# THE U.S. SUPREME COURT'S INTERPRETATION OF THE RELIGION CLAUSES THE FIRST AMENDMENT *

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## I. INTRODUCTION

The year 1989 marks the bicentennial of the adoption of the Bill of Rights to the Constitution of the United States, an event which occurred 25 September 1789. When giving attention to the place of the First Amendment in American jurisprudence or in American cultural and social history, it is quite customary to affirm that the religion clauses constitute the cornerstone of the American Bill or Rights and to maintain that these clauses were fundamental in the development of American civilization. The guiding principle of the religion clauses is, of course, religious liberty which has long viewed by Americans and their courts as being at the heart of Americas's national life. Indeed, the relationships between religion, the state, and society has been described as «perhaps the most fundamental —certainly it is most distinctive— feature of American political as well as American religious life» [1]. Clearly, the first sixteen words of the First Amendment attest to the primacy assigned to religion by the framers of the Bill of Rights: «Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.»

If, in fact, the religion clauses of the First Amendment are to be viewed as a fundamental and distinctive feature of American political and religious life, an inevitable question must be raised: Why was is that for almost one hundred and fifty years so very few church-state cases reached the United States Supreme Court? The fact is that, with few exceptions, interpretations of the religion clauses by the United States Supreme Court are virtually limited to the period since 1940. While state courts almost from the inception of state governments were frequently called upon to resolve questions bearing upon the free exercise of religion or on matters relating to the institutional relationship between church and state government, only a handful of Supreme Court decisions on religion and the state were handed down during the first century and a half of the notion's history.

Since this is the bicentennial of the adoption of the Bill of Rights to the Constitution, it is important to remember that for one hundred fifty of those years, there were very few Supreme Court cases on church and state. Even among those, still fewer involved the religion clauses of the First Amendment. The first several religion

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[1] Quoted in WILLIAM LEE MILLER, «Religion and the American Way of Life», *Religion and the Free Society* (New York: The Fund for the Republic, 1958), 18.

cases taken by the Court either did not involve the First Amendment or were dismissed on appeal.

Not until 1872, in *Watson v. Jones,* did the United States Supreme Court render a church-state decision based upon the First Amendment. It did so by ruling that it could not involve itself in deciding which of two factions represented the true faith in a church dispute. The decision of the Court was that it did not have the power to decide which of two Presbyterian factions contesting for church property was the true Presbyterian Church. The Court expressly denied that government has any competence to decide which faith is true and which faith is false or to define orthodoxy or heresy in the dispute. In unequivocal language, the Court declared: «In this country the full and free right to entertain any religious belief, to practice any religious principle, and to reach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect» [2].

In spite of this unambiguous denial of the right of government jurisdiction in religious matters, the principle applied only to the *federal* government, not to the states. In fact, at an early date the Court explicitly acknowledged that the religion clauses were applicable only to the federal government and denied their applicability to the states. In 1833, in one of its earliest church-state cases, *Permoli v. First Municipality of New Orleans,* the Court dismissed the appeal of a Catholic priest who contended that his free exercise of religion was infringed upon by a New Orleans city ordinance that gave to one chapel a monopoly of all funerals, when it affirmed that the religion clauses «do not extend to the States» [3]. That same year, Chief Justice John Marshall declared that the first eigth amendments were «intended solely as a limitantion on the exercise of power by the government of the United States» [4]. Likewise, the Court denied that the Fifth Amendment was applicable to the states, by unanimously affirming, in *Barron v. Baltimre,* that «the fifth amendment must be understood as restraining the power of the general government, not as applicable to the States», and ruling that the other amendments comprising the Bill of Rights were equally inapplicable to the States [5].

The first major church-state case in America did not appear until almost a century after the adoption of the Firs Amendment. The case involved the Mormons in *Reynolds v. United States* (1878), in which the Court rejected the contention of the plaintiff that his practice of polygamy was a religious obligation. Chief Justice Morrison Waite wrote for the Court, «Laws are made for the government of actions, and while they cannot interfere with the mere religious belief and opinions, they may with practices» [6]. Quoting Thomas Jefferson, the Court affirmed that the purpose of the First Amendment was to build «a wall of separation betwenn Church and State», but that this did not deprive the state of the right to limit actions based on religious beliefs [7]. Other Mormon cases followed, *Davis v. Beason* (1890) [8] and *Church of Jesus Christ of Latter-Day Saints v. United States* (1892) [9], both aimed at prohibiting the practice of polygamy by the Mormons.

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[2] *Watson v. Jones,* 13 Wallace 679 (1872) at 728.

[3] *Permoli v. Muncipality No. 1 of the City of New Orleans,* 3 How. 589 (1845).

[4] See LEONARD W. LEVY, «Incorporation Doctrine», in *Encyclopedia of the American Constitution,* 4 vols., ed. Leonard W. Levy (New York: The Macmillan Co., 1986), 2:970.

[5] *Barron v. Baltimore,* 7 Pet. (32 U.S.) 243 (1833).

[6] *Reynolds v. United States,* 98 U.S. 145 (1878) at 166.

[7] *Ibid.*

[8] *Davis v. Beason,* 133 U.S. 333 (1890).

[9] *Church of Jesus Christ of Latter-Day Saints v. United States,* 136 U.S. 1 (1890).

Originally, JAMES MADISON, the author of the amendments that became known as the Bill of Rights, included an amendment that provided that «no State shall violate the equal rights of conscience, of the freedom of the press, of the trial by jury in criminal cases» [10], but the Senate defeated the proposal. Prior to the incorporation doctrine whereby the Fourteenth Amendment of 1868 was incorporated or absorbed in the Bill of Rights, the religion clauses of the First Amendment were simply not applicable to the states, since the Bill of Rights limited only the federal government not state governments. As Leonard W. Levy has written, «Before 1868 nothing in the Constitution of the United States prevented a state from imprisoning religious heretics or political dissenters, of from abolishing trial by jury, or from torturing suspects to extort confessions of guilt» [11].

The fulcrum for making the First Amendment applicable to the states came with the adoption of the Fourteenth Amendment in 1868, which provides in part: «Nor shall any State deprive any person of life, liberty or property without due process of law.» This amendment, in virtually the same words used in the Fifth Amendment, restricts Congress, except here the prohibition is directed against the states. The direct application, however, of the Fourteenth Amendment to the religion clauses of the First Amendment was slow in developing. For many years, the Supreme Court resisted any effort to incorporate the First Amendment into the «liberty» that is guaranteed in the Fourteenth Amendment against state action or law. As late as 1922, in *Prudential Insurance Co. v. Cheek,* the Court held that «neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restrictions about 'freedom of speech'» [12].

Withing three years the free speech guarantee of the First Amendment was incorporated into the Fourteenth Amendment, in *Gitlow v. New York* [13]. For this reason the first two of numerous Jehovah's Witness cases were decided under the speech clause rather than religion clauses of the First Amendment [14]. Neither of the religion clauses was to experience incorporation until 1940, which goes a long way toward explaining why virtually all of the more than ninety Supreme Court church-state cases have been decided since 1940 [15].

## II. THE SUPREME COURT AND THE FREE EXERCISE CLAUSE

In 1940, in a landmark church-state case, *Cantwell v. Connecticut,* the Court unanimously upheld the right of Jehovah's Witnesses to propagate their faith in public and to engage in door-to-door solicitation without a permit or «certificate of approval». For the first time, the Court specifically «incorporated» the Free Exercise Clause into the Fourteenth Amendment, thus making the Clause applicable to the states. The Court declared: «We hold that the statute, as constructed and applied to the applicants, deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment. The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of

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[10] Quoted in Levy, «Incorporation Doctrine», 2:970.

[11] *Ibid.*

[12] *Prudential Insurance Co. v. Cheek,* 259 U.S. 530 (1922).

[13] *Gitlow v. New York,* 268 U.S. 652 (1925).

[14] *Lovell v. Griffin,* 303 U.S. 444 (1938), and *Schneider v. United States,* 308 U.S. 147 (1939).

[15] Earlier church-state cases were either confined to federal territory before statehood, as in the *Reynolds* case, or were decided on constitutional grounds other than the religion clauses.

religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws» [16]. From this time forward, the states no less than the federal government are subject to the restrictions of the Free Exercise Clause.

While the religion clauses of the First Amendment are expressed in unconditional language, «Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof», religious liberty is clearly not an absolute right. In *Cantwell,* the Court noted that the First Amendment «embraces two concepts — freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society» [17].

That same year, the Court upheld the expulsion of children of a Jehovah's Witness from the public schools of Minersville, Pennsylvania, in *Minersville School District v. Gobitis* (1940), for refusing to salute the flag and to recite the pledge of allegiance [18]. This decison, however, was overturned three years later in *West Virginia Board of Education v. Barnette,* in which the Court declared, «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. If there are any circumstances which permit an exception, they do not now occur to us» [19].

It should be noted that the first eleven church-state cases to be decided on the Free Exercise Clause, during the years 1940-1944, involved the Jehovah's Witnesses [20]. Twenty-five church-state cases involving the Witnesses reached the Court during the decade 1938-1948. Far out of proportion to their numerical membership or institutional strength, Jehovah's Witnesses have been responsible for far more cases concerned with religious liberty than any other religious denomination in America. The result of these decisions involving the Witnesses was, by and large, a broadening of the meaning of the Free Exercise Clause as applied to the dissemination of religious materials and the public propagation of one's faith.

In *United States v. Ballard,* the Court addressed the claims of the truth or falsity of religious beliefs. The case involved the organizers of the «I Am» movement, Guy W., Edna W., and Donald Ballard, all of whom were charged with using the mail to defraud by claiming that they had supernatural powers to heal diseases and injuries. The Court ruled that no agency of the state has the competence or the power to determine «the truth or falsity of beliefs or doctrines» of anyone even though these beliefs «might seem incredible, if not preposterous to most people» [21]. Speaking for the majority, JUSTICE WILLIAM O. DOUGLAS wrote:

> «Heresy trials are foreign to our Constitution. Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines, or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken

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[16] *Cantwell v. Connecticut,* 310 U.S. 296 (1940).

[17] *Ibid.* at 303-04.

[18] *Minersville School District v. Gobitis,* 310 U.S. 586 (1940).

[19] *West Virginia Board of Education v. Barnette,* 319 U.S. 624 (1943).

[20] In addition to the *Cantwell* and *Minersville* cases noted above, the remaining nine were as follows: *Cox v. New Hampshire,* 312 U.S. 569 (1941); *Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942); *Jones v. City of Opelika,* 316 U.S. 584 (1942); *Murdock v. Pennsylvania,* 319 U.S. 105; *Jones v. Opelika II,* 319 U.S. 103 (1943); *Martin v. City of Struthers,* 319 U.S. 141 (1943); *West Virginia Board of Education v. Barnette,* 319 U.S. 624 (1943); *Taylor v. Mississippi,* 319 U.S. 583 (1943); and *Jamison v. Texas,* 318 U.S. 413 (1943).

[21] *United States v. Ballard,* 322 U.S. 78 (1944).

> of mortals does not mean that they can be made suspect before the law. Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations. The miracles of the New Testament, the Divinity of Christ, life after death, the power of prayer are deep in the religious convictions of many. If one could be sent to jail because a jury in a hostile environment found those teachings false, little indeed would be left to religious freedom... if... doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain. The First Amendment does not select any one group or any one type or religion fort preferred treatment» [22].

In their struggle for religious freedom, America's marginal or nonconventional religions have increasingly sought legitimation of their claims as bona fide religions and, thereby, equality with other religions in the «free exercise» of their beliefs and teachings. Many court cases involving the Black Muslims have been illustrative of this pattern, most of them arising out of grievances that Black Muslims prison inmates were denied their right to hold services, to receive Black Muslim religious literature, to eat pork-free meals, to wear beards, and to obtain the services of Black Muslim clergy.

In *Cooper v. Pate* [23], the Supreme Corut reversed two lower courts' decisions that denied the rights of a Black Muslim prison inmate to obtain his Koran and other Black Muslim literature, to attend Black Muslim religious services, and to have contacts with Black Muslim clergy. The Court rejected the argument of the attorney general of Illinois that the «Black Muslim Movement, despite its pretext of a religious facade, is an organization that, outside of prison walls, has for its object the overthrow of the white race, and inside prison walls, has an impressive history of inciting riots and violence». In a brief per curiam opinion, the Court held that it was unconstitutional to deny a prisoner religious privileges enjoyed by other inmates of mainline denominations.

The Black Muslim struggle for legitimation may also be seen in the prolonged effort of Muhammad Ali (earlier known as Cassius Clay, Jr.) to avoid induction into military service. In *Clay v. United States* [24], the Supreme Court overruled the Fifth Circuit Court of Appeals that had accepted the ruling of the Justice Department and the Appeal Board that Ali's refusal to enter military service was based on «grounds which primarily are political and racial» and did not constitute a «general scruple against participation in war in any form». The Supreme Court declared that the Justice Department «was simply wrong as a matter of law in advising that the petitioner's beliefs were not religiously based and were not sincerely held». After several decades of Black Muslim struggle in the courts, some have seen this decision «as clear legitimation of the Black Muslim faith» [25].

Confrontations with the state are more likely to occur with new or nonconventional religions and this has been a recurring pattern in recent decades as in the distant past. During the past two decades, confrontations have occurred with such groups as the Church of Scientology, the International Society for Krishna Consciousness (ISKCON) or the Hare Krishna movement, and the Unification Church, all of which

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[22] *Ibid.* at 86-87.

[23] *Cooper v. Pate,* 378 U.S. 546 (1964).

[24] *Clay v. United States,* 403 U.S. 698 (1971).

[25] See JOHN RICHARD BURKHOLDER, «'The Law Knows No Heresy': Marginal Religious Groups and the Courts», in *Religious Movements in Contemporary America,* ed. Irving I. Zaretsky and Mark P. Leone (Princeton: Princeton University Press, 1974), 36.

have been viewed with much disfavor as they have been able to win converts from mainline Christian denominations and the Jewish community. Crucial to all confrontations of new religions with the state is the issue of equality under the law, as applied to both religion clauses of the First Amendment. As the Supreme Court affirmed in *Everson,* no government, state or federal, «can pass laws which... prefer one religion over another» [26]. In 1981, *Heffron v. International Society for Krishna Consciousness,* the Court ruled that a state may limit solicitation and the selling of literature at a state fair, even though, as in the case of members of Hare Krishna, they have a prescribed ritual of Sankirtan that requires them to distribute and to sell their religious literature publicly [27]. In response to an amendment to Minnesota's Charitable Solicitation Act directed against new religions, particularly the Unification Church, the Supreme Court in *Larson v. Valente* (1982) found the statutory amendment unconstitutional, as violative of both the Establishment Clause and the Free Exercise Clause of the First Amendment. Speaking for the majority opinon, JUSTICE WILLIAM J. BRENNAN wrote, «The constitutional prohibition of denominational preference is inexorably connected with the continuing vitality of the Free Exercise Clause» [28].

New and nonconventional religions have not enjoyed the same legal rights and equality under the law as have Catholic, Protestant, and Jewish groups. One recent example is to be found in a federal court case of income-tax evasion, *Moon v. United States* (1984), which resulted in the conviction of Rev. Sun Myung Moon, the founder of the Unification Church [29]. The key issue in this case came to light early, namely the selective prosecution of Moon for doing what many other religious leaders of mainline groups have done through the years. Moon expressed a view shared by many when he declared, «I would not be standing here today if my skin were white and my religion were Presbyterian», a point of view shared by the judge in the case. «I am not so naive», the judge said, «as to believe that if Reverend Moon was a controversial person whose religion was Pollyannish, who nobody took exception to, that the government would not have had as much interest in looking at his taxes as they did». The United States Supreme Court declined to overturn the lower court's conviction and, thus, the conviction was upheld and Moon was sentenced to prison.

A number of recent court cases raises serious questions as to the constitutional rights of various new religions and their enjoyment of equality under the law with older religious faiths. By and large, litigation in these cases has been aided and abetted by a host of self-appointed «experts» who profess competence in the dynamics of human behavior but who manifestly show little corresponding knowledge, let alone sympathetic understanding, of the dynamics or phenomenology of religion and religious

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[26] *Everson v. Board of Education* at 15.

[27] *Heffron v. International Society for Krishna Consciousness,* 452 U.S. 640 (1981).

[28] *Larson v. Valente,* 456 U.S. 228 (1982).

[29] *Moon v. United States,* 104 S.Ct. 2344 (1984), denying cert. in 718 F. 2d 1210. Massive support for Moon came from a large number and a wide variety of organizations in the form amicus curiae briefs, perhaps unprecedented in both number and diversity including: the American Civil Liberties Union; the National Association of Evangelicals; the National Bar Association; the National Council of Church of Christ in the U.S.A.; the Catholic League for Religion and Civil Rights; Church of Jesus Christ of Latter-day Saints; the American Association of Christian Schools; the Southern Christian Leadership Conference; the Center for Judicial Studies; and the Institute for the Study of American Religion. In addition, amicus curiae briefs were submitted by the States of Hawaii, Oregon, and Rhode Island and by Senator Orrin G. Hatch, chairman of the Subcommittee of the Constitution, United States Senate Committee on the Judiciary. For complete texts of these briefs, see Herbert Richardson, ed., *Constitutional Issues in the Case of Rev. Moon: Amicus Briefs Presented to the United States Supreme Court* (New York: Edwin Mellen Press, 1984).

experience. A jury in Denver recently acquitted two men who admitted abducting a thirty-one-year-old member of the Unification Church to «deprogram» her at the request of her parents. Enormous awards have recently been assessed against the Church of Scientology in *Scientology v. Wollersheim* [30], the Hare Krishna movement in *George v. ISKCON* [31], and the Unification Church in *Molko v. Holy Spirit Association* [32].

In adjudicating the Free Exercise Clause, the Court has set forth two judicial standards for regulating actions based on religious beliefs: the «compelling interest» and the «alternate means» test. The first specific Supreme Court case to «balance» freedom of religion with compelling public or state interest came in 1944, in *Prince v. Commonwealth of Massachusetts,* in which the Court upheld a state child labor law and denied the right of a Jehovah's Witness to have her nine-year-old niece accompany her in selling religious literature on the street [33]. The Court did so, in the words of Justice Wiley Rutledge, in order to uphold the prior claim of «the interest of society to protect the welfare of the children».

For some years the Court used this test largely by simply determining whether or not the state's interest was not weightier than the individual conscience, as in time of war. More recently, the state has been inclined to require the state to convince the courts that the «interests» it seeks to protect are greater than the rights of conscience that are involved. Thus, in accord with this reasoning, the Court in the 1972 case of *Wisconsin v. Yoder* held that Amish parents could not be prosecuted for refusing to send their children to school after the age of fourteen. The Court declared, «Only those interests of the highest order and those not otherwise served can overbalance the legitimate claim to the free exercise of religion» [34].

Another judicial criterion for determining the limits of the Free Exercise Clause came almost two decades later in the «alternate means» test. First advanced in *Braunfeld v. Brown* in 1961 [35], the test was used in *Sherbert v. Verner* in 1963 [36] to invalidate the denial of unemployment compensation by the state of South Carolina to Adell Sherbert, a Seventh-day Adventist, because she refused to work on Saturday. The state's unwillingness to find «alternate» means readily available to it, the Court said, imposed a religious burden on the appellant in that it forced her to choose between following her religious convictions and, thus, forfeiting her employment compensation or abandoning her religious principles in order to accept employment. «Only the gravest abuses», the Court said, «endangering paramount interest, give occasion for permissible limitation» of the «free exercise» of religion. The *Sherbert* doctrine has been called «the highwater mark in the Supreme Court's interpretation of the scope of free exercise of religion» [37]. The *Sherbert* doctrine has been reaffirmed in two subsequent decision that have been handed down in the 1980s.

In *Thomas v. Review Board,* the Supreme Court declared unconstitutional the denial of unemployment compensation benefits to a Jehovah's Witness for refusing employment on religious grounds in a plant making weapons for war. The Court declared that «the state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest» [38]. The Court

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[30] *Scientology v. Wollersheim,* 481 U.S. 1023 (1987).

[31] *George v. ISKCON,* California Court of Appeals, Fourth Appellate District, Division No. 1, D007153-4 (1 March 1989).

[32] *Molko v. Holy Spirit Association,* 762 Pac.2d 46.

[33] *Prince v. Commonwealth of Massachusetts,* 331 U.S. 158 (1944).

[34] *Wisconsin v. Yoder,* 406 U.S. 205 (1972).

[35] *Braunfeld v. Brown,* 366 U.S. 599 (1961).

[36] *Sherbert v. Verner,* 374 U.S. 398 (1963).

[37] BURKHOLDER, *'The Law Knows No Heresy',* 36

[38] *Thomas v. Review Board of the Indiana Employment Security Division,* 450 U.S. 707 (1981).

refused to examine the nature of the claimant's religious belief as such but rather as to whether it was a belief that was sincerely held. The Court said:

> The Indiana court also appears to have given significant weight to the fact that another Jehovah's Witness had no scruples about working on tank turrets; for that other Witness, at least, such work was «scripturally» acceptable. Intrafaith differences of that kind are not uncommon among followers of a particular creed, and the judicial process in singularly ill-equipped to resolve such differences in relation to the Religion Clauses. One can, of course, imagine an asserted claim so bizarre, so clearly nonreligious in motivation, as not to be entitled to protection under the Free Exercise Clause; but that is not the case here, and the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect. Particularly in this sensitive area, it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the command of their common faith. Courts are not arbiters of scriptural interpretation [39].

However, in a 1977 case, *TWA v. Hardison,* the Supreme Court ruled that employers need not take extraordinary measures to accommodate religious beliefs of theim employees when to do so would «discriminate against some employees in order to enable others to observe their Sabbath» [40]. One other case involving the balancing of religious rights with compelling public or state interest came in 1986, in *Ohio Civil Rights Commission v. Dayton Christian Schools,* in which a woman teacher charged that her dismissal was the result of sex discrimination. Although the Court did not address the merits of the case, the Court's unanimous opinion did support the liability of religious schools to investigation and hearings by civil rights commissions under state antidiscrimation laws [41].

In *Hobbie v. Unemployment Appeals Commission* (1987), a case similar to the *Sherbert* case, except that the individual claming unemployment compensation did so after changing her religious beliefs and affiliation pursuant to her initial employment [42]. The Court rejected the argument that Mrs. Hobbie should be denied unemployment compensation because she was the «agent of change» in her religious faith. The Court said:

> In effect, the Appeals Commission asks us to single out the religious convert for different, less favorable treatment than that given to an individual whose adherence to his or her faith precedes employment. We decline to do so. The First Amendment protects the free exercise rights of employees who adopt religious beliefs or convert from one faith another after they are hired. The timing of Hobbie's conversion is immaterial to our determination that her free exercise rights have been burdened; the salient inquiry under the Free Exercise Clause is the burden involved. In *Sherbert, Thomas,* and the present case, the employee was forced to choose between fidelity to religious belief and continued employment; the forfeiture of unemployment benefits for choosing the former over the latter brings unlawful coercion to bear on the employee's choice [43].

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[39] *Ibid.* at 715-16.
[40] *Trans World Airlines v. Hardison,* 432 U.S. 63 (1977).
[41] *Ohio Civil Rights Commission v. Dayton Christian Schools,* 477 U.S. 619 (1986).
[42] *Hobbie v. Unemployment Appeals Commission of Florida,* 480 U.S. 136 (1987).
[43] *Ibid.* at 144.

In more than a half-dozen cases, the Court has applied the Free Exercise Clause to conscientious objection to war. While exemption of conscientious objectors from combatant services is a precedent going back to colonial times, it is nowhere guaranteed as a constitutional right as in the case of freedom of religion, freedom of assembly, or freedom of speech. The Court has repeatedly affirmed the supremacy of the defense of the state against a foreign enemy as taking precedence over constitutional guarantees of civil liberties and individual rights. In a famous case, *United States v. Macintosh* [44], which occurred a decade before the period of this review of court cases, the Supreme Court repudiated as «astonishing» the claim that it is a «fixed principle of our Constitution... that a citizen cannot be forced and need not bear arms in a war if he has conscientious religious scruples against doing so». *Macintosh* was overturned in 1946, however, not on constitutional grounds but on the basis that Congress had not intended to make conscientious objection a bar to citizenship.

Conscientious objection did not become a serious church-state issue until there was a universal or national conscription for military service at the time of War I. First restricted to members of peace churches, Congress extended it in 1948 to those with «religious training and belief». In *United States v. Seeger* (1965), the Court broadly interpreted this provision to include those whose religious beliefs may not be theistic in nature, but who possess «a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by God of those qualifying for exemption» [45]. In June 1967, Congress deleted the Supreme Being clause as a basis for conscientious objection. Three years later, in *Welsh v. United States,* the Court extended conscientious objection status to those with beliefs that occupy «a place parallel to that filled by... God» [46]. In balancing the interests of the state, however, against one's religious beliefs in participating only in the case of a «just war», the Court held in *Negre v. Larsen* (1971) that a faithful Roman Catholic's belief that the «unjust» nature of the war in Vietnam required him to refuse to participate did not excuse his refusal to be inducted into the armed forces [47].

The ratification of the Constitution did not mark an end to state laws of religious tests for public office, since Article VI prohibiting any religious tests applied only to the federal government and federal elections. As noted earlier, although the Fourteenth Amendment (1868) to the U.S. Constitution denied the right of any state to «abridge the privileges or immunities of citizens of the United States», this amendment was not «incorporated» or applied to the states with respect to the religion clauses of the First Amendment until after 1940. A landmark case bearing on religious tests for state office came in *Torcaso v. Watkins* (1961), in which the Court unanimously held unconstitutional a Maryland law requiring «a declaration of belief in the existence of God» for state office [48]. The significance of *Torcaso* is that the Court categorically denied religious tests for office at any level of government and any preferential treatment of theistic over nontheistic faiths, or religion over against nonreligion as a qualification for public office. In a case out of Tennesee, the last of the state laws barring clergy from state office was unanimously declared unconstituional by Court in *McDaniel v. Paty* (1978) [49].

In two cases involving the balancing of free exercise claims against Congressional power to tax, the Court upheld, in *United States v. Lee* (1982), the government's con-

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[44] *United States v. Macintosh,* 238 U.S. 605 (7931).
[45] *United States v. Seeger,* 380 U.S. 163 (1965)
[46] *Welsh v. United States,* 398 U.S. 333 (1970)
[47] *Negre v. Larsen,* 401 U.S. 437 (1971); a companion case, *Gillette v. United States,* 401 U.S. 437 (1971), based on «a humanistic approach to religion», was decided on the same grounds.
[48] *Torcaso v. Watkins,* 367 U.S. 488 (1961).
[49] *McDaniel v. Paty,* 435 U.S. 618 (1978).

tention that no statutory exempion based on religion applies to an Amish employer and his employees in the payment of social security taxes [50]; Tax exemption was denied in *Bob Jones University v. United States* and *Goldsboro Christian Schools v. United States* (1983) on the ground that beyond meeting the requirements of the Internal Revenue code, entitlement requires «meeting certain common law standards of charity — namely, that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy» [51].

More recently, the Court unanimously upheld the right of religious organizations to discriminate on the basis of religion in hiring persons to fill positions within their organizations and institutions, in *Church of Jesus Christ of Latter-Day Saints v. Amos* (1987). At the same time, the immediate effect of the Court's decision was to affirm the constitutionality of Section 702 of the Civil Rights Act of 1964 permitting an exemption based upon religion to a religious entity in hiring persons «to perform work connected with carrying on its activities» [52]. For the first time, the Court specifically affirmed that religious organizations may enjoy special protections from governmental interference in employment that are not accorded to other organizations. The most far-reaching impact of the *Amos* decision was that it resoundingly affirmed the constitutional right of religious identity and integrity to religious organizations and institutions [53].

## III. The Supreme Court and the Establishment Clause

The Establisment Clause, traditionally regarded, in the words of Justice William J. Brennan, as the «co-guarantor, with the Free Exercise Clause, or religious liberty» [54], comprises the first ten words of the First Amendment: «Congress shall make no law respecting an establishment of religion...» Again, as Justice Brennan has so aptly said, «The Framers did not entrust the liberty of religious beliefs to either clause alone». In this clause, the prohibition is on government not to sponsor, promote, or promulgate religion, not to prefer one religion over another religion over irreligion, not to intrude without «probable cause» into the affairs of religion, not give financial aid to religion, and not to involve itself in religious affairs.

Incorporation of this clause into the Fourteenth Amendment, and thereby making it applicable to the states, did not occur until seven years after the incorporation of the Free Exercise Clause, in *Everson v. Board of Education* (1947), in which the Court upheld a New Jersey law providing for bus transportation of pupils in parochial schools [55]. This landmark decision marked the first time that the Court attempted to define the Establishment Clause and incorporate it into the Fourteenth Amendment. The Court declared:

> 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.

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[50] *United States v. Lee,* 455 U.S. 252 (1982). The employers argued that their free exercise of religion had been violated, citing I Timothy 5:8: «But if any provide... for those of his own house, he hath denied the faith, and is worse than an infidel.» The Court said the involuntary contribution was justified in order to accomplish the overriding state interest in the effective operation of the social security system.

[51] *Bob Jones University v. United States* and *Goldsboro Christian Schools v. United States,* 461 U.S. 574 (1983) 0.

[52] *Church of Jesus Christ of Latter-Day Saints v. Amos,* 479 U.S. 296 (1987).

[53] See James E. Wood, Jr., «Religious Discrimination in Employment and the Churches», *Journal of Church and State,* 30 (Winter 1988): 7-13.

[54] *Abington School District v. Schemp,* 374 U.S. 203 (1963) at 256.

[55] *Everson v. Board of Education,* 330 U.S. 1 (1947).

> 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 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 nonattendance. 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 organization or groups and *vice versa.* In the words of Jefferson, the clause against establishment of religion by law was intended to erect «a wall of separation between church and state» [56].

While the Court unanimously adopted this broad interpretation of the Establishment Clause, the justices then and thereafter have disagreed on its application.

Perhaps here it may be well to take note that questions concerning the use of public funds for religious schools and the role of religion in public schools have become critical issues in U.S. church-state relations. During the past forty years no other church-state issues have provoked as much litigation. Indeed, the issues addressed by the Court during these decades —public funds and religious schools and the role of religion in public schools— are indissolubly and inexorably linked in American church-state relations. In large measure, during the past forty years religion and education have constituted the primary basis upon which the Establishment Clause has been adjudicated.

Beginning in the early sixties and culminating in *Lemon v. Kurtzman* in 1971, in adjudicating the Establishment Clause the Court has applied a three-prong test in judging the constitutionality of legislation or public policy: the statute must have a «secular legislative purpose»; it must have a «primary effect that neither advances nor inhibits religion»; and its administration must avoid «excessive entanglement» with religion [57]. The Court has subsequently applied this three-prong test on more than twenty occasions, primarily in cases concerned with the use of public funds to religious schools.

Not until *Lemon v. Kurtzman* (1971) and *Eearley v. DiCenso* (1971) [58] did the Court have occasion to strike down legislation authorizing public funds for parochial schools. From almost any perspective, the Court's rulings in these cases must be viewed as landmark decisions in American church-state relations. In a unanimous decision the Court ruled in *Lemon* that Pennsylvania's Nonpublic Elementary and Secondary Act of 1968, which authorized the state to purchase educational services as teachers' salaries, textbooks, and instructional materials for secular subjects was unconstitutional. It did so on the ground that such aid would foster «excessive entanglement» between government and religion. In an eight-to-one decision, in *Eearley v. DiCenso,* the Court also declared unconstitutional the Rhode Island Supplement Act of 199, which provided for 15 percent supplement to be paid to private school teachers of secular subjects using the same instructional materials as those used in public schools. There can be no question, the Court said, but that the intent of the First Amendment is to maintain a boundary between church and state.

Two years later in three separate opinions, *Committee for Public Education and Religious Liberty, v. Nyquist, Levitt v. Committe for Public Education and Religious Liberty,* and *Sloan v. Lemon,* the Court again denied the use of public funds for non-

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[56] *Ibid.* at 15-16. Clearly, the most oft-quoted statement on church and state by the Court in the four decades since it originally appeared.

[57] *Lemon v. Kurtzman,* 403 U.S. 602 (1971).

[58] *Earley v. DiCenso,* 403 U.S. 602 (1971).

public schools [59]. In these three cases the Court specifically struck down five programs of public assistance in parochial schools. In *Nyquist,* in a six-to-three decision, the Court held as unconstitutional amendments to New York's Education and Tax Laws establishing three financial aid programs to nonpublic elementary and secondary schools: the maintenance and repair of facilities and equipment and tuition reimbursement and tax credit plans for parents of children attending nonpublic schools. In *Levitt,* in an eight-to-one decision, the Court ruled as unconstitutional a 1970 New York programm which allocated $28 million annually to reimburse nonpublic schools for educational testing and other «mandates services» imposed by the State on nonpublic schools. In *Sloan,* in a six-to-one decision, the Court also ruled as unconstitutional a Pennsylvania law, the Parent Reimbursement Act for Nonpublic Education, which was designed to reimburse parents of nonpublic schools pupils for part of the tuition expense ($75 for each child in elementary school and $150 for each child in high school). Of its decision, the Court said, «If novel forms of aid have not readily been sustained by this Court, the 'fault' lies... with the Establishment Clause itself... With that judgment we are not free to tamper» [60].

The Court substantially restricted still further the use of public funds for parochial schools two years later in 1975, in *Meek v. Pittenger.* Both educational materials and auxiliary services (remedial and special learning classes, counseling, testing, and psychological services), even when provided by public school personnel in parochial schools, were found to be in violation of the Establishment Clause of the First Amendment. Later, in *Wolman v. Walter* (1977), in a taxpayers' suit challenging the constitutionality of an Ohio statute which provided auxiliary educational services to parochial schools, the Court declared the loan of instructional materials and equipment to parochial schools to be unconstitutional. The Court categorically rejected the notion that the loan of such equipment and the funding of field trips were merely aids to the pupils rather than to the parochial schools themselves. While in *Wolman* the Court upheld the constitutionality of loan of secular textbooks and the providing of diagnostic and therapeutic services to parochial schools pupils when administered by public officials on site not identified with nonpublic schools, the Court clearly reaffirmed the impermissibility of the use of public funds for the support of religious schools [61].

More recently, in *Pearl v. Regan* (1980), the Court narorwly upheld a New York state court decision authorizing public funds for grading state-mandated and state-prepared examinations on secular subjects as reimbursement to parochial schools for the cost incurred in meeting the requirement of state record keeping [62]. In still another split decision, *Mueller v. Allen* (1983), the Court upheld the constitutionality of Minnesota's tuition tax deduction system [63]. Two years later, however, in twin cases, *Grand Rapids v. Ball* and *Aguilar v. Felton,* the Court struck down state-funded parochiaid programs for teaching remedial and enrichment course in Grand Rapids church schools and a federally funded program for «educationally deprived» children in New York City's parochial schools [64].

In the case of church-related colleges and universities, the Court's position has appeared to be less clear, but certainly has viewed aid to church-related higher education more favorably than to elementary and secondary schools. Even here, however,

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[59] *Committee for Public Education and Religious Liberty v. Nyquist,* 413 U.S. 756 (1973); *Levitt v. Committee for Public Education and Religious Liberty,* 413 U.S. 472 (1973); and *Sloan v. Lemon,* 413 U.S. 825 (1973).

[60] *Sloan v. Lemon* at 835.

[61] *Wolman v. Walter,* 433 U.S. 229 (1977).

[62] *Committee for Public Education and Religious Liberty v. Regan,* 444 U.S. 646 (1980).

[63] *Mueller v. Allen,* 463 U.S. 388 (1983).

[64] *Grand Rapids School District v. Ball,* 105 S.Ct. 3216 (1985); *Aquilar v. Felton,* 105 S.Ct. 3237 (1985).

the Court has denied the constitutionality of tax funds to church colleges or universities that are sectarian or pervasively religious and not primarily secular in character. The Court has rendered but three decisions directly bearing upon church-related higher education. In *Tilton v. Richardson* (1971), the Court gave qualified approval of the use of federal funds for the construction of church college facilities not used, now or at any time in the future, for religious purposes and where the primary purpose of the college was found to be secular, not religious [65]. Two years later, in *Hunt v. McNair,* the Court upheld a South Carolina statute that authorized the issuance of bonds to finance college facilities not used for religious purposes [66].

In the most important of these three cases on church-related higher education, *Romer v. Board of Public Works* (197), the Court upheld the constitutionality of a Maryland law authorizing an annual subsidy to private colleges, including church schools, with the proviso that none of the state funds may be used for «sectarian purposes» [67]. Eligibility for these funds also rested upon the findings of the Court that the colleges in question were found not to be «pervasively sectarian», that they performed «essentially secular functions», and that they were neither controlled nor financed by the church.

A very recent Supreme Court case involving the question of government aid to religion, *Bowen v. Kendrick* (1988), the Court sustained in a five-to-four decision the constitutionality of providing federal grants to public and nonpublic (including religious) organizations in carrying out programs authorized by the Adolescent Family Life Act (A.F.L.A.) in combating teenage pregnancy and abortion, and categorically rejected the argument that this policy violated the separation of church and state [68].

In nine major decisions, the United States Supreme Court has repeatedly denied the permissibility of state sponsorship of religion in the public schools. In *McCollum v. Board of Education* (1948), the Court declared by a vote of eight to one that «released time», i.e., setting aside a portion of each day for religious education by representatives of various faiths, is unconstitutional even though attendance in these classes might be on a purely voluntary basis [69]. The Court explicitly rejected the argument that the First Amendment only meant nonpreferential treatment of one religion over another. «The First Amendment», the Court said, «rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respected sphere. Or, as we said in the *Everson* case, the First Amendment has erected a wall between Church and State which must be kept high and impregnable» [70]. The decision was a clearly controversial one.

Four years later in *Zorach v. Clausen* (1952) [71], by a vote of six to three, the Court declared unconstitutional the practice of «dismissed time», which was essentially the same program of religious education considered in *McCollum* except that the program was maintained off the grounds of the public schools. Once again, the Court affirmed that the First Amendment means the separation of church and state, of which «there cannot be the slightest doubt». «Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person» [72]. In 1962, the Court ruled in *Engel v. Vitale,* by a vote of eight to one, that the state-sponsored prayer

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[65] *Tilton v. Richardson,* 403 U.S. 672 (1971).
[66] *Hunt v. McNair,* 413 U.S. 734 (1973).
[67] *Roemer v. Board of Public Works of Maryland,* 426 U.S. 736 (1976).
[68] *Bowen v. Kendrick,* 108 S.Ct. 2562 (1988).
[69] *McCollum v. Board of Education,* 333 U.S. 203, 211-12 (1948).
[70] *Ibid.* at 212.
[71] *Zorach v. Clausen,* 343 U.S. 306 (1952).
[72] *Ibid.* at 314.

program of the schools of New York State was unconstitutional [73]. In *Engel,* the Court declared that government may not require prayer in the public schools even when it is conditioned on a «voluntary» basis for schools pupils [74]. In effect, the Court said that whether such a prayer program is nondenominational, or optional, or involves the use of tax funds, is immaterial. Prayer is a religious act and therefore cannot be sponsored by the state without violating the Establishment Clause. As in *McCollum,* the Court disclaimed that its decision was in any way to be interpreted as one of government hostility to religion. «It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers...» [75].

The following year, the Court was inevitably faced with the widespread practice of Bible reading exercises in the public schools. Again, by an almost unanimous vote, eight to one, the Court ruled in *Abington School District v. Schempp* [76] that the practices of devotional Bible reading and the recitation of the Lord's Prayer were unconstitutional. Once again the Court rejected «unequivocally» the reasoning that the Establishment Clause forbids «only governmental preference of one religion over another», but that the First Amendment means nothing less than the separation of church and state [77]. Quoting *Everson v. Board of Education* [78], the Court affirmed, «The [first] amendment's purpose was not to strike merely the official establishment of a single... religion... It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion» [79].

Once again the Court asserted that the decision outlawing religious exercises in the public schools is not a manifestation of a hostility to religion, nor does it mean establishing a «religion of secularism». Neither the study of the Bible nor the study of religion, when made the object of academic inquiry and «presented objectively», is in conflict with this decision or the First Amendment. Rather, the Court said that «one's education is not complete without a study of... religion». Devotional Bible reading and prayer recitation, however, «are religious exercises, required by the States in violation of the command of the First Amendment that the Government maintain strict neutrality, neither aiding nor opposing religion» [80]. In no way did these decisions deny or prohibit the right of teachers and pupils to pray in public schools on an individual or voluntary basis, but such prayers were not be a part of the public school as such. In 1980, in *Stone v. Graham,* the Court ruled that the Kentucky statute mandating the placing of the Ten Commandments in public school classrooms also violated the Establishment Clause [81].

During the past twenty-five years, more than two hundred proposals have been introduced in the United States Congress to overturn the Supreme Court's decisions on public school-sponsored prayer. To the dismay of the proponents, the strongest opposition to these proposals came from organized religion, namely Protestantism and Judaism, while Roman Catholicism maintained an unsympathetic neutrality. A prayer amendment did not reach the floor of the House of Representatives until 8 November 1971. It was narrowly defeated, failing by twenty-eight votes to receive the two-thirds majority required. Interestingly enough, opposition to the prayer

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[73] *Engel v. Vitale,* 370 U.S. 421 (1962).
[74] *Ibid.* at 430.
[75] *Ibid.* at 435.
[76] *Abington School District v. Schemp,* 374 U.S. 203 (1963).
[77] *Ibid.* at 216.
[78] *Ibid.*
[79] *Ibid.* at 217.
[80] *Ibid.*
[81] *Stone v. Graham,* 449 U.S. 39 (1980).

amendment was led by the then Congressman Robert F. Drinan, S.J., the only Roman Catholic priest to be elected to Congress in this nation's history. To date, no proposed constitutional amendment has gained the endorsement or support of any of America's mainline religious denominations despite pleas of legislators and President Ronald Reagan during his eight years in office.

During the past decade, efforts in Congress, led primarily by Senator Jesse Helms of North Carolina, have been directed toward limiting by Congressional statute United States Supreme Court and all federal district courts from hearing cases involving «voluntary prayers in the public schools and public buildings» [82]. By removing public school-sponsored prayers and religious exercises from the jurisdiction of all federal courts, the place of prayer in the public schools would be determined by the state's local communities or local school authorities.

Still another effort to overturn the Supreme Court's decisions on public school-sponsored prayer has been to legislate that public schools provide a daily period of silence or meditation. Legislative proposals have been made in twenty-three states authorizing or requiring a period of silence, some for meditation, some for prayer, and still others for a combination of all three. «Regardless of the wording», as NORMAN REDLICH, dean of the New York University School of Law, has written, «These laws should be viewed by the courts simply as substitute for state-supported religion... Were it not for the controversy over the unconstitutionality of state-sponsored prayer, there would be no pressure for a moment of silence or meditation» [83]. During 1983 and 1984, United States district courts in New Jersey, New Mexico, and Tennnessee ruled against legislation providing for either a period of prayer or a moment of silence [84]. A district court in New Mexico, held that a moment of silence was a «devotional exercise» that had the effect of «the advancement of religion» [85].

In Alabama, the Eleventh Court of Appeals, in *Jaffree v. Wallace,* overturned a district court decision by finding the Alabama statute requiring a one-minute period of silence «for prayer or meditation» at the beginning of each school day to be a «quintessential religious practice» and therefore unconstitutional [86]. The United States Supreme Court agreed to review this case on appeal and on 4 June 1985 ruled the Alabama statute to be unconstitutional [87]. In voiding the Alabama law, the Court Court ruled six to three, that the state law violated the Establishment Clause because the statute had as its sole purpose the fostering of religious activity in the classroom. Writing for the six-member majority, Justice John Paul Stevens wrote that the Alabama law also failed the test that a law must have a secular purpose. Justice

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[82] On 5 April 1979, Helms' unprinted amendment No. 69, 125 Cong. Rec. 7577 (1979), proposing limitations on the jurisdiction of the Supreme Court with respect to cases relating to voluntary prayer in public schools was attached by the Senate to the Department of Education Organization Act of 1979, S. 2830, 96th Cong., 1st Sess. 125 Cong. Rec. 7581 (1979). On 9 April 1979, the identical amendment was attached to the Supreme Court Jurisdictional Act of 1979, S. 450, 96th Cong., 1st Sess., 125 Cong. Rec. 7644 (1979). The Senate then in effect stripped the amendment from the Department of Education Act, 125 Cong. Rec. 7657 (1979). Similar legislation was introduced by Helms in the Ninety-seventh Congress, S. 481, 97th Cong., 1st Eess. (1981), and again in the Ninety-eigth Congress, S. 784, 785, 98th Cong. 1st. Sess. (1983).

[83] NORMAN REDLICH, «Religion and the Schools: The New Political Establishment», in *Religion and State,* ed. James E. Wood, Jr. (Waco, Texas: Baylor University Press, 1985), 286.

[84] *May v. Cooperman,* 572 F. Supp. 1561 (D.N.J. 1983); *Duffy v. Las Cruces Public Schools,* 557 F. Supp. 1013 (D.N.M. 1983).

[85] *Duffy,* 557 F. Supp. at 1020.

[86] *Jaffree v. Wallace,* 705 F.2d 1526, 1534 (11th Cir. 1983); quoting *Karen B. v. Treen,* 653 F.2d 897, 901 (5th Cir. 1981).

[87] *Wallace v. Jaffree,* 105 S.Ct. 2479 (1985).

Stevens noted that the Alabama legislature had passed the bill «for the sole purpose of expressing the State's endorsement of prayer activities... at the beginning of each school day». The Court declared that since the statute specifically allowed for meditation «or voluntary prayer», the state intended to characterize prayer as a favored practice. «Such an endorsement is not consistent», the Court said, «with the establishment principle that the government must pursue a course of complete neutrality toward religion» [88].

One other case closely related to these, but lacking any Supreme Court decision as to the merits of the case itself came in 1986 in *Bender v. Williamsport Area School* District [89]. The case involved the practice of equal access, namely whether student religious groups in public high scholls have the right to hold religious meetings or prayer services in their schools. At the time of the *Bender* case, all of lower federal courts, with but one exception, had rejected the concept of equal access for the public schools [90]. Similarly, two state courts have declared that meetings of religious clubs in public school is impermissible [91]. They have all done so because they found varying «equal access» plans to be violative of the Establishment Clause.

In 1981 the Court rendered its only decision relating to the right of religious groups to meet in state-owned facilities of a state university. In *Widmar v. Vincent,* the Supreme Court declared that public universities are open forums and, therefore, they cannot deny the right of religion groups to meet. There were approximately eight hundred student groups in the university involved. In adjudicating the Establishment Clause in *Widmar,* the Court took a much more tolerant attitude toward religious services in an institution of higher learning than in primary and secondary schools. For almost twenty years, the Court has made a distinction in applying the Establishment Clause to elementary and secondary schools and post-secondary schools. The Court was explicit in making a distinction between younger students and older university students who are adults. In the words of the Court, «University students are, of course, young adults. In the impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion» [92].

Two other cases relating to religion and the public schools have come as a result of religiously motivated efforts to alter or modify the public school curriculum. A case challenging an Arkansas statute that forbade teaching «the theory or doctrine that mankind ascended or descended from a lower order of animals» resulted in the Supreme Court's 1968 decision in *Epperson v. Arkansas.* In its unanimous ruling invalidating Arkansas law prohibiting the teaching of evolution in public schools, the Court ruled that the law not only lacked religious neutrality, but was rooted in a fundamentalist view of Genesis and violated both the First and the Fourteenth Amend-

[88] *Ibid.* at 2497-98 (Justice O'Connor concurring).

[89] *Bender v. Williamsport Area School District,* 475 U.S. 534 (1986).

[90] *Bender v. Williamsport Area School Dictrict,* 741 F.2d 538 (3d Cir. 1984), vacated, 106 S.Ct. (1986); *Nartowicz v. Clayton County School District,* 736 F.2d 646 (11th Cir. 1984); *Lubbock Civil Liberties Union v. Lubbock Independent School District,* 669 F.2d 1038 (5th Cir. 1982), *cert.* denied, 459 U.S. 1155 (1983); *Brandon v. Board of Education,* 635 F.2d 971 (2d Cir. 1980), *cert.* denied, 454 U.S. 1123 (1981). The U.S. Supreme Court has agreed to hear a second equal access case, *Mergens v. Westside Community School Board of Education,* during its October 1989 Term. For an analysis of some of the constitutional questions raised by equal access, see JAMES E. WOOD, Jr., «Equal Access: A New Direction in American Public Education», *Journal of Church and State,* 27 (Winter 1985): 5-17 and RUTI G. TEITEL, «Equal Access and the Public Schools», in *Ecumenical Perspective on Church and State: Protestant, Catholic, and Jewish,* ed. James E. Wood, Jr. (Waco, Texas, J. M. Dawson Institute of Church-State Studies, Baylor University, 1988), 139-65.

[91] *Trietle v. Board of Education,* 65 A.D.2d 1, 409 N.Y.S.2d 912 (N.Y. App. Div. 1978); *Johnson v. Huntington Beach Union High School District,* 68 Cal. App. 3d 1, 137 Cal. Rptz. 43, *cert.* denied, 434 U.S. 877 (1977).

[92] *Widmar v. Vincent,* 454 U.S. 263, 277 n.14.

ments. In the words of the Court: «There can be no doubt that the Arkansas has sought to prevent its teachers from discussing the theory of evolution because it is contrary to the belief of some that the Book of Genesis must be the exclusive source of doctrine as to the origin of man... It is clear that fundamentalist sectarian conviction was and is the law's reason for existence» [93].

Faced with the Supreme Court's ruling that legislation aimed at prohibiting evolution from being taught in the public schools is unconstitutional, anti-evolutionists adopted a new tactic in the 1970s and the 1980s. Their purpose was no longer to promote antievolution legislation but to argue for the teaching of creationism as science or «scientific creationism» along with evolution. Thus, for anti-evolutionists, the strategy became one of demand for «equal time» rather than for substituting the Genesis account of creation for evolution.

Advocates of «scientific creationism» in the public schools experienced a major defeat in June 1987, when the Supreme Courts struck down, by a vote of seven to two, a Louisiana law mandating that «equal time» be provided in the public school curriculum for «creation science» whenever evolution is taught. In *Edwards v. Aguillard,* the Court found the Louisiana law to be violative of the Establishment Clause because it failed the «secular purpose» test. «A government intention to promote religion is clear», the Court opined, «when the State enacts a law to serve a religious purpose. This intention may be evidenced by promotion of religion in general... or by advancement of a particular religious belief» [94]. According to the Court, the law was further flawed because it «does not serve to protect academic freedom, but has the distinctly different purpose of discrediting evolution by counterbalancing its teaching at every turn with the teaching of creation science». Far from protecting academic freedom, the Court declared, the statute actually «serves to diminish academic freedom» [95].

The Court noted that for some decades it has been particularly vigilant in reviewing compliance with the Establishment Clause in elementary and secondary schools. Quoting Justice FELIX FRANKFURTHER in the case of *McCollum v. Board of Education* twenty years earler, which, as has been noted, denied the constitutionality of providing religious education classes in the public schools, the Court noted that it has done so because «the public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the States is it more vital to keep out divisive forces than in its schools» [96].

The Court has also had to balance competing interests in determining the constitutionality of enforcing compulsory Sunday-closing laws against those whose religious beliefs mandate strict observance of the seventh day of the week rather than the first day of the week. In 1961, in a series of Sunday law cases [97], the Court upheld that Sunday laws were not religious laws but social welfare laws. Although their origin may have been religious, the Court said, the present purpose of these laws is secular, i.e., to assure a weekly day of relaxation and rest and to provide a day for family to be together. In 1985, however, in *Thornton v. Caldor,* the Court invalidated a Connecticut law that exempted employees from work on their Sabbath day as violative of the «primary effect» test. The state law was found to be preferential to religion since any one who observed a Sabbath day for religious reasons *must* be excused from work no matter what sort of burden it placed on others. The Court said, «The statute arms

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[93] *Epperson v. Arkansas,* 393 U.S. 97 (1986) at 107-08.
[94] *Edwards v. Aguillard,* 476 U.S. 1103 (1987).
[95] *Ibid.*
[96] *McCollum v. Board of Education.*
[97] *McGowan v. Maryland,* 366 U.S. 420 (1962); *Two Guiys from Harrison-Allentown, Inc. v. McGinley,* 366 U.S 582 (1961); *Gallagher v. Crown Kosher Super Market of Massachusetts,* 366 U.S. 617 (1961); and *Braunfeld v. Brown,* 366 U.S. 599 (1961).

Sabbath observers with an absolute and unqualified right not to work on whatever day they designate as their Sabbath» [98].

Another issue involving the Establishment Clause is tax exemption and religious institutions. In its only decision directly bearing on tax exemption of church property, *Walz v. Tax Commission* (1970), the Court upheld tax exemption for the churches, but its decision deal only with property used solely for religious worship [99]. The Court did not rule on whether or not the Free Exercise Clause would be violated if tax exemption were disallowed. As LEO PFEFFER has written, «As of the present, therefore, it seems that government, federal or state, have the constitutional option of granting or denying exemption» [100].

Under the Establishment Clause the Court has addressed a wide range of other church-state issues, some of which bear at least some brief mention. In *NLBR v. Catholic Bishop of Chicago* (1979), the Court denied the claim of jurisdiction by the National Labor Relations Board over parochial schools in the payment of an unemployment tax [101].

The accelerated expansion of America religious pluralism in recent years, marked by the extraordinary growth of new religions, has given renewed attention to the issue of equality of all religions before the law. Recently, the Court has denied the constitutionality of an amendment to Minnesota's Charitable Solicitation Act directed against new religions, as violative of both the Establishment Clause and the Free Exercise Clause, *Larson v. Valente* (1982). Justice BRENNAN in writing for the majority, in a case brought by the Unification Church, declared: «The clearest of the Establishment Clause is that one religious denomination cannot be officially preferred over another» [102].

More recently, the Court reviewed and upheld by a vote of five to four, *Lynch v. Donnelly* (1984), the constitutionality of a nativity scene erected by the city of Pawtucket, Rhode Island, in front of its city hall. The Court found that the government-sponsored nativity scene served a secular purpose as part of the city's traditional holiday display and did not have any primary effect of advancing religion. In its ruling, the Court overturned the decisions of two lower courts and gave further indication of its present direction away from any «wall of separation», which Chief Justice Burger some years earlier had found to be «a blurred, indistinct, and variable barrier». In writing for the majority in *Lynch,* Chief Justice Burger stated that while the wall of separation is a «useful figure of speech», «the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state». For this reason, as he has often stated in the past, the Court has

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[98] *Thornton v. Caldor,* 472 U.S. 703 (1985) at 709.

[99] *Walz v. Tax Commission,* 397 U.S. 664 (1970).

[100] LEO PFEFFER, «Government Aid to Religious Institutions», in *Encyclopedia of the American Constitution,* 4 vols., ed. Leonard W. Levy (New York: The Macmillan Co., 1986), 2:856.

[101] *National Labors Relations Board v. The Catholic Bishop of Chicago,* 440 U.S. 490 (1979).

[102] *Larson v. Valente,* 456 U.S. 228 (1982) at 244. The Court has through the years frequently stated that the Establishment Clause requires neutrality between religions and between religion and irreligion. For example, in *Everson v. Board Education,* 330 U.S. 1, 18 (1947), the Court stated that government must «be neutral in its relations» with other religions. In *Zorach v. Clausen,* 343 U.S. 306, 314 (1952), the Court declared that «the government must be neutral when it comes to competition between sects...». In *Epperson v. Arkansas,* 393 U.S. 97, 104 (1968), the Court said that «the First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion». Still again, in *Rome: v. Board of Public Works,* 426 U.S. 736, 745-46 (1976), it was affirmed that «the Court has enforced a scrupulous neutrality by the State, as among religions...».

consistently «declined to take a rigid, absolutist view of the Establishment Clause» [103]. In June 1989, the Court, again grappling with the constitutionality of officially sponsored religious displays, in a vote of five to tour, held that a creche in the county courthouse in Pittsburgh violated the Establishment Clause, since the prominent display location and a banner with «Gloria in Excelsis Deo» inscribed on its gave the appearance of the state's endorsement of the Christian religion. In that same case the Court, in a vote of six to three, upheld the display of a menorah in front of a city-county building and did not constitute an endorsement of Judaism [104].

## IV. Conclusion

After almost a half century of more than seventy-five Supreme Court cases directly bearing on the religion clauses, since being made applicable to the states, what conclusions, if any, may be drawn from this historical review? After all the Court has said, what does the «free exercise of religion» mean? It clearly means far more than freedom of belief which requires no constitutional guarantee since, in the words of the common law, «the devil himself knows not the thoughts of man». The free exercise of religion also means something other than freedom of expression, since the First Amendment explicitly guarantees «feedom of speech» and «freedom of press». Before *Cantwell* in 1940, the Court applied the guarantee of free speech to church-state cases rather than the guarantee of the «free exercise of religion». The Founding Fathers doubtlessly saw the need for a constitutional guarantee that was expressly directed toward protecting the *exercise* of religion, i.e., that religious *activity* should be regarded as a natural or inalienable right of the citizenry. How is one to define «an establishment of religion»? What are its boundaries and at what point is there «an establishment of religion»? There are no definitive or precise answers to these questions in the decisions of the Supreme Court. The very term «religion» remains undefined. Having said this, however, there are some tentative conclusions to be drawn and some directions to be noted.

There are some who hold that there is simply no coherent pattern to be derived from the Court's interpretations of the religion clauses. For still others, the problem of a coherent pattern lies in the ambiguity of the religion clauses in their relationship to one another. On the one hand, the Establishment Clause forbids government action on behalf of religion. On the other hand, the Free Exercise Clause requires government to give preferential or special benefit to religion in protecting its free exercise.

This apparent conflict between the two religion clauses, however, is not beyond practical resolution. Both the Establishment Clause and the Free Exercise Clause need always to be seen as complementary ways of achieving one common purpose — religious liberty. The religion clauses place severe limitations on the state which is neither to advance nor support religion nor to abridge nor inhibit the free exercise of religion. Indeed, the Court has taken cognizance of this on more than one occasion. Almost two decades ago, in *Walz v. Tax Commission,* the Court declared:

> The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference [105].

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[103] *Lynch v. Donnelly,* 465 U.S. 668 (1984).
[104] *County of Allegheny v. American Civil Liberties Union.*
[105] *Walz v. Tax Commission,* 397 U.S. at 669.

That there are at times tension between prohibiting an establishment of religion and protecting the free exercise of religion is undeniable. Justice BRENNAN, an ardent separationist, took note of this tension in the *Schempp* decision of 1963, in which he denied the constitutionality of state-sponsored prayers in the public schools in light of the Establishment Clause. Nowhere has this tension been more acute than in cases dealing with aid to parochial schools. In *Nyquist,* Justice LEWIS F. POWELL acknowledged that this tension «inevitably exists» but in ruling on a New York state program of aid to parochial schools he stated that the state must maintain «an attitude of 'neutrality', neither 'advancing' nor 'inhibiting' religion» [106]. Nonetheless, to the degree that the two clauses protect the free exercise of religion, which is not to be equated with the preservation or the propagation of religion, to that degree the clauses reenforce one another. It is well to remember that religious liberty is not something that the state can confer upon religion, but that which ultimately only religion can confirm and exercise for itself.

It is now almost a half-century since the incorporation of the religion clauses into the Fourteenth Amendment and thereby making them applicable to the states. In view of the wide variety of cases and issues and the long succession of justices who have served on the Court during these years, one may find considerable continuity, by and large, in the Court's interpretations of the religion clauses even if one is inclined to find the reasoning of the Court in many of these decisions to be seriously flawed. Repeatedly, the Court has affirmed that the Establishment Clause means nothing less than the separation of church and state.

During the 1980s, a shift may be discerned in the direction that the Court has been moving ,which some scholarly observers foresee as a «new direction in the law of church and state» [107]. Less attention, it is argued, should be given to the Establishment Clause and far more attention should be given the Free Exercise Clause since it is the basis upon which the Establishment Clause rests. At the same time, there is a tendency to reduce claims of religious liberty to claims of free speech, as in the case of Equal Access, and thereby denying the distintly religious element in the Free Exercise Clause. There is also the tendency to protect religious liberty only to the degree that it has any social consequences.

This shift it not without firm evidence in the decisions of the Supreme Court during the present decade. In a series of cases in the 1980s the Court has denied challenges under the Establishment Clause and sustained state support of religion [108]. In *Lynch v. Donnelly,* the Court declared that the Constitution does not «require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions and forbids hostility toward any... Anything less would require the 'callous indifference' we have said was never intended by the Establishment Clause... Indeed, we have observed such hostility would bring us into 'war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion'» [109]. In categorically affirming that the Court has «consistently» refused «to take a rigid, absolutist view of the Establishment Clause», Chief Justice Warren Burger in speaking for the Court asserted that the Court had «repeatedly emphasized [its] unwillingness to be confined to any single test or criterion in this sensitive area» [110].

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[106] *Committee for Public Education and Religious Liberty v. Nyquist,* 413 U.S. at 788.

[107] OAKS, «Separation, Accommodation, and the Future of Church and State», 3.

[108] These include *Committee for Public Education v. Regal* (1980); *Mueller v. Allen* (1983); *Marsh v. Chambers* (1983); *Lynch v. Donnelly* (1984); and *Bowen v. Kendrick* (1988).

[109] *Lynch v. Donnelly,* 465 U.S. at 1359.

[110] *Ibid.* at 1362.

Chief Justice William H. Rehnquist has long argued that accommodation is far more compatible with the original intent of the Founding Fathers and the First Amendment than the concept of the separation of church and state. According to Justice Rehnquist, the Establishment Clause permits «governmental assistance which does not have the effect of 'inducing religious belief' but merely *'accommodates'* [italics mine] or implements and independent religious choice» [111]. Later in *Jaffree,* Rehnquist wrote that while the Establishment Clause forbade «the establishment of a national church, and perhaps the preference of one religion sect over another» [112], it did not require government neutrality between religion or irreligion [113].

As one American jurist, DALLIN H. OAKS, has perceptively observed:

> Until recently, the law of church and state was in a state of equilibrium that emphasized *separation.* The scales now seem to be moving toward an equilibrium that emphasizes *accommodation.* This new emphasis diminishes the constitutional obstacle to government support for churches and religious activities, and correspondingly diminishes the constitutional guarantees against taxation and regulation. In this position, constitutional litigation will be a less effective safeguard of free exercise, and churches and religious practioners will need to protect their interests more frequently through legislative lobbying [114].

There is, of course, no way of predicting with any degree of certainty the directions the Supreme Court will be taking in its interpretations and applications of the religion clauses during the next decade, but the expanded role of government in educational and welfare services and the growing involvement of religion in public life increase the likelihood of both greater accommodation as well as conflict.

For those who are committed to the separation of church and state, as envisioned by Thomas Jefferson and James Madison, as espoused by John Witherspoon and John Leland, and reaffirmed by the Supreme Court in the great majority of cases prior to 1980, the present trend of the Court is generally viewed as disturbing and disappointing. To be sure, the primary concern is for religious liberty, for which both clauses are to serve, even if in slightly different ways. As Justice Wiley Rutledge wrote in his dissenting opinion in *Everson,* «Like St. Paul's freedom, religious liberty with a great price must be bought. And for those who exercise it most fully... by the terms of our Constitution the price is greater than for others [115] — a price many Americans believeis worth of vigilance and dedicated resolve.

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[111] *Thomas v. Review Board* at 727 (Rehnquist, J., dissenting).
[112] *Wallace v. Jaffree* at 2513.
[113] *Ibid.* at 2516.
[114] OAKS, «Separation, Accommodation, and the Future of Church and State», 21.
[115] *Everson v. Board of Education* at 59 (Rutledge, J., dissenting).