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FIVE JUSTICES HAVE TRANSFORMED THE FIRST AMENDMENT'S FREEDOM *OF* RELIGION TO FREEDOM *FROM* RELIGION

*Gerald Walpin**

I. INTRODUCTION

The religion clauses in the First Amendment prohibit any governmental interference with individuals' "free exercise" of religion and prohibit government from "establishment of religion."¹ One would think that these clauses are clear in (i) guaranteeing to all the right to freely exercise the individual's chosen religion, to the same unlimited extent that the accompanying First Amendment clause guarantees "freedom of speech," and (ii) mandating that government take no sides among the various religions through prohibiting any religion from being the Government's chosen "establishment of religion."²

Unfortunately, the Supreme Court rejected such clarity. Many Court opinions and opinions by individual Justices express one reality: nothing is clear on what these clauses mean, as far as some recent Supreme Court Justices are concerned. An almost unanimous (with one dissenting Justice) Court opinion in 1971 admitted:

Candor compels acknowledgement . . . that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law. . . . A law "respecting" the proscribed result, that is, the establishment of religion, is not always easily identifi-

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¹ U.S. CONST. amend. I.

² *Id.*

able as one violative of the Clause.³

While some Justices have simplistically summarized these clauses as creating a “wall of separation between Church and State,”⁴ the Court has rejected such rule by describing any line of separation as “blurred, indistinct, and variable,”⁵ a description at least twice reiterated.⁶ Indeed, the Court, more recently, candidly described its decisions on the Establishment Clause as “Januslike,” or two-faced.⁷ In one 5-4 opinion, the Court declared, “total separation of the two [Church and State] is not possible,” and, more to the heart of the issue, that the Constitution does not “require complete separation of church and state.”⁸ The lack of consistency in Court rulings led four dissenters, in one case, to frustratingly comment that *stare decisis* has been overruled by the willingness of the Court “to alter its analysis from Term to Term in order to suit its preferred results.”⁹ In addition, the majority in one decision proudly threw Establishment Clause *stare decisis* to the junk heap, by extolling the Court’s lack of consistency as “sacrific[ing] clarity and predictability for flexibility”¹⁰—thereby admitting their failure to declare a rule of law that would—indeed, should—overcome personal views of individual Justices.¹¹

It is therefore not surprising that one Justice recognized that Court rulings have provided no consistent guidance on the meaning of the Establishment Clause: Justice Clarence Thomas wrote that it was time for the Court “to begin the process of rethinking the Establishment Clause.”¹² What *is* surprising is that all nine Justices did not join in that direction, given the inconsistent and irrational decisions the Court has rendered, examples of which I will now spotlight.

³ *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

⁴ *E.g.*, *Everson v. Bd. of Educ. of Ewing TP*, 330 U.S. 1, 16 (1947) (quoting Jefferson’s “wall of separation between Church and State” (citing *Reynolds v. United States*, 98 U.S. 145, 164 (1878))); *see infra* notes 151-52 and accompanying text for a discussion of the *Reynolds* decision that, despite the reference to Jefferson’s “wall of separation” phrase, in fact, recognized God.

⁵ *Lemon*, 403 U.S. at 614.

⁶ *Id.*; *Wallace v. Jaffree*, 472 U.S. 38, 107 (1985) (Rehnquist, J., dissenting).

⁷ *Van Orden v. Perry*, 545 U.S. 677, 683 (2005).

⁸ *Lynch v. Donnelly*, 465 U.S. 668, 672-73 (1984).

⁹ *Id.* at 699 n.4 (Brennan, J., dissenting).

¹⁰ *Comm. for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 662 (1980).

¹¹ *Id.*

¹² *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 45 (2004) (Thomas, J., concurring).

II. THE COURT HAS CREATED IRRECONCILABLE RULINGS

Examples of these rulings are as follows:

- A State-composed 22-word prayer, carefully non-sectarian, simply recognizing God and praying for God’s blessings, to be used in schools, is unconstitutional,¹³ while, a daily prayer in the legislature, given by a sectarian chaplain paid for by taxpayers’ money, is constitutional.¹⁴
- The Court held unconstitutional a State requirement that 10 Bible verses, chosen by the student reading them, be read each day, followed by the Lord’s Prayer and the Flag Salute,¹⁵ because, as Justice William J. Brennan wrote, “it placed the ‘power, prestige and financial support of government’ behind the prayer.”¹⁶ Yet, the Court recognized prayer as constitutional when the much greater “power, prestige, and financial support of government is placed behind” praying to God in all three branches of Government:¹⁷ the President, in proclaiming a Thanksgiving Day on which all people are asked to pray to God; Congress, in daily prayers, often sectarian, voiced by a Chaplain paid with taxpayers’ money; and the Supreme Court, in its daily opening prayer for God’s blessings.¹⁸
- Even a “period of silence not to exceed one minute in duration,” which the students had the freedom to use “for meditation or voluntary prayer,” was declared unconstitutional,¹⁹ while the identical statute, except without words expressly authorizing students to use the time to pray—even though they could—was constitutional.²⁰ The result: it was unconstitutional to inform students that they could exercise their constitutionally-guaranteed “free exercise” of religion right for prayer during the moment of silence.

¹³ *Engel v. Vitale*, 370 U.S. 421, 422, 425 (1962).

¹⁴ *Marsh v. Chambers*, 463 U.S. 783, 785-87 (1983); *Engel*, 370 U.S. at 439-42 (Douglas, J., concurring), thus describing the Court’s decision in *Engel*.

¹⁵ *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 205, 207 (1963).

¹⁶ *Id.* at 264 (Brennan, J., concurring).

¹⁷ *Engel*, 370 U.S. at 431.

¹⁸ *E.g.*, *Marsh*, 463 U.S. 783, 786-89 n.9 (1983) (mentioning, in apparent approval, prayers in Supreme Court, in Congress, and in Presidential proclamations).

¹⁹ *Wallace*, 472 U.S. at 60-61 (with text of statute at *id.* 40 n.2).

²⁰ *Id.* at 40 n.1. Appellees abandoned any claim that this statute was unconstitutional. *Id.* at 40.

- The Court affirmed that high school students maintain their First Amendment rights to freedom of speech and expression,²¹ but a student, chosen by a vote of her fellow students to give a non-denominational invocation at her school's football game of a short prayer of gratitude to God, cannot do so as it was declared unconstitutional.²² The effect: a student may express her view, for example, for or against abortion (a subject affecting many religious people), but may not say "thanks to God." And that student can express her gratitude to, for example, Locke, Rousseau, and Voltaire (or even any of Presidents Reagan, Clinton, Bush (either or both), or Obama), but, heaven forbid, not to God.²³
- It is unconstitutional for that student, chosen by vote of her fellow students, to give a short non-denominational prayer, on the ground that it communicates State endorsement of a prayer to God, despite the fact that it is a student, not the State, who decides what she will say. However, it is not an unconstitutional State endorsement of God in Presidential proclamations, Supreme Court opening prayers, and Congress's opening prayers (that are often sectarian).
- It is unconstitutional for a public middle or high school to invite a Rabbi to provide an invocation and benediction, both non-sectarian, that, among similar comments, thanked God "[f]or the legacy of America where diversity is celebrated and the rights of minorities are protected,"²⁴ while it is constitutional for each house of Congress to open each session with a prayer that is often sectarian.
- It is unconstitutional for State officials to allow "a formal religious exercise at promotional and graduation ceremonies for secondary schools,"²⁵ but it is constitutional for State officials to

²¹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

²² *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 296, 317 (2000).

²³ The irrationality of the Supreme Court decision apparently caused the Court of Appeals for the Fifth Circuit to reverse a district court, that, following *Santa Fe*, had enjoined a high school valedictorian from praying or calling on the audience to pray. The Court of Appeals found it unlikely that it would appear that "individual prayers or other remarks to be given by students at graduation are, in fact, school-sponsored." Guillermo Contreras, *Appeals Panel Overturns Medina Valley Graduation Prayer Ban*, SAN ANTONIO EXPRESS-NEWS (June 4, 2011, 7:33 PM), http://www.mysanantonio.com/news/local_news/article/Appeals-panel-overturns-Medina-Valley-graduation-1408548.php.

²⁴ *Lee v. Weisman*, 505 U.S. 577, 581-82, 599 (1992).

²⁵ *Id.* at 586-87.

direct that each Legislative session day be opened by a formal prayer voiced by a chaplain paid for with State funds, with the public, often schoolchildren, in attendance.²⁶

- The Court found constitutional State tax exemptions for real estate held by religious organizations and used for religious worship,²⁷ but held unconstitutional the exemption from sales and use taxes that a State granted for “[p]eriodicals . . . published . . . by a religious faith . . . consist[ing] wholly of writings promulgating the teaching of the faith”²⁸
- Inclusion of a crèche in a city’s Christmas season display in the City of Pawtucket was held constitutional,²⁹ while a crèche included in the Pittsburgh area Christmas display, five years later, was held unconstitutional.³⁰ And, while holding the crèche unconstitutional, that Court held constitutional an 18-foot Menorah (a Jewish symbol integral to its religious Hanukkah festival) that was included in the display.³¹
- It is unconstitutional for a local government to post a banner reading “Glory to God in the Highest,” because it “is indisputably religious,”³² but “In God We Trust,” as a congressionally-legislated “national motto,” and those words on all our money,

²⁶ *Marsh*, 463 U.S. at 784-86.

²⁷ *Walz v. Tax Comm’n of City of New York*, 397 U.S. 664, 676, 679-80 (1970).

²⁸ *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 5 (1989) (quoting TEX. TAX CODE ANN. § 151.312 (1982)).

²⁹ *Lynch*, 465 U.S. at 671-72.

³⁰ *Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 578, 602 (1989). In deciding that a crèche is constitutional in one Christmas display but not in another, the Court often rests on its placement and the nature of other items in the display. *Id.* at 598. Thus, in allowing the crèche in the Pawtucket display, the Court considered that, while it was life-size, with figures as large as five feet in height, the display had other “figures and decorations traditionally associated with Christmas,” including a Christmas tree, carolers, a clown, and hundreds of colored lights. *Lynch*, 465 U.S. at 671. On the other hand, “the menorah is readily understood as simply a recognition that Christmas is not the only traditional way of observing the winter-holiday season.” *Cnty. of Allegheny*, 492 U.S. at 617 (Brennan, J., concurring). This type of desiderata is no more relevant than a woman’s assertion that she is only slightly pregnant. The Menorah, regardless of location, is a Jewish religious symbol, not accepted by other religions. The nearby Christmas tree does not alter that reality; moreover, the tree is not an accepted “secular” symbol by many non-Christian Americans. That these decisions were made by split Courts, demonstrates the impossibility of declaring a rule of law based on such variables. Decisions should rest on the fact that America is a religious nation that is proud to display its acceptance of and respect for all religions.

³¹ *Cnty. of Allegheny*, 492 U.S. at 620-21.

³² *Id.* at 598, 602.

are constitutional.³³

- “Bus transportation, school lunches, public health services, and secular textbooks supplied” to religious school students, as they are supplied to public school students, do not “offend the Establishment Clause,”³⁴ but State reimbursement of religious schools for cost of salaries and textbooks used in secular subject teaching is unconstitutional.³⁵
- While it is constitutional for a State to pay for bus transportation of parochial school students *to* their parochial school,³⁶ it is unconstitutional for a State to pay for bus transportation—solely the cost of a non-sectarian bus and driver³⁷—*from* the parochial school for a field trip to a natural history museum.³⁸
- It is constitutional for a State to reimburse a parochial school for the expense of administering State tests,³⁹ but unconstitutional to reimburse the parochial school for the cost of administering tests on secular subjects,⁴⁰ even though the school, acting in the letter of the authorizing statute, expressly prohibits any payment “for religious worship or instruction.”⁴¹
- A State violates the Establishment Clause if it lends maps of the United States to a parochial school,⁴² but it is constitutional for a State to lend geography textbooks to the same school.⁴³
- “The Government may . . . finance a hospital though it is run by a religious order,”⁴⁴ but the Court, relying, in part, on “the role of teaching nuns in enhancing the religious atmosphere,” disal-

³³ *Aronow v. United States*, 432 F.2d 242, 243-44 (9th Cir. 1970). The Supreme Court, although asked, declined to review the decision. Four other Courts of Appeals, asked to consider the constitutionality of “In God We Trust,” have also ruled its use constitutional. Myra Adams, *Federal Court Rules “In God We Trust” Will Remain on Coins and Currency*, REDSTATE (Sept. 13, 2013, 8:53 PM), <http://www.redstate.com/diary/6755mm/2013/09/13/federal-court-rules-in-god-we-trust-will-remain-on-coins-and-currency/>.

³⁴ *Lemon*, 403 U.S. at 616-17.

³⁵ *Id.* at 620-21.

³⁶ *Everson*, 330 U.S. at 17.

³⁷ *Wolman v. Walter*, 433 U.S. 229, 264 (1977) (Powell, J., dissenting).

³⁸ *Id.* at 253-54.

³⁹ *Regan*, 444 U.S. at 657.

⁴⁰ *Levitt v. Comm. for Pub. Educ. & Religious Liberty*, 413 U.S. 472, 479-82 (1973).

⁴¹ *Id.* at 477.

⁴² *Meek v. Pittenger*, 421 U.S. 349, 365-66 (1975).

⁴³ *Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen*, 392 U.S. 236, 238 (1968).

⁴⁴ *Lemon*, 403 U.S. at 633 (Douglas, J., concurring) (citing the Court’s opinion in *Bradfield v. Roberts*, 175 U.S. 291, 297-99 (1899)).

lowed State financing of secular matters at a religious school.⁴⁵ Of course, given the “free exercise” clause, in public schools, some Jewish teachers wear yarmulkes (head covering), some Christian teachers wear crosses, and some Muslim teachers wear head coverings, without any attempts to halt such endorsement of religion.

- It is constitutional for a State to provide speech and hearing diagnostic testing inside a parochial school,⁴⁶ but it is unconstitutional for the State to provide speech and hearing services inside a parochial school.⁴⁷
- It is constitutional for the State to provide a science book to parochial school students,⁴⁸ but unconstitutional for the State to provide a science kit.⁴⁹
- It is unconstitutional for the State to allow public school premises to be used for religious education, even for students so requesting with parental consent,⁵⁰ but it is constitutional for the State to use its power and staff to enforce truancy laws to compel attendance by a public school student at religious education for which the student was released from public school with parental consent.⁵¹
- It is unconstitutional for schools to post a copy of the Ten Commandments in classrooms,⁵² but constitutional to have the Ten Commandments a permanent part of the Supreme Court chamber,⁵³ where millions of young people visiting the Court building will see it, and constitutional for a State to have a 6-foot high monolith inscribed with the Ten Commandments, as one of 17 monuments surrounding a State Capitol.⁵⁴

⁴⁵ *Id.* at 615 (majority opinion).

⁴⁶ *Wolman*, 433 U.S. at 240-41.

⁴⁷ *Meek*, 421 U.S. at 372 (1975).

⁴⁸ *Allen*, 392 U.S. at 243-45.

⁴⁹ *Wolman*, 433 U.S. at 249.

⁵⁰ *Illinois v. Bd. of Educ. of Sch. Dist. No. 71, Champaign Cnty., Ill.*, 333 U.S. 203, 207-08, 212 (1948).

⁵¹ *Zorach v. Clauson*, 343 U.S. 306, 313-14 (1952).

⁵² *Stone v. Graham*, 449 U.S. 39, 41 (1980).

⁵³ *Courtroom Friezes: South and North Walls*, SUPREMECOURT.GOV (May 8, 2003), <http://www.supremecourt.gov/about/northandsouthwalls.pdf>.

⁵⁴ *Van Orden*, 545 U.S. at 681, 691-92.

How did the Supreme Court jurisprudence reach such disarray? It is necessary to understand the full history of Establishment Clause jurisprudence to learn how and why the Court took these inconsistent turns, and whether the Court was correct in reaching this point.

III. UNDERSTANDING THE ESTABLISHMENT AND FREE EXERCISE CLAUSES

Justice Brennan, voting to hold unconstitutional Bible reading in classrooms, candidly admitted that “Madison and Jefferson,” whom he described as “the architects of the First Amendment,”⁵⁵ may have “held such [Bible reading in public schools] to be permissible.”⁵⁶ That admission is telling, as the Court is supposed to be enforcing the First Amendment as written. If the principal movers of the First Amendment understood that it permitted that entry of religion into public school classrooms, on what basis did late twentieth century Justices hold that the same, unchanged First Amendment prohibited it?

To understand the meaning of the Religion Clauses, it is necessary to examine, *inter alia*, the words chosen, the drafters’ views on their meanings, how those who voted for the Amendment and their contemporaries applied it, and how the Supreme Court itself construed them during the first century of the Religion Clauses’ inclusion in the Constitution.

A. The Words Themselves

The Establishment Clause prohibits any “law respecting an establishment of religion.”⁵⁷ Significantly, it could have been, but was not, written to prohibit any law supporting or favoring a belief in God, and religion generally, as many a Court majority has recently

⁵⁵ While Madison is correctly cited as the architect of the Religion Clauses, Justice Brennan was in error in suggesting that Jefferson played a critical role in the framing of the First Amendment. *Sch. Dist. of Abington*, 374 U.S. at 234 (Brennan, J., concurring). Jefferson was in France at the time the Bill of Rights was drafted, discussed and passed in Congress, as he did not return until thereafter in October 1789. See *The Thomas Jefferson Timeline 1743-1827*, LIBRARY OF CONGRESS, http://memory.loc.gov/ammem/collections/jefferson_papers/mjtjme3a.html (last visited Mar. 3, 2015).

⁵⁶ *Id.* at 235.

⁵⁷ U.S. CONST. amend. I.

construed it.⁵⁸

We must therefore start our attempt to understand the Establishment Clause with the meaning of “an establishment.” The first American dictionary provided the definition: “the act of establishing, founding, ratifying or ordaining.”⁵⁹ Synonyms provided today are “foundation, institution, formation, inception, creation, installation, inauguration, start, initiation.”⁶⁰ None of these definitions or synonyms readily encompasses simple support, particularly if any support is offered without favoring any one religion. Nor can one reasonably construe “an establishment” to include simply a belief in God, given the recognized multiple choices of a religion to recognize God, thus precluding the “establishment” of any one religion.

In defining “an establishment,” we cannot ignore the immediate concurrent guaranty of freedom to exercise religion, alongside the other guaranteed freedoms of speech, press, assembly, and petition. Excluding an immediate threat to public safety, freedom of speech and press has been understood to preclude censoring of the opinions of a speaker or writer.⁶¹ The authors’ inclusion of free exercise of religion as one of a series of freedoms, including freedom of speech, thus defined by the Court, strongly suggests that the same parameters be applied to free exercise of religion. That identity of definition was recognized by the Court when it held that each freedom in the First Amendment must be equally enforced.⁶² Yet, as noted, the Court in recent years has applied the Establishment Clause to prohibit a student, chosen by her classmates, to include her opinion that God should be thanked for the blessings that they have,⁶³ thus violating both her “free exercise” and “free speech” rights.

⁵⁸ *E.g.*, *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (“First Amendment mandates governmental neutrality . . . between religion and non-religion.”).

⁵⁹ 1 N. WEBSTER, *AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE* (1828) (quoted in *Wallace*, 472 U.S. at 106 (Rehnquist, J., dissenting)).

⁶⁰ Google search “Establishment,” GOOGLE, <https://www.google.com/webhp?sourceid=chrome-instant&ion=1&espv=2&ie=UTF8#q=establishment> (last visited Mar. 3, 2015).

⁶¹ *Cantwell v. Connecticut*, 310 U.S. 296, 300, 304, 306 (1940) (rejects “previous restraint” in favor of exercise of free speech right in a religious context); *see also* *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1964) (“constitutional guarantees of free speech . . . do not permit a State to forbid or proscribe advocacy,” absent directly leading to “imminent lawless action”), and *Tinker*, 393 U.S. at 511 (explaining that this is a right of students as well, as long as the student’s speech does not cause “material and substantial” disturbance of school activities).

⁶² *Wallace*, 472 U.S. at 50; *see generally infra* notes 143-49 and accompanying text.

⁶³ *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 301.

B. Contemporaneous Understanding of the Meaning

The wording of the initial proposal, by both Virginia and North Carolina, for the Bill of Rights guaranty on religious liberty:

[A]ll men have an equal, natural and unalienable right to the free exercise of religion, according to the dictates of conscience, and . . . no particular religious sect or society ought to be favored or established, by law, in preference to others.⁶⁴

Two other States, New York and Rhode Island, made a similar proposal,⁶⁵ with both Virginia and Rhode Island adding an express recognition of “the duty which we owe our Creator.”⁶⁶ Madison’s proposed language in Congress for the Religion Clauses was as follows:

The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.⁶⁷

Significantly, the language of each of these proposals expressed the aim to prevent favoring any one religion over other religions; each was devoid of any prohibition of favoring equally all religious sects over non-religion, or of prayers to God, and, as noted, at least two States expressly recognizing the Country’s continuing duty to God.

After the language proposed by Madison returned to Congress from the Committee of The Whole, debate in Congress and changes thereafter made in the text before adoption further support that no prohibition of recognition of God was ever intended. Two Congressmen, Messrs. Huntington and Sylvester, respectively, voiced fear “that the words might be taken in such latitude as to be extremely hurtful to the cause of religion,” and “fear[] it might be thought to . . . abolish religion altogether.”⁶⁸ Madison attempted to assuage such fears by explaining that the proposed amendment was not intended to abolish religion nor worship of God, but “[t]hat Congress should not

⁶⁴ 3 J. ELLIOT, DEBATES ON THE FEDERAL CONSTITUTION 659 (1836); 4 *id.* at 244.

⁶⁵ 1 *id.* at 328, 334.

⁶⁶ *Id.*; 3 *id.* at 659.

⁶⁷ 1 ANNALS OF CONG. 451 (1789) (Joseph Gales ed., 1834).

⁶⁸ *Id.* at 757-58.

establish a religion . . . nor compel men to worship God *in any manner contrary to their conscience.*"⁶⁹ Madison thus made clear that the amendment would not prohibit worship of God, a prohibition he negated by carefully including "in any manner contrary to their conscience,"⁷⁰ thereby upholding the worship of God in any manner that is consistent with a person's conscience. Further in a dialogue concerning any fear that the Establishment Clause, as proposed, would deny Government involvement in the worship of God, Madison specifically offered a semantic change (which was decided to be unnecessary) to ensure that no one could construe the Clause "to patronize those who professed no religion at all."⁷¹ Madison thereby made explicit that he never intended the Establishment Clause to bar Governmental praise of, and prayer to, God.

After much discussion, the House proposal, sent to the Senate, included a prohibition against any "law establishing religion." Its metamorphosis into the final adopted language demonstrates the intent only to prohibit the establishment of any one religion as the approved religion but not prohibit helping and indiscriminately recognizing religion and God. The Senate initially substituted: "Congress shall make no law establishing one religious sect or society in preference to others, nor shall the right of conscience be infringed."⁷² The Final Senate proposal, forwarded to the Conference Committee, read: "Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion."⁷³ All of these proposals demonstrate that the understood purpose of the Religion Clauses was to prohibit the choice of any one religion or sect as the approved or favored "mode" to praise God, and that no proposal implied a separation of the Country from God.

The placement of "an" before "establishment" was Madison's way of making clear that the object of the Religion Clauses was, as Madison summarized his understanding of their meanings: to prevent "that one sect . . . obtain a pre-eminence, or two combined together, and establish a religion to which they would compel others to conform."⁷⁴

⁶⁹ *Id.* at 758 (emphasis added).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² S. JOURNAL, 1st Cong., 1st Sess. 70 (1789).

⁷³ *Id.* at 77.

⁷⁴ 1 ANNALS OF CONGRESS 730-31.

In a letter Madison wrote in 1822, he reconciled such governmental “religious” actions as Thanksgiving proclamations and payment of Chaplains for Congress, by pointing out that these actions were “absolutely indiscriminate”⁷⁵ among religions, following the objective “that all Sects might be safely & advantageously put on a footing of equal & entire freedom.”⁷⁶ Madison thus again made clear that Government praise of, or a prayer to, God, and non-discriminatory aid to any and all religious sects were consistent with his Religion Clauses.

In his first inaugural address, Madison reaffirmed his understanding of the Establishment Clause: while it prevented government “interference with the right of conscience or the functions of religion,”⁷⁷ it did not prevent Government homage and prayers to God. Indeed, as part of that talk, Madison placed his “confidence” “in the guardianship and guidance of that Almighty Being whose power regulates the destiny of nations, whose blessings have been so conspicuously dispensed to this rising Republic, and *to whom we are bound to address our devout gratitude . . .*”⁷⁸ Significantly, he also beseeched all Americans to pray to God with “our fervent supplications and best hopes for the future.”⁷⁹ That Madison, the prime author of the Establishment Clause, so explained it to the American people, is as close to conclusive on its meaning as can be found; no one can reconcile binding this Country to God with an interpretation of the Religion Clauses as separating this Country from God.

While Thomas Jefferson, as noted, being in Europe, was absent from the debates on the Bill of Rights, his views, expressed prior to these debates, suggest that, at least at that time, he agreed that the Religion Clauses prohibited favoritism and support of one religious sect, while allowing Governmental recognition of God and support of all religious sects equally. First, we know that Jefferson drafted the Declaration of Independence that, unabashedly, recognized God several times as the source of the human rights that motivated the birth of this Country.⁸⁰ But even more telling, in 1785, Jefferson authored

⁷⁵ Letter from James Madison to Edward Livingston (July 10, 1822), *available at* http://press-pubs.uchicago.edu/founders/documents/amendI_religions66.html.

⁷⁶ *Id.*

⁷⁷ President James Madison, Inaugural Address (Mar. 4, 1809), *available at* <http://www.inaugural.senate.gov/swearing-in/address/address-by-james-madison-1809>.

⁷⁸ *Id.* (emphasis added).

⁷⁹ *Id.*

⁸⁰ THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776) (“God”); *id.* at para. 2 (“en-

The Virginia Act For Establishing Religious Freedom, that opened with recognition of “Almighty God, . . . being Lord, both of body and mind . . . his Almighty power.”⁸¹ That Virginia antecedent contained the substance of what later was codified in the Constitution’s Religion Clauses: “no man shall be compelled to frequent or support any religious worship, place, ministry whatsoever”⁸² Therefore, at least at the time the Religion Clauses were adopted, Jefferson, having included homage to God in his earlier Virginia provision, understood the aim of the Establishment Clause progeny to prohibit the favoring of one religion over another, but not require Governmental rejection of God.

The two recognized experts on the meaning of the Constitution also understood the Religion Clauses as Madison described them. Justice Joseph Story, who served on the Supreme Court from 1811 to 1845 and wrote the still-accepted treatise on the Constitution, explained that the “real object of the [Establishment Clause] was . . . to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government.”⁸³ Likewise, Thomas Cooley, in his 1868 treatise on the Constitution, after declaring that the Religion Clauses prohibited government aid to a particular religion, explained the meaning of the Religion Clauses:

[T]he American constitutions contain no provisions which prohibit the authorities from such solemn recognition of a superintending Providence in public transactions and exercises as the general religious sentiment of mankind inspires. . . . [A]ll must acknowledge the fitness of recognizing in important human affairs the superintending care and control of the Great Governor of the Universe, and of acknowledging with thanksgiving his boundless favors.⁸⁴

dowed by [all men’s] Creator”); *id.* at para. 32 (“reliance on the protection of Divine Providence”).

⁸¹ VA. CODE ANN. § 57-1 (1786).

⁸² *Thomas Jefferson and the Virginia Statute of Religious Freedom*, VIRGINIA HISTORICAL SOCIETY, <http://www.vahistorical.org/collections-and-resources/virginia-history-explorer/thomas-jefferson> (last visited Mar. 3, 2015).

⁸³ JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES, BEFORE THE ADOPTION OF THE CONSTITUTION 728 (1833).

⁸⁴ *Wallace*, 472 U.S. at 105 (Rehnquist, J., dissenting) (quoting THOMAS M. COOLEY, A

Both Story's and Cooley's relatively contemporaneous nineteenth century explanations of the Religion Clauses' meanings require rejection of a total separation from God and religion interpretation that has been asserted by some more recent Justices.

C. Early Applications of the Religion Clauses

The Supreme Court has frequently reiterated that, to ascertain the meaning of a constitutional provision, "the history of the times in the midst of which the provision was adopted,"⁸⁵ and acts of those who enacted a constitutional provision and of those who acted under the new provision are the best "historical evidence" of "what the draftsmen intended the [provision] to mean."⁸⁶ Renowned Justice Oliver Wendell Holmes well expressed this rule of construction: words of the Constitution must be read in "a sense most obvious to the common understanding at the time of its adoption."⁸⁷

There is substantial, totally one-sided, best "historical evidence." The same week that Congress voted approval of the First Amendment for submission to the States, Congress voted to appoint and finance a chaplain for each House.⁸⁸ Madison, the prime author and proponent of the Religion Clauses, voted for this government-financing of religion and assumed responsibility of instituting the Chaplain in the House.⁸⁹ Also in that week, Congress voted to request the President to set aside a Thanksgiving Day to acknowledge "the many signal favors of Almighty God."⁹⁰ These acts by the Congress that proposed the Religion Clauses can be reconciled only with an understanding of those Clauses as permitting Government recognition of God, as well as recognition of and help to religion, as long as no one sect was favored over others.

Madison's actions and pronouncements after the enactment of the First Amendment demonstrate that he continued to regard recognition of God and Government assistance to religion, as long as not

TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 470-71 (1868).

⁸⁵ Reynolds v. United States, 98 U.S. 145, 162 (1878).

⁸⁶ Marsh, 463 U.S. at 790; accord Wisconsin v. Pelican Ins. Co., 127 U.S. 265, 297 (1888), overruled in part by Milwaukee Cnty. v. M.E. White Co., 296 U.S. 268 (1935).

⁸⁷ Eisner v. Macomber, 252 U.S. 189, 220 (1920) (Holmes, J., dissenting).

⁸⁸ Marsh, 463 U.S. at 790.

⁸⁹ Id. at 788 n.8.

⁹⁰ Id. at 788 n.9.

favoring a single religion, to be consistent with the Religion Clauses. And Jefferson, in many ways, endorsed that construction of the Amendment.

Both Jefferson and Madison, in their capacities as members of the Board of Visitors of the University of Virginia, a State University, made no objection to the University policy under which students are “expected to attend religious worship at the establishment of their respective sects” that are invited to “establish within, or adjacent to, the precincts of the University.”⁹¹ Both, when President, regularly attended church services in the House of Representatives, and approved the use of other government buildings for church services; the use of the House chamber for church services continued as late as 1868⁹²—use of public buildings for church services that some federal courts have recently held to be barred under the Establishment Clause.⁹³

Madison, as had Presidents George Washington and John Adams⁹⁴ before him, issued Proclamations. His Proclamation recommended “to all who should be piously disposed . . . in their respective religious congregations” to join in “adorations to the Great Parent and Sovereign of the Universe . . . for the many blessings He has bestowed on the people of the United States.”⁹⁵ Madison also quoted Isaiah 2:4, on “beat[ing] our swords into plowshares.”⁹⁶ It is worthwhile to focus again on the end to Madison’s First Inaugural Address, which could not have been voiced by him if he had thought that the Religion Clauses—for which he was primarily responsible—separated Government from God:

⁹¹ Minutes, Board of Visitors, University of Virginia (Oct. 4, 1824), available at <http://rotunda.upress.virginia.edu/founders/default.xqy?keys=FOEA-print-02-02-02-0305>. Although that was done before the Fourteenth Amendment was held to apply the Bill of Rights to State action, Virginia, at that time, had a State religion clause, substantially similar to the Religion Clauses in the First Amendment.

⁹² *Religion and the Founding of the American Republic: Religion and the Federal Government, Part II*, LIBRARY OF CONGRESS, <http://www.loc.gov/exhibits/religion/rel06-2.html> (last visited Mar. 3, 2015).

⁹³ See, e.g., *Bronx Household of Faith v. Bd. of Educ. of New York*, 750 F.3d 184 (2d Cir. 2014).

⁹⁴ *Presidential Thanksgiving Proclamations 1789-1815: George Washington, John Adams, James Madison*, PILGRIM HALL MUSEUM, http://www.pilgrimhallmuseum.org/pdf/TG_Presidential_Thanksgiving_Proclamations_1789_1815.pdf (last visited Mar. 3, 2015).

⁹⁵ President James Madison, Proclamation on Day of Public Humiliation and Prayer (July 23, 1813), available at <http://millercenter.org/president/speeches/detail/3622>.

⁹⁶ *Id.*

[W]e have all been encouraged to feel in the guardianship and guidance of that Almighty Being whose power regulates the destiny of nations, whose blessings have been so conspicuously dispensed to this rising Republic, and to whom we are bound to address our devout gratitude for the past, as well as our fervent supplications and best hopes for the future.⁹⁷

It is simply impossible to reconcile this supplication to God by the author and prime mover of the Religion Clauses with a conclusion that those Clauses created a wall of separation between Government and God. Madison preceded this clear attachment between the Government/Country and God with his view of what the Religion Clauses prohibited: “the slightest interference with the right of conscience or *the functions of religion*,” the latter of which he said was “so wisely exempted from civil jurisdiction” by the First Amendment⁹⁸ – not a belief in God.

While Jefferson was the sole President⁹⁹ not to issue a Thanksgiving Proclamation, he otherwise referred to “our country” as “rall[ying] to the unity of the Creator.”¹⁰⁰ Further, in his two inaugural addresses, he affirmed the nation’s “acknowledging and adoring an overruling providence,”¹⁰¹ and asked the Nation “to join [him] in supplications” to God.¹⁰² Properly read, Jefferson’s often quoted, but misused, “wall of separation between Church and State,” to describe the Religion Clauses, simply distinguished between choice of religion as a vehicle to God—a choice that is separated from the State—and belief in and prayer to God, which is not separated from the State. This conclusion of what Jefferson intended by his “wall of separa-

⁹⁷ President James Madison, Inaugural Address (Mar. 4, 1809), *available at* <http://www.presidency.ucsb.edu/ws/?pid=25805>.

⁹⁸ *Id.* (emphasis added).

⁹⁹ Jefferson did issue a Thanksgiving Proclamation while he was Governor of Virginia, while that State had a provision akin to the Establishment Clause. Thomas Jefferson, Proclamation Appointing a Day of Thanksgiving and Prayer (Nov. 11, 1779), *available at* <http://www.lifenews.com/2013/11/28/thomas-jeffersons-thanksgiving-and-prayer-proclamation/>.

¹⁰⁰ Letter from Thomas Jefferson to Timothy Pickering, Esq. (Feb. 27, 1821), in *THE WRITINGS OF THOMAS JEFFERSON: BEING HIS AUTOBIOGRAPHY, CORRESPONDENCE, REPORTS, MESSAGES, ADDRESSES, AND OTHER WRITINGS, OFFICIAL AND PRIVATE* 211 (1854).

¹⁰¹ President Thomas Jefferson, First Inaugural Address (Mar. 4, 1801), *available at* http://avalon.law.yale.edu/19th_century/jefinau1.asp.

¹⁰² President Thomas Jefferson, Second Inaugural Address (Mar. 4, 1805), *available at* http://avalon.law.yale.edu/19th_century/jefinau2.asp.

tion” comment is supported by many of Jefferson’s own words. First, we have Jefferson’s recognition of and prayers to God in his inaugural addresses, quoted above. In addition, in 1802, while President, he distinguished between “religion” that “lies . . . between man & his God,” as to which the Government should “make no law,” and God itself, as to whom the proscription did not apply.¹⁰³

Significantly, Jefferson also did not find that the Religion Clauses barred him from using his government powers to help religion. Thus, in the 1803 treaty with the Kaskaskia Tribe that he signed and asked the Senate to ratify, he agreed that “the United States will give annually for seven years one hundred dollars towards the support of a priest of [the Catholic] religion And . . . the sum of the three hundred dollars to assist the said tribe in the erection of a church.”¹⁰⁴ Jefferson proposed three similar laws and treaties between 1802 and 1807.¹⁰⁵ These actions by Jefferson, totally at odds with a contrary interpretation of the slogan that he wrote of separation between church and state, speak loudly of Jefferson’s rejection of the total separation—including from God—that some attempt to attribute to him.

Actions by Washington and Adams, the first two Presidents charged with enforcing the Religion Clauses, are also obviously probative of the meaning of those Clauses. Both Presidents were involved in their adoption. There is no basis to charge either with intentional violation of the Bill of Rights when they each issued very clear endorsements of God. Rather, the only fair construction of what they each did was that they believed it was consistent with the Religion Clauses.

Washington, while President, defined the Religion Clauses by repeatedly not separating himself, and thus the State, from belief in God and the Bible. Washington’s conduct during his first inauguration dramatically demonstrated the Presidency’s connection with God: Asked to swear to the oath required by Article II, section 1, of the Constitution, which contained no reference to God, he *sua sponte* added, after so swearing, “So help me God,” and bent forward to kiss

¹⁰³ President Thomas Jefferson, Draft Reply to the Danbury Baptist Association (on or before Dec. 31, 1801), *available at* <https://jeffersonpapers.princeton.edu/selected-documents/draft-reply-danbury-baptist-association>

¹⁰⁴ Treaty with the Kaskaskia, Aug. 13, 1803, art. 3, 7 Stat. 78 (1803), *in* 2 INDIAN AFFAIRS: LAWS AND TREATIES 67-68 (1904).

¹⁰⁵ *Id.* at 77-78 (Treaty with the Wyandot (July 4, 1805)); *id.* at 90-92 (Treaty with the Cherokee (Jan. 7, 1806)).

the Bible on which he had placed his hand during the oath taking.¹⁰⁶ In 1790—after the Religion Clauses had been sent to the States for ratification—he visited Newport, Rhode Island and listened to, among others, a representative of the first Jewish Congregation. He expressly demonstrated, in his subsequent letter to that Congregation, that, while affirming the Country’s guaranty of religious liberty, he did not hesitate to invoke and quote the Bible as the Government’s guidance for equal treatment of all religions.¹⁰⁷ In his farewell address, five years after the Bill of Rights had been ratified, Washington made explicit his understanding that “religion” was “indispensable” to the Country’s “prosperity,” and one of the “firmest props of the duties of men and citizens.”¹⁰⁸ To emphasize his belief, he “beseech[ed] the Almighty” for assistance.¹⁰⁹

Adams, our second President, emphasized the Country’s reliance on God by seeking “national acknowledgement” of the “truth” that the “safety and prosperity” of the Country “depend on the protection and blessing of Almighty God,” and for all Americans to join him in prayer for God’s “inestimable favor and heavenly benediction.”¹¹⁰ He also wrote that “[o]ur Constitution was made . . . for a . . . religious people”—a statement that would be hard to reconcile with the view that our Constitution separated our Government and people as a whole from invocation of God and religion.¹¹¹ That this statement was uttered by President Adams, who had been President of the Senate when that body approved the Bill of Rights, is irreconcilable with any suggestion that the Religion Clauses intended any such separation.

Within less than 50 years of the ratification of the First Amendment, Congress endorsed and implemented the Washington/Adams/Madison view that Government was not barred from aid-

¹⁰⁶ MICHAEL RICCARDS, *A REPUBLIC, IF YOU CAN KEEP IT: THE FOUNDATION OF THE AMERICAN PRESIDENCY, 1700-1800*, at 73-74 (Praeger, 1st ed. 1987).

¹⁰⁷ President George Washington, Letter to the Jews of Newport (Aug. 18, 1790), *available at* <http://www.tourosynagogue.org/index.php/history-learning/gw-letter>.

¹⁰⁸ President George Washington, Farewell Address (1796), *available at* http://avalon.law.yale.edu/18th_century/washing.asp.

¹⁰⁹ *Id.*

¹¹⁰ President John Adams, Proclamation 8 - Recommending a National Day of Humiliation, Fasting, and Prayer (Mar. 23, 1798), *available at* <http://www.presidency.ucsb.edu/ws/?pid=65661>.

¹¹¹ President John Adams, Message to the Officers of the First Brigade of the Third Division of the Militia of Massachusetts (Oct. 11, 1798), *in* 9 JOHN ADAMS, *THE WORKS OF JOHN ADAMS (LETTERS AND STATE PAPERS 1799-1811)*, at 281 (1854).

ing religion and God. For example, Congress in 1833 materially aided religion by at least two separate statutes. First, it authorized the State of Ohio to sell “all or any part of the land heretofore reserved and appropriated by Congress for the *support of religion* within the Ohio Company’s . . . purchases . . . and to invest the money arising from the sale thereof . . . the proceeds of which shall be for ever annually applied . . . *for the support of religion* . . . and for no use or other purpose whatsoever.”¹¹² Then Congress enacted a law granting to a Jesuit College, “lots in the City of Washington . . . and directing the College to sell the lots and invest the proceeds . . . to establish and endow such professorships as it saw fit.”¹¹³

Evidence also exists that States, in ratifying the First Amendment, viewed it as consistent with continued Government and America’s reliance on God. Maryland, the second State to ratify it, on December 19, 1789,¹¹⁴ is a good example. It would have been unthinkable for Maryland to have ratified Religion Clauses diametrically opposite from the declaration of government’s relationship to God and religion that Maryland had in its Constitution, that “it is the *duty* of every man *to worship God* in such manner as he thinks most acceptable to him . . . [with] no person . . . molested . . . on account of his religious persuasion.”¹¹⁵

These acts and statements by those who caused and lived through the adoption of the Religion Clauses are the best evidence that those Clauses were never intended to withdraw Government and our Country’s leaders from any relationship to or aid of religion and God. Rather, they were intended solely to prevent governmental discrimination among the various religious sects and the establishment or favoring of any one sect to the detriment of all others.

¹¹² *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 858 n.3 (1995) (citing Act of Feb. 20, 1833, ch. 42, 4 Stat. 618-19) (emphasis added).

¹¹³ *Id.* (citing Act of Mar. 2, 1833, ch. 86, 6 Stat. 538) (internal quotations omitted). While I grant that, in retrospect, this might raise questions on Federal assistance to a single religious institution, and would thus warrant a detailed examination of the context and relevant facts surrounding the enactment, it clearly establishes a governmental outlook that did not shy away from such assistance, and did not simply accept a total separation rule.

¹¹⁴ *Ratification of Constitutional Amendments*, U.S. CONSTITUTION ONLINE, <http://www.usconstitution.net/constamr at.html> (last visited Mar. 3, 2015).

¹¹⁵ MD. CONST. art. XXXVI (emphasis added).

D. Religious Conduct of Subsequent Government Leaders and Institutions

All subsequent Presidents, both Houses of Congress, and the Supreme Court continued the practice of recognizing and appealing to God. Congress, in 1865, declared “it shall be lawful . . . to cause the motto ‘In God we trust’ to be placed upon such coins hereafter to be issued,” and, thereafter, most minted coins and printed bills contained the same words.¹¹⁶ In 1954, Congress amended the statute-created text of the pledge of allegiance to add “under God,”¹¹⁷ explaining, in the House Report accompanying the proposal, that from “our earliest history our peoples and our institutions have reflected the traditional concept that our Nation was founded on a fundamental belief in God.”¹¹⁸ In 1956, by joint resolution of Congress and the President’s signature, “In God We Trust” became the official National Motto.¹¹⁹ Various States, including some that ratified the First Amendment, and others that later joined the Union, adopted a State Motto reflecting belief in God. Connecticut, when it became a State, only seven years before the First Amendment was ratified, chose the motto (in Latin): “God, who transplanted us hither, will support us.”¹²⁰ Other examples of State Mottos: Arizona: “God Enriches;” Colorado: “Nothing without Providence;” Florida: “In God We Trust;” Ohio: “With God All Things Are Possible”; and South Dakota: “Under God the People Rule.”¹²¹

Examples of renowned Presidents, following Madison, who continued the practice of recognizing God: Lincoln, in his 1865 Second Inaugural Address, made repeated references to God, including “with firmness in the right as God gives us to see the right.”¹²² Woodrow Wilson, in his 1917 request to Congress for a Declaration of War against Germany, concluded his talk with the prayer that, with

¹¹⁶ H.R. Res. 807, 38th Cong. § 5 (1865).

¹¹⁷ H.R.J. Res. 243, 83d Cong (1954).

¹¹⁸ H.R. Rep. No. 83-1693 (1954), reprinted in 1954 U.S.C.C.A.N. 2339, 2340.

¹¹⁹ *History of 'In God We Trust,'* U.S. DEP’T OF THE TREASURY, <http://www.treasury.gov/about/education/Pages/in-god-we-trust.aspx> (last visited Mar. 3, 2015).

¹²⁰ *Connecticut State Motto*, NETSTATE, http://www.netstate.com/states/mottoes/ct_motto.htm (last visited Mar. 3, 2015).

¹²¹ *Elk Grove Unified Sch. Dist.*, 542 U.S. at 36 (O’Connor, J., concurring); *State Mottoes*, INFOPLEASE, <http://www.infoplease.com/ipa/A0801718.html> (last visited Mar. 3, 2015).

¹²² President Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865), available at http://avalon.law.yale.edu/19th_century/lincoln2.asp.

the help of God, this country would win.¹²³ Franklin Roosevelt, in his 1933 First Inaugural address, voiced three prayers to God: “[W]e humbly ask the blessing of God;” “[m]ay He protect each and every one of us”; and “[m]ay He guide me in the days to come.”¹²⁴ In his most famous Four Freedoms speech on January 6, 1941, President Franklin Roosevelt demonstrated his understanding of the Religion Clauses: “freedom of every person to worship God in his own way”—well stating that the First Amendment was not intended to exclude worship of God, but only to prohibit Government interference in each individual’s choice of religion to engage in that worship.¹²⁵ General (later President) Dwight Eisenhower concluded his “Order of the Day” to the U.S. and allied military on the D-Day invasion of France with: “[L]et us all beseech the blessing of Almighty God upon this great and noble undertaking.”¹²⁶ All Presidents after Madison similarly in—but not limited to—Thanksgiving proclamations, asked all Americans for prayers to God.¹²⁷ If, as noted, some more recent Justices have declared that the Government must remain neutral between believers and non-believers, each of our Presidents would have had to be held to have acted unconstitutionally. I suggest that there is no basis to indict all these elected Presidents for violating the Religion Clauses of our Constitution; they each correctly believed, based on the historical facts, that recognition of and prayers to God were consistent with the First Amendment.

The Supreme Court once explained the obvious: “[A] solemn avowal of divine faith and supplication for the blessings of the Almighty . . . has always been religious.”¹²⁸ It gave that reason for barring prayers from public schools. How is that ruling reconcilable with the Supreme Court’s repeated declaration that “[w]e are a reli-

¹²³ See S. DOC. NO. 5 (1st Sess. 1917) (President Woodrow Wilson’s War Message to Congress on April 2, 1917); see also S.J. Res. 1, 65th Cong. (1917).

¹²⁴ President Franklin D. Roosevelt, First Inaugural Address (Mar. 4, 1933), available at <http://www.inaugural.senate.gov/swearing-in/address/address-by-franklin-d-roosevelt-1933>.

¹²⁵ President Franklin D. Roosevelt, State of the Union Address (Jan. 6, 1941), available at <http://voicesofdemocracy.umd.edu/fdr-the-four-freedoms-speech-text>.

¹²⁶ General Dwight D. Eisenhower, D-Day Statement to Soldiers, Sailors and Airmen of the Allied Expeditionary Force! (June 6, 1944), available at <http://www.archives.gov/historical-docs/doc-content/images/ww2-eisenhower-d-day-order.pdf>.

¹²⁷ While, as noted, Jefferson was the sole President who declined to issue a Thanksgiving Proclamation, he did recognize God and helped, in certain circumstances, religion. See *Engel*, 370 U.S. at 425; *Marsh*, 463 U.S. at 807.

¹²⁸ *Engel*, 370 U.S. at 424-25.

gious people whose institutions presuppose a Supreme Being?”¹²⁹ If our Country’s “institutions”—obviously including all three branches of Government—presuppose a Supreme Being, it cannot be unconstitutional for those institutions to assist in recognizing that Supreme Being, particularly as a unanimous Court early held that the Constitution, including the Bill of Rights, “affirm and reaffirm that this is a religious nation.”¹³⁰

E. The Government Permanently Placed God in Its Capitol

The presence of God, and symbols of most religions, permanently installed in Washington, from early years of our Country, further establish that the First Amendment was not understood to require a separation of God and religion (without favoritism) from Government.

Ironically, the Supreme Court—that has at times prohibited the Ten Commandments from being shown in or near government buildings—has multiple displays of religion. Moses, with tablets representing the Ten Commandments in Hebrew, is prominent inside the courtroom itself.¹³¹ Moses and the Ten Commandments are also on the exterior wall of the building, and representations of the Ten Commandments are on the metal gates on both sides of the courtroom, as well as on the doors into the courtroom.¹³² Another religious figure displayed in the Supreme Court is Mohammad holding the Qur’an depicted on the north wall.¹³³

The Capitol building twice highlights “In God We Trust,” and displays “*Annuit coeptis*” (translated: “God has favored our undertakings”) over the east doorway of the Senate Chamber.¹³⁴ Moreover, the Government, by concurrent resolution of the House and Senate in 1954, created a special room in the Capitol (paid for with taxpayers’ money), set aside for prayer by members of Congress, well decorated

¹²⁹ *Zorach*, 343 U.S. at 313-14; *Sch. Dist. of Abington*, 374 U.S. at 213; *Lynch*, 465 U.S. at 675.

¹³⁰ *Holy Trinity Church v. United States*, 143 U.S. 457, 470 (1892).

¹³¹ *Van Orden*, 545 U.S. at 688.

¹³² These depictions are seen on viewing the Supreme Court building, and were described in *Van Orden*. *Id.*

¹³³ *Courtroom Friezes: South and North Walls*, *supra* note 53.

¹³⁴ *Explore Capitol Hill: Quotations*, ARCHITECT OF THE CAPITOL, <http://www.aoc.gov/facts/quotations> (last visited Mar. 3, 2015).

with pro-God and pro-religion depictions: a large stained glass panel depicting President Washington kneeling in prayer, surrounded by an etching of the first verse of the Sixteenth psalm: “Preserve me, O God, for in thee do I put my trust,” and the words above him of “This Nation Under God.” A Bible is provided for use in the room. And the brochure, created by Congress to explain the room’s decoration and purpose, describes it as depicting “the beauty of God’s world,” so as to make it “a shrine at which the individual may renew his faith in his God”¹³⁵

The east tip of the Washington Monument contains “*Laus Deo*,” which means “Praise be to God.”¹³⁶ The Jefferson Memorial—the memorial to the man often quoted by those who support the total separation of Government from God—contains many references to God: “*Almighty God* hath created the mind free;” “the plan of the Holy Author of our religion;” “God . . . gave us liberty”; and “God is just, that his justice cannot sleep forever.”¹³⁷

F. The First 150 Years of Supreme Court Rulings on the Religion Clauses

In a 2005 Supreme Court opinion—214 years after the First Amendment was ratified and became the law of this land—holding unconstitutional a county’s display of the Ten Commandments, the 5-Justice majority claimed *stare decisis* reliance limited to “some 60 years of precedent taking neutrality [between God and religion, and the State] as its guiding principle.”¹³⁸ Even assuming *arguendo* that assertion was correct,¹³⁹ it would be an implicit admission that this position of total neutrality obtained no support in the Supreme Court during the first 154 years of the First Amendment that was ratified in 1791. In fact, the few relevant Supreme Court opinions during that first one-and-a-half centuries have to be ignored by the “neutrality”

¹³⁵ THE PRAYER ROOM IN THE UNITED STATES CAPITOL 4 (U.S. Printing Office 1956), available at <http://contentdm.baylor.edu/cdm/ref/collection/cs-vert/id/11518>.

¹³⁶ *History & Culture*, NAT’L PARK SERV., <http://www.nps.gov/wamo/historyculture/index.htm> (last visited Mar. 3, 2015).

¹³⁷ *Quotations on the Jefferson Memorial*, MONTICELLO.ORG, http://www.monticello.org/site/jefferson/quotations-jefferson-memorial#Inscription_under_the_Dome (last visited Mar. 3, 2015).

¹³⁸ *McCreary Cnty., Ky. v. ACLU of Ky.*, 545 U.S. 844, 877 (2005).

¹³⁹ In fact, even after 1945, some Supreme Court opinions rejected the total separation theory espoused by those who claimed that the post-1945 precedents supported that view. See, e.g., *supra* notes 5 & 6 and accompanying text.

justices because those earlier decisions were to the contrary. Particularly, as those earlier decisions were written by Justices who either lived through (and even, to some extent, participated in) the ratification of the Religion Clauses, or close to that event, it is preposterous for current Justices to ignore them to claim *stare decisis* support from very recent decisions that themselves ignored the *stare decisis* effect of prior opinions.

The Supreme Court, in 1815,¹⁴⁰ was required to apply the Virginia Bill of Rights, often regarded as the forerunner of the Bill of Rights in the U.S. Constitution. It construed the Virginia Bill of Rights as mandating the “free exercise of religion according to the dictates-of-conscience,” while it prohibited the State from “creat[ing] or continu[ing] a religious establishment which should have exclusive rights and prerogatives, or compel[ing] the citizens to worship under a stipulated form or discipline, or to pay taxes to those whose creed they could not conscientiously believe.”¹⁴¹ Essentially, as thus construed by the Court, the Virginia Constitution had both Free Exercise and Establishment Clauses, providing the same protections as the two Religion Clauses in the Federal Bill of Rights. And construing those provisions, the Supreme Court, only 24 years after the adoption of the Federal Bill of Rights, held that they did not prohibit the Government from “aiding with equal attention the votaries of every sect to perform their own religious duties, or by establishing funds for the support of ministers, for public charities, for the endowment of churches, or for the sepulture of the dead.”¹⁴² Significantly, this unanimous opinion by the Court, allowing government aid to all religions (and implicitly to God) as long as all sects are treated indiscriminately, was written by Justice Story, who, as noted above, wrote the first treatise on the U.S. Constitution.

Again, in 1844, Justice Story wrote for another unanimous Court,¹⁴³ construing Establishment and Free Exercise Clauses in the Pennsylvania State Constitution, which provided “all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences . . . and no preference shall ever be given by law to any religious establishment or modes of wor-

¹⁴⁰ *Terrett v. Taylor*, 13 U.S. (9 Cranch) 43 (1815).

¹⁴¹ *Id.* at 48-49.

¹⁴² *Id.* at 49.

¹⁴³ *Vidal v. Girard’s Ex’rs*, 43 U.S. (2 How.) 127, 183 (1844).

ship”¹⁴⁴—again akin to the Federal Religion Clauses. The Court there considered the validity, under those Constitutional clauses, of a bequest to the City of Philadelphia for the construction of a college.¹⁴⁵ The bequest contained a prohibition against the City’s allowing any “ecclesiastic, missionary, or minister of any sect whatsoever . . . [to] hold or exercise any station or duty whatever in the said college.”¹⁴⁶ The objection raised to the bequest was that it violated the “Free Exercise” Clause, in being “derogatory and hostile to the Christian religion, and so is void . . . [in] excluding . . . all instruction in the Christian religion.”¹⁴⁷ In rejecting that objection, the Court read the testator’s condition as allowing Christianity to be “taught in the college.”¹⁴⁸ It thereby made clear that neither the Establishment nor the Free Exercise Clause prohibited a government from establishing a college at which “the Bible” can be “read and taught as a divine revelation in the college . . . [with] its general precepts expounded, its evidences explained, and its glorious principles of morality inculcated.”¹⁴⁹

That the Supreme Court construed the Religion Clauses as distinguishing between “religion”—with which the Government could not interfere—and “God”—which our Constitution permitted the Government to recognize and esteem; was made clear in two unanimous Supreme Court opinions in 1878 and 1890.¹⁵⁰ Both decisions upheld laws prohibiting polygamy against assertions that those laws violated a Mormon’s free exercise of religion. The Court, noting that “[t]he word ‘religion’ is not defined in the Constitution,”¹⁵¹ quoted Jefferson’s explanation that “religion is a matter which lies solely between man and his God,”¹⁵² i.e., that religion is the avenue chosen by each individual to reach God. With that definition, the First Amendment prohibition against establishment of religion does not reach the worship of God. This distinction between “religion”

¹⁴⁴ *Id.* at 198 (quoting PA. CONST. art. 1, § 3).

¹⁴⁵ *Id.* at 130-32.

¹⁴⁶ *Id.* at 132-33.

¹⁴⁷ *Id.* at 197.

¹⁴⁸ *Vidal*, 43 U.S. (2 How.) at 199.

¹⁴⁹ *Id.* at 200.

¹⁵⁰ *Reynolds*, 98 U.S. at 166-67; *Davis v. Beason*, 133 U.S. 333, 342 (1890).

¹⁵¹ *Reynolds*, 98 U.S. at 162.

¹⁵² *Id.* at 164 (quoting Jefferson’s reply to the Danbury Baptist Association (on or before Dec. 31, 1801)). It was in this context and with this meaning that Jefferson used the phrase “a wall of separation between Church and State.” *See supra* note 103.

and “God” was effectively reiterated in the Court’s second polygamy ruling in 1890,¹⁵³ in which the Court referred to and upheld the First Amendment’s recognition of God, “one’s . . . Creator,” and “his Maker,” while “prohibit[ing] legislation for the support of any religious tenets, or the modes of worship of any sect.”¹⁵⁴

The Court, in a unanimous 1892 opinion, held that the First Amendment, among other controlling ideologies, “affirm[s] and reaffirm[s] that this is a religious nation,”¹⁵⁵ and “contains language which . . . recognizes a profound reverence for religion, and an assumption that its influence in all human affairs is essential to the well-being of the community.”¹⁵⁶ Although the Court recognized that each of the State Constitutions had provisions similar to the First Amendment religion clauses,¹⁵⁷ it held that nothing prohibited the legislature of any State from exercising “power to authorize and require . . . the several towns, parishes, precincts, and other bodies politic or religious societies to make suitable provision . . . for the institution of the public worship of God.”¹⁵⁸

The final unanimous decision rendered by the Court in the nineteenth century, in 1899, upheld as not violative of the Establishment Clause, Congress’s appropriation of funds for construction of a building to be owned and operated by “a monastic order or sisterhood of the Roman Catholic Church.”¹⁵⁹ The Court found nothing unconstitutional in taxpayers’ money financing a hospital “[t]o be conducted under . . . the influence or patronage of that church” as long as its “powers are to be exercised in favor of anyone seeking the ministrations of that kind of an institution.”¹⁶⁰

A final pre-1945 Supreme Court decision on the Religion Clauses involved Oregon’s attempt to enforce its Compulsory Education Act to require all children to attend public schools,¹⁶¹ rather than parochial schools in which, in addition to those “subjects usually pursued in Oregon public schools Systematic religious instruction

¹⁵³ *Davis*, 133 U.S. at 333.

¹⁵⁴ *Id.* at 342.

¹⁵⁵ *Holy Trinity Church*, 143 U.S. at 470 (1892).

¹⁵⁶ *Id.* at 468.

¹⁵⁷ *Id.* at 470.

¹⁵⁸ *Id.* at 469.

¹⁵⁹ *Bradfield v. Roberts*, 175 U.S. 291, 292, 299-300 (1899).

¹⁶⁰ *Id.* at 296-300.

¹⁶¹ *Pierce v. Soc’y of the Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510, 529-30 (1925).

and moral training according to the tenets of the Roman Catholic Church are also regularly provided.”¹⁶² The Supreme Court rejected Oregon’s statute as one that “unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children,”¹⁶³ which included implicitly the parents’ right to engage in free religious exercise teaching of their children, and thus require Government assistance of all religions by arranging for students to be excused from public schools to attend parochial schools.

Hence, every Supreme Court decision, each of which was unanimous, preceding 1945—the year utilized by some more modern day Justices as the commencement of Supreme Court decisions to be considered for *stare decisis* controlling precedent—concluded that the Religion Clauses permitted Government recognition of God and assistance to religions, as long as the assistance was not given in a manner to prefer one religion over the others. It is therefore not surprising that modern-day Justices who attempt to read the contrary into the First Amendment should seek to ignore this large number of Supreme Court rulings, much closer in time to the enactment of the First Amendment that, if considered for *stare decisis* effect, would require total rejection of their God, religion, and State separation view. But ignoring those earlier announced rulings on the Religion Clauses cannot obliterate them to any fair-minded observer or Justice abiding by *stare decisis* obligations.

Ignoring them must be construed as the improper substitution, by some contemporary Justices, of their personal views of what they think the Constitution should say for what the Constitution does say, and was intended to mean. When contemporary Justices do so, they violate the Constitution itself, as defined in the Federalist Papers—recognized as the Bible of the meaning and intent of the Constitution. Judges were not to “substitute their own pleasure to the constitutional intentions” and “[t]o avoid an arbitrary discretion in the courts, it is indispensable that [judges] should be bound down by strict rules *and precedents*.”¹⁶⁴ Moreover, they destroy the *stare decisis* doctrine that, as Justice John Marshall Harlan explained, is an essential component of the rule of law: “It certainly has never been a postulate of judicial power that mere altered disposition, or subsequent membership on

¹⁶² *Id.* at 530-32.

¹⁶³ *Id.* at 534-35.

¹⁶⁴ THE FEDERALIST NO. 78, at 471 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added).

the Court, is sufficient warrant for overturning a deliberately decided rule of Constitutional law.”¹⁶⁵

G. Analyzing the Irrationality of Some More Contemporary Contrary Rulings

Given all the above facts—including the meaning of the Religion Clauses, the words and acts of its authors, how the Clauses were construed by the people who ratified them, Government conduct under them, and the earlier Supreme Court decisions—the error in some contemporary Justices’ holding that absolute separation of God and religion from government is constitutionally required is made obvious.

It is also worthwhile to consider a few examples of the “reasoning” of those Justices. Justice O’Connor, who, while on the Court, swung from one side of the issue to the other, sought to rationalize how it was that “[t]he Court has permitted government, in some instances, to refer to or commemorate religion in public life. . . . [A]lthough these references speak in the language of religious belief, they are more properly understood as employing the idiom for essentially secular purposes.”¹⁶⁶ This is a classic Orwellian doublethink, akin to Orwell’s “war is peace” and “freedom is slavery”: as “secular” is defined as “[d]enoting attitudes, activities, or other things that have no religious or spiritual basis,”¹⁶⁷ an expressed belief in and prayer to God cannot be “essentially secular.” Further, any atheist or Buddhist—non-believers in the Judeo-Christian God—would find it totally religious, as the Court itself has held.¹⁶⁸ Her use of the word “idiom” to attempt to clothe God in a non-religious appearance is, in itself, incomprehensible. An idiom is defined as “an expression that cannot be understood from the meanings of its separate words but that has a separate meaning of its own.”¹⁶⁹ When God—a single

¹⁶⁵ *Mapp v. Ohio*, 367 U.S. 643, 677 (1961) (Harlan, J., dissenting).

¹⁶⁶ *Elk Grove Unified Sch. Dist.*, 542 U.S. at 35 (O’Connor, J., concurring) (internal citations omitted).

¹⁶⁷ *Secular Definition*, OXFORD DICTIONARIES, www.oxforddictionaries.com/us/definition/american_english/secular (last visited Mar. 3, 2015).

¹⁶⁸ *Zorach*, 343 U.S. at 313; *Sch. Dist. of Abington*, 374 U.S. at 213; *Lynch*, 465 U.S. at 675.

¹⁶⁹ *Idiom Definition*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/idiom> (last visited Mar. 3, 2015).

word, not an expression—is prayed to or revered and acknowledged as the Creator, as has been approved by the Court, the meaning of “God” is readily deducible.

Justice O’Connor, in a 2004 Supreme Court case in which a parent challenged the constitutionality of a school district’s policy requiring teacher-led recitation of the Pledge of Allegiance, expressed Orwellian rationalizations stating, “[f]acially religious references can serve . . . the legitimate secular purposes of solemnizing public occasions . . . instead of to invoke divine provenance. The reasonable observer . . . would not perceive these acknowledgements as signifying a government endorsement of . . . religion over nonreligion.”¹⁷⁰

What *reasonable* observer would ignore that asking Americans to join in a prayer to God is anything but a government endorsement of a belief in God, over atheistic beliefs, and thus an endorsement of religion, of which God is generally recognized as a necessary component? And then she employed the label “ceremonial deism.”¹⁷¹ Does she use the word “ceremonial” to mean “meaningless formalism” or “secular”? Either way, she would be insulting all believers in God—most Americans¹⁷²—contrary to the atheists who believe in no God. Another basic fallacy in her Orwellian reasoning is her failure to explain—impossible to do—why inclusion of “God” was necessary “to solemnize public occasions.”¹⁷³ If people did not believe in God, a public occasion could be solemnized without the mention of God; it is because, as the Court has previously declared, “this is a religious nation,” and that “we are a religious people,”¹⁷⁴ and that Presidents, Congress, and the Supreme Court regularly seek the help of God.

Beyond ignoring all earlier relevant precedents, the currently existing confusion on the Religion Clauses is underlined by the more recent Justices’ difficulty in reaching agreement among themselves.

¹⁷⁰ *Elk Grove Unified Sch. Dist.*, 542 U.S. at 36.

¹⁷¹ *Id.* at 37.

¹⁷² See Susan Jones, *Poll: Americans’ Belief in God Is Strong—But Declining*, CNSNEWS.COM (Dec. 17, 2013, 10:50 AM), <http://cnsnews.com/news/article/susan-jones/poll-americans-belief-god-strong-declining> (noting that 74% of adult Americans believe in God); see also Larry Shannon-Missal, *Americans’ Belief in God, Miracles and Heaven Declines*, HARRIS POLL (Dec. 16, 2013), <http://www.harrisinteractive.com/NewsRoom/HarrisPolls/tabid/447/ctl/ReadCustom%20Default/mid/1508/ArticleId/1353/Default.aspx>.

¹⁷³ *Elk Grove Unified Sch. Dist.*, 542 U.S. at 36.

¹⁷⁴ E.g., *Holy Trinity Church*, 143 U.S. at 470; *Sch. Dist. of Abington*, 374 U.S. at 213 (citing *Zorach*, 343 U.S. at 313).

During the past approximately 50 years, they have issued at least ten major opinions on the Religion Clauses in which they split 5-4. Those 5-4 decisions are epitomized by a single 107-page decision that contained eight separate opinions, attempting to explain the result of a 5-4 ruling and holding unconstitutional the display of a crèche, while splitting 6-3 and holding constitutional the display of a Menorah.¹⁷⁵ The existence of this split—and add the fact that the lower court judges split 2-2—demonstrates the Court’s inability even to reach a meaningful consensus on the Religion Clauses. This split also belies the test offered by Justice Harry Blackmun, after concurring to make a five-Justice vote, that constitutionality must be based on “the standard of a ‘reasonable observer.’”¹⁷⁶ It seems impossible for nine Justices to determine how a “reasonable observer” would view the display as pro-religion or pro-secular, when these intelligent, knowledgeable judges are almost evenly split. Who is to call unreasonable, either the five or the four Justices—some often changing sides of that split? Indeed, at least six of the Justices recognized this impossibility of finding reasonableness when they traded charges that both sides were “using little more than intuition and a tape measure” to reach their respective conclusions.¹⁷⁷

The worst impact of the Court’s reliance on such evaluative measures as “the reasonable observer” is that, as Justice Ginsburg recently commented in another “free exercise” decision, there is “[n]ot much help there for the lower courts bound by today’s decision.”¹⁷⁸

Both sides of the issue utter assertions for their respective positions, often devoid of reason or reality. For example, in a 1983 ruling holding constitutional the Nebraska Legislature’s practice of opening each day with a prayer by a chaplain paid for by the State, the majority asserted, apparently resting on its own say-so: “To invoke Divine guidance on a public body entrusted with making the laws is . . . simply a tolerable acknowledgment of beliefs widely held among the people of this country.”¹⁷⁹ Given the number of atheists (and others who do not believe in God) who have commenced lawsuits to prevent such prayers to God, this Court’s assertion simply ig-

¹⁷⁵ *Cnty. of Allegheny*, 492 U.S. at 578-79.

¹⁷⁶ *Id.* at 620.

¹⁷⁷ *Id.* at 608.

¹⁷⁸ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2805 (2014) (Ginsburg, J., dissenting).

¹⁷⁹ *Marsh*, 463 U.S. at 792.

nores reality. Atheists and other non-believers do not consider such practices to be a tolerable rejection of their beliefs. I hasten to note, however, that their objection should not carry the day, as such recognition of God is consistent with the Religion Clauses' words and intent; it is simply unfortunate that some Justices refuse to base their decisions on that unimpeachable basis.

The dissent in that case was no better, basing its position on the conclusory assertion that the "First Amendment mandates governmental neutrality between . . . religion and nonreligion,"¹⁸⁰ without any attempt to reconcile that assertion with the over 200 years of recognition of thanks and prayers to God by every branch of Government, including their own, which they hear opening every Court session day.

In *Lee v. Weisman*,¹⁸¹ a five-Justice majority held unconstitutional a non-sectarian short invocation and short benediction by a Rabbi at a public school graduation.¹⁸² In so doing, the five Justices held that the Establishment Clause obliterated rights of individuals under the Free Exercise Clause. That majority recognized that the student body and their parents clashed on the desirability of these opening and closing prayers to God. "[M]any of [Plaintiff's] classmates" sought to invoke the free exercise clause for what they considered to be "a spiritual imperative," while the two non-believing plaintiffs asserted that it forced them into "religious conformity," in violation of the Establishment Clause.¹⁸³ Without attempting to recognize and reconcile these co-equal provisions of the First Amendment, this Court majority simply eradicated the Free Exercise rights of the great majority of students, supposedly to protect against a violation of the Establishment Clause rights of these two plaintiffs.¹⁸⁴

The only way to give effect to both Clauses is to recognize the Establishment Clause as its authors understood it: to prevent establishment of a government religion, while not preventing people from speaking freely, in all contexts, of their faith, and certainly not to prevent homage to God—as this Rabbi's prayers were limited. This

¹⁸⁰ *Id.* at 802 (Brennan, J., dissenting) (citing *Epperson v. Arkansas*, 393 U.S. 97, 103-04 (1968)).

¹⁸¹ 505 U.S. 577 (1992).

¹⁸² *Id.* at 599.

¹⁸³ *Id.* at 595-96.

¹⁸⁴ *Sch. Dist. of Abington*, 374 U.S. at 312 (Stewart, J., dissenting) (declaring that there is "a substantial free exercise claim on the part of those who affirmatively desire to have their children's school day open with the reading of passages from the Bible").

restriction was contrary to the meaning of the Free Exercise clause, recently well-defined by Justice Anthony Kennedy as “implicat[ing] more than just freedom of belief. It means, too, the right to express those beliefs and to establish one’s religious (or nonreligious) self-definition in the political, civic, and economic life of our larger community.”¹⁸⁵ That “civic life” and “larger community” include events in school.

The Free Exercise Clause was carefully written to be symmetrical to the immediately following clause against any law “abridging the freedom of speech.” They should be Court-treated in the same manner, consistent with the Court’s declaration that each “of the great liberties insured by the First Article” must be equally enforced, with none “given higher place than the others.”¹⁸⁶ It is axiomatic that, if a person is called upon to speak, the First Amendment bars Government interference with that free speech. That freedom to speak may not be barred even when the speaker was to speak on a subject that might make some of the audience uncomfortable, or even that some might find offensive—and that includes all subjects, including God, religion, and abortion, a subject having religious and emotional impact. The Court has many times made clear that the right to express one’s views must be protected over offense to and dislike by others.¹⁸⁷ The First Amendment right to the “free exercise” of religion deserves similar treatment.¹⁸⁸

The First Amendment protects students in school as well.¹⁸⁹ The Equal Access Act prohibits a “public secondary school” from taking action “against [any] students who wish to” talk about “religious, political, philosophical, or other content” to other students.¹⁹⁰ If a school is so prohibited from interfering with a student’s right to talk about religious subjects by statute, *a fortiori* the First Amendment protection of freedom of speech must likewise have that effect, particularly given that “religious worship and discussion . . . are forms of speech and association protected by the First Amend-

¹⁸⁵ *Burwell*, 134 S. Ct. at 2785 (Kennedy, J., concurring) (citation omitted).

¹⁸⁶ *Wallace*, 472 U.S. at 50 n.35 (1985) (quoting *Prince v. Massachusetts*, 321 U.S. 158, 164 (1944)).

¹⁸⁷ *E.g.*, *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515-17 (1939); *accord Tinker*, 393 U.S. at 509.

¹⁸⁸ *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 302 (quoting with approval *Bd. of Educ. of Westside Cmty Schs. v. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion)).

¹⁸⁹ *Tinker*, 393 U.S. at 506.

¹⁹⁰ *Mergens*, 496 U.S. at 235 (quoting 20 U.S.C. §§ 4071(a) and (b)(1984)).

ment.”¹⁹¹ Thus, if a State refused to allow a student to speak on religion when she is authorized to speak on her choice of subjects, “then it would demonstrate not neutrality but hostility toward religion.”¹⁹²

The Court’s 2000 decision barring students from voting (by secret ballot) to determine if they want to have a non-sectarian prayer at a football game, and, if so, democratically choosing the student speaker, is illogical and impractical; the ruling would not prevent the valedictorian at the school graduation, or even a student allowed to speak at a football game, from exercising her First Amendment free speech right to announce that she has been forbidden to voice a prayer, and therefore will not, but then proceeds to explain why this decision was wrong, and encourages everyone quietly to search their collective conscience about the matter . . . for a few seconds. Realistically, that would provoke prayers from many students for a change of ruling to allow them to return to God.

Justice John Paul Stevens, a strong supporter of the absolute separation construction of the Establishment Clause, also typified the illogic of that position. According to him, “when public officials deliver public speeches, we recognize that their words are not exclusively a transmission from *the* government . . . [but are] the inherently personal views of the speaker as an individual.”¹⁹³ Most amazing is Justice Stevens’ assertion that a recognition of and request to all Americans to join in a prayer to God are treated as “personal” not Government, views, even when voiced by the President or other top Government officials, as thus permitted by his view of the Establishment Clause, while a student-given invocation at a football game or a Rabbi-led invocation at a graduation must be construed to represent the Government speaking, and are thus prohibited. I suggest that most reasonable observers would more likely look upon the President as speaking for the Government, and that an individual student or an individual Rabbi is not, but rather expressing personal views. But this convoluted reasoning is essential to many Justices’ crusade to apply the First Amendment as freeing America *from* religion.

¹⁹¹ *Widmar v. Vincent*, 454 U.S. 263, 269 (1981).

¹⁹² *Mergens*, 496 U.S. at 248.

¹⁹³ *Van Orden*, 545 U.S. at 723 (Stevens, J., dissenting).

IV. CONCLUSION

This analysis demonstrates that the Court—most often by a slim 5-4 vote—has departed from what the authors of the First Amendment intended in enacting the Religion Clauses, leaving, as Justice Thomas’ concluded, “our Establishment Clause . . . is in hopeless disarray.”¹⁹⁴ We should now, as Justice Thomas recommended, “begin the process of rethinking the Establishment Clause”¹⁹⁵ to, I would add, return jurisprudence on both Religion Clauses to their original meaning as understood by their authors and those who ratified them: guaranteeing freedom *of* religion.

¹⁹⁴ *Rosenberger*, 515 U.S. at 861 (Thomas, J., concurring).

¹⁹⁵ *Elk Grove Unified Sch. Dist.*, 542 U.S. at 45 (Thomas, J., concurring).