

# THE CHRISTIAN LAWYER®

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## The U.S. Supreme Court Religious Liberty & Sanctity of Human Life

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*"Proclaim liberty throughout all the land..."*

Leviticus 25:10

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Editor's Note

## We Still Hold These Truths...

"ETERNAL VIGILANCE IS THE PRICE OF LIBERTY."

WENDELL PHILLIPS (1811-1884),  
Abolitionist, orator and columnist for *The Liberator*,  
in a speech before the Massachusetts Antislavery Society in 1852.

While we all know that the price of liberty is eternal vigilance, is a friend of mine right when he jokes that the price of eternal vigilance is insanity? Lest we lose our mental balance or our charity, let us begin this issue of the *Christian Lawyer* by truly thanking our LORD for the religious liberties we do enjoy and for the self-evident truth that our inalienable rights of life and liberty have their transcendent source in our Creator God. Surely, even as we strive in Jesus' words to build a "City on the Hill" in which all can freely find sanctuary, it must humbly be conceded in King David's words that "unless the LORD ... watches over the city the watchmen stand guard in vain." *Psalms 127:1*

In this *Christian Lawyer*, we review the progress our 'watchmen,' including Christian Legal Society's Center for Law and Religious Freedom, are making in the defense of life and religious liberty. At CLS, we believe that such inalienable rights stand as the bulwark against the state's usurpation of absolute power at the expense of the inestimable human dignity God reposes in every human being to live our lives, choosing freely to accept or reject His Sovereignty.

From God's perspective, the solution to the problem of absolute power is as old as the tower of Babel (Genesis 11), the tyranny of Pharaoh (Exodus 4-12), the vaulting pride of Nebuchadnezzar (Daniel 4), or the religious zeal of the unconverted lawyer Saul on the road to Damascus, intent upon killing the followers of the Way of Christ (Acts 9). Clearly, only God handles absolute power absolutely well; the rest of us don't. This Biblical truth that absolute power corrupts absolutely finds its more modern political expression on the floor of the English House of Lords on January 9, 1770. Lord William Pitt, a British champion of the growing American cause (the city of Pittsburgh is his namesake), noted when referring to King George that "unlimited power is apt to corrupt the minds of those who possess it." On March 2 of that same year, Pitt made his point even clearer when he said, "There is something behind the throne greater than the King himself."

Six years later, it fell to our Founding Fathers, many of them Christian attorneys (like John Adams and James Madison) who were aware of Pitt's arguments and schooled in the English common law as it was taught to them in Judge William Blackstone's "Commentaries on the English Law," to propose a principled remedy to the age-old problem of absolute power in human hands. Their Biblical, reasoned and revolutionary words in our *Declaration of Independence* would both legitimize and continually advance the American experiment in ordered liberty:

*We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are Life, Liberty and the pursuit of Happiness.*

Like Daniel in the face of Nebuchadnezzar, let us further address the problem of absolute power with daily prayer for guidance from our Creator God, who not only plays the leading role as the Source of law, but who has also lived with us in the form of a bondservant, Jesus Christ, and who even died for us that God's law might be fulfilled. Let us hold to these truths, which can absolutely correct the absolutely corrupt in each of us.

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# *The Constitution and the High Court*

## THE CASE FOR TEXTUAL FIDELITY

by *Herbert W. Titus*

***The American Union will last as long as God pleases.  
It is the duty of every American Citizen to exert his utmost abilities  
and endeavors to preserve it as long as possible and to pray with  
submission to Providence “esto perpetua” [may it last forever].***

— JOHN ADAMS, AUG. 2, 1820

In the beginning, the people of Israel were ruled by the Ten Commandments, a covenant written by the very finger of God.<sup>1</sup> However, Moses prophesied that there would come a day when the people of Israel would reject God’s rule of law and demand a king “like all the nations.”<sup>2</sup> In the days of Samuel, this prophesy came to pass when, despite God’s warnings, the people insisted that they be ruled by a tyrannical “king like all the nations.”<sup>3</sup>

While God gave the people of Israel a king, He did not give them the lawless tyrant that they wanted. Rather, as prophesied in Deuteronomy 17, God graciously gave them a covenant king, under the law, not above it:

And Samuel said to all the people, See ye him the Lord hath chosen.... And all the people shouted, and said, God save the king. Then Samuel told the people the manner of the kingdom, and wrote it in a book.<sup>4</sup>

From the first king of the united kingdom to the last king of Judah, the kings were governed by the law of this “book.” But the history of Israel’s kings was largely one of covenant unfaithfulness. Beginning with Saul — who twice violated the written covenant<sup>5</sup> — most of Israel’s kings, like Judah’s last king, Zedekiah, “did evil in the sight of the Lord.”<sup>6</sup> Indeed, toward the end of the southern kingdom of Judah, the book of the law was apparently lost,<sup>7</sup> leaving the people no written standard by which they could hold their rulers accountable. Even though King Josiah valiantly attempted to return the nation of Judah to the rule of the law,<sup>8</sup> God finally destroyed the nation of Judah, as he had previously destroyed Israel, for breach of the written civil covenant.<sup>9</sup>

There is a history lesson here, given by God, not only to the nation of Israel, but to all nations, including the United States of America.<sup>10</sup> To be sure, America’s national covenant is not, like Israel’s, the Ten Commandments written by the finger of God. Nor is America’s form of government either Israel’s origi-

*continued on page 4*

## TEXTUAL FIDELITY

*continued from page 3*

nal rule of divinely-picked judges or its later rule of a heritable monarchy. However, as a constitutional republic, America, like the nation of Israel, is governed by a “book of the law” — the United States Constitution — the purpose of which, as Chief Justice John Marshall wrote over two hundred years ago, is to “establish for their future government ... principles ... deemed fundamental ... supreme [and] permanent.”<sup>11</sup> Indeed, as the Chief Justice wrote for a unanimous court, those “supreme and perma-

stitution forms no rule for his government? If it is closed to him, and ... not ... inspected by him? If such be the real state of things, this is worse than solemn mockery. To prescribe, or take this oath becomes equally a crime.<sup>14</sup>

Given this high view of the constitutional text, the Court adopted a rule of construction, designed to maintain the prevalence of that written text over the courts:

In expounding the Constitution of the United States, **every word** must have its due force and

Supreme Court in *Cooper* — wrenching out of context Chief Justice Marshall’s *Marbury* statement that “[i]t is emphatically the province and duty of the judicial department to say what the law is”<sup>18</sup> — misused the Marshall legacy of judicial review to support the novel proposition that, because it is the court’s duty to “say what the law is,” what the court says is law. Thus, the Court exalted itself above the Constitution’s written text, claiming that its “interpretation” of that text was “the supreme law of the land.”<sup>19</sup>

Since *Cooper*, the nation’s High Court has paid scant

of Chief Justice Marshall<sup>23</sup> — to adapt the Constitution to changing times.<sup>24</sup> Led by justices such as Oliver Wendell Holmes, Benjamin Cardozo, Felix Frankfurter, William J. Brennan and the late chief justice, William Rehnquist, these legal evolutionists typically read the historic meaning of such time-honored and fixed phrases as “due process of law” right out of the Constitution, substituting therefor inventive and manipulable slogans, such as “implicit in the concept of ordered liberty.”<sup>25</sup>

Freed from the “outworn 18th century ‘strait jacket’”<sup>26</sup> of the original constitutional text, the Supreme Court

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## ...AMERICA, LIKE THE NATION OF ISRAEL, IS GOVERNED BY A “BOOK OF LAW” — THE UNITED STATES CONSTITUTION...

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ment” principles were put in writing so that they would “not be mistaken, or forgotten” — for it is of the very essence of a written constitution that the words therein “form[] the fundamental and paramount law of the nation.”<sup>12</sup>

Accordingly, Chief Justice Marshall asserted that the United States Constitution, as it is written, forms the rule of law governing every branch of government, including the judiciary.<sup>13</sup> He, therefore, he anchored the very legitimacy of judicial review to the proposition that the “framers ... contemplated that instrument as a ‘rule of government of the courts’”:

Why otherwise does it direct the judges to take an oath to support it? ... Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that con-

appropriate meaning; for it is evident from the whole instrument that **no word was unnecessarily used or needlessly added.... Every word** appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood. **No word** in the instrument, therefore, can be rejected as superfluous or unmeaning....<sup>15</sup>

Today the American people are told quite a different story. Instead of being reminded of Chief Justice Marshall’s subordination of the courts to the Constitution as it is written — to ensure that its permanent principles “may not be mistaken or forgotten,”<sup>16</sup> — the people are admonished to obey the courts’ opinions as if they were law<sup>17</sup> In 1958, in support of this proposition of judicial supremacy over the constitutional text, a unanimous

attention to the constitutional text. Notoriously, in *Roe v. Wade*,<sup>20</sup> Justice Harry Blackmun openly admitted that “[t]he Constitution does not explicitly mention any right of privacy, [but] in a line of decisions, however, going back perhaps as far as [1891] the Court has recognized that a right of personal privacy ... does exist **under** the Constitution.”<sup>21</sup> By digging **underneath** the Constitution, the *Roe* Court cut itself free from that which is written **in** the Constitution so that it is no longer governed by the Constitution in any abortion case.<sup>22</sup>

But the Court’s claim of supremacy over the written text is not limited to abortion matters. Rather, under the tutelage of the Supreme Court, federal courts routinely deconstruct the language of the Constitution, utilizing an evolutionary philosophy of law — totally foreign to that

habitually rules that the due process clause of the Fourteenth Amendment “incorporated” most of the federal bill of rights and applied them to the states.<sup>27</sup> This view is so ensconced in the bosoms of the justices that few dare challenge it,<sup>28</sup> even though the Court has never explained: (a) how the First Amendment that expressly applies to “Congress” can be made applicable to the states via the due process clause of the Fourteenth Amendment; and (b) how the “due process clause” of the Fourteenth Amendment contains the First Amendment’s two religion clauses, and the speech, press, assembly and petition guarantees, when the same “due process clause” of the Fifth Amendment, if so construed, would render the language of the First Amendment totally redundant.<sup>29</sup>

In the 1940’s, ‘50’s and ‘60’s, Justice Hugo Black tried to

rein in the judicial “practice of substituting [the Court’s] own concepts of decency and fundamental justice for the language of the Bill of Rights,”<sup>30</sup> but Justice Black, himself, paid little attention to the Constitution’s original language. Instead, he wholeheartedly embraced Thomas Jefferson’s phrase, “a wall of separation between Church and State,” substituting it for the First Amendment text prohibiting laws “respecting an establishment of religion.”<sup>31</sup> Relieved of adhering to the Constitution’s definition of “religion” and “establishment,” the Court invented its three-part *Lemon* test<sup>32</sup> that, if not by design, then certainly by effect, has greatly “secularized” America, almost purging her of her Christian civic heritage,<sup>33</sup> and virtually removing the Bible from her civic life.<sup>34</sup>

Had the courts paid attention to the original meaning of religion, as the Supreme Court did in 1878,<sup>35</sup> it would have discovered that “religion” was a jurisdictional term, designed as a barrier to civil government intrusions upon duties owed exclusively to God, unenforceable by the blunt instrument of force and violence.<sup>36</sup> Instead, from 1946 to the present time, the courts have substituted the word, “religious” for the word “religion,” and in the process opened the door to the civil government take-over of the work of the church — such as welfare for the poor and education of the children<sup>37</sup> — and practically closed the door to Christians who would bring Biblical principles into the administration of civic affairs, reducing them to second-class citizens.<sup>38</sup>

This breach of constitutional faith has been com-

pounded by the Court’s failure to apply the full reach of the Free Exercise Clause, limiting its scope to a very narrow class of cases of “religious” discrimination.<sup>39</sup> Even then, the Court rarely invokes the Free Exercise Clause, preferring to deal with discriminations against “religious” speech as a subset of its “freedom of expression” doctrine prohibiting “viewpoint discrimination.”<sup>40</sup> Yet, the free exercise of religion, as it was originally conceived in the Virginia Bill of Rights of 1776 and implemented by Jefferson’s Act for Establishing Religious Freedom in 1785, protected the people from government viewpoint discrimination — religious and otherwise:

Whereas Almighty God hath **created the mind free**; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion, who being Lord of both body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do ...; **that to suffer a civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy ... because he being judge of that tendency will make his opinions the rule of judgment; and approve or condemn the sentiments of others only as they shall square with his own....**<sup>41</sup>

*continued on page 6*

## THE TRUE JEFFERSON LEGACY OF THE FREE EXERCISE OF RELIGION, THEN, IS NOT THE SEPARATION OF CHURCH PHRASE IN HIS LETTER TO THE DANBURY BAPTISTS...



## TEXTUAL FIDELITY

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The true Jefferson legacy of the free exercise of religion, then, is not the separation of church phrase in his letter to the Danbury Baptists. Rather, it is a legacy of the freedom of the mind, embracing the “propagation” of **all** “opinions,” not just religious ones, free from viewpoint discrimination by civil government authorities, including professors and school teachers hired and paid by the state and local government school boards.<sup>42</sup>

The Supreme Court has not only ignored the wide scope of the First Amendment’s Free Exercise Clause, but bastardized the four following freedoms — the freedoms of speech and of the press, and the rights of the people to assemble and petition — lumping them altogether as a single guarantee of “freedom of expression.”<sup>43</sup> By substituting this single phrase for four distinct guarantees, the Court has ushered down the aisle of constitutional protection such “expressions” as nude dancing,<sup>44</sup> profanity,<sup>45</sup> and obscenity,<sup>46</sup> which the Court had previously ruled to be outside the protection of the First Amendment.<sup>47</sup> Significantly, under this same “freedom of expression” doctrine, the Court has cut back on the First Amendment protection of “core political speech” in federal election campaigns, prompting Justice Thomas to observe that “defamers,” “nude dancers,” “pornographers,” “flag burners,” and “cross burners” have greater access to the “marketplace of ideas” than do candidates for election to public office.<sup>48</sup>

In today’s evolutionary world of judicial supremacy, a

“compelling,” or even some other “significant” government interest, is sufficient to justify relativizing a constitutional principle, notwithstanding the fixed constitutional text. Remarkably, it was Israel’s first king, King Saul, who first injected the compelling interest doctrine in his attempt to justify his having usurped the role of the priest in the nation of Israel.<sup>49</sup> Samuel’s response to this alleged “compelling interest” to breach the nation’s civil covenant separating the jurisdiction of the priest from that of the king<sup>50</sup> was swift and sure: “Thou hast done foolishly: thou hast not kept the commandment of the Lord thy God ... for now would the Lord have established thy kingdom upon Israel forever. But now thy kingdom shall not continue....”<sup>51</sup>

<sup>1</sup> See Exodus 31:17-18; 34:28; and Deuteronomy 9:10.

<sup>2</sup> Deuteronomy 17:14.

<sup>3</sup> See I Samuel 8:5-20.

<sup>4</sup> I Samuel 10:24-25.

<sup>5</sup> See I Samuel 13:8-14 and I Samuel 15:1-24.

<sup>6</sup> See II Kings 24:19.

<sup>7</sup> See II Chronicles 34:8-14.

<sup>8</sup> II Kings 22 and 23.

<sup>9</sup> See II Kings 17:1-18 and 23:24-26.

<sup>10</sup> See I Corinthians 10:11.

<sup>11</sup> *Marbury v. Madison*, 5 U.S. 137, 176 (1803).

<sup>12</sup> *Id.* at 177.

<sup>13</sup> *Id.* at 179-80.

<sup>14</sup> *Id.* at 180.

<sup>15</sup> *Holmes v. Jennison*, 39 U.S. 540, 570-71 (1840) (emphasis added).

<sup>16</sup> *Marbury*, 5 U.S. at 176.

<sup>17</sup> See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 865 (1992). See also, C. Stern, “The Common Law and the Religious Foundations of the Rule of Law Before Casey,” 38 *U.S.F.L. Rev.* 499, 520-23 (2004).

<sup>18</sup> See, e.g., *Cooper v. Aaron*, 358 U.S. 1, 18 (1958).

<sup>19</sup> *Id.* at 18.

<sup>20</sup> 410 U.S. 113 (1973).

<sup>21</sup> *Id.* at 152.

<sup>22</sup> See, e.g., *Stenberg v. Carhart*, 530 U.S. 914, 929-30, 147 L.Ed.2d 743, 758-59 (2000) (“The question before us is whether Nebraska’s statute, making crimi-

nal the performance of a ‘partial birth abortion,’ violates the Federal Constitution, as interpreted in *Planned Parenthood of Southeastern Pa. v. Casey* ... and *Roe v. Wade*....”).

<sup>23</sup> See H. Titus, “Moses, Blackstone and the Law of the Land,” 1 *Christian Legal Society Quarterly* No. 4, 5-6 (1980).

<sup>24</sup> See, e.g., J. Balkin, “Alive and Kicking: Why No One Truly Believes in a Dead Constitution,” <http://www.slate.com/id/2125226/> (August 29, 2005).

<sup>25</sup> See, e.g., *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

<sup>26</sup> See *Adamson v. California*, 332 U.S. 46, 89 (1947) (Black, J., dissenting).

<sup>27</sup> See *Duncan v. Louisiana*, 391 U.S. 145 (1968).

<sup>28</sup> Those who do, like U.S. District Judge Brevard Hand, are spanked by the High Court, and buried under an avalanche of precedent. See *Wallace v. Jaffree*, 472 U.S. 38, 48-55 (1985).

<sup>29</sup> See, e.g., Brief Amicus Curiae of Conservative Legal Defense and Education Fund, et al., filed in *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky*, 125 S.Ct. 2722, 162 L.Ed.2d 729 (2005).

<sup>30</sup> See *Adamson*, 332 U.S. at 89 (Black, J., dissenting).

<sup>31</sup> *Everson v. Board of Education*, 330 U.S. 1, 15-16, 18 (1947). See generally P. Hamburger, *Separation of Church and State* 454-78 (Harv. Univ. Press: 2002).

<sup>32</sup> See *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

<sup>33</sup> See, e.g., *McCreary County v. ACLU*, 125 U.S. 2722, 2748, 162 L.Ed.2d 729, 762-74 (2005) (Scalia, J., dissenting).

<sup>34</sup> See generally S. Carter, *The Culture of Disbelief* (HarperCollins: 1993).

<sup>35</sup> See discussion of *Reynolds v. United States*, 98 U.S. 145 (1878) in H. Titus, “The Free Exercise Clause: Past, Present and Future,” 6 *Regent U.L. Rev.* 7, 11-13 (1995) (hereinafter Titus, “Free Exercise”).

<sup>36</sup> See Titus, “No Taxation and No Subsidization: Two Indispensable Principles of Freedom of Religion,” 22 *Cumb. L. Rev.* 505 (1991-92).

<sup>37</sup> See Titus, “Free Exercise,” at 6 *Regent L. Rev.* at 56-62.

<sup>38</sup> See S. Carter, *God’s Name in Vain* 67-81 (Basic Books: 2001).

<sup>39</sup> See, e.g., *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993).

<sup>40</sup> See, e.g., *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995).

<sup>41</sup> Act for Establishing Religious Freedom (Oct. 31, 1785), reprinted in 5 *The Founders’ Constitution*, Doc. No. 44, p. 84 (P. Kurland and R. Lerner, eds, Liberty Fund reprint: Indianapolis 1987).

<sup>42</sup> *Id.* “[T]hat to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.”

<sup>43</sup> “Until 1945, ‘freedom of expression,’ ‘free expression,’ and ‘liberty of expression’ were used [by the Supreme Court] sparingly — only fourteen times — .... Between 1945 and 1965, one or the other of the three terms was used in approximately sixty cases. Then, beginning in 1965, the number jumped dramatically so that by the end of 1995 the Court had invoked the term ... in well over two hundred cases.” H. Titus with B. Zeerup, “Freedom of Expression,” *The Forecast* 11 (April 1996).

<sup>44</sup> *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

<sup>45</sup> *Cohen v. California*, 403 U.S. 15, 22-26 (1971).

<sup>46</sup> *Jacobellis v. Ohio*, 378 U.S. 184, 187-195 (1964).

<sup>47</sup> See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 570-72 (1942).

<sup>48</sup> *McConnell v. F.E.C.*, 540 U.S. 93, 265, 157 L.Ed.2d 491, 625 (2003).

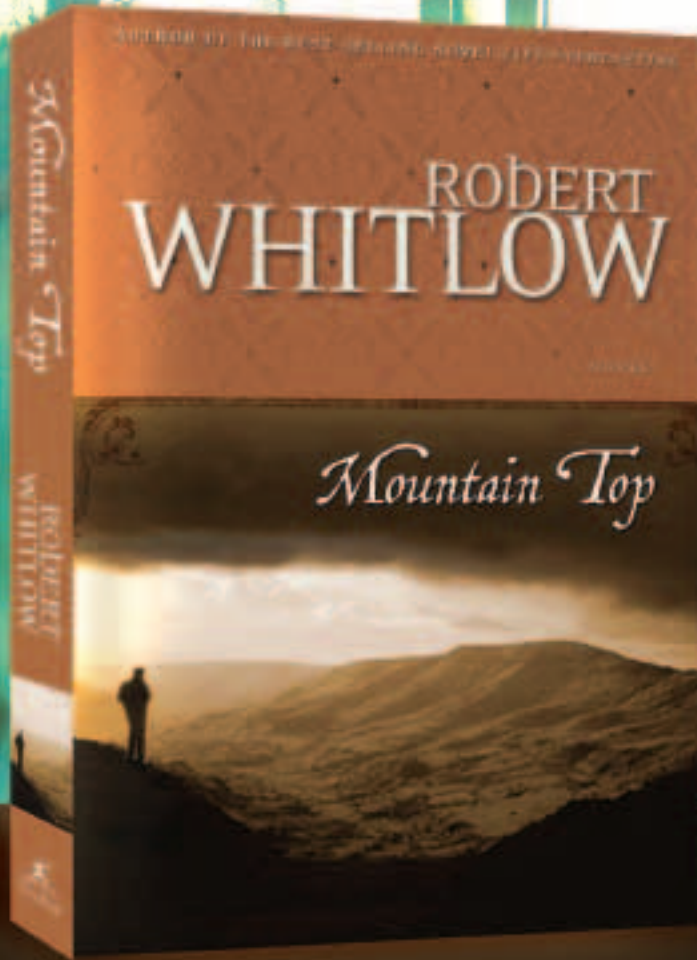
<sup>49</sup> See I Samuel 13:11-12.

<sup>50</sup> See II Chronicles 19:11.

<sup>51</sup> I Samuel 13:13-14a. See also II Chronicles 26:16-21.

Herbert W. Titus is a practicing attorney, of counsel to the McLean, Virginia law firm of William J. Olson, P.C. He specializes in constitutional litigation, appeals and strategies. For nearly thirty years he taught constitutional law at four different A.B.A.-approved law schools. From 1986 to 1993 he was the founding dean of the law school at Regent University.





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# Religious Freedom and the Supreme Court

BY GREGORY S. BAYLOR

The United States Supreme Court plays its central role in structuring the relationship between government and religion by deciding cases involving the fundamental right of religious freedom found in the First Amendment. As the Roberts Court begins its first full Term, there are unanswered questions in four key areas of church-state law: (1) government funding of religion; (2) government refusal to fund religion; (3) Free Exercise Clause doctrine; and (4) the application of non-discrimination rules to religious groups. The Court's treatment of these questions will likely affect religious freedom for all Americans.

## ESTABLISHMENT CLAUSE LIMITS ON GOVERNMENT FUNDING OF RELIGION

The First Amendment's Establishment Clause provides that "Congress shall make no law respecting an establishment of religion."<sup>1</sup> The Supreme Court interpreted this language to restrain the power of federal, state, and local governments to support religion.

Since the beginning of modern Establishment Clause jurisprudence in 1947,<sup>2</sup> the Court's opinions have expressed two somewhat contradictory notions: first, that "separation of church and state" requires the government to discriminate against religion in the funding context; and second, that the Establishment Clause simply mandates government neutrality toward religion when it comes to funding.

Both notions have been present in the Court's cases but, historically, strict separationism was the dominant paradigm. Until recent years, the Court repeatedly struck down aid programs benefiting religious elementary and secondary schools.<sup>3</sup> In older Establishment Clause cases, the Court held that government funding of religious institutions (e.g., schools and social service providers) was impermissible if the "primary effect" of the funding was the advancement of religion. The Court also reasoned

that funding of "pervasively sectarian" entities *always* had the primary effect of advancing religion and, therefore, that funding of such entities was impermissible.

Thankfully, over the last 15 years, the Court moved away from strict separationism, embracing neutrality as the dominant paradigm in adjudicating challenges to the inclusion of religion in government funding programs.<sup>4</sup> This move was foreshadowed by the Court's consistent reliance upon neutrality principles in the speech context. Specifically, the Court repeatedly rejected arguments that the Establishment Clause required government to exclude religious speakers from public speech fora in order to maintain separation of church and state.<sup>5</sup> More recent Supreme Court Establishment Clause decisions make it easier for the government to include religion in education and social service funding programs. Instead of asking whether a particular religious entity receiving funds is "pervasively sectarian," the Court asks whether the funding program defines its recipients by reference to religion, whether the funding creates an excessive entanglement, or whether the aid results in indoctrination in religion that is attributable to the government.<sup>6</sup>

In *Mitchell v. Helms*,<sup>7</sup> the Justices set forth their respective views regarding the circumstances in which "indoctrination" in religion is attributable to the state. Four members of the Court (Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas) wrote that if the program is secular in nature and distributed on religiously neutral grounds, it passes constitutional muster. Justice O'Connor rejected the plurality's approach in a concurring opinion joined by Justice Breyer. Justice O'Connor opined that while neutrality is important, additional attributes of the funding program and of the religious recipients might be relevant. Such factors might include whether government funds were actually diverted to purely religious uses, whether the program had adequate safeguards to protect against such diversion, whether government funds actually reached the coffers of reli-

gious schools, and whether the funding was direct or indirect.

Although there are no such cases this term, the Court will eventually take a case in which Chief Justice Roberts and Justice Alito will reveal their views on the Establishment Clause. Few expect them, however, to embrace the strict separationism of Justices Souter, Stevens, and Ginsburg, but the real question is whether they will align themselves with Justice O'Connor's multi-factorial approach or adopt the bright-line (and more permissive) rule of those in the *Mitchell* plurality.

### CONSTITUTIONAL LIMITS ON GOVERNMENT REFUSAL TO FUND RELIGION

The paradigm shift in Establishment Clause jurisprudence increased the importance of *state* constitutional provisions regarding church-state relations. In the past, strict separationists relied primarily upon the *federal* Constitution when challenging funding programs that included religion. This made sense because decisions striking down funding rooted in the federal Constitution would have a far greater precedential impact than decisions rooted in state constitutions. In addition, because the federal courts were interpreting the Establishment Clause in accord with strict separationism, there was little or no advantage to invoking state constitutional provisions.

Strict separationist arguments rooted in the Establishment Clause today are less likely to succeed because of the shift toward neutrality. As a result, strict separationists increasingly

invoke state constitutional provisions, many so-called "Blaine Amendments," whose language is often far more restrictive of the government's power to aid religion than is the language of the Establishment Clause. Many state and local governments already embrace a "strong" interpretation of such state constitutional provisions even without strict separationist lawsuits, thereby discriminating against religion in funding programs. Essentially, these governments sometimes discriminate against religion even though such discrimination is not required by the federal Establishment Clause.

Those who embrace the neutrality paradigm – including Christian Legal Society's Center for Law & Religious Freedom – believe the U.S. Constitution generally forbids state and local governments from discriminating against religion. This argument faced a test in a case that eventually came to be called *Locke v. Davey*.<sup>8</sup> The State of Washington, like most states, makes educational aid available to college students. Washington, however, forbids students majoring in "devotional theology" from receiving state aid based upon its understanding of the state constitution's Blaine Amendment. A student at Northwest College, Joshua Davey, was forbidden from redeeming a state-funded scholarship because he declared a major in pastoral ministries. He sued the state, arguing that the Washington rule violated the federal Constitution.

The case made it all the way to the U.S. Supreme Court, which ruled against

him in 2004. Church-state advocates across the spectrum are now arguing about the proper interpretation and application of the *Locke* opinion. Strict separationists argue that *Locke* essentially gives state and local governments a green light to discriminate against religion in the funding context. Supporters of neutrality theory, however, argue that *Locke* turned on the unique concerns associated with state funding of clergy training.

A federal district court could soon offer its views on the proper understanding of *Locke v. Davey* in a CLS Center case. The Center currently represents Colorado Christian University in a lawsuit filed against officials of the Colorado Higher Education Commission.<sup>9</sup> A Colorado statute forbids otherwise eligible students from redeeming state aid at "pervasively sectarian" schools – without regard to the classes they take, the majors they declare, or the careers for which they are studying. The Center is arguing that *Locke v. Davey* does not require the court to uphold Colorado's discrimination against religion, which is far more comprehensive than Washington's discrimination against devotional theology majors.

Chief Justice Roberts and Justice Alito were not on the Court when it decided *Locke v. Davey* two years ago, and one can only speculate about how they might apply *Locke* to a different set of facts. Given that Justices Scalia and Thomas dissented in *Locke*, it is reasonable to assume that they will be disinclined to interpret *Locke* broadly. It is also conceivable that one or more of

the remaining members of the *Locke* majority – Justices Stevens, Kennedy, Souter, Ginsburg, and Breyer – might strike down state funding discrimination where clergy training is not involved.

### FREE EXERCISE DOCTRINE

Government can burden religious exercise either intentionally or incidentally. Government burdens religion "incidentally" when it adopts and applies a legal rule that is not targeted at religion but nonetheless makes it more difficult for believers to practice their faith. The most common illustration is a law prohibiting the use of alcohol. The purpose and intent of such a law is not to forbid some Christians from using wine to celebrate the Lord's Supper; however, the law nonetheless does impose a burden upon those Christians who believe that the use of wine, as opposed to grape juice, is spiritually significant.

What does the Free Exercise Clause say about such incidental burdens on religious practice? In *Sherbert v. Verner*<sup>10</sup> and *Wisconsin v. Yoder*,<sup>11</sup> the Supreme Court held that "strict scrutiny" would be applied to such laws. More specifically, if the religious claimant could show that the governmental action in question burdened his religious exercise, the government would be required to show that the imposition of the burden was the least restrictive means of achieving a compelling state interest.

The Supreme Court modified its approach in the 1990 *Employment Div. v. Smith* case,

*continued on page 10*

## RELIGIOUS FREEDOM

*continued from page 9*

reducing the number of circumstances in which it would apply strict scrutiny to incidental burdens on religious exercise.<sup>12</sup> The Court held that in most of these cases, the Free Exercise Clause would not even be relevant.

Shocked by this severe diminution in the legal protection of religious freedom, Congress adopted the Religious Freedom Restoration Act (RFRA). The Court subsequently invalidated RFRA as applied to state and local governments in *City of Boerne v. Flores*.<sup>13</sup> Congress responded by adopting a statute (the Religious Land Use and Institutionalized Persons Act) that restored strict scrutiny to a subset of free exercise cases.

There is little reason to believe the Court is poised to overrule *Smith* and restore strict scrutiny to most Free Exercise Clause cases. At the same time, the Court's robust interpretation of RFRA in a case<sup>14</sup> earlier this year is encouraging. There, the Court made it clear that the federal government will truly need to show that the application of the objectionable legal rule to the religious claimant is really the least restrictive means of achieving a compelling state interest. The mere identification of an important state interest will not suffice.

## NON-DISCRIMINATION RULES AND RELIGIOUS LIBERTY

Finally, the greatest threat to religious liberty in America today is the application of religion and sexual orientation

non-discrimination rules to religious groups. The extent to which the Constitution forbids the government to apply such rules to religious groups is not entirely clear.

In its 2000 decision in *Boy Scouts v. Dale*,<sup>15</sup> the Court held that the First Amendment forbade New Jersey from punishing the Boy Scouts under a non-discrimination statute for refusing to allow a homosexual to serve as a scoutmaster. Homosexual rights' advocates have attempted to minimize *Dale's* significance. For example, they argue that it does not apply where the government applies a sexual orientation non-discrimination rule as a condition on access to some government benefit. Religious freedom advocates, on the other hand, urge courts to interpret *Dale* broadly.

The outcome of this debate will have enormous consequences for the religious freedom of theologically conservative believers and their organizations. Religion and the government have more points of contact than many realize, and each provides a context in which government might pressure or punish religious groups because of their adherence to traditional sexual ethics. For example, many public colleges and universities impose religion and sexual orientation non-discrimination rules upon student groups, including religious groups that require their leaders to sign a profession of faith and live by a code of conduct. Many state and local governments condition eligibility for grants and contracts upon compliance with a non-discrimination rule. There is even a legitimate concern that some governments will even-

tually withdraw tax-exempt status from religious groups that take homosexual conduct into account in their personnel decisions.

The Supreme Court has repeatedly held that the government generally may not ask individuals and groups to forfeit their constitutional rights in exchange for benefits. On the other hand, the Court did allow the Internal Revenue Service to revoke the tax-exempt status of Bob Jones University on the ground that its policies on interracial dating violated "public policy."<sup>16</sup> Homosexual rights advocates hope to persuade Americans that taking homosexual conduct into account is as pernicious as taking race into account. If they succeed, it is possible that the courts may decline to protect the religious freedom of those dissenting from the new sexual ethic.

The CLS Center represents parties in a number of cases pitting non-discrimination rules against religious freedom. A principal goal of our advocacy in those cases is to secure precedents holding that the Constitution forbids government from imposing religion or sexual orientation non-discrimination rules upon religious organizations. In many of the lawsuits we have filed, the government has capitulated, changing its rules in order to protect religious freedom. Two cases so far have resulted in reported decisions. The U.S. Court of Appeals for the Seventh Circuit held that a CLS law student chapter was likely to succeed on the merits of its claim that officials at Southern Illinois University violated its constitutional rights by revoking its recogni-

tion and attendant benefits.<sup>17</sup> A California district court, on the other hand, held that Hastings College of Law did *not* violate the Constitution by de-recognizing the school's CLS chapter.<sup>18</sup> An appeal is pending in the Ninth Circuit, and an adverse decision would create a "circuit split," increasing the possibility of Supreme Court review.

## WAITING ON ROBERTS

The addition of Chief Justice John Roberts and Justice Samuel Alito to the Supreme Court is likely to advance the cause of religious freedom and a proper understanding of the relationship between church and state as set forth in the First Amendment. Their judicial philosophies and track records as appeals court judges suggest that they will apply the First Amendment in a way that is consistent with its text, history, and underlying values. Of course, their actual votes and reasoning are what counts, and for that we must wait.

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Gregory S. Baylor is the director of Christian Legal Society's Center for Law and Religious Freedom.

<sup>1</sup> U.S. Const. amend. I.

<sup>2</sup> *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

<sup>3</sup> See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602 (1972); *Levitt v. Committee for Pub. Educ.*, 413 U.S. 472 (1973); *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973); *Sloan v. Lemon*, 413 U.S. 825 (1973); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Wolman v. Walter*, 433 U.S. 229 (1977); *Aguilar v. Felton*, 473 U.S. 402 (1985); *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373 (1985).

<sup>4</sup> See, e.g., *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993); *Agostini v. Felton*, 521 U.S. 203 (1997); *Mitchell v. Helms*, 530 U.S. 793 (2000); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

<sup>5</sup> See *Widmar v. Vincent*, 454 U.S. 263 (1981) (equal access by university

student religious groups to meeting space); *Westside Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (rejecting Establishment Clause challenge to Equal Access Act); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 520 (384) (church access to public school meeting space after hours); *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 819 (1995) (access to traditional public forum for cross display); *Rosenberger v. Rector of the Univ. of Virginia*, 515 U.S. 819 (1995) (Christian newspaper's access to public university student group funding); *Good News Club v. Milford*, 533 U.S. 98 (2001) (access to public elementary school meeting space immediately after school).

<sup>6</sup> See *Agostini v. Felton*, 521 U.S. 203 (1997).

<sup>7</sup> 530 U.S. 793 (2000).

<sup>8</sup> 540 U.S. 712 (2004).

<sup>9</sup> *Colorado Christian University v. Weaver*, D. Colo. No. 04-RB-2512.

<sup>10</sup> 374 U.S. 398 (1963).

<sup>11</sup> 406 U.S. 205 (1972).

<sup>12</sup> *Employment Div. v. Smith*, 494 U.S. 872 (1990).

<sup>13</sup> 521 U.S. 507 (1997).

<sup>14</sup> *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 126 S. Ct. 1211 (2006).

<sup>15</sup> 530 U.S. 640 (2000).

<sup>16</sup> *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

<sup>17</sup> *Christian Legal Society v. Walker*, 453 F.3d 853 (7<sup>th</sup> Cir. 2006).

<sup>18</sup> *Christian Legal Society v. Kane*, 2006 WL 997217 (N.D. Cal. 2006).



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# Life

## *in the Time of the Roberts Supreme Court*

BY  
PROFESSOR TERESA STANTON COLLETT

The 2005 Supreme Court term opened with pundits forecasting the imminent demise of *Roe v. Wade* due to the appointment of Chief Justice John Roberts. The chorus grew louder with the confirmation of Justice Alito, who supported a limited right of husbands to know of their wives' intent to abort their children in *Planned Parenthood v. Casey*. Yet if *Ayotte v. Planned Parenthood of Northern New England*, 126 S. Ct. 961 (2006), (a unanimous opinion handed down January 18, 2006) is any indication of the direction of the Roberts Court, the "imminence" the pundits speak of must be measured in terms of geologic time.

### **AYOTTE AND THE STANDARD**

The issue before the Court in *Ayotte* was whether there must be a health exception to a state law requiring one parent to be notified prior to the performance of an abortion on a minor. New Hampshire Attorney General Ayotte hoped to identify the proper standard of review for facial challenges to abortion statutes. The Court had previously endorsed three different standards, without providing guidance regarding which standard is to be used in what circumstances. In *Rust v. Sullivan*, 500 U.S. 175 (1991), the Court employed what is known as the *Salerno* test, requiring plaintiffs to show that "no set of circumstances exists under which the challenged Act would be valid." In *Planned Parenthood v. Casey*, 505 U.S. 833 (1996), the plurality opinion established the requirement that unconstitutionality must be shown in a "large fraction" of the cases in which the abortion law would be applicable. Most recently, in *Stenberg v. Carhart*, 530 U.S. 914 (2000), a majority of the Court merely required a single case in which the statute would impinge upon the woman's constitutional liberty interest in terminating her pregnancy before declaring the law unconstitutional. Various lower courts have adopted all of these standards.

The uncertainty regarding which standard will be applied if legislation is challenged makes the legislative task of drafting constitutional laws difficult, and the executive task of administering and defending those laws complex, if not almost impossible. The *Ayotte* Court, however, ultimately declined to identify the proper standard of review for abortion legislation, instead focusing on the ability of courts to tailor their rulings to invalidate only unconstitutional applications of statutes. It is an open question whether the New Hampshire law will survive review on remand due to critical concessions made at the outset of the case. The Supreme Court ruling occasioned by the law is a victory nonetheless, in so far as it heralds a more restrained approach to judicial vetoes of abortion laws.

## THE GONZALES CASES

Perhaps of equal interest to those involved in the defense of life are *Gonzales v. Oregon*, 126 S.Ct. 94 (2006), and *Gonzales v. Raich*, 545 U.S. 1 (2005). In the *Oregon* case, a six-member majority rejected the authority of the U.S. Attorney General to limit the use of controlled substances to non-lethal purposes in Oregon. The Attorney General was not free to reject Oregon's decision to include assisted suicide as a part of "legitimate medical practice" in his interpretation of the federal Controlled Substances Act. Yet, as Justice Thomas points out in his dissent, only a

Chief Justice Roberts joined the dissent in *Oregon* case. Yet there still appears to be lessons about Chief Justice Roberts' judicial philosophy that can be learned from this trio of cases. First, John Roberts was sincere in his claims that he wants to be known as a "modest judge" – one who decides the cases before him, rather than one who legislates, or executes, from the bench. Second, it appears that he is a lawyer's lawyer. He admires finely crafted legal arguments. Procedural points are important to him. Third, and perhaps most tentatively, his political theory appears to be closer to that of the State as Night

(9th Cir. 2006), from the Ninth Circuit, poses two additional questions: whether abortion clinics have standing to facially challenge the law, absent a physician plaintiff, because the law by its terms applies only to individuals who perform abortions; and whether the definition of the prohibited procedure is unconstitutionally vague.

During their confirmation hearings, Justices Roberts and Alito answered wide-ranging questions about the role of *stare decisis* in constitutional decision-making. They both acknowledged the importance of the doctrine to the stability of the Rule of Law and the

laws rather than the more lenient review dictated by the Court's interpretation of the Free Exercise Clause. Justice Kennedy, writing for the Court, explained:

When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed. RFRA

## ... HE WANTS TO BE KNOWN AS A "MODEST JUDGE" — ONE WHO DECIDES THE CASES BEFORE HIM, RATHER THAN ONE WHO LEGISLATES, OR EXECUTES, FROM THE BENCH.

year earlier in *Gonzales v. Raich*, a different six-member majority upheld the application of the federal Controlled Substances Act to preclude the possession and sale of marijuana in California under that state's law allowing the sale and use of marijuana for medical purposes. The *Oregon* majority distinguish *Raich* on the basis that marijuana can not legally be used for any purpose in this country, while the drugs at issue in the *Oregon* case could be prescribed legally. The majority in *Gonzales v. Oregon* expressed its desire that the states act as laboratories regarding varied legal approaches to the issue of assisted suicide, consistent with the Court's earlier opinions in *Washington v. Glucksberg*, 521 US 702 (1997), and *Vacco v. Quill*, 521 US 793 (1997).

Neither Chief Justice Roberts nor Justice Alito were part of the *Raich* case, and

Watchman rather than the Nanny, although he will allow the people to choose their own fate.

### THE FUTURE OF PARTIAL-BIRTH ABORTION?

What do these traits foretell for the two partial-birth abortion cases this term and for other life-related cases that appear on the horizon? *Gonzales v. Carhart*, 413 F.3d 791 (8th Cir. 2005), the partial-birth abortion case arising from the Court of Appeals for the Eighth Circuit, presents the straight-forward question of whether a federal law prohibiting a particular abortion procedure must contain an exception for the health of the mother, when Congress has found that there is substantial medical authority that such an exception is unnecessary. The companion case of *Gonzales v. Planned Parenthood Federation of America et al.*, 435 F.3d 1163

development of coherent constitutional jurisprudence. Notwithstanding the virtues of the doctrine, however, both men also carefully articulated the limitations of being bound by former cases when foundational facts differ or the original holding has proven unworkable. The key question in the partial-birth abortion cases will be whether the justices believe the rules announced in *Stenberg* regarding a state partial-birth abortion ban are applicable to the federal ban containing different terms and based upon extensive Congressional hearings.

The plaintiffs in the partial-birth abortion cases argue that these cases are similar to *City of Boerne v. Flores*, 521 U.S. 507 (1997). In *City of Boerne*, the Court refused to apply the heightened scrutiny required by the Religious Freedom Restoration Act of 1993 ("RFRA") to state and local

was designed to control cases and controversies, such as the one before us; but as the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control. *Id.* at 536.

Unlike RFRA, a federal partial-birth abortion ban was proposed prior to any judicial act in the area, and reflects a legislative resolution of a contested question of fact, rather than law. Whether five justices find these distinctions determinative is one of the many issues before the Court in these cases.

### CONTRACEPTION

Taking a longer view, at some point this Court will have to address questions arising from the merger of abortion and contraception. The marketing of "emergency contraception" or "the morn-

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**ROBERTS SUPREME COURT**  
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ing-after pill” creates a challenge to the authority of the state to define abortion. Currently some attorneys general have opined that emergency contraception is within their states’ parental involvement laws related to abortion, while others have reached contrary conclusions. Given the Court’s current position that abortion regulation is unconstitutional if contrary to “substantial medical authority,” it is only a matter of time before a court will have to determine if a state may include “emergency contraception” within its definition of abortion.

**HEALTH CARE RIGHT OF CONSCIENCE**

The power of the medical profession will also be at issue

when the Court accepts a case that requires it to decide the contours of professional’s right of conscience. What little Supreme Court precedent that exists is not encouraging. In 1945, in *In re Summers*, 325 US 561 (1945), the Court considered whether the Illinois bar could refuse to admit a candidate who, because he was a pacifist due to his religious beliefs, could not swear in good faith to fulfill the required oath of office. In a split decision, the majority acknowledged that the candidate’s beliefs were protected by the Free Exercise Clause, but held:

It is impossible for us to conclude that the insistence of Illinois that an officer who is charged with the administration of justice must take an oath to support the Constitution of Illinois and Illinois’ inter-

pretation of that oath to require a willingness to perform military service violates the principles of religious freedom which the Fourteenth Amendment secures against state action, when a like interpretation of a similar oath as to the Federal Constitution bars an alien from national citizenship. 325 U.S. 561, 572 (1945)

Justice Black, in dissent, wrote, “I am not ready to say that a mere profession of belief in that Gospel is a sufficient reason to keep otherwise well qualified men out of the legal profession, or to drive law-abiding lawyers of that belief out of the profession, which would be the next logical development.” *Id.* at 575. With *Employment Div. v. Smith*, 494 U.S. 872 (1990), having effectively nullified the Free Exercise clause, a constitutional claim by healthcare providers to refuse to participate in abortions seems problematic. This makes the work of the Christian Legal Society for passage of statutory protections even more important.

**THE FUTURE OF ABORTION**

These predictions suggest that abortion will remain an issue before the Court for several years into the future. While many hope that the South Dakota abortion ban prohibiting almost all abortions will provide the vehicle for the Court to reverse *Roe v. Wade* in the near future, it seems unlikely for three reasons. First, the statute must survive the vote of the people

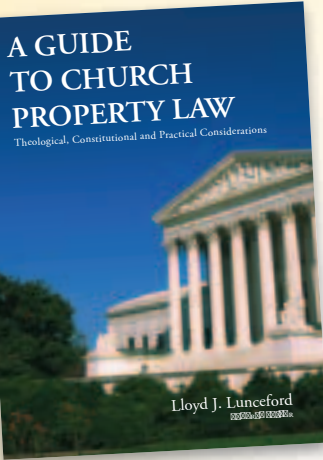
scheduled this fall before it can provide the basis for a challenge. Second, given the clarity of the governing constitutional law at this time, there is little reason for the Supreme Court to grant certiorari if the statute is affirmed by a vote of the people, then successfully challenged in court. Finally, and most importantly, this sort of fundamental change in constitutional jurisprudence is contrary to the Chief Justice’s declared desire to lead the Court toward more unanimity by issuing narrower opinions. The sincerity of his desire, as well as his ability to achieve it, is evidence by the fact that during the 2005–2006 term of the Court almost half of the Court’s decisions were unanimous, with there being only two plurality decisions. About a quarter commanded at least a six-justice majority, and only slightly fewer than a quarter of the decisions were decided by one vote. It is impossible to know the degree to which these outcomes are the result of the Chief Justice’s efforts, since it is so early in his leadership of the Court. Nonetheless, it seems safe to say that dramatic departures from existing jurisprudence seem unlikely from this Court.

Sadly, regarding the impending demise of *Roe v. Wade*, I fear the message from this Court is similar to that of Mark Twain’s to the American press after his obituary had been mistakenly published, “[t]he reports of [its] death are greatly exaggerated.”

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Professor Teresa Stanton Collett is a professor of law with St. Thomas School of Law in Minneapolis, Minnesota. Professor Collett has previously taught law at South Texas College of Law as well as has been a visiting professor at Notre Dame Law School, Washington School of Law, and University of Texas School of Law. She is a former associate at Crowe and Dunlevy and a graduate of the University of Oklahoma College of Law.

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# The Supreme Court: Looking Back, Looking Forward

by Steffen N. Johnson and Andrew C. Nichols

The most important development on the U.S. Supreme Court this past Term was not the decision in any case, but rather the arrival of two new Justices. The retirement of Justice Sandra Day O'Connor and the death of Chief Justice William Rehnquist marked the Court's first vacancies since 1994 (a modern record). The nine Justices who occupied the Court between 1994 and 2005 decided some 964 cases together—more than any other comparable group in U.S. history.<sup>1</sup> From the war on terror to religion, gay rights, assisted suicide, and abortion, their decisions left no significant area of law, or American life, untouched.<sup>2</sup>

## WINDS OF CHANGE

The arrival of Chief Justice John Roberts and Associate Justice Samuel Alito, after hard-fought confirmation battles, seems certain to bring some measure of change. Naturally, the prospect of change is due in part to the new Justices' fresh perspectives on the law. But the arrival of these two Justices may likewise affect the Court's inter-personal dynamics—the behind-the-scenes interplay among the Justices that shapes the substance of the Court's decisions.

The changes in personnel even appear to have affected the Court's mood. Roberts arrived with a reputation for grace under pressure, and he did not take long to showcase this quality in his new role. When, just days after he took center chair, a light bulb exploded during oral argument, Roberts quipped: "[I]t's a joke they play on new chief justices . . . We're even more in the dark now than before." One scholar has calculated, based on Court transcripts, that the Justices are laughing more under Roberts.<sup>3</sup> And Linda Greenhouse of *The New York Times* has described the mood at the Court as "almost palpably cheery."<sup>4</sup>

The question on most minds, however, is the extent to which the new Justices will change more than just the Court's atmosphere. Rehnquist consistently voted with the Court's "conservative" wing,<sup>5</sup> while O'Connor provided a swing vote in contested areas such as race, religion, and abortion. Will Roberts, a former law clerk for Rehnquist, follow in his mentor's footsteps? Will either Roberts or Alito adopt O'Connor's case-by-case approach to judging, siding with the Court's "liberal" wing in cases involving prominent "social" issues? Inquiring Court watchers want to know.

## LOOKING BACK ON 2005-06—A TERM OF UNUSUAL CONSENSUS

The Court's last Term offered only a glimpse into the views of the new Justices. One interesting development, however, is that the Chief Justice appears to favor more unanimous rulings. In a commencement speech, Roberts suggested that the Court should issue unanimous opinions—if narrower ones—as often as possible. Citing what he has called "the cardinal principal of judicial restraint,"<sup>6</sup> Roberts declared that "if it is not necessary to decide more to dispose of a case, in my view it is necessary not to decide more."<sup>7</sup>

Sure enough, last year brought an unusually high number of unanimous, narrow opinions. Indeed, 49

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## LOOKING BACK

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percent of the Court's cases last year were decided without dissent, compared with 38 and 44 percent in the previous two Terms, respectively.<sup>8</sup> We do not expect the Justices to beat their legal swords into plowshares anytime soon, but Roberts' emphasis on unity may have some effect at the margins. Indeed, some of the across-the-board opinions came in controversial cases, perhaps reflecting Roberts' skill as a consensus builder.

For example, in *Rumsfeld v. Forum for Academic & Institutional Rights*—known as the “Solomon Amendment” case—the Court (per Roberts) ruled 9-0 that the First Amendment did not prevent Congress from requiring federally-funded colleges, whether public or private, to provide access to military recruiters notwithstanding the colleges' objections to the military's policy towards homosexuals.<sup>9</sup> And in *Ayotte v. Planned Parenthood of Northern New England*, the Court unanimously ruled that, if a law restricting abortions would be unconstitutional in only some applications, that does not necessarily require invalidating the whole law.<sup>10</sup> Only time will tell the full effect of these holdings, but the issues were hardly expected to produce unanimity.<sup>11</sup>

Of course, the Court remained divided in key cases. In *Hamdan v. Rumsfeld*, the Court divided sharply over the President's authority to try enemy combatants by military commission. Five Justices (Stevens, Souter, Ginsburg, Breyer, and Kennedy (who concurred)) held the practice unlawful under the Geneva Conventions and the U.S. Code of Military Justice.<sup>12</sup>

Three Justices (Scalia, Thomas, and Alito) dissented, reasoning that the Court lacked jurisdiction and that the relevant provisions of the Geneva Conventions do not apply to Guantanamo Bay detainees such as Hamdan. This is roughly the same position that Roberts took when he heard the case as an appellate judge and thus could not hear it as a Justice.

The votes in *Hamdan* roughly resemble the 5-4 splits of the Rehnquist Court. The Court has not become a guaranteed rubber-stamp for Bush Administration policies. Justice Kennedy remains a critical swing vote. And, if it needed saying, Roberts and Alito have limited ability to shift the balance of power on the Court.

Court watchers have been reading the tea leaves from last Term in many different ways—especially given the Chief Justice's profession of support for a “narrowing” jurisprudence. Professor Cass Sunstein of The University of Chicago believes that Roberts has already “take[n] a side in one of the deepest and most longstanding divisions in American jurisprudence.”<sup>13</sup> One strand, espoused by Justices such as Antonin Scalia, “prizes broad, ambitious rulings on the ground that they give the clearest signals to lower courts, potential litigants, and the nation as a whole.” The other strand, “associated with [Justice Felix] Frankfurter and Justice Sandra Day O'Connor, prizes narrow rulings” that “emphasize[] the need for humility.” According to Sunstein, Roberts shows “unmistakable enthusiasm” for the latter approach.<sup>14</sup> Others, like Senator Ted Kennedy, argue that Roberts and Alito reflect “an activist's embrace of the [Bush] administration's

political and ideological agenda.”<sup>15</sup> According to him, Roberts and Alito are “extremists”—“partisans ready and willing to tilt the court away from the mainstream.”<sup>16</sup>

In truth, it is too soon to say. But the Court's coming Term will be more enlightening on these matters, and not only because of the substantive issues on the Court's docket. As things are unfolding, it appears that next year may require the newest Justices to address the critical issue of “stare decisis”—the question of how much weight the Court should accord its prior decisions. And that issue could prove critical to the outcome in cases spanning several areas of law.

## LOOKING FORWARD— THE TERM OF “STARE DECISIS”?

Judging by the cases the Court already agreed to decide, the next Term is shaping up to be a blockbuster. Among other issues, the Court has taken up the constitutionality of Congress's ban on partial-birth abortions,<sup>17</sup> of race-based affirmative action in public high schools,<sup>18</sup> and of massive punitive damage awards.<sup>19</sup> Moreover, the Term has yet to begin; the Court will take up dozens more cases before the year ends.

These cases are important in their own right, but the issues—partial-birth abortion, race-based affirmative action, and big punitive damage awards—share something else in common. In each area, the Court's most recent word on the issues is but a few years old and was issued by a closely divided Court. Thus, the Court may have at least three opportunities to consider how much deference it owes to precedent, and the arrival of

Roberts and Alito might (or might not) tip the balance of the Court on *either* the underlying issues or stare decisis.

For example, in the 2000 case of *Stenberg v. Carhart*, a 5-4 Court struck down a state ban on partial-birth abortion.<sup>20</sup> O'Connor joined the majority; Rehnquist dissented. If (as some predict) Roberts and Alito agree with the *Stenberg* dissenters, the federal law prohibiting such abortions will likely be upheld.

Unless, that is, one of the Justices who would otherwise vote to uphold the federal law believes that deference to *Stenberg* requires striking it down. Such reasoning was the basis of the controlling opinion in *Planned Parenthood v. Casey*, a 1992 decision striking down certain abortion restrictions (e.g., parental consent without a judicial bypass and spousal notification). The three-Justice plurality (O'Connor, Kennedy, and Souter) ruled that although they might uphold the restrictions if writing on a clean slate, deference to *Roe v. Wade* and the many women who had relied on the abortion right warranted striking down the restrictions. As the plurality put it: “Liberty finds no refuge in a jurisprudence of doubt.”<sup>21</sup>

Justice Kennedy dissented in *Stenberg* but joined the plurality opinion in *Casey*, so he in particular will have to decide whether stare decisis requires deferring to the majority's opinion in *Stenberg*.<sup>22</sup> It is also possible, however, that other Justices who may think that *Stenberg* was wrongly decided as an initial matter will feel that stare decisis requires following it in future cases, if those cases cannot be meaningfully distinguished.

Abortion is not the only

area in which the Court may confront stare decisis. In the race-based affirmative action field, the court decided in 2003 that certain forms of racial preferences in public higher education violate the equal protection clause, while others do not.<sup>23</sup> The votes were 5-4, with O'Connor in the majority and Rehnquist in dissent. If Roberts follows Rehnquist and Alito disagrees with O'Connor on this issue, the Court may reach a different result in the public high school context—again, assuming the Justices do not think stare decisis requires adherence to precedent.<sup>24</sup>

And the two leading cases imposing constitutional limits on punitive damage awards—*State Farm v. Campbell* and *BMW of North America v. Gore*—were decided in the last ten years by 6-3 and 5-4 votes, respectively.<sup>25</sup> Rehnquist and O'Connor were in the majority in *State Farm* and O'Connor was in the majority in *Gore*; so if Roberts or Alito side with the dissenters on similar issues, then stare decisis may affect the business community as well.

There is, of course, a wide range of opinion on the degree to which the Court should defer to its prior rulings. Some think the Court's members owe their predecessors virtually no deference on how to interpret the Constitution. In their view, judges take an oath to uphold the Constitution, not prior interpretations of it. Others take the view that precedent is entitled to great weight and should be disturbed only in the rare case where the Court has clearly adopted an incorrect and unworkable rule. Finally, somewhere between these two extremes lie those who think that whether precedent should be overruled

turns on factors such as how long it has been on the books, the number of times it has been reconsidered, whether it provides a workable rule of law, whether departing from it would upset the public's expectations, whether the political branches support adhering to it, how clear it is that the rule is incorrect, and the importance of consistency to the rule of law.

### A MOMENTOUS TERM?

Their confirmation hearings offered few clues on how Roberts and Alito view stare decisis. Both men indicated that they generally favor stability in the law, but did not tip their hands any further.

One can hope that Roberts and Alito, in common with their colleagues, will adhere to a principled and consistent view of stare decisis. The Justices are human, and they may be tempted (consciously or subconsciously) to take one view of stare decisis when they agree with precedent and another when they disagree with it. But it cannot be right that one side's rulings are set in stone while the other's are perpetually subject to reconsideration. Whatever the appropriate rule, both sides ought to be able to agree that stare decisis should be applied consistently, across the range of contested issues. And regardless of where the new Justices come out, it is safe to say that stare decisis holds the potential to affect the Court's decisions in a number of key areas, both this year and in years to come.

In short, the Court's next Term will be one to watch. And we may soon have a better idea whether the appointments of Roberts and Alito were as momentous as their confirmation hearings would suggest.

## WE DO NOT EXPECT THE JUSTICES TO BEAT THEIR LEGAL SWORDS INTO PLOWSHARES ANYTIME SOON, BUT ROBERT'S EMPHASIS ON UNITY MAY HAVE SOME EFFECT AT THE MARGINS.

Steffen N. Johnson & Andrew C. Nichols are members of the Appellate & Critical Motions practice at Winston & Strawn LLP in Washington, D.C. They practice regularly before the Supreme Court.

(Scalia, J., joined by Thomas, J., dissenting from denial of certiorari).

<sup>1</sup> No group of nine Justices has sat together for as long a period as the Rehnquist Court between 1994 and 2005. From 1812 to 1823—the longest period during which the Court's composition did not change—the Court decided just 459 decisions and had fewer Justices. See [http://www.supremecourthistory.org/04\\_library/subs\\_volumes/-04\\_c09\\_k.html](http://www.supremecourthistory.org/04_library/subs_volumes/-04_c09_k.html).

<sup>2</sup> See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Stenberg v. Carhart*, 530 U.S. 914 (2000).

<sup>3</sup> See Adam Liptak, *So, Guy Walks Up To The Bar, And Scalia Says*, N.Y. Times, Dec. 31, 2005, at A1 (referencing Jay D. Wexler, *Laugh Track*, 9 Green Bag 2d 59(2005)).

<sup>4</sup> Linda Greenhouse, *Advice To New Chief From The Lesser Of Two Equals: Call Me Nino*, N.Y. Times, Nov. 9, 2005, at A20.

<sup>5</sup> Jon Kyl, *Tribute to Chief Justice William H. Rehnquist*, 115 Yale L.J. 1857, 1858 (2006) (“[Rehnquist] would spend thirty-three years on the Court evaluating cases and the law in a way that generally tried to defer to the other two branches of government”).

<sup>6</sup> *P.D.K. Laboratories, Inc. v. U.S. D.E.A.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part).

<sup>7</sup> *Chief Justice Says His Goal Is More Consensus On Court*, N.Y. Times, May 22, 2006, at A16.

<sup>8</sup> Georgetown University Law Center Supreme Court Institute, *Supreme Court of the United States October Term 2005 Overview*, at 1, available at <http://www.law.georgetown.edu/sci/>.

<sup>9</sup> 126 S. Ct. 1297, 1306 (2006).  
<sup>10</sup> 126 S. Ct. 961, 967-69 (2006).

<sup>11</sup> *Compare Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174, 1175-76 (1996) (Stevens, J., concurring in denial of certiorari) with *id.* at 1176-81

<sup>12</sup> *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2786 (2006); *id.* at 2808 (Kennedy, concurring).

<sup>13</sup> Cass R. Sunstein, *The Minimalist Chief Justice Roberts Favors Narrow Rulings That Create Consensus And Tolerate Diversity*, L.A. Times, May 25, 2006, at 11.

<sup>14</sup> See generally Cass R. Sunstein, *Radicals in Robes: Why Extreme Right-Wing Courts Are Wrong For America* (2005).

<sup>15</sup> Edward M. Kennedy, *Roberts and Alito Misled Us*, Washington Post, July 30, 2006, at B1.

<sup>16</sup> *Id.*

<sup>17</sup> *Gonzales v. Carhart*, 413 F.3d 791 (8th Cir. 2005), *cert. granted*, 126 S. Ct. 1314 (2006).

<sup>18</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162 (9th Cir. 2005), *cert. granted*, 126 S. Ct. 2351 (2006); *McFarland v. Jefferson County Pub. Sch.*, 416 F.3d 513 (6th Cir. 2005), *cert. granted*, 126 S. Ct. 2351 (2006).

<sup>19</sup> *Williams v. Philip Morris, Inc.* 127 P.3d 1165 (Or. 2006), *cert. granted*, 126 S. Ct. 2329 (2006).

<sup>20</sup> *Stenberg v. Carhart*, 530 U.S. 914 (2000).

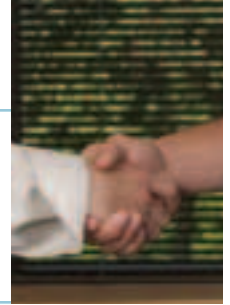
<sup>21</sup> *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 843 (1992).

<sup>22</sup> We assume that the federal statute and the Nebraska statute at issue in *Stenberg* are relatively comparable, but have not conducted any comparative analysis of them.

<sup>23</sup> *Compare Gratz v. Bollinger*, 539 U.S. 244, 275 (2003) (invalidating university's use of race in admissions because not narrowly tailored to individualized consideration of applicants) with *Grutter v. Bollinger*, 539 U.S. 306, 325 (2003) (holding that student body diversity is a compelling state interest that can constitutionally justify the use of race in university admissions where narrowly tailored).

<sup>24</sup> It is also possible, of course, that one or more of the Justices (on either side of the issue) would find differences between the public high school and higher education contexts to warrant different results.

<sup>25</sup> *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *BMW of N.A. v. Gore*, 517 U.S. 559 (1996).



## The Privilege of Being a Christian Trial Lawyer

by Craig Shultz

I remember the feeling of exhilaration when my partner and I won our first jury trial. It was a criminal case and involved only a misdemeanor, but to us it was a chance to learn firsthand what it was like to try a case. Typical skirmishes occurred throughout the two-day trial but, in the end, the jury found our client not guilty – a just verdict in our opinion. It was all we could do to contain our excitement until we left the courthouse, and my partner let out a shout of joy that sticks in my mind to this day.

Twenty-nine years later, while there are many days when I feel overwhelmed by the responsibility and the deadlines, I still love being in trial. Since that first experience, I have had the privilege of trying approximately 120 jury trials of all different kinds. Many were short, some were long, and by now in my career I have tried many more civil than criminal cases, though I still enjoy working in both areas of the law. My practice consists primarily of the representation of individuals asserting claims for injury from accidents or professional negligence, as well as defending the rights of people accused of crimes – typically people with less power, from the world's point of view, than those on the opposing side.

Occasionally, I find myself wondering about the actual significance of being a lawyer who is Christian. Am I doing what I ought to be doing? Surely there must be something more, something better to do for God. Maybe the nature of the system contributes to the doubt. A pessimistic view suggests that, as a judge once lamented to me, at best it serves to determine a winner based on something other than

who has the fastest draw. Is that as good as it gets?

A positive response to this dilemma certainly cannot be found in any tremendous public respect for the process. Condemnation of our legal system is hugely popular today with simplistic criticism of the lawyers and parties running rampant, simply ignoring or masking the real root of the problems often identified with it. Admittedly, the system has faults, largely because of the common condition we all suffer in this world – hearts of men and women that, according to Jeremiah, are more deceitful than all else and are desperately sick. Sure, the justice system is capable of being and is sometimes misused, just like money, power and possessions, but it is equally capable of being powerful to help bring about justice.

The absence of encouragement is likewise evident in the lack of public respect for lawyers in general and trial lawyers in particular. Trial lawyers on either side of a case are often misunderstood and, while it is not just a question of us versus them, plaintiff's lawyers are the subject of particular disdain, with the worst negative descriptions frequently used for political advantage by those in my own, often uncompassionate, Republican party. Even well-intentioned articles written by other lawyers can be suggestive of such bias, at least implying some less-than-honorable motive on our part. Rodney Dangerfield would have understood the feeling.

My friend, Tim Smith, in a CLS workshop several years ago, summarized the concern when he asked, "What in the world am I doing representing plaintiffs in personal injury cases?"

His thoughts on the subject express my feelings well:

Often, my clients are the poor, the widow, the orphan, someone without any power in this world, someone dependent on an advocate in order to secure any justice or recompense for a wrong. My clients are almost always the victim of a tragedy, with no ability to make things right on their own.....They are surprised to be treated like a criminal or a liar. They don't understand that we have an adversary system in which personal injury defendants presume the worst about every claim and every plaintiff and every plaintiff's attorney. (edited with permission)

Most assuredly, representing innocent victims of tortious conduct is a legitimate and important part of our system of justice. Its genesis can be found at least as far back as the Levitical law requiring justice and compensation (what we call damages) to those who are injured by the fault of another. Our duty is to help those in need even when it means confronting others to reach the truth.

In my own experience, I've heard and felt the same presumptions described by Tim, often by other believers who seem to view my job as something less than what a "good" Christian would do. How can you defend someone you think is guilty? Personal injury verdicts are way too high! Why do so many people get off on "technicalities?" I often wonder why they never ask the prosecutor how he can prosecute someone he thinks may be innocent, how many jury verdicts end up way too low, or whether those "technicalities" might be

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## OCCASIONALLY, I FIND MYSELF WONDERING ABOUT THE ACTUAL SIGNIFICANCE OF BEING A LAWYER WHO IS CHRISTIAN. AM I DOING WHAT I OUGHT TO BE DOING?

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what many of us refer to as the Constitution of the United States. Of a more telling nature, why is it that none of those questions arise when it is their child in trouble or their family member who was injured?

I remember reading an article a few years ago by Ben Stein, who observed that our culture always blames the other guy. There is some truth to that claim; however, I was admittedly disheartened by his broad brush implication that plaintiffs (and their lawyers?) are the ones in the wrong, that they stifle innovation with lawsuits, and that corporate America deserves our sympathy in the judicial system. Sure, some plaintiffs need to admit their responsibility and I often have the opportunity to suggest just that. I can't begin to provide the number of people I have told that they do not have a case because there is either no fault at all or the fault is primarily theirs. And, believe it or not, most people seem satisfied with that explanation. They just need someone to tell them. Even their close friends won't often do that. What is more disturbing to me, however, at the risk of some generalization similar to that about which I complain, is how often defendants blame the plaintiff when there is virtually no basis to do so. Defendants, in my experience, hardly ever come to court and admit, early on, they were wrong. When defendants ignore the warning signs of potential damage, I have a hard time feeling much sympathy for them. And it is rare to talk about settling a case until long after the defendant has spent a large amount of money, often trying to justify the unjustifiable. Is it wrong to suggest that defendants should more frequently accept their responsibility early in the process rather than blame the plaintiff or the other guy?

The problem doesn't end there. One juror in a case I had about five years ago did not want to compensate my client, who was injured in a rear-end collision, because "stuff happens." The rest of the jury (it takes 10 of 12 jurors to agree on

civil verdicts in Kansas) fairly compensated my client. It was a small case and I don't think anybody would suggest the award was too large, given the nature and severity of my client's injury. But I doubt that same juror would have thought that "stuff happens" if the defendant had then complained about a "high" verdict. Or if she were the victim of an accident or crime, would she say, well, "stuff happens?" Wasn't her position most likely a mere "cop out" to avoid her own responsibility to honestly deal with the issue before her?

I would suggest that criticism of plaintiffs is often just a diversion tactic used to deflect an honest assessment of this issue of personal responsibility, a standard we as plaintiff's lawyers – indeed lawyers in general – ought to hold high. This tendency toward the denial of responsibility permeates much of life and is a concern to which we in the legal system are particularly susceptible. The problem lies on either side of a controversy with those who refuse to accept it, instead denying it to the bitter end. Like speaking the truth in love, justice inherently demands true accountability in this area.

Tim Smith explains his thoughts on the situation as it applies to representing plaintiffs:

God has a tremendous heart for the orphan, the widow, the alien, the poor, and the oppressed. Deuteronomy 10:18, 14:29; Psalm 10:18; Isaiah 1:18. In Isaiah 10, we are told of woes to those who "deprive the needy of justice and rob the poor of My people of their rights." Similarly, Jeremiah 5:28-29 prophecies against those who "do not plead the cause of the orphan' and 'do not defend the rights of the poor."

We are told that God's perspective on justice has to do with how these people are treated. Christian attorneys have the opportunity to bring integrity, honesty, and excellence to the litigation process on behalf of someone who desperately needs an able advocate. That is the way the adversary system works. In

order to ethically and honorably secure justice in this environment, the victim needs an able, ethical, experienced advocate.

The adversary system is, in the end, intended to let a jury or judge decide the facts. Being a good advocate for our clients within that system and for that purpose doesn't have to mean that we hate or mistreat the other side. Many of the trials I'm in are rather pleasant and friendly experiences. It is not always a full blown battle. And certainly that's where the Christian trial lawyer – including plaintiff's lawyers – can play such an important role. Writing in the last issue of *The Christian Lawyer*, David Schlachter with Peacemaker Ministries challenged us to "intentionally avoid following the world's pattern of power and manipulation to win at all costs," and to apply Biblical principles in our advice to clients, all the while seeking opportunities "to encourage reconciliation...." That is certainly applicable in the trial setting.

I'm proud to be a plaintiff's lawyer, despite society's instinctive bias against us. It is indeed an honorable calling to work for individuals who have been injured or damaged through the actions of another, not to be greedy, but to seek fair and honest compensation. We can treat people well in the process, contribute to the integrity, honesty and excellence necessary to improve the system and, as Tim succinctly concludes, use it as "a great opportunity for Christian attorneys to show how to fully represent Christ and the client at the same time." As I often tell juries in my closing argument, it is both a responsibility and privilege to represent my clients in that process.

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Craig Shultz is in private practice in Wichita, Kansas. His practice areas primarily include plaintiffs' personal injury, medical and legal malpractice, and insurance litigation. He graduated from Wichita State University and earned his J.D., cum laude, from Washburn University School of Law in 1978. He is a Fellow in the American College of Trial Lawyers, a member of the Christian Legal Society, and the Kansas Trial Lawyers Association.



## The FAD of Christianity

by Bill Jack

**H**ugh and his friends wanted to form an Academic Bible Club on their high school campus in a small college town in Southern Illinois. They met all the requirements necessary for having such a club and approached the principal with their request. Immediately, the principal said, “No.” Hugh and his friends appealed the principal’s decision to the school board. Having been placed on the agenda for the following month, the students met to plan strategy. At that meeting, the students selected Hugh to be spokesman before the board of education. After the planning meeting, Hugh told me that he wasn’t certain he could speak to the board. Puzzled, I asked him why not.

Hugh responded, “Well, my goal is to become a medical missionary. My father who is very wealthy has abandoned our family; so, even to begin my education to meet my goal, I need a scholarship. I have applied for one, and I have met most all the requirements. The only remaining requirement is a recommendation from my principal. If I speak, he may not give me a letter of recommendation, and I may lose my scholarship.” This was not what the Bible calls “vain imagination.” I knew this principal was quite capable of being that petty. I could not look Hugh in the eye and tell him, “You have to speak; you must speak.” I could not take his future and toss it aside like a scrap of paper. I could see the fear in his eyes. I wondered: “What would Hugh do?”

What would YOU do?

When a person in position of authority says, “You cannot meet here, speak here, or pass out your literature here as a Christian,” fear can neutralize you.

“No Fear!” The bumper stickers proclaim it; clothing lines promote it; television shows exploit it—The Fear Factor. People have a desire to appear fearless, especially before peers and the public. Interestingly, however, people often react to fear irrationally. For example, a little child hides under his covers at night, as if the monster in the closet is so stupid that he can’t figure out that the tasty midnight snack he wants is the quivering heap in the middle of the bed.

Even adults are not immune to such irrational whims. The Egyptians made a god of the crocodile. Why? It would climb out of the Nile and eat their cattle and their children—not necessarily in that order. To control it or appease it, they worshipped the crocodile. The Mayans made a god of the jaguar. Why? It would jump out of the jungle and eat their faces and their children—not necessarily in that order. To control it or appease it, they turned it into a god.

Sophisticated moderns tend to make fun of such irrational fears. Yet we are not that much different than the ancients. If we fear not having enough money, what do we turn into our gods? Material things. If we fear not having enough friends, whom do we turn into our gods? People. The principle is this: What you fear is what you will worship.

What is it that scares you spitless? Is it getting old? Is it not getting the best grade? Is it challenging an atheist professor who eats Christians for breakfast? Is it not having enough money? Is it not being invited to the ACLU function where you

will meet the movers and shakers who can further your career? What you fear is what you will worship, and fear can neutralize you.

How does one overcome such debilitating fear? How does one demonstrate courage in the face of extreme opposition? Again, if you were Hugh, what would you do?

Jesus said in Matthew 10:28, “And do not fear those who kill the body, but are unable to kill the soul, but rather fear Him who is able to destroy both soul and body in hell.”

We are to fear God. It is not a namby-pamby-wimpy-awe-and-respect kind of fear, but rather a wholehearted fear of the Almighty. In Luke chapter 5 when Jesus instructed Peter to cast his nets in the sea, Peter obeyed even though he told Jesus that he had fished all night long with no success. The result? Peter made a killing on the stock or rather, the fish market. He had the best business day of his career as a commercial fisherman. Yet, instead of rejoicing wildly, Peter’s response was to fall at the feet of Jesus and ask Him to go away from him. Why? Because fear seized Peter. When one encounters the power of the awesome (fearsome) God of the universe, the only response is to fall on one’s face in fear and trembling. Truly, we are to fear God.

In light of assurances in Scripture that “God has not given us a spirit of fear” (II Timothy 1:7), how can it be that we are to tremble before God with such overwhelming fear? Is this an insurmountable paradox? How can both be true—fear God, yet not fear God?

The solution is that once one fears the true Creator, He removes all fear of everything else. What did the angels say to the shepherds? “Fear not.” To Mary? “Do not be afraid.” What did Jesus say to the disci-

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## CHRISTIANS MUST MAKE CHRISTIANITY THE **FAD** FOR THE NEXT GENERATION BY: 1) **FACING THE CHALLENGE**; 2) **ACQUIRING THE CONFIDENCE**; AND 3) **DEVELOPING THE STRATEGIES**.

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ples as He walked across the water? “Fear not.”

Even Paul wrote of this when he proclaimed, “For I am convinced that neither death, nor life, nor angels, nor principalities, nor things present, nor things to come, nor powers, nor height nor depth, nor any other created thing, shall be able to separate us from the love of God, which is in Christ Jesus our Lord.” (Romans 8:39)

To have “No Fear!” one must first “Know Fear!” Once one fears the true Creator, He removes fear of everything else.

How Christians respond in the face of fear will make Christianity the **FAD** for the next generation. **FAD** does not represent a passing fancy or a fashion statement that comes and goes; **FAD** represents one of two ways Christians respond to opposition.

Normally, Christians react in “**Fear And Defeat**.” As a young boy walking home after dark from a neighborhood Cub Scout meeting, I was whistling to keep up my courage against the imagined boogeyman, but as I rounded the corner of my house, I encountered that very boogeyman—in the form of a man peeping in the windows of my house. My response? My whistler went dry, and I simply continued to blow air with no sound. I pretended not to see the danger, sauntered on around to the front door and then pounded furiously with my tiny fists against the locked door yelling at the top of my lungs for my parents to rescue me. I had experienced both the “whistling-in-the-dark-kind-of-courage” against imagined danger, as well as the very healthy fear of imminent danger.

A healthy fear keeps one from stepping off ten-story buildings, lighting oneself on fire, or playing in traffic, but I had become so focused on my fear of the stranger that I imagined a fanged, bloodsucking vampire reaching out to devour me as I banged on that front door. Fear has an interesting effect on people. I was reacting irrationally to my fear, and what one fears is what one will worship. I was operating from a posi-

tion of fear and, as a result, was totally defeated.

Yet, we are admonished not to walk by sight, but by faith. (II Corinthians 5:7) Christians must turn their “fear” into “faith” and their “defeat” into exercising their “duty” as followers of Jesus Christ. Instead of “**Fear And Defeat**,” the Christian’s cry should be “**Faith And Duty**.”

Christians must make Christianity the **FAD** for the next generation by:  
Facing the Challenge;  
Acquiring the Confidence; and  
Developing the Strategies.

Fear is a very powerful tool used by those in opposition to a biblical worldview to silence the Christian whether he be a student or professor, client or attorney, professional or laborer. The challenges are numerous, so the Christian must “acquire the confidence”—not self-confidence, but the confidence Jesus described in John 12:24–25 when He told His disciples:

*Truly, truly, I say to you, unless a grain of wheat falls into the earth and dies, it remains by itself alone, but if it dies, it bears much fruit. He who loves his life loses it; and he who hates his life in this world shall keep it to life eternal.*

What is the number one fear people list? No, not death. Death actually comes in second on the list. Oddly, public speaking is the number one fear listed. As the Jerry Seinfeld routine goes, “the man giving the eulogy at the funeral would rather be in the casket than giving the eulogy.” Once again, people react irrationally to fear, and what one fears is what one worships.

Therefore, one must die to himself, give himself to God, and then, and only then, will he have the ability to stand and speak in the face of extreme opposition. It is not “self confidence” one must acquire; it is “God confidence.” Only when one dies to self and gives himself to God can he begin to develop effective strategies to blunt the enemy’s use of fear tactics. Will Christianity be the **FAD** for the next generation?

The night of the school board meeting rolled around and the meeting room was packed out with television cameras, radio and print journalists at the ready to report on the one item on the agenda that could possibly draw 300 or more people to a local school board meeting—the Bible Club. When that item was announced, a hush fell across the room. The first to speak on the subject was a law professor from the local university who blatantly instructed the school board that Christians did not have a right to meet on campus. He was followed by an attorney from the ACLU who echoed the same phrases, and he was followed by a representative from the B’nai Brith who repeated the same sentiments.

I then watched in amazement as Hugh stood up and very eloquently destroyed all their shallow, hollow arguments in less than five minutes. To this day I cannot recall much of what Hugh said because the entire time he was speaking, I was fascinated by his pants.

I happened to be seated directly behind Hugh and, the entire time he spoke, I watched his knees literally knock together. Is courage the absence of fear? No, courage is fear in its proper perspective. Hugh feared God more than he feared men, and what one fears is what one will worship.

What do you fear? Grades? Reputation? Partnership? Money? What will you do?

---

Bill Jack is a faculty member for Worldview Academy, week-long classes around the country that help Christians think and live in accord with a biblical worldview so that they will lead the culture and serve Christ. He spent ten years as an educator in the public schools. He was national representative for the Caleb Campaign, a creationist youth ministry, and a contributing editor for Issues & Answers. Bill lives in Colorado with his wife, Tabby, and their three children.



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## Carrying the Message

by Scott Nehrbass

Larry was living in the Kansas City area and had been receiving supplemental security income (SSI) checks for mental illness issues. After police were called during a fight, Larry was arrested and put in the Johnson County jail.

Larry then spent nine months in jail waiting to complete a court-ordered mental exam and have the results reported to the Court. By the time Larry's case came to trial, no witnesses appeared and the case was dismissed. However, the sheriff deputies allegedly refused to give Larry his

release papers and simply dropped him off outside of town.

Larry said he walked the interstate about 20 miles. During the night, he got cold and decided to find warmth inside a dumpster. Larry claimed he was awakened the next morning as the garbage truck was lifting the dumpster and that he crawled out just in time, landed face first on the concrete, spraining his arm/shoulder and cracking a rib.

Larry found his way to the City Union Mission, and I met him the following day.

I briefly prayed for him, but he was mostly concerned about getting release papers so that he could start receiving his SSI checks. Social Security Administration will not pay SSI for any time during which you are jailed or incarcerated.

I picked up the phone and called the local Social Security office. I talked with Mr. Reed, who was difficult at first. But when I told him who I was, what I was doing, and why I was doing it, his attitude changed.

After first insisting that Larry needed to go get his release papers himself, Mr. Reed ultimately agreed to call the Johnson County Sheriff's office himself while we waited on the line. Mr. Reed came back on the line, said he'd confirmed that Larry had been released, and agreed to issue a new SSI check and have it delivered to Larry at the City Union Mission.

During the interview, I saw Larry's disposition change. His spirit quieted, and he became more pleasant to deal with. I even felt comfortable putting my hand on his shoulder as we walked out of the building, and I sensed that my doing so meant a lot to him.

Larry is now back in Chicago and living with his brother. Larry was surprised that I followed up, but he is still getting his SSI checks.

I am reminded that there are people out there who feel like nobody cares about them. One of the good works God has prepared beforehand for me is to make sure that the people I meet know God does care. How fulfilling it is to carry that message to folks like Larry.

Scott Nehrbass is the director of the Zenos Project, the Christian legal aid clinic in Kansas City.

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## Lawyering by the Unforced Rhythms of Grace

by Matt Bristol

*“Come to Me. Get away with Me and you’ll recover your life. I’ll show you how to take a real rest. Walk with Me and work with Me—watch how I do it. Learn the unforced rhythms of grace. I won’t lay anything heavy or ill-fitting on you. Keep company with me and you’ll learn to live freely and lightly.”*

Matthew 11:28-30 (The Message)

Over a decade ago, I did something that our world says no respectable lawyer would ever do. I handed *full control* over all aspects of my life and legal practice to someone I had never met in the flesh. After almost 30 years of law practice, I had this empty feeling deep inside me. Success was mine, by every worldly measure; but something was missing. I encountered Jesus Christ and He turned my life upside-down and out of my personal comfort zone. He led me all over the world, and nothing has been the same.

How did all this happen? It seems like it was just yesterday.

A series of events led me to the former Soviet Union, where I spent six weeks living and working in the Kyrgyz Republic as a Legal Specialist serving on loan from the Criminal Division of the Justice Department with the ABA’s Central European and Eurasian Law Initiative (CEELI). The Lord gave me a dream one night, showing me those who had been very poor but were now wealthy, while those who had been powerful were destitute and crying out for help. I had seen more than my share of material poverty among the Kyrgyz people as I traveled throughout the country’s senior judicial official. The Lord, however, allowed me to see the world from God’s perspective

through the dream, where spiritual blessings count so much more than material wealth.

Immediately, I sensed a calling from the God of the universe to join Him on a mission among the peoples of the former Soviet Union and those in neighboring countries who had long suffered under communist regimes by using my legal experience and skills to serve God’s global purposes. The next day was Thanksgiving Day in the United States. I met with the then president of the country and later had Thanksgiving dinner with a group of Christians living and working in the capital city. I will never forget that day, as I witnessed the pure joy they shared in serving God under what we would call extraordinarily difficult circumstances. Thanksgiving for me has never been the same!

A few years later, my wife and I moved to a small regional capital high in the Tien Shan mountains, where I served as a volunteer legal advisor to the governor, learned the Kyrgyz language, and survived minus 40 degree temperatures with only intermittent electricity. My wife often reflects that the warmest spot in that house in January was the inside of the refrigerator!

We spent two years learning the language and culture before moving back to the capital city. I went back to see my old friends in their parliament and white house, who were amazed we spoke a language that many of them had forgotten (as Russian was the language of law and commerce). I opened a law office and started working with the only Christian lawyer in the country. Four years later, there were a dozen or more lawyers and judges who

had decided to follow Jesus. Our small office had prayer and fasting as our primary weapons, and time after time, God worked small miracles to steer us around seemingly insurmountable obstacles. God gave me opportunities to travel throughout the region and disciple young lawyers in many countries, teach the basics of law practice and faith, and how to be salt and light in a sea of corruption and darkness. He allowed me access to hundreds of young pastors, many younger than my own children, to gently share how to serve God in hostile environments.

One day, the Lord caused my path to cross with a man my age, Sam Ericsson, former CLS director and executive director of Advocates International. He had been called by the Lord to start a global ministry to encourage, equip and link Christian lawyers and judges, and model our Lord’s good Samaritan parable by meeting the needs of those least able to help themselves. When we first met, our hearts instantly overflowed with His joy and we sensed that God had pre-ordained our meeting from the very beginning of time. I became a board member with Advocates International and helped to coordinate its work in Central Asia.

From there, I was led to the Republic of Korea, where I began a wonderful relationship with Handong International Law School and another former CLS executive director, Lynn Buzzard, who is the school’s charter dean. The opportunity to teach at Handong allowed me to impact young law students from dozens of countries, including current and former communist countries. The students I encountered are following Jesus and seeking to use their legal

**SUCCESS WAS MINE, BY EVERY WORLDLY MEASURE; BUT SOMETHING WAS MISSING. I ENCOUNTERED JESUS CHRIST AND HE TURNED MY LIFE UPSIDE-DOWN AND OUT OF MY PERSONAL COMFORT ZONE. HE LED ME ALL OVER THE WORLD, AND NOTHING HAS BEEN THE SAME.**

skills to serve His Kingdom. Just walking on that campus was a tiny glimpse of heaven!

Would you like to get involved in something that offers no material rewards but will revolutionize your walk with the Lord? Are you willing to leave your comfort zone and cede all control to Jesus Christ, and start living by the perfect rhythms of His grace? I travel the world and see lawyers doing incredible things in the power of Jesus, all below the radar of human fame and recognition. The cynic might ask why God would ever use lawyers to accomplish His work on earth? And then I remember Paul, who studied law under the leading law professor of his time, Gamaliel. Paul was complicit in the persecution and killing of many followers of Jesus but had a miraculous encounter with Jesus Christ and then became the first

missionary of the faith, chosen by the Holy Spirit to write a large portion of the New Testament.

If any of this resonates in your heart and soul, I would like to suggest that you get on your knees and ask God to give you the supernatural ability to sense the specific assignment He has purposed for you from the beginning of time. Become informed about what God is doing around the world through law students, lawyers and judges who have decided to place their lives and futures in the loving and protecting hands of Jesus.

In the power of God, Advocates International is serving as a divine catalyst for a global network that links over ten thousand Christian legal professionals and law students who are committing their lives to advancing the Kingdom of God. I wish you could meet them. Your heart

would melt and you would want to come alongside them and be used to literally transform cultures and equip the persecuted church to do all that God has ordained it to do, until Christ's return. Explore current needs for mentors, law professors, legal advisors, and when you sense a call to a given country or people, pack up and go! You will discover the abundant life that Jesus promised, and your joy will be complete, even in the face of hardship.

My wife and I recently returned to the U.S. because she suffered a collapsed lung and almost died. All her doctors, both here and in Korea, said by all rights she should have died. We know, however, that God has further work for her, and as soon as she is physically able, we expect to return to the work overseas that we love so much. In the

*continued on page 26*



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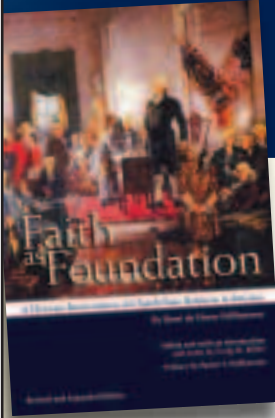
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**LAWYERING BY RHYTHMS OF GRACE**  
*continued from page 25*

meantime, we serve Him where we are and know that He will lead us day by day in the path He has chosen. We are just ordinary people who serve an extraordinary Savior, whom we praise!

The material blessings most of us enjoy in this country are a kind of anesthesia that dulls us to the needs of a world, where followers of Jesus really do live one day at a time, in survival mode, but with great joy! Have you ever wondered why Jesus asked us to pray for our *daily* bread? I know why. He loves it when we trust Him for all we need each new day. It is the life for which you were born, and there is still time to take the first step. No prior experience, whether good or bad, will be wasted. They will combine to forge a template that will propel you to a leading role on the final frontier!

---

Matt Bristol is a retired Air Force officer who currently resides in Richmond, where he serves as general counsel to a Virginia non-profit corporation with global operations. He serves on the adjunct faculty of Handong International Law School and on the board of directors of Advocates International.

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CLS Birmingham Chapter  
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semcpherson@alltel.net

### Mobile

CLS Mobile Chapter  
William Watts  
bill@alabamatrinal.com

## ARIZONA

### Phoenix

CLS Phoenix Chapter  
Timothy J. Watson, Esq.  
twatson15@cox.net

## CALIFORNIA

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CLS Los Angeles Chapter  
Terran Steinhart  
terran@steinhartlaw.com

### Orange County

CLS Orange County Chapter  
Robert Anderson  
bobanderson7@msn.com

### Sacramento

CLS Sacramento Chapter  
Steven Burlingham  
steveb@gtblaw.com

### San Diego

CLS San Diego Chapter  
John Yphantides  
johnyphantides@usa.net

### Santa Clara

CLS Santa Clara Chapter  
J. Thomas Diepenbrock  
jtdlegal@aol.com

## COLORADO

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CLS Metro Denver Chapter  
Linda R. Danskin  
Danskin4@msn.com

## DISTRICT OF COLUMBIA

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CLS DC Metropolitan Area  
David Nammo  
dnammo@clsnet.org

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CLS Daytona Beach Chapter  
Annette Pitts  
gator465@aol.com

### Jacksonville

CLS Jacksonville Chapter  
Roger Gannam  
rgannam@lfplaw.com

## HAWAII

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CLS Hawaii Chapter  
Sandra Young  
Youngsandyg@cs.com

## ILLINOIS

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CLS Indianapolis Chapter  
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Jensen@iquest.net

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## LOUISIANA

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CLS of New Orleans  
Roy Bowes  
attyrbowes@aol.com

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CLS Baltimore Chapter  
Matt Paavola  
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jodytadams@yahoo.com

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JLewis1515@aol.com

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JCAMACHO@shb.com

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RutaESQ@aol.com

### Syracuse

CLS Syracuse Chapter  
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rjdague@daguclaw.com

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CLS Oklahoma City Chapter  
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OKkidsdad@cox.net

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### Pittsburgh

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Delia Bianchin  
delia\_bianchin@pennunited.com

## TEXAS

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CLS Austin Chapter  
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### Dallas

CLS Dallas Chapter  
Jon D. Campbell  
jon@dbu.edu

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**M**y four-year-old daughter was humming and singing a familiar song around the house the other day. I'm sure you know the tune...

This little light of mine,  
I'm gonna let it shine.  
This little light of mine,  
I'm gonna let it shine.  
This little light of mine,  
I'm gonna let it shine.

Let it shine, let it shine, let it shine.

I can probably guess that, like myself, you will have this little tune stuck in your head for the rest of the day. As I listened to her sing, however, I began to think about its words and about how maybe I have been misunderstanding them since singing the same song when I was young. It is, of course, based on the scripture following the Beatitudes, as Jesus gave his mountain-top sermon:

*You are the salt of the earth. But if the salt loses its saltiness, how can it be made salty again? It is no longer good for anything, except to be thrown out and trampled by men. You are the light of the world. A city on a hill cannot be hidden. Neither do people light a lamp and put it*

*under a bowl. Instead they put it on its stand, and it gives light to everyone in the house. In the same way, let your light shine before men, that they may see your good deeds and praise your Father in heaven. Matthew 5: 13-16*

We often think and act, as the song goes, that we control this little light - that it is ours to do with what we will. Of course, the song says, I'm gonna let it shine. But we often think that we have the option of letting it shine or not. We are wrong. It is not for us to control. It is not, "This little light of **MINE... I'M** gonna let it shine."

Dietrich Bonhoeffer, in the *Cost of Discipleship*, reflects on the same passage of scripture to say that we are not merely holders of the light, but rather we are the light itself. "[We] are already the light because Christ has called [us], [we] are a light which is seen of men ... How impossible, how utterly absurd it would be for the disciples - these disciples, such men as these to try and become the light of the world! No, they are already the light, and the call has made them so." Dietrich is right. We are Jesus' light, for Him to do with what He wills. I know I am just as guilty as the next person for my wrestling

match with the Lord, as I often question what He is doing and insist on taking my own path.

I was recently visiting Howard University and its Christian law student group. While speaking with one of the group leaders, she admitted to putting the Christian Legal Society on her resume, despite the advice of Christian professors and advisors who do not want her to risk rejection by those who could be prejudiced. The attitude she displayed was refreshing. She said that she could not imagine not putting the Christian Legal Society on her resume. She also confirmed that more Christian recruiters are excited to see it on her resume and comment on her courage for doing so.

How right she is to stand up for Christ, no matter what the cost. Sadly, not all are like her. In fact, just today, an attorney declined to help CLS with a religious liberty case because he was up for partner this year and didn't want to jeopardize his standing with the senior partners. Unfortunately, the line is not "well done, good and faithful attorney!"

Christian lawyers still think they live with those great scales of justice - money and power on one side, and Christ on the other. It doesn't have to be one or the other, but somehow we think putting weight on the Christ scale will make the money and power vanish. It is just the opposite. Investing in Christ only brings the best, which may or may not mean money and power, depending on Him - but investing in money and power always forces Jesus further and further away in our lives.

I guess it all comes down to trust. Right? So how about it, how bright is your light?

---

David Nammo is the director of Attorney Ministries and Law Student Ministries for the Christian Legal Society.

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##### **Advocates International's US Office**

info@advocatesinternational.org  
sericsson@advocatesinternational.org

##### **Advocates Europe**

lpopov@advocateseurope.org  
dani@ruleoflawinstitute.bg

##### **Advocates Latin America**

aloise@adinet.com.uy  
vbaumaceda@advocatesinternational.org

##### **Advocates Asia**

cla@touchtelindia.net  
christian.lawyers@gmail.com


##### **Advocates Africa**

cla@motcon.co.za  
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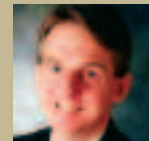
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