

BOOK REVIEW:

TEN TORTURED WORDS

TEN TORTURED WORDS: HOW THE FOUNDING FATHERS TRIED TO PROTECT RELIGION IN AMERICA . . . AND WHAT'S HAPPENED SINCE.
BY STEPHEN MANSFIELD. NASHVILLE: THOMAS NELSON. 2007.
\$26.00.

REVIEWED BY DAVID K. DEWOLF[†]

TEN TORTURED WORDS by Stephen Mansfield is not a scholarly work, by the author's own admission. Although he holds a doctorate from Whitefield Theological Seminary and has written a number of bestselling books of history and biography, he is not a specialist in early American history, and he has not attempted to do original research. Moreover, his book is marred by some embarrassing gaffes, most prominent of which is the back of the dust jacket, which describes the ten tortured words "Congress shall make no law respecting an establishment of religion . . ." as having resulted "[i]n the steamy summer of 1787, as America's founding fathers fashioned their Constitution . . ." As Chapter 1 accurately describes, the First Amendment was drafted by the new Congress in 1789 and became law in 1791. The error was undoubtedly the result of a careless publicist for Thomas Nelson (the publisher), but there are other examples of a lack of attention to detail.¹

[†] Professor, Gonzaga University School of Law; B.A., Stanford University, 1971; J.D., Yale Law School, 1979. The author gratefully acknowledges the helpful comments of Mark E. DeForrest and Robert G. Natelson.

1. An extensive and highly critical review of the book has been written by CHRIS RODDA, author of LIARS FOR JESUS: THE RELIGIOUS RIGHT'S ALTERNATE VERSION OF AMERICAN HISTORY (2006). The first installment of the review is found at http://www.talk2action.org/story/2007/8/13/16117/9532/Front_Page/_Stephen_Mansfield_s_quot_Ten_Tortured_Words_quot_A_B_ook_Review_Part_1_, with links to the second and third installments.

In addition to the dust jacket error, Rodda highlights a sentence in the introduction to Mansfield's book referring to Jefferson's letter to the Danbury Baptists as having been written "fourteen years after the First Amendment became law." Chris Rodda, *Stephen Mansfield's "Ten Tortured Words—A Book Review (Part 1), TALK TO ACTION*, Aug. 13, 2007, http://www.talk2action.org/story/2007/8/13/16117/9532/Front_Page/_Stephen_Mansfield_s_quot_Ten_Tortured_Words_quot_A_B_ook_Review_Part_1_. In fact, as Rodda points out, the First Amendment became law in 1791, and it was barely ten years later that Jefferson wrote the letter. *Id.* Similarly, Mansfield refers to "the convention that drafted the First Amendment," when in fact Congress drafted the First Amendment. *Id.* These errors do not affect the weight of Mansfield's claims (there is no significant difference between a ten-year and a fourteen-year gap; Mansfield here misidentifies the body that drafted the First Amendment, but later in the book he carefully reviews the Congressional debates); but they provide cheap ammunition for Mansfield's detractors.

The only significant error I noted is the use of an alleged quotation from James Madison, "Religion is the basis and Foundation of Government." STEPHEN MANSFIELD, TEN TORTURED WORDS:

Although some savage attacks have been directed at the book, they can be ascribed more to the overarching thesis of the book than to a concern that, for example, the date for the adoption of the First Amendment is accurate. Mansfield's overarching thesis is that the popular understanding of the adoption of the First Amendment has been badly distorted. In this Mansfield resembles the boy who points out that the emperor is wearing no clothes. Even if the boy's shirt-tail is hanging out, the question is not what *he* is wearing but whether or not the emperor has any clothes on and whether that ought to cause us concern. As Mansfield demonstrates, the official interpreters of the Constitution (the United States Supreme Court), with no significant objection from mainstream scholars, have maintained an image of the Establishment Clause of the First Amendment that is not only wrong, but so obviously wrong that it is difficult to understand how it could have been maintained for so long with such success. To put it in a nutshell, the commonly accepted notion is that our Founding Fathers, having had a bad experience with established churches, enacted the First Amendment in order to place a wall between church and state; accordingly, so it goes, both the letter of the law and our unbroken tradition compel fidelity to this core principle of the "American experiment."

Mansfield deliberately chooses not to mount an exhaustive legal or historical case against this interpretation. Instead, the five chapters in Mansfield's short book approach his subject by telling a series of stories, each incorporating an actual historical event, but with the overarching theme of puncturing some popular but misguided myth about the Establishment Clause. Chapter 1 tells the story of how the First Amendment was adopted. Chapter 2 addresses the role of Thomas Jefferson in how the Founding Fathers understood the relationship between church and state, in particular the letter that Thomas Jefferson wrote to the Danbury Baptist Association in which he used the phrase "wall of separation

HOW THE FOUNDING FATHERS TRIED TO PROTECT RELIGION IN AMERICA . . . AND WHAT'S HAPPENED SINCE 146 (2007). Although he cites Robert Rutland's collection of Madison's papers and the words he quotes do appear, they are separated by several intervening words, indeed pages, and the omission is not acknowledged in the quotation. Although "Religion" is in Madison's *Memorial and Remonstrance*, and Madison talks about "the basis and foundation of government," the subject of the latter phrase is the Virginia Declaration of Rights, not "Religion." *Id.*

It turns out that the same quotation is found in DAVID BARTON's book THE MYTH OF SEPARATION 120 (3d ed. 1992) (1989), although he withdrew it from a later edition of the book, ORIGINAL INTENT: THE COURTS, THE CONSTITUTION, & RELIGION (1996). Rodda cites similar examples of Mansfield's borrowing from the scholarship of David Barton, which is neither here nor there in terms of the validity of Mansfield's argument, but it again suggests that in providing a popular, as distinguished from scholarly, treatment of the subject Mansfield would have been wise to obtain the assistance of a knowledgeable proofreader, who would have spared him a lot of grief. All of this is unfortunate since the primary claims that Mansfield is making, as the rest of this review describes, would not be affected by correcting the errors that are pounced upon by Mansfield's critics.

between church and state."² Chapter 3 describes the opinion in *Everson v. Board of Education*³—the first decision by the United States Supreme Court to treat the Jeffersonian phrase as the Rosetta Stone for interpreting the First Amendment. Chapter 4 describes the rise of the ACLU and Americans United for Separation of Church and State, and their use of litigation, particularly the fee-shifting provisions in the United States Code, to enforce the separationist vision. Finally, Chapter 5 is a bit of an altar call—it describes how the distorted vision of a secular America can and probably will be replaced by one that corresponds more closely to the Founders' vision for America. Each chapter bears closer inspection.

Chapter 1, "What the Founders Founded," tells what should be the well-known story of how the First Amendment was adopted. In the popular mind, even in widely accepted scholarly treatments of the First Amendment, the Founders self-consciously rejected the past practices of the American colonies, which featured an overlap between religious and governmental authority. As Frank Lambert, Professor of History at Purdue University, puts it in his book *The Founding Fathers and the Place of Religion in America*, the attitude of the "Planting Fathers" contrasts sharply with the vision of the "Founding Fathers." Whereas the Planting Fathers wanted to establish a "City upon a Hill" and thought that religion and state were inextricably linked,

The Founding Fathers had a radically different conception of religious freedom. Influenced by the Enlightenment, they had great confidence in the individual's ability to understand the world and its most fundamental laws through the exercise of his or her reason. To them, true religion was not something handed down by a church or contained in the Bible but rather was to be found through free rational inquiry. Drawing on radical Whig ideology, a body of thought whose principal concern was expanded liberties, the framers sought to secure their idea of religious freedom by barring any alliance between church and state.⁴

2. Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and State.

THOMAS JEFFERSON, Letter from Thomas Jefferson to a Committee of the Danbury Baptist Association (Jan. 1, 1802), in *THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON* 332, 332 (Adrienne Koch & William Peden eds., 1972) (1944). In fact the use of the phrase "wall of separation" in this context originated with Roger Williams, who advocated a "hedge or wall of separation between the garden of the church and the wilderness of the world." PERRY MILLER, ROGER WILLIAMS: HIS CONTRIBUTION TO THE AMERICAN TRADITION 98 (Atheneum, 1962) (1953).

3. 330 U.S. 1 (1947).

4. FRANK LAMBERT, *THE FOUNDING FATHERS AND THE PLACE OF RELIGION IN AMERICA* 3 (2003). This quotation was used (originally without attribution, presumably because it was not thought to present anything particularly original), in a commencement address by Judge John E.

(To mitigate some of the embarrassment from the anachronism on the dust jacket of Mansfield's book, it is significant that Lambert places the defining moments in our nation's history to be 1639 and 1787, thus blurring the distinction between the adoption of the Constitution and the adoption of the First Amendment.⁵)

A brief consideration of Lambert's description illustrates the central point that Mansfield makes in Chapter 1: We have the story fundamentally wrong. Neither the Constitution written in 1787 nor the First Amendment drafted in 1791 and ratified in 1791 "barr[ed] any alliance between church and state." It would be more accurate to say that the First Amendment *protected* those existing establishments of religion. In fact, it was in part the fear that the national government would interfere with state establishments of religion that produced the language of the Establishment Clause—the ten tortured words.⁶

How could something so obvious as the purpose of the First Amendment be turned on its head? One answer of course is that, regardless of what was intended by the First Amendment, later constitutional developments, such as the adoption of the Fourteenth Amendment, might have accomplished precisely what Lambert and others claim was in-

Jones, who decided *Kitzmiller v. Dover Area School District*, 400 F. Supp. 2d 707 (M.D. Pa. 2005). See Judge John E. Jones III, Commencement Address at Dickinson College (May 21, 2006), <http://www.dickinson.edu/commencement/2006/address.html>.

5.

The constitution that [George Washington] swore to uphold was the work of another group of America's progenitors, commonly known as the "Founding Fathers," who in 1787 drafted a constitution for the new nation. But unlike the work of the Puritan Fathers, the federal constitution made no reference whatever to God or divine providence, citing as its sole authority "the people of the United States." Further, its stated purposes were secular, political ends: "to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty." Instead of building a "Christian Commonwealth," the supreme law of the land established a secular state. The opening clause of its First Amendment introduced the radical notion that the state had no voice concerning matters of conscience: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." [citation omitted] In debating the language of that amendment, the first House of Representatives rejected a Senate proposal that would have made possible the establishment of the Christian religion or of some aspect of Christian orthodoxy. [citation omitted] There would be no Church of the United States. Nor would America represent itself to the world as a Christian Republic.

LAMBERT, *supra* note 4, at 2. Just as 1639 represents a defining moment in Americans' religious heritage, so does 1787. *Id.*

6. See generally Van Alstyne, *What is "an Establishment of Religion"?*, 65 N.C. L. REV. 909, 910 (1987) (suggesting that the intent of the First Amendment may have been simply to prevent the federal government from usurping states' power to establish religion). Of course, the First Amendment was also drafted to specify how the national government would deal with religion; it could neither make a law that would establish religion, nor could it prohibit the free exercise of religion. But in between those two extremes there was room for nonpreferential aid to religion and nondiscriminatory enforcement of laws (e.g., against polygamy) that might impinge on the practice of religion. It is not clear that the Founders had a clear conception of the appropriate boundaries to be drawn in limiting government action affecting religion. Like many commentators, I have proposed my own set of principles: David K. DeWolf, *State Action under the Religion Clauses: Neutral in Result or Neutral in Treatment?*, 24 U. RICH. L. REV. 253 (1990).

tended by the Founding Fathers. (Whether the Fourteenth Amendment, or any other constitutional authority in fact did so is a significant part of the discussion in Chapter 3 of Mansfield's book.) Even conceding, as every examination of the First Amendment must, that the First Amendment not only did not impose separation of church and state upon the states, but prevented the federal government from interfering with the establishment of religion or the suppression of the exercise of religion, defenders of the popular understanding will say that the Fourteenth Amendment changed the landscape. We will deal with that question later in this review. But whatever was done in the late 1800's cannot be used to interpret the intention of the Founding Fathers. To say that the Founding Fathers "barr[ed] any alliance between church and state" is so wildly inaccurate that one searches for other explanations of how such a characterization could be made. Even the existence of established state churches, of which there were five at the time of the Constitutional Convention,⁷ is not seen as irrefutable proof that the purpose of the First Amendment was *not* to bar an alliance between church and state, but rather is assumed to show that most states had by that time rejected the idea of an established state church (from the time of Revolutionary War broke out in 1775 until the Constitutional Convention the number of colonies with established churches dropped from nine to five⁸).

By reading back into the Founding Fathers' later decision to abandon state establishments of religion, historians like Frank Lambert claim for them an attitude that they simply did not share: that public life could be governed by secular principles, while private life would be guided by whatever source of spiritual sustenance the individual chose. It is precisely to refute this notion that Mansfield describes, albeit in abbreviated and popular fashion, a more accurate history of how the First Amendment was adopted and what it was intended to accomplish.

The most basic starting point for the First Amendment is to identify the impetus for the Bill of Rights generally and the First Amendment in particular. This part of the history is generally agreed upon: In the debates over the ratification of the proposed constitution, the primary criticism of the new constitution was that its grant of greater power to the national government left the states and ordinary citizens vulnerable to the usurpation of their rights and prerogatives. Although the Constitution in theory granted only limited powers, history is replete with examples of limited power turning into unlimited power, and the anti-federalists argued that the new Constitution offered precious little protection from yet

7. MANSFIELD, *supra* note 1, at 120, (citing ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION 4 (1982)).

8. *Id.*

another installment in that sorry history.⁹ The defenders of the Constitution tried to reassure the state ratifying conventions that the Constitution only gave the national government enumerated and limited powers, and that it was more dangerous to specify limitations on that power, since any omission from the list of limitations could be converted into a claim of implied authority. But this argument in the end was successful only by tying it to a promise that after the Constitution was ratified it would be supplemented by a Bill of Rights in which explicit limitations were placed upon the national government. The resulting "Gentleman's Agreement" paved the way for the ratification of the Constitution.¹⁰

In other words, it would be a mistake to characterize the Bill of Rights as a guarantee of the rights of the people *in general*; instead it was a limited protection against depredation by the national government. It supplemented the enumerated powers limitation by further requiring that even if the national government were engaged in an activity authorized by Articles I, II or III of the Constitution, it could only do so within the boundaries set up by the Bill of Rights. What is typically forgotten (or deliberately obscured) in the popular telling of the story of the Bill of Rights is that the states retained the power to do precisely those things (establishing a state religion, punishing unpopular speech, denying the right to trial by jury, etc.) that were forbidden to the national government. Of course, that allocation of power may have been drastically altered by subsequent events, but if so, we should locate the authority for limiting state power in subsequent events, not in the design of the Founders.

Chapter 2 of TEN TORTURED WORDS, "Of Cheese, Walls, and Churches," addresses the role that Thomas Jefferson played in the erection of the wall between church and state. He is significant for two reasons. First, he is the author of the phrase "wall of separation between church and state"; and second, he is iconic of the mind of the Founders. More than almost any of the Founders, he is given credit for verbalizing the beliefs that led to the Revolution, to the adoption of the Constitution, and to the Bill of Rights. Jefferson of course was the primary author of the Declaration of Independence, but he was in France when the Constitutional Convention met, as well as when the First Amendment was drafted, debated, and adopted (although he returned in time to observe its ratification). But when President John F. Kennedy made the famous remark in front of forty-nine Nobel Laureates that the combined talent and human knowledge assembled in the room were exceeded only by the

9. See, e.g., Thomas B. McAfee, *Restoring the Lost World of Classical Legal Thought: The Presumption in Favor of Liberty over Law and the Court over the Constitution*, 75 U. CIN. L. REV. 1499, 1560-61 (2007).

10. Under this "Gentleman's Agreement," the federalists made important concessions, and in exchange, the moderates agreed to support the Constitution." Robert G. Natelson, *The Original Meaning of the Establishment Clause*, 14 WM. & MARY BILL RTS. J. 73, 82 (2005).

occasions when Thomas Jefferson dined alone,¹¹ he exemplified the kind of reverence in which Jefferson is held in the public understanding of the American experiment. Thus, if Jefferson was indeed a passionate separatist, that fact (in addition to the phrase he composed) might affect our understanding of the Founders' vision for the way in which religion and government would coexist in the new republic.

Mansfield approaches the subject by telling the story of the Danbury Baptists to whom the letter was written. On the same day that Jefferson wrote the letter to the Danbury Baptists, he had publicly welcomed the arrival of a half-ton of cheese that was the gift of another group of New England Baptists, from Cheshire, Massachusetts, anxious to express their affection and support for a President they thought might sympathize with their plight of being a minority religion in a state that still recognized Congregationalism as the official state religion.¹² Indeed, Jefferson did sympathize with them, and it is clear from the letter that Jefferson favored a much more restrictive role for government in promoting religion. On the other hand, Mansfield makes two important points. First, although Jefferson claims in his letter that the First Amendment was an act of the whole American people "building a wall of separation between church and state," this statement should not be taken (as it has been since the *Everson* opinion, addressed by Mansfield in Chapter 3) as an authoritative description of the purpose, much less the legal effect, of the First Amendment.

Mansfield reviews the basic, almost irrefutable, reasons for refusing to accord such weight to Jefferson's phrase. First, Mansfield recalls the history of the origin of the First Amendment, previously described in Chapter 1. It was not to satisfy separatists (assuming Jefferson to be one) that the amendment was proposed, but precisely to prevent separatist impulses (or for that matter, sectarian impulses) in the national government from interfering with whatever approach to religion (including state establishment of religion) then prevailed in the several states. Second, Jefferson took no part in the actual drafting of the First Amendment, and thus could not be considered an authoritative source for what was meant by the language of the amendment. Third, the letter to the Danbury Baptist Association was written long after the amendment had been drafted, passed, and ratified, and at a time when Jefferson occupied a political office. As a politician Jefferson was entitled, even obligated, to advance a more partisan agenda than the one he advocated when he occupied the more statesman-like role as one of the Founding Fathers. Finally, when Jefferson referred to the wall between "church and State," he probably meant "State" to mean the national government (which is the

11. Remarks at a Dinner Honoring Nobel Prize Winners of the Western Hemisphere, 1962, PUB. PAPERS 347 (Apr. 29, 1962).

12. Connecticut did not abandon Congregationalism until 1818; Massachusetts did so in 1833. MANSFIELD, *supra* note 1, at 120.

target of the First Amendment), not our more generic understanding of "state" as governmental power in general.

But I would like to amplify a point that Mansfield makes by drawing on the rules of interpretation in a legal context. When a contract is being made between two parties, the meaning of the contract depends upon the external manifestations of the parties, not any hidden subjective intent. Suppose my neighbor loves to burn wood in his fireplace but lacks any ready supply of firewood. I, by contrast, have lots of firewood. On the other hand, I would prefer (if I did not need money) to leave my property in its natural state. Suppose he and I walk through my property identifying firewood that would meet his needs, and we subsequently enter into a contract that states "In exchange for \$500, Neighbor has the right to collect a one-year supply of firewood for his personal use from DeWolf's property." If a subsequent court is required to interpret this contract (as to the amount of firewood contemplated by "personal use," or what equipment Neighbor may use in harvesting the firewood), a court will look at the objective manifestations of my behavior; the fact that I believe that wood-burning is a form of air pollution, or that I hate chain saws, will form no part of the "intent of the parties" reflected in the contract.¹³ Even if I wrote the words to the contract that we both signed, it is my *actions* (including words I spoke in the formation of the contract), not what I subjectively *thought* or *believed*, that will control. Thus, even if Jefferson had been an author of the First Amendment, or others sharing his point of view (like Madison¹⁴) were key contributors to the language of the Constitution or the First Amendment, it was the representation of its meaning to the ratifying state conventions that determines what the Constitution and the Bill of Rights meant from a legal standpoint. Once it became clear that the lack of a Bill of Rights was a major stumbling block to securing approval of the Constitution, and after the proponents of the Constitution promised that the addition of a Bill of Rights would be the first order of business for the new Congress, the Constitution was ratified.¹⁵ Thus, the meaning of the First Amendment is not to be found

13. On the other hand, the intention of the *Neighbor* may be relevant, if it is either expressed (thus forming part of the basis of the agreement) or if it can be demonstrated that the actual intent of one of the parties is so different from what the other party thought the bargain was about. In the case of the ratifiers of the First Amendment, they clearly thought that the Bill of Rights was the payment on the promissory note executed by the Federalists to secure ratification of the Constitution. See Natelson, *supra* note 10, at 82-84, 87.

14. Madison's subjective intent, based on writings he produced in other contexts, is often cited as the meaning of the First Amendment, but it is clear that despite Madison's preeminent role in the drafting and the historical record of the Constitutional Convention and the drafting of the Bill of Rights, Madison frequently acted as a facilitator and his personal preference was frequently set aside by the majority. For example, Madison favored giving the national government the power to override state actions that violated individual liberties, but the majority wanted to retain the autonomy of the states. 1 ANNALS OF CONG. 440-42 (Joseph Gales ed., 1834); see generally Natelson, *supra* note 9.

15. AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 37-38 (Random House 2005).

in the subjective intent of those who put the words on paper, but in the communicated demands of the state ratifying conventions, who made it clear that they wanted to protect the states and individual citizens from having the *national* government tell them what to do; the power of the states to regulate their own relationship with the people was to be left undisturbed.¹⁶ At the risk of becoming repetitious, this is the principle that has been stood on its head in the frequent citation of Jefferson and other Founders as the origin of a “right” to prevent the endorsement of religion by state or local governments.

Mansfield also spends considerable time exploring Jefferson’s true feelings about religion in general and Christianity in particular, and whether he can properly be claimed for the Deist or even the infidel position. Mansfield cites a number of sources suggesting that Jefferson was more pious than is popularly assumed,¹⁷ and that his theological beliefs, while less orthodox than those of the other Founders, were not a placeholder for the kind of militant secularism that is being advanced today. The debate is likely to continue about Jefferson, and this part of the book is less persuasive precisely because in the end it hardly matters. Jefferson was likely a conflicted soul, who found himself unable to affirm key tenets of orthodox Christianity, and feared the influence on civil society of religious institutions,¹⁸ but he never disputed (and seems to have agreed with) the assumption that religious belief was critical to maintaining a republican form of government. When John Adams said that our form of government required a religious people,¹⁹ or when George Washington’s Farewell Address reminded his listeners that to subvert religion and morality would be to abandon true patriotism,²⁰ they were expressing

16. As one example, while the Constitution prohibited the national government from employing a religious test for public office (Article VI), in 1789 “[a]ccording to one tally, eleven of the thirteen states had religious qualifications for officeholding.” AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 33 (Yale University Press 1998).

17. Mansfield repeats the story of Jefferson’s encountering someone on his way to church and assuring him that “no nation has ever yet existed or been governed without religion. Nor can be.” MANSFIELD, *supra* note 1, at 49-50. Critics of Mansfield have accused him of exaggerating Jefferson’s personal piety and relying on apocryphal accounts. See RODDA, *supra* note 1 (“I have to wonder if this best-selling author even realizes that he is spreading an inaccurate and deceptive version of American history to a new and wider audience.”). But the quotation is believed by many competent historians to be reliable. See GERTRUDE HIMMELFARB, *ONE NATION, TWO CULTURES* 86 (2001) (based on “recently discovered handwritten history of a Washington parish”); see also James H. Huston, *James H. Huston Responds*, *THE WILLIAM AND MARY QUARTERLY*, 3rd Ser., Vol. 56, No. 4, Oct., 1999, at 823-824.

18. “History, I believe, furnishes no example of a priest-ridden people maintaining a free civil government. This marks the lowest grade of ignorance of which their civil as well as religious leaders will always avail themselves for their own purposes.” Letter from Thomas Jefferson to Baron von Humboldt (Dec. 6, 1813), available at [http://lcweb2.loc.gov/cgi-bin/query/r?ammem/mhj:@field\(DOCID\)+@lit\(tj110127\)](http://lcweb2.loc.gov/cgi-bin/query/r?ammem/mhj:@field(DOCID)+@lit(tj110127)).

19. “Our constitution was made only for a moral and religious people. It is wholly inadequate to the government of any other.” MANSFIELD, *supra* note 1, at 144; John Adams, *To the Officers of the First Brigade of the Third Division of the Militia of Massachusetts* (Oct. 11, 1798), in 9 *THE WORKS OF JOHN ADAMS*, SECOND PRESIDENT OF THE UNITED STATES 229 (Charles Francis Adams ed., 1854).

20.

an almost universally shared belief, even if there was passionate debate over whether it was a proper object of government to encourage such belief. Jefferson may have defended the position that not one penny of government support should be furnished to religious institutions, but he was not indifferent to the benefits from religion, either on a personal level or as a basis for political stability. But regardless of how he reconciled the conflict these sentiments might have created, Jefferson's views ultimately have precious little to say about the meaning of the First Amendment.

This logically takes us to Chapter 3, "The Turning," which focuses on the case in which Jefferson's phrase and the separationist view was adopted by the United States Supreme Court. Again, Mansfield begins with a story—the story of the murder of a Catholic priest in Alabama in 1921 and the lawyer who successfully appealed to the religious and racial biases of the jury in securing an acquittal for the murderer. The lawyer subsequently joined the Ku Klux Klan—and later the Supreme Court.²¹ The lawyer of course was Hugo Black, and in many ways his fleeting membership in the Ku Klux Klan is irrelevant to the opinion he wrote in 1947 approving tax-supported reimbursement of bus transportation for Catholic school students. But part of Mansfield's purpose in telling the story is to dislodge the sort of reverence that has been accorded to the string of U.S. Supreme Court opinions imposing stringent limitations on governmental support of religion.

Most lawyers, but few lay people, know the story of how the Establishment Clause was first invoked as a limitation on what state or local government could do to support religion. In *Everson v. Board of Education of Ewing Township*,²² a group of taxpayers challenged a school district's policy of reimbursing parents for the cost of bus fares to transport their children to school, including both the public high schools and "the Catholic schools." Justice Black wrote the majority opinion, which framed the issue as whether or not the policy violated the "wall of separation between church and state" mandated by the Constitution. Justice Black (along with the rest of the Court) assumed that the First Amendment, by way of the Fourteenth Amendment, made it unconstitutional to

Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of Patriotism who should labor to subvert these great Pillars of human happiness, these firmest props of the duties of men and citizens. . . . Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.

GEORGE WASHINGTON, FAREWELL ADDRESS (Sept. 19, 1796), reprinted in 1 A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS 205, 212 (New York, Bureau of Nat'l Literature 1897), available at <http://gwpapers.virginia.edu/documents/farewell/transcript.html>.

21. An account of the trial and controversy over Hugo Black's Klan membership can be found in William H. Pryor, Jr., *The Murder of Father James Coyle, the Prosecution of Edwin Stephenson, and the True Calling of Lawyers*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 401, 407 (2006).
22. 330 U.S. 1 (1947).

“contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church.”²³ Having laid down the principle, Black’s opinion proceeded to apply it to the facts of the case, and concluded that the policy was *not* a support to the schools, but rather was an extension of “general state law benefits.”²⁴ Only four of the other members of the court agreed with him; the other four vigorously dissented, finding that in meeting the transportation needs of the Catholic school students, the school board was supporting the religious mission of the school. In arguing over the application of the principle to the facts of the case, no one questioned the way in which the principle was expressed, or its application of the First Amendment to the actions of state and local government.

Mansfield spends several pages reviewing the legitimate questions that can be raised about whether the 14th Amendment was intended to reverse the logic of the original Bill of Rights and disable the states in precisely the same way that the federal government was disabled by the Bill of Rights.²⁵ There are good reasons to be skeptical, including the contemporaneous rejection of this argument in several U.S. Supreme Court cases.²⁶ Moreover, particularly in the case of the religion clauses, the logic of the First Amendment (preventing the national government from interfering with states’ regulation of religion) makes no sense if one simply substitutes “state” for “Congress” (or “national government”). Finally, as Mansfield demonstrates through the opinion of Justice William Rehnquist in *Wallace v. Jaffree*,²⁷ the “wall of separation” metaphor has proven to be unworkable in practice as well as being based on a misleading reading of history. But the debate over the incorporation doctrine is voluminous and complex; even if one rejected the rationale presented in *Everson*—and Mansfield explains why one should—one might legitimately ask whether there is a substitute principle that limits the power of state or local government to promote or suppress religious belief and practice. The lack of such a principle may help explain the perpetuation of the stunning anachronism of using the language and intentions of Jefferson and Madison as the basis for imposing constitutional limits on tax support for parochial schools. But it is not Mansfield’s purpose—or his responsibility—to reconfigure the law defining the limits of governmental action affecting religion. His object was to correct an inaccurate account of our history, and in this he succeeds quite well.

Nonetheless, because Mansfield did not attempt a lawyer’s argument about the Constitution, I cannot resist an avenue that would have

23. *Id.* at 16.

24. *Id.*

25. See the discussion in text accompanying notes 8 and 9.

26. Slaughter-House Cases, 83 U.S. 36 (1873). See generally Jerold H. Israel, *Selective Incorporation: Revisited*, 71 GEO. L.J. 253, 256 (1982).

27. 472 U.S. 38, 66 (1985).

shed a slightly different light on Justice Black's opinion. To use one of the basic tools of legal analysis, Justice Black's claims regarding the incorporation doctrine and Jefferson's wall of separation were plainly dicta—that is, they were not necessary to the holding of the case and thus did not constitute binding precedent, even under the principle of *stare decisis*. In fact, the next case to address the issue of state aid to religious schools, *Board of Education v. Allen*,²⁸ was not decided until twenty years later, and it too permitted state aid to parochial schools in the form of providing textbooks. Thus, although the Court had used language that sounded very threatening to the type of non-preferentialist support for religion that Mansfield persuades us the Founders would have permitted, the Court had *protected* such aid from constitutional attack for almost a quarter century after the *Everson* case. In fact, in the *Allen* case the Court explicitly rejected the argument made by Justice Black in a furious dissent that aiding the educational mission of the parochial school violated the constitutional prohibitions in a way that transporting children in the Ewing Township did not.²⁹ Only in 1971, in the famous decision of *Lemon v. Kurtzman* (source of the so-called *Lemon* test),³⁰ did the U.S. Supreme Court for the first time invalidate state aid based upon the dicta in *Everson*.³¹ Thus, in seeking the guilty party for the unworkable *Lemon* test one might turn more readily to Chief Justice Burger's misplaced pragmatism in *Lemon* than to the bad history found in Justice Black's dicta in *Everson*.

Mansfield doesn't follow this branch of the *Everson* progeny, but instead cites the myriad examples of the arbitrary application of the *Lemon* test. The *Lemon* test is not the only judicially formulated rule that is vulnerable to criticism, but it helps to prove Mansfield's point about the significance of our Establishment Clause jurisprudence having been built upon a bad foundation. It is particularly ironic that those who defend decisions protecting the "wall of separation between church and state" often treat this phrase as though it were the cornerstone upon which the republic was built and that abandoning it would constitute

28. 392 U.S. 236, 238 (1968).

29. See DeWolf, *supra* note 6, at 253.

30. 403 U.S. 602, 612-13 (1971). Under the *Lemon* test, a state action is unconstitutional unless (1) it has a secular purpose; (2) it has a primary effect that neither advances nor inhibits religion; and (3) it does not result in excessive entanglement between the state and religion. *Id.*

31. It is true that the U.S. Supreme Court had invalidated religious instruction on school grounds and state-sponsored school prayer. See *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 205 (1963); *Engel v. Vitale*, 370 U.S. 421, 433-36 (1962); *McCollum v. Bd. of Educ.*, 333 U.S. 203, 231-32 (1948). But these could be distinguished in that they were the direct involvement of the state in religious practice or instruction. *Everson* and *Allen* appeared to countenance governmental aid flowing to religious organizations as long as the aid was available on a neutral basis and did not require entanglement with the religious aspect of the schools. Thus, *Lemon*, while it incorporated the dicta from *Everson*, was in sharp contrast to the actual legal precedent. Moreover, it was flatly inconsistent with its companion case, *Tilton v. Richardson*, which permitted state aid to flow almost without restriction to religious colleges and universities. 403 U.S. 672, 687-88 (1971). See generally DeWolf, *supra* note 6, at 253.

capitulation of constitutional principle in favor of mob rule. As Mansfield points out, however, nothing could be further from the truth. Most Americans are quite happy with a general policy of keeping religious authority and governmental authority separate; but they also puzzled by the zeal with which religious expression has been excluded from the public square. When the U.S. Supreme Court insists on counting reindeer in a “winter holiday” display³² or agonizes over the placement of the Ten Commandments on government property, they cannot claim the authority of the Founders.

Mansfield then moves on in Chapter 4, “Faith-Based Blackmail,” to detail the way in which litigating Establishment Clause cases has become a cottage industry for organizations like the American Civil Liberties Union and Americans United for Separation of Church and State. Again, he begins with a story. The protagonist in this chapter is an ACLU attorney inspired by his hero Cesar Chavez, who started his legal career fighting the good fight for union workers and civil rights. He eventually grew disillusioned with the ACLU’s use of techniques that capitalize on the “fee-shifting” provisions of the civil rights laws.³³ Fee-shifting was originally a device to insure that victims of racial discrimination would be able to enforce the civil rights laws, but today it is applied to a much broader set of cases.

It works like this: If the policy or practices of a public entity, say a school board, are challenged by the ACLU,³⁴ that public entity faces a scary prospect. If the case is litigated, and the school board loses, it will be forced to pay the attorney fees incurred by the ACLU in litigating the case. On the other hand, if the school board succeeds in defending its policy or practices, it has no statutory right to recover *its* fees, and it will still incur the expense of hiring its own lawyers. Since the ACLU is often able to recruit volunteer lawyers who will pursue the case *pro bono* based on their commitment to the agenda of the ACLU, there is a huge risk on one side and very little risk on the other. It is no surprise that where the legal status of the policy is in the least doubtful, the school board will have a strong incentive to capitulate.

32. In *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984), the Supreme Court narrowly upheld a “seasonal display” by the city of Pawtucket, Rhode Island, which included a crèche along with Santa Claus and reindeer. In describing the difficulty of applying the test for what violates the Establishment Clause, Judge Nelson of the Sixth Circuit complained:

The application of such a test may prove troublesome in practice. Will a mere Santa Claus suffice, or must there also be a Mrs. Claus? Are reindeer needed? If so, will one do or must there be a full complement of eight? Or is it now nine? Where in the works of Story, Cooley or Tribe are we to find answers to constitutional questions such as these?

Am. Civil Liberties Union v. City of Birmingham, 791 F.2d 1561, 1569 (6th Cir. 1986) (Nelson, J., dissenting).

33. 42 U.S.C. § 1988 (2006).

34. The same principle applies to litigation brought by Americans United for Separation of Church and State and similar organizations, and in some cases more than one group will work together, as they did in the case of *Kitzmiller v. Dover Area School Board*, 400 F. Supp. 2d 707, 709-710 (M.D. Pa. 2005). I will use the ACLU as the prime example for convenience.

Now it is only fair to point out that religious groups have used this same "fee-shifting" provision of the law to extract attorney fees from public entities, including school boards, that violated the First Amendment by, for example, refusing to provide equal access to student groups with religious viewpoints.³⁵ One might conclude from this fact that the law operates symmetrically—that is, it is no more permissible (and therefore incurs a symmetrical risk) to discriminate *against* religion as to discriminate *for* religion. But this appearance of symmetry is deceptive. The best way to illustrate this is by example. I have often had occasion to reflect on the Establishment Clause during the choir performances at the public schools my children have attended. For the "Winter Holiday" concert, the director must select music suitable to the season. A natural candidate would be Christmas music—religious music. What is the relative likelihood that a federal judge would find the selection unconstitutional if the percentage of Christmas carols (traditional Christian music) were 0%? 25%? 50%? 100%? It seems inconceivable that a parent who complained that none of the songs had religious content would succeed in obtaining an injunction and attorney fees.³⁶ On the other hand, if 100% of the songs were Christmas carols, it would be very easy to claim that the policy constituted an endorsement of Christianity.³⁷ We have been acclimated to the consequences of a school district appearing to be "too religious." But imagine for a moment if federal judges started punishing school districts for being "insufficiently religious" with injunctions and huge attorney fee awards. One can hear the—justified—howls of outrage. Yet precisely that is what has happened (with the identities reversed) when a school district has been found to be "too religious." For example, when the Dover, Pennsylvania School Board adopted a policy requiring that students hear a four-paragraph statement about intelligent design at the beginning of their study of evolution, it was sued

35. See, e.g., Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five, 470 F.3d 1062, 1074 (4th Cir. 2006) (holding defendant school district's denial of access to school facilities based upon discrimination against plaintiff's religious viewpoint entitled plaintiff to recoup attorney fees).

36. Sechler v. State Coll. Area Sch. Dist., 121 F. Supp. 2d 439, 453 (M.D. Pa. 2000) (discussing how a "winter holiday" "song program" at public elementary school that featured Kwanzaa and Chanukah songs, but no songs reflecting the Christian origin of the Christmas holiday, was not a violation of the Establishment Clause).

37. School districts are very sensitive to the accusation that their inclusion of religious music or religious art might create the impression of an establishment of religion. See, e.g., *Florey v. Sioux Falls Sch. Dist.* 49-5, 619 F.2d 1311, 1319 (8th Cir. 1980) (holding school district policy that permits singing of Christmas carols was not unconstitutional on its face). However, perfect neutrality is impossible. When my oldest son was in the sixth grade the "Winter Holiday" concert at his elementary school featured each grade in succession, from youngest kindergarten to 6th grade, singing a variety of secular and religious carols. Just before the last number on the program the students put on white gloves, which puzzled me. Then they began to sing Silent Night, which I thought was very fitting. But after the first verse, the stage lights went out and the students were bathed in black light. All that could be seen was their white gloves, and while the accompanist played the music to Silent Night, the students silently "sang" the words in sign language. I was moved to tears. I felt great admiration for the bravery of the choir teacher, but reflected bitterly on the fact that my reaction could be Exhibit A in a suit to attack the practice under the Establishment Clause.

and lost. After trial they were threatened with a \$2 million attorney fee bill, and settled by paying over \$1 million.³⁸

In terms of the title of Chapter 4, “Faith-Based Blackmail,” lest it appear to be an exaggeration or hyperbole, consider these words from the lawyer who succeeded in forcing the Dover School Board to abandon its policy of telling students about intelligent design: “This sends a message to other school districts contemplating intelligent design that the price tag can be truly substantial”³⁹ Precisely. If school boards were being threatened with similar penalties for not being sufficiently religious, what would we call such a legal climate? Faith-based blackmail? Should we not be just as outraged if the identities were reversed?

Lest Mansfield’s readers end on a note of despair, he includes a fifth chapter, “The Return.” In it he sounds an optimistic note based on two converging phenomena. On the one hand, we have the public appetite for religion resulting from the 9/11 tragedy and other reminders of our individual and corporate need for God. On the other, we have militant atheism represented by such figures as Christopher Hitchens⁴⁰ and Richard Dawkins,⁴¹ who agree with religious believers that religious ideas matter, but they disagree with the Founders about whether religious belief has a positive effect on the body politic. Until recently religious belief had been relegated by the cultural elite to the status of a personal preference—a leftover from a bygone era that might provide individuals with a source of comfort and reassurance in times of stress, but that was largely irrelevant to the important questions of how we should live.⁴² Hitchens, Dawkins, and others have reminded Americans that ideas do have consequences, and that our Founders’ conviction about the relationship between religious belief and our body politic deserves renewed attention.

This relationship—between the religious imagination and public policy—is one that Mansfield emphasizes throughout the book. Every American war has been fought not only by soldiers, but with the help of clergy who helped Americans understand what the fight was all about.

38. *Kitzmiller*, 400 F. Supp. 2d at 709. The attorney team representing the parents claimed that their fees were over \$2 million, but they agreed to settle with the school board for over \$1 million. Amy Worden, *Dover District to Pay \$1 million in Legal Fees*, PHILADELPHIA INQUIRER, Feb. 22, 2006, at B01; see also David K. DeWolf, John West, and Casey Luskin, *Intelligent Design will Survive* Kitzmiller v. Dover, 68 MONT. L. REV. 7, 8 (2007).

39. Worden, *supra* note 38, at B01 (quoting Richard Katskee, attorney for Americans United for Separation of Church and State).

40. CHRISTOPHER HITCHENS, GOD IS NOT GREAT: HOW RELIGION POISONS EVERYTHING (2007).

41. RICHARD DAWKINS, THE GOD DELUSION (2006).

42. This view is aptly summarized in the James Taylor song, “Sweet Baby James”: “There’s a song that they sing of their home in the sky / Maybe you can believe it if it helps you to sleep / But singing works just fine for me.” JAMES TAYLOR, *Sweet Baby James*, on SWEET BABY JAMES (Warner Bros. Records 1990) (1970), available at http://www.lyricsfreak.com/j/james+taylor/sweet+baby+james_20069087.html.

Even in the Civil War, when opposing armies each had chaplains reassuring the troops that they were doing God's will,⁴³ it has never been thought that religion was just a private matter. It is relatively easy to find the kinds of statements from John Adams and Washington connecting religious belief to survival as a nation, but even in recent history religion was a driving force behind the civil rights movement,⁴⁴ and it appears that Americans take religion into account when they choose their elected representatives.⁴⁵ Mansfield predicts that "[t]he next presidential election promises to be a contest of religious worldviews as much as, if not more than, any other in American history."⁴⁶ Mansfield's prediction is subject to being proven wrong (and it is hard to imagine how one would rigorously test such a hypothesis), but it may also prove prophetic.

Mansfield is encouraged to note a number of legislative efforts that would help restore balance in our approach to the role of religion in public life. One initiative, House Bill 2679, the Public Expression of Religion Act, was passed by the House of Representatives in 2006.⁴⁷ It would prevent the fee-shifting provisions of 42 U.S.C. § 1988 from applying to cases involving the Establishment Clause. Another initiative, House Bill 235, the Houses of Worship Free Speech Restoration Act, would remove the threat of the loss of non-profit tax-deductible status on the part of churches when they address political issues, particularly the conduct of politicians when their policies encourage or conflict with a church's view of what God demands of the nation.⁴⁸ Since the time that Old Testament prophets warned about God's expectations and the consequences of disregarding them, religious leaders have claimed the right, indeed the obligation, to "speak truth to power." Although some religious leaders be-

43. As Abraham Lincoln's Second Inaugural noted, with some bitter irony:

Both read the same Bible and pray to the same God, and each invokes His aid against the other. It may seem strange that any men should dare to ask a just God's assistance in wringing their bread from the sweat of other men's faces, but let us judge not, that we be not judged. The prayers of both could not be answered. That of neither has been answered fully. The Almighty has His own purposes.

Abraham Lincoln, Second Inaugural Address (March 4, 1865).

44. CHARLES MARSH, GOD'S LONG SUMMER: STORIES OF FAITH AND CIVIL RIGHTS *passim* (Princeton University Press 1997); Barbara L. Bezdek, *To Attain "The Just Rewards of So Much Struggle": Local-Resident Equity Participation in Urban Revitalization*, 35 HOFSTRA L. REV. 37, 94 n.260 (2006) ("[T]he recurring potent grass-roots forces in popular movements for economic inclusion—justice under law—have been religious leaders and congregants."). For a recent example of the involvement of religious leaders in a political/legal struggle, see Reverend Nelson Johnson, *Reflections on an Attempt to Build "Authentic Community" in the Greensboro Knart Labor Struggle*, 2 U.PA. J. LAB. & EMP. L. 675, 675 (2000).

45. Sam Harris, an author of one of the militantly atheist books, complained about a poll in which 90% of Americans said they would vote for an otherwise qualified candidate who was female, Jewish, or black, and 79% would vote for a gay candidate; however, only 37% of Americans would vote for an atheist candidate, otherwise qualified. Nicholas D. Kristof, *A Modest Proposal for a Truce on Religion*, N.Y. TIMES, December 3, 2006, § 4, at 13.

46. MANSFIELD, *supra* note 1, at 130.

47. The Public Expression of Religion Act, H.R. 2679, 109th Cong. § 2(b) (2005).

48. Houses of Worship Free Speech Restoration Act of 2005, H.R. 235, 109th Cong. § 1(a) (2005).

lieve that it is imprudent, indeed unbiblical, to make specific pronouncements about the wisdom of particular political practices, the judgment about what is morally required (as distinguished from politically wise) is essentially a theological judgment, and it should be no part of the government's jurisdiction to substitute its judgment for what topics the preacher should address. If a government bureaucracy (the Internal Revenue Service) is given the authority to withdraw significant benefits (the right to deduct contributions from one's taxes) because of complaints that the church "is too much involved in politics," we should recognize that religious liberty is seriously jeopardized. As Mansfield points out, this is bad not only for religion, but for government. If government is denied the unique perspective that religious traditions provide (and in light of the limited influence that religious leaders exert in comparison to other influences on the electorate), we are the poorer for it.

But that brings us back to the question which is bound to result from Mansfield's analysis. If the popular view of the First Amendment is wrong, and if our public discourse would benefit from correcting the misperception that religious expression somehow turns toxic in the public square, where will we find the boundary between appropriate and inappropriate interaction between government and religion? Should a state be able to establish a religion? Should it be able to provide non-preferential support to all religions? Can a city deny Wiccans the right to worship? Mansfield is not a constitutional lawyer, and it is perhaps unfair to ask him to come up with a tidy and inclusive legal doctrine. It is of course permissible to imagine the solution our Founders adopted: Let individual states develop their own unique solutions to the problem. Given the protection of religious liberty in many state constitutions and our historical experience with a tradition of tolerance, we may be confident that, even if there were no federal constitutional doctrine prohibiting state interference with religious liberty, there is not much to worry about. Even if there were individual departures from what most Americans would favor, such departures might be permitted based on the principle that Louis Brandeis articulated: "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."⁴⁹ On the other hand, perhaps some general protection might be found in the Fourteenth Amendment to the effect that if some state practice is so egregious that it violates "privileges and immunities of citizens,"⁵⁰ then a federal court has authority to prevent such abuse; but this power would be used sparingly rather than creating a cottage industry for litigation.

49. *New State Ice Co. v. Liebman*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); see Akhil Reed Amar, *Five Views of Federalism: "Converse-1983" in Context*, 47 VAND. L. REV. 1229, 1233 (1994).

50. U.S. CONST. amend. XIV, § 1.

This brings up the third of the solutions Mansfield reviews, a sort of “nuclear option” for religion clause cases. The appellate jurisdiction of the federal courts⁵¹ is subject to being withdrawn, or selectively withdrawn (via the “exceptions” clause⁵²) by Congress. Thus, at least in theory, Congress could declare that the Supreme Court had no jurisdiction to hear cases involving school prayer, or public displays of religious symbols. Ron Paul, a candidate in the 2008 Presidential campaign, has sponsored the We the People Act, House Bill 5739,⁵³ which would remove the jurisdiction of federal courts, including the Supreme Court, from “any claim involving the laws, regulations, or policies of any State or unit of local government relating to the free exercise or establishment of religion.”⁵⁴ Mansfield is not wedded to any of the three proposals. He is confident that even if all of them fail, “others like them will surely arise. The sense in the nation that something has gone horribly wrong in matters of religion and government is too pronounced for the current status quo to remain much longer.”⁵⁵ Given the fact that the *Everson* case has been around for sixty years, and similar measures in the past have come to naught, one might question Mansfield’s confidence. But those who would view the measures as extreme ought not be complacent. If Mansfield is correct (as I believe he is) that today’s Establishment Clause jurisprudence is based on a series of demonstrably false premises, and if he is also correct (as virtually everyone would concede, albeit for different reasons) that current “Establishment Clause jurisprudence” is an incoherent mess, then the prospect of significant, even dramatic, change becomes more plausible. The development of a persuasive alternative method for deciding Establishment Clause cases will make it much more likely that such change will occur. Twenty years ago I proposed a modified version of Philip Kurland’s neutrality rule,⁵⁶ and I still would prefer

51. The Supreme Court is given original jurisdiction over certain types of cases: those “affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party.” U.S. CONST. art. III, § 2. However, virtually all the cases involving freedom of religion arise as a result of the exercise of *appellate* jurisdiction by the U.S. Supreme Court. Even the jurisdiction of the lower federal courts (what the Constitution refers to as “inferior courts”—trial courts and courts of appeal) is in the plenary control of Congress: “The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish.” U.S. CONST. art. III, § 1 (emphasis added). Congress in theory could abolish federal trial and appellate courts, or authorize them for limited types of cases.

52. After describing the original jurisdiction of the Supreme Court, Article III, § 2 states, “In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.” U.S. CONST. art. III, § 2 (emphasis added).

53. We the People Act, H.R. 5739, 109th Cong. § 3(1)(a) (2006). In the Senate an equivalent bill, S. 520, has been sponsored by Senator Shelby. The Constitution Restoration Act of 2005, S. 520, 109th Cong. § 101(a) (2005).

54. MANSFIELD, *supra* note 1, at 127.
55. *Id.* at 129.

56. DeWolf, *supra* note 6, at 254-59. In essence, I proposed that state action be judged according to whether it treated religion neutrally, permitting state aid to religion so long as it was available on a neutral basis regardless of viewpoint. I contrasted this standard with what I called the “affirmative action” model, prohibiting aid to religion wherever it was perceived that “too much” benefit was inuring to religion. I also proposed that a neutrality rule would allow “secular space” for

it to the current state of affairs and to virtually all of the substantive proposals that have been proposed to bring order out of the current chaos. But some ingenuity and political savvy will be required to identify the thread by which we may escape this labyrinth.

Mansfield concludes with an epilogue that invokes the history of the Berlin Wall. As Mansfield puts it, "there is another wall whose time has come to an end."⁵⁷ He is quick to point out that it is not the wall of separation *between the institutions* of church and state that needs to be torn down; rather, it is the wall "that is assumed to stand between all government and all religion."⁵⁸ Mansfield wants to return to the vision of the Founders, in which the nation "welcomes the riches of faith into the public sphere":

This is the dream of a new generation and not because [its members] wish to religiously oppress their neighbors. Instead, they know that the secular State has been tried and found wanting in their time, and they wish for an age in which, as Dr. King dared to hope, religion once again becomes the conscience of the State.⁵⁹

Mansfield draws upon the Berlin Wall metaphor for another reason. Not only was it an instrument of oppression, but it came down relatively suddenly. Even those who bitterly opposed it had reason to think it was more or less permanent. Its collapse also left a number of very difficult practical problems to resolve. The abandonment of our current approach to the First Amendment would also create practical difficulties, but a false sense of complacency or security may arise from thinking that such problems logically entail preservation of the status quo. Thus, Mansfield may be right in thinking that the future may be dramatically different from the past.

To summarize, Mansfield's aim in writing this book was to present the origin of the Establishment Clause (and the misused phrase "wall of separation between church and state") in a lively and persuasive way. In this he has succeeded. A previous book about George Bush sold over a million copies,⁶⁰ and Mansfield may get a similar audience for this book. Despite its cosmetic flaws, the book may serve as a catalyst, or at least reflects a larger cultural hunger, for the adoption of a more sensible approach to the relationship between religion and government in America.

religion, including special zoning rules for churches, chaplains in the military, and accommodation for religious practice (like prayer) where it furthered the state's interests.

57. MANSFIELD, *supra* note 1, at 138.

58. *Id.*

59. *Id.* at 138-39.

60. STEPHEN MANSFIELD, *THE FAITH OF GEORGE W. BUSH* (2004).

