INTRODUCTION

A BRIEF BIOGRAPHY OF THE RELIGION CLAUSES

The Bill of Rights was composed by the First Congress in 1789 to fulfill the demands of several of the states that ratified the Constitution only after being assured that there would be added to it amendments to protect citizens and states from the powers of the new federal government. The First Amendment was a cluster of several of the most desired protections. (It was *first* because two other proposed amendments that preceded it in the order submitted to the states failed of ratification.) Without the assurance of the addition of those protections, the Constitution itself might not have been ratified. The First Amendment begins with sixteen words that are the basis of the law of church and state: "*Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof*...."

Volumes have been written—by courts and commentators—about what the Framers meant by those few words. The courts usually refer to the two facets or aspects of this statement as the Establishment Clause and the Free Exercise Clause, and together they comprise the Religion Clause(s) that purports to define how the two venerable institutional orders of government and religion should relate to each other in the new nation that was coming into being when they were written.

Whatever else they intended, the Framers were legislating a fundamental law for the governance of a specific subject-matter area—*religion*—with the obvious intention that it should be treated in certain unique and special ways that were unlike any other subject matter of their lawmaking efforts, viz., that "religion" was to be both protected from (federal) governmental interference and insulated from (federal) governmental proprietorship. An important nuance was added by Samuel Livermore's motion that the amendment read "Congress shall make no laws *touching* religion" (later modified—and moderated—to "respecting"), which had the effect of protecting from federal interference the established churches in those states that had them. (That protection became superfluous by 1833, when Massachusetts was the last state to disestablish its established church.)[1]

1. Some states retained some remnants of establishment—such as religious tests—still longer.

1. The First Century

Upon ratification by the requisite number of states (in 1791), the First Amendment became binding on *Congress*, but not upon the several states. That was apparent (with respect to the Religion Clauses) in an early case, *Permoli v. New Orleans* (1845),[2] in which a Roman Catholic priest sought relief under the First Amendment in the Supreme Court from a heavy fine incurred when he violated an ordinance of the First Municipality of New Orleans limiting funerals to a certain mortuary chapel in the cathedral that was controlled—according to Father Permoli's counsel—by "notorious schismatics." The Supreme Court denied relief on the ground that the First Amendment applied only to congressional action, and the states could do as they pleased with respect to religion.

During the nineteenth century, little more than a dozen cases were decided by the Supreme Court pertaining to religion, and many of them were not decided under the Religion Clauses (for the reason just mentioned). One of the most interesting was *Cummings v. Missouri* (1866),[3] in which another Roman Catholic priest was fined for practicing his religious vocation without having taken the requisite expurgatory oath in the Missouri constitution designed to limit the practice of all professions (including the clergy) to those who swore they had done nothing in support of the recent Rebellion. Father Cummings was vindicated in the Supreme Court in arguing that the oath requirement was both an *ex post facto* law (a retroactive criminal penalty) and a bill of attainder (legislative punishment without judicial trial).[4]

The Free Exercise Clause got its first definitive application when a defense of religious duty was raised in the Territory of Utah to a conviction for bigamy by a member of the Church of Jesus Christ of Latter-day Saints ("Mormon"). The Supreme Court reviewed the important role played in constitutional history by the Virginia Act for Establishing Religious Freedom (1786), drafted by Thomas Jefferson and carried to enactment by James Madison, in forming the seminal understanding of religious liberty that underlies the Free Exercise Clause. The court quoted from the preamble of that act, "[I]t is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order," and added, "In these two sentences is found the true distinction between what properly belongs to the Church and what to the State" (*Reynolds v. U.S.*, 1878).[5] Since polygamy was not just a belief but an *action*, the civil court could apply to it the sanctions of the civil law, and the criminal conviction of Reynolds was upheld.

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2. See discussion at § D1a below, AUTONOMY: CHURCH EMPLOYEES.

3. See discussion at § D1b below, AUTONOMY: CHURCH EMPLOYEES.

4. Prohibited not only to Congress but to the States by the Constitution, Art. I, Sec. 9: "No Bill of Attainder or ex post facto Law shall be passed."

5. See discussion at IVA2a, CONSCIENCE: POLYGAMY.

Thus began the "belief-action" dichotomy that still haunts the civil treatment of claims of free exercise, offering a hollow promise of immunity to belief—since there is not much that government can do to regulate *belief*—in return for limiting civil sanction to *action*, which is where protection of religious practice is most needed. (A curious *tertium quid* is *speech*, which presumably falls somewhere between belief and action; the dichotomy does not suggest whether speech is subject to civil sanction—a matter that will recur below.) Nevertheless, despite that dichotomy, the Supreme Court (per Justice Stephen J. Field) upheld a subsequent effort not only to punish belief but to punish belief-by-association! A Mormon named Davis was convicted of violating the requirement that all persons registering to vote in the Territory of Idaho must take an oath that they were not bigamists or members of any order or organization that taught or encouraged its members to engage in the crime of bigamy. Davis was not shown to have committed bigamy (action) or to have advocated bigamy (speech) or even to believe in bigamy as a religious duty (belief), but merely to have belonged to the Mormon church, which promulgated such belief, and the Supreme Court affirmed his punishment of $500 or 250 days in jail (*Davis v. Beason*, 1890).[6]

The Establishment Clause got its first workout in a case arising in the District of Columbia, where a grant (by the District Commissioners from funds provided by Congress) to a Roman Catholic hospital was challenged under the Establishment Clause. The Supreme Court, after searching the four corners of the hospital's charter, found no violation of the Clause (*Bradfield v. Roberts*, 1899).[7] This rather wooden and formalistic decision signally failed to do justice to the issues, as will be discussed at the place just cited.

Another important line of cases was initiated in 1872 that dealt with internecine disputes over church property. The Supreme Court enunciated an important principle that stood unchanged for over a century: that civil courts would not upset the decisions reached by the tribunals set up within hierarchical churches for resolving such matters (*Watson v. Jones*, 1872).[8] This line of "church autonomy" decisions, though rooted in the Free Exercise Clause (*Kedroff v. St. Nicholas Cathedral*, 1952),[9] has tended to follow a course of its own, independent of the tests of establishment or free exercise, to be surveyed below.

2. The Second Century

The first four decades of the twentieth century saw another dozen or so cases pertaining to religious issues, several having to do with conscientious objection to

6. See discussion at IVA2b, CONSCIENCE: POLYGAMY, where numerous other anti-Mormon cases are cited.

7. See discussion at IID2b, OUTREACH: SERVING HUMAN NEED: HEALTH CARE.

8. See discussion at § A3 below, AUTONOMY: CHURCH PROPERTY.

9. See discussion at § A5 below, AUTONOMY: CHURCH PROPERTY.

bearing arms (*Arver v. U.S.*, 1918; *U.S. v. Schwimmer*, 1929; *U.S. v. Macintosh* and *U.S. v. Bland*, 1931; *Hamilton v. Board of Regents*, 1934).[10] One of the most significant decisions in that period overturned a statute of the state of Oregon requiring all children to attend public schools only; the Supreme Court announced:

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[11]

Toward the end of the Great Depression the Supreme Court began to consider a rash of free-exercise claims brought by an aggressive and much-despised movement called Jehovah's Witnesses, challenging the use of various laws to block their efforts at door-to-door evangelism. In some instances relief was afforded them under the Free Speech and Free Press Clauses (*Lovell v. Griffin*, 1938; *Schneider v. Irvington*, 1939; *Martin v. Struthers*, 1943).[12] Not until 1940 did the Court rely upon the Free Exercise Clause to protect religious evangelism.

As noted above, the protections of the First Amendment were limitations on federal rather than state powers, but with the ratification of the Fourteenth Amendment in 1868, certain rights of federal citizenship were protected against state infringement. Various attempts were made to include the entire panoply of protections of the Bill of Rights under the aegis of the Fourteenth Amendment, but the Supreme Court never quite reached that step. Instead, the several specific rights were incorporated individually from time to time within the concept of "liberty" of which citizens could not be deprived by a state without "due process of law." It was in a 1940 case involving prosecution of evangelists of Jehovah's Witnesses for disturbing the peace that the Free Exercise Clause of the First Amendment was "incorporated" in the Due Process Clause of the Fourteenth and made effective against action of the states (*Cantwell v. Connecticut*, 1940).[13] The court spelled out protections borrowed from its free-speech cases: the civil authorities may not suppress religious evangelism except in the case of "clear and present danger" of civil violence, etc.; they may not impose "prior restraint" on religious expression, etc. Only later did the court develop a vocabulary more fitted to the Free Exercise Clause.

Seven years later the court "dropped the other shoe" and incorporated the Establishment Clause in the Due Process Clause of the Fourteenth Amendment,

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10. See discussion at IVA5a-d, CONSCIENCE: MILITARY SERVICE.

11. *Pierce v. Society of Sisters (1925)*. See discussion at IIIB1b, INCULCATION: STATE REGULATION OF RELIGIOUS SCHOOLS.

12. See discussion at IIA2b(3), OUTREACH: EVANGELISM.

13. See discussion at IIA2c, OUTREACH: EVANGELISM.

making it also applicable to the states (*Everson v. Board of Education*, 1947).[14] These two acts of "incorporation" had a dramatic effect upon the utility of the Religion Clauses. Prior to that time, as noted above, the Supreme Court had taken scarcely more than two dozen occasions to apply those clauses (or otherwise to adjudicate religious questions) in a century and a half, mainly because most matters pertaining to religion were subject to state rather than federal jurisdiction. In the half-century since *Cantwell* and *Everson*, the Supreme Court has handled more than *four times as many* religion cases![15]

3. The Tests of Establishment

In order not to make the remainder of this survey four times as long as what has gone before, it will focus on the *tests* the Supreme Court has used to interpret and apply the two clauses rather than on individual cases. The first test of the Establishment Clause (not counting the belief-action dichotomy of *Reynolds*, which was not a test but the absence of a test) was enunciated in *Everson* (1947) as follows:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*.[16]

This has been called the "no aid" test, for obvious reasons. The underscored words are the most controversial element in this formulation. Justice Hugo L. Black, who announced the decision, referred extensively to the part Jefferson and Madison had played in the disestablishment struggle in Virginia, the same history that the *Reynolds* court had relied on 70 years earlier.

This formulation was repeated verbatim several times in succeeding years, once by a unanimous court.[17] Then it seemed to fall into desuetude and be succeeded by one

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14. See discussion at IIID2, INCULCATION: STATE AID TO PAROCHIAL SCHOOLS.

15. The count used in this work is 33 in 153 years, as against 145 in 55 years; the tally is imprecise, since some decisions did not reach the merits, some were consolidated, some did not explicitly invoke the religion clauses, some were later reversed, etc.

16. *Supra,* emphasis added.

17. *McCollum v. Bd. of Education* (1948); *McGowan v. Maryland* (1961); *Torcaso v. Watkins* (without dissent) (1961).

or more other tests, as will be seen. But then, in 1989, in the midst of the struggle over the Pittsburgh Nativity Shrine, it appeared again in the opinion by the 5-4 majority announced by Justice Harry Blackmun (*Allegheny County v. ACLU*, 1989).[18]

Despite the rigor of this formulation, it did not result in disallowing the program of aid challenged by the plaintiffs, which was bus transportation provided at public expense to children attending parochial schools in Ewing Township, New Jersey. Justice Black announced that the aid was provided for all children and thus did not constitute impermissible aid to religious schools—a rationale that was rejected by the four dissenting justices, who thought the "no aid" standard should have ruled out a public program that relieved religious schools and/or their patrons of the expense of transportation. So they had no fault to find with the test, only with its application. Nevertheless, the "child benefit" theory has been a mitigating factor in school-aid cases ever since, justifying the loan of secular textbooks to all school children and other limited forms of assistance ostensibly benefitting children more than the religious schools they may attend. Its first appearance was in *Cochran v. Louisiana* (1930);[19] a later textbook case was *Board of Education v. Allen* (1968).[20]

4. Accommodation?

A striking departure from the foregoing test was an effusion by Justice Douglas in the second released-time case. The court had struck down an Illinois program in which children were released from regular classwork in public schools to attend various classes for religious instruction in the same schools (*McCollum v. Board of Education*, 1948).[21] A few years later, a very similar program from New York was upheld, the only difference being that the classes for religious instruction were held off the premises of the public schools. Justice Douglas, one of the court's strictest separationists, was heard to say (writing for the court):

> We are a religious people whose institutions presuppose a Supreme Being.... When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs (*Zorach v. Clauson*, 1952).[22]

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18. See discussion at VE2i, SHELTERS: STATE PROPRIETARIES: CRECHES.

19. See discussion at IIID1b, INCULCATION: STATE AID TO PAROCHIAL SCHOOLS.

20. See discussion at IIID3, INCULCATION: STATE AID TO PAROCHIAL SCHOOLS.

21. See discussion at IIIC1a, INCULCATION: RELIGIOUS INSTRUCTION IN PUBLIC SCHOOLS: RELEASED TIME.

22. See discussion at IIIC1b, INCULCATION: RELIGIOUS INSTRUCTION IN PUBLIC SCHOOLS: RELEASED TIME.

This has sometimes been characterized as an "accommodation" test, though it was not exactly a "test" and had no successors until many years later, in *Bowen v. Kendrick* (1988),[23] which was greeted by critics of the stricter tests as a reassertion of the *accommodation* mode that had been silent since *Zorach*.

5. The *Lemon* Test of Establishment

After *Zorach*, the next application of the Establishment Clause occurred in a set of cases challenging the constitutionality of Sunday-closing laws as an establishment of Sabbatarian Christian practice embodied in state "blue laws" dating from the nineteenth century or earlier. They had the effect of disadvantaging businesses owned and operated by Jews and other observers of a Saturday Sabbath, who thus were required by their faith to be closed on the seventh day of the week and by the law to be closed on the first. The Supreme Court held that the Establishment Clause was not violated because—although the Sunday-closing laws may have been enacted for religious reasons—they now served a secular purpose of providing a common day of rest from labor rather than the illicit purpose of advancing the practice of the Christian religion (*McGowan v. Maryland*, 1961).[24]

Next came two public school prayer cases (*Engel v. Vitale*, 1962, and *Abington Township v. Schempp*, 1963),[25] holding that "the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by government."[26] In *Abington* the court spelled out its standards for this view: "[T]o withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[27] The fact that the exercises in question—oral collective prayer and devotional reading of the Bible in public schools—were unquestionably religious meant that both prongs of this test were offended.

Using this test, the court struck down an Arkansas statute prohibiting the teaching of the theory of evolution in public schools (*Epperson v. Arkansas*, 1968)[28] and upheld a state-financed program for the loan of secular textbooks to children attending parochial schools (*Board of Education v. Allen*, *supra*). Then, in 1970 it added a third consideration to its understanding of "establishment." Confronting a challenge to the constitutionality of tax exemption of churches, the court held that New York had not violated the Establishment Clause by exempting (in its

23. See discussion at IID2d, OUTREACH: SERVING HUMAN NEED: HEALTH CARE.
24. See discussion at IVA7a, CONSCIENCE: SABBATH OBSERVANCE.
25. See discussion at IIIC2b, INCULCATION: RELIGIOUS INSTRUCTION IN PUBLIC SCHOOLS.
26. *Engel v. Vitale*, 370 U.S. 421, 425 (1962).
27. *Abington v. Schempp*, 374 U.S. 203, 222 (1963).
28. See discussion at IIIC3b(2), INCULCATION: RELIGIOUS INSTRUCTION IN PUBLIC SCHOOLS.

constitution) from real estate taxes the property of churches—along with the property of educational and charitable entities—because (in the instance of churches) exempting them would result in less "entanglement" of government with religion than taxing them (*Walz v. Tax Commission*, 1970).[29]

This element of "entanglement" was added to the two prongs of *Schempp* in the next establishment case, *Lemon v. Kurtzman* (1971),[30] which involved the constitutionality of tax aid to parochial schools. In that case the court expressed the full-blown three-prong test of establishment as follows:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion." *Walz*.[31]

That was the "Lemon" test of establishment that prevailed for the ensuing two decades despite criticism from several members of the court, including its author, Chief Justice Warren Burger. Under it several programs of tax aid to parochial schools were struck down (and a few upheld) because of a scissors-like operation of the second and third prongs. In order to ensure that public funding was used for exclusively secular purposes and did not advance or inhibit religion, the use of such funds must be carefully monitored by government, which very monitoring would result in "excessive entanglement" of government with religion! This has been called a "Catch-22" by the next Chief Justice, William Rehnquist, to which Justice Blackmun has responded that in his view the entanglement analysis was not a "Catch-22" but amounted to a conclusion that "to implement the required monitoring, we would have to kill the patient to cure what ailed him."[32]

The "excessive entanglement" prong has a curious corollary. In *Lemon*, Chief Justice Burger added to the entanglement analysis a warning that programs of tax aid to church-related schools could lead to polarization of the electorate: "[P]olitical division along religious lines was one of the principal evils against which the First Amendment was intended to protect."[33] This supposition has been much criticized,[34] and the "political divisiveness" theme has since served more as a "kicker" to reinforce conclusions already reached on the basis of one or more of the three principal prongs. As Justice Sandra Day O'Connor observed more recently, the "political divisiveness" element has never been utilized on its own to hold a state action unconstitutional, but has served at most as an adjunct to other findings.[35]

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29. See discussion at VC6b(3), SHELTERS: TAX EXEMPTION.
30. See discussion at IIID5, INCULCATION: STATE AID TO PAROCHIAL SCHOOLS.
31. *Lemon v. Kurtzman*, 403 U.S. 602. 613-4 (1971).
32. *Bowen v. Kendrick*, 487 U.S. 589 (1988), Blackmun, J., dissenting.
33. *Lemon*, *supra*, at 622.
34. See discussion at IIE4j, OUTREACH: INFLUENCING PUBLIC POLICY.
35. *Lynch v. Donnelly*, 465 U.S. 668, 689 (1984) (O'Connor concurring).

There were only a few establishment cases in the ensuing decades that did not utilize the *Lemon* test: (1) *Larson v. Valente* (1981),[36] holding that a Minnesota statute requiring registration and reporting to the state by religious organizations soliciting more than 50 percent of their funds from nonmembers violated the Establishment Clause because it preferred certain religions over others; (2) *Marsh v. Chambers* (1983),[37] holding that Nebraska had not violated that clause in employing a legislative chaplain because the First Congress had likewise employed such a chaplain shortly after approving the First Amendment, so therefore such chaplains were thought by the court not to be inconsistent with the Establishment principle; and (3) *Lee v. Weisman* (1992),[38] holding that a school-sponsored prayer at public school graduation violated the Establishment Clause because of its coercive effect on students, thus not reaching the questions addressed by the *Lemon* test.

6. Arguments Over the *Lemon* Test

In 1984 Justice O'Connor offered a "clarification" of the *Lemon* test; in her view the essence of the Establishment Clause was that it "prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community." Thus, the clause is violated by "government endorsement or disapproval of religion":

> Endorsement sends a message to nonadherents 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. Disapproval sends the opposite message.[39]

This "endorsement" standard has been embraced by three subsequent majority opinions written by other members of the court, though not necessarily as a substitute for the *Lemon* test.[40]

The *Lemon* test has been vehemently criticized by Justice William Rehnquist in dissent in *Wallace v. Jaffree* (1985), *supra*, and by Justice Byron White in the same case. Justice Antonin Scalia, who came on the court in 1986, criticized the *Lemon* test in dissent in *Edwards v. Aguillard* (1987),[41] and Justice Anthony Kennedy, who came on the court in 1988, criticized it in dissent in *Allegheny County v. ACLU*

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36. See discussion at IIC5c, OUTREACH: SOLICITATION.

37. See discussion at VD3, SHELTERS; STATE PROPRIETARIES: CHAPLAINCIES.

38. See discussion at IIIC2d(11), INCULCATION: RELIGIOUS INSTRUCTION IN PUBLIC SCHOOLS.

39. *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984), discussed at VE2d, SHELTERS: STATE PROPRIETARIES: CRECHES.

40. See *Wallace v. Jaffree*, 472 U.S. 38 (1985), Stevens, J., discussed at IIIC2d(7); *Grand Rapids School Dist. v. Ball*, 473 U.S. 373 (1985), Brennan, J., discussed at IIID7l; *Allegheny v. ACLU*, 492 U.S. 573 (1989), Blackmun, J., discussed at VE2i.

41. 482 U.S. 578 (1987), discussed at IIIC3b(6), INCULCATION: RELIGIOUS INSTRUCTION IN PUBLIC SCHOOLS.

(1989), *supra*, urging that "coercion" should be a necessary element in any Establishment violation. It was expected that, with the departure of Justices William Brennan and Thurgood Marshall from the court, the critics would be able to replace the *Lemon* test with something more to their liking, but the problem was what the replacement would be. Justice Kennedy had termed Justice O'Connor's "endorsement" test "most unwelcome," and she had responded that his "coercion" test would make the Free Exercise Clause a nullity because it would then be coterminous with Establishment.[42] But when the Establishment Clause challenge of 1992 came on, *Lee v. Weisman*, Justice Kennedy wrote the opinion for a bare majority, holding that the graduation prayer was improper even under his "coercion" test, and Justice O'Connor joined that opinion.

Justice David Souter, who came on the court in 1990, wrote a concurring opinion in *Weisman* in which he effectively rebutted the claim advanced by Justice Rehnquist in his *Jaffree* dissent, that the original intent of the Establishment Clause was only to prohibit the setting up of a national church or preferring one religion over another. This oft-heard plaint, which relies heavily on a book appearing in 1982,[43] is refuted by a simple recounting of the wordings successively considered by the First House and Senate, which said exactly what the nonpreferentialists claim was intended, but *they were all rejected* in favor of a broader prohibition in what is now the First Amendment. So Justice Souter, quoting a law review article by Douglas Laycock, concluded that

> confining the Establishment Clause to a prohibition on preferential aid "requires a premise that the Framers were extraordinarily bad drafters—that they believed one thing but adopted language that said something substantially different, and that they did so after repeatedly attending to the choice of language."[44]

Thus Justice Souter showed himself—in his first essay on "establishment"—to be more of a "separationist" than anyone had expected (since he had never written on the subject before, said little about it in his confirmation hearing, and was appointed by a president hostile to strict separation). He and Justices O'Connor and Kennedy at that time formed a central bloc on the court that seemed resistant to reversing precedents (in other fields as well as this one) without heavy justification. And Justice John Paul Stevens has expressed a preference for a much stronger test of establishment than *Lemon*, urging a return to the "no-aid" test of *Everson*.[45] So what

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42. Both writing in dissenting and concurring opinions, respectively, in *Allegheny*, *supra.*

43. Cord, R.L., *Separation of Church and State: Historical Fact and Current Fiction* (Grand Rapids, Mich.: Baker Book House, 1982).

44. *Lee v. Weisman*, *supra*, Souter, J., concurring, quoting Laycock, D., "`Nonpreferential' Aid to Religion: A False Claim About Original Intent," 27 *Wm. & Mary L. Rev.* 875 (1986).

45. See, e.g., *Wolman v. Walter*, 433 U.S. 229, 265 (1977), Stevens, J., concurring in part and dissenting in part.

the future may hold in the way of a test of establishment to replace *Lemon* is anyone's guess.

7. Church Autonomy

As mentioned earlier, the Supreme Court early adopted a principle of allowing churches—at least hierarchical ones—to resolve their internal disputes without interference from civil courts. The key case in this instance was *Watson v. Jones* (1872), in which two factions within the Presbyterian denomination were disputing ownership of church property in Louisville, Kentucky. The Supreme Court expressed the principle as follows (per Justice Samuel F. Miller):

> The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. The right to organize voluntary religious associations to assist in the expression and dissemination of any religious doctrine, and to create tribunals for the decision of controverted questions of faith within the association, and for the ecclesiastical government of all the individual members, congregations and officers within the general association, is unquestioned. *All who unite themselves to such a body do so with an implied consent to this government, and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organism itself provides for.*[46]

That principle of deference to ecclesiastical judgments in ecclesiastical affairs prevailed for over a century until it was displaced in part by another principle that courts could use, if they chose, instead of the *Watson* principle. This new approach permitted courts to rely on what were engagingly termed "neutral principles of law," but which often turned out to be "neutral" in favor of dissidents challenging the rule of general authorities of their church. The new approach was foreshadowed in several cases[47] before it was formally adopted in 1979 as an alternative designed to spare civil courts from becoming involved in abstruse issues of "doctrines and tenets" of a church.[48] In *Hull Church* and *Wolf* it resulted in the civil courts' dissolving the connectional bonds of the Presbyterian denomination, contrary to its own long-

46. *Watson v. Jones*, 13 Wall. 679, 728-9 (1872), emphasis added, discussed at § B1 below, AUTONOMY: CHURCH PROPERTY.

47. *Presbyterian Church v. Hull Church*, 393 U.S. 440 (1969); *Maryland and Virginia Eldership v. Sharpsburg Church*, 396 U.S. 367 (1970), Brennan, J., concurring; and *Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976).

48. *Jones v. Wolf*, 443 U.S. 595 (1979).

standing self-definition. The unfolding of this evolution and its merits and demerits are related in a later section of this volume.[49]

8. The Free Exercise Clause

The saga of Free Exercise continued after *Cantwell v. Connecticut* (1940), *supra*, with a series of cases involving Jehovah's Witnesses that broadened the reach of that clause for everyone. In the same year that *Cantwell* was decided, the Supreme Court held in *Minersville v. Gobitis* (1940)[50] that the plea of free exercise of religion did not excuse the children of Jehovah's Witnesses from the requirement to salute the American flag in public schools. That decision was overruled three years later in *West Virginia v. Barnette* (1943),[51] when the Supreme Court held in one of its greatest decisions, penned by Justice Robert Jackson, that

> To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.... It is not necessary to inquire whether nonconformist beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty....
> *The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections....*
> *If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.*[52]

Though dealing with conscientious refusal to salute the national flag based on religious convictions, the decision was not directed solely to the free exercise of religion, but to the arguably broader sweep of the Free Speech guarantee of the First Amendment. What is especially remarkable about it is that this manifesto of freedom was issued in the midst of World War II, when the nation was engaged in a struggle for its very survival.

In the same year as *Barnette*, the Supreme Court held that colporteurs of Jehovah's Witnesses could not be required to pay a fee and obtain a license under ordinances pertaining to commercial peddlers in order to go from door to door to spread their

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49. See discussion at §§ B1-8 below, AUTONOMY: CHURCH PROPERTY.
50. 310 U.S. 586, discussed at IVA6a, CONSCIENCE: FLAG SALUTE.
51. 319 U.S. 624, discussed at IVA6b, CONSCIENCE: FLAG SALUTE.
52. *West Virginia v. Barnette*, 319 U.S. 624, 633-4, 635, 638, 642 (1943), emphasis added.

faith and disseminate their literature.[53] Other decisions enforced the right of Jehovah's Witnesses to hold services in a public park[54] and to purvey their tracts on the streets of a company town.[55] Some decisions they lost. Free exercise of religion did not exonerate the activity of a minor in distributing religious literature on the street contrary to child-labor laws,[56] or of a street preacher cursing a police officer.[57]

Among the Sunday-closing cases was one that raised free-exercise claims, viz., that (Jewish) merchants required to close on Sunday suffered an economic burden on their religious practice, which required them to close their place of business also on their Sabbath, Saturday. The Supreme Court held that such a burden was incidental to a commercial regulation that was not aimed at disadvantaging their religious obligations and thus did not offend the Free Exercise Clause.[58] Yet two years later the same court held that a woman who lost her job and refused other available work in her field because of her (Seventh-day Adventist) religious objection to working on her Sabbath, Saturday, could not be denied unemployment compensation.[59]

The latter decision, *Sherbert v. Verner* (1963), initiated a new era in the jurisprudence of the Free Exercise Clause because for the first time the court asserted that infringements of free exercise would be subjected to "strict scrutiny." That is, any burdens imposed by government action on sincere religious practice must be justified by a *compelling state interest* that could be served in *no less burdensome way*. That standard was enforced even against criminal offenses in the case of three Amish fathers who were convicted of "truancy" for refusal to send their children to public high school because of the fear that their faith would be endangered. The Supreme Court held in an opinion written by Chief Justice Burger for 6 1/3[60] members of the court: "*The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion*."[61]

This represented the high-water mark for the recognition and protection of free exercise claims. Subsequently the court began to find weaker and weaker state interests "compelling." In *U.S. v. Lee* (1981),[62] for instance, the Supreme Court held

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53. *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), discussed at IIA2i, OUTREACH: EVANGELISM.

54. *Niemotko v. Maryland*, 340 U.S. 268 (1951), discussed at IIA2q, OUTREACH: EVANGELISM.

55. *Marsh v. Alabama*, 326 U.S. 501 (1946), discussed at IIA2n, OUTREACH: EVANGELISM.

56. *Prince v. Massachusetts*, 321 U.S. 158 (1944), discussed at IIA2l, OUTREACH: EVANGELISM.

57. *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), discussed at IIA2e, OUTREACH: EVANGELISM.

58. *Braunfeld v. Brown*, 366 U.S. 599 (1961), discussed at IVA7b, CONSCIENCE: SABBATH OBSERVANCE.

59. *Sherbert v. Verner*, 374 U.S. 398 (1963), discussed at IVA7c, CONSCIENCE: SABBATH OBSERVANCE.

60. Two justices did not participate, and one justice, William O. Douglas, dissented as to two of the three children involved.

61. *Wisconsin v. Yoder*, 406 U.S. 205 (1972), emphasis added, discussed at IIIB2, INCULCATION: STATE REGULATION OF RELIGIOUS SCHOOLS.

62. 455 U.S. 252 (1982), discussed at IVA9b, CONSCIENCE: SOCIAL SECURITY.

that an Amish carpenter was not excused by his religious convictions for refusal to pay Social Security tax for his employees because "the broad public interest in maintaining a sound tax system is of such high order [that] religious belief in conflict with the payment of taxes affords no basis for resisting the tax." At that time the Social Security system was far from universal in its coverage; in addition to a statutory exemption for *self-employed* Amish, the employees of nonprofit organizations were exempt, as were employees of government, including Supreme Court justices. So the system was not in such danger of unsoundness that exempting a handful of Amish employers and employees would have made a large difference. The court, in dicta, however, pointed to what may have been a graver danger to the tax system—protesters who refused to pay *income* taxes because of their conscientious opposition to expenditures for war and armaments. So to avoid opening a constitutionally justified tax exemption for conscience, the court rejected the Amish plea for the sake of the "soundness" of a tax system already riddled with (statutory) exceptions.

There were also several cases in which the court declined to apply strict scrutiny to free exercise claims, which are treated in this work as situations involving "special populations and environments." A Jewish officer in the Air Force was ordered not to wear his yarmulke when in uniform. His claim that this order interfered with his free exercise of religion was rejected by the Supreme Court, not because of a compelling governmental interest in the Air Force's uniform code, but because the court deferred to the judgment of *military* authorities as to the requirements to be enforced within the armed services irrespective of the Free Exercise Clause.[63] Likewise, a claim by a Muslim prisoner that his inability to attend Islamic religious ceremonies midday on Friday impaired his free exercise of religion was rejected in deference by the court to the judgment of *correctional* authorities as to what religious practices could be accommodated in prison.[64]

Two free-exercise claims by *American Indians* were rejected by the Supreme Court on the basis that they would oblige the government to conform its internal administrative policies to the religious requirements of individuals. In one, conscientious objection to the use of Social Security numbers was met by the court's insistence that objectors could not prevent the government from assigning such numbers to applicants for social services, but a majority of the court rejected the requirement that applicants themselves must use those numbers.[65] In the other case, the court recognized that the construction of a lumbering road through a national forest would be devastating to the religious practices of two Indian tribes that had used the forested "high country" for vision quests since time immemorial, but again the court held that the religious requirements of individuals (or even whole tribes)

63. *Goldman v. Weinberger*, 475 U.S. 503 (1986), discussed at IVE2c, CONSCIENCE: MILITARY.
64. *O'Lone v. Shabazz*, 482 U.S. 342 (1987), discussed at IVE3c, CONSCIENCE: PRISON.
65. *Bowen v. Roy*, 476 U.S. 693 (1986), discussed at IVA9g, CONSCIENCE: SOCIAL SECURITY.

could not be imposed on the government in its management of its "own" "internal" affairs.[66]

Free exercise did not always fare better when protected by statute. Congress mandated in Title VII of the Civil Rights Act of 1965 that employers must accommodate the sincere religious practices of employees (such as excusal from work on their Sabbath) so far as they could without "undue hardship" to their business, but the Supreme Court in 1977 ruled that any expense beyond *de minimis* (a trifle) was undue hardship![67] On the other hand, sometimes the court read exceptions for free exercise into a statute that made no provision for it. The Supreme Court ruled that the National Labor Relations Board had not been authorized to supervise labor relations among teachers in (Roman) Catholic parochial schools, since such supervision would interfere with the school's ability to carry out its religious practice. Unless Congress expressly authorized such jurisdiction, the court—in order to avoid constitutional problems—would *assume* Congress had not intended it.[68]

The court also upheld the authority of Congress to "accommodate" religious exercise in instances where it was burdened by requirements imposed by government. A janitor performing nonreligious functions at a gymnasium owned and operated by the Church of Jesus Christ of Latter-day Saints was discharged when he failed to meet the standards stipulated for all Mormon employees at that facility. He and other employees similarly situated challenged as an "establishment of religion" the provision of the Civil Rights Act of 1965 that permitted churches to employ their own members in preference to others, not only for religious functions, but for nonreligious ones as well. The district court found that provision to be unconstitutional, as the plaintiffs had argued, since it advanced the church's ability to attract members by offering them remunerative employment. But the Supreme Court reversed in an important opinion addressed to the establishment issue, but sounding in free exercise, written for the court by Justice White:

> [I]t is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions.... A law is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden "effects"... it must be fair to say that the *government itself* has advanced religion through its own activities and influence.[69]

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66. *Lyng v. Northwest Indian Cemetery Protective Assn.*, 485 U.S. 439 (1988), discussed at IVE1i, CONSCIENCE: AMERICAN INDIANS.

67. *TWA v. Hardison*, 432 U.S. 63 (1977), discussed at IVA7g, CONSCIENCE: SABBATH OBSERVANCE.

68. *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979), discussed at D3a below, AUTONOMY: CHURCH EMPLOYEES.

69. *Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327 (1987), emphasis in original, discussed at § D4b below, AUTONOMY: CHURCH EMPLOYEES.

The court struck down a provision of the Tennessee state constitution that prohibited clergy from running for public office (the last such prohibition in the country) on the ground that by limiting their rights as citizens it impaired the free exercise of religion of those who were ordained.[70] However, it rejected free exercise claims of a religious organization that resisted federal minimum wage law on the ground that the law did not seriously burden religious practice, and to the degree that it might, its effect was justified because the religious organization had involved itself heavily in economic pursuits that competed with businesses subject to that law.[71]

Many of the free exercise claims that were upheld, like that of Mrs. Sherbert, reached the court through the narrow aperture of eligibility for unemployment compensation because of loss of jobs through adherence to religious conviction. One Jehovah's Witness was fired from a foundry because he refused to work on armaments, and the state of Indiana refused to pay unemployment benefits, pointing out that other Witnesses expressed no such objections. The Supreme Court held that it was not the courts' business to determine whether the individual had correctly interpreted his faith's teachings. So long as the objection was sincere, it would suffice to justify compensation of the individual for unemployment resulting from adherence to the dictates of conscience.[72]

The state of Florida objected to paying unemployment compensation to a woman who rejected Saturday work because she had become a Seventh-day Adventist on the job and was thus herself the "agent of change" that brought about her loss of unemployment. The Supreme Court held that converts are no less protected in the exercise of their religion than those who are continuous adherents.[73] The state of Illinois refused to grant unemployment benefits to a claimant who declined work on Sunday because of his convictions as a Christian, based on the Ten Commandments, though he was not a member of any church. The Supreme Court held (unanimously) that membership in a recognized religious body was not necessary to qualify for the protection of the Free Exercise Clause.[74]

9. The Virtual Demise of the Free Exercise Clause

In 1990 the Supreme Court took a momentous step backward in its application of the Free Exercise Clause. In a decision that was scarcely noticed at the time by the

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70. *McDaniel v. Paty*, 435 U.S. 618 (1978) (plurality opinion), discussed at IIE4k, OUTREACH: INFLUENCING PUBLIC POLICY.

71. *Alamo Fndn. v. Secy. of Labor*, 471 U.S. 290 (1985), discussed at D3e below, AUTONOMY: CHURCH EMPLOYEES.

72. *Thomas v. Review Board*, 450 U.S. 707 (1981), discussed at IVA5l, CONSCIENCE: MILITARY SERVICE.

73. *Hobbie v. Florida*, 480 U.S. 136 (1987), discussed at IVA7i, CONSCIENCE: SABBATH OBSERVANCE.

74. *Frazee v. Illinois*, 489 U.S. 829 (1989), discussed at IVA7j, CONSCIENCE: SABBATH OBSERVANCE.

public, the court held that strict scrutiny no longer need be directed to alleged infringements of that clause. Instead, it was demoted to the level of scrutiny used for assessment of claims not protected by the First Amendment. Government need no longer justify burdening the sincere practice of religion by showing a compelling state interest that could be served in no less burdensome way. Now all that was required was that the government had used a rational means to accomplish a legitimate governmental purpose. This remarkable result occurred in a case that had two strikes against it when it reached the court: it involved Indians, and it involved drugs, neither of which had fared well in most litigation reaching the appellate courts.[75]

The third strike may have derived from a combination of causes. Some members of the court had expressed concern that the Religion Clauses were getting overblown to the degree that they interfered with each other.[76] Justice John Marshall Harlan (the Younger) had observed in 1963, "I cannot subscribe to the conclusion that the State is constitutionally *compelled* to carve out an exception [for religion] to its general rule.... Those situations in which the Constitution may require special treatment on account of religion are, in my view, few and far between."[77] Chief Justice Burger had urged (unsuccessfully) in *Bowen v. Roy* (1986) that a lesser level of scrutiny was sufficient for free exercise cases:

> In the enforcement of a facially neutral and uniformly applicable requirement for the administration of welfare programs reaching many millions of people, the Government is entitled to wide latitude. The Government should not be put to the strict test [that compels it]... to justify enforcement of the use of Social Security number requirement as the least restrictive means of accomplishing a compelling state interest. Absent proof of an intent to discriminate against particular religious beliefs or against religion in general, the Government meets its burden when it demonstrates that a challenged requirement for governmental benefits, neutral and uniform in its application, is a reasonable means of promoting a legitimate public interest.[78]

But, although in that decision the Chief Justice was writing for the court in other respects, five of the justices disagreed on that contention. Justice O'Connor, joined by Justices Brennan and Marshall, insisted that "such a test has no basis in precedent and relegates a serious First Amendment value to the barest level of minimal scrutiny that the Equal Protection Clause already provides." (Justices Blackmun and Stevens

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75. In the realm of the religion clauses, see the series of cases involving Native Americans related at IVE1 and the series of cases involving hallucinogens at IVD2.

76. Justice Rehnquist, dissenting, had referred to the two clauses as "Scylla and Charybdis," between which it was almost impossible to navigate. *Thomas v. Review Board,* 450 U.S. 707, 721 (1981)

77. *Sherbert v. Verner*, 374 U.S. 398, 423 (1963), Harlan, J., dissenting, emphasis in original.

78. *Bowen v. Roy*, 476 U.S. 693 (1986), discussed at IVA9g, CONSCIENCE: SOCIAL SECURITY.

thought it unnecessary to reach that issue on the available record.) Four years later, after Chief Justice Burger and Justice Lewis F.Powell had left the court, and their places had been taken by Justices Scalia and Kennedy, the standard suggested by Burger (and urged in several instances by the Justice Department) became the standard adopted by the court!

The case in question, *Employment Division of Oregon v. Smith* (1990),[79] involved two Native American drug counselors who were denied unemployment compensation after being fired because, contrary to the rules of the agency for which they worked, they had used a hallucinogen, peyote, a "controlled substance," in the ritual of the Native American Church, of which they were members. They challenged this denial as a violation of their free exercise of religion, since the state of Oregon had not shown a compelling state interest for prohibiting religious use of peyote (an exemption for such use being provided by the laws of twenty-three other states and the federal government). Although neither of the parties had challenged that standard, and without asking that it be briefed or argued, the court, *sua sponte*, announced that the compelling state interest test that had been settled law since *Sherbert* (1963) was now no longer necessary!

Justice Scalia, writing for a narrow majority of five justices, held that when sincere religious practice is burdened by a neutral law of general application, government need not justify that burden by a compelling state interest but need show only that it had chosen a rational means to accomplish a legitimate end. There were some important exceptions. If the law targetted religion or religious practice, the compelling state interest test still applied. Or if the free exercise claim was paired with another constitutional guarantee that really counted, such as free speech, strict scrutiny was still in order. Although this new approach would seem to put in question much of the case law that had gone before during the preceding twenty-seven years, the court did not overrule any of its earlier decisions, but brought them into consonance with its new deliverance by reinterpreting them in ways that have been characterized as "transparently dishonest."[80]

This demotion of the Free Exercise Clause was widely criticized in the legal literature, and efforts were made to secure legislation that would restore the compelling state interest test. These efforts were crowned with success when President William J. Clinton signed into law the Religious Freedom Restoration Act on November 17, 1993. Further discussion of this case may be found at the point in this work where it falls under the heading of "sacramental" usages.[81] Just as the court did not attempt to jettison its earlier work, so in this treatise it will be reported as it stood at the time, even though for a time it was not "the law of the land." How the

79. 494 U.S. 872, discussed at IVD2e.

80. Laycock, D., "The Remnants of Free Exercise," 1990 *The Supreme Court Review* 1, 3 (1991).

81. See discussion at IVD2e, CONSCIENCE: SACRAMENTAL PRACTICES: HALLUCINOGENS.

Religious Freedom Restoration Act will be interpreted and applied by the courts remains to be seen. The first straw in the wind on that issue was the decision of the federal Fifth Circuit Court of Appeals in 1996, which found the Act constitutional, reversing a lower court.[82]

82. *Flores v. City of Boerne*, 73 F.3d 1352 (5th Cir. 1996), *rev'd*, 521 U.S. 507 (1997), discussed at § 12j below, LANDMARKING OF CHURCH BUILDINGS.