Written by **Jack Kenny** on October 20, 2010

O'Donnell's 'Gaffe' on the First Amendment

"There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated," said Supreme Court Justice William O. Douglas in the 1952 Zorach v. Clauson decision. Ten years later, Justice Potter Stewart said in his dissent to Engel v. Vitale: "Moreover, I think that the Court's task, in this as in all areas of constitutional adjudication, is not responsibly aided by the uncritical invocation of metaphors like the 'wall of separation,' a phrase nowhere to be found in the Constitution."

Both justices cited above have long since been summoned to a higher, more supreme court, so neither could be in Delaware on October 19 to hear the gales of laughter from the faculty, law students and others at Widener University Law School in Wilmington when Christine O'Donnell, Republican candidate for U.S. Senate, inquired: "Where in the Constitution is the separation of church and state?" Judging by some of the comments made by those present, as well as the reaction in the news media and blogosphere, you might have thought candidate O'Donnell had just enrolled in the Flat Earth Society. After all, "everybody knows" "the separation of church and state" is in the First Amendment. Except it isn't.

The phrase, so familiar to us from countless repetitions, appears nowhere in the Constitution. The Supreme Court, however, has been working on that metaphorical "wall of separation" — sometimes raising it, sometimes lowering it, occasionally permitting a passageway through it — for decades.

Admittedly, the fact those exact words do not appear is not conclusive. To argue that is akin to making the argument to Christians that belief in the Trinity is unbiblical because the word Trinity is no more to be found in the New Testament than in the Old — though there are at least a couple of references to "the Father, the Son and the Holy Ghost," and numerous references to each of them separately. The issue here is the meaning of "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof" and how that applies to a particular case or controversy.

The issue that arose in the Delaware debates has to do with whether local school boards may prescribe the teaching of either creationism or Intelligent Design along with the teaching of evolution, as O'Donnell contends, or whether that would, as Democratic candidate Chris Coons argues, be an inherently unconstitutional imposition of "religious doctrine" in the public schools. Perhaps the first question that should be asked, but seldom is, is whether such courses necessarily involve the teaching of religious doctrine. Most opponents assert, as though self-evident truth, that they do.

There should at least be some room for doubt, since not all texts or lesson plans for the teaching of such subjects would necessarily follow the same pattern. The theory of evolution, as it is generally taught and understood, holds that fossil and other evidence demonstrates conclusively that the many forms of life on Earth came about through random mutation and natural selection, with no intelligent design or purpose involved. There are, by some accounts, hundreds of reputable scientists who believe the

evidence points instead to an intelligent design. Whether right or wrong, their findings neither confirm nor deny anything in particular about a Creator. They are not based on anything that any religion does or does not say about who God is or what he requires or what he did or did not say to Abraham or Moses or anyone else. Yet opponents seem to believe that teaching opposing theories about the origin of life would be tantamount to teaching the book of Genesis or other parts of the Bible.

It is, at any rate, a secular dogma of fairly recent origin that a belief in creation is a "religious doctrine." Thomas Jefferson belonged to no church, had no known ties with any organized religion and was author of the Virginia Declaration of Religious Liberty. It seems doubtful he believed he was preaching religious doctrine in the Declaration of Independence when he declared as "self-evident" truth that men are "endowed by their Creator with certain unalienable rights." Ironically, the "wall of separation" metaphor was taken from a letter Jefferson wrote early in his Presidency to the Danbury Baptist Association in Connecticut. The Baptist ministers had written Jefferson to congratulate him on his election and to speak of restrictions on their freedom to worship in Connecticut, where the Congregational Church enjoyed the status of an established religion.

Affirming his own belief that "religion is a matter which lies solely between Man & his God," Jefferson wrote: "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 & State."

Given some of the judicial hair splitting that has been performed in First Amendment cases, one might be tempted to ask if even Jefferson’s invocation of "sovereign reverence" with respect to the Constitution might be considered an unconstitutional imposition of religion into the official correspondence of the President of the United States. But the relevant point here is that the "wall of separation" should be understood in the context of an established church that existed in Connecticut, as in other states in the early days of the Republic. The establishment clause of the First Amendment meant that Congress may not create a national establishment of religion and must also "make no law respecting an establishment of religion" in the states.

A number of Supreme Court decisions in the 20th century established the legal doctrine (known as the Incorporation Doctrine) that the ratification of the Fourteenth Amendment in 1868 made parts of the Bill of Rights, including the prohibitions of the First Amendment, binding on the states as well as the national government. Still, Jefferson and other patriots of his day might be amazed to know that the establishment clause has been so far stretched by judicial decrees that "Congress shall make no law" has come to mean the federal judiciary shall decide, for any and every village and hamlet in America, whether a ceremonial prayer at a high school graduation or football game, or even a moment of silence in a classroom, is constitutionally permitted.

In the *Zorach* case cited at the beginning of this article, Justice Douglas also said: "We are a religious people and our institutions presuppose a Supreme Being." Perhaps that’s the same Supreme Court that banished (with Justice Douglas’ concurrence) non-sectarian prayer from the public schools that still opens every day in court with a prayer:

"God save the United States and this honorable court."

Read also: Did O’Donnell Read the Constitution Right?

Photo of Christine O’Donnell: AP Images