Freedom from the Majority in the USA

Keywords

American, Barnette, belief, case, cases, conformity, conscience, constitution, constitutional, court, courts, democracy, free, freedom, government, individual, individuals, intolerance, law, legal, liberties, liberty, loyalty oaths, majority, minority, minorities, orthodoxy, people, prayer, prayers, protect, protection, public, religion, religious, right, rights, school, state, states, Ten Commandments, tyranny, unconstitutional, U.S., U.S.A., vote

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Introduction

It is generally true that, in a democracy, politicians in the legislative and executive branches of government can enact and enforce statutes that impose the values of the majority of people on everyone. This essay considers U.S. constitutional law that imposes limits on how far the majority can go in imposing their values on everyone, specifically including minorities with different values. This essay shows that using statutes or government regulations to force everyone to conform to majority values is constitutionally *im*permissible, even if strongly supported by the majority of people.

In the context of this essay, I use the word *majority* to include a minority of the population that has substantial political power in both the legislative and executive branches of the government. In writing this paragraph, I am thinking of the recent U.S. history in which religious fundamentalists wished to impose their values about contraception, abortion, homosexuality, religion, etc. on everyone, even though the religious fundamentalists are actually less than half of the population.

Most essays in law, including my essays, collect cases on *one* issue (e.g., academic freedom, right to die, wrongful discharge of a professional who followed ethics instead of his/her manager's wishes, etc.). This narrow view is natural, because the job of judges in the USA is to resolve one specific case or controversy at a time. An alternative way to view law is to look for how one broad philosophical principle can be applied to resolve many different issues. For example, this essay looks at constitutional limits on the ability of the majority to use statutes and regulations to compel orthodoxy. Previously, I wrote an essay[1] that examined limits on a government's ability to demand that a person waive a constitutional right in exchange for some benefit.

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[1] Standler, *Doctrine of Unconstitutional Conditions in the USA,* http://www.rbs2.com/duc.pdf (Feb 2005).

This essay is intended only to present general information about an interesting topic in law and is *not* legal advice for your specific problem. See my disclaimer at http://www.rbs2.com/disclaim.htm .

I list the cases in chronological order in this essay, so the reader can easily follow the historical development of a national phenomenon. If I were writing a legal brief, then I would use the conventional citation order given in the *Bluebook*.

Overview

The U.S. Constitution explicitly contains a variety of protections for people from overreaching by the government. For example:

1. The First Amendment contains guarantees of
   (a) religious freedom: the government can neither establish a religion nor prohibit the free exercise of a religion
   (b) freedom of speech
   (c) freedom of peaceful assembly
2. The Fifth Amendment guarantees that the federal government shall not deprive a person of "life, liberty, or property without due process of law". There are two parts to "due process": (1) procedural due process[2] and (2) substantive due process.[3] The former guarantees fair procedure (e.g., notice and an opportunity to be heard in opposition), while the latter guarantees fair law on substantive issues.
3. The Ninth Amendment, which is rarely used by courts, says: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."
4. The Fourteenth Amendment, for the purposes of this essay, contains two important features:
   (a) makes the entire Bill of Rights (i.e., the first ten amendments to the U.S. Constitution) also applicable to state governments, through the "due process" clause in the 14th Amendment.[4]

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[2] See, e.g., *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950); *Fuentes v. Shevin,* 407 U.S. 67 (1972); *Board of Regents of State Colleges v. Roth,* 408 U.S. 564 (1972); *Mathews v. Eldridge,* 424 U.S. 319 (1976).

[3] See, e.g., *Palko v. State of Connecticut,* 302 U.S. 319 (1937); *Rochin v. California,* 342 U.S. 165 (1952).

[4] *Duncan v. State of Louisiana,* 391 U.S. 145, 147-148 (1968); *Harris v. McRae,* 448 U.S. 297, 312, n. 18 (1980); *New Jersey v. T.L.O.,* 469 U.S. 325, 334 (1985); *McIntyre v. Ohio Elections Com'n,* 514 U.S. 334, 336, n. 1 (1995).

(b) prohibits the federal and state governments from denying the "equal protection of the laws" to "any person within its jurisdiction". The essence of the equal protection guarantee is that similarly situated people must be treated in the same way.[5]

5. A number of guarantees for fair treatment of criminal suspects in the Fourth, Fifth, Sixth, Seventh, and Eighth Amendments.

Every student of U.S. history knows that the authors of the U.S. Constitution were concerned about a government having too much power, and individuals having too little freedom. That concern explains why the U.S. Constitution contains so many protections for individuals.

tyranny of the majority

The majority can, and often does, use its power to punish those who disagree with the values of the majority. Such punishment or retaliation is known as the "tyranny of the majority". The end result of this tyranny is an orthodoxy, enforced by censorship and repression, in which no one dares to dispute publicly the position of the majority.

The phrase "tyranny of the majority" can be traced back to Alexis DeTocqueville, *Democracy in America,* Vol. 1, chapters 15-16, and — later — an essay, *On Liberty,* by the English philosopher John Stuart Mill.

The first Justice Harlan was the first to use the phrase "tyranny of a majority" in an opinion of the U.S. Supreme Court, in a case involving a disputed election in Kentucky.

> The cornerstone of our republican institutions is the principle that the powers of government shall, in all vital particulars, be distributed among three separate co-ordinate departments, legislative, executive, and judicial. And liberty regulated by law cannot be permanently secured against the assaults of power or the tyranny of a majority, if the judiciary must be silent when rights existing independently of human sanction, or acquired under the law, are at the mercy of legislative action taken in violation of due process of law.

Taylor v. Beckham, 178 U.S. 548, 609 (1900) (Harlan, J., dissenting).

Justice Brandeis explained that the authors of the U.S. Constitution valued freedom and liberty, particularly freedom of speech and freedom of assembly.

> Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law — the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Whitney v. California, 274 U.S. 357, 375-376 (1927) (Brandeis, J., concurring).

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[5] *F.S. Royster Guano Co. v. Commonwealth of Virginia,* 253 U.S. 412, 415 (1920); *Plyler v. Doe,* 457 U.S. 202, 216 (1982); *City of Cleburne, Tex. v. Cleburne Living Center,* 473 U.S. 432, 439 (1985) ("... all persons similarly situated should be treated alike.").

cited with approval in

- *New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964);
- *Boy Scouts of America v. Dale,* 530 U.S. 640, 661 (2000).

In 1995, the U.S. Supreme Court declared unconstitutional Ohio's statute prohibiting distribution of anonymous political campaign literature.

> Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority. See generally J. Mill, *On Liberty and Considerations on Representative Government* 1, 3-4 (R. McCallum ed. 1947). It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation — and their ideas from suppression — at the hand of an intolerant society. ....

McIntyre v. Ohio Elections Commission, 514 U.S. 334, 357 (1995).

court cases

In the following sections of this essay, I quote from opinions of the U.S. Supreme Court, and occasionally quote other courts, in cases where judges refused to allow the majority to impose their values on everyone. These cases are actual historical examples of overreaching by governments in the USA.

Carolene Products

In the year 1938, the U.S. Supreme Court considered a case involving interstate shipment of milk to which coconut oil had been added, as an adulterant. Justice Stone, writing for the majority, briefly stated that legislation was presumed constitutional if it had a rational basis. In a now famous footnote, Justice Stone noted the possibility of some exceptions, which were not relevant to this defendant.

> There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten Amendments, which are deemed equally specific when held to be embraced within the Fourteenth. See *Stromberg v. California,* 283 U.S. 359, 369, 370, 51 S.Ct. 532, 535, 536, 75 L.Ed. 1117, 73 A.L.R. 1484; *Lovell v. Griffin,* 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949, decided March 28, 1938.
>
> It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation. On restrictions upon the right to vote, see *Nixon v. Herndon,* 273 U.S. 536, 47 S.Ct. 446, 71 L.Ed. 759; *Nixon v. Condon,* 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984, 88 A.L.R. 458; on restraints upon the dissemination of information, see *Near v. Minnesota,* 283 U.S. 697, 713--714, 718--720, 722, 51 S.Ct. 625, 630, 632, 633, 75 L.Ed. 1357; *Grosjean v. American Press Co.,* 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660; *Lovell v. Griffin,* supra; on interferences with political organizations, see *Stromberg v. California,* supra, 283 U.S. 359, 369, 51 S.Ct. 532, 535, 75

L.Ed. 1117, 73 A.L.R. 1484; *Fiske v. Kansas,* 274 U.S. 380, 47 S.Ct. 655, 71 L.Ed. 1108; *Whitney v. California,* 274 U.S. 357, 373--378, 47 S.Ct. 641, 647, 649, 71 L.Ed. 1095; *Herndon v. Lowry,* 301 U.S. 242, 57 S.Ct. 732, 81 L.Ed. 1066; and see Holmes, J., in *Gitlow v. New York,* 268 U.S. 652, 673, 45 S.Ct. 625, 69 L.Ed. 1138; as to prohibition of peaceable assembly, see *De Jonge v. Oregon,* 299 U.S. 353, 365, 57 S.Ct. 255, 260, 81 L.Ed. 278.

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, [6]*Pierce v. Society of Sisters,* 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070, 39 A.L.R. 468, or national, *Meyer v. Nebraska,* 262 U.S. 390, 43 S.Ct. 625, 67 L.Ed. 1042, 29 A.L.R. 1446; *Bartels v. Iowa,* 262 U.S. 404, 43 S.Ct. 628, 67 L.Ed. 1047; *Farrington v. Tokushige,* 273 U.S. 284, 47 S.Ct. 406, 71 L.Ed. 646, **or racial minorities.** *Nixon v. Herndon,* supra; *Nixon v. Condon,* supra; **whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.**[7] Compare *McCulloch v. Maryland,* 4 Wheat. 316, 428, 4 L.Ed. 579; *South Carolina State Highway Department v. Barnwell Bros.,* 303 U.S. 177, 58 S.Ct. 510, 82 L.Ed. 734, decided February 14, 1938, note 2, and cases cited.

U.S. v. Carolene Products Co., 304 U.S. 144, 152-153, n. 4 (1938).

This incidental mention by Justice Stone appears to be the first recognition by the U.S. Supreme Court that a legislature's infringement of a minority's rights would trigger a heightened judicial scrutiny.[8]

Barnette

Barnette, a case decided in 1943 by the U.S. Supreme Court, is the leading case for two propositions: (1) the government may *not* compel minorities to adopt orthodox views and (2) infringement of the constitutional rights of a minority can *not* be justified by a majority vote.

In 1943, the U.S. Supreme Court declared that schools could not require pupils to salute the U.S. flag:

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 642 (1943).

This quotation from *Barnette* was cited with approval in the following U.S. Supreme Court majority opinions:

- *Schware v. Board of Bar Exam. of State of N.M.,* 353 U.S. 232, 244, n. 15 (1957);

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[6] Emphasis added by Standler.

[7] Emphasis added by Standler.

[8] Terrance Sandalow, "Judicial Protection of Minorities," 75 Michigan Law Review 1162 (April 1977).

- *Street v. New York,* 394 U.S. 576, 593 (1969);
- *Elrod v. Burns,* 427 U.S. 347, 356 (1976);
- *Abood v. Detroit Board of Education,* 431 U.S. 209, 235 (1977);
- *Branti v. Finkel,* 445 U.S. 507, 514, n. 9 (1980);
- *Board of Education ... v. Pico,* 457 U.S. 853, 870 (1982);
- *Wallace v. Jaffree,* 472 U.S. 38, 55 (1985) ("The State of Alabama, no less than the Congress of the United States, must respect that basic truth.");
- *Texas v. Johnson,* 491 U.S. 397, 415 (1989).

Another paragraph of *Barnette* declares that constitutional rights of individual people are *not* subject to majority vote:

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

West Virginia State Board of Education v. Barnette, 319 U.S. 624, 638 (1943).

This quotation from *Barnette* was cited with approval in the following U.S. Supreme Court opinions:

- *School Dist. of Abington Township, Pa. v. Schempp,* 374 U.S. 203, 226 (1963) (majority opinion);

- *Lucas v. Forty-Fourth General Assembly of State of Colo.,* 377 U.S. 713, 736-737 (1964) (majority opinion) ("A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be.");

- *Furman v. Georgia,* 408 U.S. 238, 268-269 (1972) (Brennan, J., concurring);

- *Hudson v. Palmer,* 468 U.S. 517, 556, n. 33 (1984) (Stevens, J., concurring in part and dissenting in part) ("... the Court overlooks the purpose of a written Constitution and its Bill of Rights. That purpose, of course, is to ensure that certain principles will not be sacrificed to expediency; these are enshrined as principles of fundamental law beyond the reach of governmental officials or legislative majorities.");

- *Thornburgh v. American College of Obstetricians and Gynecologists,* 476 U.S. 747, 781-782, n. 12 (1986) (Stevens, J., concurring) ("In the final analysis, the holding in *Roe v. Wade* presumes that it is far better to permit some individuals to make incorrect decisions than to deny all individuals the right to make decisions that have a profound effect upon their destiny. .... But the lawmakers who placed a special premium on the protection of individual liberty have recognized that certain values are more important than the will of a transient majority.");

- *Webster v. Reproductive Health Services,* 492 U.S. 490, 556, n. 11 (1989) (Blackmun, J., concurring in part and dissenting in part);

- *Employment Div., Dept. of Human Resources of Oregon v. Smith,* 494 U.S. 872, 903 (1990) (O'Connor, J., concurring in judgment);

- *Turner Broadcasting System, Inc. v. F.C.C.,* 512 U.S. 622, 641 (1994) (majority opinion) ("At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence. Our political system and cultural life rest upon this ideal.");

- *Santa Fe Independent School Dist. v. Doe,* 530 U.S. 290, 305 (2000) (majority opinion);

- *Republican Party of Minnesota v. White,* 536 U.S. 765, 804 (2002) (Ginsburg, J., dissenting);

- *McCreary County, Ky v. American Civil Liberties Union of Kentucky,* 125 S.Ct. 2722, 2747 (2005) (O'Connor, J., concurring).

constitutional rights *not* subject to vote

The lower federal courts have followed this holding in *Barnette* in many cases, of which a few are quoted here:

In 1986, the U.S. Court of Appeals held that a voting reapportionment scheme in Massachusetts violated the rule "one person–one vote".

> That a majority of the voters, even those whose votes are diluted, approved the apportionment scheme, is irrelevant. As the Supreme Court noted in *Lucas v. Forty-fourth General Assembly of Colorado:*
>
> > An individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of a State's electorate, if the apportionment scheme adopted by the voters fails to measure up to the requirements of the Equal Protection Clause. Manifestly, the fact that an apportionment plan is adopted in a popular referendum is insufficient to sustain its constitutionality or to induce a court of equity to refuse to act. As stated by this Court in *West Virginia State Bd. of Educ. v. Barnette,* 319 U.S. 624, 638 [63 S.Ct. 1178, 1185, 87 L.Ed. 1628 (1943)], "One's right to life, liberty, and property ... and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be. [FN11]
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> FN11. 377 U.S. 713, 736-37, 84 S.Ct. 1459, 1473-74, 12 L.Ed.2d 632, 647 (1964) (footnotes omitted).
>
> A majority of citizens willing to have their rights diluted cannot deprive the minority of their right to cast an equally weighted vote. [FN12]
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> FN12. *Id.* 377 U.S. 713, 84 S.Ct. 1459, 12 L.Ed.2d 632; *Hadley,* 397 U.S. 50, 90 S.Ct. 791, 25 L.Ed.2d 45; *Baker,* 520 F.2d at 803 n. 11; *Powers,* 359 F.Supp. at 35; *Leopold,* 340 F.Supp. at 1018; *Meyer v. Campbell,* 260 Iowa 1346, 152 N.W.2d 617, 620 (1967); *O'Connors v. Helfgott,* 481 A.2d 388, 393-94 (R.I. 1984).

Kelleher v. Southeastern Regional Vocational Technical High School Dist., 806 F.2d 9, 12 (1st Cir. 1986).

Judge Albert V. Bryan, Jr.in the U.S. District Court in Virginia wrote:

> The notion that a person's constitutional rights may be subject to a majority vote is itself anathema.

Gearon v. Loudoun County School Board, 844 F.Supp. 1097, 1100 (E.D.Va. 1993) (Holding that prayer at high school graduation was *un*constitutional.).

In a famous case involving the words "under God" in a teacher-led Pledge of Allegiance in a public school in California, a concurring judge wrote:

> The Bill of Rights is, of course, intended to protect the rights of those in the minority against the temporary passions of a majority which might wish to limit their freedoms or liberties. As Justice Jackson recognized:
>
> > The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.
>
> *W. Va. State Bd. of Educ. v. Barnette,* 319 U.S. 624, 638, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). It is the highest calling of federal judges to invoke the Constitution to repudiate unlawful majoritarian actions and, when necessary, to strike down statutes that would infringe on fundamental rights, whether such statutes are adopted by legislatures or by popular vote. The constitutional system that vests such power in an independent judiciary does not "test[ ] the integrity of ... democracy."[9] It makes democracy vital, and is one of our proudest heritages.

Newdow v. U.S. Congress, 328 F.3d 466, 470-471 (9th Cir. 2003) (Rheinhardt, J., concurring), *rev'd sub nom. Elk Grove Unified School Dist. v. Newdow,* 542 U.S. 1 (2004) (The U.S. Supreme Court held that Plaintiff lacked standing to bring challenge.).

Korematsu

During World War II, the U.S. government prohibited U.S. citizens of Japanese ancestry from being in a "military area" (e.g., all seven states on the West Coast of the USA), without any finding that an individual citizen was either disloyal or posed a threat of sabotage or espionage. Moreover, approximately 120,000 Japanese-Americans were removed from their homes and relocated them in internment camps, allegedly because it was too much bother to sort those who

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[9] *Coalition for Economic Equity v. Wilson,* 122 F.3d 692, 699 (9th Cir. 1997) ("A system which permits one judge to block with the stroke of a pen what 4,736,180 state residents voted to enact as law tests the integrity of our constitutional democracy. These principles of judicial review are no less true today than in the days of *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803); *see, e.g., Pierce v. Society of Sisters,* 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925) (*upholding* district court injunction against state-wide initiative measure)."), *cert. den.,* 522 U.S. 963 (1997).

were loyal to Japan from those who were loyal to the USA.[10] In one of the worst decisions in the history of the U.S. Supreme Court, this racial discrimination was held to be constitutional. *Korematsu v. U.S.,* 323 U.S. 214 (1944).

Korematsu has become a classic case that shows that even the nine justices of the U.S. Supreme Court, with lifetime appointments, are *not always* isolated from current politics and hysteria. Only three justices dissented in *Korematsu.*

Approximately thirty years later, the U.S. Congress passed a statute, 18 USC § 4001(a) that was intended to prevent a repetition of such "abhorrent" internment camps.

> Section 4001(a) states that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." Congress passed § 4001(a) in 1971 as part of a bill to repeal the Emergency Detention Act of 1950, 50 U.S.C. § 811 *et seq.,* which provided procedures for executive detention, during times of emergency, of individuals deemed likely to engage in espionage or sabotage. Congress was particularly concerned about the possibility that the Act could be used to reprise the Japanese internment camps of World War II. H.R.Rep. No. 92-116 (1971); *id.,* at 4, U.S.Code Cong. & Admin.News 1971, 1435, 1438 ("The concentration camp implications of the legislation render it abhorrent").

Hamdi v. Rumsfeld, 542 U.S. 507, ___, 124 S.Ct. 2633, 2639 (2004).

In 1988, the U.S. Congress passed another statute that explicitly apologized for the mistreatment of the Japanese-Americans:

> The Congress recognizes that, as described by the Commission on Wartime Relocation and Internment of Civilians, a grave injustice was done to both citizens and permanent resident aliens of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II. As the Commission documents, these actions were carried out without adequate security reasons and without any acts of espionage or sabotage documented by the Commission, and were motivated largely by racial prejudice, wartime hysteria, and a failure of political leadership. The excluded individuals of Japanese ancestry suffered enormous damages, both material and intangible, and there were incalculable losses in education and job training, all of which resulted in significant human suffering for which appropriate compensation has not been made. For these fundamental violations of the basic civil liberties and constitutional rights of these individuals of Japanese ancestry, the Congress apologizes on behalf of the Nation.

Public Law 100-383, § 2(a), 102 Statutes at Large 903-904, 50a U.S.C. § 1989a(a) (Aug 1988).

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[10] A dissenting justice explained that the *real* reason was longstanding racial prejudice against Japanese immigrants. *Korematsu* 323 U.S. at 233-242 (Murphy, J., dissenting).

Flag Desecration

Although desecration of the U.S. flag is abhorrent to the majority of people in the USA, considerations of freedom of speech (which includes symbolic speech such as torching or trampling on the flag) prevent the majority from punishing such offensive conduct by a minority. *Street v. New York,* 394 U.S. 576 (1969); *Texas v. Johnson,* 491 U.S. 397 (1989); *U.S. v. Eichman,* 496 U.S. 310 (1990).

As an aside, despite the many *real* problems and issues facing our nation, U.S. Congressmen repeatedly propose legislation to make desecration of the flag a crime. In my opinion, these Congressmen are either (1) intellectually *in*competent to write, revise, and approve statutes or (2) demagogues who intentionally propose *un*constitutional bills. Either way, these Congressmen advocate *un*constitutional statutes and waste taxpayers' money in enacting and then futilely defending such *un*constitutional statutes.

Wall of Separation Between Church & State

An old U.S. Supreme Court case quotes President Jefferson's interpretation of the First Amendment's guarantees of religious freedom:

> Accordingly, at the first session of the first Congress the amendment now under consideration was proposed with others by Mr. Madison. It met the views of the advocates of religious freedom, and was adopted. Mr. Jefferson afterwards, in reply to an address to him by a committee of the Danbury Baptist Association (8 Jefferson *Works* 113), took occasion to say:
>
> > Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions, — 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 and State.**[11] Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties.

Reynolds v. U.S., 98 U.S. 145, 164 (1878).

Quoted with approval in *Everson v. Board of Education of Ewing Township,* 330 U.S. 1, 16 (1947). But see *Lynch v. Donnelly,* 465 U.S. 668, 673 (1984) ("The concept of a 'wall' of separation is a useful figure of speech probably deriving from views of Thomas Jefferson. The metaphor has served as a reminder that the Establishment Clause forbids an established church or anything approaching it. But the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state.").

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[11] Emphasis added by Standler.

No Organized Prayer in Public Schools

Many people in the USA, perhaps even a majority of people, are devout Christians who want to begin ceremonies, events, days, and meals with a prayer. They are free to pray as individuals, but compelling *everyone* to listen to the same public prayer in a government building is a violation of the Establishment Clause in the First Amendment of the U.S. Constitution.

- Allowing religious instruction for a half-hour/week in public school was unconstitutional. *People of State of Illinois ex rel. McCollum v. Board of Education of School Dist. No. 71, Champaign County, Ill.,* 333 U.S. 203 (1948).

- Beginning each school day with a prayer in all public schools in New York State was unconstitutional. *Engel v. Vitale,* 370 U.S. 421 (1962).

- Two Pennsylvania statutes were declared unconstitutional. A statute enacted in the year 1949 required "compulsory reading of ten verses of the *Holy Bible* at the opening of each public school in the Commonwealth of Pennsylvania on each school day by teachers or by students".[12] After being declared unconstitutional, that statute was amended in 1959 to require "... reading, without comment, over a loud speaker ten verses of the King James Version of the *Bible.* Then the children stood and repeated, with the public address system leading them, the Lord's Prayer."[13] Children had the option of leaving the classroom and standing in the hallway during the prayers, but that option did *not* make the prayers constitutional. *Schempp v. School Dist. of Abington Township, Pennsylvania,* 201 F.Supp. 815 (E.D.Pa. 1962), *aff'd,* 374 U.S. 203 (1963).

- Alabama statute requiring a one-minute interval of silence at the beginning of the day in all public schools for "meditation or voluntary prayer" was *un*constitutional. *Jaffree v. Wallace,* 705 F.2d 1526 (11th Cir. 1983), *aff'd,* 472 U.S. 38 (1985).

- Prayer given before public high school football games was *un*constitutional. *Jager v. Douglas County School Dist.,* 862 F.2d 824 (11th Cir. 1989), *cert. den.,* 490 U.S. 1090 (1989).

- "Nonsectarian" prayer before high school graduation ceremony was unconstitutional. *Weisman v. Lee,* 728 F.Supp. 68 (D.R.I. 1990), *aff'd,* 908 F.2d 1090 (1st Cir. 1990), *aff'd,* 505 U.S. 577 (1992).

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[12] 201 F.Supp at 816.

[13] 201 F.Supp. at 817-818.

- A prayer led by a pupil before each high-school football game was unconstitutional. *Doe v. Santa Fe Independent School Dist.,* 168 F.3d 806 (5th Cir. 1999), *aff'd,* 530 U.S. 290 (2000).

- *Coles ex rel. Coles v. Cleveland Board of Education,* 171 F.3d 369, 1999 Fed.App. 0101P (6th Cir. 1999) (Opening public meetings of Board of Education with either prayer or moment of silent prayer was *un*constitutional.).

- Cadets at the Virginia Military Institute, a college operated by the state of Virginia, sued to prevent a daily "prayer of thanks" before each supper. The courts held that such prayer was unconstitutional. *Mellen v. Bunting,* 181 F.Supp.2d 619 (W.D.Va. 2002), *aff'd in part,* 327 F.3d 355 (4th Cir. 2003), *cert. den.,* 541 U.S. 1019, 124 S.Ct. 1750 (2004).

The large number of U.S. Supreme Court cases on this subject is evidence that the proponents of compelled prayers for everyone in public schools simply do not understand that the majority must *not* push their values on everyone. Reading the majority opinions of these U.S. Supreme Court cases makes this lesson in constitutional law very clear.

prayer in school is coercive

The U.S. District Court in *Schempp* summarized the compulsion felt by the children to attend prayers in a public school:

> Edward Schempp, the children's father, testified that after careful consideration he had decided that he should not have Roger or Donna excused from attendance at these morning ceremonies. Among his reasons were the following. He said that the thought his children would be "labeled as 'odd balls'" before their teachers and classmates every school day; that children, like Roger's and Donna's classmates, were liable "to lump all particular religious difference(s) or religious objections (together) as 'atheism'" and that today the word "atheism" is often connected with "atheistic communism", and has "very bad" connotations, such as "un-American" or [pro-Red], with overtones of possible immorality. Mr. Schempp pointed out that due to the events of the morning exercises following in rapid succession, the Bible reading, the Lord's Prayer, the Flag Salute, and the announcements, excusing his children from the Bible reading would mean that probably they would miss hearing the announcements so important to children. He testified also that if Roger and Donna were excused from Bible reading they would have to stand in the hall outside their 'homeroom' and that this carried with it the imputation of punishment for bad conduct.

Schempp v. School Dist. of Abington Township, 201 F.Supp. 815, 818 (E.D.Pa. 1962), *aff'd,* 374 U.S. 203 (1963).

In 1992, the U.S. Supreme Court explained why such coercion was *not* permissible in a case involving prayer at a high school graduation ceremony.

> The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause. It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce

anyone to support or participate in religion or its exercise, or otherwise act in a way which "establishes a [state] religion or religious faith, or tends to do so." *Lynch [v. Donnelly,* 465 U.S.] at 678, 104 S.Ct., at 1361; see also *County of Allegheny, supra,* 492 U.S., at 591, 109 S.Ct., at 3100, quoting *Everson v. Board of Ed. of Ewing,* 330 U.S. 1, 15-16, 67 S.Ct. 504, 511-512, 91 L.Ed. 711 (1947). The State's involvement in the school prayers challenged today violates these central principles.

That involvement is as troubling as it is undenied. A school official, the principal, decided that an invocation and a benediction should be given; this is a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur. The principal chose the religious participant, here a rabbi, and that choice is also attributable to the State. The reason for the choice of a rabbi is not disclosed by the record, but the potential for divisiveness over the choice of a particular member of the clergy to conduct the ceremony is apparent.

Lee v. Weisman, 505 U.S. 577, 587 (1992).

A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed.

The lessons of the First Amendment are as urgent in the modern world as in the 18th century when it was written. One timeless lesson is that if citizens are subjected to state-sponsored religious exercises, the State disavows its own duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people.
To compromise that principle today would be to deny our own tradition and forfeit our standing to urge others to secure the protections of that tradition for themselves.

As we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools. See, *e.g., School Dist. of Abington v. Schempp,* 374 U.S. 203, 307, 83 S.Ct. 1560, 1616, 10 L.Ed.2d 844 (1963) (Goldberg, J., concurring); *Edwards v. Aguillard,* 482 U.S. 578, 584, 107 S.Ct. 2573, 2578, 96 L.Ed.2d 510 (1987); *Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens,* 496 U.S. 226, 261-262, 110 S.Ct. 2356, 2377-2378, 110 L.Ed.2d 191 (1990) (KENNEDY, J., concurring). Our decisions in *Engel v. Vitale,* 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962), and *School Dist. of Abington, supra,* recognize, among other things, that prayer exercises in public schools carry a particular risk of indirect coercion. The concern may not be limited to the context of schools, but it is most pronounced there. See *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter,* 492 U.S., at 661, 109 S.Ct., at 3137 (KENNEDY, J., concurring in judgment in part and dissenting in part). What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.

We need not look beyond the circumstances of this case to see the phenomenon at work. The undeniable fact is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion. Of course, in our culture standing or remaining silent can signify adherence to a view or simple respect for the views of others. And no doubt some persons who have no desire to join a prayer have little objection to standing as a sign of respect for those who do. But for the dissenter of high school age, who has a reasonable perception that she is being forced by the State to pray in a manner her conscience will not allow, the injury is no less real. There can be no doubt that for many, if not most, of the students at the graduation, the act of standing or remaining silent was an expression of participation in the rabbi's prayer. That was the very point of the

> religious exercise. It is of little comfort to a dissenter, then, to be told that for her the act of standing or remaining in silence signifies mere respect, rather than participation. What matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it.
>
> Finding no violation under these circumstances would place objectors in the dilemma of participating, with all that implies, or protesting. We do not address whether that choice is acceptable if the affected citizens are mature adults, but we think the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position. Research in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention. Brittain, Adolescent Choices and Parent-Peer Cross-Pressures, 28 Am.Sociological Rev. 385 (June 1963); Clasen & Brown, The Multidimensionality of Peer Pressure in Adolescence, 14 J. of Youth and Adolescence 451 (Dec.1985); Brown, Clasen, & Eicher, Perceptions of Peer Pressure, Peer Conformity Dispositions, and Self-Reported Behavior Among Adolescents, 22 Developmental Psychology 521 (July 1986). To recognize that the choice imposed by the State constitutes an unacceptable constraint only acknowledges that the government may no more use social pressure to enforce orthodoxy than it may use more direct means.
>
> The injury caused by the government's action, and the reason why Daniel and Deborah Weisman object to it, is that the State, in a school setting, in effect required participation in a religious exercise. It is, we concede, a brief exercise during which the individual can concentrate on joining its message, meditate on her own religion, or let her mind wander. But the embarrassment and the intrusion of the religious exercise cannot be refuted by arguing that these prayers, and similar ones to be said in the future, are of a *de minimis* character. To do so would be an affront to the rabbi who offered them and to all those for whom the prayers were an essential and profound recognition of divine authority. And for the same reason, we think that the intrusion is greater than the two minutes or so of time consumed for prayers like these. Assuming, as we must, that the prayers were offensive to the student and the parent who now object, the intrusion was both real and, in the context of a secondary school, a violation of the objectors' rights. That the intrusion was in the course of promulgating religion that sought to be civic or nonsectarian rather than pertaining to one sect does not lessen the offense or isolation to the objectors. At best it narrows their number, at worst increases their sense of isolation and affront.

Lee v. Weisman, 505 U.S. at 592-594.

The fact that attendance at the high school graduation ceremony was voluntary did not make the prayer constitutional.

> There was a stipulation in the District Court that attendance at graduation and promotional ceremonies is voluntary. Agreed Statement of Facts 41, App. 18. Petitioners and the United States, as *amicus,* made this a center point of the case, arguing that the option of not attending the graduation excuses any inducement or coercion in the ceremony itself. The argument lacks all persuasion. Law reaches past formalism. And to say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme. True, Deborah could elect not to attend commencement without renouncing her diploma; but we shall not allow the case to turn on this point. Everyone knows that in our society and in our culture high school graduation is one of life's most significant occasions. A school rule which excuses attendance is beside the point. Attendance may not be required by official decree, yet it is apparent that a student is not free to absent herself from the graduation exercise in any real sense of the term "voluntary," for absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school

> years. Graduation is a time for family and those closest to the student to celebrate success and express mutual wishes of gratitude and respect, all to the end of impressing upon the young person the role that it is his or her right and duty to assume in the community and all of its diverse parts.
>
> The importance of the event is the point the school district and the United States rely upon to argue that a formal prayer ought to be permitted, but it becomes one of the principal reasons why their argument must fail. Their contention, one of considerable force were it not for the constitutional constraints applied to state action, is that the prayers are an essential part of these ceremonies because for many persons an occasion of this significance lacks meaning if there is no recognition, however brief, that human achievements cannot be understood apart from their spiritual essence. We think the Government's position that this interest suffices to force students to choose between compliance or forfeiture demonstrates fundamental inconsistency in its argumentation. It fails to acknowledge that what for many of Deborah's classmates and their parents was a spiritual imperative was for Daniel and Deborah Weisman religious conformance compelled by the State. While in some societies the wishes of the majority might prevail, the Establishment Clause of the First Amendment is addressed to this contingency and rejects the balance urged upon us. The Constitution forbids the State to exact religious conformity from a student as the price of attending her own high school graduation. This is the calculus the Constitution commands.
>
> The Government's argument gives insufficient recognition to the real conflict of conscience faced by the young student. The essence of the Government's position is that with regard to a civic, social occasion of this importance it is the objector, not the majority, who must take unilateral and private action to avoid compromising religious scruples, hereby electing to miss the graduation exercise. This turns conventional First Amendment analysis on its head. It is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice. To say that a student must remain apart from the ceremony at the opening invocation and closing benediction is to risk compelling conformity in an environment analogous to the classroom setting, where we have said the risk of compulsion is especially high. See *supra,* at 2658-2659. Just as in *Engel v. Vitale,* 370 U.S., at 430, 82 S.Ct., at 1266, and *School Dist. of Abington v. Schempp,* 374 U.S., at 224-225, 83 S.Ct., at 1572-1573, where we found that provisions within the challenged legislation permitting a student to be voluntarily excused from attendance or participation in the daily prayers did not shield those practices from invalidation, the fact that attendance at the graduation ceremonies is voluntary in a legal sense does not save the religious exercise.

Lee v. Weisman, 505 U.S. at 594-596.

In a case involving student-led prayers at the beginning of a football game, the U.S. Supreme Court declared the prayers unconstitutional, repeated some of the wisdom in *Lee v. Weisman,* and wrote:

> Even if we regard every high school student's decision to attend a home football game as purely voluntary, we are nevertheless persuaded that the delivery of a pregame prayer has the improper effect of coercing those present to participate in an act of religious worship. For "the government may no more use social pressure to enforce orthodoxy than it may use more direct means." [*Lee v. Weisman,* 505 U.S.] at 594, 112 S.Ct. 2649. As in *Lee,* "[w]hat to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy." *Id.,* at 592, 112 S.Ct. 2649. The constitutional command will not permit the District "to exact

> religious conformity from a student as the price" of joining her classmates at a varsity football game. [quoting from *Lee v. Weisman,* 505 U.S. at 596.]

Santa Fe Independent School District v. Doe, 530 U.S. 290, 312 (2000).

By forbidding public prayers in public schools, we avoid characterizing nonparticipants in the public prayer as “heretics”, “sinners”, “infidels”, “godless atheists”, or other pejorative labels. By forbidding public prayer and avoiding these pejorative labels, we decrease the amount of humiliation, ridicule, and harassment of those who have chosen a religion outside of the Christian mainstream.

protection of atheists

In 1961, the U.S. Supreme Court held:

> We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion.' Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs. [two footnotes omitted]

Torcaso v. Watkins, 367 U.S. 488, 495 (1961).

The majority opinion in a 1985 U.S. Supreme Court case explicitly protects the right of atheists not to have prayers forced on them by the majority.

> Just as the right to speak and the right to refrain from speaking are complementary components of a broader concept of individual freedom of mind, so also the individual's freedom to choose his own creed is the counterpart of his right to refrain from accepting the creed established by the majority. At one time it was thought that this right merely proscribed the preference of one Christian sect over another, but would not require equal respect for the conscience of the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism. [footnote omitted] But when the underlying principle has been examined in the crucible of litigation, the Court has unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith or none at all. [quotations from three cases omitted] This conclusion derives support not only from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful, [footnote omitted] and from recognition of the fact that the political interest in forestalling intolerance extends beyond intolerance among Christian sects — or even intolerance among "religions" — to encompass intolerance of the disbeliever and the uncertain. [footnote omitted] As Justice Jackson eloquently stated in *West Virginia Board of Education v. Barnette,* 319 U.S. 624, 642, 63 S.Ct. 1178, 1187, 87 L.Ed. 1628 (1943):
>
> > "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

Wallace v. Jaffree, 472 U.S. 38, 52-55 (1985).

The opinion in a 1989 U.S. Supreme Court case says:

> Precisely because of the religious diversity that is our national heritage, the Founders added to the Constitution a Bill of Rights, the very first words of which declare: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...." Perhaps in the early days of the Republic these words were understood to protect only the diversity within Christianity, but today they are recognized as guaranteeing religious liberty and equality to "the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism." *Wallace v. Jaffree,* 472 U.S., at 52, 105 S.Ct., at 2487. [FN39]
> It is settled law that no government official in this Nation may violate these fundamental constitutional rights regarding matters of conscience. *Id.,* at 49, 105 S.Ct., at 2485.
>
> FN39. See also M. Borden, Jews, Turks, and Infidels (1984) (charting the history of discrimination against non-Christian citizens of the United States in the 18th and 19th centuries); Laycock, "Nonpreferential" Aid to Religion: A False Claim About Original Intent, 27 Wm. & Mary L.Rev. 875, 919-920 (1986) (Laycock) (the intolerance of late 18th-century Americans towards Catholics, Jews, Moslems, and atheists cannot be the basis of interpreting the Establishment Clause today).

County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 589-590 (1989).

No Legal Requirement to Believe in a Deity

In 1961, the U.S. Supreme Court considered a statute in Maryland that required an applicant for a Notary Public license to declare his belief in God. The Court held the Maryland statute unconstitutional.

> The power and authority of the State of Maryland thus is put on the side of one particular sort of believers — those who are willing to say they believe in 'the existence of God.' It is true that there is much historical precedent for such laws. Indeed, it was largely to escape religious test oaths and declarations that a great many of the early colonists left Europe and came here hoping to worship in their own way. It soon developed, however, that many of those who had fled to escape religious test oaths turned out to be perfectly willing, when they had the power to do so, to force dissenters from their faith to take test oaths in conformity with that faith. This brought on a host of laws in the New Colonies imposing burdens and disabilities of various kinds upon varied beliefs depending largely upon what group happened to be politically strong enough to legislate in favor of its own beliefs. The effect of all this was the formal or practical 'establishment' of particular religious faiths in most of the Colonies, with consequent burdens imposed on the free exercise of the faiths of nonfavored believers. [footnote omitted]

Torcaso v. Watkins, 367 U.S. 488, 489-490 (1961).

No Display of Ten Commandments

Christians have repeatedly tried to post copies of the Ten Commandments in school classrooms, courthouses, and other government-owned buildings. Such displays are generally *un*constitutional, as shown by the following series of cases.

- *Ring v. Grand Forks Public School Dist. No. 1,* 483 F.Supp. 272 (D.N.D. 28 Jan 1980) (Declaring *un*constitutional a North Dakota statute that required a copy of the Ten Commandments to be posted in every classroom.).

- *Stone v. Graham,* 449 U.S. 39 (1980) (per Curiam) (Declaring *un*constitutional a Kentucky state statute that required the Ten Commandments to be posted on wall of every public school classroom.).

- *Harvey v. Cobb County, Georgia,* 811 F.Supp. 669 (N.D.Ga. 1993), *aff'd,* 15 F.3d 1097 (11th Cir. 1994), *cert. den.,* 511 U.S. 1129 (1994) (Copy of Ten Commandments on wall of a county court building near the clerk's office was *un*constitutional.).

- *Books v. City of Elkhart, Indiana,* 235 F.3d 292 (7th Cir. 2000), *cert. den.,* 532 U.S. 1058 (2001) (Monument on lawn in front of municipal building violates Establishment Clause.).

- *Adland v. Russ,* 107 F.Supp.2d 782 (E.D.Ky. 2000), *aff'd,* 307 F.3d 471, 2002 Fed.App. 0354P (6th Cir. 2002), *cert. den.,* 538 U.S. 999 (2003) (Monument on lawn at Kentucky state capitol building violates Establishment Clause.).

- *Indiana Civil Liberties Union Inc. v. O'Bannon,* 110 F.Supp.2d 842 (S.D.Ind. 2000), *aff'd,* 259 F.3d 766 (7th Cir. 2001), *cert. den.,* 534 U.S. 1162 (2002) (Monument on lawn in group of Indiana state government buildings violates Establishment Clause.).

- *American Civil Liberties Union of Ohio Foundation, Inc. v. Ashbrook,* 211 F.Supp.2d 873 (N.D.Ohio 2002), *aff'd,* 375 F.3d 484, 2004 Fed.App. 0224P (6th Cir. 2004), *cert. den., sub nom. DeWeese v. American Civil Liberties Union of Ohio Foundation, Inc.,* 125 S.Ct. 2990 (28 June 2005) (Copy of Ten Commandments on wall of courtroom of Ohio state court judge violates Establishment Clause.).

- *Glassroth v. Roy Moore,* 229 F.Supp.2d 1290 (M.D.Ala. 18 Nov 2002), *aff'd,* 335 F.3d 1282 (11th Cir. 1 July 2003), *cert. den.,* 540 U.S. 1000 (3 Nov 2003).

- *American Civil Liberties Union of Kentucky v. McCreary County, Kentucky,* 145 F.Supp.2d 845 (E.D.Ky. 2001), *aff'd,* 354 F.3d 438 (6th Cir. 2003), *aff'd,* 125 S.Ct. 2722 (27 June 2005).

However, a monument to the Ten Commandments outside a building, on the lawn of the Texas state capitol (one of 21 historical markers and 17 monuments there), was held constitutional. *Van Orden v. Perry,* 125 S.Ct. 2854 (27 June 2005). In this plurality opinion, Chief Justice Rehnquist acknowledged that monuments to the Ten Commandments were common in

government buildings, and he also openly acknowledged the essentially religious nature of these Commandments.

> In this case we are faced with a display of the Ten Commandments on government property outside the Texas State Capitol. Such acknowledgments of the role played by the Ten Commandments in our Nation's heritage are common throughout America. We need only look within our own Courtroom. Since 1935, Moses has stood, holding two tablets that reveal portions of the Ten Commandments written in Hebrew, among other lawgivers in the south frieze. Representations of the Ten Commandments adorn the metal gates lining the north and south sides of the Courtroom as well as the doors leading into the Courtroom. Moses also sits on the exterior east facade of the building holding the Ten Commandments tablets.
>
> Similar acknowledgments can be seen throughout a visitor's tour of our Nation's Capital. For example, a large statue of Moses holding the Ten Commandments, alongside a statue of the Apostle Paul, has overlooked the rotunda of the Library of Congress' Jefferson Building since 1897. And the Jefferson Building's Great Reading Room contains a sculpture of a woman beside the Ten Commandments with a quote above her from the Old Testament (Micah 6:8). A medallion with two tablets depicting the Ten Commandments decorates the floor of the National Archives. Inside the Department of Justice, a statue entitled "The Spirit of Law" has two tablets representing the Ten Commandments lying at its feet. In front of the Ronald Reagan Building is another sculpture that includes a depiction of the Ten Commandments. So too a 24-foot-tall sculpture, depicting, among other things, the Ten Commandments and a cross, stands outside the federal courthouse that houses both the Court of Appeals and the District Court for the District of Columbia. Moses is also prominently featured in the Chamber of the United States House of Representatives. [omitted footnote with other examples]
>
> Our opinions, like our building, have recognized the role the Decalogue plays in America's heritage. See, *e.g., McGowan v. Maryland,* 366 U.S., at 442, 81 S.Ct. 1101; *id.,* at 462, 81 S.Ct. 1101 (separate opinion of Frankfurter, J.). [footnote omitted] The Executive and Legislative Branches have also acknowledged the historical role of the Ten Commandments. See, *e.g.,* Public Papers of the Presidents, Harry S. Truman, 1950, p. 157 (1965); S. Con. Res. 13, 105th Cong., 1st Sess. (1997); H. Con. Res. 31, 105th Cong., 1st Sess. (1997). These displays and recognitions of the Ten Commandments bespeak the rich American tradition of religious acknowledgments.
>
> Of course, the Ten Commandments are religious — they were so viewed at their inception and so remain. The monument, therefore, has religious significance. According to Judeo-Christian belief, the Ten Commandments were given to Moses by God on Mt. Sinai. But Moses was a lawgiver as well as a religious leader. And the Ten Commandments have an undeniable historical meaning, as the foregoing examples demonstrate.

Van Orden v. Perry, 125 S.Ct. 2854, 2862-63 (2005).

This is the view of Justices Rehnquist, Scalia, Kennedy and Thomas,[14] with whom Justice Breyer concurred in the judgment for a different reason.[15] The decision in *Van Orden* appears to be a departure from 25 years of precedent. I argue that the fact that monuments to the Ten Commandments are common in government buildings, including courthouses, does *not* make those monuments constitutional. Further, *some* of the monuments in courthouses cited by Chief Justice Rehnquist above are to statues of Moses holding either blank tablets or tablets with numbers 1 to 10, but *not* displaying the text of the Ten Commandments.[16] I suggest that tablets without the text of the Commandments, is only symbolic of the Ten Commandments, and thus *may* be permissible outside of courtrooms and classrooms.

Incidentally, there appears to be two different motives for the display of monuments to the Ten Commandments: promotion of morality and publicity for a movie.

1. The original motive, back in the mid-1940s, was from Judge E.J. Ruegemer, who presided over a juvenile court in St. Cloud, Minnesota.

> "Appearing in Judge Ruegemer's court one day was a teenager charges with auto theft. When Judge Ruegemer asked if he realized he had broken the Ten Commandments, the young defendant said he had never even heard of them. The judge promptly sentenced him to learn and live by them, and the boy was never in trouble again."[17]

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[14] May I be forgiven for remarking that this list of justices shows the importance of *not* allowing presidents to pack the U.S. Supreme Court with justices who want to tear down the wall of separation between church and state. Justice Rehnquist was initially appointed by President Nixon and later appointed Chief Justice by President Reagan. Justices Scalia and Kennedy were both appointed by President Reagan. Justice Thomas was appointed by the first President Bush.

[15] Justice Breyer found the fact that this particular monument had been there for 40 years without any challenge — until this Plaintiff sued for an injunction — was evidence that the monument was not objectionable. 125 S.Ct. at 2870 (Breyer, J., concurring in judgment). My disagreement with Justice Breyer is simple: black people were owned as slaves and women were not permitted to vote, but these longstanding practices are now seen to be clearly not only wrong, but also offensive. So longstanding acceptance of a practice is *not* proof that the practice is constitutional. One reason that no one challenged the Ten Commandments monument on the Texas capitol lawn for 40 years was that the U.S. Supreme Court first held only in June 2005, in the companion case of *McCreary County,* that such displays were *un*constitutional. It costs a lot of money to bring litigation and pursue appeals, and most people do not want to waste their money on futile litigation over a symbol, hence no litigation.

[16] *Glassroth v. Roy Moore,* 229 F.Supp.2d 1290, 1300-1301, 1307 (M.D.Ala. 18 Nov 2002).

[17] Fraternal Order of Eagels, "Ten Commandments Monoliths," http://www.foe.com/tencommandments/ (visited 23 Oct 2005, appears to have been written in mid-2004). Also see "Ten Commandments Monoliths," *Eagle Magazine,* http://www.foe.com/tencommandments/mar_2002_ten_commandments.html (Mar 2002).

The Judge avoided a serious legal problem by making "... arrangements with a pastor of the boy's mother's faith to teach him the Ten Commandments."[18] Thereafter, Judge Ruegerner decided to publicize the Commandments among young people, in an attempt to reduce crime and promote morality.

2. Judge Ruegemer approached the Fraternal Order of Eagles, for financial and logistical assistance in distributing paper copies of the Ten Commandments, to be posted in courthouses nationwide. (Such posting in courtrooms now appears to be *un*constitutional, in view of recent cases cited above.)
3. During the late 1950s and early 1960s, Cecil B. DeMille gave financial support for large granite monuments to the Ten Commandments, as publicity for his new movie, *The Ten Commandments.* DeMille sponsored more than 100 public granite monuments to the Ten Commandments.

Colorado v. Freedom From Religion Foundation, Inc., 898 P.2d 1013, 1017 (Colo. 1995);
Books v. City of Elkhart, Indiana, 235 F.3d 292, 294-295 (7th Cir. 2000);
Van Orden v. Perry, 125 S.Ct. at 2877-78 (2005) (Stevens, J., dissenting).
Thus, the history of these granite monuments began as a sincere and pious (and probably *un*constitutional) effort to promote morality amongst young people, and ended as commercial promotion of a movie.

After federal courts in the 1980s made clear that displays of the Ten Commandments were *un*constitutional, advocates of such displays attempted to camouflage the commandments by also inscribing on other parts of the same monument quotations from other documents. Roy Moore's monument was the most famous example of such camouflage: he also included 14 secular quotations.[19] But his camouflage did *not* work — even his supporters called his monument the "Ten Commandments monument". Furthermore, by placing the Ten Commandments amongst secular or legal documents in a government building, the government may be endorsing the Commandments at an equal level to the secular or legal documents. See, for example:

- *Books v. City of Elkhart, Indiana,* 235 F.3d 292, 307 (7th Cir. 13 Dec 2000) ("In this regard, the placement of the American Eagle gripping the national colors at the top of the monument hardly detracts from the message of endorsement; rather, it specifically links religion, or more specifically these two religions, and civil government.");

- *Indiana Civil Liberties Union v. O'Bannon,* 259 F.3d 766, 773 (7th Cir. 27 July 2001) ("Moreover, an observer who views the entire monument may reasonably believe that it impermissibly links religion and law since the Bill of Rights and the 1851 Preamble are near the sacred text. This would signal that the state approved of such a link, and was sending a message of endorsement.");

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[18] Sue A. Hoffman, "THE REAL HISTORY OF THE TEN COMMANDMENTS PROJECT OF THE *FRATERNAL ORDER OF EAGLES,*" http://www.religioustolerance.org/hoffman01.htm (6 Mar 2005).

[19] *Glassroth v. Roy Moore,* 229 F.Supp.2d 1290, 1295, 1320-1321 (M.D.Ala. 2002).

- *Adland v. Russ,* 307 F.3d 471, 486-487 (6th Cir. 9 Oct 2002) ("As a general matter, the inclusion of secular symbols in a display may dilute a message of religious endorsement. In this case, however, the monument's combination of revered secular symbols like the American flag and the Ten Commandment serves to link government and religion in an impermissible fashion. Thus, we also agree with the Seventh Circuit that the inclusion of an American eagle gripping the national colors at the top of the monument, serves to heighten the appearance of government endorsement of religion. *See* 235 F.3d at 307.");

- *Turner v. Habersham County, Georgia,* 290 F.Supp.2d 1362, 1373 (N.D.Ga. 17 Nov 2003) ([citing four cases] "Those courts reasoned that by placing the Ten Commandments with a collection of non-religious, secular documents, the government was sending a message that the one religious document was on par with the non-religious documents.");

- *American Civil Liberties Union of Ohio Foundation, Inc. v. Ashbrook,* 375 F.3d 484, 494 (6thCir. 14 July 2004) ("Insofar as there is a cohesiveness suggesting a unified display, the Bill of Rights poster does nothing to negate the endorsement effect of the Ten Commandments poster, and the joint display affords Appellant no relief. DeWeese's display conveys a message of religious endorsement because of the complete lack of any analytical connection between the Ten Commandments and the Bill of Rights that could yield "a unifying historical or cultural theme that is also secular" for a reasonable observer. *McCreary County,* 354 F.3d at 460.").

Religious or civic organizations *could* put monuments to the Ten Commandments in churchyards and on lawns of businesses, without objection from civil liberties organizations, because the First Amendment only limits the power of governments in the USA. Why are the Ten Commandments being posted in government buildings? In my opinion, the answer is clear: some of the Christian majority wishes to have the government endorse its religion, and politicians do not want to offend the majority by opposing the display of the Ten Commandments.

Proponents of posting the Ten Commandments in public places claim that the Commandments are the basis for the law in the USA. However, it is undeniable that there are other historical sources of law in the USA (e.g., the Magna Carta) and we do not see legislators or religious leaders demanding to also post those other historical sources on the walls of every school classroom. And if it is essential to post important information on walls, why not post calculus theorems and Maxwell's Equations[20] on the walls of schools, courts, and churches too? <*smile*> All of which leads me to believe that people touting the alleged historical importance of the Ten Commandments in the development of law in the USA is just a pretext for pushing the majority's religious document on everyone.

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[20] The four Maxwell's Equations, expressed in vector calculus and partial differential equations, are the basis for quantitative description of electromagnetic fields. Learning how to apply these four equations is a rite of passage in the education of every physicist.

religious aspects

As the legal challenges to public display of the Ten Commandments shows, the effect of such postings is to divide citizens, *not* unite them in a common belief. Surprisingly, there is disagreement among the Judeo-Christian religions about the Ten Commandments. The text of the Torah is typically translated "You shall not murder." while the King James version of the Bible says "Thou shalt not kill."[21] Even the sequence of the Commandments varies amongst the different versions. A so-called "nonsectarian version of the Ten Commandments" might be acceptable to Jews, Catholics, and Protestant Christians, but *not* to atheists, Secular Humanists, and members of religions outside the Judeo-Christian tradition.

Furthermore, four of the Ten Commandments are purely religious[22] and are *not* the foundation for either criminal law or civil law in the USA. For example:

- "I am the Lord thy God .... Thou shalt have no other Gods before me."
- "Thou shalt not make unto thee any graven image, ..."
- "Thou shalt not take the name of the Lord thy God in vain."
- "Remember the sabbath day, to keep it holy."

Ten Commandments are *not* the law in the USA

Proponents of posting the Ten Commandments in public places claim that the Commandments are the basis for the law in the USA. As shown in the previous paragraph, four of the Ten Commandments are purely religious. The following paragraph shows that one of the remaining Commandments is *not* reflected in modern American law. Therefore, only *half* of the Ten Commandments can be the basis for modern criminal law in the USA. That is a rather tenuous connection between the Ten Commandments and the current criminal law.

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[21] Courts have recognized these differences amongst different religions, e.g., *Van Orden v. Perry,* 125 S.Ct. 2854, 2879-2880, nn. 15-16 (2005) (Stevens, J., dissenting) ("The difference between the two versions is not merely semantic; rather, it is but one example of a deep theological dispute."); *Glassroth v. Moore,* 335 F.3d 1282, 1299, n. 3 (11th Cir. 1 July 2003); *Harvey v. Cobb County, Georgia,* 811 F.Supp. 669, 672 (N.D.Ga. 13 Jan 1993); *Turner v. Habersham County, Georgia,* 290 F.Supp.2d 1362, 1373 (N.D.Ga. 17 Nov 2003).

[22] *Stone v. Graham,* 449 U.S. 39, 41-42 (1980) ("The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact. The Commandments do not confine themselves to arguably secular matters, such as honoring one's parents, killing or murder, adultery, stealing, false witness, and covetousness. Rather, the first part of the Commandments concerns the religious duties of believers: worshipping the Lord God alone, avoiding idolatry, not using the Lord's name in vain, and observing the Sabbath Day." [citations to Bible and one footnote omitted]).

The Judeo-Christian God also commanded "Thou shalt not commit adultery", but in recent years adultery in the USA is neither a crime nor a tort in most of the USA.

1. Some states in the USA have repealed former statutes that made adultery a crime. For example, California Penal Code § 269a (enacted 1975); Connecticut General Statutes § 53a-81 (1991); Ohio Revised Code § 2905.08 (enacted 1973). See also *City of Sherman v. Henry,* 928 S.W.2d 464, 470, n. 3 (Tex. 1996) ("In fact, adultery is a crime today in half of the states and the District of Columbia. [citing 26 statutes]").
2. Many states in the USA have enacted a so-called "Heart Balm Act" to abolish torts for "alienation of affections" and "criminal conversation" (i.e., defendant has sexual intercourse with plaintiff's spouse). For example, California Civil Code § 43.5 (enacted 1939); Massachusetts General Laws ch. 207 § 47B (enacted in 1985); New Jersey Statutes 2A:23-1 to 23-6 (enacted in 1935); New York Civil Rights Laws § 80-a (originally enacted 1962); Ohio Revised Code § 2305.29 (1978); 23 Pennsylvania Consolidated Statutes § 1901-1905 (enacted 1935 and 1990). Some history is given in *Magierowski v. Buckley,* 121 A.2d 749, 752-758 (N.J.Super.A.D. 1956); *Strock v. Pressnell,* 527 N.E.2d 1235, 1240-41 (Ohio 1988); *Quinn v. Walsh,* 732 N.E.2d 330, 334-337 (Mass.App.Ct. 2000).

It would seem that the modern law on adultery in the USA does *not* conform to the law of the Judeo-Christian God.

The U.S. Court of Appeals, in a case involving posting both the Bill of Rights and the Ten Commandments in Judge DeWeese's courtroom in an Ohio state court, explicitly noted that the Ten Commandments are *not* the law in the USA:

> The Bill of Rights is not only a cherished secular document — it is a legal document securing the rights of parties appearing in DeWeese's courtroom and binding DeWeese as a jurist. "The Ten Commandments are several thousands of years old, [are] not a product of ... American culture and, many believe, are the word of God." [*McCreary County,* 354 F.3d at 460 (6thCir. 2003).] They bind no jurist and are not "law" in any courtroom, notwithstanding any similarities or historical associations between the Decalogue and our Constitution, the Bill of Rights, statutes, and common law.

American Civil Liberties Union of Ohio Foundation, Inc. v. Ashbrook, 375 F.3d 484, 494 (6thCir. 14 July 2004).

harm from Ten Commandments displays

The harm from displays of the Ten Commandments in school classrooms, courthouses, and other government buildings is simply that a religious message is forced on some people who do *not* believe that these Commandments are the word of God. As shown above, at page 17 constitutional law in the USA protects atheists (as well as non-Christians) from the Christian majority.

McCreary County

The trial court noted that displaying a copy of the Ten Commandments inside a Kentucky courthouse harmed visitors to the courthouse.

> Here, the plaintiffs have not specifically alleged that the display has forced them to alter their normal routines. The necessary alterations would be highly impractical, however, because they must enter the courthouse to conduct civic business, and therefore the individual plaintiffs have met the standing requirement for their First Amendment claim.

American Civil Liberties Union of Kentucky v. McCreary County, Kentucky, 96 F.Supp.2d 679, 682-683 (E.D.Ky. 5 May 2000).

> McCreary County officials recently erected in the McCreary County courthouse a Ten Commandments display, pursuant to an August 17, 1999 fiscal court order, signed by the defendant Jimmie Greene, that the display be posted in "a very high traffic area" of the courthouse. .... The display, both in its original form and as amended, is readily visible to the plaintiffs and the other county citizens who use the courthouse to conduct their civic business, to obtain or renew driver's licenses and permits, to register cars, to pay local taxes, and to register to vote.

McCreary County, 96 F.Supp.2d at 684.

> The First Amendment will not permit such an endorsement, as "it sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." *[County of] Allegheny,* 492 U.S. at 595, 109 S.Ct. 3086 [, 3102 (1989)], *quoting Lynch [v. Donnelly],* 465 U.S. at 688, 104 S.Ct. [at 1367 (O'Connor, J., concurring)]. If the governmental display endorses religion then the constitutionally impermissible message must be removed, as it attacks this nation's "history and tradition of religious diversity that dates from the settlement of the North American Continent" and "the religious diversity that is our national heritage." *Id.* at 589, 109 S.Ct. 3086. Here, the display communicates a governmental endorsement not only of religion over non-religion, but of the particular religion, Christianity, [FN9] whose message is contained within the display. Both in the impetus for its creation and the manner in which it was assembled, the display evidences a governmental purpose and effect of endorsing Christianity, and therefore the display violates the Establishment Clause of the First Amendment.
>
> FN9. Notably, the defendants did not post a Hebrew version of the Ten Commandments and in selecting a version of the Ten Commandments had to choose among several differing translations, some favored by particular Christian sects over others. The other documents in the display reinforce its distinctly Christian theme. To the extent that the displayed version of the Ten Commandments may be favored by one sect over another, the display runs further afoul of the

> Establishment Clause because it infringes upon the "sectarian differences among various Christian denominations [that] were central to the origins of our Republic." *Allegheny,* 492 U.S. at 589, 109 S.Ct. 3086.

McCreary County, 96 F.Supp.2d at 689-690.

The U.S. District court then granted plaintiffs' motion for a preliminary injunction ordering the removal of the Ten Commandments display from the courthouse. Later, this opinion was affirmed by both the U.S. Court of Appeals and the U.S. Supreme Court. 354 F.3d 438 (6th Cir. 2003), *aff'd,* 125 S.Ct. 2722 (27 June 2005).

Ashbrook

In a U.S. District Court case involving the display of the Ten Commandments in an Ohio state courtroom of Judge DeWeese, the federal judge said:

> The ACLU has identified a member, Davis, that it claims would have standing to sue in his own right. In order to have standing as an individual, Davis would have to show that he suffered an actual injury caused by the Defendants' conduct that can be remedied by a court. *Washegesic v. Bloomingdale Public Schools,* 33 F.3d 679, 682 (6th Cir. 1994). As is true in many First Amendment cases, this injury can be non-economic; " 'unwelcome' direct contact with the offensive object is enough." *Id.* (quoting *Harvey v. Cobb County, Georgia,* 811 F.Supp. 669, 674 (N.D.Ga. 1993), *aff'd,* 15 F.3d 1097 (11th Cir. 1994)). In *Washegesic,* the Sixth Circuit found standing where a high school graduate brought suit to remove a portrait of Jesus Christ from a display in the school hallway. Despite having graduated during the pendency of the litigation, the Court held that his status as a student was not relevant because he continued to visit his girlfriend and attend sporting and social events at the school. *Id.* at 681. Similarly, courts repeatedly have found standing where plaintiffs or their members suffer unwelcome direct contact with the Ten Commandments in public facilities. *See, e.g., Books v. City of Elkhart, Indiana,* 235 F.3d 292, 299-301 (7th Cir. 2000) (standing exists where plaintiffs are forced to view a religious object because of a right or duty to go to a municipal building where the Ten Commandments monument is located), *cert. denied,* 532 U.S. 1058, 121 S.Ct. 2209, 149 L.Ed.2d 1036 (2001); *American Civil Liberties Union of Tennessee v. Hamilton County,* 202 F.Supp.2d 757, 761-62 (E.D.Tenn. 2002) (standing exists where association members have to go to a courthouse housing Ten Commandments to renew automobile license tags, where clergy goes with parishioners, and where professor takes his students on field trips); *Adland v. Russ,* 107 F.Supp.2d 782, 784 (E.D.Ky. 2000) (standing exists where plaintiffs' members frequently travel to State Capitol grounds housing Ten Commandments monument); *American Civil Liberties Union of Kentucky v. Pulaski County, Kentucky,* 96 F.Supp.2d 691, 694 (E.D.Ky. 2000) (standing exists where plaintiffs need to enter courthouse housing Ten Commandments exhibit in order to conduct civic business).
>
> In this case, Davis practices law in Richland County and frequently appears in the courthouse in the regular course of his job. Davis has appeared in Courtroom Number One before and, given that there are only two Common Pleas Judges in Richland County, he is likely to appear there again. Further, he has indicated that the poster of the Ten Commandments personally offends him and affects his use of the courtroom. This is sufficient to confer standing upon Davis and, derivatively, upon the ACLU of which he is a member. *See Harvey v. Cobb County, Georgia,* 811 F.Supp. 669, 674-75 (N.D.Ga. 1993), *aff'd* 15 F.3d 1097 (11th Cir. 1994) (holding that an attorney whose practice required him to make regular appearances in the Cobb County Courthouse had standing to challenge the

> county's placement of the Ten Commandments on a wall outside the clerk's office). Thus, the Court finds that the ACLU has satisfied the first prong of the *Hunt* test.

American Civil Liberties Union of Ohio Foundation, Inc. v. Ashbrook, 211 F.Supp.2d 873, 880-881 (N.D.Ohio 11 June 2002).

The federal trial court found a religious purpose in the display of the Commandments in Judge DeWeese's courtroom in an Ohio state court.

> This Court agrees that the Ten Commandments are a "precious gift," *Harvey [v. Cobb County, Georgia],* 811 F.Supp. at 671, and finds Judge DeWeese's *purposes* are generally laudable — especially in an era where individuals seem more concerned about the events on their favorite television shows than about the moral and legal compass by which they should be guided. Judge DeWeese's *methods,* however, are constitutionally deficient, because the debate the Judge seeks to foster is inherently religious in character. As the Judge makes clear, the debate involving moral absolutism necessarily involves questions of divine law, and the Ten Commandments inherently are symbolic of the link between the two. Despite characterizing the purpose behind hanging the Ten Commandments on his courtroom wall as secular, the Court cannot help but conclude that Judge DeWeese's purpose is, at heart, religious in nature. The "moral absolutes" the Judge has chosen to display are those embraced by particular religious groups. They include directives that are distinctly religious (*e.g.,* "Thou shalt have no other gods before me" and "Remember the Sabbath day, to keep it holy") and others which, though not patently religious, have no parallel proscription in our current legal structure (*e.g.,* "Honor thy father and thy mother" and "Thou shalt not covet ... anything that is thy neighbor's"). A state actor officially sanctioning a view of moral absolutism in his courtroom *by particularly referring to the Ten Commandments* espouses an innately religious view and, thus, crosses the line created by the Establishment Clause. The Court, therefore, finds that the presence of the Ten Commandments in Courtroom Number One fails the first prong of the *Lemon* test.

Ashbrook, 211 F.Supp.2d at 888-889.

> The Court concludes that a reasonable observer of the Ten Commandments in Courtroom Number One would: (1) believe that the county and/or the State of Ohio have endorsed their presence; (2) know that the Ten Commandments are a sacred text in the Jewish and Christian faiths; and (3) have some awareness of the general influence of at least a portion of this text in American legal history. Whether this reasonable observer would know the Judge's purpose behind the hanging of the Ten Commandments is a more difficult question. The Judge hung the posters without any public announcement or proclamation of their purpose. No resolution or plaque indicates their purpose, either. The Judge testified that, prior to the lawsuit, he only mentioned the Ten Commandments to individuals or groups in his courtroom on one or two occasions. [FN16] Thus, the Court concludes that a reasonable observer is unlikely to be aware of the Judge's personal purpose, whether or not one characterizes that purpose, as the Court does here, as a religious one.
>
> FN16. Since the lawsuit was filed by the ACLU, the Judge indicates he has spoken more frequently about the Ten Commandments and moral absolutism, but this still amounts to discussions before only a few more small groups. DeWeese Depo., p. 52.
>
> The reasonable observer in Courtroom Number One, rather, would see two large posters in gilded frames unlike anything else in the courtroom — one of the Ten Commandments and one of the Bill of Rights. The posters are displayed prominently on walls flanking the gallery or spectator portion of the courtroom, placed just beyond the well of the courtroom. These posters are both entitled "the rule of law" and written in identical script. From their position

> and style, the reasonable observer likely would conclude that they are co-equal in importance — in this courtroom, the Ten Commandments and the Bill of Rights are equivalent. The Judge and the Commissioners argue that giving both posters the title "the rule of law" conveys the secular and historical nature of the Ten Commandments and dilutes their religious nature. The Court is not convinced. If anything, entitling both "the rule of law" has the opposite effect and, instead, creates the appearance that the Ten Commandments are rules of substantive American law, or at least are elevated to this status by this particular court. *See O'Bannon,* 259 F.3d at 773 ("[A]n observer who views the entire monument may reasonably believe that it impermissibly links religion and law since the Bill of Rights and the 1851 Preamble [to the Indiana Constitution] are near the [Ten Commandments]."); *McCreary County,* 145 F.Supp.2d at 851 ("Given the religious nature of this document, placing it among these patriotic and political documents, with no other religious symbols or moral codes of any kind, imbues it with a national significance constituting endorsement."). The reasonable observer will be left with the impression that Richland County and the State of Ohio endorse the concepts set forth in the Ten Commandments, including those that are distinctly religious, and, indeed, believe that enforcement of those concepts is one of the functions to be carried out in Courtroom Number One. [FN17] *See Adland v. Russ,* 107 F.Supp.2d 782, 785-86 (E.D.Ky. 2000) (finding that the presentation of a Ten Commandments monument on state capitol grounds would lead a reasonable observer to conclude that the state endorsed Christianity). Indeed, a "reasonable" courtroom observer might conclude that the Judge would be less favorably disposed to a lawyer or litigant whose religious views or affiliation do not have Judeo-Christian roots. This is an impermissible endorsement of religion and, indeed, of specific religious views.
>
> FN17. As noted above, the majority of the Ten Commandments have no parallel in our secular legal structure.

Ashbrook, 211 F.Supp.2d at 890-891.

The trial judge then ordered the Ten Commandments removed from the courtroom. This case was later affirmed by the U.S. Court of Appeals and the U.S. Supreme Court refused to review it. 375 F.3d 484 (6th Cir. 2004), *cert. den., sub nom. DeWeese v. American Civil Liberties Union of Ohio Foundation, Inc.,* 125 S.Ct. 2990 (28 June 2005).

Roy Moore

In a case that received extensive nationwide publicity, Chief Justice Roy Moore of the Alabama Supreme Court on 31 July 2001 put a 5280 pound (2390 kg) monument to the Ten Commandments in the rotunda of the Alabama State Judicial Building, which contains the state law library and several courtrooms, including the Alabama Supreme Court.

> All three plaintiffs are attorneys who regularly practice law in Alabama's courts. Each has testified that he or she has come into direct contact with the monument on multiple occasions, and each expects to do so in the future as a result of his or her professional obligations. Each finds the monument offensive, and each has said the monument makes him or her feel like an "outsider." Furthermore, two plaintiffs, Howard and Maddox, have changed their behavior as a result of the monument: each visits the rotunda less frequently and enjoys the rotunda less because of the monument's presence. The monument has, therefore, had a direct negative effect on each plaintiff's "use and enjoyment" of the rotunda. *Id.* at 1105.

> The Chief Justice responds that the plaintiffs, nevertheless, do not have standing to bring these cases on the ground that their testimony is not credible. Toward this, the Chief Justice has elicited statements by the plaintiffs showing that they were offended by the Chief Justice's actions before he placed the monument in the State Judicial Building rotunda. For example, plaintiff Glassroth testified in his deposition that he found the use of the Ten Commandments in the Chief Justice's campaign to be "a shameless political use of religion." Plaintiff Maddox, too, thinks that the Chief Justice is "using religion to further his political career"; she also says she was "embarrassed" by the Chief Justice long before he was elected Chief Justice, when, as a state trial judge, he displayed a Ten Commandments plaque in his courtroom. Maddox admitted she was willing to become a plaintiff in these cases before she saw the monument in person. Finally, plaintiff Howard says she is bothered by the Chief Justice's reliance on his religious views in making his decisions as Chief Justice.
>
> While these facts show that the plaintiffs may have been predisposed to being offended by the monument, they do not go so far as to discredit their testimony that they are, in fact, offended by the monument. Instead, the Chief Justice simply has demonstrated that the plaintiffs have been previously offended by his actions. The Chief Justice suggests that, because of this previous offense, the plaintiffs cannot also have been injured by the monument. This argument is untenable. The plaintiffs' previous offense is consistent with, rather than contradictory to, their offense about the monument. If the court were to find otherwise, it would be mandating that plaintiffs must assert their claims at the first instance of their offense to a defendant's actions or lose their opportunity to complain about later actions; conversely, such holding would also mean that government officials could act without regard to the constitutionality of their actions, so long as they first offended any potential plaintiffs at an earlier time.
>
> The Chief Justice also takes issue with the plaintiffs' testimony that they feel like "outsiders"; he maintains that they are independent thinkers, or are actively involved in their communities, or are thick-skinned. He observes that plaintiff Glassroth serves as a member of the board of directors for the Federal Defenders of the Middle District of Alabama and on the Alabama Sentencing Commission; that plaintiff Maddox is referred to by others and even herself as "the tiny tiger"; and that plaintiff Howard identifies herself as a political independent. The fact that the plaintiffs are strong and accomplished individuals in general, however, is not inconsistent with the fact that they feel like, and are, outsiders within the walls of the Alabama State Judicial Building. If anything, this fact reflects that the plaintiffs are among the few, if not the only, attorneys who have the commendable courage to sue a judge or justice to seek personal redress under the First Amendment for the harm they have suffered and continue to suffer. Standing is not the sole province of the weak; if anything, as a matter of practice if not the law, it is that of the strong, for only they will rise to assert it.
>
> The plaintiffs have all testified that they have been injured as a direct result of their contact with the monument, and the court finds their testimony credible in full. The plaintiffs have standing to pursue their Establishment Clause claim. [footnote omitted]

Glassroth v. Moore, 229 F.Supp.2d 1290, 1297-98 (M.D.Ala. 18 Nov 2002).

In affirming the U.S. District Court's order that Judge Roy Moore remove his monument, the U.S. Court of Appeals said:

> Thousands of people enter the Judicial Building each year. In addition to attorneys, parties, judges, and employees, every fourth grader in the state is brought on a tour of the building as part of a field trip to the state capital. No one who enters the building through the main entrance can miss the monument. It is in the rotunda, directly across from the main entrance, in front of a plate-glass window with a courtyard and waterfall behind it. After entering the building, members of the public must pass through the rotunda to access the

> public elevator or stairs, to enter the law library, or to use the public restrooms. A person walking to the elevator, stairs, or restroom will pass within ten to twenty feet of the monument. The Chief Justice chose the location of the monument so that everyone visiting the Judicial Building would see it. [*Glassroth,* 229 F.Supp.2d at 1294.]

Glassroth v. Roy Moore, 335 F.3d 1282, 1285 (11th Cir. 1 July 2003).

> The three plaintiffs are practicing attorneys in the Alabama courts. As a result of their professional obligations, each of them has entered, and will in the future have to enter, the Judicial Building. Because of its location, they necessarily come in contact with the monument. The monument offends each of them and makes them feel like "outsiders." Because of the monument, two of the plaintiffs have chosen to visit the Judicial Building less often and enjoy the rotunda less when they are there. One of those two has avoided the building to the extent of purchasing law books and online research services instead of using the library, and hiring a messenger to file documents in the courts located in the Judicial Building. [*Glassroth,* 229 F.Supp.2d at 1297.]

Glassroth v. Roy Moore, 335 F.3d at 1288 (11th Cir. 1 July 2003).

> The location of the monument in the rotunda of the Judicial Building makes it impossible for anyone using the stairs, elevators, or restrooms to avoid it. Everyone going to the state law library in the building has to walk past the monument. *Glassroth,* 229 F.Supp.2d at 1294. The three plaintiffs are attorneys whose professional duties require them to enter the Judicial Building regularly, and when they do so they must pass by the monument. None of them shares the Chief Justice's religious views, and all of them consider the monument offensive. It makes them feel like outsiders, and two of the plaintiffs have altered their behavior as a consequence. *Id.* at 1297. As we noted earlier, one of those two has incurred expenses in order to minimize contact with the monument, purchasing law books and online research to minimize use of the state law library and hiring messengers to file documents in the courts located in the building.
>
> Under these facts, the two plaintiffs who have altered their behavior as a result of the monument have suffered and will continue to suffer injuries in fact sufficient for standing purposes. [citations to three cases omitted]
>
> ....
>
> Contrary to Chief Justice Moore's contention, the injuries the plaintiffs assert are not based solely on their disagreement with his views about religion and government, which would be a non-redressable injury. While the Chief Justice's views may aggravate the emotional injury the plaintiffs suffer from viewing the monument, the worst of the wound is inflicted by the monument itself. The plaintiff who has incurred expense and inconvenience to avoid entering the building has done so not because it houses the Chief Justice's chambers, but because the monument is there. The district court did not err by declining to dismiss the cases on standing grounds.

Glassroth v. Roy Moore, 335 F.3d at 1292-1293 (11th Cir. 1 July 2003).

In the end, the monument was removed from the courthouse, the state of Alabama reimbursed plaintiffs for their legal fees in this civil rights litigation, and Roy Moore was removed[23] from the Alabama Supreme Court for his defiance of an order of a federal court to remove his monument.

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[23] *Roy S. Moore v. Judicial Inquiry Commission,* 891 So.2d 848 (Ala. 30 April 2004).

No Loyalty Oaths

All civilian employees of the U.S. Government, except the President, must take the following oath before being employed:

> I, [state your name], do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

5 U.S.C. § 3331 (formerly 5 USC § 16) (traceable back to the year 1861, revised 1966).

This oath is constitutional.[24] However, in the post-Civil War era there were two U.S. Supreme Court cases involving *un*constitutional loyalty oaths:

- Missouri state statute required all professionals to take a loyalty oath to the U.S. Government. Held *un*constitutional as a bill of attainder and also because the statute was ex post facto. *Cummings v. Missouri,* 71 U.S. 277, 4 Wallace 277 (1866). See also the companion case of *Ex parte Garland,* 71 U.S. 333, 4 Wall. 333 (1866) (Invalidating federal statute enacted in 1862 that required loyalty oath for attorneys practicing before the U.S. Courts.) The real purpose of these statutes was to punish those who has served in the Confederate government or military during the Civil War, by denying them employment after the Civil War.

Beginning in the late 1940s and continuing for approximately thirty years, numerous state governments required their employees, particularly school teachers and professors at state universities, to swear that they were members of neither the communist party nor other "subversive" organization. In a long series of cases, the U.S. Supreme Court has ruled these anti-communist loyalty oaths *un*constitutional:

- Oklahoma state statute required state employees to take an oath that they are not now, nor for five years previously, been a member of a communist or subversive organization. Statute was declared *un*constitutional because it indiscriminately classified innocent people with those who knew the evil purposes of the organization. *Wieman v. Updegraff,* 344 U.S. 183, 190-191 (1952).

- *Slochower v. Board of Higher Ed. of City of New York,* 350 U.S. 551 (1956).

- California gave a property tax exemption to World War II veterans who signed a loyalty oath. Held that the loyalty oath was an *un*constitutional condition. *Speiser v. Randall,* 357 U.S. 513 (1958).

- *Shelton v. Tucker,* 364 U.S. 479 (1960).

- *Cramp v. Board of Public Instruction of Orange County, Fla.,* 368 U.S. 278 (1961).

- *Baggett v. Bullitt,* 377 U.S. 360 (1964).

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[24] U.S. Constitution, Article VI, paragraph 3.

- *Elfbrandt v. Russell,* 384 U.S. 11 (1966).

- A New York state regulation requiring teachers in public schools and state universities to sign a certificate stating: "'Have you ever advised or taught or were you ever a member of any society or group of persons which taught or advocated the doctrine that the Government of the United States or of any political subdivisions thereof should be overthrown or overturned by force, violence or any unlawful means?" This regulation was held unconstitutional in *Keyishian v. Board of Regents of University of State of N.Y.,* 385 U.S. 589 (1967).

- *Whitehill v. Elkins,* 389 U.S. 54 (1967).

- A state statute in Indiana required leaders of a political party to submit an affidavit stating that the party "'does not advocate the overthrow of local, state or National Government by force or violence" before that party's candidates were listed on a ballot. This statute was *un*constitutional. *Communist Party of Indiana v. Whitcomb,* 414 U.S. 441 (1974).

- Held unconstitutional Florida state loyalty oath for teachers declaring (1) "I am not a member of the Communist party" and (2) "that I am not a member of any organization or party which believes in or teaches, directly or indirectly, the overthrow of the Government of the United States of Florida by force or violence". *Connell v. Higginbotham,* 305 F.Supp. 445 (M.D.Fla. 1969), *aff'd in part,* 403 U.S. 207 (1971).

A good discussion of the early cases is found in R. David Broiles, Note, "Loyalty Oaths," 77 Yale Law Journal 739 (March 1968).

I can not resist quoting some of the eloquent commentary in these U.S. Supreme Court cases on loyalty oaths. In particular, Justices Douglas and Black were intensely opposed to loyalty oaths. To be clear, the majority opinions of the U.S. Supreme Court did not go as far as Justices Douglas and Black in condemning loyalty oaths.

In 1950, Justice Jackson wrote:

> The idea that a Constitution should protect individual nonconformity is essentially American and is the last thing in the world that Communists will tolerate. Nothing exceeds the bitterness of their demands for freedom for themselves in this country except the bitterness of their intolerance of freedom for others where they are in power. [footnote omitted] An exaction of some profession of belief or nonbelief is precisely what the Communists would enact — each individual must adopt the ideas that are common to the ruling group. Their whole philosophy is to minimize man as an individual and to increase the power of man acting in the mass. If any single characteristic distinguishes our democracy from Communism it is our recognition of the individual as a personality rather than as a soulless part in the jigsaw puzzle that is the collectivist state.
>
> I adhere to views I have heretofore expressed, whether the Court agreed, *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628, 147 A.L.R. 674, or disagreed, see dissenting opinion in *United States v. Ballard,* 322 U.S. 78, 92, 64 S.Ct. 882, 889, 88 L.Ed. 1148, that our Constitution excludes both general and local governments from the realm of opinions and ideas, beliefs and doubts, heresy and orthodoxy, political, religious or scientific. The right to speak out, or to publish, also is protected when it

> does not clearly and presently threaten some injury to society which the Government has a right to protect. Separate opinion, *Thomas v. Collins,* 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430. But I have protested the degradation of these constitutional liberties to immunize and approve mob movements, whether those mobs be religious or political, radical or conservative, liberal or illiberal, *Douglas v. City of Jeannette,* 319 U.S. 157, 63 S.Ct. 882, 87 L.Ed. 1324, 146 A.L.R. 81; *Terminiello v. Chicago,* 337 U.S. 1, 13, 69 S.Ct. 894, 899, or to authorize pressure groups to use amplifying devices to drown out the natural voice and destroy the peace of other individuals. *Saia v. People of New York,* 334 U.S. 558, 68 S.Ct. 1148, 92 L.Ed. 1574; *Kovacs v. Cooper,* 336 U.S. 77, 69 S.Ct. 448. And I have pointed out that men cannot enjoy their right to personal freedom if fanatical masses, whatever their mission, can strangle individual thoughts and invade personal privacy. *Martin v. Struthers,* 319 U.S. 141, dissent at page 166, 63 S.Ct. 862, at page 882, 87 L.Ed. 1313. A catalogue of rights was placed in our Constitution, in my view, to protect the individual in his individuality, and neither statutes which put those rights at the mercy of officials nor judicial decisions which put them at the mercy of the mob are consistent with its text or its spirit.
>
> I think that under our system, it is time enough for the law to lay hold of the citizen when he acts illegally, or in some rare circumstances when his thoughts are given illegal utterance. I think we must let his mind alone.

American Communications Ass'n, C.I.O., v. Douds, 339 U.S. 382, 443-444 (1950) (Jackson, J., concurring in part and dissenting in part).

In the same case, Justice Black dissented:

> The Court assures us that today's encroachment on liberty is just a small one, that this particular statutory provision 'touches only a relative, a handful of persons, leaving the great majority of persons of the identified affiliations and beliefs completely free from restraint.' But not the least of the virtues of the First Amendment is its protection of each member of the smallest and most unorthodox minority. Centuries of experience testify that laws aimed at one political or religious group, however rational these laws may be in their beginnings, generate hatreds and prejudices which rapidly spread beyond control. Too often it is fear which inspires such passions, and nothing is more reckless or contagious. In the resulting hysteria, popular indignation tars with the same brush all those who have ever been associated with any member of the group under attack or who hold a view which, though supported by revered Americans as essential to democracy, has been adopted by that group for its own purposes.
>
> Under such circumstances, restrictions imposed on proscribed groups are seldom static, [footnote omitted] even though the rate of expansion may not move in geometric progression from discrimination to arm-band to ghetto and worse. Thus I cannot regard the Court's holding as one which merely bars Communists from holding union office and nothing more. For its reasoning would apply just as forcibly to statutes barring Communists and their suspected sympathizers from election to political office, mere membership in unions, and in fact from getting or holding any jobs whereby they could earn a living.

American Communications Ass'n, C.I.O., v. Douds, 339 U.S. 382, 448-449 (1950) (Black, J., dissenting).

In 1957, Justice Black wrote:

> Unless there is complete freedom for expression of all ideas, whether we like them or not, concerning the way government should be run and who shall run it, I doubt if any views in the long run can be secured against the censor. The First Amendment provides the only kind of security system that can preserve a free government — one that leaves the way wide open

> for people to favor, discuss, advocate, or incite causes and doctrines however obnoxious and antagonistic such views may be to the rest of us.

Yates v. U. S., 354 U.S. 298, 344 (1957) (Black, J., concurring in part and dissenting in part). Part of this quotation was quoted with approval in *Cole v. Richardson,* 405 U.S. 676, 688-689 (1972) (Douglas, J., dissenting).

In 1958, Justice Black wrote:

> California, in effect, has imposed a tax on belief and expression. In my view, a levy of this nature is wholly out of place in this country; so far as I know such a thing has never even been attempted before. I believe that it constitutes a palpable violation of the First Amendment, which of course is applicable in all its particulars to the States. [citations to 15 cases omitted] The mere fact that California attempts to exact this ill-concealed penalty from individuals and churches and that its validity has to be considered in this Court only emphasizes how dangerously far we have departed from the fundamental principles of freedom declared in the First Amendment. We should never forget that the freedoms secured by that Amendment — Speech, Press, Religion, Petition and Assembly — are absolutely indispensable for the preservation of a free society in which government is based upon the consent of an informed citizenry and is **dedicated to the protection of the rights of all, even the most despised minorities.**[25] [citations to two dissenting opinions omitted]

First Unitarian Church of Los Angeles v. County of Los Angeles, 357 U.S. 513, 529-530 (1958) (Black, J., concurring).

> Loyalty oaths, as well as other contemporary 'security measures,' tend to stifle all forms of unorthodox or unpopular thinking or expression — the kind of thought and expression which has played such a vital and beneficial role in the history of this Nation. The result is a stultifying conformity which in the end may well turn out to be more destructive to our free society than foreign agents could ever hope to be. The course which we have been following the last decade is not the course of a strong, free, secure people, but that of the frightened, the insecure, the intolerant. I am certain that loyalty to the United States can never be secured by the endless proliferation of 'loyalty' oaths; loyalty must arise spontaneously from the hearts of people who love their country and respect their government. I also adhere to the proposition that the 'First Amendment provides the only kind of security system that can preserve a free government — one that leaves the way wide open for people to favor, discuss, advocate, or incite causes and doctrines however obnoxious and antagonistic such views may be to the rest of us.' *Yates v. United States,* 354 U.S. 298, 344, 77 S.Ct. 1064, 1090, 1 L.Ed.2d 1356 (separate opinion).

First Unitarian Church of Los Angeles v. County of Los Angeles,[26] 357 U.S. 513, 532 (1958) (Black, J., concurring). Quoted with approval in *Cole v. Richardson,* 405 U.S. 676, 698 (1972) (Marshall, J., dissenting).

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[25] Emphasis added by Standler.

[26] Companion case to *Speiser v. Randall.*.

In 1958, Justice Douglas wrote:

> If one conspires to overthrow the government, he commits a crime. To make him swear he is innocent to avoid the consequences of a law is to put on him the burden of proving his innocence. That method does not square with our standards of procedural due process, as the opinion of the Court points out.

Speiser v. Randall, 357 U.S. 513, 535 (1958) (Douglas, J. concurring).

> If the aim of the law is not to apprehend criminals but to penalize advocacy, it likewise must fall. Since the time that Alexander Hamilton wrote concerning these oaths, the Bill of Rights was adopted; and then much later came the Fourteenth Amendment. As a result of the latter a rather broad range of liberties was newly guaranteed to the citizen against state action. Included were those contained in the First Amendment — the right to speak freely, the right to believe what one chooses, the right of conscience. [citations to three cases omitted] Today what one thinks or believes, what one utters and says have the full protection of the First Amendment. It is only his actions that government may examine and penalize. When we allow government to probe his beliefs and withhold from him some of the privileges of citizenship because of what he thinks, we do indeed 'invert the order of things,' to use Hamilton's phrase. All public officials — state and federal — must take an oath to support the Constitution by the express command of Article VI of the Constitution. And see *Gerende v. Board of Sup'rs of Elections,* 341 U.S. 56, 71 S.Ct. 565, 95 L.Ed. 745. But otherwise the domains of conscience and belief have been set aside and protected from government intrusion. *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628. What a man thinks is of no concern to government. 'The First Amendment gives freedom of mind the same security as freedom of conscience.' *Thomas v. Collins,* 323 U.S. 516, 531, 65 S.Ct. 315,323, 89 L.Ed. 430. Advocacy and belief go hand in hand. For there can be no true freedom of mind if thoughts are secure only when they are pent up.

Speiser v. Randall, 357 U.S. 513, 535-536 (1958) (Douglas, J. concurring).

In 1972, Justice Douglas wrote:

> We [i.e., Justices Black and Douglas] have condemned loyalty oaths as “manifestation(s) of a national network of laws aimed at coercing and controlling the minds of men.
>
> Test oaths are notorious tools of tyranny. When used to shackle the mind they are, or at least they should be, unspeakably odious to a free people.” *Wieman v. Updegraff,* 344 U.S. 183, 193, 73 S.Ct. 215, 220 (Black, J., concurring).

Cole v. Richardson, 405 U.S. 676, 688 (1972) (Douglas, J., dissenting).

Death Penalty

By majority vote, the legislatures in many states, as well as in the U.S. Congress, have authorized courts to impose the death penalty on criminals who are convicted of serious crimes, such as murder. Various liberal justices have questioned whether the death penalty violates the prohibition in the Eighth Amendment against "cruel and unusual punishments". This is an example of the majority of people wanting to impose a punishment that *might* violate the rights of a minority. I say *might,* because — unlike my personal belief in freedom of speech, freedom of religion, and constitutional privacy rights — I personally favor the death penalty for heinous or especially repugnant crimes. This section of this essay clearly indicates for me the conflict between (1) judicial deference to standards decided by legislatures and (2) so-called "judicial activism" in which a judge imposes his/her own standards of morality and decency. These are *not* easy issues, but I firmly believe that judges should have the power to protect minorities from the majority.[27]

In a plurality opinion written in 1958 by Chief Justice Earl Warren, and joined by Justices Black, Douglas, and Whittaker, the Court held:

> At the outset, let us put to one side the death penalty as an index of the constitutional limit on punishment. Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment — and they are forceful — the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty. But it is equally plain that the existence of the death penalty is not a license to the Government to devise any punishment short of death within the limit of its imagination.
>
> The exact scope of the constitutional phrase 'cruel and unusual' has not been detailed by this Court. But the basic policy reflected in these words is firmly established in the Anglo-American tradition of criminal justice. The phrase in our Constitution was taken directly from the English Declaration of Rights of 1688, and the principle it represents can be traced back to the Magna Carta. The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect. This Court has had little occasion to give precise content to the Eighth Amendment, and, in an enlightened democracy such as ours, this is not surprising. But when the Court was confronted with a punishment of 12 years in irons at hard and painful labor imposed for the crime of falsifying public records, it did not hesitate to declare that the penalty was cruel in its excessiveness and unusual in its character. *Weems v. United States,* 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793. The Court recognized in that case that the words of the Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.

Trop v. Dulles, 356 U.S. 86, 99-101 (1958) [four footnotes omitted].

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[27] Ronald B. Standler, *Is Judicial Activism Bad?,* http://www.rbs0.com/judact.pdf (Sep 2005).

The last sentence in this quotation is now often cited as an example of "judicial activism", in which judges interpret the Constitution in an evolving way. One would never know it from this quotation, but the case is actually about the power of the government to strip Trop, who was born in the USA, of his U.S. citizenship as a consequence of his one-day desertion during World War II.

In 1972, the U.S. Supreme Court held the death penalty was *un*constitutional in two cases from Georgia and one case from Texas.

> In short, this Court finally adopted the Framers' view of the Clause as a 'constitutional check' to ensure that 'when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives.' That, indeed, is the only view consonant with our constitutional form of government. If the judicial conclusion that a punishment is 'cruel and unusual' 'depend(ed) upon virtually unanimous condemnation of the penalty at issue,' then, '(l)ike no other constitutional provision, (the Clause's) only function would be to legitimize advances already made by the other departments and opinions already the conventional wisdom.' We know that the Framers did not envision 'so narrow a role for this basic guaranty of human rights.' Goldberg & Dershowitz, Declaring the Death Penalty Unconstitutional, 83 Harv.L.Rev. 1773, 1782 (1970). The right to be free of cruel and unusual punishments, like the other guarantees of the Bill of Rights, 'may not be submitted to vote; (it) depend(s) on the outcome of no elections.' 'The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.' *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 638, 63 S.Ct. 1178, 1185, 87 L.Ed. 1628 (1943).

Furman v. Georgia, 408 U.S. 238, 268-269 (1972) (Brennan, J., concurring).

In 1980, the U.S. Supreme Court heard an appeal from Texas in which a criminal received a life sentence as a habitual offender, as the result of three separate convictions for frauds totalling approximately $230. The U.S. Supreme Court affirmed by a 5 to 4 vote. Justice Powell, joined by Justices Brennan, Marshall, and Stevens, wrote a dissenting opinion:

> We are construing a living Constitution. The sentence imposed upon the petitioner would be viewed as grossly unjust by virtually every layman and lawyer. In my view, objective criteria clearly establish that a mandatory life sentence for defrauding persons of about $230 crosses any rationally drawn line separating punishment that lawfully may be imposed from that which is proscribed by the Eighth Amendment. I would reverse the decision of the Court of Appeals.

Rummel v. Estelle, 445 U.S. 263, 307 (1980) (Powell, J., dissenting).

In 1989, the U.S. Supreme Court heard appeals of two cases in which boys aged 16.5 and 17.3 years at the time of their crime were sentenced to death. The Court by a 5 to 4 vote upheld the death sentences. Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens, wrote a dissenting opinion:

> Justice SCALIA's approach [in the majority opinion for the Court] would largely return the task of defining the contours of Eighth Amendment protection to political majorities. But
>
> > "[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities

> and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."
>
> *West Virginia Board of Education v. Barnette,* 319 U.S. 624, 638, 63 S.Ct. 1178, 1185, 87 L.Ed. 1628 (1943).

Stanford v. Kentucky, 492 U.S. 361, 391-392 (1989) (Brennan, J., dissenting).

> There are strong indications that the execution of juvenile offenders violates contemporary standards of decency: a majority of States decline to permit juveniles to be sentenced to death; imposition of the sentence upon minors is very unusual even in those States that permit it; and respected organizations with expertise in relevant areas regard the execution of juveniles as unacceptable, as does international opinion. These indicators serve to confirm in my view my conclusion that the Eighth Amendment prohibits the execution of persons for offenses they committed while below the age of 18, because the death penalty is disproportionate when applied to such young offenders and fails measurably to serve the goals of capital punishment. I dissent.

Stanford v. Kentucky, 492 U.S. 361, 405 (1989) (Brennan, J., dissenting).

Incidentally, the death penalty for criminals who were under 18 y of age at the time of their crime was declared *un*constitutional by a 5 to 4 vote in *Roper v. Simmons,* 125 S.Ct. 1183 (2005).

Constitutional privacy rights

My separate essay, *Fundamental Rights Under Privacy in the USA,* at http://www.rbs2.com/priv2.pdf discusses various fundamental constitutional rights comprising a zone of privacy (e.g., rearing children, procreation, marriage and family, home, refusing medical treatment) into which the government can not intrude. These rights are additional examples of how constitutional law protects minorities from the tyranny of the majority.

Conclusion

There seems to be a strong tendency amongst human beings to form groups of people, who often act like a pack of wolves in attacking anyone who either (1) is different or (2) dares to disagree with the group's dogma. This human tendency can be described as the tyranny of the majority. The examples in the above essay support my opinion[28] that justices of the U.S. Supreme Court should be independent of the two political branches of government and, when necessary to protect the rights of a minority from tyranny of the majority, should declare statutes or regulations *un*constitutional. Occasional disagreement with the *result* of a decision of the U.S. Supreme Court is not a good reason to oppose judicial independence that interprets the Constitution in a contemporary way.

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[28] Ronald B. Standler, *Is Judicial Activism Bad?,* http://www.rbs0.com/judact.pdf (Sep 2005).

Please do not misunderstand this essay. The majority in legislatures routinely does make law and policy that affects everyone. It is *only* in the area of constitutional rights (e.g., the Bill of Rights in the U.S. Constitution, constitutional privacy rights, freedom of travel inside the USA, freedom of association, equal protection of the laws, etc.) that the majority in a legislature can *not* impose its values on everyone.

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