

# Praying in the Name of Jesus: A Reflection on the controversy in the Indiana House of Representatives

By  
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Much has been said and written about the controversy surrounding prayer in the Indiana House of Representatives, *Hinrichs v. Bosma* (the ensuing lawsuit) and H.R. 4776 (a bill proposed by Congressman Sodrel in the U.S. House of Representatives to restrict the jurisdiction of the federal courts on free speech matters in State Legislatures). However, many times the facts have been overlooked or ignored in this monumentally important case. The issue is not merely about the 188 year tradition of prayer opening the daily business of the Indiana House of Representatives; it goes much deeper – to the fundamental principles of American government.

## **“Who started this?”**

This is a logical question and one that has an interesting answer. There are four plaintiffs who filed suit against the Speaker of the Indiana House of Representatives, Brian Bosma, in order to stop the “sectarian Christian” nature of prayers being given in the Indiana House. Anthony Hinrichs was a lobbyist for the Indiana Friends Committee on Legislation. As such he heard many prayers and objected to their “sectarian” content. However, Mr. Hinrichs is no longer a lobbyist and “has no plans to lobby in the Indiana General Assembly...in the future.” In other words, he will no longer have to endure these “sectarian” prayers with or without Judge Hamilton’s ruling.

The Reverend Henry Gerner has visited the General Assembly, “once several years ago.” However, he has never “seen the House prayers live or via the Internet.”

Francis White Quigley, Executive Director of the Indiana Civil Liberties Union (ICLU) “has never been in the House while the prayer was being delivered. He has, however, listened to a number of prayers through the Indiana General Assembly website.”

Lynette Herold “has never visited the General Assembly, but did view about three of the prayers via the Internet.”

Do these plaintiffs really sound like they have suffered an injustice? Most don’t even care enough to show up to the Statehouse in person. Mr. Hinrichs was only there in the flesh because of his employment, and that employment is no longer a problem.

## **“Why wasn’t the case just thrown out?”**

Given the impressive facts regarding the severe injustice the plaintiffs in this case suffered, this question begs to be asked. However, Judge Hamilton has an answer for us. All four plaintiffs are Indiana taxpayers. As such their case will be heard because the State of Indiana spent tax dollars on a practice they find offensive and believe is unconstitutional - certain ministers praying in the name of Jesus from the speaker’s podium in the Indiana House of Representatives.

So just how many tax dollars were spent on these ministers? Clerics were sent a confirmation letter (\$0.54) and a thank-you letter (\$0.54), a picture was sent to 11 of the 53 clerics (\$0.68 each, if the picture is sent with the thank-you note the cost of the mailing jumps to \$1.60) and the State paid \$1.88 per minute to stream video online (prayers are generally only “a few minutes in length”). The plaintiffs are taxpayers. An infinitesimal portion of their tax dollars went towards a practice they find unconstitutional under the establishment clause of the First Amendment. Therefore Judge Hamilton did not dismiss their case.

**“How could Judge Hamilton ban certain content of prayers, does that not infringe on the ministers rights to free speech?”**

Judge Hamilton makes a distinction in his decision between private speech and government speech. He has no power to regulate the prayer of a minister in the hallway of the Statehouse, for example, but because the ministers are technically praying from the speaker’s podium at Speaker Bosma’s discretion, their prayers are considered government speech. The Speaker did not dispute this point.

**“How can Judge Hamilton target Christian prayers?”**

The plaintiffs do not ask for prayer to be abolished altogether. Instead, they specifically ask for overtly Christian prayers to be barred. Judge Hamilton relies heavily on the U.S. Supreme Court case of *Marsh v. Chambers*. Particularly the following language:

The content of the prayer is not of concern to judges where, as here there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. ***That being so, it is not for us to embark on a sensitive evaluation or to parse the content of particular prayer.*** (emphasis added)

In the first sentence quoted above, Judge Hamilton extrapolates a theory that prayer before a state legislative body, used to advance any one faith or belief, is unconstitutional. However, the last sentence is most instructional, but ignored by Judge Hamilton. The Court’s opinion in *Marsh* specifically warns Judge Hamilton not to “embark on a sensitive evaluation or to parse the content of particular prayer,” but that is exactly what he does. Judge Hamilton not only parses the content, he bans specific content (prayer in the name of Jesus).

**“Was this really a governmental establishment of religion?”**

“Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech....”

*First Amendment to the U.S. Constitution*

The Plaintiffs in this case contended that the Speaker violated the Establishment Clause of the First Amendment to the United States Constitution. They believe he has done so by allowing clerics to give overtly Christian prayers, through invoking the name of Christ, from the speaker’s podium. However, what constitutes an establishment of religion?

These 1853-1854 U.S. House and Senate Judiciary Committee reports express a clear understanding:

HOUSE JUDICIARY COMMITTEE: What is an establishment of religion? It must have a creed defining what a man must believe; it must have rites and ordinances which believers must observe; it must have ministers of defined qualifications to teach the doctrines and administer the rites; it must have tests for the submissive and penalties for the nonconformist. There never was an established religion without all these. Had the people, during the Revolution, had a suspicion of any attempt to war against Christianity, that Revolution would have been strangled in its cradle. At the time of the adoption of the Constitution and the amendments, the universal sentiment was that Christianity should be encouraged, not any one sect [denomination]. Any attempt to level and discard all religion would have been viewed with universal indignation.... It [religion] must be considered as the foundation on which the whole structure rests....In this age there can be no substitute for Christianity; that, in its general principles, is the great conservative element on which we must rely for the purity and permanence of free in situations. That was the religion of the founders of the republic, and they expected it to remain the religion of their descendents.

SENATE JUDICIARY COMMITTEE: The clause speaks of “an establishment of religion.” What is meant by that expression? It referred, without doubt, to that establishment which existed in the mother-country...[which was an] endowment, at the public expense, in exclusion of or in preference to any other, by giving to its members exclusive political rights, and by compelling the attendance of those who rejected its communion upon its worship or religious observances. These three particulars constituted that union of church and state of which our ancestors were so justly jealous, and against which they so wisely and carefully provided....They [the Founders] intended, by this Amendment, to prohibit “an establishment of religion” such as the English Church presented, or any thing like it. But they had no fear or jealousy of religion itself nor did they wish to see us an irreligious people...they did not intend to spread over all the public authorities and the whole public action of the nation the dead and revolting spectacle of atheistical apathy.<sup>1</sup>

The difference between the historical understanding of the establishment of religion and the modern day understanding is profound. The historical understanding above speaks to an institutional separation of Church and State. Judge Hamilton and modern courts understand establishment of religion to be the complete separation of religious expression from the public arena. According to the definition above, merely praying in the name of Jesus, even if it is interpreted as government speech, does not come close to constituting an establishment of religion.

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<sup>1</sup> David Barton, *Original Intent: The Courts, the Constitution, & Religion*, 2<sup>nd</sup> Ed. (Aledo: WallBuilder Press, 1997), 30-31.

## “What about judicial precedent?”

The principle of stare decisis (let the decision stand) is important in matters of law. Judicial precedent should be given weight as new cases and controversies arise. In order to maintain stability within the law, judges must rely on prior case law when deciding cases before their court. However, those cases (prior to 1940) which would give us the most insight surrounding the formation of the First Amendment and its applicability to the States are not cited in Judge Hamilton’s decision.

On page 25 of Judge Hamilton’s decision he quotes the U.S. Supreme Court case of *Epperson v. Arkansas* (1968) in order to lay the foundation for his decision against Speaker Bosma.

The ‘touchstone’ of the Establishment Clause is the principle that the ‘First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.’

However, up until the 1940’s this concept of government neutrality regarding religions and between religion and nonreligion was foreign and even repugnant to the court system in general and the U.S. Supreme Court in particular.

Joseph Story was the Founder of Harvard Law School; was called the “foremost of American legal writers” and was nominated to the Supreme Court by President James Madison. Here is his explanation of the Establishment Clause:

We are not to attribute this [First Amendment] prohibition of a national religious establishment to an indifference to religion in general, and especially to Christianity (which none could hold in more reverence, than the framers of the Constitution)...Probably, at the time of the adoption of the Constitution, and of the Amendment to it now under consideration, the general, if not the universal, sentiment in America was that Christianity ought to receive encouragement from the State....An attempt to level all religions and to make it a matter of state policy to hold all in utter indifference would have created universal disapprobation [disapproval] if not universal indignation [anger].<sup>2</sup>

In 1892 the U.S. Supreme Court in *Church of the Holy Trinity v. United States* declared:

[N]o purpose of action against religion can be imputed to any legislation, State or national, because this is a religious people...[T]his is a Christian nation.<sup>3</sup>

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<sup>2</sup> Ibid., 29-30.

<sup>3</sup> Ibid., 50.

In 1844 the U.S. Supreme Court in *Vidal v. Girard's Executors* declared:

Christianity...is not to be maliciously and openly reviled and blasphemed against to the annoyance of believers or the injury of the public.<sup>4</sup>

The Court then goes on to call the United States of America, “a Christian country.” Furthermore, in discussing the education of orphans and college students by the City of Philadelphia the Court states:

And we cannot overlook the blessings which such [lay]men by their conduct, as well as their instructions, may, nay *must* impart to their youthful pupils. Why may not the Bible, and *especially* the New Testament, without note or comment, be read and taught as a *divine revelation* in the college – its general precepts expounded, its evidence explained and its glorious principles of morality inculcated?...Where can the purest principles of morality be learned so clearly or so perfectly as from the New Testament?”<sup>5</sup> (emphasis added)

Even as recently as 1931 the U.S. Supreme Court in *United States v. Macintosh* declared:

We are a Christian people...according to one another the equal right of religious freedom and acknowledging with reverence the duty of obedience to the will of God.<sup>6</sup>

The history indicates judicial precedent not only preferring religion over nonreligion, but Christianity in particular. With this history, and much more, on its side it is ironic that in *Hinrichs v. Bosma* the Christian religion would be targeted and silenced.

### **“Why does Judge Hamilton arrive at such a troublesome decision as to censure Christian prayers?”**

Judge Hamilton’s job in this case was to interpret the U.S. Constitution, specifically the First Amendment’s Establishment Clause in light of the complaint brought to his court. We have already taken a brief look at the judicial precedent gone unnoticed in his decision. In order to properly interpret something that he has not written, it logically follows that Judge Hamilton must understand what those who were involved in its writing actually meant.

However, instead of troubling himself to find what the Founders meant when they wrote the First Amendment, Judge Hamilton goes back no further than 1947 – to the notorious case of *Everson v. Board of Education*. This is the case that forever enshrined the concept of the “wall of separation between church and state” into the national dialogue. In *Everson* the Court declared, “The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach.”

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<sup>4</sup> Ibid., 57.

<sup>5</sup> Ibid., 58.

<sup>6</sup> Ibid., 73.

Judge Hamilton should not be criticized too harshly, however. After all, his powers as a United States District Court Judge are limited. He answers to the federal appellate level which, in turn, must answer to the U.S. Supreme Court. The U.S. Supreme Court has created an impossible framework from which the lower courts must work, regarding the interpretation of the Establishment Clause of the First Amendment.

Pretend that a true understanding of the Establishment Clause as envisioned by the Founding Fathers is represented in the form of a ring. The U.S. Supreme Court over the last 60+ years has taken the ring, thrown it into a large pond and continuously stirred the water. Judge Hamilton's job is to find this ring – quite an unenviable task.

Why are the waters so murky? There are two main reasons. First, (I will attempt to put an extremely complicated topic in a nutshell) the U.S. Supreme Court has interpreted the Fourteenth Amendment incorrectly, so that the Bill of Rights can be used as a sword against the States. Earlier, I quote the First Amendment. Notice the first word within the First Amendment, "Congress." The Founding Fathers constructed the First Amendment so that "Congress," and in fact the entire federal government, could not dictate its will on the States regarding religion (or any other area, unless expressly given that power within the U.S. Constitution). The First Amendment was meant to be a gift to the States, a shield, to protect the States from the federal government and ensure that this new federal government could never use its power to dictate a NATIONAL religion or to rob the States (and therefore the people) of their religious liberty. It was never meant to be used as a sword in the hands of an all-powerful federal government to micro-manage the affairs of the States, in whom the Tenth Amendment of the Constitution reserves all power not delegated to the federal government. The Court has turned the Founding Fathers intent for the Bill of Rights on its head.

Secondly, as the federal courts continue to unconstitutionally batter the States with the Bill of Rights (particularly the First Amendment in this case), they do so without relying on the historical context in which the Founding Fathers crafted the language or the judicial precedent by which their decisions should be guided. Hence, their decisions are often incoherent, illogical and contradictory.

### **The separation of church and state**

What about Thomas Jefferson's immortal words within the Everson case? The Court took eight words from Jefferson's personal letter to the Baptist Association of Danbury, Connecticut, "a wall of separation between church and state." However, the Court does not explain the context of these eight words. By these words Jefferson did not mean for the federal government to force the States to separate all religious activities from all government activities (as cases like *Hinrichs v. Bosma* and others push us towards). In fact, that flies in the face of the main point of his letter to the Danbury Baptists.

The Danbury Baptist (who were elated that the Anti-Federalist Jefferson had been elected President, as most Baptists at that time were Anti-Federalist) wrote Jefferson, concerned that the First Amendment would give the federal government the power to restrict their inalienable (God

given) right to religious expression. Jefferson's letter in response was meant to assure the Danbury Baptists that he agreed with them, that their right to religious expression was inalienable, and that the federal government would have no power to regulate the States in matters of religion, hence the "wall of separation between church [religion in the several States] and State [the federal government]."

Thomas Jefferson had no intention of allowing the federal government to limit, restrict, regulate, or interfere with public religious practices. He believed, along with the other Founders, that the First Amendment had been enacted to prevent the federal establishment of a national Christian denomination – a fact he made clear in a letter to fellow-signer of the Declaration of Independence Benjamin Rush:

[T]he clause of the Constitution which, while it secured the freedom of press, covered also the freedom of religion, had given to the clergy a very favorite hope of obtaining an establishment of a particular form of Christianity through the United States; and as every sect believes its own form the true one, every perhaps hoped for his own, but especially the Episcopalians and Congregationalists. The returning good sense of our country threatens abortion to their hopes and they believe that any portion of power confided to me will be exerted in opposition to their schemes. And they believe rightly."<sup>7</sup>

A true Anti-Federalist, Jefferson wanted to keep the power of the federal government limited, especially with respect to a matter as important as religion. With the Everson case, Jefferson's fears were realized (well over 100 years later) as the Court took his words, twisted them, and used them for the exact purpose Jefferson opposed. The Court in Everson takes the shield of the First Amendment, meant to protect the States from the federal government, and beats it into a sword, with which it attacks the States on matters of religion. Likewise, Judge Hamilton takes up this makeshift sword of the First Amendment and continues to slash away at these principles of federalism today.

The Founding Fathers did not intend for the First Amendment to be used in such a way. For example James Madison originally proposed this version of the First Amendment so that it would be clear that it was only meant to restrain the federal government:

The civil rights of none shall be abridged on account of religious belief or worship, nor shall any ***national*** religion be established.<sup>8</sup> (emphasis added)

Additionally, the *The Annals of Congress* from June 7, 1789, to September 25, 1789, contain the complete official records of those who drafted and approved the First Amendment. Notice some of their discussions on its intent:

AUGUST 15, 1789. Mr. [Peter] Sylvester [of New York] had some doubts...He feared it [the First Amendment] might be thought to have a tendency to abolish religion altogether...Mr. [Elbridge] Gerry [of Massachusetts] said it would read better

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<sup>7</sup> Ibid., 45.

<sup>8</sup> Ibid., 23.

if it was that “no religious doctrine shall be established by law.”...Mr. [James] Madison [of Virginia] said he apprehended the meaning of the words to be, that “Congress should not establish a religion, and enforce the legal observation of it by law.”...[T]he State[s]...seemed to entertain an opinion that under the clause of the Constitution...it enabled them [Congress] to make laws of such a nature as might...establish a national religion; to prevent these effects he presumed the amendment was intended...Mr. Madison thought if the word “national” was inserted before religion, it would satisfy the minds of honorable gentlemen...He thought if the word “national” was introduced, it would point the amendment directly to the object it was intended to prevent.<sup>9</sup>

We’ve just begun to scratch the surface of the historical context surrounding the First Amendment, but I believe the point has been made that the views of the Founding Fathers regarding the First Amendment and the views of the federal courts (in the modern era) contradict. Most of the cases Judge Hamilton cites in *Hinrichs v. Bosma* disregard the historical context and true meaning of the First Amendment.

### “What is the proper response?”

Through *Hinrichs v. Bosma* we see the most recent example in a long line of constitutional abuse. Our very Constitution is being abused and twisted to mean something entirely foreign from the intent of the Founding Fathers, and the will of most Americans, by the federal judiciary. Something must be done. Fortunately, there is more than one branch of government.

In “The Federalist Papers,” No. 78, Alexander Hamilton explains the relationship among the three branches of government:

...[T]he judiciary, from the nature of its functions, will always be the *least dangerous* to the political rights of the Constitution; because it will be *least* in a capacity to annoy or injure them. The executive not only dispenses the honors but holds the sword of the community. The legislature not only commands the purse but prescribes the rules by which the duties and rights of every citizen are to be regulated. *The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society, and can take no active resolution whatever.* (emphasis added)

Thomas Jefferson foresaw the danger of an activist federal judiciary:

It has long, however, been my opinion, and I have never shrunk from its expression...that the germ of dissolution of our federal government is in the constitution of the federal Judiciary;...working like gravity by night and by day, gaining a little today and a little tomorrow, and advancing its noiseless step like a thief, over the field of jurisdiction, until all shall be usurped.

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<sup>9</sup> Ibid., 23-24.

The Constitution...is a mere thing of wax in the hands of the judiciary which they may twist and shape into any form they please.<sup>10</sup>

They are both correct. Jefferson accurately predicted the judicial mess we are in today. However, all is not lost. Hamilton points out the beauty of our Constitution – an understanding of the nature of man.

James Madison says it best in Federalist No.51:

But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary.

Because the Founders realized that men are not angels they separated the power of the federal government into three branches, with the legislative branch receiving the greatest share of power because it is closest to the people. Though Jefferson foresaw the problem, Hamilton trumped him by foreseeing the solution – Congress.

The Constitution gives Congress the power to remove the jurisdiction of the federal courts, or even destroy the lower courts (all the federal courts below the U.S. Supreme Court) entirely. Congress can impeach judges and restrict the funding of the courts, among other powers. Congress is given this power for a reason. Men are not angels. Judges will and have vastly increased the reach of their courts in ways that are totally against the intent of the Founders and contrary to the common good. Congress must act in order to begin to restore the genius that is the Constitution.

H.R. 4776 represents a policy that will begin to do just that. U.S. Representative Mike Sodrel, from Indiana's 9<sup>th</sup> Congressional district, has introduced this legislation in order to begin the process of restoring the constitutional balance of power among the three branches of the federal government.

H.R. 4776 would:

- o remove the review of content of speech in state legislatures from the jurisdiction of federal courts; (had this been in place prior to *Hinrichs v. Bosma*, Judge Hamilton could not have heard the case)
- o provide immunity for the content of speech during a legislative session by a legislator or lawfully invited guests; (allows prayer tradition to continue in Indiana House)
- o prohibit the use of federal funds to enforce this or similar decisions; and prohibit the use of fines against the state as a body in order to enforce such a decision. (makes it impossible for Judge Hamilton to enforce his decision)

Policies like 4776 and others should be energetically supported. They represent the best tool the Founders gave us to thwart judicial activism and control the abuse of power we have seen from the federal judiciary over the last half century.

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<sup>10</sup> Ibid., 189.