ISSUE ANALYSIS

ISLAM, SHARIAH LAW, AND THE AMERICAN CONSTITUTION

By
Professor William Wagner*

Our nation's Founders knew God as the source of our liberty and rights.[1] The Declaration of Independence, of course, reflects such a view: *"We hold these truths to be self-evident, that all …are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty...."* [2] We see

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[1] *See, e.g.*, Charles E. Rice, *Rights and the Need for Objective Moral Limits*, (2005).

[2] The Declaration of Independence para. 2 (U.S. 1776). The Creator makes truth and other moral absolutes evident to us; we do not create them. Moreover, the Creator makes us creatures; we are not the Creator, and, as such, we are subordinate to—though certainly a part of—that realm of absolutes. Good government is not immoral or amoral. Good government is moral. Under this objective worldview, the good that government is designed to do is premised on absolute and objective truths, not subjective and relative feelings. That is ultimately what we must mean when we affirm that we are a "government of laws, not of men." *See, e.g.*, Marbury v. Madison, (1803). John Adams embedded this principle in the Massachusetts Constitution in the context of establishing a separation of governmental powers. Mass. Const., pt. I, art. XXX). Moreover, when our founders adopted the Constitution and the Bill of Rights (and for many decades thereafter) natural-law theory dominated American jurisprudence. Richard H. Helmholz, *The Law of Nature and the Early History of Unenumerated Rights in the United States*, (2007); Douglas W. Kmiec, *Natural Law Originalism for the Twenty-First Century – A Principle of Judicial Restraint, Not Invention*, (2007). The Declaration of Independence, the Federalist Papers, and the writings of many of the Founding Fathers and leading attorneys refer to natural law as a source of our rights. Helmholz, *supra*; Nelson Miller, *The Nobility of the American Lawyer: The Ennobling History, Philosophy, and Morality of a Maligned Profession*, (2005). Judges, lawyers, and legal scholars widely agreed that the common law was an expression of natural or divine law. Helmholz, *supra*; Jonathan T. Molot, *The Rise and Fall of Textualism*, (2006) ("[T]he Founders expected judges to draw upon natural law principles as sources of decision in both common law cases and in the course of interpreting legislative enactments."); Mark L. Jones, *Fundamental Dimensions of Law and Legal Education: An Historical Framework – A History of U.S. Legal Education Phase I: From the Founding of the Republic Until the 1860s*, (2006); Russell Kirk, *Natural Law and the Constitution of the United States*, (1994).

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the promise of the Declaration in the structure and text of the Constitution. Here, *we the people* delegate power to the government to secure our freedom, while expressly limiting government's ability to deprive individual liberty.

Viewed through the lens of the founders' worldview, one discovers divinely revealed, naturally existing, objective standards. Standards which, when reflected in the Constitution, one uses to objectively measure whether a government action is right or wrong, good or bad, just or unjust and, ultimately whether it is constitutional.

The constitutional jurisprudence grounded in these deeply rooted cultural and legal traditions, customarily clashes with secular worldview jurisprudence (rejecting the inviolable standard for an evolving morally-relative approach). Thus, historically, Christians view threats to their inalienable liberty as emerging most especially from those espousing such a secular world-view. No surprise here. Policy initiatives and litigation by the secular left aggressively attack the sanctity of life, the sanctity of marriage, the sanctity of family, the origin of the universe, and the free exercise of sacred conscience, just to name a few. Litigation strategies formulated to defend religious liberty habitually, therefore, presuppose the ubiquitous secular foe. Likewise, strategic approaches designed

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Our Supreme Court cited the writings of three of Europe's greatest natural-law scholars (Grotius, Puffendorf, and Vattel) at least ninety times in its opinions between 1789 and 1825. Helmholz, *supra*. Blackstone, whose *Commentaries on the Laws of England* was the "bible" for early American lawyers and judges, repeatedly referenced natural and divine law principles. William Blackstone, 4 Commentaries; Thomas J. Marzen et al., *Suicide: A Constitutional Right?*, (1985); Kirk, *supra* (noting that Edmund Burke reported that by 1775, nearly as many copies of the Commentary had been sold in America as in England); Jones, *supra*; Kmiec, *supra*; Miller, *supra*.

to impact policy promulgation anticipate worldly opponents advancing secular progressive positions. We fiercely fight these battles on our left flank since secularism seeks to shift the political paradigm to prevent Christian citizens, with viewpoints grounded in the sacred, from participating in the political process. Indeed, our opponents on the left presume that God and His self-evident Truth do not even exist. They therefore contend that our viewpoints, informed by such Truth, have no place in constitutional governance. These are battles well worth fighting.

While our litigation and policy battles with the secular world keep our left flank occupied, the issue of Islamic theocracy amasses ominously on our rear flank. Immigrants from Muslim countries are moving in increasingly greater numbers to Europe and the Americas, many with the specific purpose of extending the "Abode of Islam." For example, Yusuf al-Qaradawi, a Sunni Muslim cleric and head of the European Council for Fatwa and Research, is quoted as saying:

> Islam entered Europe twice and left it... Perhaps the next conquest, Allah willing, will be by means of preaching and ideology. The conquest need not necessarily be by the sword... Perhaps we will conquer these lands without armies. We want an army of preachers and teachers who will present Islam in all languages and in all dialects. [3]

Likewise, Omar M. Ahmad, Chairman of the Council for American Islamic Relations has said, "Islam isn't in America to be equal to any other faith, but to become dominant. The Koran ... should be the highest authority in America, and

[3] Quoted in *The Islamisation of the West* by Dr Patrick Sookhdeo (2010).

Islam the only accepted religion on earth."[4] Similarly, Anjem Choudary, Head of Islam4UK, states: "Our objectives are to invite the societies in which we live to think about Islam as an alternative way of life … and ultimately, as well, to establish the Shariah on state level."[5]

With the patient planting of new enclaves, the process of establishing the parallel society and political system has begun. Those behind this process seem willing to master an understanding of the occupied country's government and legal system, systematically dismantling it while building the framework for an Islamic theocracy as its replacement. Such a replacement, when complete, dogmatically declares a different kind of absolute than the self-evident Truths, which undergird the American constitution.

A small sample of examples is sufficient to illustrate:

> Islam is the Religion of the State. Arabic is its official language, and the principal source of legislation is Islamic Jurisprudence (Shariah). (Egypt, Const. Art. 2)
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> Islam is the official religion of the State and is a foundation source of legislation: … No law may be enacted that contradicts the established provisions of Islam. (Iraq, Const. Section One - Fundamental Principles, Art. 2)
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> The religion of the state of the Islamic Republic of Afghanistan is the sacred religion of Islam…. In Afghanistan, no law can be

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[4] Quoted in, John Griffing, *Islamocracy* (American Thinker – January 14, 2010).
[5] (MEMRI TV Project, Press TV Iran – Feb. 3, 2010) available on UTube at http://www.youtube.com/watch?v=Ne7z-_RXWeA

> contrary to the beliefs and provisions of the sacred religion of Islam. (Afganistan, Const. Chapter One – The State, Art. 2, 3)

Gaining strength daily, the prospect of theocratic rule poses a growing threat to the free exercise of Christian conscience and constitutional governance. This regime, unlike our secular foe, claims the existence of a dogmatic deity where law, Islam, and the state are one. We must give serious intellectual attention to this matter, and raise our concerns publicly whenever necessary. Our singluar focus on secular challenges to God's existence ill-prepares us to respond (in a constitutional context) to a stealth religious jihad by advocates of an authoritarian regime. Whether in the academic world, in the courts, or in the legislatures, this must change.

Do the Islamic authorities mean what they say? If so, their doctrines seek nothing less than to replace the American constitutional republic, grounded in deeply rooted Greco-Roman / Judeo-Christian traditions, with the formal establishment of Islamic government, birthed in jihad and grounded in the Shariah.[6] Thus, in the future, we must look beyond the secular attacks on our religious liberty. We must also consider that a religious regime (often under the guise of exercising First Amendment freedoms) seeks to replace our current constitutional government with a theocracy – a theocracy which is devastatingly adverse to a Christian's exercise of inalienable liberty. Removing the sheep'swool

[6] Solomon & Al Maqdisi, Modern Day Trojan Horse – The Islamic Doctrine of Immigration: Accepting Freedom or Imposing Islam (ANM 2009).

of religious freedom from the wolf of religious fascism, while at the same time not capitulating to secular positions, will be difficult. [7]

Let us begin by considering that the purpose of implementing the Shariah incrementally is to establish an Islamic theocracy brick by brick. If the means of establishing fascist theocracy piecemeal via Shariah is stealth jihad (e.g., using free exercise principles as pretext), it behooves us to study again the relevant text of the First Amendment to the United States Constitution.

> Ratified in 1791, the First Amendment states:
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> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…."

Although the concise language of the amendment is clear, American academics and judges continue to evolve enough opacity around it to cloud its meaning in controversy. Emerging from the fog though, if one watches carefully, the first-stated of our founder's first principles appears. It is here we find some hope.

In defending religious liberty of Christians, religious liberty advocates traditionally understand the free exercise of religious conscience to be one of our inalienable, fundamental rights. Given the deeply rooted cultural and legal traditions of the nation, it is not surprising that, for a time, a majority of the Supreme Court agreed. In a number of cases, the Court recognized the free

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[7] The difficulty is exacerbated by the Islamic doctrine of takiyya "which permeates almost all the activities and dealings of Muslims within non-Muslim societies…." Solomon & Alamaqdisi, The Mosque Exposed (ANM Press 2006). Takiyya permits a Muslim to disguise true intentions in certain circumstances in a non-Muslim society. *Id.*

exercise of religion as a fundamental right.[8] The Court, therefore, required government to provide a compelling interest of the highest order to justify its interference with an individual's free exercise of religion. While applying this strict scrutiny to government action the Court further required the government to show it used the least restrictive means available to accomplish its interest.

Conservative Christians approve when the Court confirms such rights as fundamental under the constitution – and quietly applaud when it strikes down government action that infringes on such rights. These Christians know they need not look to a Supreme Court opinion for the right to freely exercise their religion; it is liberty they naturally and divinely possess. For these citizens, it is a self-evident Truth that the Creator endows all people with the inalienable right to the free exercise of religious conscience. When the Court eventually drifted away from this principle as a Constitutional absolute, Christians vociferously objected. Indeed, religious liberty advocates vehemently opposed interpretations of the Free Exercise Clause diminishing the inalienable, fundamental nature of the right. For example, in *Employment Division v. Smith*, the Supreme Court upheld a law that substantially infringed upon the free exercise of religious conscience.[9] Because the Court characterized the government action as a neutral law of general applicability, it required no justification by the government for its

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[8] See, e.g., *Sherbert v Verner*, 374 U.S. 398 (1963) (striking down government action denying unemployment benefits to person who lost job when she did not work on her Sabbath; *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (striking down criminal convictions for violations of state compulsory school attendance laws that conflicted with defendants' sincerely held religious beliefs).

[9] *Employment Division, Department Of Human Resources of Oregon v. Smith,* 494 U.S. 872 (1990)

action, even though the action substantially infringed upon the free exercise of religious liberty. Thus, the Court concluded that in such situations, government action is constitutional if rationally related to a legitimate government interest – the lowest level of scrutiny the court can apply when reviewing a law to determine whether it is constitutional.[10]

Congress, with some success, enacted laws to overturn the Court's holding. Again, conservative Christians supported these congressional efforts to restore the free exercise of religion to full-fundamental right status under the Constitution.[11] What will Christian religious liberty advocates say though when

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[10] Compare, *Church of Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520 (1993)(holding that Court will apply strict scrutiny to a law substantially infringing upon religious liberty when the law is not a neutral law of general applicability).

[11] After the Supreme Court's decision in *Smith,* an astounded American citizenry looked to their politically accountable representatives in Congress. Congress responded to the Supreme Court by passing, in a bi-partisan way, the Religious Freedom Restoration Act. The act expressly provided that:

> Government shall not substantially burden a person's exercise of religion, even if the burden results from a rule of general applicability, [unless] … it demonstrates that application of the burden to the person— (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest. RFRA § 2000bb–1

In promulgating the RFRA, Congress declared: "the framers of the Constitution, recognizing free exercise of religion as an unalienable right, secured its protection in the First Amendment to the Constitution." Congress stated the purpose of the legislation was —

> (1) to restore the compelling interest test as set forth in Sherbert v. Verner, 374 U.S. 398 (1963) and Wisconsin v. Yoder, 406 U.S. 205 (1972) and to guarantee its application in all cases where free exercise of religion is substantially burdened; and
> (2) to provide a claim or defense to persons whose religious exercise is substantially burdened by government.

The Congressional response to the Supreme Court's *Smith* decision was not limited to passage of the Religious Freedom Restoration Act. Congress also enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA). Title 42, United State Code – Chapter 21C. This act

asked to join in Islamic/Shariah free exercise advocacy? How will they respond to the contention that discrimination against any religion is a threat to the free exercise of religious conscience of all? What will our amicus briefs argue when individuals inevitably profess free exercise of religion under the First Amendment, while seeking government exemptions in order to implement the Shariah? Christian policy and religious liberty groups need to start thinking about these questions. Requests for separate Shariah courts, Shariah financing, food regulation, government sanctioned prayer, and official suppression of Christian religious expression – all building blocks for an established Islamic theocracy – already abound.[12]

Is the wolf slyly establishing theocracy, constructing it brick by brick, concealed in the sheep's clothing of free exercise? At some point it becomes imperative to carefully discern and distinguish private exercises of religious conscience

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required state and federal courts to apply strict scrutiny to any government actions substantially infringing on the free exercise of religion in cases involving land use or institutionalized persons.

The Supreme Court reviewed Congress' exercise of its power after the passage of RFRA and RLUIPA. In *City of Boerne v. Flores,* the Court held that Congress acted outside the scope of its constitutional authority when enacting the RFRA as applied to the states. *City of Boerne v. Flores*, 521 U.S. 507 (1997); In *Gonzales v. O Centro Espirita A Beneficente Uniao Do*, 546 U.S. 418 (U.S. 2006) it upheld the RFRA requirements as applied to federal government actions. In *Cutter v. Wilkinson,* 544 U.S. 709 (2005), the Court upheld RLUIPA, finding that the Commerce Power and the Spending Power constitutionally authorized Congress to enact the relevant provisions of the statute.

[12] See, e.g, Katharine C. Gorka, *Shariah Financing and the Constitution*, (The Westminster Institute 2010); Asifa Quraishi and Najeeba Syeed-Miller, *No Altars: An Introduction to Islamic Family Law in U.S. Courts*. (University of Wisconsin Legal Studies Research Paper Series - Dec. 16, 2009); Stephen Schwartz, Islamist Gulen Movement Runs U.S. Charter Schools (American Thinker - March 29, 2010); John Griffing, Islamocracy (American Thinker – January 14, 2010) (discussing government exemptions for Islamic prayer); www.AnsweringMuslims.com - *Dearborn Police: Defending Islam Against the Constitution* (showing law enforcment actions against Christians peacefully handing out scripture on a public street) (http://www.youtube.com/watch?v=Smw9QuH1xkA&feature=player_embedded).

protected by the Free Exercise Clause – and government action respecting an establishment of religion, prohibited by the Establishment clause.

We might begin by making some distinctions. The integration of government action by officials with intentions of establishing an Islamic theocracy is not the same as a Christian lawmaker seeking to participate in the political process, notwithstanding having positions informed by sacred moral principles rather than secular ones. When Christians participate in policy promulgation informed by sacred moral principles they do not seek to establish a Christian theocracy; they merely seek to fulfill their responsibility of good governance by participating in the policy-making process. Those seeking to implement the Shariah into American public policy, however, intend much more. With each government action, they seek to lay another brick in the establishment of a religious government. We must ask if each one of the official incremental efforts implementing the Shariah is respecting an establishment of an Islamic theocracy – and evaluate our legal and policy strategies accordingly.

Most everyone agrees that government action violates the Establishment Clause if government officially establishes one religion against others. Assuming government is not overtly establishing a state religion, how does one decide whether a government action survives or fails an Establishment Clause challenge? Any determination necessarily involves interpretation of the Establishment Clause.

When it comes to judicial review of government action and the Establishment Clause, competing constitutional philosophies produce a jurisprudential jumble resulting in inconsistent precedents providing little predictability.[13]

Again, we find the jurisprudence grounded in America's deeply rooted cultural and legal traditions at odds with secular worldview jurisprudence embracing an ever-evolving, morally-relative approach. Many in the left-leaning legal academy and the courts see the Constitution as a living, evolving organism (which they, being specially trained in the law, deem themselves worthy of actively manipulating).[14] When such a judicially active interpretative approach is applied to Establishment Clause jurisprudence, "*Congress shall pass no law respecting the establishment of religion*" evolves into a morally-relative, surreal world where government action must comport with judicially deemed illusions of neutrality. Here, to be constitutionally "neutral," all laws and other government action must have a secular purpose and not symbolically endorse religion.[15]

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[13] To illustrate, compare two Establishment Clause cases handed down by the Supreme Court on the same day: *Van Orden v. Perry,* 125 S.Ct. 2854 (2005) (upholding government action placing Ten Commandments on Government property as Constitutional) and *McCreary County v. ACLU,* 125 S.Ct. 2722 (2005) (striking down government action placing Ten Commandments on government property as unconstitutional).

[14] Such an approach allows judges to pretend to look into the shadows of the Constitution's text to discern liberty interests they personally believe require judicial protection from politically accountable expressions of the will of the people. And so we learn from what has been appropriately characterized as an imperial judiciary that we have "liberty" interests and rights nowhere stated in the Constitution (e.g., the right to contraception, abortion, etc.).

[15] In *Lemon v. Kurtzman*, the Supreme Court stated that the government must meet all three prongs of the following test to survive an Establishment Clause challenge: "First, the statute must have a secular legislative purpose; 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."

Given the enormity of the threat, it might be tempting, like Abraham impatiently calling on Hagar, to solve the issue of Islamic theocracy with the illusory neutrality principles of the left. Let us not do so. Capitulating to judicially enforced secularism excludes participation in the policy-making process by Christian citizens whose policy positions are informed by the Sacred. This is not an acceptable answer to Islamic theocracy. But if not secularism, then what? The answer to this question is not easy.

Other justices see the Constitution through a different jurisprudential lens. They believe its provisions call judges in our Republic's representative government to act with restraint when interpreting the Constitution. These justices often do so by looking to history, tradition, and the original intent of the framers. Former Chief Justice Burger, writing for the Court in *Marsh v. Chambers*, recognized the

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A number of justices address the second prong of the Lemon test by asking whether the government action symbolically endorses religion. Even these justices though, disagree as to the standard by which to determine whether symbolic endorsement of religion exists in a particular case. For example, Justice O'Connor, concurring in *Wallace v Jaffree* stated:

> [W]hether a government activity communicates endorsement of religion is not a question of simple historical fact. *** The relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of [religion].

Elsewhere she likewise stated that: "the endorsement test necessarily focuses upon the perception of a reasonable, informed observer." *Capitol Square Review and Advisory Board v. Pinette,* 515 U.S. 753, 773 (1995) (O'connor, J. concurring). Compare Justice O'Connor's measure with that of Justice Souter, who opined that he "attribute[s] these perceptions of the intelligent observer to the reasonable observer of Establishment Clause analysis…, where I believe that such reasonable perceptions matter." Likewise, Justice Stevens articulated a less informed "reasonable person" standard to determine whether or not an endorsement of religion exists when addressing the second prong in *Lemon*:

> If a reasonable person could perceive a government endorsement of religion from a private display, then the State may not allow its property to be used as a forum for that display. No less stringent rule can adequately protect nonadherents from a well-grounded perception that their sovereign supports a faith to which they do not subscribe.

importance of tradition and history in interpreting the Establishment Clause: "historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to [a] practice authorized by the First Congress — their actions reveal their intent."[16] After rigorous historical review Justice Rehnquist articulated in *Wallace v Jaffree* the foundational fact necessary for understanding the Establishment Clause: "The Framers intended the Establishment Clause to prohibit the designation of any church as a "national" one. The Clause was also designed to stop the federal government from asserting a preference for one religious denomination or sect over others."[17] In *Lee v. Weisman*, Justice Scalia, joined by three other justices, stated that: "the meaning of the Clause is to be determined by reference to historical practices and understandings."[18] Looking to original intent, interpretation of the Establishment Clause is often expressed in terms of accommodation, equality of treatment, and no coercion. For example, government policies supporting, acknowledging, and accommodating religion are considered time-honored practices that are part of the nation's heritage.[19]

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[16] *Marsh v. Chambers,* 463 U.S. 783, 790 (1983)
[17] *Wallace v. Jaffree,* 472 U.S. 38, 113 (1985)
[18] *Lee v. Weisman*, 505 U.S. 577, 631 (1992)
[19] Thus, in *Allegheny Co. v. Greater Pittsburg ACLU,* 492 U.S. 573 (1989) Justice Kennedy, joined by Justices Rehnquist, Scalia, and White (concurring in the judgment in part and dissenting in part) stated:

> Government policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage…. Rather than requiring government to avoid any action that acknowledges or aids religion, the Establishment Clause permits government some latitude in recognizing and accommodating the central role religion plays in our society [citation omitted]. Any approach less sensitive to our heritage would border on latent hostility toward

Christian conservatives traditionally support such an interpretative approach. We do so since it provides a basis to uphold government action accommodating and supporting religion, as long as government does not coerce anyone to participate in religious activity.[20] It also permits us to challenge the judicially-created doctrine on the separation of church and state. Finally, it allows us to argue that nothing in the First Amendment requires Congress to avoid religious matters. Rather, we contend that Congress simply must not promulgate statutes respecting an establishment of religion.

> religion, as it would require government in all its multifaceted roles to acknowledge only the secular, to the exclusion and so to the detriment of the religious…. Our cases reflect this understanding. In *Zorach* v. *Clauson*, for example, we permitted New York City's public school system to accommodate the religious preferences of its students by giving them the option of staying in school or leaving to attend religious classes for part of the day. Justice Douglas wrote for the Court:
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> > When the state encourages religious instruction . . . it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.
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> > Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion . . . ." (citation omitted).

[20] And so, for example, in *Board of Educ. of Westside Community Schools v. Mergens*, 496 U.S. 226, 260 (1990) Justice Kennedy wrote:

The accommodation of religion mandated by the Act is a neutral one, and in the context of this case it suffices to inquire whether the Act violates either one of two principles. The first is that the government cannot "give direct benefits to religion in such a degree that it in fact 'establishes a [state] religion or religious faith, or tends to do so.' (citation omitted). *** The second principle controlling the case now before us, in my view, is that the government cannot coerce any student to participate in a religious activity.

How will the Court's mishmash of Establishment Clause precedents affect Muslim requests for Islam (via the Shariah) to become part of government? One can imagine dozens of ways a lawyer could construe precedents reached under any jurisprudential approach to support requests for official actions to implement the Shariah.[21]

Perhaps a better approach may be to simply ask whether a law implementing Shariah is a law "respecting the establishment of religion." If the Framers of the First Amendment meant what they wrote, then the plain meaning of the words plausibly indicates they intended to prevent government action establishing a national religion in total, as well as piecemeal government actions intended to incrementally establish religion.[22]

In any case, it seems clear we must change, in a constitutional sense, how we view Islam. Islam is not merely a religion, the free exercise of which the Free

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[21] See, e.g., *Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding government legislative prayer and payment of a legislative chaplain; *Zorach v. Clauson,* 343 U.S. 306 (1952) (upholding government action allowing for release time for religious instruction); *Lynch v. Donnelly*, 465 U.S. 668 (1984) (upholding government action involving placement of nativity scene on government property; *Van Orden v. Perry*, 545 U.S. 677 (2005) (upholding government action involving display of 10 commandments on government property); *County of Allegheny v ACLU,* 492 U.S. 573 (1989) (upholding government action involving placement of a menorah on government property); *Mitchell v Helms,* 530 U.S. 793 (2000) (upholding government action giving instructional equipment to religious schools).

And what if Justice Thomas is correct that text and history of the Establishment Clause supports a position that the Clause is not incorporated against the States? He contends it is not due to the historical fact that the Clause's purpose meant to protect state establishments of religion from laws passed by Congress. See, e.g., *Elk Grove Unified School Dist.* v. *Newdow*, 542 U. S. 1, 50-51 (2004) (Thomas, J., concurring in judgment). If he is correct, then one must also anticipate an argument for an established Islamic state religion at the state level.

[22] See e.g., John Witte, God's Joust, God's Justice – Law and Religion in the Western Tradition at 198 (2006)

Exercise Clause protects. It is also a religious government, the establishment of which the Establishment Clause prohibits. We see building blocks for incrementally establishing Islamic theocracy laid daily in the form of Shariah courts, Shariah financing, food regulation, government sanctioned prayer, etc. It is time to start thinking about the constitutional considerations of such actions. At the very least, legal and public policy strategies formulated to defend religious liberty must no longer presuppose a singular secular foe.[23] Since Islam claims law, Islam, and the state are one, we must, whether in academia, the legislatures or the courts, focus some of our attention here. We must not be afraid to ask if any one of the official incremental efforts implementing the Shariah is respecting an establishment of a theocracy – and evaluate our litigation and policy strategies accordingly.

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[*] William Wagner is a Christian who currently holds a tenured law school professorship teaching constitutional law. A frequent speaker at world conferences, Professor Wagner has a special interest in the protection of free expression and the free exercise of religious conscience. As lead *amicus* counsel in a variety of matters before the United States Supreme Court, he authored briefs on behalf of various Christian organizations. He also authored written testimony, evidence, and briefs in such forums as the Swedish Supreme Court, the U.S. Congress, and the U.K. Parliament. He has further addressed many executive, legislative, parliamentary, and judicial audiences throughout the world, and presented at various diplomatic forums including the United Nations Human Rights Council in Geneva. Professor Wagner previously served in the United States Courts as a federal judge. Prior to his appointment on the federal bench, he served as an American diplomat, senior Assistant United States Attorney, and chief of appellate litigation for the Office of the United States Attorney. Prior to serving in the Justice Department, Professor Wagner served as legal counsel in the United States Senate. Professor Wagner received the post-doctoral Danforth Fellowship in Law after earning his J.D. in 1986. He has served on the executive governing boards of a number of international and national ministries. In 1986, he founded, and continues to lead, *Salt and Light Global,* serving Christian ministries, government, academia and businesses. Soli Deo Gloria.

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[23] *Cf.* Shariah: The Threat to America (Center for Security Policy, 2010.)