

FREEDOM
of **RELIGION**
the **FIRST**
AMENDMENT
and
the **SUPREME**
COURT

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How the Court Flunked History

BARRY ADAMSON



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Preface: How Clear the Lens of Historical Reality

Two fortuitous events spawned all that follows.

In the spring of 2002, I chanced to hear Darrell Scott speak of his certainty that his daughter Rachel might not have been gunned down by a fellow student on April 20, 1999, at Columbine High School in Littleton, Colorado, had our nation's public education system not been so persistent with its crusade to rid the educational process of any hint of faith-based influences such as character, values, integrity, truth, and non-variable morals. Irony of ironies, the fellow student who thrust his gun in Rachel's face that morning asked Rachel whether she believed in God; she said "yes," and in the next instant became the first victim, shot point blank.

Darrell posed this question to his audience: "How many of you can recite the first ten words of the First Amendment?" I can still recall the jolt of two emotions as he asked that question: the giddy elation of sensing that, as a graduate of the UCLA School of Law, I had an inherent advantage over other listeners, followed by an overwhelming discomfiture as, stunned, I realized that I had no recollection of having ever learned the precise wording of the First Amendment. Something to do with speech, or the press, I thought. Not even close; the first ten words of the Constitution's First Amendment—actually the first "right" implemented in the Bill of Rights—form the Establishment Clause: "Congress shall make no law respecting an establishment of religion[.]"¹

Darrell asked more humbling questions: "How many of you have heard the expression 'separation of church and state'?" It seemed that all hands shot up, including mine. "How many of you think that phrase appears in the Constitution?" Hands started upward, then hesitated, as many folks suddenly found themselves wondering why he would ask the obvious, unless . . . then it dawned on them. I recall thinking that,

although I knew the phrase “separation of church and state” appeared nowhere in the Constitution, I believed that the United States Supreme Court authored those words, and that the phrase summarized the historical meaning of the Establishment Clause. Wrong; so wrong.

Within a couple of months of Darrell Scott’s piercing illumination of my ignorance, one of the most singularly dumb moments in United States history occurred: in June 2002 the United States Ninth Circuit Court of Appeals declared a portion of the Pledge of Allegiance unconstitutional because, according to the Court, the words “under God” ran afoul of the Establishment Clause.² I simply could not fathom how that could be.

I concluded at that point that I must have no idea what the Establishment Clause really means, because the Pledge of Allegiance’s mere reference to “God” surely seems innocent enough. I also decided that simply reading what the United States Supreme Court had to say about it would simply not suffice, because even it had to start somewhere. So I began at the beginning—the *true* beginning.

I have now learned, as will you, that the Supreme Court has never had any idea what the words in the Establishment Clause actually mean, and has cared little about the reality that history so plainly reveals. And worse, the Court seems quite content to allow that predicament to endure.

I began my research with some unremarkable premises.

First, words have meaning only within a specific, singular, idiosyncratic context. In fact, words have no meaning otherwise. Correlatively, words relinquish “meaning” when divorced from the unique contextual framework within which their author(s) assembled them.

Second, authors mean what they say when they say it, and they write with neither the apprehension nor the expectation that the meaning of their published words will or might change over time. Hence, the meaning of published words necessarily remains constant over time, else “meaning” ceases to exist. Even those who disagree with this premise invariably—not to mention hypocritically—voice their disagreements in conformance with the very premise with which they purport to disagree. In other words, they certainly do not anticipate that their objections will change in meaning over time.

Third, the “intent” of an author to convey a particular thought,

message, idea, or concept plays no role in the determination of “meaning”; only the words themselves and their unique historical context can determine “meaning.” If an author successfully conveys “intent” via specific words used within a specific context, then “intent” becomes a superfluous and inconsequential consideration. And if an author fails in that effort, *viz.*, “intent” remains ineffectively expressed (or entirely unexpressed), then the author’s unexpressed “intent” likewise remains irrelevant because it remains hidden.

Fourth, the opinions of others as to the “meaning” of an author’s work never create a new “meaning.”

And *fifth*, truth really does matter.

The narrative that follows offers none of the usual distractions and diversions:

- no psychic delving into the minds or elusive “intention” of the 1789 Congress;
- no scholarly excursions through perceived grammatical abstrusities among the words in the ten-word phrase “Congress shall make no law respecting an establishment of religion”;
- no academic ramblings about the nature of constitutions and why, according to some, words written in constitutions fluctuate or ebb and flow with time; and,
- no treks along the interminable trails of the “what ifs.”

Abiding the advice that “the right answer depends on the right question,”³ the research that follows tracks two questions to a definitive conclusion: *First*, what did the word “establishment” and the phrase “an establishment of religion” mean on September 25, 1789, when Congress authored the text of the Establishment Clause? *Second*, has the United States Supreme Court abided by that historical meaning? Let the answers fall where they may.