RELIGIOUS FREE SPEECH AND SOMEBODY ELSE'S CIVIL RIGHTS: REVIEWING AN OLD CONFLICT IN LIGHT OF CALIFORNIA'S PROPOSITION 8

Robert D. Crockett

INTRODUCTION

California barred gay marriage with popular initiative Proposition 8 in 2008. On August 4, 2010, a federal district court in San Francisco struck down the legislation as unconstitutional because, in small part, religious groups had backed it.

Should legislation become invalid because religious folk spoke out in favor of it? Judge Walker's decision in *Perry v. Schwartzenegger*[1] resuscitates the age-old conflict between free speech and civil rights when religion utters the speech.

Anticlericalism holds that government should be free from religion as much as religion should be free from government. There is a rich history of anticlericalism in the United States. Thomas Jefferson had much to do with this history.

The struggle for gay rights is one thing, but officially sanctioned anticlericalism is quite another. Legislation should not be jeopardized when an unpopular religious minority advances it, even when such legislation affects the civil rights of another minority group. Courts should review morals legislation for its effects, not for the influence of religion. To invalidate morals legislation because it has the backing of religion would make religious speech unlawful.

Proposition 8 and the Backlash against Religion

In California in the 1970s, several same-sex couples sought marriage licenses from county clerks.[2] The California legislature responded in 1977 with restrictive legislation banning same-sex marriages.[3] In 2000, by way of a popular initiative, voters further enacted Family Code section 308.5, which stated simply: "Only marriage between a man and a woman is valid or recognized in

1. Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D.Cal. 2010).
2. In re Marriage Cases, 183 P.3d 384 (2008).
3. *Id.*

California." Proposition proponents argued that Proposition 22 was necessary to prevent the domestic recognition of out-of-state same-sex marriages.[4]

On February 10, 2004, the Mayor of the City of San Francisco directed city clerks to change its procedures and issue marriage licenses to same-sex couples in defiance of the law.[5] The California Attorney General, among others, sought immediate relief from the California Supreme Court to enjoin the City of San Francisco from issuing same-sex marriage licenses, which the court did pending a decision challenging the constitutionality of the marriage statutes.[6]

Attempting to forestall what might be a possible loss before the California Supreme Court, and before the Court would rule, groups opposed to same-sex marriage began circulating an initiative for popular vote. It became known as Proposition 8, which would change the California state constitution to limit marriage to heterosexual couples.[7] Proposition 8 proposed the more impermeable legislative solution of a constitutional amendment, rather than Proposition 22's statutory enactment.

California Attorney General Jerry Brown, over the protests of initiative promoters, approved the ballot description for Proposition 8 as: "ELIMINATES RIGHT OF SAME-SEX COUPLES TO MARRY. Changes California Constitution to eliminate right of same-sex couples to marry."[8]

The petition proponents qualified Proposition 8 with the requisite signatures on June 2, 2008.[9] Exactly two days later, on June 4, 2008, the California Supreme Court justified the fears of Proposition 8 proponents, granting sweeping new civil rights to a historically oppressed minority. The Supreme Court struck down Proposition 22 and related family legislation in *In re Marriage Cases.*[10]

---

4. *Id*. at 713.
5. *Id*. at 410.
6. *Id*. at 402.
7. Melissa Murray, *Marriage Rights and Parental Rights: Parents, the State, and Proposition 8*, 5 STAN. J. CIV. RTS. & CIV. LIBERTIES 357, 365 (2009).
8. Strauss v. Horton, 207 P.3d 48, 77 (2009).
9. News Release, California Secretary of State News Release: Secretary of State Debra Bowen Certifies Eighth Measure for November 4, 2008 General Election (June 2, 2008), www.sos.ca.gov/admin/press-releases/2008/DB08-068.pdf.
10. *In re Marriage Cases*, 183 P.3d at 764.

The very lengthy decision examined the history of California's particular versions of the Equal Protection and Due Process Clauses to conclude that "separate but equal" domestic partnership rights in California were not sufficient to overcome the stigma of lack of available marriage rights and, as a result, prohibitions of same-sex marriages were invalid.[11] The California Supreme Court held that gender preferences were entitled to a strict scrutiny test for discrimination, such that the state would have to show more than a rational basis for its legislation, but a compelling state interest.[12] The court stated: "Accordingly, we conclude that to the extent the current California statutory provisions limit marriage to opposite-sex couples, these statutes are unconstitutional."[13]

Proposition 8 then passed with a 52.3 percent majority, or by 599,602 votes.[14] By comparison, Californians elected Barack Obama with a 61.1 percent majority, or by 3,262,692 votes.[15]

Religion, or views of religion, had taken a central role in the public debate. There is little doubt about it. The Roman Catholic archbishop for San Francisco had asked for Mormon (also, "Latter-day Saints" or "LDS")[16] support for the Proposition 8 fight, which had heretofore included Catholics, Evangelical Christians, conservative blacks, Hispanic pastors and other groups with conservative religious ties.[17] Thereafter, the *New York Times* reported that Mormons pitched in with financial and labor fervor.[18] Mormons comprised the great bulk of precinct walkers for the Proposition and telephone closers on Election Day.[19]

Proposition 8 opponents spent $44,103,525, with supporters spending $38,766,260.[20] Although campaign disclosure laws do not require that a contributor state his or her religious affiliation, me-

---

11. Murray, *supra* note 7, at 364-65.

12. *In re Marriage Cases,* 183 P.3d at 401-02.

13. *Id.* at 402.

14. News Release, Statement of Vote, November 4, 2008, General Election, p. 7 (Nov. 4, 2008), www.sos.ca.gov/elections/sov/2008_general/sov_complete.pdf.

15. *Id*. at 19.

16. The Mormons are formally known as the Church of Jesus Christ of Latter-day Saints. *Mormonism*, CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, http://lds.org/study/topics/mormonism?lang=eng (last visited Dec. 15, 2011).

17. Jesse McKinley & Kirk Johnson*, Mormons Tipped Scale on Ban on Gay Marriage*, N.Y TIMES¸ Nov. 14, 2008, *available at* http://www.nytimes.com/2008/11/15/us/politics/15marriage.html?pagewanted=all.

18. *Id*.

19. *Id.*

20. *Tracking the money: Final Numbers*, L.A. TIMES*,* Feb. 3, 2009, *available at* http://www.latimes.com/news/local/la-moneymap,0,2198220.htmlstory.

dia articles either hostile to the Mormons' involvement or relying upon hostile sources estimated that Mormons contributed $20 million to the campaign.[21] These Mormon contributions were joined with substantial contributions from the Knights of Columbus, the American Family Association, and the evangelical group known as Focus on the Family.[22]

In the pre-election work, the conservative community argued in favor of religious and historical tradition, with challenges to the "gay agenda" to legitimatize what they said God ruled illegitimate.[23] There were scattered reports of violence, mostly against Proposition 8 supporters.[24] There were calls for the revocation of the LDS Church's tax-exempt status.[25]

Similarly, academic and Internet literature reveals almost universal condemnation of religion's role, and in particular, the Mormons' role in Proposition 8's passage. Geoffrey Stone of the University of Chicago Law School said that the Proposition:

> [W]as a highly successful effort of a particular religious group [i.e., the Mormons] to conscript the power of the state . . . This is a serious threat to a free society committed to the principle of separation of church and state . . . [T]hey are not free -- not if

---

21. Peggy Fletcher Stack, *Prop 8 involvement a P.R. fiasco for LDS Church*, SALT LAKE TRIBUNE, Nov. 21, 2008, *available at* http://archive.sltrib.com/article.php?id=11044660&itype=NGPSID; Nicholas Riccardi, *Mormons feel the backlash over their support of Prop. 8*, L.A TIMES, Nov. 17, 2008, *available at* http://articles.latimes.com/2008/nov/17/nation/na-mormons17.

22. John Wildermuth, *Out-of-state money floods to Prop. 8,* SFGATE.COm (July 28, 2008), http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/07/27/BA7E12038R.DTL.

23. Media references are too numerous to even briefly summarize and are beyond the scope of this paper. *See, e.g.*, John Seery, *Proposition 8: 'It is written, but I Say unto You*, HUFFINGTON POST, Oct. 28, 2008, *available at* http://www.huffingtonpost.com/john-seery/proposition-8-it-is-writt_b_138669.html (summarizing and criticizing the religious arguments for Proposition 8). The posted comments roundly condemn the role of religion in the contest.

24. *Compare Prop. 8 supporters suffer vandalism, violence*, ASSOCIATED PRESS, Nov. 3, 2008, *available at* http://www.onenewsnow.com/Politics/Default.aspx?id=308506 (a "Christian perspective"), *with* Dan Aiello, *D.A. blames Prop 8 for anti-gay violence*, BAY AREA REPORTER, Apr. 2, 2009, *available at* http://www.ebar.com/news/article.php?sec=news&article=3839.

25. *See, e.g.*, Brian Galle, *The LDS Church, Proposition 8, and the Federal Law of Charities*, 130 NW. U. L. REV. 370 (2009), http://www.law.northwestern.edu/lawreview/colloquy/2009/10/LRColl2009n10Galle.pdf.

> they are to act as faithful American citizens -- to impose their religious views on others. That is, quite simply, un-American.[26]

As one more polite civil rights advocate put it during the Proposition 8 debate: "I'm not intending it to harm the religion. I think they do wonderful things. Nicest people . . . My single goal is to get them out of the same-sex marriage business and back to helping hurricane victims."[27]

Despite the scorn heaped upon the largely white Mormons and their money and time, it is quite apparent that the single most significant factor for the success of Proposition 8 was black voter turnout during an election in which Barack Obama was the Democratic nominee for President. Efforts directed to black voters were made principally through their pastors. Influential pastors organized rallies in northern and southern California.[28] Blacks turned out in overwhelming numbers to support Proposition 8. The difference between the "yes" and "no" vote for Proposition 8 was 504,479 votes; the number of black voters who voted in favor of Proposition 8 was 718,997.[29]

Some have argued that black support can be explained away by "higher levels of religiosity among racial and ethnic minority groups,"[30] a common refrain in the media. Polling data seems to dispute that notion, in that "being a black respondent" had the "largest impact" upon whether a voter was likely to vote for Proposition 8.[31] Nonetheless, the next most significant factor in predicting a Proposition 8 supporter was religion.[32] Blacks who were

---

26. Geoffrey Stone, *Democracy, Religion and Proposition 8*, UNIVERSITY OF CHICAGO LAW SCHOOL FACULTY BLOG, (Nov. 16, 2008), http://uchicagolaw.typepad.com/faculty/2008/11/democracy-relig.html.

27. Elder Dallin H. Oaks, Speech at BYU-Idaho (Oct. 13, 2009) (transcript available at http://www.mormonnewsroom.org/article/oaks-religious-freedom) (quoting Karl Vick, *"Gay groups targeting Mormons*," SALT LAKE TRIBUNE, May 30, 2009 at A8).

28. Marisa Abrajano, *Are Blacks and Latinos Responsible for the Passage of Proposition 8? Analyzing Voter Attitudes on California's Proposal to Ban Sam-Sex Marriage in 2008*, POLITICAL RESEARCH QUARTERLY 63:922, 924 (2010), *available at* http://prq.sagepub.com/content/63/4/922.

29. *Id*. at 930.

30. Melisa Murray, *Marriage Rights and Parental Rights: Parents, the State, and Proposition 8,* 5 STAN. J.C.R. & C.L. 357, 358 n.3 (2009).

31. Abrajano, *supra* note 28, at 927.

32. *Id*.

born-again Christians were more than twice likely to vote for Proposition 8 than blacks who were not.[33]

On May 22, 2009, a group of gay plaintiffs filed suit in the United States District Court for the District of Northern California in San Francisco, challenging the constitutionality of Proposition 8.[34] Attorneys Ted Olson and David Boies represented the plaintiffs. They had previously squared off against each other in *Bush v. Gore*, the Florida election rights contest decided in the United States Supreme Court.[35] Olson represented George W. Bush, while Boies represented the Democratic Party.[36]

By random case assignment, Judge Vaughn Walker would try the contest. Judge Walker was a life-long bachelor nominated, unsuccessfully, to the bench by Ronald Reagan and then successfully by George H.W. Bush. Judge Walker tried the case in 2010. The plaintiffs offered thirteen live witnesses.[37] Eight of the witnesses were lay witnesses, seven of whom testified generally as to their experiences as gay couples. One of the plaintiffs' witnesses was called adversely, a Proposition 8 promoter. Plaintiffs produced nine expert witnesses[38] and also offered the adverse cross-examination deposition testimony of two McGill University professors the Proposition 8 proponents had withdrawn.[39]

Although much of the testimony offered by plaintiffs focused upon societal discrimination and, conversely, the aptitude gay couples have to function as normal parents and adults, some of the testimony and evidence focused exclusively upon the effect religion has had on gays. Plaintiffs' expert Gary Segura, a political scientist, "identified religion as the chief obstacle to gay and lesbian political advances."[40] Expert Katherine Young (one of the withdrawn defense experts, thereafter offered adversely by the plaintiffs through her deposition) testified that there "is a religious component to the bigotry and prejudice against gay and lesbian individuals." The Proposition 8 promoter, called adversely, admit-

---

33. *Id*. at 929.
34. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 928 (N.D.Cal. 2010).
35. Bush v. Gore, 531 U.S. 98 (2000).
36. Margaret Talbot, *A Risky Proposal: Is it too soon to petition the Supreme Court on gay marriage?,* THE NEW YORKER, Jan. 18, 2010, *available at* http://www.newyorker.com/reporting/2010/01/18/100118fa_fact_talbot.
37. *Perry v. Schwarzenegger*, 704 F. Supp. 2d at 938.
38. *Id*. at 932.
39. *Id.* at 944.
40. *Id*. at 937.

ted that he was the "secretary of the America Return to God Prayer Movement," and he linked Satan to gays.[41]

The other McGill professor, Paul Nathanson, testified that "religion lies at the heart of the hostility and violence directed at gays and lesbians . . . ."[42] He testified that religions teach that homosexuality is a sin and this contributes to gay bashing.[43]

The Proposition 8 proponents called only two witnesses, David Blankenhorn, the founder and president of the Institute for American Values, an expert on marriage, fatherhood and family structure, and Dr. Kenneth P. Miller, a professor of government at Claremont McKenna College, an expert in American and California politics.[44]

On August 4, 2010, Judge Walker ruled that Proposition 8 was unconstitutional under both the Equal Protection and Due Process Clauses.[45] The Court held that, under the Equal Protection Clause, the proposition could satisfy neither the higher strict scrutiny test nor the lesser rational basis test.[46] The proposition proponents advanced several arguments in support of rational basis review, including the argument that "tradition" supported the notion of heterosexual marriage to the exclusion of homosexual marriage.[47] "Tradition alone, however, cannot form a rational basis for a law."[48]

Further, because the availability of California's domestic partnership law does not fulfill the "fundamental right to marry," and because the proposition proponents admitted that there is a "significant symbolic disparity between domestic partnership and marriage," the proposition failed the Due Process Clause.[49]

The District Court's decision is filled with challenges to the role that religion played in the passage of Proposition 8. Judge Walker said that there were harmful religious beliefs about "gays and lesbians."[50] The District Court used "moral disapproval" as a basis to

41. *Id*.
42. *Id*. at 944.
43. *Id.* at 984.
44. *Id.* at 945-959.
45. *Id*. at 1004.
46. *Id*. at 995.
47. *Id.* at 998.
48. *Id*.
49. *Id*. at 995.
50. *Id.* at 984.

challenge the various rationales offered for propositions under the rational basis test.[51]

The Court cited a pro-Proposition 8 rally organizer claiming that "God has led the way" for the campaign.[52] The Court pointed to Catholic leaflets condemning, as casuistry and rationalization, attempts to read the Bible to pardon homosexual behavior.[53] The Evangelical Presbyterian Church advanced the position that homosexuality was a distortion of the image of God.[54] Judge Walker found that polling data revealed that persons who voted for Proposition 8 were more likely to also be those who attend church regularly.[55] His opinion singled out the Mormons, Catholic bishops and Evangelical ministers as Proposition 8's supporters. He found evidence that "[t]he coalition between the Catholic Church and the LDS [Mormon] Church against a minority group was unprecedented."[56] Religion had impermissibly influenced the contest.

The Court observed that moral disapproval of homosexuality "is not a proper basis upon which to legislate."[57] The religious animus, voiced for months in media reports, was elevated to judicial declaration.

Thereafter, and shortly before resigning from the bench on April 6, 2011, Judge Walker disclosed that he was gay. Proposition 8 supporters sought to vacate the judgment on the basis that Judge Walker should have recused himself from the matter. The judge who replaced Judge Walker denied the motion.[58] Ironically, gay rights groups had years before opposed Walker's judicial nomination because he had, as a lawyer, represented the United States Olympic Committee in its lawsuit over the phrase "Gay Olympics."[59]

Proposition proponents appealed their loss to the Ninth Circuit Court of Appeals. On January 4, 2011, when the California Attorney General refused to join the appeal, the Ninth Circuit certified

---

51. *Id*. at 1002.
52. *Id*. at 984.
53. *Id*. at 985.
54. *Id*. at 986.
55. *Id*. at 952.
56. *Id*. at 955.
57. *Id*. at 1002.
58. Perry v. Brown, No. 10-16696, 2012 WL 372713, at *28 (9th Cir. 2012) (Appellant's Petition for En Banc Review).
59. Philip Shenon, *Battle Looming Over a Nominee For U.S. Court*, N.Y. TIMES, Jan. 14, 1988, *available at* http://www.nytimes.com/1988/01/14/us/battle-looming-over-a-nominee-for-us-court.html.

a question to the California Supreme Court as to whether project proponents had standing to defend Proposition 8 when "public officials charged with that duty refuse to do so."[60] On November 17, 2011, the California Supreme Court answered in the affirmative, holding that the proponents had standing.[61]

The Ninth Circuit rendered its decision on February 7, 2012, holding there was no rational basis for Proposition 8.[62] California, having granted a civil right to gays, could not legitimately rescind it.[63] The proponents' reasons for banning gay marriage were not rational. These reasons included the assertions that heterosexual marriage would further California's interest in childbearing and responsible procreation, changes to marriage should be met with caution, gay marriage would infringe upon religious freedom, and gay marriage would lead to children hearing unsavory things in school.[64] The religious liberty argument differed from the argument this paper makes; proponents had argued that religious organizations might, under Proposition 8, be required to provide services to same-sex couples.[65] The Ninth Circuit held that Proposition 8 did nothing to affect antidiscrimination laws already in effect in California.[66]

The Ninth Circuit said nothing about Judge Walker's references to religious animus. Rather, the Court made only general and brief references to animus displayed by proponents. Television and print advertisements "focused on . . . the concern that people of faith and religious groups would somehow be harmed by the recognition of gay marriage" and "conveyed a message that gay people and relationships are inferior, that homosexuality is undesirable and that children need to be protected from exposure to gay people and their relationships." These messages were not crafted accidentally.[67] However, there should be no doubt that the only proponents making such statements were religious groups. The Ninth Circuit cited specifically to an article authored by the pro-

60. Perry v. Schwarzenegger, 628 F.3d 1191, 1193 (9th Cir. 2011).
61. Perry v. Brown, 265 P.3d 1002 (Cal. 2011).
62. Perry v. Brown, No. 10-16696, 2012 WL 372712, at *20 (9th Cir. 2012).
63. *Id*. at *15.
64. *Id.* at *20.
65. *Id*. at *24.
66. *Id*. at *24.
67. *Id*. at *27.

ponents' strategists, which repeatedly mentioned the influence of religious groups in the campaign.[68]

The proponents on February 21, 2012, petitioned for en banc review.[69] The petition focused upon the panel's use of *Romer v. Evans,*[70] a 1996 Supreme Court decision that invalidated a Colorado constitutional amendment, which banned all government action designed to protect homosexuals. The en banc petition argued that Proposition 8 was not as invidious as Colorado's sweeping ban on legislation to protect homosexuals, and that "until quite recently 'it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex.'"[71] The Ninth Circuit denied the en banc petition on June 5, 2012,[72] clearing the way for the expected Supreme Court petition for certiorari.

Historical Official Antipathy towards Religion

It is of no surprise that a modern federal judge had said negative things about religion.

The First Amendment, part of the Bill of Rights, was passed on March 4, 1789. It provides, in part, that Congress shall make no law "respecting an establishment of religion," or to impede the "free exercise of religion."[73] The First Amendment contains the word "establishment."

The authorities focus upon the words "establishment," "antiestablishment" and "disestablishment." For many years, New England states supported the "establishment" of Episcopalian and Congregational churches. The clerics of these churches fed at the public trough. They enjoyed government salaries on account of

68. *Id*. (citing Frank Schubert & Jeff Flint, *Passing Prop 8,* CAMPAIGNS & ELECTIONS, Feb. 1, 2009, *available at* http://www.campaignsandelections.com/case-studies/176127/passing-prop-8.thtml).

69. Appellants' Petition for En Banc Review is *available at* http://www.ca9.uscourts.gov/datastore/general/2012/02/21/Petition_for_Rehearing_En_Banc.pdf.

70. Romer v. Evans*,* 517 U.S. 620 (1996).

71. Perry v. Brown*,* No. 10-16696, 2012 WL 372712*,* at *8 (9th Cir. 2012) (citing Hernandez v. Robles*,* 855.N.E.2d 1, 8 (N.Y. 2006)).

72. Perry v. Brown, Nos. 10-16696, 11-16577 2012 WL 1994574 (9th Cir. Jun. 5, 2012).

73. U.S. CONST. amend. I.

their religion.[74] On its face, the First Amendment was enacted in part to separate government from the support and operation of religion.

Christianity became the established religion of the Roman Empire shortly after Constantine the Great's supposed deathbed conversion, leading to centuries of established Christianity in one form or another in Europe and England's colonies.[75] Not until 1833 were established churches completely disestablished in the United States. Massachusetts was the last to disestablish.[76] Although the First Amendment originally applied only to Congress, the U.S. Supreme Court relatively recently applied the First Amendment to state and local government.[77] It took independent state action to finally disestablish religion among the states.

After complete disestablishment, "establishment" has taken on an entirely new meaning in U.S. Supreme Court jurisprudence. "Establishment" has now been applied to Sunday closing laws, prayer in school, the distribution of Bibles in public schools, the governmental support of parochial schools and the display of religious symbols on government property. The meaning of the word "establishment" has been particularly divisive in the Supreme Court.[78]

Anticlerics point to the "wall of separation" in constitutional law. No such phrase exists in the Constitution but, as discussed below, has some force in constitutional law. After the Bill of Rights, Thomas Jefferson first used this phrase in a carefully-worded letter to a group of Connecticut Baptists. This letter became known as the "Danbury Letter."

---

74. PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE 10 (Harvard Univ. Press 2002).

75. Tudor v. Bd. of Educ. Of Borough of Rutherford, 10 A.2d 857 (N.J. 1953) [brief history of the the Church's ascension in the Roman Empire and its establishment thereafter in European states]; Rodman v. Robinson, 47 S.E. 19, 21 (N.C. 1904) [despite Constantine being known for issuing pro-Christian edicts, "[e]vidently Constantine was still something of a heathen;" also recounting anecdotes of European and U.S. state edicts protecting the Christian sabbath].

76. DANIEL WALKER HOWE, WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA 1815-1848, 165 (Oxford University Press, 2007).

77. Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687 (1994).

78. ERWIN CHEMERINKSY, THE CONSERVATIVE ASSAULT ON THE CONSTITUTION 101-34 (2010); SETH STERN & STEPHEN WERMIEL, JUSTICE BRENNAN: LIBERAL CHAMPION 168-74 (2010).

Upon Jefferson's election, clergymen sent him congratulatory letters, including the Danbury Baptist Association in October 1801. The Baptists urged his administration not to "assume the prerogative of Jehovah and make Laws to govern the Kingdom of Christ."[79] The Baptists were interested only in disestablishing religion. President Jefferson's penned reply went beyond disestablishing religion. Quoting the First Amendment, Jefferson suggested constitutional anticlericalism. He wrote that the "American people . . . declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between Church & State."[80]

The Danbury Baptists were not interested in any kind of wall of separation. Instead, they wanted an equal voice in political affairs with the Episcopalians and Congregationalists. The Baptists were known as Dissenters. In English history, dissenting pastors did not abide by the Church of England's creeds. Dissenting pastors did not enjoy government privilege and exemption. In America, the Dissenting clerics wanted to level the playing field to disestablish Episcopalians and Congregationalists. The Dissenting clerics, at least most of them, never sought their complete bar from public political life.[81]

The Danbury Letter, nonetheless, can be read to be anticlerical – the wall applies to both government and religion. Jefferson's personal history can be read to suggest that he intended anticlericalism.

Jefferson's Danbury Letter was a polarized reaction to an establishment Federalist clerical attack upon him.[82] In his recent monumental work, *Separation of Church and State*, Philip Hamburger wrote that the Danbury Letter came on the heels of a bitter presidential campaign where establishment Federalist clerics denounced Jefferson as immoral and as an atheist. These well-entrenched clerics aligned themselves with the New England Fed-

79. Letter from Danbury Baptist Association to Thomas Jefferson (Oct. 7, 1801) (published in DANIEL L. DREISBACH, THOMAS JEFFERSON AND THE WALL OF SEPARATION BETWEEN CHURCH AND STATE 142-44 (N.Y. Univ. Press 2002).

80. Letter from Thomas Jefferson to Nehemiah Dodge, et. al. (Jan. 1, 1802) (published in DREISBACH, *supra* note 73, at 148).

81. *See* HAMBURGER, *supra* note 74, at 73.

82. DREISBACH, *supra* note 79, at 30.

eralist Party, Jefferson's fierce political enemy.[83] As Jefferson put it, "I wish nothing but their eternal hatred."[84]

Quoting from Hamburger: "Beginning in the 1790s [and then with renewed effort during the 1800 presidential campaign] Federalist ministers inveighed against Jefferson, often from their pulpits, excoriating his infidelity and deism." [85] Historian Henry Adams, the grandson and great-grandson of former Presidents, observed that "[t]he [Federalist] clergy had always hated Jefferson, and believed him not only to be untruthful, but to be also a demagogue, a backbiter, and a sensualist."[86] The anti-Jefferson enmity reached its climax in the 1800 presidential campaign.[87] Adams remarked that:

> The bitterness against [Jeffersonian Republicans] became intense after the month of May, 1800, when the approaching victory of Jefferson was seen to be inevitable. Thus for the first time the clergy and nearly all the educated and respectable citizens of New England began to extend to the national government the hatred which they bore to democracy. The expressions of this mixed antipathy filled volumes. The established clergymen claimed that Jefferson brought the excesses of the French Revolution to America.[88]

In a widely-published sermon, the President of Yale, an establishment cleric in the Congregational Church, argued that the election of Jefferson would mean the elimination of morals, the morals which:

> Protect our lives from the knife of the assassin, which guard the chastity of our wives and daughters from seduction and violence, defend our property from plunder and devastation and shield our religion from contempt and profanation. For what end? . . . that our churches may become temples of reason . . . the Bible cast into a bonfire . . . that we may see our wives and daughters the

---

83. *Id.* at 27; JOSEPH J. ELLIS, AN AMERICAN SPHINX: THE CHARACTER OF THOMAS JEFFERSON 236 (Random House, Inc. 1998).

84. HENRY ADAMS, HISTORY OF THE UNITED STATES DURING THE FIRST ADMINISTRATION OF THOMAS JEFFERSON 1:320 (1889).

85. HAMBURGER, *supra* note 74, at 111.

86. ADAMS, *supra* note 84, at 1:321.

87. *Id.* at 1:83.

88. *Id.*

> victims of legal prostitution? Shall our sons become disciples of Voltaire and the dragoons of Marat?[89]

The latter is a reference to one of the more radical voices of the French Revolution.

A Federalist newspaper, the *Gazette of the United States,* asked voters the question "to be asked by every American, laying his hand on his heart. . . . Shall I continue in allegiance to God -- and a Religious President, or impiously declare for Jefferson -- and No God!!!"[90] One Federalist pastor wrote that "the election of any man avowing the principles of Mr. Jefferson" would "destroy religion, introduce immorality, and loosen all the bonds of society."[91] Another prominent clergyman sermonized on Washington's death that Jefferson's "impiety [would] take away the heavenly defence and security of a people, and render it necessary for him who ruleth among the nations in judgment to testify his displeasure against those who despise his laws and contemn his ordinances."[92]

At the end of his first Presidential campaign, Jefferson had his fill of established clerics. Jefferson would later write to Attorney General Levi Lincoln, that "from the clergy I expect no mercy. They crucified their Saviour . . . [L]ies and slander still remain to them."[93] This was Jefferson's state of mind when he penned the Danbury Letter.

Jefferson's very early writings also exhibited anticlerical feelings. He had argued that the Bible was not a basis for the English common law.[94] He disparaged the Bible as the basis for burning witches.[95] Years later, sitting Supreme Court Justice Joseph Story took exception to Jefferson's early statements and asked, "can any

---

89. WILLARD STERNE RANDALL, THOMAS JEFFERSON: A LIFE 542 (HarperCollins 1994).

90. *Id.*

91. William Linn, *Serious Considerations on the Election of a President: Addressed to the Citizens of the United States, in* HAMBURGER, *supra* note 74, at 114.

92. ADAMS, *supra* note 84, at 1:81.

93. Letter from Thomas Jefferson to Levi Lincoln (Aug. 26, 1801), *reprinted in* THE WORKS OF THOMAS JEFFERSON 9:453 (Paul Leicester Ford ed., George Putnam & Sons, 1905).

94. Thomas Jefferson, *Whether Christianity Is Part of the Common Law?* (circa 1764), *reprinted in* THE WORKS OF THOMAS JEFFERSON, *supra* note 93, at 1:453. For an excellent discussion of this letter *see also* DANIEL L. DREISBACH, RELIGION AND POLITICS IN THE EARLY REPUBLIC: JASPAR ADAMS AND THE CHURCH-STATE DEBATE 13 (University Press of Kentucky 1996).

95. THE WORKS OF THOMAS JEFFERSON, *supra* note 93 at 1:456.

man seriously doubt, that Christianity is recognized as true, as a revelation, by the law of England, that is, by the common law?"[96]

Jefferson's later writings also exhibited anticlerical feelings. Fifteen years after the Danbury Letter, Jefferson expressed anticlerical views about an abolitionist preacher. Reverend Alexander M'Leod, a Presbyterian, a preacher of no small eloquence, held that one could not be a good Christian and a slaveholder.[97] Jefferson, of course, was a prototypical Virginia slaveholder, a fact notoriously inconsistent with his support for the French Revolution and its principles of fraternity, liberty and equality.[98] Jefferson's reaction to M'Leod in a private letter was to offer the opinion that a minister who spoke out on political affairs breached his contract with his congregation. When a cleric sought to lecture about mathematics, or chemistry, or government, "it is a breach of contract depriving their audience of the kind of service for which they are salaried."[99] Jefferson, however, asked his correspondent to hold his musings in private confidence.[100] Jefferson's strongest anticlerical beliefs were not intended for public consumption.

In 1817, when Republicans finally captured Connecticut from Federalists, Jefferson wrote to John Adams that Connecticut had been the:

> last retreat of monkish darkness, bigotry and abhorrence of those advances of the mind which had carried the other States a century ahead of them . . . . [T]his den of priesthood is at length broken up, and . . . a Protestant Popedom [will] no longer disgrace the American history and character.[101]

These comments concerned the establishment church and the Federalists it supported.

---

96. Joseph Story, *Christianity a Part of the Common Law* (1811), *reprinted in* LIFE AND LETTERS OF JOSEPH STORY: ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES, AND DANE PROFESSOR OF LAW AT HARVARD UNIVERSITY 431-33 (William W. Story ed., Charles C. Little and James Brown 1851).

97. HAMBURGER, *supra* note 74, at 151.

98. ANNETTE GORDON-REED, THE HEMINGSES OF MONTICELLO: AN AMERICAN FAMILY 185 (W.W. Norton & Co. 2008).

99. Letter from Thomas Jefferson to P.H. Wendover (Mar. 13, 1815), *in* THE WRITINGS OF THOMAS JEFFERSON 14:279-283 (Andrew A. Lipscomb & Albert Ellery Bergh eds.,Thomas Jefferson Memorial Ass'n 1903).

100. *Id.* at 283. Jefferson complained that his frank comments were often released to the press without his consent.

101. Letter from Thomas Jefferson to John Adams (May 5, 1817), *in* THE WRITINGS OF THOMAS JEFFERSON, *supra* note 99 at 15:109-110.

Certainly there are Jefferson scholars who would argue against Jefferson's anticlericalism and say that he was merely antiestablishment. In 2002, Hamburger argued that it might be misleading for historians to have labeled Jefferson as anticlerical.[102] On the other hand, Noah Feldman has argued that the First Amendment is, in reality a polarized reaction to Jefferson's anticlericalism, although Jefferson wasn't even in the country during the drafting of the Bill of Rights. "Rather, [the drafters] must have meant to prohibit only the kind of arrangement they knew from the Church of England as established in the colonies."[103]

Jefferson is to blame for the uncertainty as to whether he was anticlerical or merely antiestablishment. Two days after his Danbury Letter, Jefferson invited his fellow Virginian and Baptist preacher, John Leland, to preach a sermon in the U.S. House of Representatives, which Jefferson attended.[104] Such a sermon today in the House of Representatives would be unthinkable, but Jefferson's associations with Protestant pastors in the halls of Congress were sometimes mystifying in light of his private anticlerical statements.

The U.S. Supreme Court has interpreted Jefferson's views as anticlerical. The first reference to the "wall" separating church and state comes in the 1878 case of *Reynolds v. United States*. The U.S. Supreme Court upheld George Reynolds' conviction for bigamy in Mormon Utah. The Court pointed to the Danbury Letter as a key interpreter of the First Amendment and used Jefferson's views as a basis to require the Mormons to refrain from heterodox martial practices. The Court did not profess to understand the Letter's roots or implications.[105]

As a matter of appropriate digression, Professor Sarah Barringer Gordon has observed that it was ironic that the Court used Jefferson's anticlericalism to force any kind of religious practice upon the Mormons.[106] Hamburger noted that the Supreme Court upheld Protestant Evangelicalism against the Mormons in one case but supported other types of Protestant opposition to govern-

---

102. HAMBURGER, *supra* note 74, at 352.

103. NOAH FELDMAN, DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM AND WHAT WE SHOULD DO ABOUT IT 25 (Farrar, Strauss & Giroux 2005).

104. HAMBURGER, *supra* note 74, at 162.

105. Reynolds v. United States*,* 98 U.S. 145, 163-164 (1878).

106. SARAH BARRINGER GORDON, THE MORMON QUESTION: POLYGAMY AND CONSTITUTIONAL CONFLICT IN NINETEENTH CENTURY AMERICA 133 (U.N.C. Press 2002).

ment coercion.[107] It was ironic that the trappings of Calvinist Evangelical Christianity filled the courtroom in *Reynolds.* United States Attorney Charles Devens contrasted Christian principles of the Constitution against the foreign and Asiatic principles of the Mormons.[108] It was also ironic that at the time of *Reynolds,* one of the sitting justices, Justice William Strong, was the President of the American Tract Society, the American Sunday-School Union and also of a group promoting a constitutional amendment to declare the United States a Christian nation.[109]

Leaving the digression about the irony of *Reynolds* in church-state issues, and returning to the U.S. Supreme Court's application of *Reynolds,* the Supreme Court completed anticlerical Jefferson's wall in 1947. Justice Hugo Black's decision in *Everson v. Board of Education,* in light of the material quoted below, inconsistently upheld public funding for parochial schools. Justice Black cited *Reynolds*, which had said nothing about barring religious influence from legislation. Justice Black wrote, "[n]either a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups, and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'"[110] Although Justice Black's language was mere dictum and had no role in the ultimate holding, this "*vice versa*" business had the effect of saying that the Danbury Letter prohibited religious influence on state politics.

Everson provided a modern foundation for outright anticlericalism in the United States. Perhaps, as many argue with some justification, government should be free *from* religion. But *Everson* has not been applied to go as far as Judge Walker has gone with Proposition 8 – to invalidate legislation because religious groups backed it.

---

107. HAMBURGER, *supra* note 74*,* at 260.

108. BARRINGER GORDON, *supra* note 106, at 129 (explaining that at the time, it was common to describe the Mormons as un-American and disloyal foreigners). Jacob Smith Boreman, *Crusade Against Theocracy: The Reminiscence of Judge Jacob Smith Boreman of Utah, 1872-1877*, at 7 n.6 (Leonard Arrington ed., Huntington Library Quarterly, Nov. 24, 1960) (explaining that the judge who presided over Brigham Young's divorce from plural wife Ann Eliza wrote: "The people generally were foreigners").

109. HAMBURGER, *supra* note 74, at 260 n.13.

110. Everson v. Board of Education*,* 330 U.S. 1, 16 (1947).

Anticlericalism is nonetheless a part of the national political psyche. One key example will suffice. In 1863, Evangelicals formed a grassroots effort to promote an amendment to the Constitution which would make the United States a Christian nation.[111] As mentioned above, one of the Justices in the *Reynolds* decision was the president of that organization. University of Chicago Law School's Geoffrey Stone called this, as well as other Evangelical legislation, "efforts to sacralize the nation."[112]

In reaction to this attempt to Christianize the nation, a loose alliance of atheists, humanists, Uniterarians, liberal Protestant groups, spirtualists and transcendentalists combined to fight the proposed amendment with a new-found passion for anticlericalism. They formed the Toledo Liberal Alliance, calling themselves "Liberals," to pass a competitive amendment to completely separate church from state. They formed their policies, in part, upon national anti-Catholic sentiment.[113] The Republican Party adopted the Liberal view as an official plank.[114] A federal judge offered terms to strengthen the amendment as to outlaw the Catholic Church altogether.[115] The movement foundered upon debates over obscenity and table-rapping spiritualism. Thus, concerted anticlericalism tottered and fell under its own weight due to a lack of political will.

The Power of Religion's Voice in American Politics

For the positive influence religion has had in politics, one need only look at the life of Englishman John Wilberforce. Born to privilege in 1759, Wilberforce became a Member of Parliament at the age of 21, and subsequently became the confidant of William Pitt, Jr., later Prime Minister. Wilberforce's friendship with the High Church Clergyman John Newton led Wilberforce to convert to Christianity. Wilberforce sacrificed his fortune and family standing to fight for the abolition of slavery in Great Britain. His influence led to that abolition. His writings further influenced

111. HAMBURGER, *supra* note 74*,* at 290.

112. Geoffrey R. Stone, *Same-Sex Marriage and the Establishment Clause,* 54 VILL. L. REV. 617, 620 (2009).

113. HAMBURGER, *supra* note 74, at 296-311.

114. HAMBURGER, *supra* note 74, at 311.

115. Thomas E. Buckley, *A Mandate for Anti-Catholicism: The Blaine Amendment,* America, NATIONAL CATHOLIC WEEKLY (Sept. 27, 2004), http://www.americamagazine.org/content/article.cfm?article_id=3770.

John Quincy Adams, John Jay, Thomas Jefferson, Lafayette and James Monroe.[116] Perhaps Wilberforce's work had an indirect influence upon England's decision not to enter the U.S. Civil War on behalf of the South.[117]

In 1790, Noah Webster explained that it was no longer necessary for government to discriminate against the views of clergymen.

> The separation of religion and policy, of church and state, was owing at first to the errors of a gloomy superstition, which exalted the ministers of Christ into Deities; who, like other men, under similar advantages, became tyrants. The way to check their ambition, and to give full efficacy to their administrations, is to consider them as men and citizens, subject to law, and designed for civil as well as spiritual instructors.[118]

John Leland, the pastor Jefferson listened to in the House of Representatives two days after his Danbury Letter, believed that a plurality of religious opinion had its benefits. "[I]n these lethargic days, if there is not a little difference among men, they sink into stupidity." He further stated that having several religions in Virginia was desirable because should one attempt to oppress another, all the rest would unite to prevent it."[119] Leland was a man who argued against the extremities of anticlericalism. To deny clergymen the right to serve as legislators "is absurd."[120] They should have "the liberty of free citizens, and those who prefer them, the freedom of choice."[121]

Alexis de Tocqueville devoted space in his 1848 work *Democracy in America* to the role of religion in American politics. "Relig-

---

116. BOB BELTZ, REAL CHRISTIANITY: A PARAPHRASE IN MODERN ENGLISH OF A PRACTICAL VIEW OF THE PREVAILING RELIGIOUS SYSTEM OF PROFESSED CHRISTIANS IN THE HIGHER AND MIDDLE CLASSES IN THIS COUNTY, CONTRASTED WITH REAL CHRISTIANITY 9-14 (Regal 2006).

117. "Kemper kept needling our English friend [a British military observer in the South's General James Longstreet's camp] about why they didn't come and join in with us, it being in their interest and all, and the Englishman said that it was a very touchy subject, since most Englishmen figured the war was all about, ah, *slavery* . . . ." MICHAEL SHAARA, THE KILLER ANGELS: A NOVEL OF THE CIVIL WAR 71 (Ballantine Book 1974).

118. NOAH WEBSTER, JR., A COLLECTION OF ESSAYS AND FUGITIV [SIC] WRITINGS ON MORAL, HISTORICAL, POLITICAL AND LITERARY SUBJECTS 347 (Thomas and Andrews eds. 1790) (alterations spelling modernized, emphasis omitted).

119. ELDER JOHN LELAND, THE WRITINGS OF THE LATE ELDER JOHN LELAND 121-22 (G.W. Wood 1845).

120. *Id*. at 122.

121. *Id*.

ion in America takes no direct part in the government of society, but it must be regarded as the first of their political institutions; for if it does not impart a taste for freedom, it facilitates the use of it." He asks, "[h]ow is it possible that society should escape destruction, if the moral tie is not strengthened . . . ?"[122] While approving religion's voice, Tocqueville saw the great value disestablishment played in American politics, observing that it would be necessary in a republic.[123]

Two years after Tocqueville, John C. Calhoun explained in his last address to Congress that the "strongest . . . cords" which bound the States of the Union together were "those of a spiritual and ecclesiastical nature consisted in the unity of the great religious denominations . . . ." He argued that if those ecclesiastical bonds snapped, there would be "nothing . . . left to hold the states together except by force."[124]

But it must be plainly obvious to religious folk that what they have to say in public is not to be received with glee. Some Christian pastors have preached a social justice for the poor to widespread applause, as did Walter Rauschenbusch.[125] However, preaching against moral sins is not a popular topic. The Northern Kingdom ejected Amos and told him to go preach to Judah after he told King Jeroboam that Israel would be enslaved for its sins.[126] Isaiah condemned Israel because it had forgotten God and had instead followed the gods of fertility cults.[127] When the pastor invades the privacy of the bedroom, there's going to be unhappiness. Perhaps clergymen would wish that the Bible hadn't addressed sexual issues, but for many clergymen, the message is undeniable.

The sector of churchpersons that supported Proposition 8 came from a historically suspect group of politickers against moral failure – the Evangelical Right, the Catholics and the Mormons – a coalition of usually not good bedfellows. These fellows are no Leland, Rauschenbusch or Wilberforce. Their message of morality

---

122. ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 383, 390, 393 (Henry Reeve, trans., Server & Francis, 3d ed. 1863).

123. *Id*.

124. Letter from John C. Calhoun to Congress (Mar. 4, 1850), *in* ABRIDGMENT OF THE DEBATES OF CONGRESS, FROM 1789 TO 1856 XVI:403, 409 (D. Appelton & Co., 1861).

125. WALTER RAUSCHENBUSCH, CHRISTIANITY AND THE SOCIAL CRISIS 327 (McMillan Co., 1907).

126. *Amos* 7 (King James).

127. *Isaiah* 17:8 (King James).

is not popular. As Elder Dallin Oaks, a senior Mormon Apostle noted, "we must not be surprised when our positions are ridiculed and we are persecuted and reviled."[128] And so it must be for many religionists. They have staked out their positions in life, to be unpopular and say unpopular things.

Fortunately, unpopular religious speech has its protections. Nowhere is it more apparent than in the U.S. Supreme Court's recent decision *Snyder v. Phelps*.[129] Here, the Court upheld the right of the members of a fundamental church to picket and say disgusting things at military funerals.

Given that Westboro's speech was at a public place on a matter of public concern, that speech is entitled to 'special protection' under the First Amendment. Such speech cannot be restricted simply because it is upsetting or arouses contempt. If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.[130]

Because contemptible speech in the public sphere has almost unfettered protection, legislation should not suffer because religion advances speech in a manner calculated to influence legislation. Religious persons' opinions about blue laws or the elimination of the MX missile program[131] should not call into question the constitutionality of such government laws or action, for to do so would directly penalize religious speech. However, that penalty is exactly what happened in *Perry v. Schwartzenegger*. That opinion spelled out the impact religion had on Proposition 8's passage.

The First Amendment unquestionably protects the right of speech and petition. The courts should not remediate the loss of a minority's civil right by penalizing speech or petition. This position is a simple one. If a minority's civil rights have been unfairly restricted, the analysis should look objectively to the fairness of the loss of those rights and not to the speech uttered behind legislation.

---

128. Oaks, *supra* note 27, at 14.

129. Snyder v. Phelps, 131 S.Ct. 1207 (2011).

130. *Id*. at 1219.

131. *See* Mike Carter, *In Utah, Separating Church from State Can Be Nearly Impossible: Religion: Mormons dominate virtually every aspect of political life here. The state has defied the church only once in the last 60 years*, L.A. TIMES, Mar. 21, 1993, *available at* http://articles.latimes.com/1993-03-21/news/mn-13641_1_church-support.

Speech isn't the right that trumps all others in the Bill of Rights, and nothing in that enactment so suggests. There are limits upon speech. Speech cannot be used to endanger people.[132] Speech in the context of bribery of public officials or voters can lead to serious consequences.[133] Defamatory speech may be the subject of compensatory damages.[134] Speech should not be used to violate contracts.[135] Speech should not publicize trade secrets or capitalize wrongfully upon an author's work. [136] Perhaps a good case can be made for publishing government secrets on the Internet.[137]

But when it comes to addressing legislators or voters, there should be no lawful basis to restrict the rights of religious people to band together and say what they would like to say about pending legislation. The courts and Congress should not approve an indirect affront to religious speech, such as the invalidation of legislation promoted by churchpersons. As the U.S. Supreme Court stated recently in the campaign finance decision, *Citizens United v. Federal Election Commission,*[138] "political speech must prevail against laws that would suppress it, whether by design or inadvertence."

The University of Chicago professor, Geoffrey Stone, cited at the beginning of this article who called pro-Proposition 8 religious views as un-American, later acknowledged before the decision in *Perry v. Schwarzenegger* the problem posed by using religion as a basis to invalidate Proposition 8. He said that Proposition 8 would have violated the Establishment Clause if it had expressly stated

---

132. "[N]o freedom of speech opinion would be complete without reference to the traditional example [of] yelling 'fire' in a crowded theater." U.S. v. Dellinger, 472 F.2d 340, 415 fn.5 (7th Cir. 1972).

133. The First Amendment does not protect corrupt political speech, such as bribes. U.S. v. Scruggs, Criminal No. 3:09-CR-00002-GHD, 2011 WL 6812626, *5 (N.D. Miss. 2011).

134. Damages may be recovered for defamation, even by a public figure as plaintiff. Curtis Pub. Co. v. Butts, 388 U.S. 130, 155 (1967).

135. U.S. v. Scruggs, Criminal No. 3:09-CR-00002-GHD, 2011 WL 6812626, *5 (N.D. Miss. 2011).

136. Publication of trade secrets may be a criminal act. U.S. v. Genovese, 409 F.Supp.2d 253, 256 (S.D.N.Y. 2005).

137. Or, perhaps not. Charlie Savage, *U.S. Prosecutors Study WikiLeaks Prosecution,* N.Y. TIMES, DEC. 7, 2010, *available at* http://www.nytimes.com/2010/12/08/world/08leak.html. [Prosecutors mull the prosecution of news agencies who receive leaked government files.]

138. Citizens United v. Federal Election Comm'n*,* 2010 U.S. Lexis 766, ***104 (2012).

that marriage is banned because "homosexuality is sinful and same-sex marriage is not sanctioned by God." But, as he said, Proposition 8 said no such thing and the underlying rationale was unspoken.[139] Stone admits that "it is awkward at best for courts to sort out the 'real' purpose of the law," and as a consequence "courts are reluctant to invalidate laws on the ground that they surreptitiously enact a particular religious faith."[140]

The District Court in *Perry v. Schwarzenegger* [141] could not cite authorities to say that religious animus may be a basis upon which to invalidate legislation. For instance, quoting the Supreme Court's decision in *Palmore v. Sidoti,*[142] the *Perry v. Schwarzenegger* Court stated: "[T]he Constitution cannot control [private biases] but neither can it tolerate them." But *Palmore* did not pertain to the passage of legislation. Rather, *Palmore* turned upon a Florida state court judge's decision that it would be inappropriate to permit "the child's mother [who] was then cohabiting with a Negro" to have custody.[143] Religion played no role in the judge's decision, much less in any legislation permitting a state court to make custody decisions.

The *Perry v. Schwarzenegger* Court further relied upon *Lawrence v. Texas*,[144] the 7-2 Supreme Court decision striking down Texas' sodomy law. As Judge Walker observed, "[t]he arguments surrounding Proposition 8 raise a question similar to that addressed in *Lawrence*, when the Court asked whether a majority of citizens could use the power of the state to enforce 'profound and deep convictions accepted as ethical and moral Principles' through the criminal code."[145] But, *Lawrence* said:

The condemnation [of homosexuality] has been shaped by religious beliefs . . . . For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority

139. Stone, *supra* note 112, at 620.
140. *Id.* at 621.
141. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 1002 (N.D.Cal. 2010).
142. Palmore v. Sidoti, 466 U.S. 429 (1984).
143. *Id.* at 430.
144. Lawrence v. Texas, 539 U.S. 558 (2003).
145. *Schwarzenegger,* 704 F. Supp. 2d at 1002.

may use the power of the State to enforce these views on the whole society through operation of the criminal law.[146]

Lawrence's criticism of the Texas sodomy law thus did not turn upon religious animus. Rather, citing from *Planned Parenthood of Southeastern Pa. v. Casey*,[147] the *Lawrence* Court said that: "Our obligation is to define the liberty of all, not to mandate our own moral code."[148] The word "religious beliefs" occurs just once in *Lawrence* in the context of "[t]hese considerations do not answer the question before us."[149] There is a vast difference between saying, on the one hand, that the majority should not tyrannize the freedoms of a minority, and on the other hand saying that religion should not play a role in passing popular legislation.

CONCLUSION

A court in the United States should not use "religious beliefs" to answer the question of whether gay marriage should be lawful. The battle for civil rights should not tilt against religious speech as it did in *Perry v. Schwartzenegger*. It is one thing to complain about religion's effects upon politics and quite another thing to strike legislation because it had the backing of religious groups. It makes no sense to strike the legislation on the basis of the identity of the promoter. The courts should embrace civil rights and the rights of speech and religion at the same time. The courts may strike legislation because it imperils one's civil rights and not because despised religious groups advanced it.

As Justice O'Connor wrote in *McCreary County v. American Civil Liberties Union of Kentucky,* "[f]ree people are entitled to free and diverse thoughts, which government ought neither to constrain nor to direct."[150] Free people choose freely to associate themselves with religions, unions, trade groups or public interest organizations. Voters and legislators ought to hear all sorts of messages, be they about Baal or Moses. Churchpersons should not be coerced into silence.

---

146. *Lawrence*, 539 U.S. at 571.
147. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992).
148. 539 U.S. at 571 citing *Planned Parenthood*, 505 U.S. at 850.
149. 539 U.S. at 571 (2003).
150. McCreary County v. ACLU, 545 U.S. 844, 881 (2005).