaintiff, and charges were dropped against all but seven of the defendants, two of which were New Covenant church—which had been added to the list—and its pastor.



George Callahan: "We picked up on the principle of nonviolence, Martin Luther King, Jr., civil disobedience. . . ."

The court found in favor of the plaintiff, awarding NOW a token judgment of $1 from the defendants—less than 15 cents per defendant if split equally! But what the defendants hadn't anticipated was the application of the Florida RICO Act on the case, which resulted in the defendants, including the New Covenant church, being ordered to pay more than $230,000 in NOW's legal fees, with the threat of having their assets seized if they didn't hand over the money.

During the protests the leaders of New Covenant church didn't even discuss the need to distance the church from the anti-abortion activities.

"No one imagined back in 1988 that RICO would be applied in the way it was," says Callahan. "Back then it was seen simply as civil disobedience. We picked up on the principle of non-violent, Martin Luther King, Jr., civil disobedience, believing it was our constitutional right and believing that as long as we did not hurt anyone or become violent we were operating within the realm of those rights."

The real concern in this case is the question How did the judge take a law designed to stop racketeers and "corrupt organizations" and apply it to a church involved in civil disobedience?

One way for RICO to be violated is if the accused "received any proceeds" from their illegal activities. The defendants acknowledged that they willfully and intentionally broke the law. But had they "received any proceeds" from it?

According to circuit court judge Edward Fine, who wrote the final judgment against the New Covenant, yes they had—by the offerings they had collected at their organizing rallies!

"It is unlawful for any person 'with criminal intent' to receive any 'proceeds' derived [even] indirectly from such a pattern of racketeering activity," Judge Fine wrote. "The evidence in this case was that at training sessions money was solicited and collected to be used for bail for people who were expected to be arrested. They were raising money because the leaders and trainers were intentionally planning in advance to violate the law. This money was derived indirectly from the racketeering activity just described."

Next, according to the judge, "under RICO law there must be a 'pattern' of racketeering and not just isolated incidents. These incidents do not necessarily have to involve the same people, but they must be related by distinguishing characteristics, having similar intents, results, accomplices, victims, methods of commission, or some other interrelationship."

Judge Fine then listed some of the similar intents: "to illegally trespass, block entrances, intimidate persons intending to enter the premises, and interfere with the performance of abortions"; then some of the similar victims: "the doctors, employees, and women patients"; and finally some of the similar methods: "tres-

pass by large crowds, the manipulation of the media to publicize themselves and help scare off pregnant women (a vulnerable group who frequently wish their privacy to be respected), training sessions, and interference with persons trying to enter."

What other ways did protestors violate RICO? The judge ruled that "one of the prohibited racketeering acts is Chapter 784, relating to assault and battery. Chapter 784.011 provides that an assault is an intentional unlawful threat by word or act to do violence to the person of another, coupled with an ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent." Using this definition, the defendants were guilty of assault.

According to Judge Fine, an even longer list of violations could be given: "All persons are entitled to go about their normal lawful business without being required to deviate from their personal affairs due to the intentional actions of lawbreakers. The evidence is clear and convincing that [the abortion clinic operators], against their wishes, deviated from their normal entry into their workplace due to the actions, signs displayed, and words spoken by the crowd. The conduct of the crowd meets the definition of several illegal acts, including assault, extortion, and obstruction of justice."

In his final judgment, the judge stated: "The civil remedy for violations includes: injunctive relief, attorneys fees, and court costs." The injunctive relief had been granted earlier in the June 1989 restraining order. The compensation for the plaintiff's attorneys, the court established, now had to be determined.

On June 7, 1994, the Palm Beach Circuit Court ruled that the plaintiff's attorneys were to receive $234,477.50. Because New Covenant church had the most visible assets of the seven defendants—the deepest pockets, so to speak—it felt the brunt of the judgment's force. Yet the church had always operated on a faith basis. It had no reserves and had always spent its money as it came in.

Over the next few weeks the church went from crisis to crisis as it investigated every option—from an appeal to an extension of time. Recognizing the legal issues involved, many pro-life leaders at both the local and national levels urged New Covenant church to appeal. However, legal experts weren't at all confident that New Covenant would win. And if it didn't, the church would probably be facing a minimum of $350,000 for its own legal fees and those of the plaintiff. New Covenant didn't have $234,000, let alone an additional $350,000.

News of the church's plight spread throughout the denomination, the Evangelical Presbyterian Church. Christian radio stations also reported the story, inviting listeners to help financially. Letters, many containing contributions, began pouring in from throughout the United States and even overseas. And seven "megachurches" within the Evangelical Presbyterian Church made a $212,000 loan available through the denomination's General Assembly.

A major consideration for Callahan and the leaders of New Covenant church was preserving the ministries it already operated—such as a social services program that costs nearly $150,000 per year, a school for 140 students, and a wide array of spiritual ministries. The church would jeopardize these ministries if it became unduly indebted by protracted legal wranglings.

Finally, in September 1994 the church opted to negotiate a slightly reduced settlement ($200,000 instead of $234,000), waive its right to appeal, and try to get on with its life and mission.

"The shock of my life," said Pastor Callahan, "was that I received more negative attack from the pro-life community than I would ever have imagined possible. I had one of the prime leaders of the movement say, 'You are a Judas—you have sold the pro-life movement; you have abandoned us.'"

As of this writing, New Covenant church has accrued nearly $337,000 in judgments, out-of-court settlements, and fees for its own attorneys. The stress caused by the public notoriety, financial pressures, and tensions as to the best way to proceed resulted in a drop in church membership of some 300 and a decrease in income of some $3,000 per week. Despite tens of thousands of dollars of contributions from well-wishers, New Covenant church must still raise some $45,000 to pay its own attorneys and accountants, and $212,000 to repay the loan made to the church by its fellow Presbyterian congregations.

It would be easy to overlook the implications of what happened to New Covenant church. After all, anti-abortion protestors are not well liked and did "intentionally and deliberately" break the law. Yet the United States has a long history of unpopular individuals and groups using civil disobedience (i.e., lawbreaking) as a means to raise moral consciousness and effect changes in the law. While the govern-

The real concern in this case is the question How did the judge take a law designed to stop racketeers and "corrupt organizations" and apply it to a church involved in civil disobedience?

ment must ensure that its citizens obey its laws, the U.S. historically has shown considerable sensitivity toward those who feel morally compelled to disobey.

For example, otherwise law-abiding people (many of them pacifist Quakers) were sufficiently incensed by the immorality of slavery that they illegally aided fugitive slaves in their flight to freedom.

Around the turn of the century, citizens—often women—who were weary of the devastation caused by alcohol crusaded against it in a manner that wasn't always legal. Likewise, in attempting to achieve better working conditions in a setting stacked in favor of employers, labor unions often ignored the requirements of government.

New Covenant church at worship: Racketeers?

The civil rights movement used illegal actions designed to raise the consciousness of a nation whose duly enacted laws didn't grant equality, notwithstanding the high ideals and promises of its Constitution. And those opposed to U.S. involvement in Vietnam used protest and civil disobedience to halt what they thought was an unjust war.

In each of these cases of protest and civil disobedience, people were willing to risk public ridicule, arrest, and incarceration for illegal actions they felt morally compelled to engage in.

But what if the RICO Act had been in effect? What kind of lawsuits might have been filed by the slave owners, the saloon keepers, the industrialists, the owners of discriminatory businesses, and the arms industry?

"Had RICO been in effect during the boycotts, sit-ins, and protests of the civil rights era," warned columnist Cal Thomas, "Black Baptist, Catholic, and African Methodist Episcopal churches all over America could have been seized by any white businessmen upset over the economic damage caused to their businesses by blacks who boycotted or blockaded because of segregation."

One intent of RICO was to make it illegal for criminals to use ill-gotten gain to run otherwise legitimate enterprises. It has been a beneficial law, and prosecutors have used it effectively to fight big-money crime, though it has raised concerns among some civil libertarians who fear that it can be abused.

Testifying before Congress against RICO in 1991, former ACLU legislative counsel Antonio Califa, in another case involving the use of RICO against abortion protestors, including Operation Rescue's Randall Terry, said that "defendants were sued because the town of West Hartford seemingly found their beliefs and actions bothersome and costly. By naming Randall Terry and organizations he founded as defendants, plaintiffs engaged in discovery of Mr. Terry's associational ties and the finances and membership lists, and even minutes of the organizations named. These discovery proceedings, in and of themselves, chill first amendment rights." He continued, saying that "not only abortion clinic protestors are at risk. RICO applies to anti-nuclear protestors, anti-apartheid protestors, animal rights protestors, and others who occasionally have trespassed and damaged property or who publish newsletters."

"This decision," warned constitutional law professor Joseph Broadus about New Covenant church, "is an abuse of the intent of RICO, if not the actual language. Few political activities would be safe from RICO if the courts didn't like those activities enough. Any group that uses aggressive protest styles against big business would be in trouble. Ironically enough, even some gay groups came to the defense of New Covenant."

Certainly the courts must be concerned with upholding the law. But in the case of the New Covenant church, the court may well have jeopardized protest and civil disobedience, an American heritage that paradoxically has done much to raise moral consciousness and create a more equitable society.

(*continued from page 11*)

same ease any particular sect of Christians, in exclusion of all other sects?"

The benefits of the tax in Virginia were designed to go to all "Christian" groups. Madison did not say that the fault of the proposed tax could be cured by extending its benefits to all religions, such as Islam and Judaism. Rather, he argued against the principle of direct government support of religion at all.

5. The Myth of Founder Uniformity

Wallbuilders' materials contain an array of quotes from various Founders, a number of which genuinely do appear to claim that the United States government is based, in some formal sense, on Christ and His gospel. These quotes, however, are part of a debate, and represent only one side of that debate, the losing side, a fact that Wallbuilders conveniently overlooks.

Wallbuilders treads on dangerous ground when it bases arguments about how society should work on the exceptional and unusual actions or practices of the Founders.

An example is Wallbuilders' use of quotations from one of its favorite Founders, Patrick Henry, who said, "It cannot be emphasized too strongly or too often that this great nation was founded, not by religionists, but by Christians; not on religions, but on the gospel of Jesus Christ!"[10]

Wallbuilders omits to mention the historical debate in which Patrick Henry played a leading role. It was Patrick Henry who submitted the bill to the Virginia legislature for a general tax in support of religion, which caused Madison to respond with his "Memorial and Remonstrance." Henry's views, and those of his Episcopal allies, were the views countered, and eventually defeated, by the ideas in Madison's document. The issue was controversial and heated, but Madison's side won.

The defeat of Henry's bill was followed shortly by the passage, guided by Madison, of Jefferson's Virginia Statute Establishing Religious Freedom. The Jefferson/Madison side of the debate provided the inspiration and framework, as discussed above, for the creation of the religion clauses in the federal Constitution. To quote Patrick Henry as an authority on how we should order church/state relations is like citing Marx as an authority on capitalism.

Another example of Wallbuilders' one-sided historical recounting is its description of Franklin's suggestion that prayer be offered at the start of sessions at the constitutional convention, a suggestion that was defeated for a number of reasons, including a lack of funds to hire a pastor, and out of deference to Philadelphia's Quakers. Franklin himself noted that the convention, "except three or four persons, thought prayers unnecessary."[11]

By contrast, here is Wallbuilders' recounting of that event: "Franklin's admonition—and the delegates' response to it—had been the turning point not only for the convention, but also for the future of the nation. . . . With their repentance came a desire to begin each morning of official government business with prayer."[12]

6. The Myth of the Impeccable Founders

In fairness to Wallbuilders, not all the historical stories of the Founders' public involvement with religion are mythical. In his first year as president, George Washington did issue a proclamation designating a day of thanksgiving and prayer to "Almighty God."[13] James Madison issued a similar proclamation when president. Even Thomas Jefferson proclaimed a day of religious thanksgiving when he was governor of Virginia 20 years prior to his presidency.[14] Jefferson did, however, refuse to issue a prayer and Thanksgiving edict during his presidency.

These inconsistencies can be explained. The Founders were grappling with principles of universal import and sweep, some of which had never been implemented in the day to day workings of a civil government. This was especially true of separating the church from the state, something that had never been attempted at a national level. Thus, it shouldn't be surprising that the Founders' application of these principles was not always perfect. The truth is, each of the above instances of prayer and Thanksgiving proclamations is noteworthy because of the contrast it provides with each Founder's general philosophy.

George Washington gave ample evidence of his conviction that religious belief and practice were private matters. In a letter to a Baptist church leader he wrote, "In this enlightened age and in this land of equal liberty it is our boast that a man's religious tenets will not forfeit the

protection of the laws, nor deprive him of the right of attaining and holding the highest offices that are known in the United States."[15]

His most public statement regarding the relation between Christianity and the laws and institutions of the United States is his administration's treaty with Tripoli in 1797. That treaty, in Article XI, stated that "the government of the United States of America is not, in any sense, founded on the Christian religion, as it has in itself no character of enmity against the laws, religion, or tranquility, of Mussulmen; and . . . that no pretext, arising from religious opinions, shall ever produce an interruption of the harmony existing between the two countries."[16]

To claim that Washington's Thanksgiving proclamation was a full, or even a representative, expression of his philosophy of church/state relations, one must ignore these public and emphatic statements of church/state separation.

Writing several years after his presidency, Madison admitted that the existence of congressional chaplains and national days of Thanksgiving and prayer were, strictly speaking, violations of the federal Constitution. His solution was to view these excesses as "harmless," as long as they were not used as a basis to argue for further combinations of church and state. Anticipating the arguments Wallbuilders makes, Madison wrote, "Rather than let this step beyond the landmarks of power have the effect of a legitimate precedent, it will be better to apply to it the legal aphorism *de minimis non curat lex*."[17] The latter phrase means, in effect, "the law does not concern itself with trifles." Wallbuilders treads on dangerous ground when it bases arguments about how society should work on the exceptional and unusual actions or practices of the Founders. Many of the Founders, Jefferson and Washington included, kept slaves. The Founders did not give voting rights to women. Does Wallbuilders believe the Founders' practices in these areas show that the Declaration of Independence and the principles of the Constitution should not apply to women and certain minorities? Americans should be guided by the vision of the Founders, not by their blind spots.

7. The Myth of the Unchanging Constitution

It is true, as Wallbuilders claims, that the First Amendment to the federal Constitution initially did not apply to state governments. Wallbuilders goes a step further, however, and claims that this proves that the Founders intended religion to be regulated, and even established by, state governments.[18] This argument overlooks the fact that none of the individual protections found in the Bill of Rights applied to the states. To apply Wallbuilders' logic to other parts of the Bill of Rights would require one to believe that the Founders did not mind if states infringed on speech rights, freedom of assembly, and the privacy rights of its citizens. The following quote from Madison shows his view on the issue: "Ye States of America, which retain in your Constitutions or Codes, any aberration from the sacred principle of religious liberty, by giving to Caesar what belongs to God, or joining together what God has put asunder, hasten to revise and purify your systems, and make the example of your Country as pure and complete, in what relates to the freedom of the mind and its allegiance to its maker."[19]

The states heeded Madison's exhortation and rapidly followed the example set by the federal Constitution. Soon all the states had placed clauses strikingly similar to the First Amendment in their own constitutions. The last state to abolish its established church was Massachusetts in 1833.

Furthermore, after the Civil War, Congress passed the Fourteenth Amendment, which eventually was used to apply the Bill of Rights, including the First Amendment, to the states. Wallbuilders apparently would prefer that the Fourteenth Amendment did not exist. They argue that the amendment was designed exclusively to secure civil rights for the emancipated slaves. "Did the Congress which created the Fourteenth Amendment," they ask, "intend that it should incorporate the First Amendment against the states? The answer . . . is an emphatic and resounding 'No!'"[20]

Once again Wallbuilders misstates its case. Many of the Framers of the amendment openly said that the amendment would apply at least the individual liberties to the states. It is true that for many years (until the twentieth century, actually) the U.S. Supreme Court did not carry out this intent, but applied the amendment only to the issues of freed slaves and their rights. Constitutional scholars still debate the intended scope of the Fourteenth Amendment, though some Framers express their understanding of its intent quite clearly. Congressman Bingham, the primary drafter of the language of section 1 of the Fourteenth Amendment, said years later: "[The] privileges and

immunities of citizens of the United States . . . are chiefly defined in the first eight amendments to the Constitution of the United States. Those eight amendments are as follows. [Bingham then proceeded to read the first eight amendments word for word.] These eight articles . . . never were limitations upon the power of the states, until made so by the fourteenth amendment."[21]

Other Framers and ratifiers of this amendment shared the understanding that it was meant to apply the Bill of Rights, including the First Amendment, against state governments. Senator Jacob Howard, analyzing the clause, acknowledged that prior to the Fourteenth Amendment the Bill of Rights had not applied to the states, and noted that "the great object of the first section of [the fourteenth] amendment is, therefore, to restrain the power of the states and compel them at all times to respect these great fundamental guarantees [of the Bill of Rights]."[22]

Those who advocate the enshrinement of uniquely Christian values in the laws of our land are literally advocating that force be used to coerce people to conform to spiritual ideals.

The application of the Bill of Rights, including the First Amendment, could then be deemed part of "original intent" of the Constitution, as congressmen of the 1860s became "framers" in their own right. By ignoring what these men said, Wallbuilders is guilty of what it so vociferously accuses others of, that is, of ignoring the intent of the Framers.

8. The Myth of Dependent Christianity

Wallbuilders' greatest, and most unfortunate, myth has not to do with history, but with theology. Its historical arguments imply that Christianity is dependent on civil powers for its strength and effect. Barton claimed that the consequence of the Supreme Court's decision to "remove" prayer from the public schools in 1963 has destroyed American society: "Following the judicial rejection of natural law and the embracing of relativism, the United States has become number one in the world in violent crime, divorce, illegal drug use; number one in the western world in teenage pregnancies; and number one in the industrial world in illiteracy. . . . By removing divine law, the Court removed the source of our previous national stability."[23]

Barton asserts that the Supreme Court of the United States can remove divine law through judicial fiat, a jurisdiction beyond all earthly powers. The corollary to this claim is that divine law can be *reinstated* through judicial or legislative enactment, a scary prospect.

Why? Because the basis of all earthly jurisdiction is force. No civil law is really a law unless the state is willing to enforce it. Your house, your car, even your children, are physically yours only as long as the government can exercise a greater force than that exercised by thieves, robbers, and anarchists. This simple principle explains the general ineffectiveness of the United Nations in dealing with belligerent nations. The united disapproval of virtually the entire world will not deter an Iraq or a Serbia; only the barrel of a tank or the muzzle of a rifle will.

Those who advocate the enshrinement of uniquely Christian values in the laws of our land are literally advocating that force be used to coerce people to conform to spiritual ideals. Allowing prayer in schools seems harmless enough. Those who sue school boards, however, over decisions not to allow prayer at graduations or in the classroom are in effect saying, "Allow prayer at your graduation, or if need be, we will have the sheriff arrest you, and throw you in jail, and then we will pray."

The biblical prophets warned the kings of Israel against relying on the "arm of flesh" for their salvation. It was also they who prophesied of God's "new covenant," which would be written on the "fleshy tables" of the heart. The New Testament more fully expounds the truth that Christ's kingdom is first, foremost, and (at least while we're on this earth) exclusively of spiritual authority.

His kingdom, Christ taught, was made up of voluntary adherents who chose to follow Him and have His principles written on their hearts by faith. He said, "My kingdom is not of this world. If My kingdom were of this world, My servants would fight" (John 18:36, NKJV).* He told Peter, a man zealous to wield temporal power on behalf of spiritual truths, "Put your sword in its place, for all who take the sword will perish by the sword" (Matt. 26:52, NKJV). He advocated that the use of teaching and persuasion, combined with the Holy Spirit, would

With charts, books, graphs, and videos, David Barton is out to remake America.

lead people to the truth. This in turn would cause them to have His law, voluntarily and joyfully, written on their hearts in a way that no Supreme Court edict could ever accomplish.

9. Conclusion

In their zealous advocacy for Christ's kingdom, Wallbuilders and their allies cut squarely across the spiritual principles they appear so anxious to uphold. In that sense, then, the name "Wallbuilders" is correct: the organization is building unnecessary walls of prejudice in an onlooking world, a world desperately needing to hear about the One who has "broken down the middle wall of division" (Ephesians 2:14, NKJV) between humanity and God, making possible the building of the divine law in the hearts of human beings. On the other hand, considering the fallacies of its arguments, "Mythbuilders" is the one title that really fits.

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*Texts credited to NKJV are from The New King James Version. Copyright © 1979, 1980, 1982, Thomas Nelson, Inc., Publishers.

FOOTNOTES

[1] David Barton, *The Myth of Separation* (3rd ed., 1992), pp. 41-46.

[2] Roger Williams wrote in 1644: "First, the faithful labors of many witnesses of Jesus Christ, extant to the world, abundantly proving that the church of the Jews under the Old Testament in the type of the church of the Christians under the New Testament in the antitype were both separate from the world; and that when they have opened a gap in the hedge or *wall of separation* between the garden of the church and the wilderness of the world, God hath ever broke down the wall itself, removed the candlestick, and made His garden a wilderness, as at this day. And that therefore if He will ever please to restore His garden and paradise again, it must of necessity be walled in peculiarly unto Himself from the world, and that all that shall be saved out of the world are to be transplanted out of the wilderness of the world, and added unto His church or garden" (Roger Williams, *A Letter to Mr. John Cottons* [1643], quoted in Leonard W. Levy, *The Establishment Clause: Religion and the First Amendment* [1986], p. 184).

[3] Barton, p. 45.

[4] Levy, pp. 182, 183.

[5] William Lee Miller, *The First Liberty: Religion and the American Republic* (1988), pp. 120, 211-214.

[6] James Madison, "Memorial and Remonstrance" (1785), reprinted in Edwin S. Gaustaud, *Faith of Our Fathers* (1987), appendix A.

[7] Levy, p. 194; (italics supplied).

[8] Wallbuilders avoids this problem by claiming that the Founders meant to establish Christianity, rather than religions generally. "When our Fathers enacted the First Amendment, the abuse they intended to avoid was that of having one, and only one, denomination of Christianity selected, protected, or promoted by government.... They wanted [however] to establish Christianity as the basis of government and public institutions" (Barton, p. 142).

[9] Thomas J. Curry, *The First Freedoms: Church and State in America to the Passage of the First Amendment* (1986), p. 210.

[10] Barton, p. 109.

[11] Levy, p. 64.

[12] Barton, p. 110.

[13] *Ibid.*, pp. 114, 115.

[14] Akhil Reed Amar, "The Bill of Rights as a Constitution," *Yale Law Journal* 100 (1991): 1131, 1159. It should be noted, however, that Jefferson's proclamation was prior to the passage of the Virginia Act for Establishing Religions Freedom.

[15] "George Washington Papers," *Letter Book 30*, p. 110, Manuscript Division, Library of Congress, quoted in *American State Papers on Freedom in Religion*, 3rd. ed. (1943), p. 155.

[16] Quoted in *American State Papers*, pp. 130, 131, (italics supplied).

[17] *James Madison on Religious Liberty*, R. Alley (1985), p. 92.

[18] Barton, pp. 167-169; Amar, pp. 1131, 1157.

[19] James Madison, "The Detached Memoranda," quoted in *James Madison on Religious Liberty*, p. 90.

[20] Barton, p. 169.

[21] *Congressional Globe*, 42d Congress, 1st session 84 app (1871), quoted in Akhil Reed Amar, "The Bill of Rights and the Fourteenth Amendment," *Yale Law Journal* 101 (1992): 1235.

[22] Amar, "The Bill of Rights and the Fourteenth Amendment," p. 1237.

[23] Barton, p. 217, (italics supplied).

RADICAL BELIEVER

Thomas Jefferson and the "Unchristian" Origins of America

BY MARK MEYER

When in the course of human events, it becomes necessary for one people . . . to assume among the powers of the earth, the separate and equal station to which the laws of nature and nature's God entitle them, . . . they should declare the causes which impel them to the separation. We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights."—Declaration of Independence

Do these references to Deity—nature's God and Creator—prove that America's political institutions are based on the Bible?

Some believe so.

"The forms of our constitutional government," wrote Christian Coalition founder Pat Robertson, "as implemented by Jefferson, Madison, Franklin, Washington, Adams, and others—were carefully designed to acknowledge the authority of the Scriptures and our dependence upon the Creator."[1]

Because Thomas Jefferson penned the Declaration of Independence, his religious views are crucial to the debate over America's political origins. What did he mean by *nature's God*? Is that the God of Scripture, the great I Am, the one whom the New Christian Right worships? Or was it something else entirely?

"Jefferson had a Christian value system and world view," states one Christian Right source, "based upon principles taken from the Word of God itself."[2]

If so, those principles wouldn't have been taken from the *whole* Word of God. "Among the sayings and discourses imputed to Him [Jesus Christ] by his biographers," Jefferson wrote of the Bible, "I find many passages of fine imagination, correct morality, and of the most

Mark Meyer is a freelance writer residing in Martinsburg, West Virginia.

lovely benevolence; and others, again, of so much ignorance, so much absurdity, so much untruth, charlatanism, and imposture, as to pronounce it impossible that such contradictions should have proceeded from the same being. I separate, therefore, the gold from the dross; restore to Him the former, and leave the latter to the stupidity of some, and roguery of others of His disciples. Of this band of dupes and imposters, Paul was the great Coryphaeus, and first corrupter of the doctrines of Jesus."[3]

These are not the words of a man trying to found a Christian nation. Jefferson was a "radical believer" even by today's standards, much less those of eighteenth- and nineteenth-century America. He rejected not only the divinity of Christ, but the virgin birth as well. "And the day will come," he wrote, "when the mystical generation [birth] of Jesus, by the Supreme Being as His father in the womb of a virgin will be classed with the fable of the generation [birth] of Minerva in the brain of Jupiter."[4]

Jefferson clearly was not an Orthodox Christian. His concept of God was influenced by the philosophers of the Enlightenment, who maintained that the "laws of nature and of nature's God" were discernible by man's reason, without divine revelation.

"If a rational creature could comprehend all that God had done," wrote Carl Becker, "it would, for all practical purposes, share completely the mind of God, and the natural law would be, in the last analysis, identical with the eternal law. Having deified nature, the eighteenth century could conveniently dismiss the Bible."[5]

The only creed that Jefferson ever claimed was Unitarianism, the "feather bed for fallen Christians." He believed that one day all America would be Unitarian. It was the only faith wide enough to accommodate his broad and unscriptural concept of God.

With such a radical view of biblical revelation, Jefferson rarely spoke publicly about his religious beliefs. Nevertheless, they were an issue in the 1800 election. Timothy Dwight, president of Yale, warned that if Jefferson were elected "the Bible would be cast into a bonfire."[6] Jefferson dared not respond. Historian Russell Kirk wrote that "were his deism (including his rejection of Christ as supernatural Redeemer) fully known, he and his party would be in deep difficulty with popular opinion."[7]

The stigma of heresy was attached to Jefferson even after his death. As late as 1830 the Philadelphia public library would not allow the "infidel's" books on their shelves.[8]

"And the day will come," he wrote, "when the mystical generation [birth] of Jesus, by the Supreme Being as His father in the womb of a virgin will be classed with the fable of the generation [birth] of Minerva in the brain of Jupiter."

If Jefferson's concept of God was not founded in biblical Christianity, what was he talking about in the Declaration of Independence?

In Europe monarchs ruled on the theory of "the divine right of kings." The lawyers of Cambridge University assured Charles II that "kings derive not their authority from the people but from God. . . . To Him only they are accountable."[9] Jefferson warred against this justification of tyranny. Speaking of the republican foundations of our government, he wrote: "We believed . . . that man was a rational animal, endowed by nature with rights and with an innate sense of justice; and that he could be restrained from wrong and protected in right, by moderate powers confided to persons of his own choice, and held to their duties by dependence on his own will."[10] Jefferson held that natural rights were higher than any imperial edict and refuted the arbitrary right of kings. When he referred to "the laws of nature and of nature's God" in the Declaration of Independence, he was not trying to establish a Christian nation; his goal was to lay an enduring foundation for the rights of the individual based on reason, not biblical revelation.

The belief that Jefferson wished to acknowledge the authority of the Bible in our constitutional government is false. And even *if* true, which sections did he want to base American government on—those with "correct morality and of the most lovely benevolence," or those written, as he believed, by "dupes and imposters"?

FOOTNOTES

[1] Pat Robertson, *The Turning Tide: The Fall of Liberalism and the Rise of Common Sense* (Dallas: Word Publishing, 1993), p. 270.

[2] Catherine Millard, *The Rewriting of America's History* (Camp Hill, Pa.: Horizon House, 1991), p. 109.

[3] Saul K. Padover, ed., *Thomas Jefferson on Democracy* (New York: Mentor, 1939), p. 121.

[4] *The Adams-Jefferson Letter: The Complete Correspondence Between Thomas Jefferson and Abigail and John Adams* (Chapel Hill, N.C.: 1959), vol. 2, p. 594.

[5] Carl Becker, *The Declaration of Independence, a Study in the History of Political Ideas* (New York: Alfred A Knopf, 1966), p. 40.

[6] Quoted in David Saville Muzzey, *History of the American People* (Boston: Ginn and Co., 1929), p. 196.

[7] Quoted in Peter Marshall and David Manuel, *The Light and the Glory* (Grand Rapids: Fleming H. Revell, 1977), p. 350.

[8] Norman Cousins, ed., "In God We Trust," *The Religious Beliefs and Ideas of the American Founding Fathers* (New York: Harper and Bros., 1958), p. 117.

[9] Quoted in Becker, p. 32.

[10] Saul K. Padover, ed., *Thomas Jefferson on Democracy* (New York: Mentor, 1939), p. 45.

THE MORALS OF THE MAJORITY

"Do you not see that religious belief is shaken, and the divine notion of right is declining?—that morality is debased, and the notion of moral right is therefore fading away?"
—Alexis de Tocqueville

"It is impossible to maintain civilization with 12-year-olds having babies, 15-year-olds killing each other, 17-year-olds dying of AIDS, or 18-year-olds getting diplomas that they can't read. It's just impossible."
—Newt Gingrich

Though the New Right's wrong about separation of church and state ("a lie of the left," "found only in the Soviet Constitution," "a figment of some infidel's imagination"), it's right about one thing: America's Founders never intended to separate morality from public life.

However hollow the drumbeat of original intent, even the most judicially active would agree that the overriding principles of the Framers, not their sporadic deviancy from those principles ("Congress cannot," wrote scholar Douglas Laycock, "impose civil penalties on non-Protestants or ban blasphemy against the Trinity just because the Framers did it"), should still influence jurisprudence, and nothing in the Constitution mandates a naked public square. To "establish justice, ensure domestic tranquility, provide for the common defense, promote the general welfare, and secure the blessings of liberty," though not quite the Sermon on the Mount, isn't *Thus Spake Zarathustra* either.

In formulating their political philosophy, the Framers were more influenced by Montesquieu than by the apostle Paul, and the *philosophe* argued that while despotisms ruled through fear and monarchies through honor, republics—where the people were involved in government—required morality and virtue.

"There is no great share of probity necessary to support a monarchial or despotic government," he wrote. "The force of laws in one, and the prince's arm in the other, are sufficient to direct and maintain the whole. But in a popular state, one spring more is necessary, namely, virtue."

Perhaps reflecting on his last reading of *L'esprit Des Lois*, John Adams wrote: "Public virtue cannot exist in a nation without private [virtue], and public virtue is the only foundation for republics."

But public virtue for a few million Anglo-Christians spread along the Eastern seaboard was one thing; for a cornucopian compilation of 250 million disparate souls spread out across a continent, and then some—public virtue, or morality, is another.

What is that "another"? Or, as it's usually phrased, "Whose morality?" (a sanctimonious way of inferring that until Americans unanimously agree on what public morals should be, we shouldn't have any—a possibility, perhaps, for lobsters and other amoral entities, but not for humans and their institutions). Yet the question of "Whose morality?" is easy: in despotisms, it's the despot's; in monarchies, it's the monarch's; and in popular governments, it's the populace's.

However heretical it sounds to us civil libertarian types, the unwashed masses should help determine public morality. Isn't that what representative *democracy* is all about? Though it has never been in vogue, the Tenth Amendment does leave "to the people" the powers not delegated to "the United States by the Constitution," and last I read, the Constitution was a political, not a moral, charter.

Now everyone knows, of course, that the majority isn't

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always moral, which is why, if the Founders framed a Constitution to restrain the government, they framed a Bill of Rights to restrain what Spinoza called "the fickle disposition of the multitude." America needs an active judiciary that isn't going to limit itself dogmatically to the original intent of a document that, read literally (Fourteenth Amendment jurisprudence notwithstanding), could stop only Congress, not Alabama, from making Episcopalianism the state religion.

Aquinas said that there can be no law without moral consensus, and considering that he died in 1274, he obviously wasn't influenced by a democratic (much less republican) *Sitz im Leben.* We are. Therefore, given the majoritarian nature of republics, we need laws that reflect morality, and—within the limits defined by the courts—the majority should determine that morality because someone ultimately has to and, by default, that responsibility has been left to the people.

Ultimately, either the despot's, the monarch's, the majority's, or even the judge's moral vision will prevail, as the incestuous, the pedophilic, the murderous, and the polygamous (even when practiced out of sincere religious convictions) already know. Neutrality, status quo or not, is a philosophical and legal impossibility. To not forbid incest is to allow it, itself a moral stance. Chicago law professor Cass Sunstein argued that "the problem with status quo neutrality is that it takes existing practices as given, and does not require government to bring reason forward on their behalf." By taking no position, and leaving a practice in place, the government takes a position.

Also, if a government were to make no laws based on morality (another impossibility), it would still, in essence, be taking a moral stand. Amorality, for creatures capable of morality, is itself a moral choice.

Government, by its nature, must make moral decisions. Aristotle wrote that the quest for the ultimate "good" was, ultimately, one of political science, for governments needed to secure the common good: "While it is desirable to secure what is good in the case of an individual," he wrote, "to do so in the case of a people or a state is something finer and more sublime."

The challenge, especially for republics that care about individual rights, is finding the balance between the two.

Clifford R. Goldstein

By a divine paradox, wherever there is one slave there are two. So in the wonderful reciprocities of being, we can never reach the higher levels until all our fellows ascend with us. . . .

There is no true liberty for the individual except as he finds it in the liberty of all. There is no true security for the individual except as he finds it in the security for all.

Edwin Markham

American poet (1852-1940)