

**THE FEDERALIST SOCIETY'S
STUDENT DIVISION**

presents

“God and Government”

PANELISTS:

Professor Erwin Chemerinsky, Duke University School of Law

Professor Gregory Wallace, Campbell University School of Law

Professor Richard Bowser, Campbell University School of Law
(**moderator**)

Campbell University, Norman Adrian Wiggins School of Law

FEDERALIST SOCIETY

...

PROFESSOR BOWSER: Welcome to today's presentation. As we wait for Professor Chemerinsky to come, I'll give you some preliminary matters. The topic for consideration today is a framed this way. To what extent, if any, does the Religion Clause of the First Amendment permit government to take cognizance of God? Or, to put it slightly differently, here's another way to frame it. Does the Religion Clause require government to be officially agnostic or thoroughly secular in its speech and programs, or is there some room for government in a general way to act as (inaudible)? And if that is permissible, what are the limits to such governmental action?

To discuss that matter today, we do have two presenters. Professor Chemerinsky...joined the Duke Law faculty in June or July 2004, after having spent 21 years at the University of Southern California Law School, and then three years before that at the DePaul College of Law. As most of you

1 know, he is widely published author and has been
2 asked by various media outlets to comment on legal
3 issues generally but in even more particular,
4 constitutional issues.

5 ...

6 Also today, we have with us Professor
7 Gregory Wallace, an associate professor of law here
8 at Campbell. He teaches, among other courses,
9 constitutional law, civil rights litigation, and a
10 First Amendment seminar course. He joined the
11 Campbell Law faculty in 1995. Prior to that, he was
12 on the faculty at the University of Arkansas-Little
13 Rock School of Law.

14 ...

15 (Pause.)

16 PROFESSOR CHEMERINSKY: (in progress)

17 -- but I hope that this will be the first of many
18 trips to Campbell in the months and years to come.
19 And having done it once, I won't get lost next time.

20 I think the Religion Clause of the First
21 Amendment offers a simple command and instruction.
22 And that is, private religion is a good thing, that

1 | it should be protected, but that government-sponsored
2 | religion is a bad thing. I think that Thomas
3 | Jefferson got it exactly right when he said that
4 | there should be a wall that separates church and
5 | state. What I've always understood that to mean is
6 | that the place for religion is in the private realm -
7 | - in people's homes, their churches, their
8 | synagogues, their mosques, their hearts and minds --
9 | but that our government should be secular.

10 | What I'd like to do in this initial ten
11 | minutes is explain to you, first, why I believe that
12 | our government should be strictly secular, and then
13 | second, I want to take some examples to move this
14 | from the abstract to the concrete.

15 | First, why is it that we should have our
16 | government be completely secular? I think there are
17 | several reasons. One is that we want to make sure
18 | that every citizen feels equally that it's his or her
19 | own government. I think that Justice O'Connor
20 | captured this well in her opinion in *Wallace v.*
21 | *Jaffre*, when she said that the central teaching of
22 | the Establishment Clause is that none of us should be

1 | made to feel outsiders relative to our government,
2 | nor should others be made to feel that they're
3 | insiders relative to the government.

4 | Imagine that you, as a lawyer, walked into
5 | a courtroom and there was a large Latin cross behind
6 | the judge's bench. And imagine that you weren't
7 | Christian. Would you feel, then, that this was your
8 | courtroom? Your government? The answer is clearly
9 | no. If someone were to walk into City Hall, where
10 | there's a large cross on top -- those who aren't of a
11 | religion that accepts that as a religious symbol
12 | would clearly be made to feel outsiders. One reason
13 | why we want to make sure that our government is
14 | secular is so that that each of us, from every faith
15 | or no faith, can equally believe that it is our
16 | government.

17 | Another reason that we want the government
18 | to be strictly secular -- is it's just wrong to spend
19 | a person's money to support a religion that he or she
20 | doesn't believe in. James Madison said exactly that
21 | over 200 years ago. He said it's immoral to spend
22 | one person's money to support the religion of

1 | another. And so, by making sure that our government
2 | is secular, we ensure that your dollars aren't
3 | advancing a faith that you don't believe in, or that
4 | you even find to be repugnant.

5 | Another reason why we want our government
6 | to be strictly secular is how divisive religion is.
7 | If the history of the world teaches anything about
8 | religion, it's how intense people's feelings are
9 | along religious lines, how much society can be
10 | divided along religion. If the government becomes
11 | aligned with religion, then there's going to be a
12 | fight as to whose religion. Even if the Christian
13 | majority decides it's going to be a Christian
14 | religion, then you have the question of what
15 | denomination of Christianity is going to be in
16 | control. Inevitably, there will be fights. By
17 | saying our government is secular, we avoid that.

18 | Finally, I think we keep our government
19 | secular so as to protect religion itself. Robert
20 | Williams, who was one of the founders of the
21 | Constitution, expressed this long ago when he said,
22 | the reason we want a separation of church and state

1 | is to protect the church, because the reality is that
2 | once the government starts giving money to religion,
3 | then the government puts strings on that money. The
4 | government can regulate what religion does. And we
5 | protect the free exercise of religion by making sure
6 | that our government is secular. All of this is
7 | fairly abstract, and so I want to leave it there.

8 | Now, take it to the concrete. Let me give
9 | you a few examples of what I think a secular
10 | government means. My first example is that
11 | government-sponsored religious activity in public
12 | schools is unconstitutional. I think the Supreme
13 | Court has got it exactly right for over 40 years.
14 | The Supreme Court has said that prayer, even
15 | voluntary prayer, is unconstitutional because it's
16 | government-sponsored religious activity. The Supreme
17 | Court has said that clergy-delivered prayers at
18 | public school graduations are unconstitutional
19 | because inevitably, students feel pressure to be at
20 | their graduation, and prayer should not be part of
21 | that if they don't believe in it.

22 | It was five years ago [that] the Supreme

1 | Court said that student-delivered prayers at high
2 | school football games are unconstitutional. The
3 | Court explained that students often have to be at
4 | football games, as part of the band, for getting
5 | credit, for being cheerleaders, and the like. To
6 | have a prayer, even a student prayer, violates this
7 | command.

8 | The Supreme Court has even said that a
9 | moment of prayer is unconstitutional. Now, the
10 | reality is that students have been saying silent
11 | prayers as long as teachers have been giving tests.
12 | You don't need to have the government
13 | institutionalize silent prayer, because then it's a
14 | government-sponsored religious activity.

15 | Perhaps even more controversial, I think
16 | the words "under God" in the Pledge of Allegiance in
17 | public schools are unconstitutional. The words
18 | "under God" are inherently religious. I know of no
19 | way to think of the words "under God" as secular.
20 | Yet for those who believe in no religion or a non-
21 | theistic God will feel enormous pressure to
22 | participate in pledging allegiance to a god.

1 When my youngest grandchild, now seven,
2 was in kindergarten -- she's in the public school in
3 Los Angeles -- came home at the beginning of the
4 second week of school, and she showed mom and me how
5 to do the Pledge of Allegiance. She put her hand on
6 her heart and recited it. My wife said, "I thought
7 there you won a Ninth Circuit decision that the words
8 'under God' in the Pledge of Allegiance were
9 unconstitutional." And I said, "Well, the Ninth
10 Circuit stayed that order."

11 My daughter said, "No, you have to say
12 that or you get sent to the principal's office."
13 Now, that's not what the teacher said. But what she
14 internalized in the five days of school is, you do
15 what the teacher says or the punishment is you go to
16 the principal's office. And that's what children all
17 over the country feel today, because of the words
18 "under God" in the Pledge of Allegiance in the public
19 schools.

20 The second example I would give is that
21 religious symbols should not be on government
22 property, if they symbolically endorse religion.

1 | This has been a principle that the Supreme Court has
2 | followed for almost 2 decades, saying that there
3 | shouldn't be religious symbols, if it appears that
4 | there is a symbolic endorsement of a religion. Thus,
5 | the Supreme Court has said that there can be a
6 | nativity scene on government property, if it's
7 | surrounded by symbols of other religions and secular
8 | symbols. But a nativity scene all by itself is
9 | impermissible. Last June, the Supreme Court said
10 | that a Ten Commandments display at a Kentucky county
11 | courthouse was unconstitutional because the
12 | government acted with the purpose of advancing
13 | religion.

14 | I think the Court got it wrong in another
15 | Ten Commandments case that was decided the same day,
16 | and I confess to self-interest that I argued that
17 | case in the Supreme Court, and I lost five-to-four.
18 | It [was] about the six-foot high, three-foot wide Ten
19 | Commandments monument in the Texas state capital, at
20 | the Texas Supreme Court. It sat all by itself at
21 | that corner. It had in huge letters, "I am the Lord
22 | thy God." Given its placement, given its context, I

1 think it is clearly government's symbolic endorsement
2 of religion. And I wonder, what [about] somebody who
3 doesn't believe religion or [is] atheistic [...]?
4 Would they still feel that it's their government as
5 they walk in to the state legislature or the state
6 capital? Won't they inevitably feel like outsiders?
7 And aren't their tax dollars every year going to pay
8 to take care [of] that monument?

9 One final example, and that's that I don't
10 believe the government should be giving assistance
11 that can be used for religious instruction in
12 parochial schools. I think the Supreme Court until
13 very recently got it exactly right here. The
14 government should be able to give aid to parochial
15 schools, if it's the same that it's giving the public
16 schools and if it can't be used in religious
17 instruction. The Supreme Court has modified this
18 recently to say that the government can't give aid to
19 parochial schools that goes into religious
20 indoctrination. That's because my tax dollars and
21 your tax dollars shouldn't be going to support
22 religions that we don't believe in.

1 This isn't about hostility to religion. I
2 believe in a robust Free Exercise Clause. But
3 religion should be in the private realm, and not the
4 government's. Let me just conclude this ten-minute
5 presentation by reading you something that Sandra Day
6 O'Connor wrote in a decision about the Ten
7 Commandments on June 27th. O'Connor said, "By
8 enforcing the Religion Clauses, we have kept the
9 religion matter for the individual conscience, not
10 for [the] prosecutor or the bureaucrat. At a time
11 when we see around the world the violent consequences
12 of the assumption of religious authority by
13 government, Americans may count themselves fortunate.
14 Our regard for constitutional boundaries protects us
15 from civil (inaudible), while allowing private
16 religious exercise to flourish. Those who would
17 renegotiate the boundaries between church and state
18 must therefore answer a difficult question: Why would
19 we trade a system that has served us so well for one
20 that has served others so poorly?

21 Professor Wallace.

22 PROFESSOR WALLACE: Thank you, Professor

1 Chemerinsky. I'm very grateful that you made the
2 trip down here and are participating with us at this
3 time. And much of what you said, I agree with. I
4 think that the reasons that you gave here for
5 government being strictly secular are also, in many
6 respects, good reasons for government avoiding an
7 establishment of religion, which is what in fact the
8 Religion Clause prohibits. There is nothing in the
9 text of the Religion Clause, of course, that says
10 government must be strictly secular. And again, I
11 hope that Professor Chemerinsky might define,
12 somewhat more, that understanding for us when he
13 returns in a moment.

14 There's nothing in the Religion Clause
15 that says government cannot make any references to
16 God [or] government cannot act as if God exists. In
17 fact, in formulating the Religion Clause, broader
18 language actually was proposed and rejected by
19 Congress. I mean, Samuel Livermore proposed that the
20 Religion Clause read, Congress shall make no law
21 touching religion. That particular broad
22 interpretation of how a government should relate to

1 religion was rejected by Congress.

2 The Religion Clause does prohibit an
3 establishment of religion. Now, that is a term that
4 we are not terribly familiar with, since we haven't
5 seen religious establishments in this country for
6 more than a hundred years in their formal sense. And
7 I think because of that, we do need to consult
8 history and tradition to help us understand what the
9 Religion Clause means.

10 The hallmark of religious establishments
11 was the state-enforced religious uniformity. The
12 government would use its coercive power to pressure
13 people to conform to the religion of the majority.
14 Now, we don't want government doing that. We don't
15 want government pressuring people to hold certain
16 religious beliefs or to perform certain religious
17 acts. We might describe this as a no imposition
18 principle. We don't want government interfering with
19 people's or directing people's individual religious
20 choices.

21 Now, the question that we're concerned
22 with today is: can government speak about God in a

1 way that doesn't pressure people to change their
2 religious beliefs or actions. I think that it can.
3 The position that Professor Chemerinsky has taken,
4 that of strict neutrality, I'm curious as to how far,
5 exactly, that goes. Does it require complete
6 government agnosticism toward religion? If it does,
7 that I think there are some problems with that
8 position.

9 First, it is inconsistent with the history
10 and tradition of our country. There are references
11 to God in the Declaration of Independence [and] other
12 public documents. We have a long history reaching
13 back to the founding period of government religious
14 proclamations. There are references to God in our
15 national motto. We can see that [on] all [the] money
16 that you carry around -- that's right, law students
17 don't have any money. We see that in the reference
18 to God in the Pledge, on public buildings on
19 monuments, in speeches of our leaders. In fact,
20 there are 14 references to God in the 699 words of
21 Abraham Lincoln's Second Inaugural Address, which is
22 inscribed on the walls of the Lincoln Memorial.

1 | Court sessions are opened with an acknowledgment of
2 | God: "God save the United States and this honorable
3 | Court." So, to take the position that the Religion
4 | Clause requires [...] government agnosticism [...]
5 | conflicts with our long history and tradition.

6 | The other problem, I think, with the
7 | position of the government agnosticism is that if
8 | government cannot take cognizance of God, then it
9 | cannot recognize a limitation on its own power. This
10 | is one of the central ideas of the Declaration of
11 | Independence. People have certain inalienable rights
12 | that are endowed on them by their Creator, and when
13 | government acts in conflict with those rights, when
14 | government acts in a way that violates those rights
15 | and oppresses people, people have the right to
16 | overthrow the government. By being able to recognize
17 | God, government can assert the limits of its own
18 | power and prerogative, and it can affirm [...] a
19 | transcendent source of human rights and human
20 | dignity. It was Thomas Jefferson who worried about
21 | how the liberties of our nation would be secure if
22 | removed from what he called their only firm basis; a

1 conviction in the minds of people that these
2 liberties are a gift of God.

3 Even the predominant justifications for
4 our constitutional commitment to religious freedom
5 presuppose God's existence. The whole idea of
6 religious freedom is based on taking seriously the
7 central claim of religion, namely that God exists.
8 Religious freedom makes sense only if God's being
9 makes sense. God makes claims on human beings.
10 Those claims are prior to and superior to the claims
11 of the state. The individual's response to God's
12 claims, if it is to be authentic, must not be
13 coerced. The state, therefore, must not attempt to
14 define or direct the relationship between God and
15 individual. On the other hand, if God doesn't exist,
16 if religion is nothing more than silly superstition,
17 on the same level as fortunetelling or believing in
18 ghosts, then it makes no sense to constitutionalize
19 its protection.

20 Look at Jefferson's bill for establishing
21 religious freedom that was introduced in the state of
22 Virginia. It begins with the words, "As Almighty God

1 | has created a mind free." The entire preamble
2 | amounts to a religious argument for religious
3 | freedom. A requirement of government agnosticism
4 | would obviously knock out that part of Jefferson's
5 | bill. And I think it would be ironic to interpret
6 | our constitutional protection for religious freedom
7 | to require government agnosticism about God's
8 | existence. The Religion Clause, because it is based
9 | on that very presupposition -- constitutional
10 | protection for religious freedom, assuming that God
11 | exists -- the Religion Clause would be in conflict
12 | with itself.

13 | I think a better approach is not an
14 | approach of strict secularism but what I might call a
15 | no imposition principle. Government, of course,
16 | should not favor any one particular religion over the
17 | other; that would obviously address the illustrations
18 | of a Latin cross appearing behind the judge or in a
19 | state house. But also, government should not engage
20 | in a religious imperative. What I mean by that is
21 | government should not be telling people what to
22 | believe and practice in matters of religion. It's

1 | the hallmark of the establishment of religion, and
2 | that's what the Religion Clause prohibits.
3 | Government must not speak in a way that is likely to
4 | pressure people to make religious choices or to
5 | engage in religious acts. To interject itself into
6 | individual decisionmaking in religious matters is to
7 | violate religious conscience.

8 | Now, there are times when government can
9 | speak religiously and not interject itself in that
10 | particular situation. I agree with Professor
11 | Chemerinsky that the school prayer cases, for
12 | example, were decided correctly because in that
13 | situation and that context pressure was brought to
14 | bear [on] all children to engage in a religious
15 | activity, prayer, in violation of their religious
16 | conscience. On the other hand, simply to be exposed
17 | to religious messages, such as references to God in
18 | the Declaration of Independence or in our national
19 | motto or the hanging of a religious painting in a
20 | government-sponsored museum without more, does not
21 | seem to me to be the kind of infringement on
22 | religious conscience that the Framers contemplated

1 | here.

2 | I think in a pluralistic society where the
3 | government is a significant participant in the
4 | formation of public culture, the best understanding
5 | of what the Religion Clause forbids and permits is
6 | one that allows government speech to reflect the
7 | mixture of religious and nonreligious perspectives in
8 | the private sector. In that way, government
9 | influence on religious choices is minimized because
10 | the public would be presented with the same variety
11 | of perspectives if government were absent from public
12 | cultural sphere.

13 | Professor Chemerinsky.

14 | PROFESSOR CHEMERINSKY: I couldn't get if
15 | we agree or disagree.

16 | If all you're saying is it's okay to have
17 | "In God We Trust" on money or "God save this
18 | honorable Court" at the beginning of the Supreme
19 | Court sessions, I don't think we disagree, although I
20 | could argue that I think it's pretty trivial. But if
21 | what you're saying is that the government can express
22 | a profoundly religious message, that the government

1 | can indoctrinate people by taking, through government
2 | speech, religious views, then we would disagree.

3 | Let me try to pursue our disagreement in
4 | specific areas. I began by saying we need to have
5 | our government be secular. And I explained several
6 | reasons for the government be should be secular -- to
7 | ensure there were all treated as equal citizens and
8 | equally in the government; that it's wrong to give
9 | some of our money to support the religion of others;
10 | that inherently it's divisive if the government
11 | becomes aligned with religion; and that it threatens
12 | religion itself. There's no response to any of that,
13 | so I assume we agree.

14 | Now, Professor Wallace says several
15 | things. First he says the Religion Clause prohibits
16 | the establishment of religion. Not quite right. The
17 | First Amendment prohibits the government from any law
18 | respecting the establishment of religion. To me,
19 | that's broader than just prohibiting the
20 | establishment of religion because there can't be
21 | anything "respecting the establishment of religion."
22 | And then, we get to the question of what does that

1 | mean.

2 | Second, you talk about there being
3 | references to God, and references to God throughout
4 | American history. I think it all depends upon
5 | context. I'd rather our money didn't say "In God We
6 | Trust" because I think government shouldn't be
7 | expressing religious messages. But if it bothers you
8 | that your money says that, I'm glad to take the
9 | problem off your hand. But nor do I see that it's a
10 | very big deal.

11 | (laughter)

12 | PROFESSOR CHEMERINSKY: Likewise, I'd
13 | rather they didn't say before Court sessions, "God
14 | save this honorable Court", but I don't see it as a
15 | very big deal. Now, if you change that a little bit
16 | -- and I apologize if you view it as blasphemy -- "In
17 | the name of Jesus Christ, God save this honorable
18 | Court", I would then be deeply offended because then
19 | it's invoking a particular religion. Is there a
20 | difference for an atheist between saying "one nation
21 | under Jesus Christ" and "one nation under God"? To
22 | an atheist, both are equally objectionable.

1 To me, the Pledge of Allegiance is
2 different than "In God We Trust" on coins or "God
3 save this honorable Court" because in order to spend
4 money in the store, you don't have to say "In God We
5 Trust"; in order to argue at the Supreme Court, you
6 don't have to say, "God save this honorable Court".
7 But children feel pressure every day to say "one
8 nation under God" and that's what makes it
9 objectionable.

10 The next point that you make is that in
11 order to have limits on government power, we need to
12 recognize the existence of religion. I vehemently
13 disagree with that. I think our limits on government
14 power come initially from the Constitution which
15 [formed] the United States government. And second,
16 it can come from theories of government. Maybe it's
17 social contract theory. Maybe it's natural law.
18 Maybe for you it is religion. But I don't accept
19 that the only theory that provides limits on
20 government is a religious theory. There are
21 countless jurisprudential theories and philosophical
22 theories that can also limit government power.

1 Finally it's at this point: you say that
2 religious freedom makes sense only if we acknowledge
3 the existence of God. Again, I strongly disagree. I
4 think all we need to protect religious freedom is to
5 recognize that there are many in this country who
6 believe in religion. And even those who don't
7 believe in religion can say that for those who do,
8 it's something that's very important, and the
9 Constitution says we'll protect free exercise of
10 religion. Will we protect free exercise of religion
11 for those who believe in religion? We'll protect
12 free exercise for those who don't believe in
13 religion. We don't need to believe in God in order
14 to believe that the free exercise of religion is
15 important.

16 [My] problem and arguing [are] in the
17 abstract [so] that I can't tell if we agree or
18 disagree, so let's talk about specifics. First of
19 all, Professor Wallace says he believes in a no
20 imposition principle. Well, I also think that the
21 government shouldn't impose religion. The question
22 is, what does that mean and is it sufficient, or is

1 | it just part of what the Religious Clause meant? So
2 | I've got to go to specifics, and I give you three.
3 | First, they say there shouldn't be government-
4 | sponsored religious activity in public school
5 | classrooms. No prayers; not voluntary prayer. No
6 | silent prayer; not even "under God" in the Pledge of
7 | Allegiance because students feel pressure to say it.
8 | That's nearly consistent with the no imposition rule.
9 | Second, there shouldn't be religious symbols on
10 | government property in a manner that appears to
11 | endorse religion. And when you said there shouldn't
12 | be a large Latin cross behind the judge's bench or on
13 | top of the seal, I think you agree with that. From
14 | that perspective, I see no difference between the
15 | large Ten Commandments monument and a large cross.

16 | The Ten Commandments monument that sat in
17 | the Texas state capital, in the Texas Supreme Court,
18 | with the Protestant version of the Ten Commandments.
19 | The Jewish version of the Ten Commandments is
20 | different. The Jewish version, for example, has
21 | different language in a number of places. The First
22 | Commandment, in the Jewish version, says "I am the

1 | Lord thy God who took you out of Egypt, out of
2 | bondage". That's not the version at the Texas state
3 | capital. The Catholic version of the Ten
4 | Commandments is traditionally different. The
5 | traditional version adopted by Catholic faith does
6 | not prohibit images of God because of the importance
7 | of saints and statuaries within the Catholic faith.
8 | That's not the Texas version. So, I think if you
9 | accept no imposition, then I think the Supreme Court
10 | got it wrong. When you put the Protestant version of
11 | the Ten Commandments at the Texas state capital,
12 | Texas Supreme Court, that really is the imposition of
13 | religion.

14 | And finally, with regard to aid to
15 | parochial schools, I said the government should not
16 | provide any assistance to parochial schools that's
17 | used for religious indoctrination or religious
18 | education because that would be the government
19 | supporting imposition of faith. If we agree as to
20 | those three specifics, then we really agree as to the
21 | principal. And maybe there's some abstract
22 | [inaudible] on this agreement, but my guess is that

1 | there is a fundamental disagreement between us.

2 | I think that our government should be, to
3 | the greatest extent possible, a secular government.

4 | I think that the place for religion should be a
5 | robust free exercise clause. As Justice O'Connor
6 | said, this is the system that has served us so well
7 | for 200 years. Why replace it with a system that's
8 | served others throughout the world through history so
9 | poorly.

10 | PROFESSOR WALLACE: The problem with the
11 | strictly secular approach that Professor Chemerinsky,
12 | I think, is advocating -- because at least I was
13 | pleased to see him concede that there is some place
14 | for government to acknowledge God in its speech --
15 | but he has says, not in the occasional setting; not
16 | in government symbols; not in government funding.
17 | I'm not sure exactly what sphere of government
18 | activity that leaves. But nevertheless, I think the
19 | problem here is twofold.

20 | What Professor Chemerinsky says might make
21 | more sense, if two things were true; first that we
22 | have a minimalist government, and second that we have

1 | no long history of religious speech by religious
2 | government.

3 | Let me address the first one. Given our
4 | moderate regulatory state, given its ever-growing
5 | influence over personal behavior, over education,
6 | over public culture, a strictly secular government
7 | speech would not be neutral toward religion. Secular
8 | speech, because it encompasses only that which is
9 | this worldly, it can convey the idea that all
10 | knowledge and value is confined to the secular, or
11 | the temporal. The temporal or secular reality is the
12 | only reality that really counts.

13 | As one writer has said, it's a fallacy to
14 | suppose that by omitting a subject, you teach nothing
15 | about it. On the contrary, you teach that it is to
16 | be omitted, and that it is therefore a matter of
17 | secondary importance. For the state to speak only
18 | secular or non-religious viewpoints would make those
19 | viewpoints and ideals familiar, easily understood,
20 | acceptable. On the other hand, total silence with
21 | respect to God would marginalize or trivialize
22 | religious views by making them seem irrelevant or

1 | outdated or even strange.

2 | So, for the state to confine itself to
3 | non-religious speech in all the ways that it affects
4 | public culture would not be in any sense neutral.
5 | And as I said earlier, when government is a
6 | significant participant in the formation of public
7 | culture, then the best understanding of neutrality is
8 | one that allows government speech to reflect the same
9 | mixture of religious and nonreligious perspectives in
10 | the private sector. In that way, government is not
11 | going to be able to leverage its power on individual
12 | religious choice. People would be exposed to the
13 | same voices, the same diverse voices, as [if] the
14 | government was not in the public sector at all.

15 | The second thing that's a problem, I
16 | think, is that we have this long history of
17 | government religious speech. Given that long history
18 | and given the pervasiveness of it, to eliminate all
19 | religious language and symbols from government
20 | sphere, as Professor Chemerinsky would propose, I
21 | think would send a forceful message of hostility
22 | toward religion. If you're going to take this

1 | position seriously, it means you have to remove the
2 | inscriptions containing religious language from the
3 | walls of the Lincoln and Jefferson memorials, change
4 | the names of streets, cities, mountain ranges,
5 | expunge from public school textbooks the religious
6 | affirmations in the Declaration of Independence and
7 | other public documents, etc.

8 | Now, Professor Chemerinsky would allow for
9 | some religious speech for government that doesn't
10 | endorse religion. I don't find the endorsement test
11 | particularly helpful because I think any time
12 | government affirms, any time the government speaks or
13 | acts as if God exists -- even in the statement "In
14 | God We Trust" -- that is a religious affirmation.
15 | That is an endorsement of a claim that is central to
16 | religion: God exists. And I don't see how, with a
17 | consistent application of the endorsement test, we
18 | would not lead to the kind of completely secular
19 | sphere that Professor Chemerinsky advocates for.

20 | Thank you.

21 | PROFESSOR BOWSER: Thank you, gentlemen.

22 | Questions for either or both? If you

1 | could stand and say it loudly so that everyone can
2 | hear it.

3 | AUDIENCE PARTICIPANT: In schools, the
4 | study of religion or opportunities for students to
5 | pray on their own volition, not led by a teacher, how
6 | do you see those pan out? A lot of times you see in
7 | public schools a focus on other religions besides
8 | Christianity or Judaism ... because they are more
9 | closely related to our culture.

10 | And then, I'd like to give a scenario of,
11 | let's say, you have a Muslim child who prays five
12 | times a day. Inevitably, throughout the day of
13 | school, the child would have to pray. Should that
14 | child be allowed to pray in school so that he can
15 | practice his faith?

16 | PROFESSOR CHEMERINSKY: I heard three
17 | different questions, so I'll take them one at a time.
18 | First, I no problem with schools teaching history
19 | that includes the role of religion. First of all,
20 | this is really creating a straw person here. I see
21 | no problem, even with the most a strict separation of
22 | church and state, in understanding what were the

1 | religious beliefs of the Framers and understanding
2 | what's really the role of religion in American
3 | history or world history. There's a huge difference
4 | between the government endorsing religion in some way
5 | and the government simply teaching what's been the
6 | history with regard to religion. So, even if you
7 | take my position, you can still study the Declaration
8 | of Independence, you can still study any text like
9 | the Lincoln Memorial's text, with regard to religion.

10 | The second question you asked, what about
11 | students who, on their own, wish to get together at
12 | school and pray or study Bible or whatever. I think
13 | equal access is the appropriate principle here, and
14 | the Supreme Court has said, going back to cases like
15 | *Widmar v. Vincent*, the *Mergens* case, and the like, I
16 | think if a school's going to make facilities
17 | available at lunch and after school to the chess club
18 | and the debate team, the Bible club should get the
19 | exact same access; no more and not less. If the
20 | students can schedule meetings for whatever student
21 | groups they want and a student wants to organize a
22 | group get together and pray, I have no problem with

1 | that. Now, if the teacher is becoming involved that,
2 | so that you've got the government being involved in
3 | religious activity, then that's different. But so
4 | long as long as it's private activity on the same
5 | terms as everybody else, no problem.

6 | The third question you asked is about the
7 | Muslim student that feels the need to pray five times
8 | a day during school. This is a question not of
9 | establishment but of free exercise, and I believe
10 | that we should protect the free exercise of religion,
11 | unless the government meets strict scrutiny. And
12 | this is the test that the Supreme Court followed
13 | before 1990; it's a test that I think should be
14 | followed with regard to free exercise.

15 | Now, the question there would be, if you
16 | allow the student to pray five times a day, would he
17 | be so disruptive to the school so as to amount to a
18 | compelling government interest? And I think that's
19 | probably going to depend on, contextually what does
20 | the student need to do to pray, how would it
21 | interfere with the school, and the like. But
22 | Professor Wallace I would both agree that there

1 | should be a strict scrutiny test applied when you're
2 | dealing with the Free Exercise Clause.

3 | PROFESSOR WALLACE: Yes, concerning the
4 | free exercise and the student speech issues, I'm
5 | exactly where Professor Chemerinsky is on that.
6 | Where I think we would differ with respect to
7 | studying religious history or religious affirmations
8 | in public documents, the point of difference that I
9 | see between Professor Chemerinsky and myself is that
10 | he would say you can study the Declaration of
11 | Independence, and you can learn that the Framers
12 | believed, the founders believed, that everybody is
13 | endowed with an alienable rights by their Creator.
14 | What you cannot do as a government-paid teacher is to
15 | affirm that belief. If you're studying that and a
16 | child says okay, well, that's nice; I understand
17 | that's what they said, but is that true?

18 | Under Professor Chemerinsky's version, the
19 | teacher would have to say I can't comment or I can't
20 | tell you that it is in fact true that people are
21 | endowed with inalienable rights by their Creator
22 | because that would constitute religious affirmation

1 | or religious endorsement. I don't think that's the
2 | extreme position that the Framers of the Religion
3 | Clause intended for government to take.

4 | PROFESSOR BOWSER: Another question.

5 | AUDIENCE PARTICIPANT: I've got one for
6 | Professor Chemerinsky. Hearing your arguments, it
7 | sounds like you're making policy arguments and not
8 | constitutional arguments. And I'm curious, knowing
9 | the history of our Founders, knowing that even
10 | Jefferson, who (inaudible) point to say they wanted
11 | an extreme separation of church and state, in fact
12 | Jefferson funded the first Chaplain, I believe, for
13 | the U.S. Congress and also printed Bibles; I believe
14 | he pushed the Bill through to print Bibles. How can
15 | you make a constitutional argument that the people,
16 | who framed the Constitution, like Jefferson, would
17 | want what you want today, which I guess is an extreme
18 | separation of church and state?

19 | PROFESSOR CHEMERINSKY: I think your
20 | question begs the question of what's a constitutional
21 | argument because your question assumes that the only
22 | constitutional argument is based on what the Framers

1 | intended. I'm not on that boat; I'll never get on
2 | that boat.

3 | (Laughter; applause.)

4 | PROFESSOR CHEMERINSKY: Of course, I don't
5 | think we'll ever know what the Framers of the
6 | Establishment Clause intended. I think that I can
7 | show you quotes from the Framers; all sorts of
8 | different views. I can show you Roger Williams, who
9 | really believed in the separation of church and
10 | state. I can show you conflicting quotes from Thomas
11 | Jefferson. I don't think we can find what the
12 | Framers intended. Even if we could find the Framers'
13 | intent, I don't think that what they thought in 1791
14 | tells us anything about the world in which we live in
15 | 2005. We live in vastly different world today than
16 | the world it was then.

17 | In fact, I think we really wanted to
18 | follow the Framers' intent, their intent was that
19 | their views not be followed. The only person to
20 | publish notes at the Constitutional Convention was
21 | James Madison, and he instructed they not be
22 | available until after his death because he thought

1 | that the document should stand on its own.

2 | And so, we can sit here and talk about
3 | what the Framers meant. I think it's relevant to
4 | constitutional intention, but I don't think it's
5 | determinative in terms of the constitutional
6 | intention. And so, what does the Supreme Court do?
7 | I'm going to posit that what the Supreme Court does
8 | counts as constitutional argument.

9 | Well, go to the points that I made, that
10 | it's wrong for the government to endorse religion in
11 | a way that makes some feel like insiders and some
12 | like outsiders. Justice O'Connor has said that's a
13 | central teaching of the Establishment Clause. To me,
14 | that's a constitutional argument.

15 | The Supreme Court has said that it's wrong
16 | to use tax dollars from some to support the religions
17 | of others, going back to things from Jefferson and
18 | Madison. To me, that counts as a constitutional
19 | argument. The Court has said that we should avoid
20 | being divisive along religious lines. Justice Breyer
21 | began his opinion in (inaudible) saying that. That's
22 | a constitutional argument. I think the concern that

1 | government involvement with religion harms the
2 | religion. That to me is a constitutional argument.
3 | All of these are constitutional arguments. They all
4 | go to the meaning of the Establishment Clause.

5 | Now where I'm puzzled and continue to be
6 | confused -- might be able to clarify, Professor
7 | Wallace, to answer your question -- would he find it
8 | acceptable for Congress to pass a resolution saying
9 | we are a Christian nation? Because that would seem
10 | to be the government taking a position with regard to
11 | religion. If his answer to that question is, yes,
12 | that's acceptable, then we fundamentally disagree
13 | because then it's the ability of the government to
14 | tell all of those who are not Christian that they're
15 | not really equal in the eyes of the government. And
16 | if the government can't say that we're a Christian
17 | nation, then there's even a problem with the
18 | government saying "under God" because for those who
19 | are atheists or those who don't believe in God, it's
20 | just as offensive as Jew or a Muslim would find it to
21 | be for the government to say that we're a Christian
22 | nation.

1 So, I'd be curious as to your answer to
2 the question, can Congress declare the word
3 "Christian nation"?

4 PROFESSOR WALLACE: It's my turn to answer
5 the question. My answer to that is no because that
6 would violate the principle of denominational
7 neutrality. Government cannot favor one particular
8 religion over another. On the other hand, I don't
9 think that it necessarily follows from that
10 government cannot make general references to God, so
11 long as it does not define who that God is or what
12 particular expectations he has of people.

13 I don't think one follows from the other,
14 and one of the reasons I believe that is because I do
15 think the words of our Constitution were intended to
16 mean something. I think our entire legal system is
17 built on the fundamental assumption that words count,
18 words do mean something, and that we are to make some
19 effort to understand what those words mean within
20 their particular historical context.

21 To take the position that Professor
22 Chemerinsky takes, no government school teacher could

1 | teach the affirmation that is made in the first
2 | paragraph [of] the Declaration of Independence. They
3 | refer to it and say, oh sure, this is historically
4 | what they believed, but they couldn't say that God
5 | confers upon people certain rights that you hold as
6 | against government power, because I can't talk about
7 | God; I can't say anything about God.

8 | PROFESSOR BOWSER: Mr. Gelman.

9 | AUDIENCE PARTICIPANT: I just want to know,
10 | both of you, you say --

11 | PROFESSOR BOWSER: Loud enough so that we
12 | can all year.

13 | AUDIENCE PARTICIPANT: You said that both
14 | of you agree in it being all right to have an
15 | (inaudible) of religion in any context. I wonder
16 | whether you feel that is it an endorsement of
17 | religion for the government to sanction the teaching
18 | of intelligent design that has now arrived in the
19 | public schools?

20 | MR. CHEMERINSKY: No, I think the teaching
21 | of intelligent design violates the Establishment
22 | Clause. The Supreme Court, 20 years ago in a case

1 | called *Edwards v. Aguillard*, struck down a state law
2 | that required so-called balanced speaking. The state
3 | law said that every time evolution is taught, what
4 | was then called creation science had to be taught as
5 | well. The Supreme Court said evolution is a secular
6 | theory as to the origin of human life. Creationism
7 | is a religious theory of the origin of human life.
8 | The Supreme Court said there's no secular purpose in
9 | having that religious theory taught.

10 | To me, in everything I've read,
11 | intelligent design is just creation science or
12 | creationism repackaged under new label. But it is
13 | still a religious theory for the origin of human
14 | life. For the government to teach a religious theory
15 | violates exactly what the Court said in *Edwards v.*
16 | *Aguillard*. There should be respect for that theory.
17 | I have no problem if the public school wanted to say
18 | we're going to consider all of the different theories
19 | there for the origin of human life; we'll study
20 | evolution; we'll teach intelligent design; we'll
21 | teach Native American theories; and we're going to do
22 | a comparative study of all the ways different

1 | religions do it. No problem with that, anymore than
2 | there's a problem in studying the Bible in a
3 | comparative religion course.

4 | But if the government is going to teach
5 | intelligent design as an acceptable alternative to
6 | evolution, that relieves the government supporting
7 | religion. And the Supreme Court got it right 20
8 | years ago when it said that's not okay.

9 | PROFESSOR WALLACE: I think the
10 | intelligent design case poses a bit different
11 | question. The statute that was at issue in *Edwards*
12 | *v. Aguillard* had a particular religious perspective.
13 | It looked a lot like it mandated teaching what looked
14 | a lot like the first chapter of Genesis, and
15 | intelligent design is a much broader type of
16 | approach. So, for those reasons, I'm not sure that
17 | this fits within the *Edwards v. Aguillard* case.

18 | On the other hand, I do -- again, we're
19 | back to this kind of thing where Professor
20 | Chemerinsky and I both agree that government can't
21 | favor a particular religious view. Where we disagree
22 | is that whether government can make generalized

1 | references to God -- that was the subject, the
2 | confines of our question today -- and I think that in
3 | that context, as long as the government doesn't
4 | attempt to define who that God is, or relate that God
5 | to a particular religious tradition, I don't see any
6 | Establishment Clause problems with teaching
7 | intelligent design, so long as -- I don't
8 | particularly think it necessarily ought to be
9 | mandated. But if teachers choose to do that, I don't
10 | have an -- I don't see that [as] a violation of the
11 | Establishment Clause.

12 | AUDIENCE PARTICIPANT: There's been
13 | attention brought today to Latin crosses and the
14 | words "In God We Trust", etc. Professor Chemerinsky,
15 | you say this is kind of an exclusionary practice, but
16 | I feel like this is my government. What about our
17 | elected officials? Many of us actually pray to give
18 | us guidance to pick one of these officials out.
19 | Especially -- as we all know President Bush is a
20 | direct product of this. Are they required to check
21 | their religious beliefs before they make a speech?
22 | Are they required to drop this at the schoolhouse

1 | door? Can someone listen to that and say this is not
2 | my president?

3 | PROFESSOR CHEMERINSKY: I think the
4 | President has freedom of speech, and I think the
5 | President can invoke religion, if the President wants
6 | to invoke religion. I don't have a problem with
7 | that. I have problems when it gets to the point
8 | where the government, as government, is endorsing
9 | religion.

10 | I don't understand the distinction
11 | between, it's okay for the government to endorse
12 | religion overall but it's not okay for the government
13 | to endorse a particular religion. Put it in the
14 | context of the Pledge of Allegiance. I understand
15 | that 15 percent of this country claim to believe in
16 | no God. What would we feel if everyday in school it
17 | said, for 85 percent of the semester, "one nation
18 | under God", and then for the other 15 percent of the
19 | nation, it would be "one nation under no God". How
20 | would the 85 percent feel for the 15 percent of the
21 | time when they have to say, "one nation under no
22 | God"? Isn't that exactly how the 15 percent feel

1 | every day who need to say "one nation under God" when
2 | they don't believe in God?

3 | Now what you began with is where you and I
4 | would most fundamentally disagree. I don't think the
5 | majority gets to have the government endorsing
6 | religion, just because they're the majority, because
7 | then there is no limit. Then I see no reason why the
8 | Christian majority shouldn't be able to do whatever
9 | it wants in the name of religion. I don't need to
10 | expunge all references to religions from the
11 | President's speech. I believe in eliminating "In God
12 | We Trust" from money. I shrug and I say so what.

13 | But I do think in the context that I'm
14 | concerned about, public schools, government-sponsored
15 | religious activity, religious symbols on government
16 | property that appear to endorse religion, government
17 | aid to parochial schools -- our government should be
18 | strictly secular.

19 | PROFESSOR WALLACE: I just have a brief
20 | question for Professor Chemerinsky. How does -- when
21 | the government says "In God We Trust", that seems to
22 | affirm both the existence of God and a certain

1 | attitude by the part (inaudible) before God. How is
2 | that not an endorsement of religion?

3 | PROFESSOR CHEMERINSKY: You're right. I'm
4 | pursued. We should take "In God We Trust" off of
5 | money.

6 | (Laughter.)

7 | PROFESSOR CHEMERINSKY: My problem with
8 | that example is it's trivial. The reality is that
9 | it's not like saying to schools that they have to
10 | stand up and recite "one nation under God". If every
11 | time we had to spend money, we had to say merchants
12 | we're giving the money to, "In God We Trust", then I
13 | think it would be clearly unconstitutional.

14 | Yes, I think it's a government endorsement
15 | of religion; yes, I think it shouldn't be on money
16 | for just the reasons you just said. But I just don't
17 | think it's a very big deal.

18 | AUDIENCE PARTICIPANT: This question is
19 | for both of the speakers. Which of the various tests
20 | laid out by the Supreme Court to judge the
21 | Establishment Clause violations do you think best
22 | supports your position, if any? And why do you think

1 | that that one is the best one? And do you think the
2 | Supreme Court should codify or clarify that this is
3 | the test to be used in all future Establishment
4 | Clause cases?

5 | PROFESSOR WALLACE: I'll go first on that.
6 | I don't think that there is any one overarching test
7 | that captures the essence of the Religion Clause that
8 | can be applied in every situation. I think that
9 | there are different things that the Religion Clause
10 | says when it comes to government speech through
11 | government funding. And perhaps -- I'm not a real
12 | big fan of tests, but perhaps at best there ought to
13 | be something of a different test for each of these
14 | discrete areas; government speech, government funding
15 | of religion, accommodation of religion, and these
16 | kinds of things.

17 | I do have some serious problems with the
18 | application of the endorsement test to government
19 | religious speech, just perhaps for the reasons we saw
20 | here just a moment ago. Is it endorsement? Is it
21 | not endorsement? How do we know? From whose
22 | perspective is that determined?

1 The district judge in California that just
2 invalidated the Pledge of Allegiance out there by
3 following, supposedly, Ninth Circuit precedent, threw
4 up his hands. And he said after the Ten Commandments
5 case is this summer, last year, the endorsement test
6 is a hopelessly indeterminate approach to dealing
7 with these kinds of questions.

8 PROFESSOR CHEMERINSKY: I like tests. I
9 especially like three-part tests that give clear
10 guidance. As law students, on the exam you just
11 write them down and you're done. As a lawyer, I can
12 stand before the court and I can go, let's argue
13 about these three things. And I think that the Lemon
14 test, coming from *Lemon v. Kurtzman* in 1971, got it
15 exactly right. The Supreme Court there said that the
16 government violates the Establishment Clause in any
17 one of three circumstances. First, the Court says,
18 there has to be a secular purpose. If there's not a
19 secular purpose to the government's act, it violates
20 the Establishment Clause.

21 Second, the government's action can't have
22 a primary effect that advances (inaudible) religion.

1 | That's that the government can't symbolically endorse
2 | religion. Of course there's indeterminacy to that.
3 | There's indeterminacy to most constitutional tests.
4 | What's the substantial effect on commerce? What's
5 | the prurient interest? Those are just as
6 | indeterminate. But I think it establishes the notion
7 | that reasonable observers should not be perceiving
8 | the government as endorsing religion or exclusion,
9 | and there shouldn't be excess of government
10 | (inaudible) on religion.

11 | The other thing I like about this test is
12 | any test that you remember with the acronym "SEX" is
13 | a good test. You can't go wrong.

14 | (Laughter.)

15 | PROFESSOR CHEMERINSKY: It has to be a
16 | secular purpose; the effect can't be to advance a
17 | religion; and there can't be an excess of government
18 | intent. What frightens me is that I think the
19 | Supreme Court justices, maybe soon five, would
20 | overrule the *Lemon* test by saying the government
21 | violates the Establishment Clause only if it coerces
22 | religious (inaudible), and if ever we go in that

1 | direction, then I think it's much further than what
2 | either of us would want because then there really is
3 | no limit on the ability of the government to give aid
4 | to parochial schools or religious symbols on
5 | government property and the like.

6 | So, I think the *Lemon* test was the right
7 | to set by the Court, and I hope the Court will agree
8 | with that.

9 | PROFESSOR BOWSER: That's it. Thank you
10 | both very much for coming, in particular thank you to
11 | our presenters and participants today.

12 | (Panel concluded.)