One of the issues in apologetics is to explore the reasons why Christianity and its ideas have been progressively excluded from the public square over the last 80 to 100 years. We have the best arguments, but are frequently excluded from public discussions on matters that affect the public and the common good. For example, we produce brilliant materials on the issue of Intelligent Design (ID) only to be excluded because teaching ID in public schools is, in the current opinion of the courts, an unconstitutional establishment of religion. As such, we win the argument, but fail to persuade the public with it because we have been denied access to many public forums. This needs to change.

One of the reasons I became a constitutional law professor after being a theologian for ten years was to fight the cultural and legal decay in our culture.

I have spent most of my time on constitutional law in my legal studies examining how the court has changed American law in the last 100 years. Frankly, it is a lesson in evil and sophistry.

All one need to do is look at what America *was* doing in nearly every state of the union regarding speech and religion prior to the “Selective Incorporation” of the First Amendment Religion Clauses in the 1940s with the *Cantwell* and *Everson* cases. States had Bible, prayer, the Ten Commandments, Creationism, and much more in our public schools and institutions. The U.S. Supreme Court itself has statues and a carving of the 10 Commandments in and on it. Why? Because the court was built before the 1940s, before the court turned the constitution and religious liberty on its head in the *Cantwell* (1940) and *Everson* (1947) cases.

It has been the judicial activism of the court that has been the primary vehicle for the secularization of America and the restrictions of religious liberty. This has been accomplished with a few “creative” judicial tools invented by the court by means of the misinterpretation of the 14th Amendment: Substantive Due Process, Selective Incorporation, Fundamental Rights, and the misuse of the Equal Protection Clause and the Commerce Clause. From these we have received the evils of abortion on demand (*Roe v. Wade*), Sodomy as a “fundamental right” (*Lawrence v. Texas (2003)*

, Homosexual Marriage as a fundamental right (*Obergefell* (2015), and multiple restrictions of religious liberty and speech such as the forbidding of teaching intelligent design in schools. The list goes on and on.

In short, the 14th Amendment (1868), in its original meaning, had nothing to do with giving the federal government the right to decide things such as abortion, religion, speech, or alleged homosexual rights. It was the second of the post civil war amendments. The relevant parts of the 14th Amendment were the Due Process and Equal Protection clauses, which, with few exceptions, did not mandate any particular law for the states—especially with respect to religion. It simply said that whatever laws the particular state has in effect, people must be treated equally and must have their day in court—procedurally speaking. The 14th Amendment was passed because these things were being denied to the freed slaves (see 13th Amendment (1865)).

It was over 50 years after the 14th Amendment passed when the progressives on the supreme court began to "reinterpret" the 14th Amendment to give the court the power to decide "fundamental rights" and then to begin to "incorporate the Bill of Rights" to the several States, meaning powers that were explicitly reserved to the states and forbidden from interference by the federal government (e.g., speech and religion) in the U.S. Constitution was now the domain of the federal courts through the new “Substantive Due Process" and "Selective Incorporation” analysis of the Due Process Clause of the 14th Amendment. Note well that this new “interpretation” did not exist until more than 50 years after the 14th Amendment was passed (1868) and has been used by the courts ever since to grab liberty and authority from the states and the people. This process has resulted in the progressive reduction of religious liberty.

So how did the courts change these issues related to freedom of religion to our detriment? This is fairly easy to document. Over the last half century of judicial activism the courts have made religion a federal, rather than a state issue, and then, with its new power and new interpretation of these religion amendments, attempted to eradicate religion from our government institutions and the public square. This modern view would be completely unrecognizable by those who wrote the U.S. Constitution or the 14th Amendment.

When the individual states created the federal government in 1787, the individual states already existed. And they gave the federal or national government *limited, enumerated* powers. Roughly 90% of existing government functions at that time took place at the state level, and most of those at the local government level. The federal government, by design, had nothing to

say about religion in the individual states. It is only progressive constitutional scholarship, politics, and an activist court that makes the U.S. Constitution the most important document regarding these issues.

If one actually reads the U.S. Constitution, one will find that it gives very little power to the federal government. It is designed to ensure one state does not obtain an advantage over other states (e.g. Commerce Clause) and it primarily defines tasks that related to foreign affairs. The states handled most all domestic affairs. They did not want to centralize these issues, especially the issue of religion.

Sadly, if you asked the average lawyer or secular law professor what the meaning and purpose of the First Amendment was, one will probably hear the "separation of church and state" mantra as a response. But this is not the original meaning of the First Amendment Religion Clauses. The First Amendment Religion Clauses say "*Congress* (i.e., the Federal Congress) shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." By this, the Founders intended only to preclude the establishment of a national denomination and prevent the Federal Government from interfering with religion in the several states. It was never intended to restrain public religious expressions. The Article VI “Religion Test” of the U.S. Constitution should be understood in this light.

One of the most telling pieces of evidence against the modern understanding of the First Amendment is Thomas Jefferson himself. The author of the famed "wall of separation" language in his now famous letter to the Danbury Baptists (1802) had some relevant things to say about the limits of federal power in the relationship between church and the state. He said regarding the relationship of the First Amendment and the States:

"I consider the government of the United States (i.e., the Federal Government) as interdicted by the Constitution from intermeddling with religious institutions, their doctrines, discipline, or exercises. This results not only from the provision that no law shall be made respecting the establishment or free exercise of religion, but from that also which reserves to the States the powers not delegated to the United States. Certainly, no power to prescribe any religious exercise or to assume authority in any religious discipline has been delegated to the General government. It must then rest with the States."

Joseph Story is another important early witness to the current corrupted interpretation of the First Amendment and religion in America. Story (1789-1845) was a professor at Harvard Law

School, and a Justice of the United States Supreme Court. He explained in his seminal tome on constitutional law, *Commentaries on the Constitution* (1833), that due to the First Amendment:

"…the whole power over the subject of religion is left exclusively to the State governments to be acted upon according to their own sense of justice and the State constitutions."

He further stated in his *Commentaries* that *"The real object of the Amendment was not to countenance, much less advance, Mahometanism, or Judaism, or infidelity, by prostrating Christianity; but to exclude all rivalry among Christian sects."*

So how did the state governments exercise their retained authority over religious matters? One way to discover this is to examine what the states had, in fact, been doing for the first 150 to 200 years of the republic. They had been engaged in activities such as teaching Christian views of creation and Bible in our public schools, swearing in a witness on the Bible, etc. However, after 150-200 years of doing such things these states recently (in the last 50 years) were informed that these practices were "unconstitutional," courtesy of the justices of the United States Supreme Court.

Another way to see how the Christian states exercised their retained rights to religion is to look at the original Constitutions of the several States, not the federal constitution, to see what provisions are made for religion in the state. While the states could have had an established state denomination, most did not. They mostly made provision for the general public teaching and encouragement of the Christian religion. For example, the Massachusetts State Constitution (1781) read in relevant part:

"As the happiness of a people and the good order and preservation of civil government essentially depend upon piety, religion and morality; and as these cannot be generally diffused through a community but by the institution of the public worship of God and of public instruction in piety, religion and morality: Therefore to promote their happiness and to secure the good order and preservation of their government, the People of this Commonwealth have a right to invest their Legislature with the power to authorize and require . . . the several towns, parishes, precincts, and other bodies politic or religious societies, to make suitable provision at their own expense for the institution of the public worship of God
and for the support and maintenance of public Protestant teachers of piety, religion, and morality."

At that time, as another example, the New Hampshire state constitution was substantially similar to the Massachusetts Constitution, but added that "*morality and piety [are] grounded in e vangelical principles*
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From these state constitutional provisions, the actual practice of the states for nearly two centuries, and the unanimous voice of the Founders and early justices of the United States Supreme Court, the right to determine the extent of the relationship between the church and the state rested solely with the people of the several states. The federal government had no say in the matter—until the U.S. Supreme Court in the 1940s invented a new meaning of the First Amendment Religion Clauses in the *Cantwell* and *Everson* cases. Before this time, the states and people considered themselves a Christian nation. There is simply an overwhelming abundance of evidence for this if one looks to past presidents, legislatures, judicial officers, state constitutions and does not anachronistically impose a modern, progressive standard on the Founders and their intellectual heirs. We were a Christian nation. And the secularists are doing their best to change history and undo this Christian foundation.

In sum, no matter where an individual Christian is at in his or her views of religion in the public square, the issue is that the U.S. Supreme Court has infringed on our right to decide how much or how little religion we want to have in our local jurisdictions by making the matter a federal issue and then progressively restricting religion from the public square.

The attack on religious liberty that began in the 1940s with cases regarding state governments giving aid to private religious schools has matured now to the degree where now an individual Christian is prevented from exercising his or her right of religious conscience regarding whether or not to host a homosexual wedding reception, bake a wedding cake for homosexuals, or whether a Christian medical professional can refuse to perform artificial insemination on a lesbian. (see http://humanevents.com/2014/08/25/govt-host-gay-wedding-or-pay-13000-fine/ , http://www.christiantoday.com/article/christian.baker.says.he.will.no.longer.sell.wedding.cakes.after.losing.gay.discrimination.case/37845.htm , and http://www.christianexaminer.com/article/calif.court.fertility.doctor.must.treat.gays/43979.htm)

There are hundreds of cases decided on these issues around the country. It is time to take action.

For historical documentation of these basic claims, see the Wallbuilders article http://www.wallbuilders.com/LIBissuesArticles.asp?id=23909

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For additional resources, see my materials on my faculty web page at http://www.theolaw.org and
https://itlnet.org