

PRIVILEGE, INVISIBILITY, AND RELIGION:
A CRITIQUE OF THE PRIVILEGE THAT CHRISTIANITY
HAS ENJOYED IN THE UNITED STATES

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.¹

—Justice Robert Jackson

INTRODUCTION

In the United States, Christians are privileged. Despite a constitutional guarantee that the government of the United States will be faceless when concerning religion, a system has developed that has absorbed Christian practice at every turn. At public high school football games,² the opening of legislatures,³ and in the Supreme Court,⁴ we hear prayers to solemnize the occasion. Every time we hear elected officials speak, especially in troubled times, we hear the phrase “God Bless America,” and in our own pledge of allegiance we identify the United States as “one Nation under God.”⁵ Despite all of these instances, Christians, including myself, have been blind to the privilege that we have experienced.

In the United States, we do not have to look far to see the interaction between church and state, especially between the state and traditionally Christian churches. I can remember being required to pray the Lord’s Prayer with my high school football team before every game. Reciting the Lord’s Prayer never bothered me as a high school athlete, and it is still a practice in my personal life as I continue as a believer. I never thought reciting it in the public sphere was questionable, however, until the practice arose again in college.

1. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

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

3. *See Marsh v. Chambers*, 463 U.S. 783 (1983) (holding that opening legislative sessions with prayers does not violate the Establishment Clause).

4. *See* Ashley M. Bell, Comment, “*God Save this Honorable Court*”: How Current Establishment Clause Jurisprudence can be Reconciled with the Secularization of Historical Religious Expressions, 50 AM. U. L. REV. 1273, 1273, n.1 (2001) (citing LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE, at xiv (Univ. of N.C. 2d ed. 1994)). Levy explains that “the Supreme Court’s sessions begin only after the Marshal has recited the opening chant containing the language ‘God Save the United States and this Honorable Court’”. *Id.*

5. 4 U.S.C. § 4 (2000).

As a junior in college, I began playing rugby with the university's inter-collegiate club team. As I had done in high school football, as a part of our pregame ritual, we recited the Lord's Prayer, and again, I thought nothing of the practice. Within a year, I found myself in charge of the team, overseeing a group of about fifty men that came from every region of the United States, as well as from other locales including Samoa, South Africa, Canada, Australia, Ireland, and England. The diverse origins and backgrounds of the players included different beliefs about religion.

Soon after I took charge, I was approached by a couple of our players who asked that we not recite the Lord's Prayer before matches. One player's complaint was that the Lord's Prayer did not reflect his religious beliefs, while the other player was agnostic and did not wish to be forced to participate in a religious activity. The suggestion caught me by surprise, especially since it came from American players, and I was unsure how to react. The players were United States citizens, and they clearly had a right not to be required to pray before the matches of a public institution. It is unlikely that anyone would have objected if the players decided to abstain from the prayer, but it was part of the pregame ritual from which they did not wish to be excluded. After some thought on everyone's part, the players decided that they would rather sacrifice their own interests and rights by joining in the pregame ritual, instead of disturbing the practice and run the risk of upsetting the team spirit and brotherhood that the team possessed.

Practices similar to this occur everyday across the United States, and while I did not realize it then, reciting the Lord's Prayer before every game is a perfect illustration of the privilege of being in the Christian majority of this nation. While we have a constitutional guarantee that our government and religious institutions will remain separate, we can find examples of Christian religious activities everyday in public life. This idea of being able to have a government that reflects, defends, promotes, and endorses our Christian beliefs is a privilege that is experienced by all those in the Christian majority, and it impinges on the rights of all of those that desire the promise of a government that does not affect their own personal beliefs and value systems. This Comment will examine the privilege of belonging to the Christian majority in the United States.

Part I of this Comment will examine the theory of privilege that has been developed over the past few decades.⁶ Privilege has been largely used to describe and criticize the benefits that individuals receive by having people that reflect their ideals and their interests in power now and throughout history. The theory has been applied to arguments for equality in feminism and critical race theory, as well as in other arenas.

Part II will illustrate and examine the privilege that has arisen in the United States through religious affiliation.⁷ This will include an examina-

6. See *infra* text accompanying notes 11-64.

7. See *infra* text accompanying notes 67-136.

tion of the ideological split that led to the separation of church and state in the United States. In addition, the practice of posting the Ten Commandments in public buildings will be examined as a privilege of being in the Christian majority through a critique of arguments supporting such postings as well as of Supreme Court language which has allowed privilege to become entrenched in state/church jurisprudence.⁸

I. PRIVILEGE

Privilege is a component of critical legal studies that has been developed through the last few decades by a number of authors. Several schools of thought have embraced the idea of privilege, but much of its progression has been due to human rights subjects such as feminism⁹ and critical race theory.¹⁰ Thus far, however, courts have been unwilling to recognize “[t]he notion of privilege . . . [and it] has not been recognized in legal language and doctrine.”¹¹

A. Privilege Defined

Privilege has been defined by several sources in somewhat different manners. In this situation, it seems appropriate to begin with *Black's* definition of privilege as “[a] particular and peculiar benefit or advantage enjoyed by a person, company, or class, beyond the common advantages of other citizens. An exceptional or extraordinary power or exemption. A right, power, franchise, or immunity held by a person or class, against or beyond the course of the law.”¹² Other authors, such as Stephanie Wildman, have examined the topic in other sources. After examining the *American Heritage Dictionary of the English Language*, Wildman found privilege to be defined as “a special advantage, immunity, permission, right, or benefit granted to or enjoyed by an individual, class, or caste.”¹³ Privilege can also be found in historical contexts such as the Roman *privilegium*, where the emperor would confer an irregular right or obligation on a single person.¹⁴

8. See *infra* text accompanying notes 89-136.

9. See generally CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 224 (1989); Kimberle Crenshaw, *A Black Feminist Critique of Antidiscrimination Law and Politics*, in THE POLITICS OF LAW 195 (David Kairys ed., 2d ed. 1990).

10. See generally STEPHANIE M. WILDMAN, PRIVILEGE REVEALED: HOW INVISIBLE PREFERENCE UNDERMINES AMERICA (1996); Barbara J. Flagg, “*Was Blind, But Now I See*”: *White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 955-58 (1993).

11. WILDMAN, *supra* note 10, at 8.

12. BLACK'S LAW DICTIONARY 1077 (5th ed. 1979).

13. WILDMAN, *supra* note 10, at 13 (citing AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1978)) (internal quotation marks omitted).

14. *Black's* defines *privilegium* as the following:

In Roman law, a special constitution by which the Roman emperor conferred on some single person some anomalous or irregular right, or imposed upon some single person some anomalous or irregular obligation, or inflicted on some single person some anomalous or irregular punishment. When such *privilegia* conferred anomalous rights, they were styled “favorable.”

A critical theory of privilege goes further than the traditional, static definitions.¹⁵ While privilege may still be a result of an independent choice by a person to grant rights not afforded to others, somewhat like the Roman *privilegium*,¹⁶ the idea of privilege here is closer associated with benefits that have been derived by gaining control of the system which grants rights.¹⁷ In these instances, privileges have been gained through the actions of the group in power to control the social situations, rules, and contexts by which all other people will be governed. This usually results in a system that favors their own interests at the costs of the rights of others.¹⁸ Wildman claims that this cycle of privilege is created when two elements are present.¹⁹ "First, the characteristics of the privileged group define the societal norm, often benefiting those in the privileged group. Second, privileged group members can rely on their privilege and avoid objecting to oppression."²⁰

Privileges that will result from controlling the system will surface in activities that are clearly irreprehensible, illegal, or unconstitutional. In the history of this nation, we have seen numerous instances of wrongful actions sanctioned through privilege. Such instances include the preferred status of white immigrants over ethnic minorities during the nineteenth century,²¹ the practices of slavery and segregation,²² or the wholesale, systematic taking of land from Native Americans.²³ One characteristic common to these instances, as well as to less obvious results of privilege, is a period of silence.²⁴ Preferential citizenship, slavery, segregation, and the taking of Native American lands occurred for long periods of time before those in the minority could organize and express themselves in a voice that was substantial enough to be heard and recognized by the majority. In many instances, the effects of these systems of privilege continue. Any silence, however, or lack of action resulting from the lack of power by the minority groups, does not represent consent to the majority's actions.²⁵

The same is true with other instances of privilege in our society that are not as recognizable, where it is not as obvious that the system has been

When they imposed anomalous obligations, or inflicted anomalous punishments, they were styled "odious." A private law inflicting a punishment or conferring a reward.

BLACK'S LAW DICTIONARY 1079 (5th ed. 1979).

15. See WILDMAN, *supra* note 10, at 13-15 (stating that a privilege becomes the societal norm).

16. See *supra* note 14.

17. See WILDMAN, *supra* note 10, at 14-15 (stating that the dominant side of the power system confers rights and benefits unto other members of the privileged group, thus creating a cycle of privilege).

18. *Id.*

19. *Id.* at 13.

20. *Id.*

21. See generally DERRICK A. BELL, JR., *RACE, RACISM, AND AMERICAN LAW* 3-8 (3d ed. 1992).

22. See *id.* at 9-63.

23. See generally Robert A. Williams, Jr., *The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence*, 1986 WIS. L. REV. 219.

24. See WILDMAN, *supra* note 10, at 16-17.

25. *Id.*

skewed to favor those in the majority at the cost of the minority. Instances such as these are the result of a system of privilege that is so strong that individuals may not realize that their rights are being violated or that they do not have to subjugate their rights to the interests of the majority.

Despite the presence of a social contract which champions equality—the Constitution—privilege has been created throughout the history of the United States through the use of political pressures and entrenched power by the majority, under a claim of legal authority, to oppress minorities and deny them constitutional rights.²⁶ Privilege is the embodiment of the majority's willingness to force its beliefs and social values on others, while denying the guaranteed rights of the Constitution to all of those that do not fall into the norm or into the majority group.²⁷ Furthermore, privilege embraces the belief that those creating oppression and spreading ethnocentrism have a right to mold others governed by the social contract into their view of what is normal, or else to exclude them from the social contract altogether, unwilling to recognize their rights.²⁸

Over time, denials of rights and preferential treatment result in a situation in which individuals believe that their privileges of being in a better-treated class are actually affirmative rights guaranteed by the government and by God.²⁹ As Wildman observes, however, there is no entitlement to a privilege.³⁰ "It is true that the holder of a privilege might believe she or he had a right to it, if you tried to take it away. But a right suggests the notion of an entitlement. *A privilege is not a right.*"³¹ And while the government has begun to recognize that privilege is not a right, it has done little to combat, and has even recognized, the system of privilege that has been created throughout this nation's history.

B. The Perpetuation of Privilege

"This failure to acknowledge privilege [in legal language], to make it visible in legal doctrine, creates a serious gap in legal reasoning, rendering law unable to address issues of systematic unfairness."³² The gap in legal reasoning that Wildman describes is present because of the common belief of most American citizens. In the United States, it is often presupposed that everyone begins on an equal footing—that everyone starts equally at the race. However, this is rarely the case. In this nation's history, those who have been in power have consistently manipulated the system to make it reflect their ideas, goals, morals, interests, religion, and values, thus moving their starting line forward. While it is clear that this situation was present

26. See *id.* at 19 (stating that discrimination based on wealth has been interpreted as constitutional).

27. *Id.* at 14.

28. *Id.* at 17-20.

29. WILDMAN, *supra* note 10, at 13.

30. See *id.*

31. *Id.* (emphasis added).

32. *Id.* at 8.

before the Civil Rights era, there is a presumption that civil rights legislation and affirmative action have placed everyone back on even footing. This is simply not the case.

While civil rights legislation has helped to remove some of the impediments and denials of rights that have been experienced in our history, it has done little to correct the situation that was created, and it does not recognize that a system has been created in which the descendants of those who were privileged will always enjoy the privileges that were established in the creation of this country.³³ Many people are simply unwilling to recognize that they do enjoy a privilege because of their race, sexuality, or economic background that comes from being a member of the majority.³⁴ Thus, the privileged majority is able to structure the law to be responsive to their beliefs, biases, and interests.³⁵ It is this blindness and lack of objectivity that allows systems of privilege to continue.³⁶

The invisibility of privilege strengthens the power it creates and maintains. The invisible cannot be combated, and as a result privilege is allowed to perpetuate, regenerate, and re-create itself. Privilege is systemic, not an occasional occurrence. Privilege is invisible only until looked for, but silence in the face of privilege sustains its invisibility.³⁷

Compounding this problem is the societal assumption that all those who have not elevated themselves to the standards of the norm must “have a lack, an absence, a deficiency.”³⁸ The more proper view, though, is to recognize that often these groups have not had the benefits of privilege. “Privilege is not visible to its holder; it is merely there, a part of the world, a way of life, simply the way things are.”³⁹

C. How Privilege Works and Where We Find It

The greatest means by which we enforce privilege is through categorization, usually based on language.⁴⁰ Past categorizations that have divided privilege in our society have been based on race,⁴¹ gender,⁴² economic class,⁴³ and sexual orientation.⁴⁴ It is through racial categorization that privi-

33. See Flagg, *supra* note 10, at 957 (focusing on the tendency of the privileged majority not to think about class differences).

34. *Id.*

35. *Id.*

36. WILDMAN, *supra* note 10, at 8.

37. *Id.*

38. *Id.* at 17.

39. *Id.*

40. *Id.* at 9.

41. See WILDMAN, *supra* note 10, at 17 (citing Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, CREATION SPIRITUALITY, Jan./Feb. 1992, at 33).

42. MACKINNON, *supra* note 9, at 215-34.

43. WILDMAN, *supra* note 10, at 17.

lege can be explained most clearly. “We use our language to categorize by race, particularly, if we are white, when that race is other than white.”⁴⁵ Our society often defines race as either black or white, and occasionally uses the term “of color.”⁴⁶ Under this “other” classification, we can find:

African American, Hispanic American, Asian American, Native American, and White American, if whiteness is mentioned at all. All these words, describing racial subcategories, seem neutral on their face, like equivalent titles. But however the subcategories are listed, however neutrally the words are expressed, these words mask a system of power, and that system privileges [the group that retains power].⁴⁷

Mingled with our system of classifications are the majority’s urges to describe their own characteristics and attributes as the societal norm.⁴⁸ “This normalization of privilege means that members of society are judged, and succeed or fail, measured against the characteristics that are held by those privileged.”⁴⁹ Those who are within the privileged class or characteristic become the norm, and all of those who are outside that classification become “aberrant or ‘alternative.’”⁵⁰

With respect to race, white is the norm in the United States.⁵¹ An illustrative example is the simple idea that when describing people, we are very quick to mention if a person is black or of another minority, but rarely mention if someone is white.⁵² This is because “[w]hite people externalize race. For most whites, most of the time, to think or speak about race is to think or speak about people of color, or perhaps, at times, to reflect on oneself (or other whites) in relation to people of color.”⁵³ If we have a conversation about a person, and there is no mention of race, often we assume that they must be white.⁵⁴ If a minority does something outstanding, some say that the

44. *Id.* (citing Marc Fajer, *Can Two Real Men Eat Quiche Together? Storytelling, Gender-Role Stereotypes, and Legal Protection for Lesbians and Gay Men*, 46 U. MIAMI L. REV. 511, 617 (1992); Sylvia Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 197).

45. WILDMAN, *supra* note 10, at 9.

46. *Id.*

47. *Id.* at 10.

48. *Id.* at 14.

49. *Id.*

50. WILDMAN, *supra* note 10, at 14.

51. Flagg, *supra* note 10, at 971.

52. *See id.* at 969-70.

53. *Id.* at 970.

54. In an exercise to help illustrate white transparency, Flagg challenges readers to critically assess one’s own habits of thinking about themselves and other white people. This exercise includes a series of questions that ask:

In what situations do you describe yourself as white? Would you be likely to include *white* on a list of three adjectives that describe you? . . . Are you conscious of yourself as white when you find yourself in a room occupied only by white people? What if there are people of color present? What if the room is mostly nonwhite? Do you attribute your successes or failures in life to your whiteness? Do you reflect on the ways your educational and occupational opportunities have been enhanced by your whiteness? What about the life courses of others? In

person is a credit to his or her race, or act surprised by their actions.⁵⁵ However, if a white person is in a similar situation, we say that he or she is a great citizen or use some other race neutral term.⁵⁶ In an insightful work, Peggy McIntosh created a list of forty-six advantages she experiences as a white person that her African American co-workers do not experience.⁵⁷ Some of these privileges include:

I can if I wish arrange to be in the company of people of my race most of the time. . . . When I am told about our national heritage or about "civilization," I am shown that people of my color made it what it is. . . . I can be sure that my children will be given curricular materials that testify to the existence of their race. . . . I can do well in a challenging situation without being called a credit to my race. . . . I can criticize our government and talk about how much I fear its policies and behavior without being seen as a cultural outsider. I can be late to a meeting without having the lateness reflect on my race. . . . If I have low credibility as a leader, I can be sure that my race is not the problem.⁵⁸

As Wildman has pointed out, "The power to ignore race, when white is the race, is a privilege, a societal advantage."⁵⁹

Similar classifications are also found in the literature surrounding the debate regarding church and state interaction. In interpreting the religion clauses of the Constitution, a number of different labels have been created to name the competing schools of thought.⁶⁰ One practice, followed by writers who favor religious and state interaction, is to label those who favor separation with names that indicate they are not in the majority. This includes referring to opposing schools of thought with labels such as "irreligious"⁶¹ or "secular."⁶² To classify writers who seek a separation of church

your experience, at the time of Justice Souter's nomination, how much attention did his race receive in conversations among whites about his abilities and prospects for confirmation? Did you or your white acquaintances speculate on the ways his whiteness might have contributed to his success, how his race may have affected his character and personality, or how his whiteness might pre-dispose him to a racially skewed perspective on legal issues?

Id. at 972.

55. See WILDMAN, *supra* note 10, at 17 (citing Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, CREATION SPIRITUALITY, Jan./Feb. 1992, at 33).

56. *Id.*

57. *Id.*

58. Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, CREATION SPIRITUALITY, Jan./Feb. 1992, at 33, available at <http://www.deboocracy.org/unpacking/html> (last visited Nov. 19, 2002).

59. WILDMAN, *supra* note 10, at 20.

60. See RONALD F. THIEMAN, RELIGION IN PUBLIC LIFE: A DILEMMA FOR DEMOCRACY 64-66 (1996) (labeling mutual cooperationists); Bell, *supra* note 4, at 1281 (labeling strict separationists); Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 481 (1991) (labeling secularists); Trisha A. Vicario, Note, *Religious Monuments Under Attack: Undermining Religion for the Benefit of the Irreligious in Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000), 25 HAMLINE L. REV. 151 (2001) (labeling the religious and irreligious).

61. See, e.g., Vicario, *supra* note 60.

62. See, e.g., Glendon & Yates, *supra* note 60, at 481-92 (1991).

and state as irreligious and secular is a misstatement, and it is improper, biased, and misleading.

It is more proper to use terms that accurately describe both sides rather than labels that allow the majority to attempt to portray the minority as abnormal or aberrant. For example, individuals that may be categorized as irreligious or secularist may be religious people who contemplate the same concerns as the drafters of the Constitution, believing that separation of church and state is proper.⁶³ History has provided us with numerous examples of the downfalls that can occur if religion is intermingled with government, and these examples, or concerns of government interference with religious practices or worship, could be the basis of the position taken by those classified as irreligious.⁶⁴ Therefore, the label of “irreligious” results in the inclusion of many people who may be religious but believe in a separation of church and state. To characterize the debate as religious versus irreligious, or even secularist, is to mischaracterize the disagreement.

Despite the position of religious advocates, the debate is not a disagreement over the propriety of religious life; it is a disagreement over interpretations of the constitutional provisions that separate church and state. The technique of creating the appearance that religion is being attacked is another example of privilege: Supporters of religious privilege attempt to maintain the right to control the debate and establish the terms and framework that will be used to describe religious life. For these reasons, it seems more proper that if the differing philosophies are to be labeled, the titles should accurately reflect the division that is present—some individuals believe in a distinct separation between church while others believe interactions between church and state on differing levels.

II. PRIVILEGE IN RELIGIOUS AFFILIATION

The power system that has created all of these privileges has also created the political position and power that traditional Christian religion has held in the United States. Similar to the normalization and preference in our history of whiteness and maleness,⁶⁵ there has also been a presumption, normalization, and place of power created for the Christian faith.⁶⁶ This has all occurred despite constitutional guarantees that the government of the United States will not commingle with any religion.

63. See JOHN WITTE, JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 7-22 (2000).

64. See *id.* (discussing the historical context of the American experiment with religion and the perils of church and state interaction in history). “Anyone who was still not convinced could turn to John Adams’s massive three-volume *A Defense of the Constitutions of Government in the United States of America* (1788) for an exhaustive account of the ‘gory ecclesiastical or civil tyranny’ of the Western tradition and the ‘glorious new experiment’ of the American republic.” *Id.* at 8.

65. Flagg, *supra* note 10, at 969-72.

66. WILDMAN, *supra* note 10, at 141, 157.

An application similar to that which Barbara Flagg made in regard to the privilege that arose from her whiteness can be made to government and religion.⁶⁷ People of Christian faiths are privileged in the United States in that they are guaranteed that the Supreme Court will open with a prayer that reflects their faith;⁶⁸ that their child will be taught a pledge of allegiance that adopts their God;⁶⁹ that when they look at United States currency they will see a reaffirmation of their beliefs;⁷⁰ that public laws will be written to secure the display of religious documents in public buildings, including schools, that reflect their beliefs;⁷¹ that if a judge looks to religious texts to justify a decision that those texts will reflect their beliefs;⁷² that the legislature will open with a prayer reflecting their faith;⁷³ and that the president will speak and take an oath of office in terms of their religion.⁷⁴

A. *Historical Context of the American Experiment*

All of these privileges have arisen despite a conscious decision by the creators of the United States Constitution that there would be a divergence from traditional thoughts about church and state. In what Thomas Jefferson referred to as a “‘fair’ and ‘novel experiment,’”⁷⁵ the founders of the United States, rather than establishing a state religion, decided that the government would stay out of the business of dealing with souls and remain in the sphere of dealing with people’s everyday lives. But claiming this approach as merely “novel” may be a vast understatement. Never before had a scenario similar to this been attempted anywhere in the world.⁷⁶ “These new state and federal guarantees [for religious freedom] defied the millennium-old assumptions inherited from Western Europe—that one form of Christianity must be established in a community and that the state must protect and support it against other religions.”⁷⁷

67. See *supra* text accompanying note 54.

68. See Bell, *supra* note 4, at 1273.

69. See 4 U.S.C. § 4 (2000). But see *Newdow v. United States Congress*, 292 F.3d 597 (9th Cir. 2002) (holding that the inclusion of “under God” in the pledge violates the Establishment Clause).

70. See 31 U.S.C. §§ 5112(d)(1), 5114 (2000).

71. See *infra* text accompanying notes 88-103.

72. See *Ex parte H.H.*, No. 1002045, 2002 WL 227956, at *4-*13 (Ala. Feb. 15, 2002) (Moore, C.J., concurring specially) (citing Biblical passages and English common law to determine that homosexual parents are not fit for custody).

73. See *Marsh v. Chambers*, 463 U.S. 783 (1983) (holding that opening legislative sessions with prayer is not unconstitutional).

74. While presidents often incorporate religious language into their oath, the constitutionally required oath is as follows: “I do solemnly swear (or affirm) that I will faithfully execute the Office of President of the United States, and will to the best of my Ability, preserve, protect and defend the Constitution of the United States.” U.S. CONST. art. II, § 1, cl. 8.

75. WITTE, *supra* note 63, at 1 (2000) (citing THE COMPLETE JEFFERSON, CONTAINING HIS MAJOR WRITINGS 538, 673-76, 1147 (Saul K. Padover ed., 1943); 11 THE WORKS OF THOMAS JEFFERSON 7 (P.L. Ford ed., 1904-1905); 1 THE PAPERS OF THOMAS JEFFERSON 537-39 (Julian Boyd ed., 1950)).

76. See *id.*

77. *Id.*

Much of these changes in government ideology were founded on the writings of John Locke. Locke viewed the historical relationship of church and state as a corrosive alliance that resulted in “corrupt abridgments of the liberty of conscience.”⁷⁸ John Witte, Jr. characterizes Locke’s view of church and state well in *Religion and the American Constitutional Experiment*:

The church, Locke wrote, is simply “a voluntary society of men, joining themselves together of their own accord in order to the public worshipping of God in such a manner as they judge acceptable to Him, and effectual for the salvation of their souls.” Church members are free to enter and free to exit this society. . . . “Nothing ought nor can be transacted in this society relating to the possession of civil and worldly power. No force is to be made use of upon any occasion whatsoever. For force belongs wholly to the civil magistrate.”

State force, in turn, cannot touch religion. . . . The state exists merely to protect persons in their outward lives, in their enjoyment of life, liberty, and property. “True and saving religion consists in the inward persuasion of the mind,” which only God can touch and tend. A person cannot be compelled to true belief of anything by outward force. . . . It is only light and evidence that can work a change in men’s [religious] opinions: which light can in no manner proceed from corporal sufferings, or any other outward penalties’ inflicted by the state. Every person “has the supreme and absolute authority of judging for himself” in matters of faith.⁷⁹

In United States legal history, Locke’s ideals are most recognizable in the writings of Thomas Jefferson. Jefferson recognized the risks and dangers that could be present with an intermingled church and state. He wrote: “Millions of innocent men, women, and children, since the introduction of Christianity, have been burnt, tortured, fined, imprisoned; yet we have not advanced one inch towards uniformity.”⁸⁰ More importantly though, Jefferson has been credited with the “wall of separation” metaphor that has mostly been used to describe the state/church relationship in the United States, in which Jefferson imagines a wall of separation between church and state.⁸¹ While this statement was included in a letter to a church rather than

78. *Id.* at 31.

79. *Id.* at 31-32 (quoting and citing *Epistola de Tolerantia* (Gouda 1689), translated by William Popple as *Letter Concerning Toleration* (1689), in 5 THE WORKS OF JOHN LOCKE 1-58 (12th ed. 1824)).

80. WITTE, *supra* note 63, at 8 (quoting Thomas Jefferson, *Notes on the State of Virginia* (1781-1785), *Query XVII*, in THE COMPLETE JEFFERSON, CONTAINING HIS MAJOR WRITINGS, 673-76 (Saul K. Padover ed., 1943)).

81. Letter from Thomas Jefferson to Danbury Baptist Association (Jan. 1, 1802), *reprinted* in 5 THE FOUNDER’S CONSTITUTION 96 (Philip B. Kurland & Ralph Lerner eds., 1987).

in the official record,⁸² items such as the letter have been used on both sides of the argument in attempts to illustrate the intent of the Framers.⁸³ Jefferson, however, is not the only drafter that should be credited with this approach.

This position was also clearly stated in the writings of one of Jefferson's contemporaries, Roger Williams.⁸⁴ Williams offered a metaphor of the garden and the wilderness, representing the church and the surrounding society and state, respectively.⁸⁵ Ira Lupu and Robert Tuttle summarize William's garden metaphor in their writings:

[T]here are always urges from both directions to break down the barrier that separates the garden and the wilderness. Those who serve the state want to make use of the church's reputation to seek ends in which the state is interested, such as moral living, civility, and good order. Moreover, the state's officers frequently want to wrap themselves in the mantle of worship and respectability that is enjoyed by prominent religious institutions. From the other side of the divide, those who dwell in the garden frequently are tempted to use the state's temporal power to reinforce the church's spiritual ends.⁸⁶

To create this new brand of religion-free government that Jefferson and Williams envisioned, the Framers of the Constitution included in the First Amendment the Free Exercise and Establishment Clauses.⁸⁷ These clauses provide that: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"⁸⁸ It is these sixteen words that have led to a debate that has sustained for over two hundred years.

82. *Id.*

83. This language first appeared in Supreme Court language in *Reynolds v. United States*, 98 U.S. 145, 164 (1879), and it was infused into the regular arsenal of the Supreme Court in *Everson v. Bd. of Educ.*, 330 U.S. 1, 16 (1947), as a result of Justice Black's opinion.

84. As one author has stated:

Though ignored by the Justices in their opinions in *Everson* (1947), Roger Williams was surely the earliest American exponent of religious liberty. Driven from the Massachusetts Bay Colony by the intolerant Puritan divines, Williams settled in Rhode Island. Considered the founder of American Baptists, he presents a defense of religious liberty that posits the dangers that overclose church-state cooperation poses for the church.

FRANCIS GRAHAM LEE, *WALL OF CONTROVERSY: CHURCH-STATE CONFLICT IN AMERICA* 8 (1986).

85. WITTE, *supra* note 63, at 49.

86. Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitution*, 47 VILL. L. REV. 37, 52 (2002).

87. U.S. CONST. amend. I.

88. *Id.*

*B. A Contemporary Example: The Posting of the
Ten Commandments on Public Property*

While the language of the First Amendment appears to be simple enough in stating that the government will not make any laws regarding the establishment of religion, nor will it prevent anyone from practicing their religion, the question of what acts by the government will be considered to “regard[] the establishment of religion” remains. One of the most recent acts of privilege that has fallen into the gray area of what is to be considered in breach of the Establishment Clause has been the posting of the Ten Commandments on public property by various states. The Ten Commandments state:

I am the LORD your God.

You shall have no other gods before me.

You shall not make for yourself an idol in the form of anything in heaven or on the earth beneath or in the waters below.

You shall not misuse the name of the LORD your God.

Remember the Sabbath day by keeping it holy.

Honor your father and your mother, so that you may live long in the land that the LORD your God is giving you.

You shall not murder.

You shall not commit adultery.

You shall not steal.

You shall not give false testimony against your neighbor.

You shall not covet your neighbor's house. You shall not covet your neighbor's wife, or his manservant or maidservant, his ox or donkey or anything that belongs to your neighbor.⁸⁹

As of publication, there are four states that allow the Ten Commandments to be posted in public buildings,⁹⁰ and there are others that are proposing legislation that would have them posted.⁹¹ As a general rule, such state statutes all provide that the documents that may be posted (such as the Ten Commandments) are posted for the purpose of recognizing the historical significance that they have played in the development of this nation's laws.⁹² Some statutes contain only provisions for the posting of the Ten Commandments while others allow for the posting of portions of the United

89. *Exodus* 20:1-17 (New International Version). It should be noted that in different faiths and denominations of Christianity, different versions of the Ten Commandments are found.

90. See IND. CODE § 4-20.5-21-2 (2002); N.C. GEN. STAT. § 115c-81(3)(b) (2001); N.M. STAT. ANN. § 22-15-15 to 22-15-20 (Michie 2001); S.D. CODIFIED LAWS § 13-24-17.1 (Michie 2002).

91. Several states including Florida, Illinois, Kentucky, Missouri, Oklahoma, Indiana, and South Dakota have proposed allowing posting of the Ten Commandments in the last two years. See *Southern States Action Bulletin*, Feb. 2000, at <http://www.southerncatalyst.org/netlib/ssar000225b.html> (last visited Nov. 25, 2002). Alabama has also attempted to pass similar legislation. See *id.*

92. See sources cited *supra* note 90.

States Constitution, state constitutions, the Code of Hammurabi, the Ten Commandments, the Magna Carta, and other similar documents.⁹³ The legislation also normally includes specific sections in the legislative reports that provide that the documents are posted for historical purposes.⁹⁴

Outside of statutory postings, there have been other situations in which public officials have attempted to install the Ten Commandments. In Indiana, the governor was recently blocked from placing a Ten Commandments monument on the grounds of the statehouse after the Indiana Civil Liberties Union brought suit.⁹⁵ In Alabama, Roy Moore used his position as Chief Justice of the Alabama Supreme Court to place a 5200-pound statue of the Ten Commandments in the rotunda of the Alabama State Judicial Building.⁹⁶ Before placing the monument, which was paid for with his private funds, Moore did not consult with the other justices of the Alabama Supreme Court.⁹⁷ Prior to installing his monolith, Moore had posted the document on the wall of his state courtroom and invited local clergy to open proceedings in his court with prayer.⁹⁸ In response to public reaction to Moore's practices, Governor Fob James "vowed to call out the militia to defend the Commandments if necessary," in a step that was reminiscent of former Governor George Wallace's attempts to use privilege and the National Guard to continue segregation in public schools.⁹⁹

Although the document is religious in nature, supporters of the postings have developed a number of theories as to the appropriateness of religious postings in public locations. The arguments differ somewhat, but most embrace either the idea that the drafters of the Constitution intended to allow acts such as posting,¹⁰⁰ or that this nation was founded on religious principles, and therefore, the government should be able to continue on its path of recognizing and displaying religious symbols or documents.¹⁰¹

On both sides of the argument, authors rely on uncovering the true intent of the Framers of the Constitution. The problem with this undertaking, however, is that there is not a great amount of official history behind the

93. The New Mexico statute allows for the greatest diversity of postings including teachings from the Koran, the Code of Hammurabi, Confucius, excerpts from Bhagavad-Gita, teachings of Buddha, or other display of disparate ethno-cultural or religious backgrounds. N.M. STAT. ANN. § 22-15-20 (Michie 2001).

94. See sources cited *supra* note 90.

95. *Indiana Civil Liberties Union v. O'Bannon*, 259 F.3d 766 (7th Cir. 2001).

96. *Americans United, Ten Commandments Display in Alabama Judicial Building violates Constitution, say Civil Liberties Groups in Lawsuit filed in Federal District Court*, at <http://www.au.org/press/pr103001.htm> (Oct. 30, 2001).

97. *Id.*

98. For more on Moore's battle regarding his district courtroom and his practice of inviting clergy to open his court proceedings, see *Alabama Freethought Ass'n v. Moore*, 893 F. Supp. 1522 (N.D. Ala. 1995). See also *Alabama ex rel. James v. ACLU*, 711 So. 2d 952 (Ala. 1998). For more on Moore's position as to his belief that the postings are acceptable, see Roy Moore, *Religion in the Public Square*, 29 CUMB. L. REV. 347 (1999).

99. Jonathan P. Brose, *In Birmingham They Love the Governor: Why the Fourteenth Amendment Does not Incorporate the Establishment Clause*, 24 OHIO N.U. L. REV. 1, 1 (1998).

100. See *id.*

101. See Moore, *supra* note 98.

religion clauses.¹⁰² Compounding this difficulty is a conflict that many have characterized as one that cannot be overlooked: While the Constitution states that the government will not make laws establishing religion, there are contemporary documents, such as the Declaration of Independence, and practices or writings by the drafters, that indicate that some mixture of church and state may be acceptable.¹⁰³ The lack of clear intent and the appearance of inconsistency have led many scholars to look to other writings and the actions of the individual drafters of the Constitution. Those writings, however, have disregarded the concept of privilege as well as the favored position that Christianity has enjoyed throughout the history of the United States.

*1. Privilege in Defense of the Posting
of the Ten Commandments*

Roy Moore, the Chief Justice of the Alabama Supreme Court, has repeatedly commented on the Ten Commandments debate.¹⁰⁴ To support his position, Chief Justice Moore seizes on the idea that “[t]he real purpose of the First Amendment was and is to protect the states’ and their citizenry’s rights to acknowledge God according to the dictates of their conscience. If not for a desire to protect this unalienable right, the First Amendment would not have been ratified.”¹⁰⁵ To support his position that state officials should be able to recognize God, Moore states that “[c]learly, the signers of the Declaration of Independence believed that God must be acknowledged and ‘that all men were created equal’ and ‘endowed by their Creator with certain unalienable Rights,’ among which were ‘Life, *Liberty* and the Pursuit of Happiness.’”¹⁰⁶ In addition, Moore asserts that “[h]istorically, academicians and political thinkers considered God to be the basis and grantor of all unalienable rights.”¹⁰⁷

What is problematic, however, is that while some intent can be found supporting the conclusion that the drafters personally believed in God, and while language referencing a Creator was included in the Declaration of Independence, the Constitution, the social contract that guarantees our rights, contains no mention of a Creator.¹⁰⁸ The Constitution is limited to the task of creating rules by which our government must abide, and it secures rights for all citizens. Based on this, there is no reason that we should assume that the drafters did not mean what they wrote, nor does it imply that

102. See LEE, *supra* note 84, at 14-17. Lee includes what he characterizes as “[t]he most substantive part of the debate on the religion clauses [which] took place in the House on August 15, 1789” *Id.* at 14. See also WITTE, *supra* note 63, at 241-43 (listing the proposed drafts of the religion clauses).

103. Moore, *supra* note 98, at 353-57.

104. See, e.g., Moore, *supra* note 98.

105. *Id.* at 349.

106. *Id.*

107. *Id.*

108. See U.S. CONST.

we should incorporate outside practices or rejected drafts of the Establishment Clause or of the Constitution, allowing us to reason that, in a social contract that makes no mention of God nor makes any allowances for the government to act in ways that recognize God, the government and its actors should be able to do so anyway.

Moore's argument eventually rests on the premise that the Supreme Court has misinterpreted the term "religion,"¹⁰⁹ and his belief that:

[T]he true meaning of separation of church and state—[that] government may never dictate one's form of worship or articles of faith. This does not mean that all public worship of God must be stopped; on the contrary, the free public worship of God was the very reason for a doctrine of separation of church and state.¹¹⁰

As a result of this position, Moore feels that everyone, even state officials, should have a constitutional right to acknowledge God as they see fit so long as the acts do not coerce individuals to partake in religion.¹¹¹

While I agree with Moore that the First Amendment was passed, in part, to secure religious freedom for all individuals, I disagree that this religious freedom has a superceding power over the Establishment Clause in public life. The basis of my disagreement is over the effects and characterization of coercion of religion in public life. In regards to school prayer, Moore states that the activity is not coercive to non-believers. He writes:

The only coercion that has taken place in the DeKalb County school prayer case is a federal court order forbidding such activities. The Christian majority has been coerced into silence, simply because the minority might have to hear them. But nothing in the U.S. Constitution guarantees that a student will never have to hear disagreeable or offensive views because that student might feel peer pressure to participate. Peer pressure or public opinion are not the types of coercion the Framers intended to prohibit. By its plain text, the First Amendment only forbids the enactment of "any law."¹¹²

Moore's views of what constitutes coercion are a product of privilege. Without a guarantee that individuals will not be inundated by the religious choices of the Christian majority at every public occasion—which Moore believes should be permissible—the Establishment Clause becomes useless. The result of this view is that individuals will not be able to escape the government's preference for Christianity. The Supreme Court has stated that "[i]t is beyond dispute that, at a minimum, the Constitution guarantees that

109. See Moore, *supra* note 98, at 356.

110. *Id.* at 359.

111. See *id.* at 361-62.

112. *Id.* at 362.

government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'"¹¹³

If this language is to have any weight at all, then individuals in the minority should not be subjected to a government that urges them to stand in the hall, for example, while others enjoy moments of silence to pray. Nor should individuals in minority religions or those who are not religious be expected to view a religious document as something other than what it is. No person should be ostracized by society and made to feel aberrant simply because the majority believes that it can exercise its rights to religious freedom wherever it wishes.

If we do yield to a system such as Moore's, we quickly are relegated to a system in which the Christian majority determines what type of prayers or documents will be posted, the result of which is a continuation and enlargement of Christian privilege. Moore's idea that it is coercion to require Christian majority silence is mistaken. Requiring the majority, and everyone for that matter, to be silent in regards to religion in public settings is simply the removal of a privilege unsupported by any right.

2. *Privilege Born through Supreme Court Jurisprudence*

Similar to some authors' failure to recognize privilege, the Supreme Court has created language through precedent that has resulted in a concrete affirmation of Christian privilege. In defense of postings, supporters claim that the documents have been placed on public property to give the proper respect to the Ten Commandments as the basis of our legal system, and to recognize that they are part of our history.¹¹⁴ This stated intent is largely a result of the recent Supreme Court opinions involving the Ten Commandments.

One of the most recent cases involving the Ten Commandments that gained substantial review by the Supreme Court was *Stone v. Graham*.¹¹⁵ In *Stone*, the Court applied the *Lemon* test¹¹⁶ to determine whether a Kentucky

113. *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)).

114. *See Stone v. Graham*, 449 U.S. 39, at 39 n.1 (1981) (quoting KY. REV. STAT. § 158.178 (1980)).

115. 449 U.S. 39 (1981).

116. *Stone*, 449 U.S. at 40-43. The three-pronged test was established by combining the secular purpose test from *Everson v. Board of Education*, 330 U.S. 1 (1947), the purpose and primary effect test from *McGowan v. Maryland*, 366 U.S. 420 (1961), and the no excessive entanglement test from *Walz v. Tax Commission*, 397 U.S. 664 (1970). The result of these became known as the *Lemon* test that was set out by Chief Justice Burger in *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). This was the last official test to be used by the Court, however, a number of others have been suggested. *See Lee v. Weisman*, 505 U.S. 577, 584-85 (1992) (holding school prayer is unconstitutional because students are compelled to participate, thus suggesting a coercion test); *Lynch v. Donnelly*, 456 U.S. 668, 691 (1984) (O'Connor, J., concurring) (suggesting an endorsement test); *Marsh v. Chambers*, 463 U.S. 783 (1983) (ignoring the *Lemon* test and looking to history to determine that the opening of legislative sessions with prayer is not unconstitutional); *Larson v. Valente*, 456 U.S. 228, 246 (1982) (finding that precedent requires the application of a strict scrutiny test when one denomination is benefited over another); *see also* Brian T. Coolidge, *From Mount Sinai to the Courtroom: Why Courtroom displays of the Ten Com-*

statute that required the posting of the Ten Commandments in every public school classroom was unconstitutional.¹¹⁷ The statute in question provided that:

It shall be the duty of the superintendent . . . to ensure that a durable, permanent copy of the Ten Commandments shall be displayed on a wall in each public classroom in the Commonwealth. The copy shall be sixteen (16) inches wide by twenty (20) inches high. (2) In small print below the last commandment shall appear a notation concerning the purpose of the display, as follows: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States."¹¹⁸

The final section of the statute provided that the plaques would be purchased with "funds made available through voluntary contributions made to the state treasurer."¹¹⁹ Based on this statutory language, the state trial court, as well as the Kentucky Supreme Court, held that the statute's "'avowed purpose' was 'secular and not religious,' and that the statute would 'neither advance nor inhibit any religious group' nor involve the State excessively in religious matters."¹²⁰ However, the United States Supreme Court stated that this was not an instance when the teachings of the Ten Commandments were being integrated in the curriculum as a part of history, and that, in this instance, "[p]osting of religious texts on the wall serves no such educational function."¹²¹

Rather than have a plenary hearing on the issue, the Court issued a per curiam opinion. The Court briefly addressed the arguments by the Commonwealth of Kentucky "that the statute in question serves a secular legislative purpose, observing that the legislature required the following notation in small print at the bottom of each display of the Ten Commandments."¹²² The Court noted however that "such an 'avowed' secular purpose is not sufficient to avoid conflict with the First Amendment."¹²³

The pre-eminent purpose for posting the Ten Commandments on schoolroom walls is plainly religious in nature. The Ten Commandments are undeniably a sacred text in the Jewish and Christian

mandments and Other Religious Texts Violate the Establishment Clause, 39 S. TEX. L. REV. 101 (1997). O'Connor's endorsement test in *Lynch* has emerged as a de facto level of review for the Court in some instances. See, e.g., *Elewski v. City of Syracuse*, 123 F.3d 51, 54 (2d Cir. 1997); see also *Coolidge*, *supra* at 105 n.27.

117. *Stone*, 449 U.S. at 40-42.

118. *Id.* at 39 n.1 (quoting KY. REV. STAT. § 158.178 (1980)).

119. *Id.*

120. *Id.* at 40.

121. *Id.* at 42.

122. *Stone*, 449 U.S. at 41.

123. *Id.*

faiths, and no legislative recitation of a supposed secular purpose can blind us to that fact. The Commandments do not confine themselves to arguably secular matters Rather, the first part of the Commandments concerns the religious duties of believers¹²⁴

After *Stone*, proponents of the Ten Commandments went back to the legislature to reform their statutes. The results were changes in the legislation discussed previously, which included the addition of provisions that attempt to ensure that the Ten Commandments are placed in historical significance.¹²⁵ In this approach, supporters have tailored their arguments and legislation so that they may assert that the posting of the documents is not a violation of the Supreme Court's constitutionality test. In addition, nonlegislative acts are also structured so that the Ten Commandments may be placed in an environment in accord with *Stone*.

The Supreme Court again briefly addressed the posting of the Commandments in its denial of certiorari of *City of Elkhart v. Books*.¹²⁶ In a rare step, the denial of certiorari was accompanied by dissenting opinions by Chief Justice Rehnquist, joined by Justices Scalia and Thomas, as well as a statement by Justice Stevens in response to the dissents.¹²⁷ The Court denied certiorari after the Seventh Circuit Court of Appeals applied the *Lemon* test to determine whether a monument including the Ten Commandments did not have a secular purpose.¹²⁸ Chief Justice Rehnquist criticized the Court for not accepting certiorari and for not observing the intent that had been put forward by the city. He writes, "The council's resolution stated the city's intent to display the Commandments in precisely that way—to reflect their cultural, historical, and legal significance. We are 'normally deferential' to 'articulation[s] of a secular purpose,' so long as they are 'sincere and not a sham.'"¹²⁹ The original rationale for the construction of the monument has been to encourage good behavior in wayward youths through the posting of a "nonsectarian" version of the Ten Commandments.¹³⁰ Rehnquist felt that this intent should be enough, as "[t]here is no evidence of insincerity here, and thus no justification for the Court of Appeals' refusal to credit the city's stated purpose."¹³¹

Rehnquist indicated that the Commandments might have a secular application despite the strong language of the Court in *Stone* characterizing the Commandments as religious, and despite the fact that the first half of the Commandments involves the religious duties of believers.¹³² Supporters of

124. *Id.* at 41-42.

125. See sources cited *supra* note 90.

126. 432 U.S. 1058 (2001).

127. *Books*, 432 U.S. at 1059-63.

128. *Books v. City of Elkhart*, 235 F.3d 292 (7th Cir. 2000).

129. *Books*, 432 U.S. at 1061 (quoting *Edwards v. Aguillard*, 482 U.S. 578, 586-87 (1987)).

130. *Books*, 235 F.3d at 294-95.

131. *Books*, 532 U.S. at 1061.

132. *Id.*

the Ten Commandments felt that the court of appeals incorrectly concluded that the city did not have a secular purpose echo this sentiment.¹³³ Similarly, in regards to the second prong of *Lemon*, Rehnquist asserted that it is possible for the Ten Commandments to be placed in a role that does not advance religion.¹³⁴ He highlighted that the city's display of the Commandments outside the municipal building "emphasizes the foundational role of the Ten Commandments in secular, legal matters."¹³⁵ A similar claim by critics is that the endorsement test was incorrectly applied in that a reasonable observer would not believe the city was endorsing religion.¹³⁶

Rehnquist's statements exhibit the presence of privilege on the Court, and the possibility that religious advocates may structure arguments so that religious displays are seen as secular. The idea that the Ten Commandments can be seen as anything but a religious document, even though they have played a part in this nation's history, is a position of privilege. It is a concrete instance of a scenario where religion has become so inundated in our lives that the majority can structure arguments so that documents that command religious action by God may be posted on every government building so long as they modify state legislation and intent to state that they are in the proper context.

CONCLUSION

While the drafters, through the Establishment Clause, took affirmative steps to ensure that religion and government were not comingled, religious privilege was borne into our society through the drafters' religious affiliations and beliefs. These beliefs, as well as the beliefs of those in power, have led to a presumption that Christianity should be the favored norm in this nation, and that the government should be able to recognize its Christian history actively, despite guarantees in our Constitution that such events should not occur.

Through two hundred years of American history this position has become even more firmly planted in our society, as those in power have been almost exclusively Christian. In every branch of public life, instances can be found of the belief that the allowance of Christian practices is the preferred norm. We pray at public high school events, the words "In God we trust" are on our currency, "under God" is in our pledge, legislatures and courts open with prayer, and politicians constantly use religious phrases in official speeches.¹³⁷ The result of all of this is that the Christian faith and its practices have been made the norm, while all others are seen as abnormal.

133. See Vicario, *supra* note 60, at 154.

134. *Books*, 532 U.S. at 1061.

135. *Id.*

136. See Vicario, *supra* note 60, at 181-82.

137. See *supra* notes 68-74.

Adding to the normalcy of Christian beliefs in our society is the inevitable consequence that the majority is not likely to recognize Christian practices as so pervasive in this nation, for those that have controlled the power system have been Christian throughout history. Nor are those in power likely to amend their preferential treatment of the Christian faith. Politicians and judges, on a large enough scale and regardless of their political affiliations, are not going to create the risk of offending their voters by ceasing the preferential treatment of Christianity. The common response would more likely be a vehement defense of Christian practices.

In addition, the Supreme Court's treatment of the religion clauses has allowed privilege to become firmly entrenched in the jurisprudence of this nation. The Supreme Court's treatment of religion in general can be unpredictable, and it has garnered open criticism about the state of religion clause jurisprudence. "Leading constitutional scholars now write openly that 'the entire body of modern constitutional discourse on the subject of religious freedom' is 'idolatrous,' 'founded on empty premises and false assumptions,' and ensnared in 'an irresolvable rhetorical dialect between secular individualism and religious communitarianism.'"¹³⁸ And while it seems that the highest court in the land would be able to rule consistently and deal with the subject of religion, this has not been the case.¹³⁹ While the Court has managed to deliver somewhat workable rulings on difficult subjects such as *de jure* segregation, abortion, and the restriction of political speech, it has been unable to establish a definite framework for the interaction of state and religion.¹⁴⁰ This inability to create bounds for church and state has been characterized by some as a failure and an exercise of judicial inefficiency by the Court.¹⁴¹

Rather than creating a system with clear lines of demarcation of what is acceptable church and state interaction, the Court has, instead, fashioned an unclear, unpredictable test in *Lemon* that has the risk of continuing the cycle of religious privilege.¹⁴² Even the Justices themselves have openly criticized and mocked the use of the *Lemon* test. In his dissent to *Lamb's Chapel*, Justice Scalia characterizes the test as some "ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being killed repeatedly and buried."¹⁴³

138. WITTE, *supra* note 63, at 3 (quoting FREDERICK MARK GEDICKS, *THE RHETORIC OF CHURCH AND STATE* 8-24 (1995); STEVEN D. SMITH, *FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM*, at vi (1995)).

139. See LEE, *supra* note 84, 1-3.

140. *Id.*

141. "[T]he success of a political system can be very effectively measured by its results, more specifically, by its ability to solve its problems." *Id.*

142. Some courts have even concluded that it is likely that the Supreme Court has abandoned the *Lemon* test. See Coolidge, *supra* note 116, at 105 (citing *Granzeier v. Middleton*, 955 F. Supp. 741, 748 (E.D. Ky. 1997)).

143. *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., dissenting).

This nation has a guarantee that our government will not endorse or create a state religion; however, in claiming that there is a right in this nation to display Christian documents or to use Christian prayer, those in power have actually created a state preference for one religion over all others. While this situation may be problematic with respect to free speech forums in the instance of an individual prayer, the claims of free speech seem inapplicable when physical monuments are being placed on public grounds, such as the placing of the Ten Commandments on government property. While some may claim that they must defend their Christian rights by erecting these monuments, they are blind to the fact that they are not defending their right at all. Instead, they are simply using majority privilege to assert their systems on those that have contrary rights. Similarly, authors supporting the separation of church and state have failed to recognize the concept of privilege in their arguments, as they urge those in the minority to view the Ten Commandments in a non-religious, historical light.

The idea that there can be a context that takes religion out of the Ten Commandments is presumptive, as is the idea that any objective observer could see the Ten Commandments and not recognize them as religious. The position that individuals should attempt to see the documents as only historical asks Americans to put aside their own beliefs and adopt the norms of the majority. It asks them to forget their views on religion and accept a government where those in control make displays of their own faith under the guise of history.

Joseph R. Duncan, Jr.