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# INTERPRETING THE FIRST AMENDMENT: HAS IDEOLOGY TRIUMPHED OVER HISTORY

*Thomas Curry\**

My presence here today can probably be attributed to the recent publication of my book entitled *Farewell to Christendom*.<sup>1</sup> Why Christendom? One reason is that it sounded provocative—a not unimportant consideration for any author. However, my principal reason for using the term Christendom is that it provides a basis to compare and contrast the church-state system we celebrate as one of the great achievements of the American experience.

What do I mean by Christendom? For me, the term refers to a system whereby Christianity, whether in a Catholic, Protestant, or Orthodox form, cooperates with the secular power to provide an overall view of and direction for both state and society. Christendom is a phenomenon that came into existence in 313 A.D., after the Emperor Constantine legalized Christianity in the Edict of Milan and was limited to those countries where Christianity dominated the religious and cultural lives of the people.<sup>2</sup> Christendom is not to be confused with Christianity per se; there were many Christians before the time of Constantine, but we do not refer to them as belonging to Christendom. There have always been Christians in the Moslem world, but we would not refer to those Islamic countries as being part of Christendom.

Christendom is largely associated with the past—particularly with Medieval Europe. However, as I will discuss with you today, some of its concepts are still very much in evidence, and some remnants of the system are still in practice.

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1. See generally THOMAS J. CURRY, *FAREWELL TO CHRISTENDOM: THE FUTURE OF CHURCH AND STATE IN AMERICA* (2001).

2. For more information on Christendom, see PETER ROBERT LAMONT BROWN, *THE RISE OF WESTERN CHRISTENDOM: TRIUMPH AND DIVERSITY* (1996). For more information on the Middle Ages, see NORMAN F. CANTOR, *THE CIVILIZATION OF THE MIDDLE AGES* (Harper Perenn ed. 1994).

I believe there is a tendency to think of Christendom as involving a union of church and state as contrasted with our present system, which is often defined as the separation of church and state, but this is not something I wish to advance; nor do I believe it to be true. In the Roman Empire, church and state were united, the Emperor was head of both and was, in some instances, declared as god.<sup>3</sup> Christians encountered trouble precisely because they insisted on a separation between the legitimate sphere of the Emperor and that which belonged to God.<sup>4</sup> Constantine legitimated that argument by recognizing that the secular and the sacred spheres were separate and distinct from each other.<sup>5</sup> Neither one had power over the other. Christians were bound to obey the secular ruler in secular matters, but not in matters of religion.

Jesus had told his critics to render to Caesar that which belonged to Caesar and to God that which belonged to God.<sup>6</sup> The Constantinian settlement was, in fact, intended to accomplish that goal.<sup>7</sup> But what had looked good on parchment proved difficult to implement when it came to determining specifically what belonged to Caesar and what was reserved to God. In disputed instances, who would decide? Who would have the final word? That was the issue that would plague Christendom, and I will argue that the same issue lies at the root of the confusion that dominates church-state thinking in America today.

Let me provide a thumbnail sketch of Christendom. It was an ideological system, by which I mean it was all-embracing, a system that embraced peoples' lives both as members of a state and members of society.<sup>8</sup> It required—with some exceptions—adherence to both sacred and secular powers. If one was born a member of Christendom—a Christian—one was not at liberty to dispense with adherence to that religion. Being a member of civil society also involved one as a member of a religious society, with all the religious and cultural implications of both societies. The Protestant Reformation did not immediately change that, even though it divided the western world into

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3. 1 EDWARD GIBBON, *THE HISTORY OF THE DECLINE AND FALL OF THE ROMAN EMPIRE* § 1:75 (J.B. Bury ed., AMS Press 1974) (1909).

4. Hubert Jedin, *Introduction to 1 HISTORY OF THE CHURCH* §§ 1:125-137 (Hubert Jedin & John Dolan eds., 1980).

5. ROLAND H. BAINTON, *EARLY CHRISTIANITY 159-63* (1960).

6. *Matthew* 22:21.

7. BAINTON, *supra* note 5, at 159-63.

8. *See generally* CANTOR, *supra* note 2.

Catholic and Protestant parts. The dictum *cuius regio eius religio* continued to dominate religion in the years after the Reformation.<sup>9</sup>

I describe Christendom as ideological, but by that I do not mean it was totalitarian. It was indeed an all-embracing system, but total power was not combined in one authority, as it was in the case of the Roman Empire. Rather, it was divided between two frequently competing, conflicting, and mutually suspicious spheres—the sacred and the secular. Indeed, some of the religious authorities, bishops and popes, were secular rulers as well. However, other secular rulers generally claimed authority over the religious authorities in the secular sphere and, to some extent, even in the religious sphere. In Christendom, no single power exercised total control, but, at least in theory, both powers in cooperation with each other controlled the totality of peoples' lives.

In practice, both spheres engaged in conflicts with each other with depressing regularity. Popes deposed Emperors, and Emperors deposed Popes. The boundary between the two authorities, what many in our society refer to as the wall between church and state, was in constant dispute. Christendom never succeeded in solving this problem.

The Protestant Reformation did not resolve this dispute, but it did have a major impact on it; because in a religiously polarized world, if Protestants and Catholics were to survive, they had to rely on the backing of sympathetic rulers. As a result, the influence of secular rulers tended to increase, which led to fewer conflicts with the religious power.

Let me now fast-forward from Christendom to America in 1789, the year the United States Constitution was implemented. The framers of the Constitution abandoned Christendom not because they separated church and state, but because they abandoned the effort to do precisely that. They abandoned what I have described as an ideological approach, belief in a system that embraced all of peoples' lives.

Instead, the framers adopted a contractual concept of government. For the common good, people surrendered certain rights they possessed to government, and government received only those rights given it by the people. Thus, the new government was one of specified and limited powers. It was limited to what was secular, but not in charge of all things secular. Its power extended only to those parts of

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9. 5 ERWIN ISERLON ET AL., *HISTORY OF THE CHURCH* 297 (Anselm Biggs & Peter W. Becker trans., Hubert Jedin & John Dolan eds., 1980).

the secular world that were enumerated and specified in the Constitution.

The framers determined that belief lay outside the powers delegated to government. First of all, by prohibiting test oaths, they forbade the new government to enforce any belief system, be it religious or secular. As an American, one is not required to adhere to any belief, not even to the belief in the sacredness or righteousness of the Constitution itself.

This is something the United States Supreme Court affirmed and clarified in the famous second flag salute case of 1943.<sup>10</sup> The Court decided that people could not be required to salute the United States flag because such a requirement would violate the realm of "intellect and spirit."<sup>11</sup> Similarly, in America no thought or attitude constitutes treason against the United States. Imagining the "death of the ruler" is not treasonous as "imagining the death of the king" was in English law. Rather, according to the Constitution, treason is an "overt act" that involves "levying war against them, [the United States] or in adhering to their enemies, giving them aid and comfort."<sup>12</sup> Even activity must be verified by the "testimony of two witnesses."<sup>13</sup> One can believe, as some nineteenth century abolitionists did, that the Constitution is a compact with the devil and still be a good and loyal American.<sup>14</sup>

America forsook ideology—an overarching system that embraced all aspects of life—and solved the problem of the division between church and state, of what belonged to Caesar and what belonged to God, by refusing to address it. Instead, it opted for a limited government with power over specified parts of the secular world and left the church to define itself. The state had its own legitimate sphere. All people and institutions, including the churches, are subject to such legitimate secular authority; but apart from that, they are free to define themselves—unless, as Thomas Jefferson wrote, "principles break out into overt actions against peace and good order."<sup>15</sup> However, although churches can define themselves, what they cannot do is rely on or use the jurisdiction of the state to implement religious beliefs or practices.

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10. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

11. *Id.* at 642.

12. U.S. CONST. art. III, § 3.

13. *Id.*

14. GEORGE M. FREDRICKSON, WILLIAM LLOYD GARRISON (1968).

15. 1 VIRGINIA STATUTE OF RELIGIOUS LIBERTY, DOCUMENTS OF AMERICAN HISTORY § 1:126 (Henry Steele Commager ed., 1973).

When the Constitution was presented to the states for ratification, sufficient numbers of citizens throughout the new nation were dissatisfied by the absence of a specific guarantee as to the new federal government's limitations to warrant a movement for a Bill of Rights.<sup>16</sup> Although everyone agreed that the federal government had no jurisdiction in religion, sufficient numbers of people demanded a specific statement that the people retained some fundamental rights—including the right to religious liberty.<sup>17</sup> As the Tenth Amendment makes clear, the government is a limited one of specified powers: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."<sup>18</sup> The Ninth Amendment also recognizes that while the people demanded the listing of certain rights retained by them, including the right to religious liberty, that list is not exhaustive: "The enumeration in the Constitution, of certain rights, [i.e., rights not given to government] shall not be construed to deny or disparage others retained by the people."<sup>19</sup> The free exercise of religion is one of those enumerated rights.<sup>20</sup>

Thus, the amendments contained in the Bill of Rights—particularly the First Amendment—are essentially different from subsequent amendments to the Constitution. In a certain sense, they are not amendments at all. Amendments change or alter the original Constitution. The Fourteenth Amendment greatly altered the power of the federal government with regard to the states.<sup>21</sup> The Sixteenth Amendment greatly changed and enhanced the taxing power of the federal government.<sup>22</sup>

The First Amendment, however, did not alter the Constitution. It changed nothing. It simply specified an existing reality—that religious liberty was a natural right retained by the people and that the new government had no jurisdiction over it. It begins with, "Congress shall make no law . . ." <sup>23</sup> Because it prohibited the use of a power that had not been given, it had no substantive content. It was jurisdictional in the sense that it denied jurisdiction. It was enacted to reassure the people of the government's understanding that religious liberty was a

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16. LEONARD WILLIAMS LEVY, *No Establishment of Religion: The Original Understanding, in JUDGMENTS: ESSAYS ON AMERICAN CONSTITUTIONAL HISTORY* 169, 173 (1972).

17. *Id.* at 173-79.

18. U.S. CONST. amend. X.

19. *Id.* amend. IX.

20. *Id.* amend. I.

21. *Id.* amend. XIV.

22. *Id.* amend. XVI.

23. *Id.* amend. I.

natural right reserved to them. Therefore, defining the substance or the meaning, of religious liberty—or religious coercion—is something retained by the people.

The historical background I have described—what America in 1789 accepted and rejected with regard to religious liberty—is scarcely evident today. My perception is that people generally assume the First Amendment *created* the right to religious liberty. They tend to see that liberty as a government guarantee, and to view the courts—particularly the Supreme Court—as the guarantors and vindicators of this fundamental American right.

Certainly that is how the courts themselves see the First Amendment. The Supreme Court has given it a very definite substantive content. It has divided the First Amendment into two “Clauses”—the Free Exercise Clause and the Establishment Clause—each with its own separate purpose and function, which the Court has defined as follows:

Although these two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom. The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not.<sup>24</sup>

In that pronouncement, the Court adopted a “common sense” definition of the free exercise of religion, instead of the historical one associated with the First Amendment. It seems “sensible” to assume that the Free Exercise of religion means that people are at liberty to practice their religion of choice, free from government coercion. As Justice Antonin Scalia declared in 1990: “[F]ree exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires.”<sup>25</sup> I take issue with that statement.

The right to believe and profess is a natural right, one not surrendered to government. The Free Exercise Clause of the First Amendment is a guarantee that government will not interfere with that natural right. First and foremost, it is a restraint on government. This whole relationship has now been reversed and those the Amendment was enacted to protect the people from have instead become the protectors. The First Amendment is seen as creating a right!

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24. *Engel v. Vitale*, 370 U.S. 421, 430 (1962); *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 221 (1963).

25. *Employment Div., Dep’t of Human Res. v. Smith*, 494 U.S. 872, 877 (1990).

Historically, however, free exercise meant something different. The right to practice or not to practice religion was considered a natural right, intrinsic to one's birthright. The freedom guaranteed by the First Amendment was freedom from government interference with that natural right. In the view of the First Amendment, the threat to religious liberty comes from government and it is a protection against government. In the view of the Court, the Justices are the ones who will decide what constitutes religious liberty or religious coercion. But the Amendment was enacted to protect people from government, including judges. Thus, the very act of deciding that something violates religious liberty, that some act constitutes religious coercion, is a violation of the First Amendment in that it involves the Court in a judgment about a religious matter.

The Constitution gives the government power and jurisdiction only within the secular world. Judges can say what is within the scope of government, but they are rendered incompetent to go beyond that and say what constitutes religious coercion. That determination is reserved to the free exercise of the people. As a religious leader, I may have opinions on the technical merits of particle accelerators—I do not—or on hydrogen cells for cars—I approve. However, as a religious leader, such matters are beyond the scope of my authority. Similarly, what constitutes religious coercion is beyond the scope of judges. Judges are not neutral in religious matters; they are removed from the discussion altogether.

The disparity between the First Amendment as enacted and as it is interpreted today is the difference between seeing freedom as an autonomous sphere free from entry or interference and seeing freedom as a condition guaranteed by one who comes into my sphere and proclaims that he will protect me.

Of course, the First Amendment is a guarantee against religious coercion, against an official religion. What is at stake here is how that guarantee works. According to the Constitution, if government confines itself to its assigned powers, there will be no official religion, because one cannot have an official religion without government jurisdiction in religion, and the Constitution assigns it none. Will there be religious coercion? Probably, if one defines the free exercise of religion in a way that conflicts with legitimate government jurisdiction, one will probably experience religious oppression. If my religion mandates me to pay no taxes to government, to have plural wives, to drive on the left-hand side, then I am going to experience coercion. This is something the Court deals with poorly, and I will come back to this point shortly. But because judges see themselves as in charge, defin-

ing the substance of religious liberty, of protecting people from religious coercion, they have to do a great deal of rationalizing. My point here is that judges can determine what is within their legitimate authority. People may define some exercise of that legitimate authority as religiously coercive, but judges may not.

The most grievous flight from the meaning of the First Amendment occurred in 1947, when Justice Hugo Black, writing for the Supreme Court, decided to give content to the “Establishment Clause”<sup>26</sup> and declared that the “Clause” erected, in the words of Thomas Jefferson’s metaphor, “a wall of separation between Church and State.”<sup>27</sup> Following that metaphor leads one away from one of the great achievements of the American founders and back to an acceptance of ideology and the problem that plagued Christendom. As we have seen, the United States was founded as a government limited to specified powers but the people retained freedom to determine and define the rest. The wall metaphor, however, conjures up an all-embracing system involving church and state, and confers on the government power to define the boundary between the two. This is an ideological system. It addresses every aspect of human life and decides whether it belongs in the sphere of the church or the sphere of the state. It returns to the problem of Christendom, to determining what belongs to Caesar and what belongs to God. Moreover, in Thomas Jefferson’s letter from which the metaphor is taken, he bases his interpretation of the First Amendment on a very definite and particular definition of religion.<sup>28</sup> He stated his belief: “religion is a matter which lies solely between man and his God.”<sup>29</sup> Of course, the Court does not declare what belongs to God. It does not claim control over the church, but it does claim power to determine its nature, location, and sphere.<sup>30</sup>

Chief Justice John Marshall famously declared that the “unlimited power to tax involves, necessarily, a power to destroy.”<sup>31</sup> That may or may not be true, but the power to define is certainly the power to control.

This is what I call the ideology of America—the idea that the government is in charge of a system embracing our lives—that it sees it-

26. U.S. CONST. amend. I.

27. *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947) (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)).

28. See *supra* note 6 and accompanying text.

29. 1 ANSON PHELPS STOKES, *CHURCH AND STATE IN THE UNITED STATES* § 1:335 (1950).

30. Philip Hamburger’s book, *Separation of Church and State*, provides a wonderful historical overview of this subject and a profound insight into the role it has played in American history. See PHILIP HAMBURGER, *SEPARATION OF CHURCH AND STATE* (2002).

31. *McCullough v. Maryland*, 17 U.S. (4 Wheat) 316, 327 (1819).

self as endowed with authority to draw a major dividing line between the church and the state, between the sacred and the secular, and has drawn the Court away from the American exceptionalism embodied in the Constitution. The result has been to make the church, rather than the state, the focus of judicial attention. Because the metaphor of the wall leads the Justices to the conclusion that they are not only to define the sphere of the church, but are responsible for seeing to it that, within that sphere, people experience the free exercise of religion, they have involved themselves in religion to an extraordinary degree.

What I am speaking about is the theory that surrounds the Court's decisions. It hardly matches the practice of the Court at all. That disparity between theory and practice is the source of the confusion that has progressively engulfed discussion of church and state for more than fifty years. The concept of the First Amendment as endowing the government with power to create a wall of separation between church and state has proven unworkable. First of all, no one knows what it means. It can neither be described nor defined for America. Even the Justices who approved its use in 1947 divided bitterly over the application of the metaphor to the case at hand.<sup>32</sup>

In practice, the actual metaphor has been abandoned; but the ideology, the approach to state and the society it represents, has not. The Court has continued to see itself not as a body discussing, clarifying, and determining the limited secular power of the government, but as a body whose duty it is to evaluate religious issues and decide on and arrange the proper relationship between the church and the state. In order to do so, it has to involve itself deeply in religious issues.

In the 1947 *Everson v. Board of Education*<sup>33</sup> case, in which the Court equated the First Amendment with the wall of separation, it decided that whether a law aided religion would be the standard for judgment.<sup>34</sup> It later elaborated that decision into a rule that the "principal or primary effect [of a statute] must be one that neither advances nor inhibits religion."<sup>35</sup> Thus, the Court made itself into an expert on religion—it knows better than I do what advances or hinders Catholicism! The object of these rules and approaches is entirely religious. They put the Court in the position of appointing secular judges to evaluate the effects of laws on the church and religion. In theory, at

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32. *Everson*, 330 U.S. 1 (5-4 decision).

33. *Id.*

34. *Id.* at 15.

35. *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971).

least, the Court may review every law according to a religious standard—whether it helps or hinders the spread of religion.

What aids or impedes religion is definitely a religious matter, the right to determine whether something aids or impedes religion is reserved to the people and forbidden to the government by the First Amendment. Religion is a country American government may not visit, and matters pertaining to religion are completely beyond its ken.

One might ask, however: “How can government determine the free exercise of religion or avoid an establishment of religion if it cannot describe or define those terms?” My answer is that this very question is premised on the belief that the terms have content in the context of the First Amendment, that the presumption is that they are government responsibilities. In fact, the opposite is true. Within the scope of the First Amendment, free exercise is achieved when government absents itself completely from the subject. How does it absent itself from what it cannot define? By limiting itself to the secular authority delegated to it. The original framers did not want to mention religion because the government had nothing to do with it. The terms used in the First Amendment are in the Constitution now only as an explicit warning to government of that understanding of the framers.

Yet, because they have involved themselves so deeply in religious matters, the Justices must continue to embed themselves more deeply in confusion. If they are to judge what aids or impedes religion, then they have to be neutral about religion. “Neutral” is the term that, perhaps more than any other, dominates decisions at the present time. The word (or its derivative) appears seventy times in the recent *Zelman v. Simmons-Harris*<sup>36</sup> decision concerning school vouchers in Cleveland, Ohio.<sup>37</sup>

The “neutral” concept is absurd on its face. In a country with such a range of churches, beliefs, and religious practices, virtually every law will be seen by some people some place as having an impact on their belief and practice, as aiding or hindering them. However, because the Court has returned to what I refer to as an ideology, an all-embracing system for our society, it has immersed itself hopelessly in religion. If it sees America as divided between church and state, between the secular and the religious, and itself as defining the proper spheres of political and religious activity, it has taken on an impossible role.

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36. 536 U.S. 639 (2002).

37. *Id.*

First of all, life cannot be divided so definitely or neatly between church and state. Many churches aim to be all-embracing, to influence people in every aspect of their lives, and to encourage them to bring their religious attitudes and values to their everyday lives. For example, a person working in a government social program could see that work as a “living out” of his or her religious vocation—an extension of his or her church membership. We cannot draw lines or build walls through peoples’ lives.

For example, the existence of religious or parochial schools flies in the face of the notion of the separation of church and state. In setting up religious schools, the church engages in a religious activity, one that it sees as an essential part of its mission and one that is thoroughly religious. For its part, the state accepts this activity as secular, as performing a public service and fulfilling a mandated state requirement—the education of children. This can happen because the government does not impose a theology—a way of thinking. As distinct from countries that do impose a theology or ideology, America does not impose a belief system on education. America looks for overt acts—the ability to read and write—and whether students acquire that ability by studying religious materials or nonreligious materials is immaterial to the state.

Because the Justices see themselves as administrators of the ideological system they have adopted, as separating church and state into their respective spheres, as providing and defending the free exercise of religion, and as neutral arbitrators to ensure that government neither aids nor hinders religion, they have assigned themselves problems as great as those that faced Christendom.

In order to administer this all-embracing system it has created, the Court has had to assume enormous authority in religious matters. For example, when a family claimed that providing Social Security numbers for its children would violate its religious beliefs, the Supreme Court declared that the “statutory requirement that applicants provide a Social Security number is wholly neutral in religious terms.”<sup>38</sup> In other words, the Court knew better than the believers what they believed.

The Court has to resort to such rationalization because it has led itself into such a bind. It sees itself as providing and defending the free exercise of religion. Yet if government is to work, it cannot allow believers to pick and choose what laws they are going to ignore because to obey them would violate their free exercise of religion. So

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38. *Bowen v. Roy*, 476 U.S. 693, 703 (1986).

the Court takes it upon itself to decide that such laws are religiously neutral and therefore do not violate anyone's free exercise of religion.

So what should the Court do? It should begin with the jurisdiction given to government, if the Court finds that a law is within the limited and specified jurisdiction of government, then it is a valid law. There is probably hardly any legislation that will not impinge on someone's free exercise of religion. However, when the government is exercising its own proper authority, it is confining itself to its proper sphere and is not, according to the First Amendment, legislating in religious matters, because it is incapable of determining what constitutes a religious matter.

The same approach applies to faith-based initiatives. Government may contract with religious groups for the performance of secular functions, for example, caring for addicts and sheltering and feeding the homeless. The questions the Court needs to ask are, "Will this contract bring the government into situations and conflicts that a secular judge may not adjudicate?" and "Will it involve the government in sponsoring or evaluating the permissibility of religious symbols, or the recitation of prayers, or other involvements beyond the scope of courts to judge?" The focus of the Court must be on the limited jurisdiction of government. When government confines itself to that limited jurisdiction, the people enjoy the free exercise of religion within the meaning of the Constitution and the First Amendment.

This focus on the limited role of government, the understanding that the First Amendment is intended to protect us from government interference—not to confer power on government to supposedly guarantee our free exercise of religion—has been overwhelmed by the ideology that has invaded the Court. I will use two recent cases to further illustrate that ideology.

In 2000, in *Santa Fe Independent School District v. Doe*,<sup>39</sup> the Supreme Court refused to sanction student-led prayers.<sup>40</sup> The regulations surrounding the prayers involved provisions that they be "nonsectarian, nonproselytizing,"<sup>41</sup> and that "references to particular figures, such as Mohammed, Jesus, Buddha, or the like would be permitted 'as long as the general thrust of the prayer is non-proselytizing.'"<sup>42</sup> Justice John Paul Stevens wrote the opinion for the Court striking down the practice.<sup>43</sup> Clearly, the practice would involve gov-

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

40. *Id.*

41. *Id.* at 294.

42. *Id.* at 296.

43. *Id.* at 294.

ernment in the exercise of jurisdiction beyond its competence, in evaluating religious questions as to what is “nonsectarian, nonproseletyzing,” and how one is to present religious figures in such a way.

The following year, in *Good News Club v. Milford*,<sup>44</sup> the Supreme Court held that a school district in New York violated the right of a Christian group to participate in the use of a school that had been opened to other community groups for after-school activity.<sup>45</sup> Justice Stevens dissented, and in his dissent, distinguished three types of religious speech:

Speech for religious purposes may reasonably be understood to encompass three different categories. First, there is religious speech that is simply speech about a particular topic from a religious point of view . . . . Second, there is religious speech that amounts to worship, or its equivalent . . . . Third, there is an intermediate category that is aimed principally at proselytizing or inculcating belief in a particular religious faith.<sup>46</sup>

Ironically, the very Justice who wrote the opinion refusing to allow a school district to sponsor supposedly nonproselytizing student-led prayers set himself up as a religious expert, able to determine what prayer is proselytizing and even what prayers amount to worship. One could hardly imagine a greater claim to religious jurisdiction by government.

I believe the Court decided correctly in both instances. It refused jurisdiction to government agencies in each case—to impose a majoritarian, supposedly “nonsectarian,” prayer on Catholic and Mormon parents using government authority in the first case, or to use government authority to single out and prohibit the free exercise of religion by individuals in the second.

However, the dissenters in both cases illustrate the extent to which ideology has overwhelmed church-state thinking. Dissenters in the first case represent those who would go back to a form of Christendom—a total system of government, religion, and culture. They would promote a supposedly noncoercive, nonsectarian religion to “solemnize” events to promote public morality and decorum. The Court would sit in judgment as to whether the religion involved was coercive and whether peoples’ free exercise was being violated.

The dissenters in the second case adhere to a somewhat different ideology—one that would embrace state and society. They would see

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44. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001).

45. *Id.*

46. *Id.* at 130-35.

government not just as limited to a part of the secular world, but endowed with power to make the sphere of the state secular—even as far as the behavior of individuals was concerned. They view their role as defining and controlling religion and assigning it to the sphere designated by the state where it may be free. They see themselves in charge of analyzing, categorizing, and controlling religious activity. They would forbid not just state-sponsored religion but would prohibit all religion, even that religion engaged in voluntarily by individuals and within the realm and reach of the state.

These two ideologies feed off each other and fortify each other by mutual fear—that one will restore Christendom with an official religion, or that the other will use the power of government to sweep public life free of all expression of religion and impose a regime of secularism. They masquerade under metaphors that are indefinable: the “wall of separation” or the “naked public square.” Schools are often battlegrounds wherein one party is trying to impose on children the religion it thinks will be good for them, and the other is trying to save the children from the religion it thinks will be bad for them.

Fortunately, the free exercise of religion has been saved by a third group of pragmatists on the Court. They cannot give a reason for their decisions because they, too, have bought into the ideology that endows the Courts with power in religion—to determine what aids and hinders religion, what is religious coercion, what is neutral in religion, and that the First Amendment created religious liberty. However, in practice, they refuse to follow the logic of the ideology that has overwhelmed the court.

I would like to illustrate this confusion by reading the syllabus of the decision in the 1989 case *County of Allegheny v. ACLU*<sup>47</sup> dealing with the issue of displaying a crèche and a menorah on public property in Pittsburgh:

BLACKMUN, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts III-A, IV, and V, in which BRENNAN, MARSHALL, STEVENS, and O'CONNOR, JJ., joined, an opinion with respect to Parts I and II, in which STEVENS and O'CONNOR, JJ., joined, an opinion with respect to Part III-B, in which STEVENS, J., joined, an opinion with respect to Part VII, in which O'CONNOR, J., joined, and an opinion with respect to Part VI. O'CONNOR, J., filed an opinion concurring in part and concurring in the judgment, in Part II of which BRENNAN and STEVENS, JJ., joined. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL and STEVENS, JJ., joined. STEVENS, J., filed an opinion concur-

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47. 492 U.S. 573 (1989).

ring in part and dissenting in part, in which BRENNAN and MARSHALL, JJ., joined. KENNEDY, J., filed an opinion concurring in the judgment in part and dissenting in part, in which REHNQUIST, C. J., and WHITE and SCALIA, JJ., joined.<sup>48</sup>

If the Court is to connect its decisions with a reasoned, believable explanation of how it arrives at them, it will need to approach the First Amendment with a different mindset. This is what I have advanced in this presentation. We live in the most powerful country the world has ever known, but the concept of a limited government is still the key to understanding the meaning of the First Amendment. In the time since the enactment of the Bill of Rights, the power of the federal government has increased immeasurably—to the point whereby it would possibly be unrecognizable by those who enacted that Bill of Rights. I would argue, however, that as far as “church and state” is concerned and as far as the First Amendment is involved, the changes are in degree, not kind. The federal government at its creation was deprived of jurisdiction in religious matters—what aids religion, what is neutral with regard to religion—and it is still deprived of that jurisdiction. No matter how powerful it has become, it remains limited to a part of the secular world, and the free exercise of religion is achieved within the meaning of the Constitution when the government confines itself to that world.

Focusing on what is secular and within its power will require only a change in imagination. The ideology promoted by the image of the wall of separation, the assumption that the government has been endowed with power to separate the church and the state to organize state and society, has entered deeply into our public discourse. In this ideology, a system that embraces state and society, the sacred and the secular, the government assumes a kind of absolutism that is foreign to the genius and exceptionalism of the Constitution. In his book *With Liberty for All*, Professor Phillip Hammond of the University of California at Santa Barbara writes: “It is not that all Americans must relinquish their faith in the ultimacy of their religion. It is rather that the American government—which in governing must judge what is and what is not religiously permissible—is itself required, by the twin demands of the Religion Clauses, to remain agnostic.”<sup>49</sup>

Reviewers of my own recent book have written: “Defining the secular means, by default, defining the sacred . . .”<sup>50</sup> and “In reality, these

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48. *Id.* at 577.

49. PHILLIP E. HAMMOND, *WITH LIBERTY FOR ALL: FREEDOM OF RELIGION IN THE UNITED STATES* xii (1998).

50. Lee Canipe, *Farewell to Christendom: The Future of Church and State in America*, 44 J. CHURCH & ST. 590 (2002) (book review).

[sacred and secular] are two sides of the same coin—any time the state says that something is secular it is also saying, at the same time, that it is not religious. Any time that the state says that something is not secular, it is also saying that it is religious.”<sup>51</sup>

That is the ideology that has engulfed the First Amendment. It is a political theory and a theology that the sacred and the secular are two different worlds, and that the government has the power to draw the boundary between the two. The Amendment then would require the government to confine what it defined as religious to the sphere beyond the wall of its creation.

The genius of what I call American exceptionalism is that it avoided such ideology. The Constitution endowed the American government with power over part of the secular world, and the First Amendment was a reminder to that government to heed that limitation.

Alexander Hamilton warned of the danger inherent in what I have called the “common sense” interpretation of the First Amendment. He opposed a Bill of Rights on the grounds that such a bill *would only prohibit the use of a power not granted*.<sup>52</sup>

They would contain various exceptions to powers not granted; and, on this very account, would afford a colorable pretext to claim more than were granted. For why declare that things shall not be done which there is no power to do? Why, for instance, should it be said that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed? I will not contend that such a provision would confer a regulating power; but it is evident that it would furnish . . . a plausible pretense for claiming that power. They might urge with a semblance of reason, that the Constitution ought not to be charged with the absurdity of providing against the abuse of an authority which was not given, and that the provision against restraining the liberty of the press afforded a clear implication, that a power to prescribe proper regulations concerning it was intended to be vested in the national government.<sup>53</sup>

This is what has happened with regard to the First Amendment. It involves the prohibition of a power not given, and it sees the free exercise of religion taking place when government recognizes its limited powers and confines itself to them. Instead, the Amendment has come to be interpreted not as a prohibition against government, but as conferring on government the authority to guarantee religious liberty to its citizens, to separate church and state and to decide what aids or

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51. See THOMAS J. CURRY, FAREWELL TO CHRISTENDOM: THE FUTURE OF CHURCH AND STATE IN AMERICA, available at <http://atheism.about.com/library/books/full/aafprFarewellChristendom.htm> (last visited Oct. 24, 2003).

52. THE FEDERALIST No. 84 (Alexander Hamilton).

53. *Id.*

hinders religion, what is religiously neutral, and what constitutes religious coercion.

We can only recover the genius and exceptionalism of the American founders, who rejected ideology, who left the people and not the government, to define what is religious, if we heed that extraordinary advice provided by Hamilton so long ago.

