THE TRUE MEANING OF "SEPARATION OF CHURCH AND STATE."

By: Edward Tabash

INTRODUCTION

It is my purpose to demonstrate that the Framers of the Constitution and the Bill of Rights intended government to be neutral in matters of religion. Contrary to the historical interpretation of the religious right wing, government was not designed so that any branch of government could favor belief over non belief, even generally. By the enactment of the Establishment Clause of the First Amendment, government was designed to treat belief and non belief equally, and to never betray any theistic preferences. The Clause reads: "Congress shall make no law respecting an establishment of religion."

JEFFERSON AND MADISON: ARCHITECTS OF FREEDOM OF AND FROM RELIGION

While the future fourth president of the United States, James Madison, was the principal drafter of the First Amendment, his main ally and mentor in the realm of government and religion was the future third president of the United States, Thomas Jefferson. The efforts of these two men, along with the Framers of the original Constitution and the members of the First Congress, leave a clear historical record that those who drafted the original Constitution and the First Amendment intended government neutrality in matters of religion and did not intend to allow government to favor belief over non belief.

MADISON OPPOSES GOVERNMENT SPONSORED AID TO ALL RELIGIONS

In 1785, four years before submitting the initial draft of the First Amendment, Madison wrote in opposition to a proposal by the Virginia Legislature to levy a general assessment for support of the clergy, generally. Madison wrote that the religion of every person must be left to the conviction and conscience of every person. Madison went on to write that our opinions depend only upon the evidence contemplated by our own minds and cannot follow the dictates of others[1] Madison also warned that the same government authority that can force someone to contribute to any individual religious establishment can also compel support for any other religious establishment in all cases.[2]

From this we can already see that Madison opposed government aid to religion, generally. This is important as it shows that the primary legal historical claim of the religious right, that the First Amendment was designed to allow government to favor belief over non belief, but only prohibited government from favoring one religion over another, is wrong. The principal architect of the First Amendment, four years before initiating the first draft of it, already demonstrated clear opposition to government preference for religion, generally.

---

[1] *Memorial and Remonstrance, James Madison on Religious Liberty,* Alley, Robert S., editor, Prometheus Books, Buffalo, New York, 1985, page 56

[2] Ibid., page 57.

JEFFERSON AND MADISON SECURE ENACTMENT OF VIRGINIA STATUTE FOR RELIGIOUS FREEDOM

Jefferson and Madison collaborated on what was to become the *Virginia Statute for Religious Freedom*, enacted in 1786. The collaboration of the then future 3d and 4th presidents of the United States in an endeavor that was the first major enactment of any legislative body in the known world, up to that point in history, for purposes of protecting freedom of conscience against any tyranny by any religious majority, was a major advance in humanity's struggle toward severing the bonds between religious dogma and government. Jefferson and Madison successfully persuaded the Virginia Legislature to enact into law this statute which contained the assertion that a person's civil rights should not depend in any way on that persons's opinions on religion. Further language stated that everyone should be free to profess and to argue for any view on matters of religion, and that no one's legal rights should depend in any way on those views, whatever they may be.[3]

JEFFERSON LEFT NO DOUBT ABOUT HIS VIEW THAT BOTH NON BELIEVERS AND THOSE HOLDING UNCONVENTIONAL VIEWS ON MATTERS OF RELIGION DESERVE FULL EQUALITY BEFORE THE LAW

In 1787, the year following the successful enactment of the *Virginia Statute for Religious Freedom*, Jefferson offered to the public his *Notes on Virginia*. In *Query XVII* thereof, he wrote:

> "The legitimate powers of government extend to such acts only as are injurious to others. But it does me know injury for my neighbor to say there are twenty gods or no god. It neither picks my pocket nor breaks my leg."[4]

It can then be seen that the man who had the greatest influence on Madison, regarding government neutrality in matters of religion, was deeply committed to just that, strict government neutrality in which the proclamation of twenty gods or no god could not in any way invoke any differential treatment by any government authority.

---

[3] http://usinfo.state.gov/usa/infousa/facts/democrac/42.htm (viewed on September 2, 2006).

[4] *Jefferson, Writings*, Library of America, Literary Classics of the United States, Inc, New York, N.Y., 1984, page 285.

THE ONLY REFERENCE TO RELIGION IN THE ORIGINAL CONSTITUTION WAS A NEGATIVE ONE: A PROHIBITION AGAINST ANY RELIGIOUS TEST FOR PUBLIC OFFICE, AS SET FORTH IN ARTICLE VI, CLAUSE III.

In the Summer of 1787, 55 Founders gathered in Philadelphia to draft the original Constitution of the United States. Of the many remarkable features of the Constitution, what stands out most for our purposes was that the only reference to religion was a negative one. In *Article VI, Clause III*, the Founders prohibited all religious tests for public office.

Also, during the deliberations, the Founders specifically refused suggestions that they pray for guidance, when they had difficulty working out consensus on various issues.[5]

On February 8, 1788, about a year and a half before presenting the first draft of the First Amendment before Congress, Madison, in *Federalist No. 52*, defended the prohibition of any religious test for public office. He wrote that public office should be open to "merit of every description" without regard to "any particular profession of religious faith."[6] On October 17, 1788, in a letter to Jefferson, Madison was contemptuous of an objection to the prohibition of any religious test for office because that objection was rooted in a concern over "infidels" being elected to office.[7] In this same letter, forecasting his soon-to-be First Amendment views that the majority should not be permitted to use popular government to oppress the rights of the minority, Madison wrote that the "rights of conscience" would be substantially narrowed if "submitted to public definition."

As the United States Supreme Court has noted, during the debates on whether or not to ratify the Constitution, a then future Justice of the Supreme Court, James Iredell, argued in favor of the prohibition against any religious tests for office by saying that if we are to value religious liberty, we must allow "pagans" and those "who have no religion at all" to be elected to office.[8]

Thus, by the time that the original Constitution was officially ratified in 1788, the new nation had thoroughly debated and accepted the prohibition against any religious test for public office. Before Madison's initial draft and introduction of the First Amendment, he and Jefferson had already demonstrated their firm commitment to a form of government that does not in any way favor religious

---

[5] Pfeffer, Leo, *Church State and Freedom*, Revised Edition, Beacon Press, 1967, page 122.

[6] *http://www.foundingfathers.info/federalistpapers/fed52.htm* (Viewed on September 3, 2006).

[7] http://www.founding.com/library/lbody.cfm?id=181&parent=58 (Viewed on September 3, 2006).

[8] *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961).

belief over non belief. The stage was now set for enshrining these principles into the Bill of Rights, the first ten amendments to the original Constitution.

THE FIRST AMENDMENT IS BORN

In the above referenced October 17, 1788, letter to Jefferson, Madison also expressed the concern that even though popular government does not have as great a danger of leading toward tyranny as does a monarchy, a bill of rights is still necessary to guard against oppression that could be engendered by the majority.[9]

The people of the new nation were also generally concerned that the Constitution, by itself, did not provide adequate restraints on the national government. The prevailing sentiment in the country favored a bill of rights.

On June 8, 1789, Madison, as a member of the House of Representatives, introduced into Congress proposed amendments to the Constitution, one of which initially read:

> "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.
>
> No state shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases."[10]

This set in motion the most remarkable series of alterations, over the next three months, resulting in the strengthening of the language on government neutrality in matters of religion in the final version that was jointly approved by the House and Senate in September of 1789.

Justice Souter, in his concurring opinion in *Lee v. Wesiman*[11] points out that Madison came to his initial draft of what was to ultimately become the First Amendment, after having collaborated with Jefferson on the *Virginia Statute for Religious Freedom* a few years earlier.[12] Madison was thus committed to government neutrality in matters or religion and opposed to allowing government to favor

---

[9] Op cit., footnote 7, above.

[10] Stokes, Anson Phelps and Pfeffer, Leo, *Church and State in The United States*, Harper & Row, 1964, at page 93.

[11] 505 U.S. 577 (1992)

[12] Ibid., page 615.

religion, generally, over non belief. Yet, remarkably, as Justice Souter further explains, by September of 1789, the final language of the First Amendment that emerged as a result of a joint conference between the House and Senate, adopted language even more assertive in mandating government neutrality in matters of religion, than what was set forth in Madison's initial formulation.[13] The phrase "no law respecting an establishment of religion" is much more prohibitory of any government preference for theological beliefs over non belief than even Madison's initial wording of "nor shall nay national religion be established."

Thus, the final result was that the First Congress strengthened the language on church/state separation, even beyond the force and effect of the initial wording composed by the nation's staunchest advocate of strict separation.

The path the First Congress took in finalizing the wording of the Establishment Clause of the First Amendment, in between Madison's initial wording introduced on June 8, 1789 and the final wording, passed first by the House and then finally by the Senate on September 25, 1789,[14] shows a developing trend toward government neutrality in matters of religion, and not just a non preferential stance in which government would be permitted to assist religion, generally. For instance, on September 3, 1789, three motions were defeated in the Senate that, if passed, would have restrained government only from favoring one religion over another.[15]

During the House debate on August 15, 1789, Representative Daniel Carroll of Maryland, who was also one of the fifty five Framers of the original Constitution in 1787, said: "....the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand..."[16]

Further, since the Bill of Rights was designed to restrain the power of the federal government, the First Amendment could not have contributed to an expansion of government's authority to aid all religions. The First Amendment consists of prohibitory constraints on what government can do. It

---

[13] Ibid., page 614

[14] Levy, Leonard W., *The Establishment Clause: Religion and the First Amendment*, Macmillan Publishing Company, 1986, at page 83.

[15] Ibid., page 82.

[16] Op cit., Stokes and Pfeffer (footnote 10, above), page 94.

does not empower any branch of government to do anything. It restrains government authority. It does not add to it. It does not expand it.[17]

We have the collaboration of Jefferson and Madison on government neutrality in matters of religion and securing equal rights for believers and non believers, in the years leading up to the enactment of the First Amendment. We have Madison's submitting the initial draft of what was to become the First Amendment, in his role as having always advocated prohibiting government from betraying any favoritism toward religion. Then, we have the First Congress' further strengthening of the separationist language contained in Madison's initial draft. All of these factors make it far more likely than not that the Framers of the Establishment Clause, as properly recognized by the U.S. Supreme Court, intended to prevent government from showing favoritism to any one religion, or to all religions, as against non belief.[18]

THE STATEMENTS AND POSITIONS OF BOTH JEFFERSON AND MADISON AFTER THE FIRST AMENDMENT WAS ENACTED, FURTHER SHOWS THEIR COMMITMENT TO STRICT SEPARATION/GOVERNMENT NEUTRALITY

Now that we have seen that Jefferson and Madison engaged in a close collaboration that ultimately led to Madison's initial introduction of the First Amendment into Congress, the views of both of them on church/state separation and on the meaning of the Establishment Clause, after it was already enacted, are highly relevant to the proper interpretation of the Clause.

On January 1, 1802, Thomas Jefferson, now the president of the United States, wrote to the Danbury Baptist Association that the Establishment Clause of the First Amendment built "a wall of separation between church and state."[19] Certainly, Jefferson was in the best position to know what he and Madison meant in their collaborative efforts to secure government neutrality in matters of religion. So, if he chose to categorize the Establishment Clause as requiring a wall of separation between church and state, his wording should be deemed an accurate interpretation of the Clause.

---

[17] Levy, Leonard W., *The Original Meaning of the Establishment Clause of the First Amendment*, in *Religion and the State, Essays in Honor of Leo Pfeffer*, Wood, Jr., James E., editor, Baylor University Press, Waco, Texas, 1985, page 61.

[18] *Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947).

[19] Op cit., *Jefferson, Writings* (footnote 4, above), page 510.

Jefferson also refused to issue proclamations of Thanksgiving during his presidency. In his second inaugural address, on March 4, 1805, he stated that for himself, as president, there will be "no occasion, to prescribe...religious exercises..."[20]

When we also see Jefferson's lifelong expressions of hostility to any religion or its clergy having any official power within government, we can see that he was, just like his closest ally on church/state matters, James Madison, always committed to a government that cannot even favor religion generally, but must be neutral as between belief and non belief. In 1800, the year of his first election to the presidency, Jefferson wrote to Jeremiah Moor: "The clergy, by getting themselves established by law and ingrafted into the machine of government, have been a formidable engine against civil and religious rights."[21] In 1813, he wrote to Alexander von Humboldt:

> "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."[22]

In 1814, Jefferson wrote to Horatio Spafford:

> "In every country and in every age, the priest has been hostile to liberty. He is always in alliance with the despot, abetting his abuses in exchange for protection of his own."[23]

These are not the words of someone who would allow government to even generally promote and support religion as opposed to non belief.

Jefferson also held in ridicule the supernatural beliefs of Christianity. Since the only candidates for government sponsored, or government supported, religion were various Christian sects, during Jefferson's time, it is not likely that he supported anything other than strict government neutrality in matters of religion. On April 11, 1823, Jefferson, the retired third president of the United States, wrote to John Adams, the retired second president of the United States:

> "And the day will come when the mystical generation of Jesus, by the

---

[20] Ibid., page 520.

[21] http://etext.virginia.edu/jefferson/quotations/jeff1650.htm (Viewed on September 6, 2006).

[22] Ibid.

[23] Ibid.

> supreme being, as his father, in the womb of a virgin, will be classed with the fable of the generation of Minerva in the brain of Jupiter."[24]

An exceptionally powerful demonstration of where Jefferson stood with respect to strict government neutrality in matters of religion and the full equality of non believers, can be seen in his *Autobiography*, dated January 6, 1821. In a magnificent paragraph, Jefferson talks about how the Virginia Statute for Religious Freedom was meant to secure protection for all points of view on matters of religion and how an attempt to still show preference for Christianity was defeated. Jefferson then exults in the result that non believers are to enjoy equal protection under the law. His precise words are:

> "The insertion was rejected by a great majority, in proof that they meant to comprehend, within the mantle of its protection, the Jew and the Gentile, the Christian and Mahometan, the Hindoo, and infidel of every denomination."[25]

To give full equality under the law to "the infidel of every denomination" constitutes the clearest proof that Jefferson, Madison's closest partner and confidant in church/state separation, had always intended that government be neutral in matters of religion and that government be prohibited from betraying any favoritism for belief over non belief.

Madison always affirmed his view that government should not promote religion in any way. Dumas Malone, the famed historian who authored the acclaimed multi-volume biography of Jefferson, *Jefferson and His Time*, has said that Jefferson and Madison held the same views with respect to religion and government.[26]

Madison shared Jefferson's distrust of any clergy, who seek to obtain political power for purposes of using government to impose any religious view. On January 24, 1774, twelve years before introducing the Jefferson/Madison *Statute for Religious Freedom* into the Virginia Legislature, and more than fifteen years before embarking on the first draft of the First Amendment, Madison wrote to William Bradford:

> "That diabolical hell conceived principle of persecution rages among some and to their eternal infamy, the Clergy can furnish

---

[24] Op cit., *Jefferson, Writings* (footnote 4, above), page 1469.

[25] Ibid., page 40.

[26] Op cit., Alley (footnote 1, above), pages 304 and 338.

their quota of imps for such business.[27]

Bearing in mind that when Madison wrote the *Memorial and Remonstrance* in 1785, the only possible choices of religions for government to support were all Christian denominations, we again see his firm conviction that government must not convey any support for religion, even generally. Madison thus wrote in the *Memorial*:

> "During almost fifteen centuries has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy, ignorance and servility in the laity, in both, superstition, bigotry and persecution.[28]

This shows that very early on, Madison was already committed to a scheme of government in which religion could not at all seek any special favors.

No one could imagine any major political figure, today, with viable aspirations to the presidency, clearly saying that Congress should not have chaplains paid for by public funds and that presidents should not issue proclamations of thanksgiving with any religious implications. Yet, Madison, the 4th president of the United States, and principle author of the First Amendment, believed such appropriation of public money for Congressional chaplains violated the constitutionally required government neutrality in matters of religion and that presidents should not issue thanksgiving proclamations that contain any religious content..[29]

In 1970, the United States Supreme Court was very supportive of the notion of church/state separation. Yet, by a seven to one decision, the Court upheld property tax exemptions for the property of religious organizations that were to be used solely for religious worship.[30] Madison, however, opposed such tax exemptions for the property owned by religious organizations.[31] In giving examples of violations of the principle of government neutrality in matters of religion, Madison cited attempts in

---

[27] Ibid., page 48.

[28] Ibid., page 58.

[29] Ibid, July 10, 1822, Letter to Edward Livingston, page 82.

[30] *Walz v. Tax Commission of City of New York*, 397 U.S. 664, 680 (1970)

[31] Pfeffer, Leo, *God Caesar and the Constitution*, Beacon Press, Boston, Mass, 1975, page 66.

Kentucky to "exempt houses of worship from taxes."[32] Madison also warned against accumulation of property by religious organizations, generally. He wrote:

> "But besides the danger of a direct mixture of religion and civil government, there is an evil that ought to be guarded against in the indefinite accumulation of property from the capacity of holding it in perpetuity by ecclesiastical corporations.[33]

In light of the strict separationist perspective clearly articulated throughout the lives of the principle author of the First Amendment–Madison–and his closest confidant and partner in matters of separating religion from government–Jefferson–their clear intent of a government that is prohibited from betraying any favoritism for believers over non believers is unmistakable. This argument is even further bolstered by Congress' ultimate strengthening of Madison's original church/state separation language in what was to finally take shape as the First Amendment.

The most plausible interpretation of the First Amendment, then, is that the Framers did intend to establish a government that was required to be neutral in matters of religion and that was required to treat the non believer as fully equal under the law.

THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION INCORPORATES THE BILL OF RIGHTS, INCLUDING THE FIRST AMENDMENT, TO THE STATES

Though Madison attempted to initially have what was to become the First Amendment also bind state governments (see footnote 10, above), as ultimately passed and ratified, the First Amendment restrained only the federal government. However, in 1868, the nation ratified the Fourteenth Amendment to the United States Constitution. The Fourteenth Amendment sought to put limits on the extent to which state power can be exercised against individuals and thus it makes sense to deem the limits imposed on the federal government, by the Bill of Rights, to now be equally imposed on state governments. To hold otherwise would be for state governments to be able to nullify the individual liberty that the federal government must allow. Thus, without a legal system that deems the Bill of Rights incorporated to bind all state and local governments, a person who makes a speech about a controversial topic could be imprisoned by authorities in the city, county, or state in which the speech occurred, even though that individual would be free from federal prosecution.

---

[32] Op cit., Alley (footnote 1, above), page 90 (Directly Quoted from Madison's *Detached Memoranda*, estimated to have been written by him at some point after 1817.)

[33] Ibid, page 91.

If a liberty is worth preserving, it must be preserved against encroachments by all branches of government. If a state can imprison a non believer for expressing views on why religious beliefs are incorrect, it would not matter that the federal government could not so imprison the non believer. The individual would still be imprisoned by government for no more than expressing a viewpoint about the structure and nature of reality. The Supreme Court first acknowledged the incorporation of the religion clauses of the First Amendment to the states in 1940.[34] The Court's first explicit application of the Establishment Clause to state and local governments came bout in 1947.[35] Since that time, the Court has consistently never wavered in its majority view that the Fourteenth Amendment incorporates the Establishment Clause to the states and that state and local governments are as powerless to favor the believer over the non believer as is the federal government.

SINCE 1947, THE SUPREME COURT HAS RECOGNIZED THAT THE FIRST AMENDMENT REQUIRES GOVERNMENT NEUTRALITY IN MATTERS OF RELIGION AND THAT NO BRANCH OF GOVERNMENT MAY FAVOR BELIEF OVER NON BELIEF.

Starting in 1947, the Supreme Court began what is up to now an unbroken line of decisions in which there has always been a majority of Justices to proclaim that the First Amendment means that no branch of government can favor the believer over the nonbeliever.[36]
The Supreme Court has, by majority vote, adopted language that explicitly says:

> "We repeat and again reaffirm that neither the a State nor the Federal Government can constitutionally force a person to 'profess a belief or disbelief in any religion.' Neither can constitutionally pass laws or impose requirements which aid all religions against non believers."[37]

In 1985, a majority of the Court fleshed out a thorough statement affirming that the First Amendment protects those who harbor all points of view on matters of religion, including non believers, by declaring that the Court has always:

> "Unambiguously concluded that the individual freedom of conscience protected by the First Amendment embraces the right to select any religious faith, or none at all. This conclusion derives support not only

---

[34] *Cantwell v. Connecticut,* 310 U.S. 296, 303-304 (1940)

[35] Op cit., *Everson* (footnote 18, above.) 330 U.S., at page 15.

[36] Op cit., *Everson* (footnote 18, above.)

[37] Op cit., *Torcaso* (footnote 8, above.)

> from the interest in respecting the individual's freedom of conscience, but also from the conviction that religious beliefs worthy of respect are the product of free and voluntary choice by the faithful, and from recognition of the fact that the political interest in forestalling intolerance extends beyond intolerance among Christian sects–or even intolerance among 'religions'–to encompass intolerance of the disbeliever or uncertain."[38]

In 2000, the Court held by a 6 to 3 majority that government sponsorship of a religious message is:

> "impermissible because it sends the ancillary message to members of the audience who are nonadherents that 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community."[39]

Another way of wording the true meaning of the separation of church and state was expressed, again, by Justice O'Connor in a concurring opinion, when she said that no branch of government can "treat people differently, based on the God or gods they worship or don't worship.[40]

THE ACCOMPANYING GUARANTEE OF THE FREE EXERCISE OF RELIGION CLAUSE DOES NOT ALLOW BRANCHES OF GOVERNMENT TO CONFER SPECIAL BENEFITS ON BELIEVERS. IT ONLY PROPERLY ENSURES THAT BELIEVERS WILL NOT SUFFER SPECIAL ADVERSE DISCRIMINATION BECAUSE OF THEIR BELIEFS.

The First Amendment not only contains a clause prohibiting government from passing any laws respecting an establishment of religion, it also contains a companion clause that prevents government from prohibiting the free exercise of religion. In order for the Free Exercise Clause to be harmonious with the Establishment Clause, the total constitutional scheme must still preserve the same legal rights for the non believer as are enjoyed by the believer. Thus, for believers to be permitted to avoid complying with laws that apply to everyone else would render non believers legally second class citizens.

---

[38] *Wallace v. Jaffree,* 472 U.S. 38, 53-54 (1985)

[39] *Santa Fe Independent School District v. Doe,* 530 U.S. 290, 309-310 (2000) adopting Justice O'Connor's language from her concurring opinion in *Lynch v. Donnelly,* 465 U.S. 668, 688 (1984).

[40] *Board of Education of Kiryas Joel v. Grumet,* 512 U.S. 687, 714 (1994).

The Supreme Court recognizes that government has no obligation to give believes special exemption from laws of general applicability.[41] Justice Stevens has recognized that any government program, law, or regulation that provides only believers with the right to seek exemption from laws of generally applicability, but that does not provide the same right to, in his words, "atheists and agnostics," is a violation of the Establishment Clause.[42]

An example of the type of disastrous results that can derive from allowing only religious people to avoid complying with laws that apply to everyone else, is the type of overt discrimination such a view would permit. Many people were horrified in the 1960's when the then Governor of Georgia, Lester Maddox, made a name for himself by chasing black people out of his chicken restaurant.[43] If a person, who can show that a sincerely held religious belief bars doing business with a certain category of people, can claim a religious exemption from non discrimination laws, such a person, even if otherwise doing business with the general public, could refuse to sell to those members of whatever that category of people would be.

Someone could found a church that prohibited doing business with atheists, and a restaurant owner, who is a member of that church, could then legally stand in the doorway and bar any known non believer from entering the place of business. This would be the same as white supremacists refusing to seat African Americans at lunch counters in the South during the 1950s and 1960s.

In 1996, the California Supreme Court dealt with the case of a landlord, who rented out apartment units to members of the general public, but who claimed that her religion deemed it sinful for her to rent to unmarried couples.[44] The California Supreme Court reversed the Court of Appeal, which had ruled for the landlord and which held that her right of free exercise of religion allowed her to claim exemption from California's anti marital status discrimination laws that otherwise apply to all other landlords. The California Supreme Court expressed concern over what would happen if any time that someone wanted to escape complying with a law, that individual could merely claim that compliance would violate a tenet of religious faith.[45] The California Supreme Court also expressed concern over the consequences of allowing someone to claim a religious exemption from an enforceable duty to

---

[41] *Employment Division, Oregon Department of Human Resources v. Smith,* 494 U.S. 872, 879 (1990).

[42] *City of Boerne v. Flores*, 521 U.S. 507, 536-537 (1997)

[43] http://www.cnn.com/2003/ALLPOLITICS/06/25/maddox.dead/ (Viewed on September 26, 2006).

[44] *Smith v. Fair Employment & Housing Commission,* 12 Cal 4th 1143, 1151 (1996).

[45] Ibid., page 1168.

comply with laws of general applicability, when the exemption sought would permit the religious claimant to engage in otherwise legally prohibited discrimination against third parties.[46]

Indeed, had the California case been decided differently, the state would be in a position to deny all landlords the right to refuse to rent apartment units to gay and other unmarried couples, but would have been compelled to allow any landlord, pleading a religious motivation to so discriminate, a special right to engage in this form of discrimination.

In order to avoid an irreconcilable collision between the Establishment Clause and the Free Exercise Clause, the latter must be read as a shield and not a sword. It must be seen as protecting religious believers from being singled out for special invidious discrimination because of their beliefs. It must not be seen as a means by which those who assert a religious belief will have greater legal rights and exemptions from compliance with generally applicable laws than anyone else.

The best example of the Free Exercise Clause, properly implemented, can be seen in a United States Supreme Court case that arose when the city of Hialeah, Florida, passed an ordinance banning the ritual killing of animals, but in a way that prevented only followers of the Santeria religion from killing animals in their ceremonies, while for instances, still allowing the kosher process of slaughter.[47] This case did not involve religious claimants seeking to avoid a law that applied to everyone else. This case involved members of a specific religious sect being singled out for discriminatory treatment.[48] Because this was not a law of general applicability but one designed to single out Santeria for special deprivation of rights, the Supreme Court declared it unconstitutional[49]

CONCLUSION

It was the intent of the Framers to create a legal system in which the believer and non believer are equal before the law and in which no branch of government can betray any prejudice toward someone for either accepting or rejecting any tenet of religious belief or theological assertion.

---

[46] Ibid., page 1170.

[47] *Church of Lukumi Babalu Aye v. City of Hialieah*, 508 U.S. 520, 536-537 (1993).

[48] Ibid, pages 540-541

[49] Ibid, page 542