"Beyond the Pledge of Allegiance: Hostility to Religious Expression in the Public Square"

June 8, 2004 Testimony of Richard W. Garnett, to the Subcomittee on the Constitution, Civil Rights & Property Rights, United States Senate Committee on the Judiciary*

I appreciate the opportunity to share with the Subcommittee some thoughts about the place of religion in civil society and – more particularly – about the protections that our Constitution guarantees to religious expression and activity in the public square.

These are issues of great importance to me as a scholar, a lawyer, a teacher, and a citizen. By way of background: I teach and write about the First Amendment at the Notre Dame Law School.[1] At Notre Dame, we invite and – we hope – inspire young lawyers to bring their values and religious faith to their studies, and then to carry them into their lives in the law. In our view, we cannot expect young lawyers to think deeply and well about law, justice, and the common good if we tell them to privatize their ideals, or to radically separate their fundamental moral commitments from their law practices. Therefore, we encourage our students to approach both their vocations in the law and their roles as citizens as *whole persons.* We challenge them to *integrate* their work, their beliefs, their values, and their activism. We urge them to avoid the temptation to "check their faith at the door" of their professional and public lives.

With respect to the matter before us today – *i.e.,* discrimination by government against religiously motivated expression and action – I begin with a fundamental, bedrock premise: As President Clinton put it, nearly ten years ago, "religious freedom is literally our first freedom."[2] In other words, the freedom of religion was *central* to our Founders' vision for America.[3] The Framers did not always agree about *precisely* what the "freedom of religion" meant, but they knew that it mattered.

We should remember, therefore, that the protections afforded to religious freedom in our constitutional text and tradition are neither accidents nor anomalies. They are not, as one scholar once claimed, an "aberration in a secular state."[4] Quite the contrary: In our traditions and laws, religious freedom is cherished as a basic human right and a non-negotiable aspect of human dignity. Our Constitution does not regard religious faith with grudging suspicion, or as a bizarre quirk or quaint relic. Rather, as my former colleague, Dean John Garvey, once observed, our laws protect the freedom of religion because "religion is important" and because, put simply, "the law thinks religion is a good thing."[5] In our traditions, faith is a gift, not a threat.

Now, from all this, it follows that our laws and constitutional doctrines should regard governmental restrictions upon religious expression – and *not* religious expression itself – with sober skepticism. In a free society like ours, the "[t]he calculus of religious liberty . . . is determined" not by the extent to which governments manage to confine religious expression to the privacy of homes and churches, but instead "by the measure of religiously motivated thought and action that is insulated from public authority."[6]

* * * * *

The law books, newspapers, weblogs, and talk shows are rich with stories of public officials who have neglected, or lost sight of, these fundamental premises of the American experiment. They have turned things upside down by treating citizens' public religious expression with suspicion, and even hostility, rather than with evenhandedness and respect.

I will mention here just a few examples, because I know you have heard and will hear about many more: Not long ago, Robert and Mildred Tong sought to participate in a local "buy a brick" program, designed to raise money for a new playground at their local park. They were told, however, by Chicago Park District officials that the message they submitted for their family brick – which included the words, "Jesus is the Cornerstone" – was *too religious* to be included.[7]

Another example: When several residents of Oak Park, Illinois, sought permission to use the Village Hall for a ceremony connected to the National Day of Prayer, their application was denied, even though the Hall was generally available to citizens and community groups for a wide range of activities, on the ground that the proposed ceremony was "religious," not a "civic program or activity," and would not "benefit the public as a whole."[8]

Finally: The School District in Scottsdale, Arizona had a general, community-service policy of permitting non-profit groups to distribute literature pro-

moting events and activities of interest to students, such as summer camps, art classes, sports leagues, and artistic performances. However, the District refused to distribute the brochure for one particular summer camp, citing the fact that the camp offered two courses on "Bible Heroes" and "Bible Tales."[9]

Now, the "good news" is that in these particular cases – and also in many others – courts of law eventually vindicated the basic constitutional rule that governments may not discriminate against "religious ideas [and] religious people."[10] What's more, although some government officials continue to misunderstand their obligations and authority with respect to private persons' religious expression, the United State Supreme Court continues to reaffirm that the Constitution neither requires nor permits state actors to single out private religious expression and activities for unfavorable or unequal treatment.[11] As Justice Scalia once put it, "private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression."[12]

And so, a question for this Committee is, why does state-sponsored discrimination against religious expression continue? What's the problem? I am confident that the public officials involved in these cases do not harbor ugly prejudices or deep hostility toward religious believers.[13] Nor do I believe that they are willfully neglecting their obligations under the Constitution. Instead, I am convinced that the officials in these cases – and also, unfortunately, too many well-meaning Americans today – fail to understand and appreciate the text, history, and purpose of the Religion Clauses of the First Amendment, in several important and related ways.

First, many public officials and citizens misunderstand the meaning of the phrase, "separation of church and state," and the place of this idea in our constitutional tradition. To be sure – as thinkers from St. Augustine to Pope Gregory VII to Roger Williams have taught us[14] – the "separation of church and state," properly understood, is an important component of religious freedom. That is, the *institutional and jurisdictional separation* of religious and political authority, the independence of religious communities from government oversight and control, respect for the freedom of individual conscience, government neutrality with respect to different religious traditions, and a strict rule against formal religious tests for public office – all these "separationist" features of our constitutional order have helped religious faith to thrive in America. Properly understood, the separation of church and state is not an anti-religious ideology, but a "means, a technique, [and] a policy to implement the principle of religious freedom."[15]

However, too many have confused Thomas Jefferson's "figure of speech"[16] about a "wall of separation between church and State" with a novel and unsound rule that would obligate public officials to scrub clean the public square of all "sectarian" residue.[17] Professor Kathleen Sullivan, for example, has argued forcefully and prominently that the First Amendment's Establishment Clause was designed not simply to end official sponsorship of churches but also to *affirmatively establish* a secular "civil order for the resolution of disputes."[18] This view of church-state separation is seriously mistaken. It is untrue to the vision of our Founders and to the text of our Constitution.[19] As John Courtney Murray lamented more than 50 years ago, arguments like this stand the First Amendment "on its head. And in that position it cannot but gurgle nonsense."[20]

In fact, our Constitution separates "church" and "state" not to confine religious belief or silence religious expression, but to *curb the ambitions and reach of governments*. In our laws, "Caesar recognizes that he is only Caesar and forswears any attempt to demand what is God's. (Surely this is one of history's more encouraging examples of secular modesty.) The State realistically admits that there are . . . limits on its authority and leaves the churches free to perform their work in society."[21]

Second, and relatedly, too many of us have forgotten that the First Amendment limits *government* conduct only. It has *nothing* to say about private action, other than to confirm that religious expression, exercise, and worship are worth protecting.[22] The First Amendment's Establishment Clause is not a *sword*, driving private religious expression from the marketplace of ideas; rather, the Clause constrains government, precisely to serve as a *shield*, and to protect religiously motivated speech and action. Judge McConnell captured the idea succinctly: "If a group of people get together and form a church, that is the free exercise of religion. If the government forms a church, that is an establishment of religion. One is protected; one is forbidden."[23]

Third, nothing in our political morality or constitutional traditions mandates or implies a duty of self-censorship by religious believers. Nothing in the First Amendment suggests that religious expression is somehow unwelcome or out of place in civil society and

public debate. And yet, many in America appear to share the view – expressed bluntly by one of our leading public intellectuals – that it is in "bad taste to bring religion into discussions of public policy."[24] On this view, as Stephen Carter memorably put it, religion is "like building model airplanes, just another hobby: something quiet, something trivial–not really a fit activity for intelligent . . . adults."[25]

Now, scholars are and have long been wrestling with the question of the appropriate place for religiously grounded arguments in public life. This is a rich and important conversation, but the bottom line is clear: Our Constitution does not demand a Naked Public Square,[26] nor does it tolerate efforts by government to create one. The Constitution imposes no "don't ask, don't tell" rule on religious believers presumptuous enough to venture into public life,[27] and the Establishment Clause imposes no special obligation on devout religious believers to "sterili[ze]" their speech before entering the public forum.[28] Active and engaged participation by the faithful is perfectly consistent with the institutional separation of church and state that the Constitution is understood to require. For example, while reasonable and faithful Christians might think it is unwise, it is certainly not unconstitutional for Christian leaders to address political questions, or to remind politicians of the implications of what they profess.

What's more, and going beyond constitutional law for a moment, the political morality of liberal democracy, rightly understood, does not require self-censorship on the part of persons who are believers *and* citizens. In fact, it would seem more than a little bit *illiberal*, to assert the peculiar unsuitability for public discourse of one source–*i.e.,* religious faith–of morality, "values," and commitment.[29] To force religious believers to concede, as the price of admission to the political community, that "religious reasons are not good reasons for political action," is, as my colleague Paul Weithman has observed, to deny religious believers "full membership" in that community.[30]

True, some courts and officials have at times seemed more worried about the "divisiveness"[31] thought to attend public manifestations of religious commitment than about the threats posed to authentic religious freedom and pluralism by their own over-reactions.[32] And, as a result, their pronouncements have, in Chief Justice Rehnquist's words, at times seemed to "bristle[] with hostility to all things religious in public life."[33] The recent decision by Los Angeles County, bowing to the threat of a meritless law suit, to remove a tiny gold cross from the County Seal is a reminder that such regrettable over-reactions continue. We should remember, as Professor Jean Bethke Elshtain has warned, that "if we push too far the notion that, in order to be acceptable public fare, all religious claims . . . must be secularized, we wind up de-pluralizing our polity and endangering our democracy."[34]

Finally, many Americans misunderstand the significance of the Supreme Court's observation that, under our Constitution, "religion must be a private matter for the individual, the family, and the institutions of private choice[.]"[35] Clearly, few would disagree with the claim that "religion is private," if the claim is taken to refer to institutional disestablishment or an entirely appropriate respect on government's part for individual freedom of conscience and the autonomy of religious institutions. But this claim should *not* be taken to mean that religious expression and witness has no place in civil society or that religious faith does not speak to questions of public policy and the common good.

William James once quipped, "in this age of toleration, [no one] will ever try actively to interfere with our religious faith, provided we enjoy it quietly with our friends and do not make a public nuisance of it[.]"[36] Sometimes, though, religious people are called *precisely* to "make a public nuisance" – and also to engage respectfully their fellow citizens in dialogue about how we should live and live together. Nothing in our constitutional text and traditions implies that religious citizens should not speak and act as though their faith had consequences for state and society. As Justice Thomas has insisted, it would be a "most bizarre" reading of the First Amendment that would "reserve special hostility for those who take their religion seriously, [and] who think that their religion should affect the whole of their lives."[37]

The Constitution protects our right to keep our faith private. However, it does not *require* us to privatize our faith before entering into the public square, or taking up the responsibilities of citizenship. Indeed, it would be highly – and unconstitutionally – presumptuous for government to instruct religious believers and communities as to the limited scope of religion's concerns.[38]

Here, it is worth bringing up a recent decision by the California Supreme Court, which recently ratified an effort by that State's legislature to confine, and to re-define, the religious mission of the Catholic

Church.[39] In the *Catholic Charities* case, the court upheld a provision that denies a "religious employer" exemption from the State's requirement that employers include contraception coverage in their prescription-drug-benefit programs to Catholic organizations that engage in activities other than worship and religious instruction or that hire and serve people other than co-religionists. Put simply, California has imposed on religious communities like the Catholic Church an ideology of radically privatized religion. As Justice Brown reminded her colleagues, though, many churches have "never envisioned a sharp divide between the Church and the world, the spiritual and the temporal, or religion and politics. For the Church, the internal spiritual life of its members and institutions must always move outward as a sign and instrument for the transformation of the larger society."[40]

As I have discussed elsewhere, sweeping mandates and narrow exemptions, like the ones at issue in the *Catholic Charities* case, pose grave threats to church autonomy and religious freedom.[41] They also rest – like the arguments of those who contend that religious expression is inappropriate in public settings, or about public-policy issues – on a misunderstanding of "private religion."

In the end, as Professor John Witte writes, "public religion must be as free as private religion. Not because the religious groups in these cases are really nonreligious. Not because their public activities are really nonsectarian. And not because their public expressions are really part of the cultural mainstream. To the contrary, these public groups and activities deserve to be free *just because they are religious*."[42]

* * * * *

Thank you very much.

*Richard W. Garnett is an Associate Professor of Law at the University of Notre Dame Law School.

Footnotes

[1] *See, e.g., Assimilation, Toleration, and the State's Interest in Religious Doctrine*, ___ U.C.L.A. L. Rev. ___ (2004) (forthcoming); *American Conversations With(in) Catholicism*, ___ Mich. L. Rev. ___ (2004) (forthcoming) (reviewing John T. McGreevy, Catholicism and American Freedom: A History (2003)); *The Theology of the Blaine Amendments*, 2 First. Amd. L. Rev. 45 (2003); *Christian Witness, Moral Anthropology, and the Death Penalty*, 17 Notre Dame J. Ethics, L. & Pub. Pol'y 541 (2003); *The Right Questions About Schoo1 Choice: Education, Religious Freedom, and the Common Good*, 23 Cardozo L. Rev. 1281 (2002); *Sectarian Reflections on Lawyers' Ethics and Death-Row Volunteers*, 77 Notre Dame L. Rev. 795 (2002); *Common Schools and the Common Good: Reflections on the School-Choice Debate*, 75 St. John's Law Rev. 219 (2001); *A Quiet Faith? Taxes, Politics, and the Privatization of Religion*, 42 B.C. L. Rev. 771 (2001); *The Story of Henry Adams's Soul: Education and the Expression of Associations*, 85 Minn. L. Rev. 1841 (2001); Brown's *Promise, Blaine's Legacy*, 17 Const. Comm. 651 (2000) (reviewing Joseph P. Viteritti, Choosing Equality: School Choice, The Constitution, and Civil Society (1999)); *Taking* Pierce *Seriously: The Family, Religious Education, and Harm to Children*, 76 Notre Dame L. Rev. 109 (2000); *Francis Bacon Takes On The Ghouls: The "First Principles" of Religious Freedom*, 3 Green Bag 2d 421 (2000) (reviewing John Witte Jr., Religion and the American Constitutional Experiment (2000)); *School Choice, The First Amendment, and Justice*, 4 Tex. Rev. L. & Pol. 301 (2000) (with Nicole Stelle Garnett).

[2] President William Jefferson Clinton, *Religious Liberty in America* (July 12, 1995). *See also, e.g.,* Thomas J. Curry, The First Freedoms: Church and State in America to the Passage of the First Amendment (1986); Michael W. McConnell, *Why Is Religious Liberty the "First Freedom"?*, 21 Cardozo L. Rev. 1243 (2000).

[3] *See generally, e.g.,* John Witte, Jr., Religion and the American Constitutional Experiment: Essential Rights and Liberties (2000); John T. Noonan, The Lustre of Our Country: The American Experience of Religious Freedom (1998).

[4] Suzanna Sherry, *Enlightening the Religion Clauses,* 7. J. Contemp. Legal Issues 473, 477 (1996).

[5] John H. Garvey, What Are Freedoms For? 42, 57 (1996). *See also* McConnell, *supra,* at 1265 ("Freedom of conscience mattered a great deal [to the Founders] because religion mattered a great deal.").

[6] Joseph P. Viteritti, Choosing Equality: School Choice, the Constitution, and Civil Society 165 (1999).

[7] Tong v. Chicago Park District, ___ F. Supp. 2d ___, 2004 WL 943446 (D. Ill., April 29, 2004).

[8] DeBoer v. Village of Oak Park, 267 F.3d 558 (7th Cir. 2001).

[9] Hills v. Scottsdale Unified School District, 329 F.3d 1044 (9th Cir. 2003).

[10] Board of Educ. of Kiryas Joel v. Grumet, 512 U.S. 687, 717 (1994) (O'Connor, J., concurring in part and concurring in the judgment). *See also, e.g.,* Employment Div. v. Smith, 494 U.S. 872, 877 (1990) (noting the bedrock principle of First Amendment jurisprudence that the government "may not . . . impose special disabilities on the basis of religious views or religious status"); McDaniel v. Paty, 435 U.S. 618, 639 (1978) (Brennan, J., concurring in the judgment) (insisting that government "may not use religion as a basis for classification for the imposition of duties, penalties, privileges or benefits").

[11] *See, e.g.,* Good News Bible Club v. Milford Central School, 533 U.S. 98 (2001); Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995); Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753 (1995); Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993). *See generally, e.g.,* Eugene Volokh, *Equal Treatment Is Not Establishment,* 13 Notre Dame J. L. Ethics & Pub. Pol'y 341 (1999); Michael A. Paulsen, *Religion, Equality, and the Constitution: An Equal Protection Ap-*

proach to Establishment Clause Litigation, 61 NOTRE DAME L. REV. 311 (1986).

[12] *Capitol Square,* 515 U.S. at 760 ("[G]overnment suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince.").

[13] In the elite academy, on the other hand, an aggressive, anti-religious, and comprehensive brand of political liberalism is increasingly influential. For a discussion of this theory, and of the leading scholars who embrace it, see James Hitchcock, *The Enemies of Religious Liberty,* FIRST THINGS (February 2004). I have appended a copy of Professor Hitchcock's article to this statement.

[14] *See generally, e.g.,* John Witte, Jr., Book Review, *That Serpentine Wall of Separation,* 101 MICH. L. REV. 1869 (2003).

[15] John Courtney Murray, *Law or Prepossessions?,* 14 J. L. CONTEMP. PROBS. 23, 32 (1949).

[16] *See* McCollum v. Board of Education, 333 U.S. 203, 247 (1948) (Reed, J., dissenting) ("A rule of law should not be drawn from a figure of speech.").

[17] For a helpful reminder, by a leading scholar, that Jefferson's views on religion were far from widely accepted, either at the time of the Founding or for most of our history, see John Witte, Jr., *Publick Religion: Adams v. Jefferson,* FIRST THINGS (Feb. 2004). I have appended Professor Witte's article to my statement.

[18] Kathleen Sullivan, *Religion and Liberal Democracy,* 59 U. CHIC. L. REV. 195, 197 (1992).

[19] *See generally, e.g.,* PHILIP HAMBURGER, SEPARATION OF CHURCH AND STATE (2002); JOHN WITTE JR., RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT (2000); STEVEN D. SMITH, FOREORDAINED FAILURE: THE QUEST FOR A CONSTITUTIONAL PRINCIPLE OF RELIGIOUS FREEDOM (1995); GERALD V. BRADLEY, CHURCH-STATE RELATIONSHIPS IN AMERICA (1987). *See also, e.g.,* Wallace v. Jaffree, 472 U.S. 38, 91-113 (1985) (Rehnquist, J., dissenting).

[20] John Courtney Murray, *Law or Prepossessions?,* 14 J. L. CONTEMP. PROBS. 23, 23 (1949).

[21] William Clancy, *Religion as a Source of Tension*, *in* RELIGION AND THE FREE SOCIETY 27-28 (1958). *Cf., e.g.,* Thomas C. Berg, *The Pledge of Allegiance and the Limited State,* 8 TEX. REV. L. & POL. 41, 76 (2003) (suggesting, among other things, that "Under God" in the Pledge "is a means for the state to declare that it is a limited institution that is subject to, and does not interfere with, higher commitments and norms"); McConnell, *Why Is Religious Liberty the "First Freedom," supra,* at 1244 ("The division between temporal and spiritual authority gave rise to the most fundamental features of liberal democratic order: the idea of limited government, the idea of individual conscience and hence of individual rights, and the idea of civil society, as apart from government, bearing primary responsibility for the formation and transmission of opinions and ideas.").

[22] *See, e.g.*, *Capitol Square,* 515 U.S. at 767 ("By its terms [the Establishment] Clause applies only to the words and acts of *government.* It was never meant, and has never been read by this Court, to serve as an impediment to purely *private* religious speech[.]"); Board of Educ. v. Mergens, 496 U.S. 226, 250 (1990) (O'Connor, J., concurring) ("[T]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.").

[23] Michael W. McConnell, *"God Is Dead and We Have Killed Him!": Freedom of Religion in the Post-Modern Age*, 1993 BYU L. REV. 163, 184.

[24] Richard Rorty, *Religion as Conversation-Stopper,* 3 COMMON KNOWLEDGE 1, 2 (1994). *See also* William Marshall, *The Other Side of Religion,* 44 HASTINGS LAW JOURNAL 843, 844 (1993) (Religion and religious conviction, on the other hand, "are purely private matters that have no role or place" in the political arena).

[25] STEPHEN L. CARTER, THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION 22(1993).

[26] *See* RICHARD JOHN NEUHAUS, THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA (2d ed. 1996).

[27] Jean Bethke Elshtain, *How Should We Talk?,* 49 Case WESTERN RES. L. REV. 741, 744 (1999) ("To tell religious believers to keep quiet, else they interfere with my rights simply by speaking out is an intolerant idea. It is, in effect, to tell folks that they can not really believe what they believe or be who they are: Don't ask. Don't tell.").

[28] *Good News Club v. Milford Central School,* 533 U.S. 98, 124 (2001) (Scalia, J., concurring). *See also, e.g.,* Michael J. Perry, *Why Political Reliance on Religiously Grounded Morality Does Not Violate the Establishment Clause,* 42 WILLIAM AND MARY LAW REVIEW 663 (2001).

[29] *See, e.g.,* Michael W. McConnell, *Five Reasons to Reject the Claim that Religious Arguments Should Be Excluded from Democratic Deliberation,* 1999 UTAH L. REV. 639, 654 n. 56 ("Some views–such as advocacy of slavery or cruelty–may be treated by a liberal society as beyond the pale. But to treat religious views, which have been, and are, entertained by a large majority of the people, including many people of eminent reasonableness and good sense, as within this category, is surely illiberal."); Nicholas Wolterstorff, *Audi on Religion, Politics, and Liberal Democracy*, *in* ROBERT AUDI & NICHOLAS WOLTERSTORFF, RELIGION IN THE PUBLIC SQUARE 147 (1997) ("[T]he ethic of the citizen in a liberal democracy imposes no restrictions on the reasons people offer in their discussion of political issues in the public square . . . . If the position adopted, and the manner in which it is acted upon, are compatible with the concept of liberal democracy, and if the discussion concerning the issue is conducted with civility, then citizens are free to offer and act on whatever reasons they find compelling."); Michael J. Sandel, *Political Liberalism,* 107 HARVARD LAW REVIEW 1765, 1772-73 (1994) ("Why must we 'bracket' . . . our moral and religious convictions, our conceptions of the good life? Why should we not base the principles of justice that govern the basic structure of society on our best understanding of the highest human ends?") (reviewing JOHN RAWLS, POLITICAL LIBERALISM (1993)).

[30] Paul Weithman, *Religious Reasons and the Duties of Membership,* 35 WAKE FOREST L. REV. 511, 532 (2001).

[31] *See, e.g.,* Lemon v. Kurtzman, 403 U.S. 602 (1971).

[32] *Cf. Good News Club,* 533 U.S. at 118 ("[W]e cannot say the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum.").

[33] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 318 (2000) (Rehnquist, J., dissenting).

[34] Jean Bethke Elshtain, *State-Imposed Secularism as a Potential Pitfall of Liberal Democracy* (Prague 2000).

[35] *Lemon,* 403 U.S. at 625.

[36] William James, The Will to Believe and Other Essays in Popular Philosophy xi (1897) (Dover ed. 1956).

[37] Mitchell v. Helms, 530 U.S. 793, 827-28 (2000) (plurality op.).

[38] *See generally, e.g*., Richard W. Garnett, *A Quiet Faith? Taxes, Politics, and the Privatization of Religion*, 42 B.C. L. Rev. 771 (2001); Gerard V. Bradley, *Dogmatomachy: A "Privatization" Theory of the Religion Clause Cases*, St. Louis U. L. J. 275 (1986).

[39] Catholic Charities of Sacramento, Inc. v. Superior Court, 10 Cal. Rptr. 3d 283 (2004).

[40] *Id*. at 573 (Brown, J., dissenting) (citing *K. Brady, Religious Organizations and Mandatory Collective Bargaining Under Federal and State Labor Laws: Freedom From and Freedom For*, 49 Villanova L. Rev. 156, 157 (2004)).

[41] Richard W. Garnett, *Confine and Conquer,* National Review Online (March 3, 2004). I have appended this essay to my statement.

[42] Witte, Religion and the American Constitutional Experiment, *supra,* at 237.