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EQUAL TREATMENT: A CHRISTIAN SEPARATIONIST PERSPECTIVE

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Until recently, the Supreme Court's analysis of religion cases typically began with a review to see if either the Establishment or Free Exercise Clause of the First Amendment was implicated under the facts of the case. Only after the Court concluded its analysis and was assured that the religion clauses had not been violated did it proceed to determine whether other constitutional protections might have been breached. This approach by the Court recognized the preeminent position our Constitution places upon the American people's right to follow freely their conscience in the private practice of religion, and the concurrent right to be free from government coercion in matters of faith.

A series of opinions by the Court has signaled a departure from this historic pattern of analysis. In these cases, the Court seemed satisfied to equate religious speech with other forms of secular speech, so that it adjudicated the cases strictly pursuant to a free speech analysis. This approach emphasized that religious speech is not in a privileged position vis-à-vis political, philosophical, or other forms of speech, leading the Court to justify its decisions on an "equal treatment" or "nondiscrimination" principle. Concurrently, some members of the United States Congress have introduced various versions of a constitutional amendment, any of which, if adopted, would endorse this approach as a viable means to forbid discrimination of any kind based on an individual or group's religious beliefs.

Many Christians herald the Court's recent decisions and the proposed amendments as a major victory, believing that the "equal treatment" of religious speech with secular speech necessarily equates with greater religious liberty. But this trend actually raises serious concerns for those Christians dedicated to the concept of the separation of church and state as the surest guarantor of religious liberty. While Christians might enjoy the most recent results of the equal treatment approach, they should be aware of the possible implications and perhaps inevitable negative impact that equal treatment may have on the status of religion in America, a status that has primacy due to the nation's longstanding commitment to the separation of church and state.

I. A New Paradigm—the Equal Treatment Approach

The Supreme Court's "equal treatment" approach in religious speech cases began with the 1981 case of *Widmar v. Vincent*.¹ The Court determined that a state university could not refuse to allow Christian Bible study groups to use campus facilities when it extended to nonreligious groups the same privilege. The university's discrimination against the study groups based upon the religious content of the speech impermissibly violated the students' right to free speech.

The *Widmar* case became the legal basis for the 1984 Equal Access Act which grants "equal access" to school facilities to students of religious and nonreligious clubs for their pre- or after-hours meetings. Religious meetings are required to be student-initiated and student-led. The constitutionality of the Act was upheld in 1990 in *Westside v. Mergens*.² The Supreme Court appropriately held that requiring equal access among all student groups regardless of their religious nature is reasonable since there is little, if any, government advocacy of religion, and no realistic perception that government is endorsing religion when religious groups use the school facilities. In her plurality opinion in *Mergens*, Justice Sandra Day O'Connor commented, "There is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."³ As a supplement, not as a precursor, to its free speech analysis, the Court determined that the use of the public facilities by religious groups would not violate the Establishment Clause.

Other issues traditionally analyzed under the Establishment Clause have begun to be decided primarily as free speech cases, following the *Widmar* and *Mergens* precedents. For example, typically it was under the Establishment Clause that the Court examined the constitutionality of placing religious symbols (crèches, menorahs, crosses, Stars of David, etc.) on government property, holding that such symbols are permissible only if they are muted by secular symbols or objects so that they do not convey a message of governmental endorsement of religion.⁴ Recently, however, the Supreme Court (and following its lead, the lower courts also) has begun to consider these symbols primarily as forms of protected free speech rather than specifically religious speech, and therefore has allowed their display on government property on the theory that all forms of speech in public fora, including religious speech, should be protected. For example, in June 1995, the Court in *Capitol Square Review and Advisory Board v. Pinette*⁵ held that the Free Speech Clause required the city of Columbus, Ohio to allow the display of a Ku Klux Klan Latin cross in its Capitol Square along with a Christmas tree and a menorah. The Court affirmed the appellate court's ruling that "speakers with a religious message are entitled no less access to public forums than that afforded speakers whose message is secular and otherwise nonreligious."⁶ The seven Supreme Court justices affirming the free speech analysis nevertheless disagreed over the extent to which the Establishment

Clause could operate to limit the “equal treatment” of religious and nonreligious speech. Justices Scalia, Thomas, and Kennedy and Chief Justice Rehnquist proposed a standard whereby the Establishment Clause could rarely be invoked; Justices O’Connor, Souter, and Breyer proposed that there should always be an Establishment Clause analysis to determine whether a governmental endorsement of religion has occurred. As the two dissenters, Justices Stevens and Ginsburg proposed that a violation of the endorsement standard of the Establishment Clause necessarily always occurs when any religious symbol is placed on public property, even by private interests. But even with the disagreement, the majority of the Court proposed elevating the Free Speech Clause to such an extent that it would nearly always “trump” Establishment Clause analysis—a clear reversal of the Court’s prior approaches in which Establishment Clause concerns took precedence.

Essentially the same “equal treatment” or nondiscrimination principle in *Widmar*, *Mergens*, and *Pinette* was used by the majority of the Court in deciding the case of *Rosenberger v. University of Virginia*⁷ in which the justices reviewed the University’s refusal to fund the printing of a student religious group’s publication, *Wide Awake*. In a 5-4 vote, the Court held that the religious character of a student publication was immaterial; because the University was funding other kinds of private student speech, it was also required to fund *Wide Awake*. Four separate opinions were written in *Rosenberger*: Justice Kennedy wrote for the five-person majority (which included Chief Justice Rehnquist and Justices O’Connor, Scalia, and Thomas); Justices O’Connor and Thomas each wrote concurring opinions; and Justice Souter wrote for the four dissenting justices (himself and Justices Stevens, Ginsburg, and Breyer). The opinions reveal deep divisions within the Court regarding how to decide religion cases.

Justice Kennedy’s majority opinion, accepting the argument that the case falls within the Free Speech Clause rather than the religion clauses of the First Amendment, held that the University’s refusal to fund the printing of student religious publications like *Wide Awake* discriminated against the group because of its viewpoint. Under this analysis *Wide Awake*’s religious speech is on par with all other types of speech. In fact, in their brief to the Court, the petitioners equated the constitutional position of *Wide Awake*’s Christian message to “a gay rights, racist, or antiwar point of view.” Justice Thomas, in a concurring opinion, focused not on the content of the speech but on the constitutional position of the speakers. Since the First Amendment requires neutrality between religion and nonreligion in the administration of government programs, “religious adherents” should be treated the same as all others in the public forum. Justice O’Connor’s concurring opinion emphasized that the political equity between religious and nonreligious speakers demanded by the Constitution required that governmental entities not favor any political group over another.

For the majority writers, a religious viewpoint is regarded as the same as any other type of speech advocating a point of view, not as speech receiving special constitutional stature. The majority never subjected *Wide Awake's* message and the University's activity in paying for its copying to an Establishment Clause test because of its determination to treat all types of speech equally. Only Justice Souter's dissenting opinion considered *Wide Awake's* religious message as special, necessitating special review under the Establishment Clause. He was concerned that the magazine went beyond mere words of "student news, information, opinion, entertainment, or academic communication."⁸ Rather, quoting from the magazine itself, the publication aimed to "challenge Christians to live, in word and deed, according to the faith they proclaim and . . . to consider what a personal relationship with Jesus Christ means."⁹ He warned that "the Court is ordering an instrumentality of the State to support religious evangelism with direct funding. This is a flat violation of the Establishment Clause."¹⁰

The student Christian group won the funding of printing for its publication but at the price of having its religious message reduced to the commonality of every other form of human speech. By insisting on equal treatment for religious speech, the petitioners were willing to give up the special status that religion is otherwise granted under the Constitution. The Court bought the petitioner's argument, which is a disturbing development indeed. If protected religious speech is simply free speech, then why, we might ask, do we need the religion clauses of the First Amendment? Those who drafted the Bill of Rights were, of course, concerned to protect the free exercise of religion. They took special pains to do so by separating the Free Exercise Clause from the Free Speech Clause, which should indicate the differences they saw in "religion" and "speech." They also took care to juxtapose the Free Exercise Clause with an Establishment Clause that would act as a restraint on religion to prevent its power from becoming too closely identified with state activity. This was not done for other forms of protected speech. In other words, the Founders believed that religious speech is different from mere speech, and they could scarcely have done more to make the point.

The *Rosenberger* decision denies the power of religion by approving state subsidization for the preaching of the gospel. By wishing not to deny religion its place in a marketplace of ideas, the Court denies the special place held by religion in our constitutional framework. Private exercise of religion must be protected, to be sure, but only when it is unaided by government funds. The Founding Fathers, due to their appreciation of the coercive effects of religion when joined with political power, intended that the Establishment Clause act as a special restraint on religion. If "preaching the word," the stated purpose of *Wide Awake*, is only speech, it is outside the restraints of the Establishment Clause. But "preaching the word" is not mere speech; it is religion and must, therefore, suffer the inconvenience of full protection only when disassociated from the power of government.

Widmar, *Mergens*, *Pinette*, *Rosenberger*, and similar cases are difficult because they deal with the *private* exercise of religion in *public* settings. The easy cases deal with *private* expression in *private* settings (e.g., church attendance), which are clearly protected by the Free Exercise Clause, and *public* advocacy of religion in *public* settings (e.g., teacher-led prayer in public schools), which are clearly prohibited by the Establishment Clause. But *private* religious expression in *public* settings might or might not be protected, depending on whether the religious activity is the result of state advancement, sponsorship, or endorsement. A feeble appreciation of the importance and value of the Establishment Clause lies at the heart of the “equal treatment” concept. While the Supreme Court, as seen in *Pinette*, continues to acknowledge that the Establishment Clause has *some* degree of application in religious speech cases, the devaluation of the Establishment Clause can especially be seen in various proposals that have been made to amend the Constitution to remove virtually all of the Establishment Clause’s jurisdiction.

II. Legislative Proposals to Amend the Constitution

In the final weeks of November 1995, Congressmen Henry Hyde (R-IL) and Ernest Istook (R-OK) introduced before the U.S. House of Representatives their respective versions of a constitutional amendment, either of which, if adopted, would drastically alter the meaning of the First Amendment’s religion clauses.¹¹ A month later, Senator Orrin Hatch (R-UT) joined forces with Congressman Hyde and introduced Hyde’s measure in the Senate. Believing that a Congressional battle over these rival versions would be self-defeating, Congressman Dick Armey (R-TX) marshaled forces and crafted a joint House-Senate resolution that sought to combine the best features of both proposals. He introduced his resolution on 16 July 1996, and the House Judiciary Committee held hearings on the proposed amendment shortly thereafter. As of the date of this writing, the Senate had not scheduled hearings and seemed unwilling to do so until early 1997. Thus, the amendment proposal has an uncertain future, but even if defeated, there is every likelihood that a similar proposal, even the earlier Hyde or Istook proposals, will be reintroduced.

Supporters claim that an amendment is needed to protect religious expression in public settings (especially the public schools) and to guard against a perceived growing trend toward religious discrimination by the nation’s courts, public officials, and society in general. The amendments proposed in 1995 and 1996 expanded the courts’ equal treatment approach to such a degree that the nature of the First Amendment’s religion clauses are virtually denuded. If enacted, any of these three attempts to amend the First Amendment’s jurisdiction over religion’s place in public America would seriously jeopardize religion’s special constitutional status.

The first proposed amendment—the Hyde-Hatch proposal¹² which supporters call the “Religious Equality Amendment”—reads:

Preamble: Proposing an amendment to the Constitution of the United States in order to secure the inalienable right of the people to acknowledge, worship, and serve their Creator, according to the dictates of conscience.

Text: Neither the United States nor any state shall deny benefits to or otherwise discriminate against any private person or groups on account of religious expression, belief, or identity; nor shall the prohibition on laws respecting an establishment of religion be construed to require such discrimination.

Congressman Istook’s proposal, which its supporters call the “Religious Liberties Amendment,” reads as follows:

Preamble: To secure the people’s right to acknowledge God according to the dictates of conscience.

Text: Nothing in this Constitution shall prohibit acknowledgments of the religious heritage, beliefs, or traditions of the people, or prohibit student-sponsored prayer in public schools. Neither the United States nor any state shall compose any official prayer or compel joining in prayer, or discriminate against religious expression or belief.

Congressman Arney’s proposal, often called the “Religious Freedom Amendment,” reads as follows:

Preamble: Proposing an amendment to the Constitution of the United States to further protect religious freedom, including the right of students in public schools to pray without government sponsorship or compulsion, by clarifying the proper construction of any prohibition on laws respecting an establishment of religion.

Text: In order to secure the right of the people to acknowledge and serve God according to the dictates of conscience, neither the United States nor any State shall deny any person equal access to a benefit, or otherwise discriminate against any person, on account of religious belief, expression, or exercise. This amendment does not authorize government to coerce or inhibit religious belief, expression, or exercise.

Even a casual reading reveals the vagueness and ambiguity of these three proposals. Ambiguities are usually inherent in constitutional language, given this nation’s commendable tradition of writing constitutional provisions in broad, general language, then entrusting interpretation and application to the courts and the other branches of government. But overly-broad provisions like these fall below an acceptable level of generality. In these circumstances, the hopelessly vague language utilized in each proposal will only tend to confuse, rather than clarify, the jurisprudence attending the intersections of law and religion in America.

But beyond a criticism of the form of these proposals is a critique of their content which should alarm any Christian dedicated to the proposition of religious liberty. If for whatever reason these proposals fail to be adopted, then given today’s climate of suspicion and the overreaction among some of the more conservative members of the Christian community, other proposals just like these are likely to arise. It is therefore appropriate to analyze these proposals’ potential effect on the American doctrine of separation of church and state as traditionally

understood.

Nondiscrimination Provisions

All three amendments specifically forbid “discrimination” against any individual or entity on the basis of religious expression of belief. These statements appear innocuous and even laudatory, since it is the goal of our system of religious freedom that no person face discrimination on religious grounds. Surely religious persons and organizations should not be singled out for discriminatory treatment. But traditionally, in maintaining the separation of church and state, the Supreme Court has recognized that under certain circumstances, the government must “discriminate” against religious organizations or individuals by forbidding expressions which are tantamount to government endorsement of religion.

To avert this effect of the Establishment Clause and void over two hundred years of religion clause jurisprudence, these relatively innocent sounding proposals legalize religious practices in public fora which presently are either illegal or whose legality is disputed under current court decisions. The Hyde-Hatch version makes such acts legal under the Free Exercise Clause by emasculating the Establishment Clause. The Free Exercise Clause essentially would trump any potential application of the Establishment Clause. It is difficult to see what jurisdiction, if any, would remain to the Establishment Clause other than forbidding an official act of establishment of a government sponsored religion, or the express preference of one religion over another. Any concern over “excessive entanglement” between church and state would be a thing of the past. The Istook and Arney versions operate similarly. They expressly legalize certain practices which have been found to violate the Establishment Clause, as well as protecting other unspecified free exercise practices in a “catch-all” fashion.

Additionally, the Hyde-Hatch and Arney proposals, and arguably the Istook proposal also, move beyond free exercise issues and require government to give “equal treatment” to religious activities by funding them in the same way it funds secular activities. The Hyde-Hatch and Arney proposals, and possibly the Istook proposal also, extend the discrimination principle in a way that would open the public purse to all churches and religious organizations across America, including religious schools. These proposals, in other words, unabashedly seek to revolutionize church-state relations in America by permitting governments to fund religious activities in the same way that they fund secular activities. Thus, if a state government funds public education, it would also be permitted to fund religious education. If a civic organization receives city funds to run a homeless shelter, the funds would also have to be made available to religious organizations for the same purpose. Actually, there would be no limits on the range of activities for which churches could receive government funds. It would appear

that churches could, for example, receive Small Business Administration loans to operate any of the kinds of businesses that private citizens might receive loans for, from oil and gas exploration to computer sales.

There are several serious problems attending a framework of nondiscriminatory distribution of benefits. First, every distribution of taxpayer dollars to a church, synagogue, mosque, or other religious organization is a violation of the religious liberty of taxpayers who would find objectionable the propagation of the form of religious belief represented by the recipient. In the words of Thomas Jefferson, “to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical.”¹³

Second, a nondiscriminatory program should be expected to operate in a genuinely nondiscriminatory way. As there are now approximately two thousand identifiable religions and sects in this nation, it would be impossible to fairly and equitably distribute government monies among them all. Instead, governments at all levels would be forced to make hard choices about which faith groups would receive public money, which would necessarily result in weighing the utility of certain religious programs. Inevitably, those with the most financial resources and political clout would get the largest share of the pie; smaller, less popular faith groups would be forced to the periphery in the new climate of destructive competition among America communities of faith.

Third, those faith groups receiving public dollars would justifiably be subjected to government audits and monitoring. This would lead to excessive entanglements between religion and government and an unhealthy dependence of religion upon government. Making religion the servant of government would likely inaugurate the decline of religion’s current role as the nation’s “prophetic voice” and conscience against ill-advised governmental policies. Religion with its hand out can never fulfill its prophetic role in society. All three proposals prove the point that many in America still fail to understand that religion is better off without government money. It should be made clear, of course, that current law enables religious organizations to receive government funds for the operation of certain social programs, but only if those funds are not commingled with other funds or used to advance a religious message. This allows churches and other religious groups to become partners with government in administering welfare programs, but without losing their autonomy as they pursue their other spiritual goals. Under the amendment proposals, however, the limitation on proselytization and religious advancement would disappear, to the denial of the religious liberty of American citizens whose receipt of benefits might be conditioned upon their willingness to first hear a religious message. What is so wrong with the current system of requiring religion to rely upon its supporters, and ultimately, upon God, for sustenance? Benjamin Franklin’s counsel is surely appropriate here: “When a Religion is good I conceive that it will support itself; and when it cannot support itself, and God does not care to support it, so that its Professors are obliged to call for the help of the Civil Power,

‘tis a sign, I apprehend, of its being a bad one!’¹⁴

It is an ironic but nonetheless true fact that passage of an amendment to allow for nondiscriminatory benefits to religion will destroy over time the hallowed and sacred character of religion in America. Religion remains robust in America precisely because it has remained independent of government support and regulation. Americans possess a will to support their religious institutions because government does not do it for them. A new era of government benefits to religion will kill the voluntary spirit that sustains the vibrancy and dynamism of American religion. If we are willing to take a lesson from our European friends, we will know that government aid and support is a wolf in sheep’s clothing. Religion in Europe today is unfortunately looked upon by many Europeans as just another government program. Attendance in most European churches is abysmal. The people have lost, to a very large degree, the will to support their own religious institutions because government does it for them. It would be a disappointment indeed if in the United States of America, where religion is alive and robust, we would choose to adopt funding practices that for years have characterized most of Europe, where religion is essentially moribund.

Effect of Proposed Amendments

Unmistakably, these three proposals and any others of their ilk launch full scale assaults not only on the majority of the Supreme Court’s church-state decisions of the last fifty years, but also upon the First Amendment’s religion clauses as originally framed by the Founders. Cases like *Pinette* probably would never reach the courts. Indeed, *Pinette*-like results would be automatic. While religious symbols on public property are not to be discouraged in all cases, the Hyde-Hatch amendment, or one like it, would eliminate any possibility that religious symbols on public property constitute religious establishments. It would be clear that all religious speech is to be treated no differently from secular speech, and once government review boards like the one in Columbus, Ohio adopt a public forum policy, they would have no authority to deny to any organization the right to display its symbols. Religious symbols and ideological messages of all kinds, for better or worse, would become prominent in public parks and on courthouse lawns. In fact, this is precisely what happened in Columbus. Once the District Court approved of the KKK’s right to display its cross, religious groups (mostly Christian churches) sought and received permits to display their own symbols. Apparently some members of the religious community attempted to mute the effect of the KKK cross with a multiplicity of their own displays.

The amendments would alter the treatment of religious speech in other public forums as well. For example, in litigation involving the right of public school students to engage in religious expression, it has

become fashionable for students' attorneys to argue that all religious expression is protected by the Free Speech Clause rather than the Free Exercise Clause. This was true in *Harris v. Joint School District No. 241*,¹⁵ a 1992 case challenging the right of a high school senior class in Idaho to choose one of its members to say a prayer at commencement ceremonies. On its face, this kind of student-led, student-initiated prayer, built upon the sensible principles of *Widmar v. Vincent* and the Equal Access Act, hardly seems to offend the Free Speech Clause. In fact, the Fifth Circuit Court of Appeals in *Jones v. Clear Creek Independent School District*¹⁶ held in 1992 on almost identical facts that such an arrangement in a Texas high school in no way violated the First Amendment. The *Jones* court found the prayer to be protected under the Free Speech and Free Exercise Clauses, and not in violation of the Establishment Clause since the prayer had the secular purpose of solemnizing the occasion, did not advance or endorse religion, and did not create an excessive entanglement between religion and government. The *Harris* court, however, ruled differently. The court first held that the prayer was not protected by the Free Speech Clause because the commencement ceremony was not an "open" or "public" forum. The court found it significant that only a student chosen by the majority of the senior class was allowed to speak and pray; no matter what religious message a minority of students may have wished to convey, the graduation forum was closed to them. Accordingly, the open or public forum framework upon which *Widmar*, *Mergens*, and the Equal Access Act depended, was not present.

The *Harris* court also did an extensive Establishment Clause analysis, finding that the graduation ceremony was ultimately a school-controlled, school-sponsored event. Thus, the ceremony amounted to an endorsement of the proceedings, including the religious elements. On appeal, the decision was affirmed by the Ninth Circuit Court of Appeals. "School officials," wrote Justice Charles E. Wiggins, "cannot divest themselves of constitutional responsibility by allowing the students to make crucial decisions."¹⁷ He added, quoting *West Virginia v. Barnette* (1943), that 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."¹⁸ Unfortunately, the Supreme Court later vacated the lower courts' judgments for mootness (the student-plaintiff had graduated). Had the Hyde-Hatch proposal been the law when the *Harris* case was decided, the courts would have been stripped of their ability to make an Establishment Clause analysis. The Hyde-Hatch proposal ignores the tender balance among the various First Amendment freedoms that only the courts are equipped to preserve. If either the Istook or Armev proposal had been the law when *Harris* was decided, an establishment analysis would have been permitted, but the case's outcome would have been virtually the same as if there had been no establishment analysis allowed, since both proposals suggest that "student-sponsored prayer"

must always be allowed, no matter the context or its effect on objecting students.

Clearly, any of these proposals would accomplish no less than the complete demolition of Jefferson's celebrated "wall of separation between church and state." While the Supreme Court's recent trend toward an equal treatment approach is of serious concern to those who support the Supreme Court's commitment to church-state separation, proposals to amend the Constitution and remove any possibility of Supreme Court interpolation are intolerable.

III. American Christianity's Historic Commitment to Separation of Church and State

All of the recent proposals to amend the Constitution contain nondiscrimination provisions which attempt to ensure that public religious expressions receive equal treatment with secular expressions. In other words, the proposals seek to ensure that courts may not discriminate against religious speech in public fora where philosophic or political speech is permitted. As noted earlier, the Supreme Court already has made significant movement towards this end, but constitutional amendments like those recently proposed would require a result similar to that in *Widmar*, *Pinette*, and *Rosenberger*, without any need to analyze the possible impediment raised by the Establishment Clause. On the surface, the recent cases decided under the equal treatment analysis have resulted in victories for religious freedom. However, many religious advocates view the recent decisions as dangerous to the religious freedom which our forebears fought so hard to preserve.

The modern idea of the separation of church and state resulted from the religious pluralism that was an outgrowth of the Reformation and the accompanying recognition that religion is perhaps more a matter of private conscience than public concern. The atrocities of the Middle Ages and the Reformation in which hundreds of thousands died in Inquisitions, witch-hunts, and religious wars were thought to be the result of government having too much authority in matters of religion. The evolution of individual rights which began in earnest in the fourteenth century led human government, in the West at least, to abandon its previous role of causing all people to conform to a common faith in favor of a new role of protecting individual rights, including the free exercise of religion.

During the American founding era, Christian leaders labored zealously to secure religious freedom within the founding documents, believing that religious liberty is necessary to enact the biblical doctrine of the individual's freedom of conscience. God's creation of man in his own image endowed each individual with dignity as a free moral agent. Faith in God is the individual's free act of responding to his creator, and the freedom

and independence of that act must be independent of any outside influence or coercion. Religious liberty removes the state from any coercive position. The best protection for the individual, for the state, and for the church, was to separate church and state. This separation also served to recognize the inherent difference between the spheres of influence of church and state—the spiritual and the secular.

Roger Williams, founder of the colony of Rhode Island and the first Baptist church in America in 1638, argued from Scripture for religious liberty and the separation of church and state. For Williams, the state is not religious or Christian, but a man-made civil institution and therefore without authority to proscribe conscience or legislate regarding religious matters. Williams saw that church and state must remain separate for the state to be the state and the church to be the church. It was, in fact, Williams who coined the analogy of a “wall” separating the church and the state that was later used by Thomas Jefferson. Williams warned that a system of interrelation between church and state would “[open] a gap in the hedge, or wall of separation, between the garden of the church and the wilderness of the world.”¹⁹ Williams’s wall exists to protect the sanctity of the church from the encroachment of the secular government.

Later, Isaac Backus, a pastor, evangelist, historian, and ardent apostle of religious liberty, aggressively campaigned throughout the colonies for church-state separation. Like Williams, his position was rooted in the God-given freedom of human conscience. Backus wrote, “Religion is a concern between God and the soul with which no human authority can intermeddle.”²⁰ Backus appeared before the Continental Congress in 1774 and the Constitutional Convention in 1787 to advocate religious liberty for all American citizens. A third leader, John Leland, influenced Thomas Jefferson and James Madison with his views on freedom of conscience and the moral necessity of disestablishment throughout the colonies. Leland noted that the union of church and state, so characteristic of other societies throughout history, resulted in the corruption of both.²¹

Many early Americans were concerned by the Constitution’s failure to make reference to God. But this omission was neither inadvertent nor an attempt to subjugate religion’s place within the new government. It was the Founders’ unmistakable intention to create a neutral state that would be without authority in religious matters. Their decision to omit God’s name in the Constitution had to do with their belief that the power to frame a new government derived not immediately from heaven, but from the American people. Moreover, the failure to specify a particular deity within the founding documents was intended to acknowledge the religious plurality that already existed within the young country, and to allow all Americans the right to believe and act upon their own religious convictions, as dictated by conscience. The decision not to create a religious state but rather, in modern terms, a secular, neutral, or liberal state, had nothing to do with a desire to impede religion but rather to vitalize

religion in all of its variety, something which could only be achieved by requiring state and religion to remain separate and distinct.

America was the first nation to construct a constitutional framework that officially sanctioned the separation of church and state. It was a noble experiment in the founding era and remains so today. The experiment was undertaken by the Framers in the hope that it would enable America to escape the persecutions and religious wars that had characterized the Christian West since the emperor Theodosius made Christianity the Roman Empire's official religion in 380 A.D. The First Amendment's religion clauses have proved to be, in the words of the great Catholic theologian, John Courtney Murray, "Articles of Peace."²² Religion of all persuasions is accorded a greater respect in the United States than in any other civilized society.

From America's earliest days, many religious leaders have strongly advocated the separation of church and state—both for the protection of religion itself and the protection of human conscience in religious matters. The result has been a formal national commitment to the twin pillars of freedom—religious liberty and the separation of church and state—what eminent religious historian Sanford Cobb rightly referred to earlier this century as "America's greatest gift to civilization and to the world."²³ Only by upholding individual freedom of conscience can all citizens be allowed to respond to God—in their own way or not at all, but free from any coercive powers of the state. Any movement to diminish the separation between the state and religion can only diminish each citizen's freedom of self-determination.

IV. Equal Treatment's Potential Erosion of the Separation of Church and State

The concept of equal treatment—treating all religious expression the same as other forms of speech—sounds alluringly democratic, pluralistic, and fair. To the Christian who, rightly or wrongly, feels increasingly marginalized within American society and disenfranchised by the Supreme Court's many rulings keeping religious exercise out of the public sphere, the concept may appear like a return to "better" days when Christianity enjoyed an undisputed nationwide hegemony and de facto establishment. But in fact, it may signal the triumph of the postmodern relativist mind in which every statement is of equal value to any other.²⁴ One's religious beliefs would be protected equally and at the same level as one's right to attend a particular university, live in a certain neighborhood, or express a particular political opinion. In short, one's religious faith will become on par with every other worldview and life belief. Americans of every religious belief and no religious belief should carefully consider whether this is a desirable result.

Under the recent equal treatment cases, religious speech is placed on equal footing with all speech, thereby removing the traditional additional analysis to determine whether a reasonable observer would infer a message of endorsement by the government. Some of the proposed constitutional amendments advocated in the name of equal treatment go so far as to prohibit the Supreme Court from ever invoking the Establishment Clause. In the name of religious zeal, proponents of these amendments would tear down almost every vestige of church-state separation. The results could only be disastrous to the elevated and protected status now enjoyed by religion.

Contrary to popular mischaracterization by many religious people, especially the more politically conservative, the Supreme Court's historic decisions concerning religion in the public square, including the public schools, have never sought to establish irreligion in America, but rather have sought to protect the right of all to freely exercise their own religion, free from government coercion or interference. The best guarantee of the free exercise of religion has been the requirement that the government and its property remain neutral regarding religion, thereby preventing any advancement or endorsement of any kind of religious doctrine. And by keeping the government out of every aspect of religion's business, Americans have ensured the sanctity of their religious practices. As Justice O'Connor noted in her concurring opinion in *County of Allegheny*, "We live in a pluralistic society. Our citizens come from diverse religious traditions, or adhere to no particular religious beliefs at all. If government is to be neutral in matters of religion, rather than showing either favoritism or disapproval towards citizens based on their personal religious choices, government cannot endorse the religious practices and beliefs of some citizens without sending a clear message to non-adherents that they are outsiders or less than full members of the political community."²⁵

At the same time, as religious speech and practice is denigrated to that of any secular speech and practice, American churches lose their protection from governmental encroachment. This is especially true if equal treatment is expanded to allow government funding of religious activities and institutions. The Framers of the Constitution, naming religion as the *first* freedom in the First Amendment, intended for religion to be treated differently, *unequally*, when it comes to government entitlements. Since the founding, the Constitution has been understood to prohibit the advancement or endorsement of religion. Churches, mosques, synagogues, and other houses of worship have always been required to be self sustaining, not because they were to be the objects of discrimination, but because their mission and influence were thought to be so vital to American life that the regulation and control that would inevitably follow the grant of government benefits was to be avoided at all cost. But if religious expression is no more protected than political opinion and if religious practice is no more sacrosanct than social club membership, no valid reason remains for exempting churches and religious organizations from

tax requirements or government regulations. Every exemption extending to religion arises from the ideology that the churches, synagogues, and mosques, as houses of faith, are fundamentally different than a business or club. If there is nothing special about our religious speech and practices, then perhaps a church should be forbidden from discriminating in who it hires for its staff or who it decides to ordain. Perhaps the content of what is taught in religious day schools should be regulated to match the curriculum being taught in public schools. Equal treatment could become the Pandora's Box which drives government regulation and government interference every bit as much in the sanctuary as it does in every other place in society.

Equal treatment also means the equal treatment of all ideologies, as well as every type of religious faith. The public square indeed will be clothed and populated, not only with religious expressions of every type, but also with every identifiable belief system. The crèche on the courthouse lawn may well be completely obscured by the swastika, the flaming white cross, or any other ideological symbols a group may wish to display publicly. With a crumbled wall of separation, government property will degenerate into a billboard advertising all types of beliefs and ideas, religious and nonreligious. The fear will not be that our government endorses the Christian, Jewish, Buddhist, or Islam faith, but that it will be required to endorse all viewpoints. The secular state will become hopelessly entangled with every known and yet unknown belief a person could espouse.

V. Conclusion

Equality is a hallmark of American democracy, but it should not rule in every case. The Framers, recognizing the special place of religion in our lives, provided both special protection for religion and important limitations on government support of religion. At times our system of separation of church and state results in limitations on the public expression of our religious faith. At times, it results in unintended discrimination against religious individuals and organizations. Certainly the Supreme Court's analysis of religion issues sometimes has been confused and even overly restrictive. And many times the confusion caused by the Court's decisions has trickled down to public officials below who have then misunderstood and misapplied the fine lines drawn by the Court. The separation of church and state, as a grand experiment in human history, is still in a state of infancy. It is to be expected that problems and difficulties within the separation framework will arise from time to time. But in spite of some missteps, the American system of separation of church and state remains the most brilliant conception of religious freedom ever conceived. Overhauls to the system—and the equal treatment concept represents a major overhaul—should be avoided.

In the end, all Americans must recognize that, in a democratic framework that values religion in all its

diversity, it is the *private* expression of religion in *private* spheres that is the heart of religion and which must be protected at all cost. Compromises that respect religious diversity must be made when religion enters our shared *public* institutions. The equal treatment principle denies the need for any such compromise and actually endorses a form of tyranny by the majority. The religion clauses as they have come to be interpreted and applied over two hundred years of history demand such compromises, denying to government the right to favor the religion of any American citizen over others. We would do well to remember the words of James Madison: “The religion then of every man must be left to the conviction and conscience of every man. . . . [i]n matters of Religion, no man’s right is abridged by the institution of Civil Society and . . . [R]eligion is wholly exempt from its cognizance.”²⁶

(Footnotes)

¹450 U.S. 909 (1981).

²496 U.S. 226 (1990).

³*Ibid.* at 250.

⁴See, for example, *Lynch v. Donnelly*, 465 U.S. 668 (1994), and *County of Allegheny v. Pittsburgh A.C.L.U.*, 492 U.S. 573 (1989).

⁵115 S. Ct. 2440 (1995).

⁶30 F.3d 675 (6th Cir. 1994) at 679.

⁷115 S.Ct. 2510 (1995).

⁸*Ibid.* at 2535.

⁹*Ibid.* at 2534

¹⁰*Ibid.* at 2547

¹¹For an analysis of both proposals, see Derek H. Davis, “A Commentary on the Proposed Religious Liberties/Equality Amendment,” *Journal of Church and State* 38 (Winter 1996): 5. For comments on an earlier version of a Religious Equality Amendment, see Derek H. Davis, “Assessing the Proposed Religious Equality Amendment,” *Journal of Church and State* 37 (Summer 1995): 493.

¹²Congressman Henry Hyde (R-IL) introduced before the U.S. House of Representatives his version of the constitutional amendment, which included a preamble. Senator Orrin Hatch (R-UT) joined with Hyde and introduced Hyde’s measure in the Senate, with the only difference the omission of the preamble.

¹³Thomas Jefferson, Statute for Religious Freedom, in *The Papers of Thomas Jefferson*, ed. Julian P. Boyd (Princeton, N.J.: Princeton University Press, 1950), 2: 545.

¹⁴Jared Sparks, ed., *The Works of Benjamin Franklin* (Chicago: MacCoun, 1882), 8: 505.

¹⁵41 F.3d 447 (9th Cir., 1994).

¹⁶77 F.2d 963 (5th Cir., 1992).

¹⁷41 F.3d 447 (9th Cir., 1994) at 455.

¹⁸*Ibid.*

¹⁹Roger Williams, *Mr. Cotton’s Letter . . . Answered*, reprinted in *The Complete Writings of Roger Williams*, 7 vols., (New York: Russell and Russell, Inc., 1963), 1: 392. Among the many good books detailing the life and work of Williams are Perry Miller, *Roger Williams and His Constitution to the American Tradition* (New York: The Bobs Merrill Company, Inc., 1953), Irwin H. Polishook, *Roger Williams and Religious Freedom: A Controversy in New and Old England* (Englewood Cliffs, N.J.: Prentice Hall, Inc., 1967), and Edwin S. Gaustad, *Liberty of Conscience: Roger Williams in America* (Grand Rapids, Mich.: William B. Eerdmans Publishing Co., 1991).

²⁰William G. McLoughlin, *Isaac Backus and the American Pietistic Tradition* (Boston: Little, Brown and Company, 1967), 131.

²¹See generally, Lyman Butterfield, *Elder John Leland, Jeffersonian Itinerant* (Worcester, Mass.: American Antiquaries on Society, 1953); also Don M. Fearheiley, *The John Leland Story* (Nashville, Tenn.: Broadman Press, 1964).

²²John Courtney Murray, *We Hold These Truths: Catholic Reflections on the American Proposition* (New York: Sheed and Ward, 1960), 45.

²³Sanford H. Cobb, *The Rise of Religious Liberty in America: A History* (New York: Macmillan, 1902), 2.

²⁴See the thoughtful article by Winnifred Fullers Sullivan, “The Difference Religion Makes: Reflections on *Rosenberger*,” *Christian Century*, 13 March 1996, 294.

²⁵*County of Allegheny* at 627.

²⁶James Madison, “Memorial and Remonstrance,” in *The Founders’ Constitution*, eds. Philip B. Kurland and Ralph Lerner (Chicago: University of Chicago Press, 1987), 5: 82