Busy on All Fronts

William Donohue

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Last December I wrote a president's desk piece titled, "Culture War Ready to Explode." I predicted that the election of Barack Obama would occasion a fierce battle between traditionalists and modernists, and that was because many of those in the latter category will "see in his victory a golden opportunity to wage war on traditionalists." That is exactly what has happened.

We have been so busy at the Catholic League, and on so many fronts, that we could fill this issue of *Catalyst* many times over. We could also fill the entire issue with all the media hits we've had. So the bad news is the bigots are on the march; the good news is we're taking them on, chalking up some big victories along the way.

The culture war has indeed exploded. I am of the 60s generation, the generation that witnessed a radical turn in our culture. Some good things happened in the 60s—such as the civil rights movement, giving black Americans rights long denied them. But overall, the 60s saw a coarsening of our culture. Radical individualism triumphed, something which by now is deeply ingrained in our society.

I was in the U.S. Air Force in the late 60s, stationed at Beale Air Force Base in northern California, not far from Marysville and Yuba City. On weekends, I would travel with friends to San Francisco. The Haight-Ashbury section was the epicenter of hippie America, a drug infested hell hole where anti-Americanism flourished. Many of those radicals wound up dead. Others turned the corner. Still others joined the establishment, but never really changed their thinking. It is this group that is now igniting the culture war.

The radicals who are fomenting the culture war see in Obama a chance to relive the 60s. As I said in December, “I am not blaming Barack Obama for all of what is about to happen.” But he is the catalyst, however personally uninvolved he may be. The fact is that many see in him a chance to finish what they started in their youth. And a big part of it is driven by anti-Catholicism. Consider the following.

In Maryland and New York, as this issue shows, bills have been introduced that take direct aim at the Catholic Church. The proponents say they are interested in protecting children, and that is why they want to suspend the statute of limitations allowing for those abused many years ago to get their day in court. But this is a ruse. They are not interested in protecting kids—they are interested in sticking it to the Catholic Church.

How do I know this? Because if they were truly interested in protecting kids and securing justice for those who have been molested, they would start where the action is, and that would be in the public schools. But, in fact, in every state where these bills have been introduced, the public schools have been shielded by special laws tailored to insulate them from the same kinds of penalties afforded private institutions. It is outrageous, duplicitous and bigoted.

Look at what happened in Connecticut. Two gay Democrats tried to engineer a takeover of the Catholic Church by the Connecticut legislature. They lost, but the fact that they even tried is incredible. To single out the Roman Catholic Church in an unprecedented power grab shows beyond any doubt that anti-Catholicism is alive and well in the United States. No other religion is ever targeted the way Catholicism is.

As I said on “Glenn Beck,” could anyone imagine what would have happened had Catholic bishops in Connecticut decided to lobby for a bill granting them the authority to run the administrative and fiscal affairs of the state legislature?

The charge would be fascism. So why, aside from the Catholic League, didn't others use this term to describe what happened?

And where was the ACLU, that great protector of separation of church and state? Americans United for Separation of Church and State was even worse: it took the occasion to lecture the Catholic Church on the meaning of separation of church and state! The best it could do was to say that the lawmakers who tried to stage this coup were "misguided." It proves, once and for all, that Americans United is an organization that exploits the First Amendment for political reasons, not principled ones.

Not only is Catholicism singled out, when our side strikes back, we are bashed beyond belief. Our victory in Georgia, as this issue shows (and we could fill many pages with the hate mail we received), triggered a hate-filled stream of bigoted comments. Not to worry—we are thick-skinned at the Catholic League.

Radical secularists, many of them from the 60s generation, believe this is their last shot. That's why they are in high gear. They can create so much damage because of where they are situated: They dominate higher education, the arts, the media, Hollywood, the publishing industry, the foundations and the non-profit advocacy organizations. And their lust for power is insatiable.

As I said in December, "So buckle your seat belts." Just reading this issue of *Catalyst*shows why.

An Anti-Catholic Law's Troubling Legacy

Libby Sternberg

November, 2007

As they went to the polls on November 7, 1922—85 years ago this month—the voters of Oregon were asked to approve an amendment to the state's education laws that read in part:

"…Any parent, guardian or other person in the state of Oregon, having control or charge or custody of a child under the age of 16 years and of the age of 8 years or over at the commencement of a term of public school of the district in which said child resides, who should fail or neglect or refuse to send such child to a public school for the period of time a public school shall be held during the current year in said district shall be guilty of a misdemeanor and each day's failure to send such a child to a public school shall constitute a separate offense…."

Translation: if you send your child to a private school instead of a public one, you face a fine, imprisonment, or both.

Nowhere in that law was the word "Catholic" mentioned, but the goal was clear: to shut down all Catholic schools and to steer their students into public schools, where threatening "papist" views could be safely blanched from the youngsters' minds.

The law was championed by the Ku Klux Klan and other zealous nativists who believed that Catholic immigrants threatened to bring bolshevism to America after World War I. Grand Dragon Fred Gifford, a chief advocate of the school statute, believed that "the American public school, non-partisan, non-sectarian, efficient, [and] democratic," was "for all the children of all

the people." (By "non-sectarian," he meant "non-denominational Christian;" public schools, though drenched in religion at the time, were of a "non-sectarian" type.) Gifford went so far as to say that immigrants ("mongrel hordes") "must be Americanized. Failing that, deportation is the only remedy."

Anti-Catholic nativists believed that Catholics could overthrow the government at a moment's notice, turning Americans into knaves of the Roman pope. They believed that only by attending a government-controlled school could children learn to be true Americans, and become properly grounded in American history and the principles of liberty.

The campaign for the Oregon law included a mix of hysteria and grand theater. An ages-old anti-Catholic device—lectures by an "escaped nun"—was trotted out. "Sister Lucretia" was taken around the state, sometimes speaking in public schools themselves, to denounce Catholicism and stir up audiences against the Roman church.

An anti-Catholic, pro-public school booklet entitled *The Old Cedar School* was circulated as well. This allegorical tale included the story of a farmer's son who converts to Catholicism and sends his children to the "Academy of St. Gregory's Holy Toe Nail," where they study "histomorphology, the Petrine Supremacy, Transubstantiation, and…the beatification of Saint Caviar."

The story isn't content to merely ridicule Catholics and what they believe. It paints a picture of a Catholic bishop who actually burns down a public school.

The message was hardly subtle—Catholics and their schools were not just threats to the public schools, but a mere matchstick away from destroying them entirely. It was no wonder, then, that the King Kleagle of the Pacific Klan declared that the battle for the Oregon School Law was about "the ultimate

perpetuation or destruction of free institutions, based upon the perpetuation or destruction of the public schools."

In short, if you sent your kids to private schools, particularly Catholic ones, you were against public schools and against what America stood for.

Ironically, though the nativists feared bolshevism, their insistence on one government-controlled school system actually smacked of the very communism that they sought to avoid, a point made by Archbishop Michael J. Curley of Baltimore. "The whole trend of such legislation," wrote Curley, "is state socialism, setting up an omnipotent state…on the principles of Karl Marx."

Catholic defenders felt compelled to point out the obvious—that Catholic schools were absolutely American, that English was the language spoken in the schools, and that even their mottos were American ("For God and country").

These arguments failed to persuade. Oregonians passed the law by a vote of 115,506 to 103,685.

But the arguments continued, this time in the courts of law, where Catholic plaintiffs challenged the new law as unconstitutional.

The lawyer for the state of Oregon told one court that juvenile delinquency had increased as attendance at non-public schools increased. Thus, he said, forced attendance at public schools was the only way to ward off "the moral pestilence of paupers, vagabonds, and possibly convicts." He, like the anti-Catholic nativists who had championed the law, also warned of bolshevism. Children educated in private schools would be inclined to adopt the principles of "bolshevists, syndicalists, and communists," he contended. And he went on to warn that if the law was not upheld, cities across the country would be dotted with "elementary schools which instead of being red on the outside will be red on the inside."

Despite such heated rhetoric, reason eventually prevailed. On June 1, 1925, the U.S. Supreme Court ruled that “the child is not the mere creature of the state,” overturning the Oregon law and settling once and for all the question of whether Catholic schools had a right to exist in America.

In the unobstructed view of retrospect, it’s hard to understand the fear-mongering that led to the passage of the Oregon law. Even if one were to accept the preposterous claims of the law’s anti-Catholic supporters—that Catholics, out to destroy the Republic, were using their schools to advance their plan—Oregon’s demographics should have put nervous xenophobes at ease.

At the time, fewer than 10 percent of Oregon’s inhabitants were Catholic, and only 13 percent were foreign-born. Of the students attending school, 93 percent were in public schools already.
But the Oregon law was only the tip of a much larger iceberg that had been gaining heft for nearly a century.

From the mid-1800s until the battle for the Oregon law, the very formation and growth of America’s public school system was intertwined with an unsavory nativist movement that sought to use the newly-formed “common schools” to turn immigrants—mostly Catholics—into true Americans. Unfortunately, these reformers’ vision of what made a true American didn’t include the tenets, the rituals, the prayers, or even the Bible of the Roman Catholic Church. Instead, they wished to inculcate children with a non-denominational brand of Protestant Christianity.

In these new common schools, Catholic children were forced to recite Protestant prayers, sing Protestant hymns, and use the King James, rather than the Douay, version of the Bible. Resisting students were punished, and the punishment was upheld by the courts.

Not surprisingly, this led to the blossoming of the Catholic school system; Catholic schools became havens for new immigrants. And while English was the language spoken in the schools, some classes were also offered in the immigrants' native tongues. My father's Catholic elementary school in Baltimore, for example, taught religion classes in Polish.

While the Oregon School Law might have died in 1925, the anti-Catholic sentiments that spawned it still leave a troubling legacy. Today, the only K-12 schools that are cost-free to students in America are public ones. Unlike our post-secondary system, where students can use public funds in the form of grants, scholarship, GI Bill money, and the like at the institutions of their choice, the only schools automatically getting public funding at the K-12 level are public ones.

Nativist entanglement with the school law also led to the passage of so-called Blaine Amendments in several states. Enacted in the late 1800s, these amendments prohibited the use of public funds for sectarian schools or institutions. For all practical purposes, "sectarian schools" was code for "Catholic schools." As explained previously, "non-sectarian" meant the non-denominational brand of Protestant Christianity taught in public schools.

Even today, Blaine Amendments still stymie voucher and school choice advocates in the courts. And even in states without such amendments, courts will sometimes interpret state and federal law as if Blaine Amendments were on the books.

In addition, today's voucher opponents, when making their case, often unwittingly use the language of the proponents of the Oregon law, by asserting claims about the necessity for enshrining the public school in a special place in American life because such schools teach us how to be Americans.

Even a current mainstream organization that attempts to block voucher programs has some roots in a movement to stop

Catholics. Americans United for Separation of Church and State, a prominent voucher opponent in the public square and in the courtroom, started out with a different name—Protestants and Other Americans United for the Separation of Church and State. Formed in 1947, the organization didn't change its name until 1971.

This is not to say that those who oppose vouchers today are anti-Catholic. But they might be surprised to learn that they are standing shoulder-to-ideological shoulder with an unsavory cadre from history—those who, 85 years ago, sought to make the public school the preeminent educational institution in America by quashing diversity and stifling Catholics.

Making education free and available to all children was a noble goal. Had it not been overrun by distasteful political forces, parents might have been allowed to choose where that education would take place, without incurring a financial penalty.

Libby Sternberg is the former head of Vermonters for Better Education, a school choice organization. She is an Edgar-nominated author of several teen mysteries. Her new book, The Case Against My Brother*, is set in 1922 Oregon against the backdrop of the campaign for the state's School Law.*

Patrick M. Garry: Wrestling with God: The Courts' Tortuous Treatment of

Religion

by William Donohue

(Catalyst, 7/2006)

Every now and then, I read a book I wish I had written. Such a book is Patrick M. Garry's *Wrestling with God: The Courts' Tortuous Treatment of Religion*. For those interested in how the courts have twisted the First Amendment's guarantee of religious liberty into an unseemly mess, this is the book to buy. Garry offers a masterful account of the attenuation of religious liberty by a series of inconsistent and poorly reasoned decisions.

We have come a long way from the time when religious liberty was robustly celebrated by the framers of the Constitution to the point where singing "Silent Night" at a public school Holiday or Winter concert (formerly known as the Christmas concert) is likely to trigger a lawsuit. What this has to do with the First Amendment is something only those bent on rewriting history are prepared to argue.

Leonard Levy is one of the nation's leading students of the First Amendment. It is his view that the First Amendment does not offer much latitude to the public expression of religion. But as Garry points out, even a strict separationist like Levy never thought that the expression "under God" in the Pledge of Allegiance would ever be challenged in the courts. Levy made that prediction in 1994, only a decade before the Supreme Court considered such a case.

The First Amendment begins, "Congress shall pass no law respecting an establishment of religion, or prohibiting the free exercise thereof." Regarding the "establishment" provision, we know from the author of this amendment, James Madison, that those words were penned to prohibit the Congress from establishing a national church and to prohibit the

federal government from showing favoritism of one religion over another; what the states decided was to be their business. As for the reference to “free exercise,” it was meant to insulate religion from the reach of the state. As we now know, this is hardly the way most judges view the First Amendment today.

Under the current view, Garry instructs, “the exercise and establishment clauses [are] seen as being ‘at war with each other,’ with the exercise clause conferring benefits on religion and the establishment clause imposing burdens.” He wryly notes that “It was as if the framers had intended the two clauses to cancel each other out, producing a kind of zero-sum result with regard to religion.” He adds that “such an approach makes no textual sense, because the exercise clause is essentially being nullified by the establishment clause.” In other words, such reasoning has resulted in a form of judicial jujitsu.

Garry is correct to say that “there is no constitutional basis for interpreting the establishment clause as contradictory to the exercise clause,” and that is why he sees them forming “a single, unified religion clause that seeks exclusively to protect religious liberty.” He aptly quotes Michael Paulson to the effect that the establishment clause “prohibits the use of the coercive power of the state to prescribe religious exercise, while the exercise clause prohibits the use of government compulsion to proscribe religious exercise.”

No matter, today’s rendering of the First Amendment pays no attention to what the framers wanted. Instead, much attention is given to the alleged “wall” that separates church and state. But prior to the Everson decision in 1947, there was no talk about this proverbial wall. Such talk became commonplace only after Supreme Court Justice Hugo Black (a former Ku Klux Klan member who hated Catholicism) lifted the metaphor from a letter that Thomas Jefferson wrote in 1802 and inserted it into his 1947 decision. For the record, Jefferson penned his

famous “wall” statement to convey his belief that the relationship between the federal government and religion should remain distant: the states, he reasoned, were best suited to deal with matters religious, and that is why as a Virginia legislator and governor he thought it proper for his state to endorse days of fasting and thanksgiving.

Once Black prevailed in his “wall of separation” opinion, it led the courts to become increasingly hostile to religious liberty. This hostility was given a new shot in the arm in the high court’s 1971 *Lemon v. Kurtzman* ruling. This decision held that for a statute to pass constitutional muster, it must have a secular purpose, must not advance or inhibit religion and must not foster “excessive government entanglement with religion.” Easier said than done.

In the wake of raising the bar so high, towns were told they could not have a nativity scene displayed on public property without displaying baby Jesus with a reindeer. Similarly, the parents of children who had been receiving remedial education from public school teachers in a parochial school—for two decades without a single complaint—were suddenly informed that this practice violated the U.S. Constitution. Even candy canes with religious messages had to be confiscated lest some high priest of tolerance objects.

To make matters worse, not only have the courts chopped the religious liberty clause in two—assigning a subordinate position to the free exercise provision—they have assigned a subordinate position to religious speech vis-à-vis secular speech. For example, the courts typically grant constitutional protection to obscene speech—including obscenities that target religion—but they quickly become censorial when it comes to religious speech. So absurd has this condition become that the student who spews vulgarities at a high school commencement address has a much better chance of proceeding with impunity than the student who invokes the name of Jesus. Indeed, a student who curses Jesus has a better chance of escaping the

wrath of school officials than the student who quotes Jesus.

“Textually,” Garry writes, “the Constitution provides greater protection for religious practices than for any secular-belief-related activities.” In fact, he contends, not only is religious speech afforded protection via the free exercise provision, it receives further immunity via the free speech clause of the First Amendment. It is precisely because Garry is so right about this that it is positively maddening to read court decisions that allow the establishment provision to trump religious speech. Such revisionism has created more than a legal nightmare—its tentacles have been felt in the nucleus of our culture: the public expression of religion has atrophied under the weight of judicial activism.

The way it works now, in order to get the courts to regulate secular speech, a direct cause and effect must be shown. For instance, the courts must be persuaded that if a particularly inflammatory exercise of speech occurs, then a particularly dangerous condition is almost certain to follow. Notwithstanding this caveat, the courts have allowed Nazis to march in a Jewish suburb, thus demonstrating the near absolute status it grants secular speech. But when it comes to religious speech—such as a nativity scene erected in the public square—all it takes for the courts to get involved is the outcry of someone who claims to be offended. This explains why many defense attorneys now argue that the religious expression they are defending is not a matter of free exercise, it is a matter of free speech.

There is something absurd going on when a crucifix drowned in a jar of urine can be hung from a Christmas tree in the rotunda of a state capitol building, but a crucifix that is reverentially displayed can be prohibited (this hasn’t happened yet, but it will). What this represents is nothing short of a bastardization of the intent of the framers: just as the left likes to play fast and loose with Scripture, the left likes to play fast and loose with the Constitution.

Fidelity to the original text means nothing to ideologues bent on winning at all costs.

There are some legal scholars who find solace in recent court decisions that seek to skirt the Lemon rule by promoting a principle of neutrality: the government, so goes the argument, should remain neutral in cases involving religious expression. But Garry is not among them. Although he welcomes neutrality as a change from the hostility towards religion found in Lemon, he makes it clear that the framers never intended to "place religion and nonreligion on the same level."

The evidence that Garry marshals to support his argument about the intent of the framers is irrefutable. Despite attempts by secular supremacists to impose a rigidly secular vision of the common good on the rest of us, and their enfeebled attempts to distort history, nothing can change the words of the framers. They understood the critical connection between religion and freedom and it was their expressed view that self-government could not take root in a society without a strong religious—read Christian—foundation. From the beliefs, practices and public statements of the framers, to their insistence on ordered liberty, the men who launched our nation always gave due deference to the indispensable role that religion plays in society.

It is truly one of the great tragedies of our law schools that students are taught virtually nothing about the religious and moral underpinnings of our society. Indoctrinated in formalisms, they think that rules and procedures are the heart and soul of a free society. The founders would have regarded such a conception of liberty as impoverished, so totally myopic as to render it useless.

For freedom to prosper, civil liberties must be respected, but there is more to freedom than individual rights: a degree of civility and a sense of community must also prevail. Religious liberty helps to provide the latter, and without it all the

rights in the world matter little in the end.

"The only way to preserve religious liberty and uphold the spirit of the First Amendment," Garry informs, "is for the courts to articulate an enduring and consistent theory of the religion clauses." To do this, however, requires an intellectual assault on the postmodernist game of rewriting history. Garry has made his contribution, and for that we can all be grateful.

The December Celebration

A response to the ADL's December Dilemma

Guidelines for the recognition of Christmas for Public Schools

Posted on the website of the Anti-Defamation League are guidelines called "December's Dilemma." Essentially, the ADL proposes to public school administrators, teachers and parents guidelines that in essence banish virtually any mention of Christmas. These guidelines have absolutely no legal standing and turn the First Amendment on its head. "December Dilemma" is the product of ADL's own philosophy that would ban any expression of religious belief in public schools. Below, the Catholic League has drafted a revision of the ADL guidelines that give an alternative to a philosophy that has reduced Christmas to a pagan "winter solstice" ritual in our public schools.

December presents public schools with the opportunity of

acknowledging the diverse religious beliefs of their students while avoiding the kind of divisiveness that some activist organizations foster by misinterpreting the constitutional mandate regarding freedom of religion. Teachers, administrators and parents should try to promote greater understanding and tolerance among students of different traditions by taking care of First Amendment rights which guarantee the right of religious expression. Public Schools cannot prohibit legitimate acknowledgment of Christmas as an important cultural and religious celebration.

The First Amendment guarantees freedom of religion to all Americans, including young schoolchildren. It forbids the government or public school authorities from imposing arbitrary, coercive and prohibitive regulations that directly threaten to interfere with the right of students to acknowledge the Christmas season. The courts have long interpreted that students in public schools have the right to engage in individual prayer, organize student-led religious clubs, and engage in organized prayer with other students. Additionally, the courts have not banned the recognition of Christmas – with songs and seasonal symbols – within public schools. Unfortunately, certain activist organizations have convinced far too many public school authorities that such recognition of Christmas is unconstitutional, to the point where the use of the word Christmas is effectively banned, traditional Christmas carols silenced, and symbols of Christmas such as nativity scenes prohibited. The imposition within public schools of an essentially pagan "winter solstice" or "winter holiday" celebration while banning all reference to the traditional Christmas celebration is not supported by any rational interpretation of the First Amendment.

Our goal is to explain that the Christmas holiday observance in public schools is constitutionally permissible. If you have any questions about this issue, contact the Catholic League

for Religious and Civil Rights.

Christmas as an Educational Lesson

There are appropriate educational benefits to teaching and recognizing within public schools the diverse religious traditions and cultures of our country. School officials must be sure they do not give students the impression that one set of holiday beliefs, specifically Christmas, is less acceptable than others.

Courts have never ruled that the study of Christmas as a religious celebration must be banned from public schools. Courts have stressed that religion is a pervasive and enduring human phenomenon which is an appropriate, if not desirable, subject of secular study. In fact, it might well be said that one's education is not complete without a study of the comparative religion or the history of religion and its relationship to the advancement of civilization.

Additionally, there is a critical difference between school-organized prayer services and teaching about religion. Most importantly, it is constitutionally permissible for public schools to teach about the role of religion in the Christmas celebration and to acknowledge the religious dimensions of the Christmas celebration. School officials and parents must be careful not to misunderstand the difference between school-organized religious observance and the impermissible banning of Christmas discussion, symbols and song that have religious foundations.

Contrary to certain assumptions, the Supreme Court has never banned the acknowledgment of religious holidays in public schools, including Christmas. The Supreme Court has said that religion can be presented objectively as part of a secular program of education. That cannot be interpreted to mean that the Bible passages cannot be read in public schools in a secular context of study, or that explanations of the

religious meaning of Christmas, or the right to display religious symbols of Christmas with other religious or secular symbols of the season can be banned. It is important to remember that, in any context, the public schools must not coerce students away from their religious beliefs, denigrate religion nor be hostile to religion.

It is often appropriate to teach about the historical, contemporary and cultural aspects of religious holidays. Unfortunately, many public school administrators and teachers have been misled to believe that any mention of the religious context of the Christmas celebration is forbidden. The use of religious Christmas symbols within the context of a discussion of the season, or acknowledging the religious Christmas celebration along with the secular aspects of the season and the traditions of other faiths within December is not only permissible but appropriate. From these lessons, young children often gain understanding and respect for the diverse cultures and beliefs in our country.

Teachers should make sure not to avoid covering the religious meaning of the Christmas celebration when recognizing the holiday celebrations of different traditions. For example, in any given year a number of holidays may occur in December – Christmas, Chanukah, Kwanzaa, Bill of Rights Day, and Bodhi Day (a Bhuddist celebration) – and are appropriate for lessons, recognition and acknowledgement. Banning the mention of Christmas, or refusing to display religious Christmas symbols when other such holidays are acknowledged and displayed, is impermissible.

Holiday Assemblies and Other Public School Activities

The study of religious holidays may also include more than mere classroom instruction. For instance, public performances or presentations of music, literature and art are permissible. It is also permissible that such performances and presentations include material from a religious Christmas

tradition.

Religious music, literature, art or other religious activities cannot be banned from school activities. These activities are permissible and they cannot be prohibited from a school-sponsored event. For instance, it is permissible to have students act out a play which contains a scene where a family is shown exchanging Christmas presents on Christmas morning. School-sponsorship of a play that makes mention of the birth of Jesus on Christmas is permissible and can be a part of a school-sponsored event. School authorities have no obligation – or right – under the constitution to ban any mention in a school-sponsored event of the religious meaning of Christmas.

School-sponsored activities that focus on more than one religion and religious holiday, or a secular celebration of "winter holiday," can also focus on Christmas. Depicting a diversity of beliefs and customs is important to teaching public school students about religion and culture. It also helps to ensure that public schools do not denigrate Christmas and promote a purely secular or pagan view of the celebration of the "winter holiday" or "winter solstice."

It is also important to provide students the opportunity to choose to participate in activities that they find sensitive to their beliefs. Banning Christmas symbols, customs and traditions while forcing students to participate in a "winter holiday" or "winter solstice" program is inappropriate. School administrators must be sure that students have the option to avoid such programs that ban mention of Christmas and not be forced to participate out of embarrassment or peer pressure.

Performing Religious Music

Due to the dominance of religious music in serious choral music, it is perfectly permissible to allow public school choirs to sing religious music as part of a choral performance.

In fact, forbidding choirs to sing music that is religious has been found to be hostile toward religion. School officials have no right to forbid the singing of religious music in a school assembly or at other religious activities. School choirs can sing secular Christmas songs and religious music. No student can be forbidden in choir from singing religious songs out of fear of embarrassment or peer pressure.

For instance, at a winter public school choral concert, it is permissible to include religious songs from a religious Christmas tradition. It is not appropriate for a public school choir to perform a concert at Christmas that is dominated solely be secular songs or songs from other religious traditions while completely excluding Christian Christmas songs.

Christian students certainly have the right to sing songs reflecting their understanding of Christmas if other students are engaged in songs reflecting their perspective of the season.

Public school students have the right to perform at churches, synagogues or temples. A public school choir cannot be forced to sing exclusively at neutral or secular sites.

As with other public school activities that legitimately involve religion, school authorities and parents should consider the effects of denying all religious music to impressionable young children.

Decorating Classrooms and Grounds With Holiday Symbols

Public school officials can decorate classrooms and other areas of public schools to recognize certain holiday seasons. They must be careful not to send a message through these decorations that the expression of the religious nature of Christmas is banned or prohibited by the school.

The Supreme Court has never ruled on holiday displays in

public schools. Certain activist organizations have attempted to interpret court decisions to mean that all religious symbols of the Christmas season as decorations are banned. This is not so. Certain symbols common to the month of December, such as dreidels or Christmas trees, are permissible. In addition, schools are not required to avoid any decoration that reflects a religious understanding of Christmas when other secular and religious symbols of the season are being used. Religious Christmas symbols cannot be the sole holiday decoration banned.

If schools choose to recognize holidays through decorations, they should represent the diversity of the season's celebration. Schools should avoid banning any religious symbol to avoid sending the message to students that a religion or a particular denomination is forbidden.

Additionally, symbols depicting secular celebrations of the season are most appropriate when accompanied by both Christian objects and symbols from holidays of other religions. This combination of faith and of sacred and secular helps to avoid messages of favoritism to a secular understanding and concerns about arbitrary banning of religious symbols.

For instance, on a board filled during December with images of snowflakes, candles and evergreen trees, it might be appropriate to add images of Santa Claus and even a dreidel because clearly the message is a celebration of the season. To include a nativity scene or menorah or other undeniably religious symbols is not inappropriate as long as all these other objects are displayed.

If a school wishes to recognize seasonal holidays, temporary displays that depict the secular aspects of the season and holidays with a religious origin are appropriate and permissible. If symbols that depict religious holidays are used, the display should visibly represent that religious origin, as well as the secular aspects, and should also

include holidays of several religions. But it would be inappropriate to ban all religious symbols of the Christmas season and solely depict its secular aspects.

Catholics and the Supreme Court: An Uneasy Relationship

by James Hitchcock

(Catalyst 6/2004)

Perhaps the most revolutionary changes on the Supreme Court began in the 1930's. That is when President Franklin D. Roosevelt began to choose justices inclined to approach the Constitution in a "broad" and "flexible" spirit. Some of his appointees were crudely anti-Catholic.

Hugo L. Black (1937-71) was a lapsed Baptist who, like many ex-fundamentalists, retained anti-Catholicism as the sole legacy of his one-time faith. He had once belonged to the Ku Klux Klan, and although he later repudiated the Klan's racism, he never condemned its anti-Catholicism. Indeed, his son said that the one thing Black had in common with the Klan was his suspicion of the Catholic Church. This explains why Black considered Governor Alfred E. Smith of New York unqualified for the Presidency in 1928 because of his Catholicism.

As a lawyer in Alabama, Black successfully defended a Methodist minister who shot and killed a Catholic priest in front of witnesses. Why? Because the priest had officiated at the marriage of the minister's daughter to a Puerto Rican.

Black fought the case with unusual aggressiveness, making anti-Catholic comments in the process.

Black, a Mason, was offended by the fact that the Catholic Church condemned Masonry; by contrast, he characterized its adherents as "free-thinkers." In effect he did not think Catholic schools had the right to exist, and even warned against the "powerful sectarian propagandists" [Catholics] who were "looking towards complete domination and supremacy of their particular brand of religion."

William O. Douglas (1939-75) was the son of a Presbyterian minister but grew up with the belief that church-going people were "not only a thieving lot, but hypocrites, and above all else dull, pious and boring." He claimed to have abandoned belief in heaven and hell because he could not stand the prospect of spending eternity with people like Cardinal Francis J. Spellman of New York.

Although Douglas professedly believed in the strictest separation of church and state, in fact he used his judicial authority to promote his own opinions. He thought religion was used to control people, and, when bishops in Puerto Rico criticized a candidate for governor, Douglas denounced their action as a clear violation of the Constitution. But in 1967, when Father Charles Curran of the Catholic University of America publicly rejected the Church's teaching on birth control, Douglas wrote to congratulate him "in the name of the First Amendment community."

One of Douglas' problems with the Catholic schools was his own version of political correctness—Catholic history texts would not deal properly with the Crusades, the Spanish conquest of Mexico, or the Franco government in Spain. As he put it, "I can imagine what a religious zealot, as contrasted to a civil libertarian, can do with the Reformation or with the Inquisition." He once warned Black that "I think if Catholics get public money to finance their schools, we better insist on

getting some good prayers in public schools or we Protestants are out of business."

After 1894 there was always at least one Catholic on the Court, and Roosevelt honored the tradition by appointing Francis P. Murphy (1940-49). Perhaps without knowing it, Murphy had been made to pass a religious test. He was recommended to Roosevelt by the latter's brother-in-law. The president was informed that Murphy was a Catholic "who will not let religion stand in his way"; the future justice himself assured a Roosevelt advisor that he kept religion and politics "in air-tight compartments."

Some of Murphy's brethren on the Court continued to hold him to a religious test, and to some extent he internalized that test. Felix Frankfurter (1939-62) said of him, condescendingly, "When I think of the many Catholics that have taken the life of dissenters, I'm not surprised that F.M. wants the undivided glory of being a dissenter." Privately, Murphy admitted that "It comforts me that with eight hundred years of Catholic background I can speak in defense of a people opposed to my own faith."

Frankfurter pressed Murphy to support liberal separationism with tactics little short of moral blackmail. He played on Murphy's evident craving for approval from people who did not respect his faith. For instance, Frankfurter would appeal to Murphy to make decisions "for the sake of history, for the sake of your inner peace," exhorting him to rise above "temporary fame."

Following Murphy's death in 1949, a fellow Catholic, Attorney General J. Howard McGrath, eulogized him as "a devout Roman Catholic who disregarded personal preferences which we all know were very dear to him in favor of what his conscience told him to be his duty as justice of this Court." Thus was the moral law reduced to a "personal preference," and "conscience" enlisted to serve the needs of political

expediency (an early formulation of what would become the Kennedy Doctrine).

Robert H. Jackson (194l-53), a nominal Episcopalian, once made an extraordinarily blunt admission from the bench: “Our public school, if not a product of Protestantism, at least is more consistent with it than with the Catholic culture and scheme of values.” Just as offensive was the thinking of Justice Wiley Rutledge (1943-49), the lapsed son of a fundamentalist Baptist minister: he once circulated a warning to his brethren that the Catholic Church was planning “a raid on the treasury.”

When Murphy retired in 1949, President Harry S. Truman declined to accept the claim of a “Catholic seat” on the Court; the period 1949-56 was the only time since l894 that no Catholic served there. But in 1956 President Dwight D. Eisenhower was persuaded that a Catholic should be appointed, and a search produced the name of William J. Brennan (1956-90), a justice of the New Jersey Supreme Court.

Cardinal Spellman was consulted and confirmed that Brennan was a practicing Catholic. But an acquaintance said of Brennan, “Those who knew him realized that, although he was a decent person and God-fearing, he was not a zealously religious man. He was Catholic with a small ‘c.'” Eisenhower’s wish to please Catholics by naming one of their own to the Court led, ironically, to the appointment of a man who would use his power to undermine Catholic interests at every point.

Brennan was the strictest of separationists, and his position seems to have been motivated in part by his liberal religious outlook. For example, he once assured his brethren that “If public funds are not given, parochial schools will not perish.” He also objected to state-supported remedial-education programs in Catholic schools on the grounds that “they serve the principal purpose of integrating the child, both socially and educationally, into the parochial school.

Such services foster in the child a profound dependence on the religious school….” Brennan believed that the public schools were a uniquely unifying force, because they were based on “democratic values,” while private schools were not.

Of other Eisenhower appointees, Potter Stewart (1958-8l), an Episcopalian, appears to have been somewhat anti-Catholic: he consistently voted to accommodate religious practices in the public schools, but equally consistently opposed public aid to Catholic schools. When the Court upheld grants to religiously affiliated colleges, Stewart curiously objected that theology was not an academic subject.

Several Republican presidents proclaimed an intention to reverse the Supreme Court’s liberalism, but with only indifferent results. Thus President Gerald R. Ford appointed John Paul Stevens (1975-), a justice who is apparently without formal religious affiliation. Stevens sees opposition to abortion as essentially religious, so that there can be no legal restrictions on the practice. He has also questioned whether private religious education is good for the nation.

President Ronald Reagan appointed Antonin Scalia (1986-) and Anthony Kennedy (1988-). Scalia has also been a severe critic of the modern Court’s approach to constitutional issues. In a public address in 2002, he disagreed with Catholics, including Pope John Paul II, who oppose capital punishment, and asserted that judges who do not support the death penalty should resign from the bench. Kennedy tends to occupy the ideological middle, but in the Romer case (1996) he issued an opinion of far-reaching implications when he proclaimed a constitutional “right of self-definition” in connection with homosexuality.

In 1990, President George H. Bush appointed Clarence Thomas, a black Episcopalian who had been raised a Catholic and who in 1996 announced that he had returned to the Church. In a case in 2000, he bluntly traced the separationist position to historic anti-Catholicism and called it “a shameful pedigree.”

Indicative of changing political alliances, the Republican ascendancy in the White House in 1988 produced, for the first time in history, three Catholics sitting on the Court simultaneously—Brennan, Scalia, and Kennedy (with Thomas later replacing Brennan in a Catholic triumvirate). Through much of its history the Court was an entirely Protestant body, so this is surely a dramatic change.

Looking back at the evolution of the high court, it is clear that Catholics were unable, or unwilling, to bring pressure to bear on the Democratic Party to select better justices. Not only were anti-Catholics put on the bench, justices like Murphy were continuously made to justify their faith to those who did not respect it. Moreover, there was no protest against Truman's refusal to name a Catholic to the Court, and, when a Republican president gave Catholics an opportunity in 1956, the Church's leadership could not identify a truly Catholic candidate. Largely because of Catholic political naiveté and loyalty to the Democratic Party, the Court after 1947 could steadily exclude religion from public life.

Catholics and other religious believers have at last awakened to its reality of judicial activism, but whether almost a half-century of aggressively secularist constitutional interpretation can now be overcome is entirely dependent on future appointments to a Court poised between two irreconcilable views of the nation's founding document.

James Hitchcock is a professor of history at St. Louis University. This article is adapted from a longer version that appeared in the April edition of Catholic World Report*. It is reprinted here with permission from the author.*

Religious Expression at Christmastime: Guidelines of the Catholic League

Guidelines of the Catholic League

Christmas 2003

This booklet was prepared by Gerard Bradley of the University of Notre Dame School of Law and Robert Lockwood of the Catholic League. It is a guide that we hope will be of use to Catholics, as well as to the general public, regarding what kinds of religious expression are permissible at Christmastime.

William A. Donohue
President
Catholic League for Religious and Civil Rights

Guidelines from the Catholic League for Religious and Civil Rights on the proper means for the religious celebration of Christmas in the public arena

Introduction

Each year during the Christmas season, there are reports that the religious aspects of Christmas are being banned or omitted from the public arena. These stories can involve anything from threats of legal action over the placing of traditional nativity crèches on public property, to various directives from administrators that eliminate the very mention of the religious aspect of the season from public schools. Such stories can reach ridiculous proportions, as when a city manager in Eugene, Oregon, banned the display of decorated trees on public property. In Vancouver, Washington, transit authorities cited the constitutional separation of church and

state in forbidding employees to wear seasonal ties or jewelry that displayed a religious symbol.

There is a tendency to either treat these seasonal stories as something to be laughed at, or to respond to them by assuming that the constitution and court decisions mandate the elimination of the spiritual aspects of Christmas from public life. In many cases, activist organizations employ bullying tactics and threats of lawsuits to attempt to force their private interpretation of the role of religion in public life, particularly within the public school environment. Those who are unaware of the actual legal precedents in these matters and the proper interpretation of the constitution find themselves cowed into submission.

The purpose of this booklet is to outline not only what is permissible, but also what is proper in acknowledging and recognizing the religious aspects of the Christmas season in the public arena. The booklet will provide an overview of the issues involved, and guidelines for civic groups, private organizations and individuals, as well as public school administrators, teachers, and parents.

Overview

Christmas is at its roots a religious celebration. Yet, within American culture there has been a long accretion of secular customs and traditions surrounding the feast, so much so that non-Christians and avowed non-believers celebrate the holiday. At the same time, there has been a growing diversity within American culture. While 86 percent of Americans identify themselves as Christian, there is a growing non-Christian cultures.

In discussing how to recognize and allow for appropriate celebration of the Christmas season in the public arena, there has always been a certain tension among the religious significance of the celebration, the overwhelming secular

traditions of the season, and respect for those for whom Christmas is not a part of their culture or religious faith. In the public arena, there needs to be an understanding of the difference between accommodation of religious belief, and giving the appearance of the establishment of religious belief.

At the same time, there needs to be a sensible understanding of the right to freedom of religious expression, and the right of religious groups, civic organizations and private citizens to use public property in the same fashion allowed to secular organizations. Finally, it must be clearly understood that within a public school environment, the religious aspects of the Christmas season have no less right to expression and recognition than the secular aspects of the season, or non-Christian faiths and cultural celebrations that are recognized and explained within the school year.

The issue of recognizing Christmas in the public arena generally arises in two forms: 1) the display of secular and/or religious seasonal symbols on public property at the expense of either government or private groups; and 2) the treatment of the Christmas season within public schools. Yet, as noted above in Eugene, Oregon, and Vancouver, Washington, the issue can also come up in a host of different ways where the action that is taken is decidedly hostile to religion, or even to the secular observance of the Christmas season. These issues are sometimes raised by administrative fiat resulting from an individual complaint, or under threat of legal action.

Even well meaning people attempting to avoid alleged controversy, or under threats, give in to a view that holds that there is a constitutional requirement that the government be hostile to religion in the public arena, rather than neutral. Such was the case when a public school system in Georgia responded to threats of legal action by ceasing any reference to a “Christmas break” for the traditional period when schools close around the holidays. Though it defied logic

and common sense—the break has always been associated and timed for the Christmas season, and will continue as such—this kind of intolerance and censorship of speech have been common. And the response is often complete surrender to the complaint.

There is the unfortunate aspect to much of this discussion about Christmas in the public arena that certain elements within society consider religion—particularly Christianity—to be a divisive, if not dangerous force, in society. Their campaigns are built on intolerance, restriction of free speech and hostility toward religion. They believe that people need protection from religion and religious expression. While they have a right to such views, they do not have the right to treat Christian religious expression as in and of itself a secondary right. Unfortunately, the Supreme Court has allowed private religious expression to be limited when it could appear to the "reasonable" observer that the government is "endorsing" that expression—meaning that the government appears to agree with or affirm a particular view of religion. (*County of Allegheny v. ACLU*, 492 U.S. 573 (1989)). Although four members of the Supreme Court have disagreed with use of this "endorsement test" against privately sponsored religious free speech, that test—derived from *Allegheny*—has not yet been explicitly overruled. (*Capitol Square Review & Advisory Board v. Pinette*, 515 U.S. 753 (1995)).

The *publicly* sponsored display of religious symbols in the public arena, however, is a different matter. Worried that publicly sponsored religious displays could reasonably be seen as an endorsement of religion or a particular religion, the Supreme Court has applied a more exacting standard to publicly sponsored displays than private ones. The focus of the guidelines given in this booklet, however, will be on *privately* sponsored religious expression in the public arena, and religious expression by students or teachers in public schools during the Christmas season.

The display of religious Christmas symbols in the public arena

certainly involves a greater understanding and tolerance for different religious traditions within the United States. It is also an opportunity to see that First Amendment rights of religious expression and free speech be guaranteed to all on an equal basis. Openness to religious expression, recognition, and speech in forums that are traditionally open to secular speech is not a violation of separation of church and state, or government seal of approval for any particular religious sect.

State Constitutions

Keep in mind that the guidelines presented in this booklet are based on the First Amendment to the Constitution of the United States. Most state constitutions also contain, like the First Amendment, guarantees of non-establishment and free exercise of religion. The non-establishment clause of a state constitution may be more specific in defining what constitutes an "establishment" of religion than the non-establishment clause in the First Amendment. Theoretically, what might be permissible under the First Amendment might also be expressly prohibited by a state constitution. At the same time, a state constitution may not limit or burden the free exercise clause guaranteed by the First Amendment. Whether the two ever conflict is a state-specific determination beyond the scope of this pamphlet. While it is *highly unlikely* that any state constitution could successfully prohibit a nativity scene that satisfies the federal First Amendment, the concern is one to be kept in mind if litigation might arise.

Forums

In relation to expression or free speech, all public property generally falls under the classification of one or another types of forums: the traditional or open public forum, the limited or designated use forum, and the non-public forum. The classification of a forum critically affects how much the government may limit expression or speech in that forum. As

one can see after reviewing the guidelines, the question of whether a court will uphold any given nativity scene display is not easily predictable, nor does it depend on any formulaic rule. Therefore, the guidelines in this booklet are not a sure formula for winning litigation. Rather, they are principles applied by the courts in determining such litigation. By considering these principles, one can erect a nativity display where it is most likely to be upheld and least likely to be struck down.

Guidelines for Private Groups or Individuals Erecting Nativity Scenes on Public Property

I. In which kind of forum will the nativity scene be erected?

A. Traditional/Open Public Forum

1) A traditional/open public forum provides the best protection for nativity scenes.

2) The traditional/open public forum is characterized by being an open public thoroughfare with an objective use of open access (examples: streets, sidewalks, and parks).

3) The government may place objectively reasonable time, place, and manner regulations on the display of the nativity scene so long as the regulations are content-neutral (example: limiting the amount of electricity a display can use for safety reasons).

4) In order to subject a nativity scene to content-based regulations (example: no nativity scenes are allowed because they are religious), the government must show a compelling interest in having the regulations and must show that the regulations are narrowly tailored to that interest.

a) Governments may have a compelling interest in avoiding a situation where a reasonable observer of the situation would conclude that the government was endorsing religion over non-

religion, one religion over another, or several religions over others.

b) If a nativity scene or other religious display stands alone in front of a public building, especially a seat of government (example: a courthouse or city hall), courts have often found that such a display would impermissibly give the reasonable observer the impression that the government was endorsing religion—even though the scene was privately sponsored.

c) Secular symbols, such as Christmas trees, Santa Claus, reindeer, and candy canes, if placed prominently around a nativity scene, can downplay what a reasonable observer would otherwise see as a government endorsement of religion.

d) Merely grouping together religious displays (example: a crèche and a menorah) does not solve the endorsement problem. Without secular symbols present, the reasonable observer might still conclude that the government was endorsing several religions over others (example: Christianity and Judaism).

e) Nevertheless, governments may not from the beginning subject a nativity scene or the permission to erect one to more unique rules or a more restrictive application process than the rules or process applicable to any display in the open public forum.

B. Limited/Designated Use Forum

1) The limited/designated use forum is one that the government purposefully makes available to a particular class of persons or for a particular class of uses. (example: the government may open a government-owned area to use by military veterans, or for religious and cultural displays).

2) The limited/designated use forum is just like a traditional/open public forum for all those falling within the class to which the forum was opened. Apply the traditional/open public forum guidelines.

3) The government's ability to limit use of the forum to a particular class is not unlimited, but the courts have not defined what the limits are. The courts have said that once a limited forum has been created, entries of a similar character to those allowed access may not be excluded. (example: if the forum has been opened to religious displays, nativity scenes may not be excluded).

4) Note that the government simply allowing some speech or expression on public property that is not an open/traditional public forum does not created a limited/designated use forum. The government can keep the forum non-public by allowing selective, permission only access that depends upon non-discretionary judgments (example: x amount of insurance coverage)

C. Non-Public Forum

1) Non-public fora are generally all those government properties that are not traditional/open public fora and have not been made designated/limited use fora.

2) The government can refuse to allow a nativity scene display in a non-public forum when that display would interfere with the objective use to which the property has been dedicated (example: the government may refuse to allow a nativity scene near the runway of an Air Force base because it would distract landing pilots).

Public Schools

Most people are surprised to discover that the courts have issued few guidelines at all for public schools concerning seasonal religious displays. When the Supreme Court has touched on the issue, it has generally found in favor of religious expression and displays, for example, in favor of allowing the performance of religious music in public school choral performances during the Christmas season, and the performance of public school choirs at religious institutions.

While some administrators of public schools—and activist organizations that attempt to bully public schools—will often cite vague references to separation of church and state, there is no legal precedent in this area that bans the display of religious symbols at Christmastime. The reason for this is that courts will not interfere in the educational process. Display of religious symbols, when done even-handedly and without devotional intent, is perfectly legitimate as part of the school's mission to educate.

Some Christmas symbols—reindeer, Santa Claus, and candy canes, for example, have been viewed by the courts as secular rather than religious symbols of Christmas, and their display is legitimate. Other symbols have been viewed as secular or religious depending on the context. When the Supreme Court has dealt with Christmas trees it has generally viewed them as a secular symbol. Even so, in the specific context of public schools, a lower court has treated a Christmas tree as a religious symbol when it was placed next to religious items from non-Christian faiths. That court seemed to feel that the very name of the Christmas tree evoked the Christian meaning of Christmas when the Christmas tree was placed next to a menorah and Kwanzaa symbols. Menorahs are viewed as mainly religious, but have been considered secular when surrounded by largely secular items. It seems unclear in the courts whether Kwanzaa symbols are religious or secular in nature. Whether the display of these secular-religious symbols is legitimate depends, like the display of nativity scenes, largely on rules of context.

Unfortunately, too many public school authorities have become convinced that *any* recognition of Christmas violates the separation of church and state, to the point where the use of the word "Christmas" is effectively banned, traditional Christmas carols silenced, and both religious and secular Christmas symbols prohibited. In many areas of the country, there is the imposition within public schools of an

essentially pagan “winter solstice” and “winter holiday” celebration while banning all reference to the traditional Christmas celebration. While the display of religious symbols in public schools obviously cannot involve school-sponsored religious ceremonies, the courts have never banned a basic recognition of Christmas—with songs and seasonal activities and displays—within public schools. There is no basis for such a ban in law, and it could quite possibly be interpreted as actively hostile to religious freedom of expression, which hostility is illegal.

Following are guidelines and recommendations for the proper recognition of the religious aspects of the Christmas season within public schools:

Christmas in Public Schools

1. An increasing number of teachers throughout the country, including those in public schools, recognize that study *about*religion in social studies, literature, art, and music is important to a well-rounded education.
2. Therefore it is entirely appropriate and good for public school teachers to educate their students *about* religious traditions, including those of Christianity, so long as the approach is *academic* and not *devotional*; that is, so long as, for example, Christmas is not taught as truly the Son of God’s birthday. It is permissible for teachers to state, however, that Christians celebrate Christmas as the birthday of Jesus, whom they believe to be the Son of God.
3. While teachers may not *promote* religion, they may not *denigrate*it either. Teachers may never consciously lure students away from their own religious beliefs, denigrate those beliefs, or show hostility to those beliefs.
4. It is perfectly acceptable to use religious symbols, such as nativity scenes, as an aid or resource in teaching *about* religious holidays, but the religious

symbols must be used *only* as examples of religious or cultural heritage.

5. It is appropriate to display Christian religious symbols of the Christmas season along with symbols of other faiths and secular symbols.

– Most courts view Santa Claus, reindeer, and candy canes as secular symbols

– Menorahs can be considered either a secular or religious symbol, depending upon the context in which they are placed. For example, a menorah placed next to a crèche and Kwanzaa symbols would likely be considered a religious symbol. A menorah placed next to a Santa and candy canes, however, would probably be considered a secular symbol.

– Christmas trees are a predominately secular symbol, but might be considered religious in certain contexts. For example, one court found that a Christmas tree placed next to a menorah and Kwanzaa symbols acted as a Christian symbol. Therefore, the court held, the school display did not discriminate against Christianity and the school could not be compelled to display a crèche.

6. The use of religious symbols in class and the display of religious symbols in schools should only be done on a *temporary* basis, such as during a particular season or the study of a particular lesson.
7. School rules about the display of religious symbols should be uniform and even-handed. They cannot apply to one faith alone or discriminate against one faith alone. A school may *not* ban the mention of Christmas by students, and may not refuse to display Christian religious symbols of Christmas when other faith and traditions are being recognized. Note, however, that a Christmas tree might sometimes count as a Christian religious symbol.
8. The use of religious music, art, or literature in school

> Christmas performances that present a variety of selections is appropriate. Concerts should avoid programs heavily dominated by religious music, particularly when such concerts coincide with holidays such as Christmas.

In many cases, bans against the mention of Christmas or the use of Christian Christmas symbols within public schools are explained as a means to respect "diversity." Unfortunately, this term is too often used as a club wielded intolerantly. It is used not to respect diversity, but to restrict free speech and religious expression.

"Diversity" means recognizing the diverse cultures and faith traditions within America. It does not mean banning recognition of a part of that culture and faith tradition within public schools. Most of all, "diversity" does not mean hostility toward Christian religious expression and recognition. It means a balanced, fair, and even-handed treatment that does not exclude the religious significance and meaning of the Christmas celebration.

Thomas Jefferson and the Wall of Separation between Church and State

by Joseph De Feo

(Catalyst 3/2003)

Justice Felix Frankfurter wrote, "A phrase begins life as a

literary expression; its felicity leads to its lazy repetition; and repetition soon establishes it as a legal formula, undiscriminatingly used to express different and sometimes contradictory ideas." The foregoing lines represent an apt condensation of Professor Daniel L. Dreisbach's thesis in his book *Thomas Jefferson and the Separation between Church and State*. This slim volume consists of a relatively short essay on Jefferson's "wall of separation" metaphor, some primary sources, and a wealth of notes. Although Dreisbach calls the work merely a "sourcebook"—and it is an excellent one—it is hard for the reader to glance over the bare facts of the case without sincere and grave doubts about both the legitimacy and the desirability of the concept of a "wall of separation."

Unlike many other recent treatments of church-state relations, Dreisbach's study concentrates on the life of a metaphor—the "wall of separation between church and state"—and how it compares to the actual Constitutional law it is meant to represent. Thomas Jefferson used the phrase in 1802 in his response to the Danbury Baptist Association, which had written to the president to congratulate him on his electoral victory. He wrote, "…I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between Church & State."

Dreisbach makes the persuasive case that Jefferson wrote his famous letter to "hurl a brick" at his Federalist opponents, who had branded him an atheist in the bitter election of 1800; his pious tone and offer of prayer were meant to silence his foes: "I reciprocate your kind prayers for the protection and blessing of the common Father and Creator of man, and tender you for yourselves and your religious association, assurances of my high respect and esteem."

Jefferson wrote also to appease some of his supporters—the

Danbury Baptists, who voted Democratic-Republican and suffered under harsh regulation from the Congregationalist (and mostly Federalist) establishment in Connecticut. Connecticut in the early 19th century, like many states, had an established church. The state was firmly Congregational, with ministers on state salaries; dissenting religious groups, such as the Baptists, usually paid for the support of the established church, and did not enjoy the same privileges as Congregational ministers (e.g., for a time they could not even perform legal marriage ceremonies). This was perfectly legal, because the Constitution only prohibited the federal government from passing laws "respecting an establishment of religion"; and the Bill of Rights provides, through the tenth amendment, that, "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." The power to establish a state religion, then, though denied to the United States, was reserved to the individual states.

Jefferson's acknowledgement of this federalist structure is evident in his conduct in office: he refused to proclaim federal days of prayer or fasting while president, breaking with the tradition of his predecessors; on the other hand, he drafted resolutions in support of such days of prayer while in the Virginia House of Burgesses and as governor of Virginia. Jefferson, Dreisbach shows, held a jurisdictional view of the First Amendment.

It is clear from Jefferson's letter to the Danbury Baptists that he did hope in time to "see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights…"; he here referred to the eventual disestablishment of the various churches in the states, to match the federal government. But he would never have considered that the First Amendment could be used to do this, because he was committed both to federalism and to limited

central government; he would have thought it a transgression for the federal government to stomp on the states' sovereignty.

Of course, a belief in disestablishment does not entail hostility to religion in government. Jefferson frequently showed his belief that the federal government is permitted to perform acts of hospitality toward religion without threatening the First Amendment. Not only did he ask listeners to join him in prayer in his second inaugural address; Dreisbach notes that he "personally encouraged and symbolically supported religion by attending public church services in the Capitol," in January of 1802 and with some frequency thereafter. He also negotiated a treaty with the Kaskaskia Indians designating federal moneys to pay for the construction of a Catholic church and the salary of a Catholic priest. His notion of a "law respecting the establishment of religion" was obviously more robust than the stark image of the "wall of separation."

Despite Jefferson's nuanced thought on the relationship between church and state, jurists have seized on one phrase in his letter, presenting a caricature of Jefferson's views to promote their secularization of the U.S. government—which Dreisbach suggests Jefferson might have found objectionable.

The metaphor is not truly analogous to the Constitutional arrangement of church and state. The wall of separation presupposes that government and religion are wholly distinct and can be divided as though by a physical structure. A strict wall would eliminate practices that even supporters of strict separation now take for granted: for instance, military chaplains and tax exemptions for religious organizations. And it would be outrageous to ask legislators to leave their religion at home—not to mention harmful; the Bible is not *Mein Kampf*, although the ACLU and Americans United for the Separation of Church and State might sooner allow the latter than the former to be read in Congress. The wall also tends to

undermine the proper idea of freedom of religion, which should be like freedom of the press: the free press is protected from government interference. Banning the press from the public square would be viewed as an outrage; not so with religion.

What is more puzzling than the continual historical distortion of Jefferson's views is the fact that they matter at all in this debate. Jefferson's metaphor has become a canonized gloss on the First Amendment, despite the man's noticeable absence from this country during both the Constitutional Convention and the debate on the Bill of Rights during the First Federal Congress (he was the U.S. Minister to France); not to mention the fact that Jefferson was never on the Supreme Court. And there is no evidence that the phrase to which so much attention is now paid, was ever again uttered or written by Jefferson after he penned it in 1802.

Dreisbach attributes the phrase's continuing power partly to the unique advantages of metaphor in legal analysis. Metaphors liven up legal language, provide concrete images of the abstract, and engage the reader, causing him to make comparisons between the metaphor and that which it represents; all of which make the concept more memorable.

But this does not fully explain the wide currency of Jefferson's wall. To tell the whole story, one would have to take into account societal developments in the late nineteenth and early twentieth centuries (namely, the increasing numbers of Catholic immigrants and the matching waves of nativist sentiment) as well as the biographies and psychologies of key proponents of the wall (for example, Justice Hugo L. Black's membership in the Ku Klux Klan and abiding anti-Catholicism). Dreisbach makes only passing mention of these factors, since he has limited the structure of his work to that of a legal sourcebook; nonetheless, any picture of the metaphor's life-span without these details lacks depth.

A major shortcoming of the use of metaphor in legal analysis

is that a metaphor, in equating two distinct objects, can easily lend itself to faulty comparisons. For instance, a wall restricts parties on both sides; but the First Amendment was meant to restrict only the federal government. When Justice Hugo Black in his decision in the 1947 Everson v. Board of Education case called Jefferson's wall the definitive interpretation of the First Amendment, he capitalized on the image, declaring, "That wall must be kept high and impregnable." This is an even greater broadening of the First Amendment's scope. Dreisbach notes that some have called a high and impregnable wall a "wall of spite," and that good neighbors would prefer a low New England stone wall, at which neighbors can meet and speak. An amicus brief filed in Everson warned against turning the wall of separation into an iron curtain. Others have suggested the images of a wall with doors or guarded gaps, like the Great Wall of China; a barbed wire fence; and even a prison wall. The fact that all of these conceptions of the wall with their conflicting legal corollaries can be (and are) drawn from Jefferson's wall demonstrates how problematic the metaphor is.

Different readings of the wall metaphor result in an inconsistent array of decisions dealing with church and state: confusion over school vouchers, prayer or crèches in public schools, the tune "God Bless America," the words "Under God" in the Pledge of Allegiance, etc. More often than not, the metaphor's ambiguity has made it an easy cudgel to be used by radical secularists and other unprincipled partisans to promote their political agendas. It should be unsurprising that then-Justice Rehnquist in 1985 said of the wall of separation: "[It] is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging. It should be frankly and explicitly abandoned."

Professor Dreisbach takes great pains to present an impartial study. He even concludes with an even-handed presentation of arguments for and against the "wall of separation." Despite

his mostly descriptive tenor, the facts of the matter tend to highlight what is prescriptive: nothing short of a serious reconsideration of the metaphor as a condensation of Constitutional law.

Joseph A. P. De Feo is a policy analyst at the Catholic League.

Testimony before the U.S. House Subcommittee on the Constitution

by William A. Donohue; on the Religious Freedom Amendment

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On July 23, Catholic League president William Donohue testified before the Subcommittee on the Constitution of the House Committee on the Judiciary on a proposed amendment to the U.S. Constitution. The Religious Freedom Amendment, which was first sponsored by Rep. Ernest Istook and then revised twice, once by Rep. Henry Hyde and again by Rep. Dick Armey, reads as follows: "In order to secure the right of the people to acknowledge and serve God according to the dictates of conscience, neither the United States nor any State shall deny any person equal access to a benefit, or otherwise discriminate against any person, on account of religious belief, expression or exercise. This amendment does not authorize government to coerce or inhibit religious belief, expression or exercise." Text of Donohue's testimony: The

Catholic League for Religious and Civil Rights, the nation's largest Catholic civil rights organization, enthusiastically endorses the Religious Freedom Amendment as proposed by Congressman Henry Hyde and modified by Congressman Dick Armey. The First Amendment was written, in part, to secure religious liberty by keeping religion free from governmental intrusion. James Madison, who authored the First Amendment, made it quite clear what he meant when he wrote the so-called establishment clause. He meant to forbid the establishment of a national church and to forbid governmental preference of one religion over another. The idea that this clause would be used to insulate religion from government would have struck Madison, and the other Framers, as bizarre and downright disrespectful of their original intent. Regrettably, the work of the Framers has been so upended by recent judicial and executive decisions as to make moot their efforts. In the 1984 Supreme Court decision, Lynch v. Donnelly, Chief Justice Warren Burger, writing for the majority, stated that the Constitution does not require "complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." Unfortunately, the record shows an increasing hostility for religious belief, expression and exercise, making necessary the remedy that Congressman Armey has proposed. Whatever the sources of the current animus against religion, there can be little doubt that state encroachment on religion is a reality and that religious speech is often assigned a second-class status. The examples that follow are offered as evidence of the need for a Religious Freedom Amendment. The encroachment of government on religion has infused many public policy measures. It has been well-documented that religious organizations have managed to service the needy in ways that are both effective and cost efficient. Yet when the federal government entertains day care bills, as it did in 1988, it does so with the proviso that religious institutions that participate in such programs must first sanitize their quarters of religious symbols and halt all religious

instruction and worship. In New York the authorities even went so far as to say that religious preference was illegal in religious-based foster care centers and that Catholic schoolchildren were barred from making the sign of the cross before meals. It would be more honest for legislators to simply say that the gutting of religious institutions is a precondition for largesse. Even more incredible was the attempt by the City of New York to force the Archdiocese of New York to abide by an executive order (Executive Order 50) that mandated an affirmative action program for homosexuals for all institutions that receive municipal funds. The Archdiocese of New York, which was expecting to receive $120 million to operate its child care facilities, refused to accept this litmus test and thus did not receive the funding. Though the Archdiocese eventually prevailed in the courts, it did not do so before considerable damage had been done to the children in its care. Indeed, the damage was even more extensive than that. At the time that the litigation was pending, the Archdiocese of New York had responded to an appeal by the mayor to open its churches to the homeless during a very bad winter. It did so without hesitation. But when the winter ended and the priests who serviced the homeless sought reimbursement for their outlays, the city refused to pay a dime, citing non-compliance with Executive Order 50. Freedom of religious expression is challenged in many ways. I recently was asked by the New York Daily News to participate in an Op-Ed debate over the question of Cardinal O'Connor's criticisms of partial-birth abortions. The issue was not whether His Eminence was right on the subject, but whether he had the right to even address the issue. That's how far we've gone: Catholic priests now have to explain why they should have the same First Amendment rights that others enjoy. And I know from talking to many priests, that this attempt to accord a second-class status to the free speech rights of priests has had the effect of stifling their expression, so scared are they of jeopardizing the tax exempt status of the Catholic Church. Their fears, of course, are not unfounded. In

the late 1980s, the National Catholic Conference of Bishops and the United States Catholic Conference were sued by abortion advocates because they advocated a pro-life position. Though the plaintiffs were denied standing, the effect of this action was to create a chilling effect on the free speech rights of the Catholic clergy. Perhaps one of the most disturbing problems that the Catholic League faces is the extent to which religious expression is denied by the same agents of government that allow for the defamation of religion under the guise of freedom of expression. To be specific, despite court decisions to the contrary, the placement of religious symbols on public property continues to be problematic, while public funding of bigoted assaults on religion proceeds with alacrity. Yet if it is wrong to use public monies and facilities to promote religion, why is it not also wrong to use public monies and facilities to bash religion? This is a question that needs to be addressed and it is one reason why the Catholic League is looking for a remedy in Congressman Armey's bill. To be specific, in the fall of 1993, a blasphemous ad for VH-1, an MTV outlet, was posted on the sides of buses in New York City. It pictured Madonna, the pop star, on one side, and Our Blessed Mother on the other, with the inscription, "The Difference Between You and Your Parents" placed squarely in the middle. Now I cannot imagine for a moment that an ad that simply featured Our Blessed Mother, complete with a reverential statement, would have passed muster with the guardians of church and state in New York. Here's another example. In 1990, in the Capitol rotunda in Harrisburg, Pennsylvania, a Christmas tree was put on display, adorned with about 1,000 ornaments made by senior citizens. Three of the ornaments were made in the shape of a cross, and that was enough to send the ACLU into federal district court. Though the ACLU lost, the point to be made here is that if the senior citizens decided to immerse their crosses in a jar of their own urine—much the way the celebrated artist Andres Serrano did—perhaps the ACLU would have defended their action as freedom of expression (they

might even have qualified for a federal grant from the National Endowment for the Arts). We have also seen attempts to remove Catholic federal judges from cases dealing with abortion, and instances when Catholic jurors have been excluded from cases where a priest is the defendant. These examples of blatant anti-Catholic bigotry may not occur everyday, but to those who suffer such indignities, it is a condition that needs to be seriously addressed. If there were ever a place where religious expression is frequently challenged, it is in our nation's public schools. Not only are teachers afraid to even discuss religion in the classroom, principals and superintendents throughout the nation have engaged in religion-cleansing efforts to rid the schools of any religious element. Most of these school officials are good Americans who bear no animosity toward religion and who would be quite supportive of directives that allowed for equal treatment of religious expression. What motivates them to rid their schools of religious expression is not malice, but fear. Fear of a lawsuit. I have spoken to too many school lawyers to know that even they are confused about the status of the law. So they do what lawyers naturally incline to do—they advise their clients to avoid any opportunity for a lawsuit. The result is that religious-free zones are the norm. Here are some examples of what I mean. We have all heard of instances where the display of crèches are banned in the schools, as well as the singing of religious songs like "Silent Night." But how many know about the banning of "garlands, wreaths, evergreens, menorahs and caroling"? That is exactly what happened in Scarsdale, New York just a few years ago. In addition, the Scarsdale School Board revoked permission to sing secular songs like "Jingle Bells" and took the word "Christmas" off the spelling list in its schools. Candy canes were even confiscated by some teachers and even the color and shape of cookies became an issue: green and red sprinkles as well as bell and star shapes were all suspect. The same sanitization program was applied to Easter, to the point where even the term "Easter" was stricken from all school

publications. We know there is something terribly wrong when the play “Jesus Christ Superstar” is banned from public high schools. Would they ban “Oh! Calcutta!” as well. Not for a minute: the argument would be made that frontal nudity and simulated sex was freedom of expression and if people didn’t want to see it, they could absent themselves. That plays with a religious theme are not accorded the same treatment is testimony to the present state of affairs. Children have been harassed by school officials for reading a bible on a school bus and teachers have been told to remove their bibles from the view of students in the classroom. Books like “The Bible in Pictures” and “The Story of Jesus” have been banned from school libraries, but we hear no outrage from the same civil libertarians who would protest the removal of child pornography from library shelves. Even more astounding have been the attempts by the ACLU to ban books from school libraries that promote abstinence. It does so on the grounds that abstinence is a religious perspective and is therefore unsuitable for dissemination in public schools. Other examples are easy to come by. Public school teachers have refused to accept term papers on the life of Jesus, prayers are banned in a huddle before football games and the mere mention of God at a commencement exercise—by a student valedictorian—is regularly proscribed. The Catholic League believes that if the Religious Freedom Amendment were passed by the Congress and ratified by the states that it would go a long way toward ensuring the rights that were originally guaranteed in the First Amendment. There is nothing in the amendment that would coerce anyone from observing any religion, and that is how it should be. What we are looking for is not special treatment but an end to the two-class system we have at the moment where secular expression is given preferential treatment over religious expression. That is why the Catholic League strongly urges this committee to vote in favor of Congressman Armey’s amendment.

Religious Expression in Public Schools.

Memo from the Clinton Administration to all public school superintendents.

(August 1995)

Student prayer and religious discussion: The Establishment Clause of the First Amendment does not prohibit purely private religious speech by students. Students therefore have the same right to engage in individual or group prayer and religious discussion during the school day as they do to engage in other comparable activity. For example, students may read their bible or other scriptures, say grace before meals, and pray before tests to the same extent they may engage in comparable nondisruptive activities. Local school authorities possess substantial discretion to impose rules of order and other pedagogical restrictions on student activities, but they may not structure or administer such rules to discriminate against religious activity or speech.

Generally, students may pray in a nondisruptive manner when not engaged in school activities or instruction, and subject to the rules that normally pertain in the application setting. Specifically, students in informal settings, such as cafeterias and hallways, may pray and discuss their religious views with each other, subject to the same rules of order as apply to other student activities and speech. Students may also speak to, and attempt to persuade, their peers about religious topics just as they do with regard to political topics. School officials, however, should intercede to stop student speech that constitutes harassment aimed at a student

or a group of students.

Students may also participate in before or after school events with religious content, such as “see you at the flag pole” gatherings, on the same terms as they may participate in other noncurriculum activities on school premises. School officials may neither discourage nor encourage participation in such an event.

The right to engage in voluntary prayer or religious discussion free from discrimination does not include the right to have a captive audience listen, or to compel other students to participate. Teachers and school administrators should ensure that no student is in any way coerced to participate in religious activity.

Graduation prayer and baccalaureates: Under current Supreme Court decisions, school officials may not mandate or organize prayer at graduation, nor organize religious baccalaureate ceremonies. If a school generally opens its facilities to private groups, it must make its facilities available on the same terms to organizers of privately sponsored religious baccalaureate services. A school may not extend preferential treatment to baccalaureate ceremonies and may in some instances be obliged to disclaim official endorsement of such ceremonies.

Official neutrality regarding religious activity: Teachers and school administrators, when acting in those capacities, are representatives of the state and are prohibited by the establishment clause from soliciting or encouraging religious activity, and from participating in such activity with students. Teachers and administrators also are prohibited from discouraging activity because of its religious content, and from soliciting or encouraging anti-religious activity.

Teaching about religion: Public schools may not provide religious instruction, but they may teach about religion,

including the Bible or other scripture: the history of religion, comparative religion, the Bible (or other scripture)-as-literature, and the role of religion in the history of the United States and other countries all are permissible public school subjects. Similarly, it is permissible to consider religious influences on art, music, literature, and social studies. Although public schools may teach about religious holidays, including their religious aspects, and may celebrate the secular aspects of holidays, schools may not observe holidays as religious events or promote such observance by students.

Student assignments: Students may express their beliefs about religion in the form of homework, artwork, and other written and oral assignments free of discrimination based on the religious content of their submissions. Such home and classroom work should be judged by ordinary academic standards of substance and relevance, and against other legitimate pedagogical concerns identified by the school.

Religious literature: Students have a right to distribute religious literature to their schoolmates on the same terms as they are permitted to distribute other literature that is unrelated to school curriculum or activities. Schools may impose the same reasonable time, place, and manner or other constitutional restrictions on distribution of religious literature as they do on nonschool literature generally, but they may not single out religious literatures for special regulation.

Religious excusals: Subject to applicable State laws, schools enjoy substantial discretion to excuse individual students from lessons that are objectionable to the student or the students' parents on religious or other conscientious grounds. However, students generally do not have a Federal right to be excused from lessons that may be inconsistent with their religious beliefs or practices. School officials may neither encourage nor discourage students from availing themselves of

an excusal option.

Released time: Subject to applicable State laws, schools have the discretion to dismiss students to off-premises religious instruction, provided that schools do not encourage or discourage participation or penalize those who do not attend. Schools may not allow religious instruction by outsiders on school premises during the school day.

Teaching values: Though schools must be neutral with respect to religion, they may play an active role with respect to teaching civic values and virtue, and the moral codes that hold us together as a community. The fact that some of these values are held also by religions does not make it unlawful to teach them in school.

Student garb: Schools enjoy substantial discretion in adopting policies relating to student dress and school uniforms. Students generally have no Federal right to be exempted from religiously-neutral and generally applicable school dress rules based on their religious beliefs or practices; however, schools may not single out religious attire in general, or attire of a particular religion, for prohibition or regulation. Students may display religious messages on items of clothing to the same extent that they are permitted to display other comparable messages. Religious messages may not be singled out for suppression, but rather are subject to the same rules as generally apply to comparable messages.

THE EQUAL ACCESS ACT

The Equal Access Act is designed to ensure that, consistent with the same First Amendment, student religious activities are accorded the same access to public school facilities as are student secular activities. Based on decisions of the Federal courts, as well as its interpretations of the Act, the Department of Justice has advised that the Act should be interpreted as providing, among other things, that:

General provisions: Student religious groups at public secondary schools have the same right of access to school facilities as is enjoyed by other comparable student groups. Under the Equal Access Act, a school receiving Federal funds that allows one or more student noncurriculum-related clubs to meet on its premises during noninstructional time may not refuse access to student religious groups.

Prayer services and worship exercises covered: A meeting, as defined and protected by the Equal Access Act, may include prayer service, Bible reading, or other worship exercise.

Equal access to means of publicizing meetings: A school receiving Federal funds must allow student groups meeting under the Act to use the school media – including the public address system, the school newspaper, an the school bulletin board – to announce their meetings on the same terms as other noncurriculum-related student groups are allowed to use the school media. Any policy concerning the use of school media must be applied to all noncurriculum-related student groups in a nondiscriminatory matter. Schools, however, may inform students that certain groups are not school sponsored.

Lunch-time and recess covered: A school creates a limited open forum under the Equal Access Act, triggering equal access rights for religious groups, when it allows students to meet during their lunch periods or other noninstructional time during the school day, as well as when it allows students to meet before and after the school day.