CHAPTER 5

CONCLUSIONS

Contrary to the common assumption that judges merely cite aids in support of their legal conclusions, this survey of how American judges, both state and federal, used history and original intent of the guarantee of separation of church and state found that judges do not always use history to support their legal conclusions. The judicial uses of history in this case law survey were too complex and demonstrated several unexpected paradoxes. In short, history was more than mere supportive aid in legal reasoning.

Few scholars have examined the complex role history plays in legal reasoning. J.A.G. Popock was the first to examine how common law lawyers in England used the history of the "ancient constitution," which had no historical foundation in fact, as a means of placing rights and liberties beyond the reach of the sovereign.[1] The appeal of a using a founding history, such as a the idea of an ancient constitution, was its' power as a *negative* argument which could place law and tradition beyond the will of the sovereign. Popock's insights suggest that lawyers' history is not only special in securing rights and liberties, but also, a partisan tool for those arguing against the excesses of the crown.

In the American context, history and original intent takes on a special significance—because we have a written Constitution and founders. Here, history must define and defend the American Constitution and its provisions. This study examined the guarantee of separation of church and state. Separation of church and state was an ideal subject because it fits into the American idea of limited government—government should

not aid religion, or determine religious truths, because government was incompetent to do so. Americans have valued the guarantee of separation as a co-guarantor of religious liberty. If any history is dear to Americans, it is the colonists' struggles to secure what they saw as fundamental natural rights of religious liberty.

However, this survey of the case law found that the uses of history did not always meet common expectations. History did not always justify separation or limited government. History did not always protect a high wall of separation. *Accommodationist* history was the most prominent type of original intent of the federal founders' observed. Madison and Jefferson were rarely consulted for their separationist views, if they were consulted at all. Long time separationist historians, such as Leonard Levy, were misquoted and misused. Citations to history books were almost non existent. History did not always "match" the legal conclusions. Separationists histories are found in opinions reaching accommodationist legal outcomes. When faced with historical "truth" or law, judges always chose the law or the precedent. Indeed, legal positivism would defeat the introduction of "history." This study found that when matched or measured against the legal outcomes, "history" was irrelevant to legal reasoning. So why bother citing history?

Several scholars have tried to decipher the judicial uses of history.[2] Most have offered descriptive typologies or functions. Constrained by single case study approach, none have examined one area across time or jurisdiction. By examining the guarantee of separation of church and state across time, and across jurisdiction, this study found that there exists no one type or no one function of the judicial uses of history. But what counts as legal reasoning? Is it the *dicta* or results which counts, or both?

This survey found that the uses of history in this area clearly identified historical eras of legal history. The most significant observation is that the type of history the judiciary uses at any one time reflects dominant paradigms of legal thought. This study also found that history and original intent came in different varieties. There were no one historical 'truth' but several. At the same time, the case law across time demonstrated a strong commitment to legalism, legal formalism and common law principles. In fact, entrenched principles of the common law still govern American legal thought in this area. The American legal community is clearly wedded to common law reasoning. This study also found that the use of one type of original intent did not predict the legal outcome. History was, for the most part, "window dressing" or *dicta* in legal opinions. When needed, the lawyers "invented" a history (i.e., the accommodationist "list" discussed in **Chapter 3** above) to avoid the dark side of a history of religious discrimination by the colonists—in short, sanitize the past in order to justify the status quo. This study also found that federalism had a great impact on the development of the meaning of separation, the state courts being the leaders in the uses of history and the development of separationist doctrine. It was due to the strictness of the wordings of the state constitutions. Finally, if American judges disagreed on whether the founders were separations or accommodationists, all joined in a shared separationist consensus. The most conservative accommodationist would vote to prohibit monetary aid to religion. These findings will be discussed more fully below.

I. Summary of Findings.

A. Historicity in the Uses of History: Three Eras --Three Principles of

Separation.

The "historical" meaning of separation of church and state was not static, but reflected *three different eras* of American legal history. The first era reflected the dependence upon and influence of English common law. Law during this first era was the product of early American legal education -- the reading of English case law of property and contract. Thus we see English principles of property, contract, and of labor law were applied in the American context.

However, the first era did not adopt the English notions of the union of church and state that existed in England. On the contrary, American judges understood "separation" to mean the complete break with the English past involving church-state unions (as property in both church office and glebe land). In the case law in early America involving church property disputes, one can see the beginnings of separationist principle (government is incompetent to determine religious truths).

No doubt, the reception of English common law had two profound effects on the development of American legal understandings of the meaning of "separation." One, the complete secularization of what today would be viewed as aids to Christianity, e.g., Sunday law as labor law. Second, the narrowing of the meaning of religious freedom to a mere guarantee of religious liberty (i.e., no coercion), but not to include religiously motivated action. These two effects would have a great impact on the development of religious liberty law. In short, the adoption of English common law was both liberating and narrowing in its impact.

The second era was that of state framers' intent involving separation of church

and state as guaranteed in the state constitutions. This era was a product of the early public schools movement and the ideology of democratic western expansion. American judges turned to American experiences, not English law, to resolve litigation involving Bible reading in the public schools. This era marks a conceptual change in American legal thought, from one of understanding "separation" as mere religious liberty (i.e., no coercion), to one of understanding the meaning of "separation" as the guarantee of equality (i.e., no preference). This dramatic change in legal thinking was due to the application of strict separationist wordings of the state constitutions themselves, e.g., Blaine Amendments, which were added to prohibit state aid to church schools. Here, legal change was the product of local state lawmaking and the legal tradition of legal positivism. State framers' intent, not federal founders, thus became the first original intent on the meaning of American guarantees of separation of church and state.

The third era, or the modern era, was the product of several forces. One, the incorporation of the federal constitution's First Amendment on the states, which made Thomas Jefferson and James Madison, as authors of the First Amendment, legitimate authorities to cite. However, the introduction of Jefferson and Madison did not settle the debate over the meaning of "separation," but rather contributed to the two contradictory founders' intents which now exist: accommodationist intent, which argues that the founders wanted to aid religion, and separationist intent, which argues that the founders wished to erect a high "wall of separation," in the words of Jefferson, between church and state.

This study found that the most frequent variety of federal founders' intent was the

accommodationist variety. To be sure, this view has its roots in the early American Puritan goal of establishing a "Christian" state on this continent.[3] This goal was later articulated in the state constitutional drafting of the Massachusetts constitution of 1820.[4] The "lawyer's" version of this history or Puritan goal evolved into a lawyer's "list" of past or present governmental aids to religion. The accommodationist "list" would not appear in majority opinions to sanction state aid to religion until the 1920's. Today, accommodationist "lists" are frequently found in litigation involving religious displays in public places, and in dissenting opinions.

The second variety, separationist intent, had its roots in the legacy of the separate jurisdictions between the ecclesiastical and the secular courts in English law, e.g., jurisdictional separation, which meant that government was incompetent to determine religious truths. The federal variety of separationist intent appeared in the 1940's as a product of the incorporation of the First Amendment to the states. It is often cited as a means to scold lawyers or lower courts on the principle of protecting religious minorities from the majority. The growing importance of the First Amendment -- it's reading and its scholarship has reinforced separationist intent.

B. Entrenched Principles: Separationism and the Common Law.

It appears that, once the American judiciary adopted a principle of the common law, it would not relinquish it. In the area of the establishment clause and its state counterparts, certain core principles became entrenched into American law. These entrenched principles were the product of the case law method in American legal education and to legal community's commitment to common-law reasoning (e.g., the "one

right answer" to every case). The American legal community's commitment was, not to "history" or original intent, but rather, to legalism or legal formalism. American law has never abandoned English common law. For example:

Torts and trespass. The early cases involving relief from state-imposed Bible reading in the public schools treated the problem as a "tort," or harm. Finding no harm in the mere act of reading, the cases were dismissed. Change came about when the western judges, relying on the wordings of their state constitutions, were able to see the act of Bible reading as giving preference to one religion over others or over non-religion.

Contract. Is there a valid contract? In one case, the court found that a contract did not exist.[5] In another case, the court found that a school board could not contract with a sectarian college to provide for public school teachers, because it had no authority to make such contracts.[6] This "no contract -- thus no authority" rule was prominent in state bus aid litigation. In one case, the court held that the bus aid was invalid because the jurisdiction of the public school district did not extend beyond its boundaries.[7] At the very least, the legal language, or the phrasing of the contract, must be correct, or it was struck down.[8]

Labor law. Sunday laws have been analyzed in terms of the sovereign's power to regulate labor, just as William Blackstone had done. Such laws were rarely, if ever, struck down as aids to Christianity (the California Supreme Court being the one exception).[9] Instead, state litigation involved the applicability of state laws to various activities (e.g., sports, recreation, travel or the public sale of alcohol) and rarely involved constitutional issues. The courts have been satisfied in determining whether practices

were exempted as a "work of necessity or charity" under state laws.

Fighting words. The state blasphemy cases were treated as the English had treated them -- as disturbing the public peace, or "fighting words," a regulation under the police power. Such laws were not seen as aids to Christianity. It was not until *State v. West* (1970) that the last remaining state blasphemy law was struck down as a violation of freedom of expression under the First Amendment.[10]

Administrative law. A general rule of administrative law is that at minimum government agencies must follow their own rules and practices. In *Feminist Women's Health Center v. Philibosian* (1984), a court argued *inter alia* that the district attorney could not provide a religious service at a county burial of fetal remains because his "practices and procedures" did not provide for religious ceremonies in all cases, nor give him the discretion to do more than what the law required him to do.[11]

Legal positivism--law is the command of the sovereign. The rule of legal positivism means that, when there is no current law, there is no authority. Thus, state authority to aid religion can be defeated by the simple expedient of observing that no law existed. If there is no law or enabling statute, then there was no authorization. This argument prevailed in state bus aid cases.[12] If there is no law, then there is no crime. This was seen in an early Kentucky case, where the court dismissed the blasphemy indictment because the state of Kentucky did not have a blasphemy law.[13]

Judges utilized legal positivism to reject counsel's accommodationist interpretation of Article III of the Northwest Ordinance in the western Bible reading cases. The ordinance was no longer law in a territory once that territory became a state,

an argument affirmed by the U.S. Supreme Court.[14] Since the ordinance was no longer law, both it and its intent were irrelevant.

Legal positivism also means that only current law applies. In state controversies involving religious education in the public schools, judges readily applied their Blaine Amendments or current state laws prohibiting sectarian literature and instruction in the public schools.[15]

Stare Decisis. The common-law method of the application of precedent involved the application of the rule of law to cases where the facts matched. When the facts did not match, the courts steadfastly refused to apply the *dictum* of the precedent. For example, it was common for counsel to rely on the U.S. Supreme Court's *Zorach*'s "We are a religious people" statement as if it were the rule of law. However, unless the facts of the case matched those of *Zorach* (i.e., an off-campus release case), the judiciary rejected an application of *Zorach* and considered its accommodationist statement as mere *dictum*.[16] Legalism has meant confining the precedent to the rule of law, not its historicism.

Procedural rules. The procedural rules of the common law legal system have erected serious barriers to the use of "history" books or "learned treatises" as evidence in litigation. Most notably, the federal rules of procedure state that treatises cannot be admitted as exhibits, but can be discussed when accompanied by the testimony of expert witnesses.[17] The rule is concerned that the treatises are not "misunderstood and misapplied" in the courtroom. The rules also do not allow judicial notice to be taken of texts whose facts are in dispute.[18] These rules of procedure reflect two major concerns:

that evidence be tested by the adversarial system (i.e., examination and cross-examination); and that the introduction of extrinsic evidence, without such testing and without according the opposing side the "opportunity to be heard" might well deny procedural due process.

Representative Government. Principles of American government could also defeat attempts at union of church and state. For example, in *State v. Celmer* (1976), an individual challenged the jurisdiction of a municipal court, where the municipality was the incorporated Methodist church.[19] The superior court dismissed a conviction by abolishing the city government, on the ground that it "establishes a government by a religious organization."[20] The vice in such an arrangement was that no resident took part in either appointing or electing the city council, which wrote the municipal laws for the city. "Law" proper must come from a legitimate, elected body. The New Jersey Supreme Court agreed, finding the arrangement offensive as violating the state's constitutional prohibition of religious requirements for public office.[21]

A resort to fundamental freedoms has also been utilized to resolve church-state conflicts, such as freedom of speech and intellectual freedom,[22] the sanctity of private property,[23] and the use of public property as a public forum for the dissemination of ideas.[24]

"Shock the Conscience." The judiciary has exhibited a sensitivity to actual or threatened coercion which "shocks the conscience and sense of justice of the people."[25] The judiciary was concerned with two fears: first, the fear that the judicial arm could be used to coerce religious choice in inflicting penalties and punishments (which Lord

Mansfield denied the common law had ever done); second, the fear that an intolerant society will erode First Amendment freedoms.

The fear of the court's inflicting penalties can be seen in the Jehovah's Witnesses cases. Utilizing a variety of legal techniques, including legal positivism (e.g., the law has no penalty) and independent state grounds, few courts refused to find parents "unfit" under state law. It was the state courts' emphasis on actual punishments involved, not whether the state laws were unconstitutional in an abstract sense that makes these cases unique in their approach.

State courts also refused to modify or enforce divorce or child custody decree that reflected religious choice. Enforcing decrees would put the judiciary in the position of jailing people because of their refusal to discontinue religious meetings in a home.[26] Nor would courts use their authority to deprive parents of custody of their children solely because one parent was a Jehovah's Witness or an atheist.[27] In either case, the judiciary feared the use of judicial power to coerce religious choice.

Also, recounting the facts of a case is often designed to "shock" the conscience of the average person. This was seen in a recent case involving a moment of silence in a public school, where a child of the Jewish faith suffered both psychological and physical indignities.[28] If left unchecked, society's intolerance would jeopardize First Amendment freedoms for all.

"Shock the conscience" works because the horrors of the past (i.e., history) are unnecessary when the horrors of the present are sufficient to persuade the reader of the correctness of the court's conclusions. These principles, so common in the resolution of

legal disputes involving separation of church and state, illustrate the persistence of the common law in American law.

D. The Mismatch of History and Law: Redundant Dicta.

Seventy-four percent of the cases surveyed for this study did not invoke historical references at all. This absence of historical narrative can be attributed to the traditional common law view that "extrinsic" aids are not appropriate in legal reasoning. Judges have argued that "history" was too ambiguous,[29] did not constitute law proper,[30] or that rights "declared in words might be lost in reality."[31] Judges have refused to enter historical debates, or they complain that the existence of a debate "is barren of meaning and persuasive power."[32]

The "history" that judges invoked was mostly *dicta* for a number of reasons. First was the observed lack of correspondence between history (accommodationist or separationist) and legal outcomes (sanctioning or striking down state aid to religion). At least fifteen opinions exhibited this lack of correlation: accommodationist intents in opinions reaching separationist outcomes.[33] and separationist intents in opinions reaching separationist outcomes.[34] It was the most puzzling phenomenon to find an elegant accommodationist "list" in an opinion striking down Bible reading in the public schools.[35] Or the first examination of James Madison's *Detached Memoranda*, where Madison clearly states that legislative chaplains violate the First Amendment, in an opinion upholding the state practice of paying the salary of two legislative chaplains, both of who were Catholic priests.[36] There is no real answer to any of those cases. Perhaps judges used history to limit the law in that case, e.g., we are sanctioning the aid here, but not in

other cases. Perhaps the court is following precedent, and decides to elaborate on what history it thinks is correct, or scolds counsel for citing the wrong history.

When the history cited corresponded to the legal outcome, the legal outcome was often reached through common-law principle, doctrine, or precedent. Here, history invoked was redundant or "window dressing" to the legalism. Only four cases relied on historical intent to reach the legal outcomes, two lower court opinions that were overturned on appeal, and two U.S. Supreme Court opinions.[37]

The highest correlation between type of intent (accommodationist or separationist) and the legal outcome was accommodationist histories and accommodationist outcomes, as illustrated in Figures 1 and 2. A closer examination of those 87 cases that invoked federal founders' intent reveals accommodationist history was needed to avoid the application of the *Lemon* test or a separationist outcome dictated by legalism.

Figure 1.

Uses of Federal Founders' Intent: Percentage of the Uses of Accommodationist History Compared to the Legal Results in 87 Cases

	Accommodationist History: Yes	Accommodationist History: No
Result: Yes	82.6	29.6
Result: No	17.4	70.4
	100.0	100.0

Figure 2

Uses of Federal Founders' Intent: Percentage of the Uses of Separationist Histories Compared to the Legal Results in 87 Cases.

		Separationist History	
		Yes	No
Result	Yes	63.9	35.7
	No	36.1	64.3
		100.0	100.0

While significant to predicting the outcome of a case (sanctioning or striking down the aid in question) as the data shows, the use of the accommodationist "list" is, in the final analysis, *dicta* to the legal reasoning. The basic premise of the "list" is that government can permissibly aid religion. However, the majority opinions that have used the "list" tend to argue that the aid in question is permissible because it does not violate religious liberty (i.e., no coercion). The "list" is of no help because the "list" of governmental aids to religion is not the history of religious liberty in America. Historian Sanford Cobb's classic work clearly shows that the history of religious liberty in America was the attempt to obtain both equality of rights and secure separation of church and state through law.[38] In short, the history of religious liberty is the history of separation!

Moreover, those who assert that the "list" is evidence that government can aid religion, as long as there is no force or compulsion, are substituting the free exercise standard for the establishment clause and resurrecting English toleration, i.e., the state can aid religion, leaving religious dissenters free from penalty. This, however, as Sanford Cobb has argued, is what the American concept of religious liberty rejected.[39]

D. Sanitizing the Dark Side of Religious Liberty: The Development of Accommodationist Theory.

Those who are advocates of originalism as a standard in constitutional decision making run into the problem of the dark side of American history: blasphemy laws, taxing in support of ministers, religious oaths for office, and discrimination against religious minorities. The most innovative means to get around this dark past was the lawyer's accommodationist "list" (which has no counterpart in the scholarship). The "list," devoid of historical context, is a list of benign aids that are acceptable today. Note what is not on the "list" namely, any colonial precedent, blasphemy laws or religious oaths for office. The accommodationist "list" avoids those precedents.

In the final analysis, the "list" is a remarkable and thoughtful invention. Its shortcoming is that it merely justifies the legal status quo of what is acceptable today.

E. The Impact of State Courts.

The state courts have been the leaders, not the followers, in articulating both the historical intent of separation and separationist principles simply because they were the first courts to resolve church-state disputes. The very first disputes that reached the state courts were those of church property. In fact, property claims were inevitably linked to

the development of the distinction between the secular state and religion.[40] American judges turned to English precedent to resolve such disputes, adopting the principle that the common law courts were incompetent to determine religious truths because there existed a rival ecclesiastical court that had jurisdiction over religious truths. This principle in the American context, became government in general could not settle church claims over property because that would involve a state church under American law.

A state court was the first to cite and apply the First Amendment's establishment clause in a case involving former federal territory.[41] This case is significant in illustrating that both sides understood that "establishment meant" more than "religious liberty" and "no tax aid to religion," but also involved not recognizing the right of advowson, which is the property interest in church office.

The state courts were the first to reject the accommodationist *dictum* that "We are a religious people" when that argument was presented as community morality.[42] The state courts were also the first to reject the accommodationist interpretation of federal founders' intent, evidenced in Article III of the Northwest Ordinance. The Ohio, Wisconsin and Illinois state supreme courts all rejected counsel's accommodationism.

The state courts provided an alternative to the accommodationist interpretation of the Northwest Ordinance, that of democratic goals of the western settlers. State framers' intent, not federal founders, thus became the first "original intent" invoked involving the meaning of separation of church and state. The state courts broke free of English law and the past of 1776, forever changing the meaning of separation of church and state. It is of interest to note that state framers' intent was not exactly "history," but rather an

observation of demographic change in American society -- the religious diversity of present-day society.

The state courts today continue to carry on their separationist traditions by means of independent state grounds. Generally unhappy with U.S. Supreme Court accommodationist *dicta*, a number of state courts have justified stricter separation or have read its accommodationist *dicta* back into the separationist tradition.[43] For example, Idaho, Alaska, Hawaii, Nebraska, Wisconsin, Delaware and Oklahoma have struck down bus aid to parochial schools under their state constitutions, arguing that their state framers secured a stricter separation than that of the First Amendment.[44] The same attitude can be seen in the area of textbook aid (both areas where the U.S. Supreme Court sanctioned such aids).[45]

If the state courts were the first to reject the Northwest Ordinance as a guide, they were also the first to invent the accommodationist "list" as evidence of federal founders' intent to aid religion.[46] In the 1920's, federal founders' intent appears in majority opinions sustaining state blasphemy law, Sunday law, and Bible reading in the public schools.[47] No doubt, enormous creativity and thoughtfulness exist at the state level of judicial decision making.

II. The Separationist Consensus and the Appeal of History.

There exists in American law limits on what government may not do in the area of religion. These accepted limitations constitute a separation consensus among the legal community. These core principles are: that government shall not provide money to religious institutions or to religious instruction; that government shall not coerce by law

or allow peer pressure (e.g., it shocks the conscience); that government shall not delegate governmental decision making to sectarian agents; and that government shall not determine religious truths because it is incompetent to do so. These limits constitute the minimum consensus about what government many never do. This separationist consensus has operated as a "check" on governmental action. However, its employment has not led to predictable results or consistent application or doctrine.

If separationist consensus works, why invoke history? The use of history invokes another kind of consensus -- locating rights and liberties at the time of the founding. The great appeal of history is that it introduces a two-contract or Lockean view of American government's protection of rights and liberties, where a social consensus (the first contract) defines the meaning of the second contract (the Constitution). This view has great appeal in American thought and is persuasive because of its antigovernment appeal. Like the English common law lawyer's invention of the concept of the Ancient Constitution, as it is a means to locate rights and liberties beyond the sovereign's will. Americans like original intent because it locates liberties beyond the written texts and appeals to society for the protection of those liberties.[48]

However, history's defense of rights and liberties is at odds with the practice of strict legal positivism and the rights theories of the legal scholars. The legal community has been reluctant to allow the security of rights reside with majorities (i.e., the community) or with unwritten promises. The legal community rarely assumes that the community is tolerant, since its experience has been one of settling the dark side of society's conflicts. Strict legal positivism is also hostile to the idea of natural rights --

locating rights outside written promises. History is distrusted and discarded not because it is unknowable, but rather, because it is unpredictable and in practice does not secure rights. For the legal community, law, not history, is the protector of ever-expanding liberty, rights and property. In short, when the legal community became the keeper of the liberal tradition, historicism was abandoned in favor of traditional legal techniques. It has not been able to recover since.

ENDNOTES TO CONCLUSIONS

1

See, e.g., J.G.A. POCOCK, THE ANCIENT CONSTITUTION AND THE FEUDAL LAW (1957).

2

See, e.g., CHARLES A. MILLER, THE SUPREME COURT AND THE USES OF HISTORY (1969); John G. Wofford, *The Blinding Light: The Uses of History in Constitutional Interpretation*, 31 U. CHI. L. REV. 502 (1964); Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119; Jacobus tenbroek, *Use of the United States Supreme Court of Extrinsic Aids in Constitutional Construction*, 26 CAL. L. REV. 287, 437-664 (1938, 27 CAL. L. REV. 157-399 (1939).

Recent contributions include: William W. Weicek, *Clio as Hostage: The United States Supreme Court and the Uses of History*, 24 CAL. W. L. REV. 227 (1987); Peter Irons, *Clio on the Stand: The Promise and Perils of Historical Review*, 24 CAL. W. L. REV. 337 (1987); H. Jefferson Powell, *Rules for Originalists*, 73 VAL. L. REV. 659 (1987); and GREGORY BASSHAM, ORIGINAL INTENT AND THE CONSTITUTION: PHILOSOPHICAL STUDY (1992). *See also* Clyde W. Summers, *Sources and Limits of Religious Freedom*, 41 ILL. L. REV. 53 (1946).

3

See, e.g., PERRY MILLER, ERRAND INTO WILDERNESS (1956).

4

MASSACHUSETTS CONSTITUTIONAL CONVENTION 1779-1780: JOURNAL OF THE CONVENTION (1832).

5

See, e.g., Donahue v. Richards, 38 Me. 379 (1854) discussed in **Chapter 2** *supra*; McCormick v. Bust, 95 Ill. 263 (1880); Spiller v. Woburn, 94 Mass. 127 (1866) discussed in **Chapter 2** *supra*.

6

See, e.g., Synod of Dakota v. State, 2 S.D. 366, 50 N.W. 632 (Sup. Ct. S.D. 1891) discussed in **Chapter 2** *supra* note 58 and accompanying text.

7

See, e.g., McVey v Hawkins, 364 Mo. 44, 258 S.W. 2d 927 (Sup. Ct. Mo. 1953); Americans United for Separation of Church and State v. Benton, 413 F. Supp. 955 (Iowa 1976); Jamestown v. Schmit, 427 F. Supp. 1339 (R.I. 1977).

8

See, e.g., California v. Priest, 12 Cal. 3d 593, 16 Cal. Rptr. 361, 526 P. 2d 573 (Sup. Ct. Cal. 1974) (upholding state subsidies to private colleges, including religious ones. It is of interest to note that the court is careful to examine the "contract" and found a provision providing that no state funds were to used for sectarian instruction on campuses receiving the aid, that provision saved it).

9

See, e.g., Ex Parte Newman, 9 Cal. 502 (1858).

10

See, e.g., State v. West, 3 Md. App. 270, 263 A. 2d 602 (1970).

11

157 Cal. App. 3d 1076, 203 Cal. Rptr. 918 (1984) (religious service at county burial of fetuses violated both state and federal constitutions).

12

See, e.g., School District v. Houghton, 387 Pa. 236, 128 A. 2d 58 (Sup. Ct. Pa. 1956); Squires v. Inhabitants of Augusta, 155 Me. 151, 153 A. 2d 80 (1959). These cases are discussed in **Chapter 3** *supra*.

13

The Kentucky court said:

> In the code of laws of a country enjoying absolute religious freedom there is no place for the common law crime of blasphemy. Unsuited to the spirit of the age, its enforcement would be in contravention of the constitution of this state, and this crime must be considered a stranger to the laws of Kentucky.

reprinted *in* THEODORE A. SCHROEDER, CONSTITUTIONAL FREE SPEECH 64 (1919). Again, legal positivism (Kentucky had no blasphemy law) defeated the accommodationist argument. *See also* State v. Smith, 155 Kan. 588, 596, 127 P. 2d 518, 523 (1942).

14

Permoli v. New Orleans, 3 How. 589 (1844) (involving the free exercise clause).

15

See, e.g., Evans v. Selma Union High School District of Fresno City, 193 Cal. 54, 222 P. 801 (1924) (involving a state law barring 'sectarian' books from the public schools); Miller v. Cooper, 56 N.M. 355, 244 P. 2d 520 (1952) (the application of a state law barring sectarian literature in the public classroom); or State v. District Board no. 8, *supra* note 39. Wis. CONST. art. 10 § 2 subd. 1 provided: "The Legislature shall provide by law for the establishment of the district schools. . . and no establishment of the district schools. . . and no sectarian instruction shall be allowed therein."

Compare Utter, *Church and State on the Frontier: The History of the Establishment Clause in the Washington State Constitution*, 15 HASTINGS L. Q. 451 (1988) (Justice Utter recounts the religious aspirations of the state framers as accommodationist), with the actual application of the state constitutional provisions of the Washington constitution which the Washington Supreme Court interpreted as reflecting a separationist intent. *See, e.g.*, State v. Frazier, 102 Wash. 367, 173 P. 35 (Sup. Ct. Wash. 1918) discussed in **Chapter 2** *supra*; Bolling v. Superior Court for Clallam County, 16 Wash. 2d 373, 133 P. 2d 803 (Sup. Ct. Wash. 1943); Perry School District no. 8, 344 P. 2d 1036 (Sup. Ct. Wash. 1959); Calvary Bible Presbyterian Church of Seattle v. Board of Regents of University of Washington, 72 Wash. 2d 912, 436 P. 2d 189 (Sup. Ct. Wash. 1967) discussed in **Chapter 3** *supra*; or Weiss v. Bruno, 82 Wash. 2d 199, 509 P. 2d 973 (Sup. Ct. Wash. 1973) (arguing that the state constitution was stricter than the federal concerning the wall of separation).

16

33 U.S. 203 (1948), 343 U.S. 306 (1952).

See, e.g., Collins v. Chandler Unified School District, 470 F. Supp. 959, 963 (1979). The court said:

> They also contend that the prayers said at assemblies are voluntary, and are protected by the free speech provision of the First Amendment, and fall within the exception mentioned in Zorach v. Clauson by Justice Douglas. . . . Aside from the fact that such statements by Justice Douglas were dicta (that is not necessary to the decision on the facts presented in that case), the actual facts of the case involved religious activity not conducted by the school away from the school under a release time program. (citations omitted, italics in original, at 963)

17
See, e.g.,:

> To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be recieved as exhibits.

At Fed. R. Evid. 803 § 18.

18
Id. at 783 (commentary by editors):

> Judicial notice is the cognizance of certain facts which judges and jurors may properly take and act on without proof because they already know them.

in the C.J.S. 6, Evidence. Or:

> . . . The court may resort to dictionaries, works of history, or other writings. These works are not strictly evidence, and are not conclusive, but are used, at the option of the judge, to refresh his memory and bring actual knowledge up to judicial knowledge. . . . (citations omitted)

See also Rule 201 "Judicial Notice of Adjudicative Facts" at Fed. R. Evid. 201.

19
143 N.J. Super. 371, 362 A. 2d 1330, *rev'd*, 157 N.J. Super. 242, 384 A. 2d 894, *rev'd*, 80 N.J. 405, 404 A.2d 1, *cert. denied*, Ocean Grove Camp Meeting Ass'n of United

Methodist Church v. Celmer, 444 U.S. 951 (1979).

20
143 N.J. Super. 376, 362 A. 2d 1332.

21
80 N.J. 417, 404 A. 2d 6.

22
See, e.g., State v. West, *supra* note 9 (striking down Maryland's blasphemy law); Gaston County Board of Education v. Moore, 357 F. Supp. 37 (1973) (invalidating school board's decision to fire a teacher for answering student questions with Darwinian theory). Discussed in **Chapter 4** *supra*.

23
Terret v. Taylor, 13 U.S. (9 Cranch) 43 (1815) discussed in **Chapter 1** *supra*.

24
See, e.g., Berger v. Rensselaer Central School Corp., 766 F. Supp. 696 (1991) (allowing the distribution of Gideon Bibles in the public schools), *rev'd*, 982 F. 2d 1160 (1993).

25
See, e.g., United States v. Rosenberg, 195 F. 2d 583, 608 (Frank, J.), *cert. denied*, 344 U.S. 838 (1952). Quoted by Justice Marshall in Furman v. Georgia, 408 U.S. 238, 360, 369 (Marshall, J., concurring) (striking down Georgia's death penalty law).

26
See, e.g., Bond v. Bond, 109 S.E., 2d 16 (Sup. Ct. App. W. Va. 1959). *See also* Brown v. Szakal, 514 A. 2d 81 (Sup. Ct. N.J. 1986) (father could not be required to observe the Jewish Sabbath and dietary laws during child visitation when mother converted to Judaism).

27
See, e.g., Bonjour v. Bonjour, 592 P. 2d 1233 (1979). *See also* In re Adoption of "E," 271 A. 2d 27, 279 A. 2d 785, 59 N.J. 36 (N.J. 1971).

28
See, e.g., Walter v. West Virginia Board of Education, 610 F. Sup. 1169, 1170-1173 (1985).

29
See, e.g., Justice Brennan's remarks in his concurring opinion in School District

of Abington Township v. Schempp, 374 U.S. 203, 237 (1963) (Brennan, J., concurring):

> . . . A too literal quest for the advice of the Founding Fathers upon the issues of these cases seems to me futile and misdirected for several reasons: First, on our precise problem the historical record is at best ambiguous, and statements can readily be found to support either side of the proposition. The ambiguity of history is understandable if we recall the nature of the problems uppermost in the thinking of the statesmen who fashioned the religious guarantees. . . .

30

See, e.g., State v. District Board, 76 Wis., 177, 44 N.W. 997 (1890).

31

Rights declared in words might be lost in reality. . .

in Weems v. United States, 217 U.S. 349, 373 (1910) (declaring that the meaning of the Eighth Amendment was not fixed in history).

32

Weisman v. Lee, 908 F. 2d 1090, 1093 (1990) (Bownes, S.C.J., concurring).

33

See, e.g., Everson v. Board of Education, 330 U.S. 1 (1947); McGowan v. Maryland, 366 U.S. 420 (1961); Horace Mann League of the U.S. v. Board of Public Works, 242 Md. 645, 220 A. 2d 51 (1966); State v. Gamble, 144 N.W. 2d 740 (1966); Fox v. Board of Education, 93 N.J. Super. 544, 226 A. 2d 471 (1967); Americans United v. Independent School District, 288 Minn., 196, 179 N.W. 2d 146 (1970); Americans United v. Bubb, 379 F. Supp. 892 (1974); Colo v. Treasurer and Reciever General, 378 Mass. 550, 392 N.E. 2d 1195 (1979); Bogen v. Doty, 456 F. Supp. 983 (1978); and Berger v. Rensselaer Central School Corp., 766 F. Supp. 696 (1991) [*rev'd*, 982 F. 2d 1160]. These cases are examined in **Chapter 4** *supra*. *See also* Lewis v. Board of Education of City of New York, 285 N.Y.S. 164 [*mod.*, 286 N.Y.S. 147, *app. dis.*, 288 N.Y.S. 751, *app. dis.*, 12 N.E. 2d 172 (Sup. Ct. N.Y. 1936)].

34

See, e.g., Herold v. Parish Board of School Directors, 136 La. 1034, 68 S. 116 (1915); Carden v. Bland, 198 Tenn. 665, 288 S.W. 718 (1956) [*rev'd*]; Synder v. Town

of Newtown, 147 Conn. 374, 161 A. 2d 77 (1960); Chamberlain v. Dade County Board of Public Instruction, 143 S. 2d 21 (1962); School District of Abington Township v. Schempp, 374 U.S. 203 (1963) (Brennan, J., concurring); Sheldon v. Fannon, 221 F. Supp. 766 (1963); Calvary Bible v. Board of Regents, 72 Wash. 2d 912, 436 P. 2d 189 (1967) *cert. denied*, 393 U.S. 960; Lowe v. Eugene, 254 Or. 518, 463 P. 2d 360 (1969); People v. Baldwin, 112 Cal. Rptr. 290 (1974); Wiest v. Mt. Lebannon School District, 475 Pa. 166, 320 A. 2d 362 (1974); Stein v. Plainwell Community Schools, 822 F. 2d 1406 (1987); American Jewish Congress v. City of Chicago, 827 F. 2d 120 (1987) (Easterbrook, J., dissenting). These cases are examined in **Chapter 4** *supra*.

35
See, e.g., Herold v. Parish Board of School Directors, *supra* note 35.

36
See, e.g., Colo v. Treasurer and Reciever General, *supra* note 34.

37
See, e.g., Anderson v. Salt Lake City Corp., 348 F. Supp. 879 (1974) (striking down a display of a granite monolith with religious symbols on it, overturned on appeal); Jaffree v. Board of School Commissioners, 554 F. Supp. 1104 (1983) (upholding silent prayers in the public schools of Alabama) [*rev'd*, 705 F. 2d 1526, *aff'd*, 472 U.S. 38]; Marsh v. Chambers, 463 U.S. 783 (1983) (upholding the state practice of paying the legislative chaplain's salary); Lynch v. Donnelly, 465 U.S. 688 (1984) (upholding city sponsored display of a crèche).

38
See, e.g., Paul Weber, *James Madison and Religious Equality: The Perfect Separation*, 44 REV. OF POLITICS 163 (1982). *See also* SANFORD H. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA (1902, reprinted 1968).

39
Id.

40
See, e.g., Wardens Church of St. Louis of New Orleans v. Blanc, 8 Rob. 51, 18 La. Rpts. 28 (1844) discussed in **Chapter 4** *supra* note 38 and accompanying texts.

41
Id.

42
These cases are discussed in **Chapter 3** *supra*.

43

See, e.g., Bennet v. Livermore Unified School District, 193 Cal. App. 3d 1012 (1987).

44

See, e.g., Matthews v. Quinton, 362 P. 2d 932, *app. dis.*, 368 U.S. 517 (1961); Spears v. Honda 51 Hawaii, 1, 449 P.2d 130 (Sup. Ct. Hawaii 1968); State v. Nusbaum, 17 Wis. 2d 148, 115 N.W. 2d 761 (Wis. 1962); Board of Education v. Antone, 384 P. 2d 11 (Okla. 1963); Opinion of the Justices, 57 Del. 196, 216 A. 2d 668 (Del. 1966).

45

See, e.g., McDonald v. School Board, 90 S.D. 599, 246 N.W. 2d 93 (1976); Gaffney v. State Dep't of Educ., 192 Neb. 358, 220 N.W. 2d 550 (1974); Bloom v. School Comm., 376 Mass. 35, 379 N.E. 2d 578 (1978); California Teachers Ass'n v. Riles, 29 Cal. 3d 794, 632 P. 2d 953, 176 Cal. Rptr. 300 (1981); In re Advisory Opinion, 394 Mich. 41, 228 N.W. 2d 722 (1975); Dickman v. School Dist., 232 Or. 238, 366 P.2d 533 (1961), *cert. denied*, 371 U.S. 823 (1962).

46

See, e.g., State v. Mockus, 120 Me. 84, 113 A. 39 (Sup. Ct. Me. 1921) (upholding Maine's blasphemy law); Pirkey Bros. v. Commonwealth, 134 Va. 713, 114 S. E. 765 (Sup. Ct. Va. 1922) (upholding Sunday law); Wilkerson v. City of Rome, 152 Ga. 666, 110 S.E. 895 (Sup. Ct. Ga. 1922) (upholding Bible reading in the public schools). These cases are discussed in **Chapter 3** *supra*.

47

See, e.g., Herold v. Parish Board of School Directors, *supra* note 35.