

What Is Constitutional?

by Robert P. Jr Dugan

The Constitution is a sacred document that establishes a nation ruled by law, not men, and protects individual rights, but its meaning and application are often misunderstood.

Scripture: Proverbs 11:9, Proverbs 24:23, Isaiah 1:17, Matthew 22:21, Acts 5:29, Romans 13:1, 1 Corinthians 10:31, 1 Timothy 2:1, 1 Peter 2:16

Topics: "Religious Freedom", "Church State"

Description

Robert P. Jr Dugan discusses the importance of understanding the Constitution, particularly in relation to religious freedom and the separation of church and state. He highlights the misconceptions and ignorance surrounding constitutional law, emphasizing the need for clarity and knowledge in this area. Dugan delves into the historical context of the Constitution's formation, the significance of the Bill of Rights, and the evolving interpretations of the establishment clause by the Supreme Court. He also addresses the role of religion in public life, the rights of citizens to influence government, and the need for evangelicals to exercise their constitutional rights without being intimidated by arguments of separation of church and state.

Transcript

Phil Donahue's television show thrives on the controversial -- the more outlandish, the better. But until the day I found myself a participant on his show in December 1983, I had actually seen little more than occasional glimpses of the program.

Phil's intent for that day was to parlay President Ronald Reagan's November radio and television spots for the Layman's National Bible Week into a national controversy. The president had not simply referred to "the Bible" in his public service announcements, but had urged Americans to read "God's Word." In short, he had dared express publicly his belief about the Bible -- his religious conviction. To Donahue and much of his audience, such contentious commercials were out of order.

The cast of characters fascinated me. Two panelists were to critique the president: a Southern Baptist minister from North Carolina who also served as a vice president of his state's ACLU chapter, and an atheist from New York who found it necessary to tell the world he was a homosexual and proud of it. I was expected to support the president, along with Martin Marty, church history professor, author, and a regular contributor to Christian Century. While Marty did support Reagan's right to make the announcements, he obviously wished the president hadn't done so. Marty was generally critical throughout the show. It

became three against one, and Phil Donahue wasn't exactly on my side.

One theme kept recurring in the first half of the show: the president had done something worse than malevolent. He had violated the Constitution of the United States. On that accusation, I bided my time. Waiting can create a problem on a show like Donahue's, however, for if you're not aggressive, the hour will pass you by.

Finally, the time seemed right. I interrupted at the three-quarters mark. "Phil, I have a question that needs answering. Several times today I've heard somebody on this panel or in the audience say that the president did something 'unconstitutional' when he make those announcements. It's time somebody explained just how the president transgressed the Constitution he is sworn to uphold. Who will point out the constitutional chapter and verse that he violated?"

Silence. Not wanting the question to get away, I suggested that the only possible text in anybody's mind was the First Amendment, whose first sixteen words I then quoted. But that mentions Congress, not the president. It mentions a law, not the speech, remarks, or media announcements of the Chief Executive. The First Amendment authorizes free exercise of religion, a right the president had used.

"If President Reagan has not disobeyed the First Amendment to the Constitution, then what other section are we talking about?" No one said anything. Martin Marty assuredly knew I was right, and I suspect Donahue did too. But the discussion quickly moved on to other things, without an answer from any direction.

Pity those who, over the years, have "learned" most of what they know about constitutional law from lightweight shows like Donahue's. Our country is plagued with ignorance, especially where the Constitution is concerned.

A Hearst national survey marking the Constitution's 1987 bicentennial found that nearly 50 percent of

Americans thought the Constitution contained Karl Marx's axiom, "From each according to his ability, to each according to his need." Six out of ten thought that the president, acting alone, could appoint or fire a Supreme Court Justice. The same number were unaware that the Bill of Rights is the first ten amendments to the Constitution.

While anyone can benefit from using a hand-held calculator without knowing how it works, constitutional illiteracy is another matter. There is great danger when public opinion would deny rights guaranteed in the Constitution or demand rights that aren't there.

Profound misunderstanding of the Constitution has deeply affected evangelical Christians. Unfortunately, many have privatized their faith, meekly but unnecessarily submitting to the media elite's insistence that religiously-based convictions should have no part in public policy, that we must have what Richard John Neuhaus calls "The Naked Public Square." In some cases, they have even acquiesced in the matter of elections, having been cajoled into thinking that the personal moral qualifications and convictions of candidates are not proper political considerations.

Evangelicals have been rhetorically beaten about the head and shoulders until they are black and blue with one of the most misunderstood phrases of our time: "separation of church and state." Because they assume such separation to be constitutional, they knuckle under. Thus, the question posed by this chapter is critical: what is constitutional?

The "Grand Experiment" that became the United States of America has the Declaration of Independence for its foundation and the Constitution for its political structure. Several years ago Warren Burger, chief justice of the Supreme Court, sent a message to a National Day of Prayer banquet. His nephew Steve, an evangelical leader from Seattle, was his courier. The chief justice had discovered this marvelous quote in the writings of James Madison, and wanted to share it: "We would not have a Constitution, were it not for the intervention of God."

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That Constitution -- the result of much compromise -- was not perfect, but it has served magnificently. Over a century ago, British prime minister William Gladstone (who, from his side of the Atlantic, might have been expected to be critical of our breakaway nation) lauded our national charter: "I have always regarded that Constitution as the most remarkable work known to me in modern times to have been produced by the human intellect, at a single stroke (so to speak), in its application to political affairs."¹

About two-thirds of the world's constitutions have been adopted or revised since 1970, and only fourteen predate World War II.² Ours is the oldest written national constitution still in force in the world today, the source of the United States' remarkable political stability. When Sen. Daniel Patrick Moynihan (D-NY) was ambassador to the United Nations, he discovered that only seven nations going as far back as 1914 had not suffered a change of government through violent revolution.

The Constitution was signed on September 17, 1787, and technically ratified by the ninth state, New Hampshire, on June 21 of the following year. It seemed best to await the action of New York and Virginia, however, since the government could not succeed without them. After they ratified, the Continental Congress put the Constitution into effect on September 13, 1788.

The framers stated their intentions in a magnificent preamble:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Their foremost purpose was to establish a nation that would be ruled by law, not by men. The Constitution itself is basically a secular document which mentions

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religion only twice, the first time in the final paragraph of Article VI:

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office of public Trust under the United States.

The framers made provision for those unwilling to take an oath of office, usually implying formal calling upon God to bear witness to one's sincerity, by allowing office-holders merely to affirm their commitment to support the Constitution. The words following could not be more clear. They have always been observed in the legal and technical sense that no religious belief has ever been listed as a requirement to hold any federal political office.

On the other hand, the voting public may sometimes apply an unwritten religious test. Imagine a school board election in a Bible belt state, with a Southern Baptist running against an avowed atheist. It would be a rainy day in the Sahara before the non-believer would win. Imagine a last-minute revelation that one of two candidates in a congressional race is a "Moonie." No doubt about the outcome there. But one is not limited to hypothesizing about religious tests applied by voters.

In 1928, Alfred E. Smith had no chance for the presidency against Herbert Hoover because of anti-Catholic sentiment. In 1960, the anti-Catholic vote was still a reality, but it did not prevent John F. Kennedy from winning the presidency. A Williamsburg Charter survey in February 1988 found that only 8 percent would today refuse to vote for a Catholic but 13 percent would never vote for "a born again Baptist" for president, and 21 percent were unwilling to vote for a candidate who had been a minister of a church. On the other side, 62 percent were unwilling to vote for an atheist for president.

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Given the growing secularism in America, increasing numbers of voters consciously or unconsciously may discriminate against candidates with strong religious beliefs. There are scattered evidences of that in the last decade. In the summer of 1986, Norman Lear's People for the American Way (PAW) ballyhooed an "election project" targeted at religious intolerance in political campaigns. It was obvious that PAW believed there was plenty of it, especially among Christian candidates.

PAW insisted on five standards. Candidates should not: claim to be better qualified because of religious affiliation; assert that God endorses their views; question their opponents' religious faith or personal morality on the basis of their political stands; claim that God endorses their aspirations for public office; or accept support that violates these guidelines.

Who could disagree? Frankly, I've not seen many of these "violations" among evangelical candidates. The offensive, overtly Christian candidates PAW was describing were most likely to be found in made-for-television productions.

Do you see the irony here? PAW is oblivious to the beam in its own eye. It regularly set up negative religious tests, labeling committed Christians "ultra-fundamentalists," calling President Reagan "evangelist-in-chief," and ridiculing anyone who believes a philosophy of secular humanism exists. Worse yet, PAW conducted a national media campaign which precluded an evangelical Christian's appointment to the Justice Department, largely on the basis of his personal faith. That's not the American, constitutional way.

The second place religion is mentioned in the Constitution is in a portion added four years later. The chief barrier to ratification had been criticism that the Constitution lacked a Bill of Rights to prevent tyranny by the majority.

While the Constitution was being drafted in Philadelphia, Thomas Jefferson was serving as ambassador

to France. That December, on studying the document, he wrote to James Madison:

I will now tell you what I do not like. First, the omission of a bill of rights, providing clearly, and without the aid of sophism, for freedom of religion, freedom of the press, protection against standing armies, restriction of monopolies. . . 3

On July 31, 1788, Jefferson again wrote to Madison from Paris, revealing his intention for such a package:

I hope . . . a bill of rights will be formed to guard the people against the federal government, as they are already guarded against their State governments in most instances.

It is worth noting that Jefferson's letter did not express concern about protecting the government from religious influence, but precisely the opposite -- protecting religion, as practiced by the people, from the government.

It was James Madison's assurances that the first Congress would pass a Bill of Rights that calmed the fears of many. The promise was kept with ten amendments passed by Congress in September 1789, and their ratification completed on December 15, 1791.

America was the first country ever to establish religious freedom as its "first liberty." In the words of the first two clauses of the First Amendment are the guarantees of this precious freedom:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

- The no establishment clause ("Congress shall make no law respecting an establishment of religion . . .") means primarily that the federal government must not give preference to any one religion. No church could be elevated to an exclusive position of favor and power. The clause

makes all the sense in the world when we recall how many newcomers to America, like the Pilgrims, were fleeing religious persecution by established churches in Europe.

Still, at the time of the Revolution nine of the thirteen colonies had established churches, six being Anglican and three Congregational. Paradoxically, many who fled religious persecution became intolerant of dissenters in their own states. By 1787, however, four of those churches had been disestablished.⁴ The framers clearly intended that there would be no establishment of a national church. Later, by the "doctrine of incorporation," the 14th Amendment would apply the no establishment clause to the several states.

- The free exercise clause ("Congress shall make no law . . . prohibiting the free exercise thereof") means that citizens of all faiths or of no faith would have liberty not only to hold their deepest religious beliefs -- something that cannot be prevented even in a totalitarian society -- but also to express and practice them.

There are limitations, however. While the freedom to believe is absolute, the freedom to act cannot be. If a religion required human sacrifice, society would be obligated to interfere with the free exercise of that religion in order to protect the lives of potential victims.

It surprises many people to discover that the concept of "separation of church and state" is not found in the Constitution in so many words, but I do not make much of that. The word "trinity" is not found in the Bible either, but it is the ideal word to express a historic, orthodox doctrine of Scripture. Not incidentally, the concept of separation of church and state has for years been enunciated in the Soviet constitution.

Evangelicals believe strongly in the separation of church and state, as historically understood. Both institutions originate with God, and each has its proper spheres of responsibility. The obligation to evangelize belongs to the church; the duty to govern belongs to the state. The Bible

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spells out three functions for the state: to provide order, to promote well-doing, and to punish wrongdoing.⁵

To see how this works out, take the matter of discipline. Should the church interfere with the government's criminal justice system by springing from prison someone presumed to be innocent, or by hanging someone the church feels to have been mistakenly acquitted of murder? Either would be preposterous. Should government interfere with a church's internal discipline by forcing it against its will to hire a certain person, or by overruling its excommunication of an openly sinning member who is having an affair with a prominent leader in the community? Either of those would be preposterous, too.

Tragically, the preposterous sometimes happens.

In 1984, after a week-long trial, a Tulsa jury awarded \$390,000 in actual and punitive damages to a woman disfellowshipped by the Collinsville, Oklahoma Church of Christ, for having an affair with a politician. If there were ever a clear violation of the historic concept of separation of church and state, this is it.

What the framers intended church/state separation to mean is quite different from the Supreme Court's interpretation since 1947.⁶ In the last few decades much greater emphasis has been placed on the no establishment clause, with free exercise receding into the background. It's as if the High Court has been constitutionally allergic to anything in public life tasting of religion. Decision after decision has seemed designed to sanitize education and legislation of religiously-based values, as if the court's ultimate goal was to achieve a fully secularized state. The judicial branch of government was subtly shifting the United States from separation of church and state to separation of religion and state.

In the *Lemon v. Kurtzman* case in 1971, then Chief Justice Burger set forth three tests that would be used to decide establishment cases in the future:

First, the statute must have a secular legislative purpose;

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second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion."⁷

Current Chief Justice William Rehnquist has severely criticized this judge-made law. Because the three-pronged *Lemon* test is based on a "historically false doctrine," the approach is inadequate for deciding establishment clause cases. And what is the faulty doctrine? Rehnquist asserted in his learned

dissent in the Jaffree silent prayer case that the court, ever since 1947, has been interpreting the First Amendment's ban on "establishing" religion erroneously. "The 'wall of separation between church and state' is a metaphor based on bad history, a metaphor which has proved useless as a guide to judging," he said. "It should be frankly and explicitly abandoned."⁸

Arguing that "The true meaning of the establishment clause can only be seen in its history," Rehnquist wrote that the clause "did not require government neutrality between religion and irreligion, nor did it prohibit the federal government from providing non-discriminatory aid to religion. There is simply no historical foundation for the proposition that the framers intended to build the 'wall of separation.'" The "wall," he said, in recent opinions has become a "blurred, indistinct, and variable barrier." As NAE's counsel puts it, "The Lemon test is a lemon."

Four sitting justices, including the chief justice, are prepared to reconsider the court's establishment clause doctrine. With the confirmation of President Bush's first nominee to the court, Judge David Souter, by all accounts a judicial conservative, we may see a major change in the court's view of that clause. To take one example, such a court would likely declare constitutional an educational system of tuition tax credits or vouchers which would include private and religious education as choices, along with public schools. At the least, the court will move toward greater accommodation of religion instead of continual attempts to produce an absolute separation of church and state.

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Absolute separation never has been constitutionally necessary, and always has been impossible in a practical sense. Given an absolute separation of church and state, the local fire department would not respond to the alarm -- and should not -- if your church building were ablaze. There would be no need to seek town planning commission permission approval for expanding church facilities. Why not get maximum square footage by building over the sidewalks to the very street itself? Government, under absolute separation, would have no right to insist on parking lots, size limitations, or anything else. If there were absolute separation of church and state, the crier would not open daily sessions at a beautiful marble building on Capitol Hill as he now does:

Oyez, Oyez, Oyez! All persons having business before the Honorable, the Supreme Court of the United States, are admonished to draw near and give their attention, for the Court is now sitting. God save the United States and this Honorable Court.

Given the controversies over religion in public life, the Williamsburg Charter Project of 1987-88 was a godsend. It was a blue-ribbon national project designed to celebrate the genius of the First Amendment's religious liberty provisions and to attempt to construct a new national consensus on the meaning of that amendment. It was hoped that the nation would then be able to reaffirm and rededicate itself to that understanding.

Led by sociologist and author Of Guinness, this project became an officially recognized program of the Commission on the Bicentennial of the United States Constitution. The Williamsburg Charter⁹ document itself is a superb achievement, drafted by a divergent group of scholars and publicly signed in Williamsburg, Virginia, on June 25, 1988. The nearly two hundred signers were not invited as "celebrity" public figures, but as leaders pledging themselves to uphold and defend the charter's principles.

Judging by the diversity of signers, an incredible new consensus was achieved. Representing government were

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Chief Justices William H. Rehnquist and Warren E. Burger; former Presidents Jimmy Carter and Gerald Ford; and the democratic speaker and the minority leader of the House, Reps. Jim Wright and Robert Michel. Representing political parties were the chairmen of the Republican and Democratic National Committees. Representing the Bicentennial Commission were, among others, ideological opposites Sen. Edward M. Kennedy (D-MA) and Mrs. Phyllis Schlafly.

Representing American communities of faith were Catholic, Jewish, and other religious leaders, along with the presidents of the National Association of Evangelicals and the National Council of Churches. Representing education and public policy were the top leaders of the National Education Association and the conservative Heritage Foundation. Representing minorities and ethnic groups were Coretta Scott King, Beverly LaHaye, and others. There were signers from business, labor, and law.

Most revealing was the diversity of those who signed on behalf of organizations specifically concerned with religion and public life. Juxtaposed against evangelical leaders like Charles W. Colson of Prison Fellowship, James Dobson of Focus on the Family, and Samuel Ericsson of the Christian Legal Society were Arie Brouwer of the National Council of Churches, John Buchanan and Norman Lear of People for the American Way, and Robert Maddox of Americans United for Separation of Church and State.

Such a diverse group normally would never have put their signatures on one document about religion in public life -- unless it were an unparalleled accomplishment. It is. It articulates a proper balance. While differences of opinion still exist, these opinion leaders arrived at a new consensus of principles, the vanguard of a new civility in public debate.

To echo the famous E.F. Hutton television commercial, when The Williamsburg Charter speaks, the people listen. Here are some highlights from the twenty-three page charter:

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The First Amendment Religious Liberty provisions provide the United States' most distinctive answer to one of the world's most pressing questions in the late-twentieth century. They address the problem: How do we live with each other's deepest differences?

. . . the need for . . . today can best be addressed by remembering that the two clauses are essentially one provision for preserving religious liberty. Both parts, no establishment and free exercise, are to be comprehensively understood as being in the service of religious liberty as a positive good. At the heart of the establishment clause is the prohibition of state sponsorship of religion and at the heart of the free exercise clause is the prohibition of state interference with religious liberty.

The result is neither a naked public square where all religion is excluded, nor a sacred public square with any religion established or semi-established. The result, rather, is a civil public square in which citizens of all religious faiths, or none, engage one another in the continuing democratic discourse.¹⁰

Evangelical Christians, and all people with strong religious convictions, should take heart. Nothing in the Constitution implies that it is improper for religion to have an influence on the government -- not Article VI,

not the First Amendment, not a derived but unwritten concept of separation of church and state.¹¹ Only a distorted interpretation of the First Amendment, making of it "an intellectual pretzel" (to use George Will's metaphor), can be used to intimidate religious citizens from becoming political activists.

Once again, the Williamsburg Charter consensus is crystal clear when it refers to the "right to influence":

Too often in recent disputes over religion and public affairs, some have insisted that any evidence of religious influence on public policy represents an establishment

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of religion and is therefore precluded as an improper "imposition." Such exclusion of religion from public life is historically unwarranted, philosophically inconsistent, and profoundly undemocratic. The Framers' intention is indisputably ignored when public policy debates can appeal to the theses of Adam Smith and Karl Marx, or Charles Darwin and Sigmund Freud, but not to the Western religious tradition in general and the Hebrew and Christian Scriptures in particular. Many of the most dynamic social movements in American history, including that of civil rights, were legitimately inspired and shaped by religious motivation.

Freedom of conscience and the right to influence public policy on the basis of religiously informed ideas are inseparably linked. In short, a key to democratic renewal is the fullest possible participation in the most open possible debate.

The Internal Revenue Code does limit how much of their resources churches and other 501(c)(3) organizations may use in seeking to influence government on issues. Further, the code declares illegal direct participation in political campaigns, either for or against any candidate for public office.¹² It is critical to note that only institutional campaign involvement by churches is prohibited; the individual involvement of church members is a right guaranteed by the Constitution.

It is possible to argue that these restrictions on political activity by churches are unconstitutional on their face. Oliver Thomas, general counsel of the Baptist Joint Committee on Public Affairs, summarizes the question:

Once the government has granted an organization exempt status, goes the argument, it may not condition this benefit upon the organization's willingness to surrender its constitutionally protected right to engage in political speech. The Supreme Court has held, however, that the less restrictive limitation on lobbying by exempt organizations (may not engage in

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"substantial" amounts of lobbying) is not unconstitutional, at least as applied to the rights of non-religious exempt organizations. In short, it is impossible to predict with certainty whether the restriction on political activity is unconstitutional as applied to churches. For that reason, both the churches and the IRS are skittish about litigating the issue. Apparently, both prefer the present state of ambiguity to risking the possibility of an unfavorable decision by the courts.¹³

Cutting through all the technical analysis, the Constitution gives to all citizens the right to influence their government -- and nowhere does it deny those rights to citizens who hold deep religious convictions. Evangelicals have all the room they need to be involved in politics and government.

Those who attempt to browbeat evangelicals into political silence are, at best, intellectually inconsistent. At worst, they are deliberately dishonest.

Let me show you what I mean. When Walter Mondale selected Geraldine Ferraro as his vice presidential running mate in the 1984 presidential campaign, religion became a major issue. Although a Catholic, Ferraro fell back on the old saw about being personally opposed to abortion, but not wanting to impose her religious views on others. When Archbishop (now Cardinal) John O'Connor pressed Ferraro, prominent Catholic politicians like New York governor Mario Cuomo came to her defense, arguing that abortion is a religious issue which should have no place in the campaign.

In a speech at the Notre Dame Law School in September 1984, Rep. Henry Hyde (R-IL) gave an illustration of today's double standard concerning religious input in politics. He read from a letter written to the president of the National Conference of Catholic Bishops which appeared in the New York Diocesan newspaper, Catholic New York, on July 7, 1983.

As an American and a Catholic I am proud of you. It

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would have been easy to compromise your position so as to offend no one. You chose instead to tend to your duties as shepherds, to teach the moral law as best you can. You can do no more. Our Church has sometimes been accused of not having spoken out when it might have. Now you, our Bishops, show the courage and moral judgment to meet this issue of nuclear holocaust with a collective expression of where the Church in America stands.¹⁴

Hyde then stated simply: "This letter was signed by the present governor of New York, Mario Cuomo." Touché. Apparently for Cuomo, when it comes to nuclear freezes and the like, religious persuasion is good. But when it comes to abortion, religious influence is bad.

Evangelicals had better not let themselves be bullied by political opponents brandishing separation of church and state arguments. Most of those folks would be cheering them on if their religious convictions put them on the other side of certain issues.

Just as the Apostle Paul exercised his rights as a Roman citizen,¹⁵ we need to understand our constitutional rights -- and exercise them. And we must let no mythical "wall" stand in our way.

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Notes

1. Mark W. Canon, "Why Celebrate the Constitution?" *The Constitution*, September 1985, 22. [BACK]
2. Cannon, 20. [BACK]
3. Robert L. Cord, *Separation of Church and State: Historical Fact and Current Fiction* (New York: Lambeth Press, 1982), 86. [BACK]
4. Cord, 4. [BACK]
5. Robert Dugan, "Preserving the Role of the State," *Platform Plank 2, Eternity*, October 1987, 25. [BACK]

6. I will deal with the pivotal Emerson v. Board of Education Supreme Court decision of 1947 in Chapter 11. [BACK]

7. Cord, 198f. [BACK]

8. Congressional Quarterly Weekly Report, 8 June 1985, 1114. [BACK]

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9. Information about the charter is available through The First Liberty Institute, George Mason University, 4400 University Drive, Fairfax, VA 22030. [BACK]

10. First Liberty, 12, 16, 19. [BACK]

11. I will deal with the source of the phrase "separation of church and state" -- a letter from Thomas Jefferson -- in Chapter 11. [BACK]

12. See Chapter 6, "Myth #6," and cf. Appendix I. [BACK]

13. Oliver S. Thomas, "Views of the Wall," Report from the Capital, September 1988, 6. [BACK]

14. Rep. Henry J. Hyde, "Keeping God in the Closet -- Some Thoughts on the Exorcism of Religious Values from Public Life," speech given 24 September 1984, at Notre Dame Law School. [BACK]

15. Acts 22:25-29; most of chapters 25 and 26; 28:17-20. [BACK]

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