Order Code 98-65 A

# Report for Congress

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# The Law of Church and State: Developments in the Supreme Court Since 1980

**Updated August 15, 2002**

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# The Law of Church and State: Developments in the Supreme Court Since 1980


## Summary

The religion clauses of the First Amendment provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ...." Prior to the past two decades the Supreme Court frequently construed these clauses to create, in Thomas Jefferson's oft-quoted metaphor, a "wall of separation between church and state." However, many of the Court's decisions precipitated substantial public discontent and spawned organized efforts to overturn or otherwise alter its decisions. Particularly since Ronald Reagan was elected to the Presidency in 1980, those efforts have been increasingly successful.

That election has proven to be a critical turning point, because President Reagan and his successor, President Bush, were able to replace more than half of the Justices on the Supreme Court during their terms. President Reagan elevated Justice Rehnquist to Chief Justice and appointed Justices O'Connor, Scalia, and Kennedy, while President Bush appointed Justices Souter and Thomas. Not all of these appointees have fulfilled the expectations of the Presidents who appointed them, but they have led to vigorous debates on the Court about the meaning of the religion clauses and to a church-state jurisprudence that increasingly loosens the constitutional constraints on government action that affects religion.

During the past two decades the Court has been a willing forum for the debate over the proper relationship between government and religion. From the fall of 1980 to the present the Court has handed down 59 decisions on issues of church and state — more than in any previous comparable period. In many of its decisions the Court has been sharply split. But the changes in the Court's composition have had a demonstrable effect: The Court has substantially narrowed the scope of the free exercise clause as a constraint on government action and it has begun to recast its establishment clause jurisprudence as well. On both clauses the Court's interpretations are now giving government greater discretion than formerly to take actions that affect religious practices and institutions, both positively and negatively. Nonetheless, the Court remains sharply divided on the interpretation and application of the religion clauses, and the outcome of particular cases is often unpredictable.

In sum, the period since 1980 has been a profoundly important time for the law of church and state in the Supreme Court. The arguments both on and off the Court about the proper relationship of government and religion have been spirited and extensive, and the Court has issued dozens of rulings on specific issues. This report summarizes the doctrinal debates and shifts on the religion clauses that have occurred on the Court during this period. It summarizes and examines as well the legal effect of all of the decisions the Court has handed down concerning church and state since 1980. An Appendix lists these decisions and how each of the Justices voted. The report will be updated as new decisions are rendered by the Court.

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# The Law of Church and State: Developments in the Supreme Court Since 1980

## Introduction

The religion clauses of the First Amendment to the Constitution provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ...." In its modern jurisprudence (beginning in the 1940s) the Supreme Court frequently construed these clauses to create, in Thomas Jefferson's words, a "wall of separation between church and state."[1] But many of the Court's decisions – particularly with respect to prayer and other religious activities in the public schools – were controversial, and they often led to concerted political efforts to change the Court's church-state jurisprudence.

Prior to 1980 those efforts were unavailing, and a separationist perspective continued to dominate the Court's interpretation of the religion clauses. But that began to change with the election of Ronald Reagan to the Presidency in 1980. His election was fueled in part by opposition to the Court's church-state decisions; and in response, he not only became the first President to propose a constitutional amendment to overturn some of the Court's church-state decisions[2] but also

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[1] In a letter of January 1, 1802, to the Baptist Association of Danbury, Connecticut, President Jefferson stated as follows:

> Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the Government reach actions only, and not opinions — I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion or prohibiting the free exercise thereof," thus building a wall of separation between church and State.
> Quoted in Everson v. Board of Education, 330 U.S. 1, 16 (1947).

The Court's modern interpretation of the religion clauses generally dates from the time it incorporated them into the due process clause of the Fourteenth Amendment and held them applicable to the states — Cantwell v. Connecticut, 310 U.S. 296 (1940) (free exercise clause) and Everson v. Board of Education, *supra* (establishment clause). During the previous 150 years of the nation's existence, the Court rarely had occasion to apply and interpret the religion clauses to the actions of the national government. But once it held them applicable to the states, issues arose with increasing frequency and led to the development of an extensive church-state jurisprudence by the Court.

[2] In 1981 President Reagan first proposed a constitutional amendment on school prayer. *See*

(continued...)

appointed public officials who vigorously and publicly challenged the Court's jurisprudence.[3] He also oversaw energetic efforts by his Solicitors General to argue for a loosened interpretation of the religion clauses in cases before the Court, both when the government was a party and as *amicus curiae* when it was not.[4] But to greater and more long-lasting effect, the election of President Reagan and his successor, President Bush, opened the door to the possibility of changing the Court's church-state jurisprudence by means of the exercise of the Presidential powers of Article II, Section 2, of the Constitution to "nominate and ... appoint ... Judges of the supreme Court."

Presidents Reagan and Bush replaced more than half of the Court during their twelve years in office. Chief Justice Burger (1985) and Justices Stewart (1980), Powell (1986), Brennan (1990), and Marshall (1991) all retired from the Court during this period. In their stead President Reagan elevated Justice Rehnquist to Chief Justice and appointed Justices O'Connor, Scalia, and Kennedy; and President Bush

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[2] (...continued)
S.J.Res. 199 and H.J.Res. 493, 97th Cong., 1st Sess. (1981). In 1984 the Senate Judiciary Committee reported a modified version of that amendment (S.J.Res. 73), and the Senate debated the matter for two and a half weeks. Ultimately, a majority voted in favor of it, 56-44; but that vote was 11 votes short of the two-thirds majority necessary for the measure to be adopted. *See* 130 CONG. REC. 5619 (March 20, 1984). A similar effort took place soon after the Republicans took control of both the House and the Senate after the 1994 elections. Although no formal votes occurred in the 104th Congress, a number of significant developments occurred. Perhaps most important, the constitutional debate in Congress broadened beyond the school prayer issue to include other aspects of the Court's church-state jurisprudence. In the 105th Congress that interest and debate persisted; and on May 19, 1998, the House Judiciary Committee favorably reported a modified version of a broad-gauge constitutional amendment introduced by Rep. Istook (H.J.Res. 78). After rejecting two amendments to the proposal, the House voted in favor, 223-203; but that vote fell 61 votes short of the two-thirds majority necessary for adoption. For a fuller description of Congressional action, *see* CRS, *School Prayer: The Congressional Response, 1962-1998* (December 1, 1998) (Report 96-846A).

[3] *See, e.g.*, the address by Attorney General Edwin Meese III to the House of Delegates of the American Bar Association (July 9, 1985).

[4] The Solicitors General under Presidents Reagan and Bush repeatedly urged the Court to loosen the constraints of the religion clauses on government action affecting religion. Of the forty-nine church-state cases decided during their terms, the Solicitors General proffered the government's views in thirty — sixteen because the United States was a party, fourteen as an amicus curiae; and in all of them the government argued for a less constrictive interpretation of the religion clauses. The Solicitors General under President Clinton continued this effort, as they filed briefs in three of the seven church-state cases that the Court decided from 1993-2001. They, too, urged the Court in every instance to uphold the government's action as constitutional; and in two of the cases they urged the Court to do so by overturning some of its prior establishment clause decisions. The Solicitor General in the current Bush Administration so far has intervened as an amicus curiae in one of the three church-state cases accepted for review by the Court; and in that case he not only filed a brief but also sought and gained permission to participate in the oral argument. Again, the Administration's position favored a loosened interpretation of the establishment clause. *See* Zelman v. Simmons-Harris, 122 S.Ct. 2460 (2002) (upholding a school voucher program against establishment clause objections).

appointed Justices Souter and Thomas. These changes led to increasingly public criticism on the Court of its prior church-state jurisprudence and to very sharp splits among the Justices on new cases that came before it. It quickly became clear that Chief Justice Rehnquist and Justices Scalia and Thomas staunchly favored greater government discretion with respect to religion and that Justices O'Connor and Kennedy, although not as predictable, often decided cases from a similar perspective. Although some of these appointees did not entirely fulfil the expectations of the Presidents who appointed them,[5] they did precipitate vigorous debates about the meaning of the religion clauses and did fuel the increasing dominance on the Court of what are deemed "conservative" constructions of the law. President Clinton appointed Justices Ginsburg and Breyer to the Supreme Court in 1993 and 1994, respectively, to replace retiring Justices White and Blackmun; but while these Justices generally favor separationist constructions of the religion clauses, their appointments did not reestablish a consistent separationist majority.[6]

During this time the Supreme Court has been a willing, even eager, forum for disputes over the proper relationship between government and religion. From the fall of 1980 to the present the Court has handed down 59 decisions[7] in cases raising church-state issues — more than in any prior comparable time period. Its decisions have involved such familiar issues as religious activities in the public schools and direct public aid to sectarian schools. But the Court has also addressed such relatively unexplored matters as the constitutionality of the public display of religious symbols, legislative prayer, indirect aid to sectarian schools, government regulation of minority religious practices, the accommodation and protection of religion, and the taxation and regulation of religious entities.

As noted, the Court has been sharply split in many of these decisions. Nearly a third of the Court's church-state decisions since 1981 have been by a margin of 5-4

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[5] See, *e.g.*, Lee v. Weisman, 505 U.S. 577 (1992), in which the Court reaffirmed its prior school prayer decisions and held that the establishment clause forbids a public secondary school from including prayers by a clergyman in its commencement ceremony. The decision was 5-4, with Justices O'Connor, Kennedy, and Souter — all appointed by Presidents Reagan and Bush — joining Justices Blackmun and Stevens in the majority. Indeed, Justice Souter appears to have become one of the leading separationists on the Court, and Justice O'Connor has often been a swing vote on church-state issues.

[6] It might be noted that President Clinton's appointees have also not always fulfilled the expectations that separationist advocates might have had of them. See, *e.g.*, City of Boerne v. Flores, 521 U.S. 407 (1997), which held the Religious Freedom Restoration Act unconstitutional (Justice Ginsburg was part of the majority) and Mitchell v. Helms, 530 U.S. 793 (2000), which upheld as constitutional the loan of instructional materials and equipment to sectarian schools (Justice Breyer was part of the majority). Nonetheless, they often join with Justices Stevens and Souter in the expression of separationist views.

[7] This total obviously is selective in some respects. It includes all decisions involving the establishment or free exercise clauses, all decisions concerning religious discrimination under Title VII of the Civil Rights Act of 1964, selected decisions involving religious speech but decided under the free speech clause, and selected decisions involving the taxation of religious entities. It does not include dismissals of appeals from state court decisions or summary affirmances by an equally divided Court. *See* the Appendix for a listing of the pertinent cases and for a breakdown of how the Justices voted on each case.

(compared to less than 20 percent for all of the Court's decisions during this period).[8] But although some of the cases have been decided by the narrowest of margins, the changes in the Court's composition have had a demonstrable effect. The Court has dramatically altered its interpretation of the free exercise clause by generally replacing the strict scrutiny standard it formerly employed with the more lenient standard of formal neutrality.[9] With respect to the establishment clause, the Court's actions have not been quite so sweeping. But it has in its most recent decisions overturned several prior rulings that were separationist in nature[10]; and on issues which it had not previously addressed, a substantial portion of the Court's establishment clause decisions since 1980 can be described as accommodationist in nature. Under both clauses the Court has created a wider constitutional space for government action affecting religious institutions and religious practices.

In sum, the period since 1980 has been a time of sustained ferment on the Court about the law of church and state. That ferment has produced spirited and extensive arguments about the meaning of the religion clauses of the First Amendment and the proper relationship of government and religion as well as a plethora of specific rulings. This report provides an overview of that ferment and of the changes in the Court's church-state jurisprudence. It examines the doctrinal shifts and debates on the free exercise and establishment of religion clauses that have occurred on the Court since Ronald Reagan's election to the Presidency in 1980. It summarizes and examines as well the legal effect of each of the 59 decisions the Supreme Court has handed down concerning church and state from its October, 1980 Term, through its October, 2001 Term (*i.e.*, October, 1980, through June, 2002). Finally, it concludes with an Appendix listing all of the Court's church-state decisions during this period and the votes of each of the Justices.

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[8] These statistics are based on the annual compilations published in the November *Harvard Law Revie*w and, for the 2001 Term, in 71 *United States Law Week* 3102 (July 23, 2002). Since the 1981 Term (no statistics on 5-4 decisions were compiled for the 1980 Term), 469 of the Court's 2392 written decisions have been by 5-4 margins — 19.6 percent. In contrast, 17 of its 59 church-state decisions have been by 5-4 margins — 28.8 percent. (These figures should not be taken too literally; several of the church-state cases, and presumably of the others as well, involved more than one issue and, thus, more than one vote by the Justices. But they are indicative of the sharp division on the Court in this area of the law.)

[9] Employment Division, Oregon Department of Human Resources v. Smith, 494 U.S. 872 (1990).

[10] Agostini v. Felton, 521 U.S. 203 (1997), overturning Aguilar v. Felton, 473 U.S. 402 (1985) and parts of three other decisions, and Mitchell v. Helms, 530 U.S. 793 (2000), overturning parts of Meek v. Pittenger, 421 U.S. 349 (1975) and Wolman v. Walter, 433 U.S. 229 (1977).

## "Congress Shall Make No Law ... Prohibiting the Free Exercise [of Religion]": The Rise and Fall of the Strict Scrutiny Standard

**(a) From *Sherbert-Yoder-Thomas* to *Smith*.** Prior to the past decade most of the political furor over the Court's modern church-state jurisprudence stemmed from its decisions concerning religion in the public schools, public aid to sectarian schools, and the display of religious symbols in public places — all of which are essentially establishment clause or free speech issues. But with little public attention the Court has also wrestled with the question of how broadly to interpret the free exercise clause. From a construction of the clause in 1963 that gave special protection to religious practices, the Court by 1990 had moved to a construction that allows government substantial discretion to regulate and even prohibit religiously motivated actions.

Over a century ago the Court made clear that the free exercise clause protects religious **beliefs** absolutely from governmental interference.[11] The difficult question has been whether, and the extent to which, the clause also protects **religiously motivated conduct or action** from governmental interference.

In a number of decisions concerning the Mormon practice of polygamy at the end of the nineteenth century, the Court answered that question by ruling that the free exercise clause provided **no** protection whatsoever for conduct compelled or motivated by religious beliefs.[12] But that interpretation gradually changed, and in the two decades immediately preceding the 1980s, the Court settled on a broad view of the scope of the free exercise clause. In two seminal decisions — *Sherbert v. Verner*[13] and *Wisconsin v. Yoder*[14] — the Court held that religious interests are to be considered of **paramount** importance in the constitutional scheme and that government actions infringing those interests are to be viewed as **highly suspect**.

In *Sherbert* the Court held that a state could not, consistent with the free exercise clause, deny unemployment compensation benefits to a person who was fired because she refused to work on her Sabbath. The denial of benefits, the Court said, pressured the claimant to forego her religious practice and thus could be justified only if it served "some compelling state interest," a standard it found the

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[11] Reynolds v. United States, 98 U.S. (8 Otto) 145 (1878).

[12] See *id.*(free exercise clause held to be no defense in prosecution of Mormons for bigamy and polygamy); Murphy v. Ramsey, 114 U.S. 15 (1885) (free exercise clause held to be no barrier to a statute prohibiting bigamists and polygamists from serving on juries); Davis v. Beason, 133 U.S. 333 (1890) (free exercise clause held not to invalidate a statute barring not only bigamists and polygamists from voting but also those who taught or advocated bigamy or polygamy); and The Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890) (free exercise clause held to provide no protection against statute revoking the territorial charter of the Mormon Church and confiscating all of its property not actually used for religious worship or burial).

[13] 374 U.S. 398 (1963).

[14] 406 U.S. 205 (1972).

state to be unable to meet. Similarly, in *Yoder* the Court held the free exercise clause to mandate an exemption for the Old Order Amish from Wisconsin's compulsory education laws. Those laws required all children to attend school until the age of sixteen, but the Amish believed that attendance beyond the eighth grade would expose their children to worldly influences dangerous to their salvation. In holding for the Amish, the Court said that "there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the state to control, even under regulations of general applicability."[15]

In these two cases, in other words, the Court held that government action alleged to interfere with religious practices could be constitutional only if it were shown to serve some **compelling** public interest and to be no more restrictive of religious practices than necessary. Government action burdening religious exercise, in short, was deemed to be subject to a constitutional standard of **strict scrutiny**.

But in the decade after 1980, the Court dramatically altered this construction of the free exercise clause. Two decisions a decade apart encapsulated that process. In the first decision in 1981, *Thomas v. Review Board, Indiana Employment Security Commission*,[16] the Court strongly reaffirmed the broad and sweeping construction it had given the free exercise clause in *Sherbert* and *Yoder*. In *Thomas*, as in *Sherbert*, it held the clause to require a state to grant unemployment compensation benefits to an individual who interpreted the Bible to forbid him from accepting work on an armaments production line and who, as a consequence, quit his job. The Court did so even though Thomas's scriptural interpretation was a personal one and was not shared by the religious community to which he belonged (the Jehovah's Witnesses) and even though a denial of benefits would have only indirectly burdened his ability to practice his religion.[17] *Thomas*, thus, made crystal clear that governmental actions infringing religiously motivated conduct are to be reviewed by the courts under a standard of strict scrutiny:

> The state may justify an inroad on religious liberty by showing that it is the least restrictive means of achieving some compelling state interest. However, it is still true that "the essence of all that has been said and written on the subject is that

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[15] *Id.* at 220.

[16] 450 U.S. 707 (1981).

[17] A denial of unemployment benefits would not have precluded Thomas from practicing his religion but only made it more expensive to do so. But the Court found this indirect burden to be "substantial":

> Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial.
> Thomas, 450 U.S. at 717-18.

> only those interests of the highest order ... can overbalance claims to the free exercise of religion."[18]

The decision in *Thomas* was 8-1, with only then-Justice Rehnquist dissenting.

But in a decision in 1990, the Court resurrected its 19th century interpretation of the free exercise clause. In *Employment Division, Oregon Department of Human Resources v. Smith*,[19] the Court held the free exercise clause to provide **no protection** whatever for individuals who used peyote in the religious ceremonies of the Native American Church. Technically, the issue in the case was identical to that in *Thomas* — the eligibility for unemployment benefits of two individuals who were unemployed because they had been fired from their jobs as drug counselors after it was discovered that they were using peyote in the religious ceremonies of their church. But the determinative questions in the case were whether the sacramental use of peyote was illegal under Oregon's controlled substances law and, if so, whether the free exercise clause nonetheless required an exemption from the law for such a religious use. The Oregon Supreme Court construed the State's law criminalizing drug use and possession to apply to the sacramental use of peyote, and in *Smith* the U.S. Supreme Court held the free exercise clause **not** to compel an exemption.[20] Consequently, the Court held Oregon's denial of unemployment benefits to be constitutional.

In the context of the nation's war against drugs, that holding was not, in itself, entirely surprising; and it could have been reconciled with the Court's prior free exercise jurisprudence. What was unexpected was that on the way to this conclusion a majority of the Court largely abandoned the strict scrutiny test established in *Sherbert*, *Yoder*, and *Thomas* as the standard for free exercise cases. The Court said the compelling public interest test was simply "inapplicable" to the circumstances of this case. Moreover, Justice Scalia wrote for the majority, the free exercise clause **never** "relieve[s] an individual of the obligation to comply with a `valid and neutral law of general applicability.'"

> ...[T]he right of free exercise does not relieve an individual of the obligation to comply with a "valid and neutral law of general applicability on the ground that

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[18] Id. at 718, quoting Wisconsin v. Yoder, 406 U.S. 205, 215 (1972).

[19] 494 U.S. 872 (1990).

[20] The case had been before the Court two years previously. But at that time the Oregon Supreme Court had not ruled on whether the state's criminal drug statute applied to the sacramental use of peyote or, if it did, whether that application was compatible with the Oregon Constitution or the free exercise clause. Consequently, the Supreme Court had remanded the case back to the Oregon Supreme Court for consideration of those issues. *See* Employment Division, Department of Human Resources v. Smith, 483 U.S. 660 (1988), *vacating and remanding*, 301 Or. 209, 721 P.2d 445 (1986). In that reconsideration the Oregon Supreme Court held the state's controlled substance statute to apply to those who used peyote in religious ceremonies but held the free exercise clause to immunize such use from prosecution. *See* Smith v. Employment Division, Department of Human Resources, 307 Or. 68, 763 P.2d 146 (1988).

> the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."[21]

To employ the compelling interest test for free exercise purposes, Justice Scalia said, would "court ... anarchy," permit every individual "to become a law unto himself," and create "a private right to ignore generally applicable laws."[22] Religious minorities, he said, need to seek protection for their practices in the political process, not the courts. The fact that "the political process will place at a relative disadvantage those religious practices that are not widely engaged in," he stated, is simply an "unavoidable consequence of democratic government."[23] The margin was 5-4, with the majority formed by the lone dissenter in *Thomas* (Chief Justice Rehnquist), two new appointees to the Court (Justices Scalia and Kennedy), and two who had been in the majority in *Thomas* (Justices White and Stevens).[24]

The Court did not abandon strict scrutiny entirely. Justice Scalia's articulation of the new standard of formal neutrality retained strict scrutiny for cases involving government programs allowing individualized assessment of claims for exemption, such as state unemployment compensation programs — the area in which the strict scrutiny test was first applied in the free exercise area. In addition, his opinion said strict scrutiny was still appropriate for governmental actions that discriminate against religion or deliberately impose special burdens on religion. Finally, Justice Scalia suggested that "hybrid" claims, *i.e.*, those involving a free exercise claim coupled with another constitutional interest such as freedom of speech or parental rights, might also be constitutionally entitled to some degree of exemption from neutral, generally applicable laws. But his opinion left it decidedly unclear whether strict scrutiny would apply to such cases, and in any event clearly abandoned strict scrutiny for all non-hybrid cases other than those involving religious claims for exemption in programs allowing individualized assessment and deliberate governmental targeting of religion.

The four dissenters sharply criticized the majority's constriction of the strict scrutiny test. Justice O'Connor asserted that Justice Scalia's view "dramatically departs from well-settled First Amendment jurisprudence ..., is incompatible with our Nation's fundamental commitment to individual religious liberty ..., and relegates a serious First Amendment value to the barest level of minimum scrutiny ...." Religious liberty, she said, is a preferred value, and the free exercise clause should be interpreted to bar "encroachment upon this liberty, whether direct or indirect, unless required by clear and compelling governmental interests `of the highest order.'" Justice Blackmun, joined by Justices Brennan and Marshall, charged that

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[21] Employment Division v. Smith, *supra* n. 19, at 879, quoting United States v. Lee, 455 U.S. 252, 263 (1982) (Stevens, J., concurring in the judgment).

[22] *Id.* at 884-86.

[23] *Id.* at 890.

[24] Although the margin was 5-4 on the disavowal of the strict scrutiny test, the Court divided 6-3 on the merits. Justice O'Connor joined Chief Justice Rehnquist and Justices Scalia, Kennedy, White, and Stevens in ruling the two Indians ineligible for unemployment benefits. But she did so on the grounds Oregon had a compelling interest in regulating the use of drugs, and she dissented vigorously from their disavowal of the strict scrutiny test.

the majority's decision "effectuates a wholesale overturning of settled law concerning the Religion Clauses of our Constitution." It is a "settled and inviolate principle of this Court's First Amendment jurisprudence," he said, that "a state statute that burdens the free exercise of religion ... may stand only if the law in general, and the State's refusal to allow a religious exemption in particular, are justified by a compelling interest that cannot be served by less restrictive means."

In short, in *Smith* the Court stepped back from the separationist standard it had articulated in *Sherbert, Yoder,* and *Thomas* and re-interpreted the free exercise clause to mean that, in most circumstances, an individual possesses no constitutional right not to comply "with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)."[25]

**(b) Harbingers of *Smith.*** This demise of the strict scrutiny test for most free exercise cases and the possible subordination of religiously motivated conduct to the will of political majorities, although unexpected in *Smith*, had in fact been foreshadowed throughout the decade. In eight free exercise decisions between *Thomas* and *Smith*, the Court had demonstrated increasing discontent with the strict scrutiny test in free exercise cases. Four of those decisions nominally employed the test, but the Court held the government to have met its requirements. In the four other decisions the Court simply held strict scrutiny to be inapplicable in particular contexts.

In *United States v. Lee*,[26] decided within a year of *Thomas*, the Court unanimously held the free exercise clause **not** to exempt an Amish employer from paying the employer's portion of Social Security taxes. The Court noted that the religious beliefs of the Amish specifically oppose support for a public system of social insurance. But it held an Amish employer not to be entitled to an exemption because, it said, "mandatory participation is indispensable to the fiscal vitality of the social security system."[27]

The following Term in *Bob Jones University v. United States*[28] the Court upheld IRS' imposition of a racial nondiscrimination condition on the tax exemption accorded a private college notwithstanding the college's claim that its discriminatory practices were mandated by religious belief. On the free exercise claim the Court applied strict scrutiny but simply asserted in conclusory fashion that "the Government has a fundamental, overriding interest in eradicating racial discrimination in education" and that its interest "substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs." The Court's decision on the free exercise issue was again unanimous.[29]

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[25] Employment Division v. Smith, *supra* n. 19, at 878.

[26] 455 U.S. 252 (1981).

[27] *Id*. at 258.

[28] 461 U.S. 574 (1983).

[29] *Id*. at 604. Justice Rehnquist dissented from the Court's holding that the IRS could (continued...)

Subsequently, in 1989 the Court in *Hernandez v. Commissioner of Internal Revenue*[30] upheld IRS' denial of a tax deduction to members of the Church of Scientology for payments made for "auditing" and "training" services. The members claimed that these services were central to the practice of their faith and that the payments made for them were "fixed donations" entitled to be treated as charitable contributions under the Internal Revenue Code. But the Court denied the claim, 5-2.[31] The Court said that it doubted that the disallowance of the deduction placed any "substantial burden" on the Scientologists' practice of their religion but that even if it did, the disallowance was justified by the compelling governmental interest in maintaining a uniform tax system, "free of `myriad exceptions flowing from a wide variety of religious beliefs.'"[32]

Finally, in *Jimmy Swaggart Ministries v. Board of Equalization*[33] in 1990, the Court unanimously upheld the imposition of a general sales and use tax on a religious organization's sale of religious materials. Nominally using the strict scrutiny test, the Court found the imposition of the taxes to violate no religious precept of the religious organization and to impose no burden on religious organizations different from that imposed on other sellers. Although the taxes reduced the amount of money the religious organization had to spend on its religious activities, the Court held that burden to be "not constitutionally significant."

These four decisions preserved the form, if not the substance, of strict scrutiny. Four other decisions eschewed even the form. In *Goldman v. Weinberger*[34] the Court upheld a military dress code against the free exercise claim of a Jewish psychologist who felt religiously obligated to wear a yarmulke while on duty. An Air Force regulation mandating "uniform dress" and barring the wearing of headgear while indoors had been construed to bar yarmulkes. The Court held the *Sherbert-Yoder-Thomas* test to be inapplicable in the military context and, as a consequence, found the free exercise clause to require no exception for religious apparel. "The military," the Court said, "is ... a specialized society separate from civilian society" and thus "our review of military regulations challenged on First Amendment grounds is far more deferential than constitutional review of similar laws or regulations designed for civilian society." "Courts," it asserted, "must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest."[35] So long as the military regulations in question are

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[29] (...continued)
impose a racial nondiscrimination condition on the grant of tax-exempt status to private schools; but he agreed that if such a condition were imposed, it would not violate the free exercise clause. See *id.* at 622, n. 3 (Rehnquist, J., dissenting).

[30] 490 U.S. 680 (1989).

[31] Neither Justice Brennan nor Justice Kennedy participated.

[32] *Id*. at 687, quoting United States v. Lee, *supra*, at 260.

[33] 493 U.S. 378 (1990).

[34] 475 U.S. 503 (1986).

[35] *Id*. at 506-07. The majority was composed of Chief Justice Burger and Justices (continued...)

reasonable and evenhanded, it held, the free exercise clause is not violated. The decision was by a 5-4 margin.[36]

In *O'Lone v. Estate of Shabazz*[37] the Court held strict scrutiny also not to be applicable in the prison context. The case involved a free exercise challenge by several Muslim prisoners against New Jersey prison regulations that had the effect of preventing their participation in Jumu'ah, a weekly worship service commanded by the Koran. In upholding the regulations, again by a 5-4 margin, the Court asserted that "we take this opportunity to reaffirm our refusal, even where claims are made under the First Amendment, to `substitute our judgment on ... difficult and sensitive matters of institutional administration' (citation omitted) for the determinations of those charged with the formidable task of running a prison."[38] "To ensure that courts afford appropriate deference to prison officials," it stated, prison regulations need be examined only to determine whether they are "reasonably related to legitimate penological interests" such as security and rehabilitation.[39] Finding the regulations in question to be related to both those interests, the Court denied the prisoners' free exercise claims.

In *Bowen v. Roy*[40] the Court held strict scrutiny to be inappropriate with respect to the government's internal administrative practices that were alleged to burden an individual's religious beliefs and practices. That case involved a challenge by an Abenaki Indian family to the government's requirements that applicants for benefits under the Aid to Families with Dependent Children program furnish state welfare agencies the Social Security numbers of all members of their household and that the agencies use the numbers in administering their AFDC program.[41] The Indians' interpretation of their religion deemed personal numerical identifiers a "great evil" to be avoided and perceived their use as preventing an individual from exercising control over his life and robbing him of his spirit. The Court, without a majority opinion, remanded the issue concerning the constitutionality of requiring the Indians to provide their Social Security numbers as a condition of receiving assistance back to the lower court to see if it had become moot. But on the issue of the

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[35] (...continued)
Rehnquist, White, Powell, and Stevens.

[36] Congress, it might be noted, responded to this decision by adopting a statute permitting military personnel to wear items of religious apparel while on duty so long as the items are "neat and conservative" and do not "interfere with the performance of the member's military duties." See 10 U.S.C. 774 (1988).

[37] 482 U.S. 342 (1987).

[38] *Id.* at 353, quoting Block v. Rutherford, 468 U.S. 576, 588 (1984).

[39] *Id.* at 349.

[40] 476 U.S. 693 (1986).

[41] The case was brought by an Abenaki Indian who claimed on behalf of his two-year old daughter that a Social Security number would undermine the uniqueness of her person and spirit and prevent her from asserting the control over her life necessary to develop spiritual power. That damage, he claimed, would flow both from obtaining a Social Security number for her and from the use of that number by the state welfare agency.

constitutionality of the government using Social Security numbers already in its possession to administer its programs, the Court, by an 8-1 margin, found no free exercise violation.[42] The Court asserted that the claim amounted to an effort "to dictate the conduct of the Government's internal procedures" and a "demand that the Government join in the (Indians') chosen religious practices ...."[43] The claimant's ability to "believe, express, and exercise his religion," the Court held, was simply not impaired by the government's administrative use of a Social Security number.

Finally, the Court held strict scrutiny analysis to be inapplicable with respect to the government's land use decisions in *Lyng v. Northwest Indian Cemetery Protective Association*.[44] The proposed building of a road for logging purposes in a region of a National Forest in California had been challenged on free exercise grounds by several Indian tribes that deemed the region to be sacred and used it for religious ceremonies. But the Court held that "even if we assume that ... the ... road will virtually destroy the Indians' ability to practice their religion, the Constitution simply does not provide a principle that could justify upholding (their) legal claims."[45] The Court said the critical question was whether the government's action directly coerced individuals into violating their religious beliefs or imposed unique disabilities on religious activities, and it held that the road-building plan did not. The road, it found, would only have "incidental effects" that might "make it more difficult to practice certain religions"[46]; and thus, the Court said, the government did not need to demonstrate a compelling justification for the plan. "Whatever may be the exact line between unconstitutional prohibitions on the free exercise of religion and the legitimate conduct by government of its own affairs," the Court stated, "the location of the line cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development."[47] Again, the margin of decision was 5-4.

Between *Thomas* and *Smith* the Court did employ strict scrutiny to invalidate government action on two occasions, both involving state denials of unemployment compensation to individuals who were unemployed for religious reasons. In *Hobbie v. Unemployment Appeals Commission of Florida*[48] the Court held unconstitutional Florida's denial of unemployment benefits to a person who had been fired from her retail sales job because she had joined the Seventh Day Adventist Church and was no longer available for work on her Sabbath, which ran from sundown Friday to sundown Saturday. In an 8-1 decision, the Court held this case to be controlled by *Sherbert* and *Thomas* and thus subject to strict scrutiny. Finding no significant differences between those cases and this one, it reiterated that "the State may not

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[42] Only Justice White dissented from this portion of the Court's ruling, saying without further explanation that Thomas and Sherbert "control this case." See Bowen v. Roy, 476 U.S. at 733 (White, J., dissenting).

[43] *Id.* at 700.

[44] 485 U.S. 439 (1988).

[45] *Id.* at 451-52.

[46] *Id.* at 450.

[47] *Id.* at 451.

[48] 480 U.S. 136 (1987).

force an employee `to choose between following the precepts of her religion and forfeiting benefits, ... and abandoning one of the precepts of her religion in order to accept work.'"[49]

Similarly, in *Frazee v. Illinois Department of Employment Security*[50] the Court unanimously held unconstitutional Illinois' denial of unemployment benefits to an individual who refused a job that would have involved working on Sunday, his Sabbath. The allegedly unique fact of the case was that Frazee belonged to no organized religious sect or church and his refusal to work, thus, was based on his personal beliefs as a Christian and not on the tenets or teachings of any established religious body. But the Court found this fact not to distinguish the case from *Sherbert*, *Thomas*, and *Hobbie*. In every one of those cases, it said, the claimant was "forced to choose between fidelity to religious belief and ... employment."[51] Finding no compelling justification for Illinois' denial of benefits, the Court held it unconstitutional.

In sum, it is clear that since 1980 the Court has substantially narrowed the scope of the free exercise clause. At the beginning of the decade *Thomas*, building on the foundation of *Sherbert* and *Yoder*, seemed to command that the government accommodate minority religious practices in all but the most compelling countervailing circumstances. But after *Goldman*, *Shabazz*, *Roy*, *Lyng*, and *Smith*, that can no longer be said to be the case. Those decisions reassessed the balance between religious interests and governmental interests and resurrected the standard of review for free exercise cases that the Court frequently used prior to its 1963 decision in *Sherbert*. That standard is essentially one of **formal neutrality**. Except in the narrow category of eligibility for governmental benefits, the ill-defined area of "hybrid" claims, and overt government discrimination, the free exercise clause means only that government must regulate religious practices in a neutral, evenhanded manner. The clause no longer compels the government to exempt particular religious practices from the prohibitions and requirements of its statutes and regulations or to accommodate religious needs in its actions. By the beginning of the 1990s, then-Justice Rehnquist's dissent in *Thomas* had become the Court's standard for most free exercise cases:

> Where ... a State has enacted a general statute, the purpose and effect of which is to advance the State's secular goals, the Free Exercise Clause does not ... require the State to conform that statute to the dictates of religious conscience of any group.[52]

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[49] *Id.* at 146, quoting Sherbert v. Verner, *supra*, at 404.

[50] 489 U.S. 829 (1989).

[51] *Id.* at 1516, quoting Hobbie, *supra*, at 144.

[52] Thomas v. Review Board, Indiana Employment Security Division, 450 U.S. at 723 (Rehnquist, J., dissenting).

### (c) The Aftermath of *Smith.*

Since the *Smith* decision in 1990, the Court has rendered only one other free exercise decision, albeit a significant one. Primary attention has focused on the political reaction to *Smith* and the resulting struggle between Congress and the Court about which branch of government has primary responsibility for determining the scope to be afforded constitutional rights such as the free exercise of religion. That struggle ultimately resulted in a substantial diminution in Congress' ability to legislate protections for constitutional rights beyond what the Court has allowed. The following sections summarize these developments.

***(1) Lukumi Babalu Aye.*** In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*[53] the Court employed *Smith's* framework of analysis but still found strict scrutiny to be applicable. As a result, the Court held unconstitutional several city ordinances prohibiting the ritual sacrifice of animals.

The case arose when the Church of the Lukumi Babalu Aye, Inc., sought to bring the practices of the Santeria religion into the open by establishing a church and cultural center in Hialeah, Florida. The Santeria faith has no centralized authority or written tenets but centers on the performance of certain rituals and ceremonies for such life events as birth, marriage, sickness, and death. These rituals often involve the sacrifice of goats, fowl, sheep, and/or turtles by means of cutting their carotid arteries and previously had been performed in private homes with only limited public awareness. When the proposal to establish a Santeria church and cultural center in Hialeah became public, these practices aroused vehement public antipathy. The City Council responded by adopting a series of resolutions and ordinances condemning Santeria's practices and making various aspects of the Santeria sacrifice ritual illegal.

The Supreme Court held Hialeah's ordinances to violate the free exercise clause, 9-0. The Court noted that under *Smith* "a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."[54] But it found Hialeah's ordinances to be neither neutral nor of general applicability, because they prohibited the killing of animals only for religious reasons. Killing for secular reasons — hunting, pest control, euthanasia, *etc*. — was not forbidden. As a consequence, Justice Kennedy concluded for the Court, "the ordinances had as their object the suppression of religion,"[55] and strict scrutiny of the ordinances was still appropriate under the *Smith* framework of analysis. Finding that Hialeah failed to show either that the ordinances served any compelling governmental interests or that they were drawn in narrow terms to accomplish their objectives, Justice Kennedy found for the Court that the ordinances violated the free exercise clause:

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[53] 508 U.S. 520 (1993).

[54] *Id.* at 2226.

[55] *Id.* at 2231.

> Legislators may not devise mechanisms, overt or disguised, designed to persecute or oppress a religion or its practice. The laws here in question were enacted contrary to these constitutional principles, and they are void.[56]

Thus, *Babalu Aye* made clear that, notwithstanding the Court's relaxation of the strictures of the free exercise clause in *Smith*, government still cannot single out particular religious practices for special burdens not imposed on analogous secular conduct. The free exercise clause, as construed in *Smith*, may not mandate any exemptions for religious practices from burdensome or even prohibitory laws; but it does mandate that such laws be religiously neutral and generally applicable.

***(2) RFRA and City of Boerne.*** The apparent abandonment of strict scrutiny in *Smith* aroused widespread concern in the religious community and elsewhere and led Congress, after three years of consideration, to enact the "Religious Freedom Restoration Act" (RFRA).[57] Purportedly leaving *Smith* intact as the constitutional standard for free exercise cases, RFRA mandated the use of the strict scrutiny test as a **statutory** standard governing the interaction of government and religion. As enacted, RFRA provided that a statute or regulation of general applicability could lawfully burden a person's exercise of religion only if it were shown to be "essential to further a compelling governmental interest and (to be) the least restrictive means of furthering that compelling governmental interest." RFRA made the standard applicable to governmental action at every level of government — federal, state, and local — and allowed aggrieved persons to bring suit if they believed their free exercise of religion had been restricted by government in violation of the statutory strict scrutiny standard.

However, in 1997 the Supreme Court held RFRA to be unconstitutional as applied to the states and localities. In *City of Boerne, Texas v. Flores*[58] the Court held, 6-3, that Congress lacks the constitutional power to impose such a sweeping requirement on the states. In enacting RFRA Congress had relied, in part, on its power under § 5 of the Fourteenth Amendment to enact "appropriate legislation" to enforce the substantive protections of the Amendment, including the religious liberty protections incorporated in the due process clause. But the Court said that RFRA exceeded Congress' power under §5. In imposing a strict scrutiny standard for free exercise claims, it stated, Congress altered the meaning of the free exercise clause as determined by the Court, and "[l]egislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause."

Moreover, the Court asserted, RFRA constituted "a considerable ... intrusion into the States' traditional prerogatives and general authority to regulate for the health and welfare of their citizens." In enacting RFRA, it noted, Congress had failed to develop a legislative record that showed extensive denials of religious liberty. Yet RFRA was so broad, the Court said, that it intruded "at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter." As a consequence, the Court concluded, RFRA

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[56] *Id.* at 2234.

[57] P.L. 103-41, 103d Cong., 1st Sess. (Nov. 16, 1993); 42 U.S.C.A. 2000bb *et seq.*

[58] 521 U.S. 407 (1997).

"reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved ... and contradicts vital principles necessary to maintain separation of powers and the federal balance."

In short, the Court in *Boerne* affirmed its own primacy in determining the scope to be afforded the rights protected in the Constitution. Congressional efforts to protect those rights, it said, cannot – at least in the absence of a strong record of abuse needing to be rectified – broaden that right beyond what the Court has delineated.

***(3) Administration and Congressional Response to Boerne.*** In response to the *Boerne* decision, the Clinton Administration adopted a policy affirming that RFRA remains valid for the federal government. For that application, it said, Congress did not rely on § 5 of the Fourteenth Amendment but its legislative powers under Article I of the Constitution. The current Bush Administration has continued to maintain that policy.

Also in response, Congress, after considerable debate, enacted the "Religious Land Use and Institutionalized Persons Act of 2000" (RLUIPA).[59] That statute is narrower in scope and relies on different Congressional powers than RFRA. It imposes a statutory strict scrutiny test on state and local zoning and landmarking laws that "impose a substantial burden on an individual's or institution's exercise of religion" and on state and local actions that impair the religious practices of individuals in public institutions such as prisons, mental hospitals, and nursing homes. But instead of using § 5 of the Fourteenth Amendment, RLUIPA is based largely on Congress' interstate commerce and spending powers under Article I, § 8, of the Constitution.

Both the Administration's contentions that RFRA remains applicable to the federal government and RLUIPA are being challenged in the courts. No case has yet been accepted for review by the Supreme Court.

**(d) Conclusion.** Both *Babalu Aye* and *City of Boerne* illustrate that the ferment on and off the Court over the free exercise clause was not ended by *Smith*. In *Babalu Aye* Justices Blackmun, O'Connor, and Souter, although joining in the Court's judgment in the case, all criticized its use of the *Smith* rule. Justice Souter argued that the *Smith* rule reflects a particularly narrow conception of neutrality. "A law that is religion neutral on its face or in its purpose," he said, "may lack neutrality in its effect by forbidding something that religion requires or requiring something that religion forbids." Thus, he argued, the "formal" neutrality reflected in the *Smith* rule, which only bars laws which intentionally discriminate against religion, needs to be supplemented with "substantive" neutrality, which would "generally require government to accommodate religious differences by exempting religious practices from formally neutral laws." He said as well that *Smith* is "in tension with" the Court's prior free exercise decisions and with the historical evidence of the original intent of the free exercise clause. In a proper case, he said, the Court should "re-examine the rule *Smith* declared." Justices Blackmun and O'Connor reiterated the

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[59] P.L. 106-204 (Sept. 22, 2000); 114 Stat. 804; 42 U.S.C.A. 2000cc *et seq.*

view they articulated in their opinions in *Smith* that "*Smith* was wrongly decided." Similarly, in *City of Boerne* Justices O'Connor and Breyer (Blackmun's replacement) argued that the case should have been used as a vehicle for overturning *Smith*, and Justice Souter contended that there should at least have been briefing and argument on the merits of *Smith* before the Court addressed the question of Congress' authority under § 5 of the Fourteenth Amendment.

Nonetheless, the central fact remains: Since 1980 the Supreme Court has substantially restricted the constitutional protection afforded religious practices by the free exercise clause. As a matter of constitutional law, *Smith* reigns. Intentional discrimination against religious practices violates the free exercise clause, but not inadvertent discrimination that results from the application of statutes and regulations of general applicability. Moreover, Congress' power to alter the *Smith* standard by legislation has been substantially limited by the decision in *Boerne*.

## "Congress Shall Make No Law Respecting an Establishment of Religion...": *Lemon* and the Lessons of History

The debates among the Justices about the free exercise clause in the period since 1980 were, at least until *Smith*, relatively sedate. But that has not been the case with the establishment clause. On the construction of that clause the Justices have disagreed vigorously and, at times, testily. The Court has not yet altered its interpretation of the establishment clause as fully as it has the construction of the free exercise clause, but the changing composition of the Court has still had a substantial impact. Since 1980 the Court has rendered a number of decisions that affirm government's discretion to take actions protecting or benefitting religion; it has substantially modified the *Lemon* test it formulated in 1971 to guide its consideration of the constitutionality of government actions under the establishment clause; and in several of its most recent rulings it overturned or narrowed a number of its prior establishment clause decisions.

The arguments on the Court have ranged over virtually every aspect of its establishment clause jurisprudence. In part the criticism of its past decisions has been wholesale in nature. Various Justices have termed the Court's establishment clause jurisprudence "embarrassing,"[60] "unprincipled,"[61] "in hopeless disarray,"[62] and as manifesting an "unjustified hostility toward religion."[63] But four aspects of the separationist interpretation of the establishment clause have been particular focal points for criticism and debate: (1) the Court's repeated use of Jefferson's phrase "wall of separation between church and state" as a metaphor for the meaning of the establishment clause; (2) its reliance on European and colonial history in interpreting the clause; (3) its development and application of what is known as the tripartite, or

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[60] Edwards v. Aguillard, 482 U.S. 578, 639 (1987) (Scalia, J., dissenting).

[61] Wallace v. Jaffree, 472 U.S. 38, 113 (1985) (Rehnquist, J., dissenting).

[62] Rosenberger v. The Rector and Visitors of the University of Virginia, *supra* (Thomas, J., concurring).

[63] County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter, 492 U.S. 573, 655 (1989) (Kennedy, J., dissenting).

*Lemon*, test; and (4) its understanding of the original intent of the first Congress in formulating the establishment clause. All of these aspects have been interwoven in the Court's establishment clause jurisprudence, and all are critical to any reinterpretation. The following subsections summarize the contentions made by the Justices on these issues and the effect on its establishment clause jurisprudence.

**(a) The Separationist Understanding.** In the seminal decisions of the Court's modern establishment clause jurisprudence, the Court rooted its interpretation of the clause in the history of the American colonies and of the colonists' European forebears. The First Amendment "is at once," the Court said in 1947, "the refined product and the terse summation of that history."[64] The Court cited in particular the "turmoil, civil strife, and persecutions" that had been endemic in Europe in the centuries preceding and contemporaneous with the colonization of America as various religious sects allied themselves with government to establish their supremacy[65]:

> With the power of government supporting them, at various times and places, Catholics had persecuted Protestants, Protestants had persecuted Catholics, Protestant sects had persecuted other Protestant sects, Catholics of one shade of belief had persecuted Catholics of another shade of belief, and all of these had from time to time persecuted Jews. In efforts to force loyalty to whatever religious group happened to be on top and in league with the government of a particular time and place, men and women had been fined, cast in jail, cruelly tortured, and killed.[66]

Many of the early settlers came to America, the Court said, to "escape the bondage which compelled them to support and attend government-favored churches."[67] Although they often engaged in the same practices themselves, the Court observed that over time the colonists gradually developed a "feeling of abhorrence" about such practices and by the time of the Revolution had begun to disestablish the unions of church and state that existed.

In these early decisions the Court stressed as "particularly relevant" to the meaning of the First Amendment the experience of Virginia, which, after a momentous struggle, disestablished the Anglican Church in 1785 and adopted Jefferson's "Bill for Religious Liberty." Virginia, it said, "provided a great stimulus and able leadership" for the view that "individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group."[68] Virginia's experience, the Court said, "best reflect[ed] the

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[64] Everson v. Board of Education, 330 U.S. 1, 33 (1947) (Rutledge, J., dissenting).

[65] *Id.* at 8 (opinion of the Court)..

[66] *Id.*, at 9.

[67] *Id.*

[68] *Id.* at 11.

long and intensive struggle for religious freedom in America."[69] Indeed, so instructive was Virginia's example, the Court declared, that "the provisions of the First Amendment ... had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute."[70]

As part of this emphasis, the Court also stressed the importance of the views of James Madison and Thomas Jefferson to the interpretation of the First Amendment. Both had played leading roles in disestablishing the Anglican church in Virginia: Madison was the author of the "Memorial and Remonstrance Against Religious Assessments" in 1784 that articulated numerous arguments against taxation for the benefit of religious institutions; and Jefferson was the author of the "Virginia Bill for Religious Liberty" that ultimately was enacted in 1785.[71] Madison also was a primary architect of the Bill of Rights in the First Congress. Indeed, so central was his role in the latter process, one Justice said, that the establishment clause "is the compact and exact summation of its author's views formed during his long struggle for religious freedom"[72]:

> All the great instruments of the Virginia struggle for religious liberty thus became warp and woof of our constitutional tradition, not simply by the course of history, but by the common unifying force of Madison's life, thought and sponsorship. He epitomized the whole of that tradition in the Amendment's compact, but nonetheless comprehensive, phrasing.[73]

This history and the debates in the First Congress on what became the First Amendment, the Court said, showed that the establishment clause was intended to do more than prohibit direct government compulsion or coercion in matters of religion. It identified two broad purposes underlying the clause:

> Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion. The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs. That same history showed that many people had lost their respect for any religion that had relied upon the support of government to spread its faith. The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its "unhallowed perversion" by a civil magistrate.

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[69] McGowan v. Maryland, 366 U.S. 420, 437 (1961).

[70] *Id.* at 13.

[71] *Id.*; Engel v. Vitale, 370 U.S. 421, 427-28 (1962). See also McGowan v. Maryland, 366 U.S. 420, 437-440 (1961).

[72] Everson v. Board of Education, 330 U.S. at 31 (Rutledge, J., dissenting).

[73] *Id.* at 39.

> Another purpose of the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand .... It was in large part to get completely away from this sort of systematic religious persecution that the Founders brought into being our Nation, our Constitution, and our Bill of Rights with its prohibition against any governmental establishment of religion.[74]

Thus, the Court concluded that the establishment clause, "in its final form, did not simply bar a congressional enactment *establishing a church*; it forbade all laws *respecting an establishment of religion* .... [T]he First and Fourteenth Amendment afford protection against religious establishment far more extensive than merely to forbid a national or state church."[75] In the classic statement of the separationist understanding, Justice Black stated for the Court:

> 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 .... 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."[76]

Initially, every member of the Court joined in this separationist reading of the historical underpinnings and consequent broad scope of the establishment clause.[77]

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[74] Engel v. Vitale, 370 U.S. at 431-33.

[75] McGowan v. Maryland, *supra*, at 441-42.

[76] Everson v. Board of Education, 330 U.S. at 15-16. Jefferson had created his "wall of separation" metaphor in 1802. *See* n. 1.

[77] Dissenting from the result but not the historical reasoning of the majority in Everson, 330 U.S. 1 (1947), Justice Rutledge asserted for himself and three other dissenters the following understanding of the establishment clause:

> Not simply an established church, but any law respecting an establishment of religion is forbidden. ...The Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. 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.
> 330 U.S. at 31-32 (Rutledge, J., dissenting).

The tripartite *Lemon* test developed more slowly. Not until *Abington School District v. Schempp*[78] in 1963 did the Court first distill a test to help it ferret out establishment clause violations. In that case it stated that to pass muster under the clause governmental action had to have "a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[79] Subsequently, in *Walz v. Tax Commission of New York*[80] in 1970 the Court articulated a requirement that government action not precipitate excessive entanglement between government and religion. Finally, in *Lemon v. Kurtzman*[81] in 1971 the tripartite test gained its full articulation:

> 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 entanglement with religion."

The Court further held that a statute or governmental action had to satisfy every prong of the tripartite test in order to pass constitutional muster. Although often stating that the test was merely a "guideline" or "signpost," the Court used the test in every establishment clause case but one between its inception and 1991[82]; and after

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[78] 374 U.S. 203 (1963).

[79] *Id.* at 222.

[80] 397 U.S. 664 (1970).

[81] 403 U.S. 602, 612-13 (1971).

[82] See Marsh v. Chambers, 463 U.S. 783 (1983) (upholding the constitutionality of legislative prayers). Larson v. Valente, 456 U.S. 228 (1983) is also sometimes cited as a case that did not use the *Lemon* standard, because the Court primarily relied on a strict scrutiny test in striking down a charitable solicitations statute as religiously discriminatory. But that contention is not wholly correct, because the Court also used the entanglement prong of the tripartite test. In church-state cases subsequent to 1991 the Court has used (1) a coercion test (*see* Lee v. Weisman, 505 U.S. 577 (1992) (holding the inclusion of prayers by a clergyman in a public school commencement ceremony to be unconstitutional)) and Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000) (holding student-led prayers prior to school football games unconstitutional)) ; (2) a neutrality test (*see* Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993) (upholding the provision of a sign language interpreter to a deaf student attending a Catholic high school); Board of Education of the Kiryas Joel Village School District v. Grumet, 512 U.S. 687 (1994) (striking down a state statute creating a special education school district for a single religious group); Rosenberger v. The Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995) (upholding the funding of a student religious publication out of a student activities fund); and Good News Club v. Milford Central School, 533 U.S. 98 (2001) (upholding the right of a religious club to meet on school property after school hours)); or (3) a modified version of the *Lemon* test (*see* Capitol Square Review and Advisory Board v. Pinette, 515 U.S. 753 (1995) (using an endorsement version of the *Lemon* test in upholding the private display of a cross at Christmastime in a public square in front of a State Capitol building); Agostini v. Felton, 521 U.S. 203 (1997) (submerging the entanglement prong of the *Lemon* test into the primary effect prong and construing primary effect to mean using religion as a criterion for benefits or government engaging in religious indoctrination in upholding as constitutional the provision by public school teachers of remedial educational services to sectarian schoolchildren on the premises of the sectarian schools)); and Mitchell v. Helms, 530 U.S.

(continued...)

a lapse of several years, the Court has used it anew in several of its most recent establishment clause decisions, albeit in modified form.[83]

**(b) The Critique.** Notwithstanding the initial unanimity of the Court's historical analysis and its almost unfailing recourse to the tripartite test, every aspect of the separationist understanding of the establishment clause has come under persistent criticism. Indeed, the Court's interpretation of history and use of Jefferson's phrase "wall of separation" as a metaphor for the establishment clause was criticized by Justice Reed as early as 1948,[84] and Justice White raised questions about the excessive entanglement prong of the tripartite test in the very case in which the test was first fully articulated.[85] But during the 1980s criticism of the history relied upon by the Court, the "wall of separation" metaphor, the tripartite test, and the Court's understanding of the original intent of the establishment clause crescendoed. During this time Chief Justices Burger and Rehnquist and Justices White, Kennedy, and Thomas all attacked the historical justifications for a separationist construction of the establishment clause. The tripartite test, in turn, was attacked in part or in whole by Chief Justice Rehnquist and Justices White, O'Connor, Scalia, Kennedy, and Thomas.

The critiques have been voiced in both majority decisions and concurring and dissenting opinions. In 1983 in *Marsh v. Chambers*,[86] for instance, a majority of the Court emphasized other aspects of American history in upholding as constitutional the practice of legislatures opening their daily sessions with prayer by a paid chaplain, 6-3. Chief Justice Burger, writing for the Court, ignored the history of religious conflict in Europe and the colonies and stressed instead the ubiquity of the practice of legislative prayer from colonial times forward. He also cited as critically important the fact that the First Congress authorized the appointment of paid chaplains for itself within three days of agreeing on the language of the Bill of Rights and that James Madison served on the House committee to decide how chaplains should be chosen and voted for the bill authorizing the payment of the chaplains. Eschewing any reference to, or use of, the tripartite *Lemon* test in deciding the case, the Chief Justice concluded that legislative prayer "has become part of the fabric of our society ... [and] is simply a tolerable acknowledgment of beliefs widely held among the people of this country."[87]

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[82] (...continued)
793 (2000) (the Agostini modification used in upholding program providing instructional materials and equipment to sectarian schools).

[83] Agostini v. Felton, 521 U.S. 203 (1997); Mitchell v. Helms, 530 U.S. 793 (2000); and Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000).

[84] McCollum v. Board of Education, 333 U.S. 203, 244-48 (1948) (Reed, J., dissenting). Of the "wall of separation" metaphor, Justice Reed said that "[a] rule of law should not be drawn from a figure of speech." *Id*. at 247.

[85] Lemon v. Kurtzman, 403 U.S. at 661-671 (White, J., dissenting).

[86] 463 U.S. 783 (1983).

[87] Marsh v. Chambers, 463 U.S. at 792.

One year later in *Lynch v. Donnelly*[88] a narrower majority of the Court expanded on that accommodationist emphasis in upholding a city's inclusion of a creche in a Christmas display that included such other items as a Santa Claus house, reindeer, Santa's sleigh, colored lights, and a banner proclaiming "Season's Greetings." Chief Justice Burger, again writing for the Court, this time used the tripartite test but stressed that the Court was not "confined to any single test or criterion in this sensitive area."[89] More significantly, the Chief Justice emphasized what he called "an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789."[90] Official invocations of Divine guidance, proclamations of days of thanksgiving and prayer, legislative chaplains, the national motto "In God We Trust" on the nation's currency, the phrase "one nation under God" in the Pledge of Allegiance, the designation of Thanksgiving and Christmas as national holidays, the invocation "God save the United States and this Honorable Court" at the opening of judicial sessions, the display of religious paintings in public art galleries — all illustrated the principle, the Chief Justice asserted, that the Constitution does not require "complete separation of church and state ... [but] affirmatively mandates accommodation ... of all religions, and forbids hostility toward any."[91] The metaphor "wall of separation," the Chief Justice stated, fails to give "a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state."[92] The decision was 5-4.

Dissenting in *Wallace v. Jaffree*[93] in 1985, Justice Rehnquist — soon to be elevated to Chief Justice — authored the most searing and comprehensive critique of the Court's separationist construction of the establishment clause. He condemned the Court's use of Jefferson's phrase "wall of separation" as a metaphor for the establishment clause as "misleading," "useless," a "mischievous diversion," and a "metaphor based on bad history."[94] Jefferson, Justice Rehnquist noted, did not even play a direct role in the adoption of the Bill of Rights, as he was in France at the time as the American ambassador. Madison, he agreed, was "undoubtedly the most important architect ... of the Bill of Rights"; but the records of the First Congress, Justice Rehnquist claimed, demonstrated that Madison's role in the drafting and adoption of the language of the religion clauses was not that of "an advocate of incorporating the Virginia Statute of Religious Liberty into the United States Constitution" but of "an advocate of sensible legislative compromise."[95] Based on the records of the debate, it is "indisputable," Justice Rehnquist asserted, that

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[88] 465 U.S. 668 (1984).

[89] *Id.* at 679.

[90] *Id.* at 674.

[91] *Id.* at 673.

[92] *Id.*

[93] 472 U.S. 38 (1985). Justice Rehnquist's critique of the Court's use of history was largely informed by the analysis set forth in ROBERT L. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT AND CURRENT FICTION (1982).

[94] *Id.* at 92, 107

[95] *Id.* at 98.

Madison saw the establishment clause "as designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects. He did not see it as requiring neutrality on the part of government between religion and irreligion."[96] The contrary view set forth by the Court in *Everson v. Board of Education*, *supra*, he asserted, was "totally incorrect."[97]

Justice Rehnquist further noted that the First Congress re-enacted the Northwest Ordinance of 1787, which provided land grants in the designated territories for both sectarian and public schools, and adopted a resolution calling on the President to designate a "day of public thanksgiving and prayer." Moreover, he said, in the nineteenth century Congress routinely appropriated money to support sectarian Indian education by religious organizations, and the eminent constitutional authorities Joseph Story and Thomas Cooley both asserted that the religion clauses permitted nondiscriminatory governmental assistance to religion. Agreeing with the separationists' view that "[t]he true meaning of the Establishment Clause can only be seen in its history,"[98] Justice Rehnquist, nonetheless, concluded that prior to the Court's modern attempts to construe the establishment clause the clause had a "well-accepted meaning: it forbade establishment of a national religion, and forbade preference among religious sects or denominations.... [It] did not require government neutrality between religion and irreligion nor did it prohibit the Federal Government from providing nondiscriminatory aid to religion."[99] The wall of separation metaphor, he said, "should be frankly and explicitly abandoned."[100]

With respect to the tripartite *Lemon* test, Justice Rehnquist charged that it "has no basis in the history of the amendment it seeks to interpret, is difficult to apply, and yields unprincipled results ...."[101] The secular purpose prong, he said, "has proven mercurial in application,"[102] because it is not clear whether it prohibits all aid to sectarian institutions or only that which is accompanied by a stated purpose to aid religion. The entanglement prong, he asserted, had become "divorced" from its use in a historical context in *Walz* and, when joined with the primary effect prong, had created a "Catch-22" in school aid cases: the effect test required such government aid to be "closely watched lest it be put to sectarian use," but the entanglement test rendered aid unconstitutional precisely because it is closely watched. Finally, he claimed, the tripartite test "has caused this Court to fracture into unworkable plurality opinions," has yielded "unprincipled results," and "has produced only consistent unpredictability."[103]

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[96] *Id.*

[97] *Id.* at 99.

[98] *Id.* at 113.

[99] *Id.* at 106.

[100] *Id.* at 107.

[101] *Id.* at 112.

[102] *Id.* at 108.

[103] *Id.* at 110, 112.

Justice White, in a separate dissent in *Wallace*, expressed appreciation for Justice Rehnquist's explication of the history of the religion clauses and, as he had even in the 1970s,[104] called for "a basic reconsideration of our precedents."[105]

In *Edwards v. Aguillard*[106] in 1987, Justice Scalia, appointed to the Court in 1986, began to articulate what has become a steady drumbeat of derision about the Court's establishment clause jurisprudence. In that case the Court held unconstitutional a Louisiana statute that mandated that creationism be taught along with evolution in the public schools on the grounds the statute was intended to endorse and promote a particular religious doctrine. Justice Scalia dissented from that conclusion and termed the Court's establishment clause jurisprudence "embarrassing."[107] More particularly, he asserted that the Court's application of the purpose prong of the tripartite test had "made such a maze of the Establishment Clause that even the most conscientious governmental officials can only guess what motives will be held unconstitutional." The purpose test, he charged, "exacerbates the tension between the Free Exercise and Establishment Clauses, has no basis in the language or history of the Amendment, and ... has wonderfully flexible consequences."[108] More generally, he has "bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes [*Lemon's*] intermittent use has produced," and has likened the test to "some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried ..., frightening the little children and ... attorneys ...."[109]

In 1989 in *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*[110] Justice Kennedy, appointed to the Court in 1988, suggested that "substantial revision of our Establishment Clause doctrine may be in order."[111] In that case the Court held unconstitutional the display of a creche by itself in a county courthouse but found constitutional the display of a Christmas tree and a menorah in front of a city-county building during the Christmas and Chanukah seasons. Justice Kennedy argued in partial dissent that the Court's holding with respect to the creche display "reflects an unjustified hostility toward religion, a hostility inconsistent with our history and our precedents."[112] "Government policies of accommodation, acknowledgment, and support for religion," he said, "are an

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[104] See, *e.g.*, Committee for Public Education v. Nyquist, 413 U.S. 756, 813 (1973) (White, J., dissenting).

[105] Wallace v. Jaffree, 472 U.S. at 90-91 (White, J., dissenting).

[106] 482 U.S. 578 (1987).

[107] *Id.* at 639 (Scalia, J., dissenting).

[108] *Id.* at 640.

[109] Lamb's Chapel v. Center Moriches School District, 508 U.S. 384, 403 (1993) (Scalia, J., concurring in the judgment).

[110] 492 U.S. 573 (1989).

[111] *Id.* at 655, 656 (Kennedy, J., concurring in part and dissenting in part).

[112] *Id.* at 655.

accepted part of our political and cultural heritage."[113] Thus, he charged, any interpretation of the establishment clause that invalidates "historical practices" and "longstanding traditions" of government acknowledgment and accommodation of religion can not be legitimate. The establishment clause, he said, ought to be construed to mean only that "government may not coerce anyone to support or participate in any religion or its exercise; and it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact `establishes a [state] religion or religious faith, or tends to do so.'"[114]

Justice Thomas, in a concurring opinion in *Rosenberger v. Rector and Visitors of the University of Virginia*[115] took sharp issue with the separationist view that the establishment clause bars nondiscriminatory assistance to religion. Terming the Court's establishment clause jurisprudence to be "in hopeless disarray," he said that Virginia's controversy over assessments in 1785 and Madison's "Memorial and Remonstrance" had nothing to do with a subsidy available to both religious and nonreligious entities. Instead, he contended, it concerned only the support of ministers and teachers of religion. Thus, he argued, that incident, as well as Madison's actions in bringing about a Bill of Rights, cannot be used to support the "extreme view that the government must discriminate against religious adherents by excluding them from more generally available financial subsidies."[116] Moreover, he asserted, government in the early years of the Republic provided a number of supports for religion — Congress hired a chaplain; religious properties were exempted from property taxes; the Northwest Ordinance of 1787 provided land grants for the benefit of schools, many of which were sectarian; and copyright protections included religious authors and publications. He concluded:

> Thus, history provides an answer for the constitutional question posed by this case .... [There is] no evidence that the Framers intended to disable religious entities from participating on neutral terms in evenhanded government programs. The evidence that does exist points in the opposite direction ....[117]

Finally, Justice Thomas in the Court's most recent decision questioned whether the establishment clause ought to be deemed fully incorporated in the due process clause of the Fourteenth Amendment and, as a consequence, fully applicable to the states.[118] "In the context of the Establishment Clause," he said, "it may well be that state action should be evaluated on different terms than similar action by the Federal Government." "The federalism prerogatives of the States," he suggested, ought to be weighed in establishing the proper construction of the establishment clause.

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[113] *Id.* at 657.

[114] *Id.* at 659, quoting Lynch v. Donnelly, *supra*, at 678.

[115] 515 U.S. 819, 852 (1995) (Thomas, J., concurring).

[116] *Id.* at 857.

[117] *Id.* at 863.

[118] Zelman v. Simmons-Harris, 122 S.Ct. 2460 (2002) (Thomas, J., concurring).

**(c) The Response.** These criticisms of the Court's broad interpretation of the establishment clause, of course, have not gone without rejoinder. In further support of the "wall of separation" construction, for instance, Justice Brennan cited the historical facts that the Constitution broke with the common practice of the day in not invoking the name of God, that Madison subsequently recanted his views regarding the constitutionality of legislative chaplains and prayers, and that Presidents Jefferson and Jackson refused on establishment clause grounds to proclaim national days of thanksgiving or fasting.[119] He also argued that the acts of the First Congress cannot alone serve as an authoritative guide to the meaning of the establishment clause, because the views of the states that ratified the Bill of Rights also have to be considered.[120] More generally, he argued that "to be truly faithful to the Framers, `our use of the history of their time must limit itself to broad purposes, not specific practices,'" lest their work be treated as "static and lifeless."[121]

In addition, Justices Blackmun, O'Connor, Brennan, Marshall, and Stevens all have stressed that the people of the United States are now religiously diverse and thus that even if "in the early days of the Republic [the religion clauses] were understood to protect only the diversity within Christianity ..., today they are recognized as guaranteeing religious liberty and equality to `the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism.'"[122]

In response to the argument that the establishment clause was intended to allow nondiscriminatory government assistance to religion, Justice Stevens, Brennan, and Marshall have contended that the religious establishments in the six states still retaining them at the time of the Bill of Rights were not limited to a single church but were multiple in nature, *i.e.*, public aid was provided on a nondiscriminatory basis to all Christian churches or to all Protestant churches. Thus, they asserted, the prohibition of the establishment clause was understood by its authors to preclude not just a single established church but multiple establishments as well, *i.e.*, it was intended to prohibit nondiscriminatory aid to all religions.[123] That intent, they claimed, was clearly shown by the evolution in the wording of the religion clauses during the House and Senate debates on Madison's proposals in the First Congress.

Following his appointment to the Court in 1990, Justice Souter, joined by Justices O'Connor and Stevens, argued this view as well. In a concurring opinion in *Lee v. Weisman*, *supra*, Justice Souter examined in detail the debates of the First Congress on what became the religion clauses and concluded:

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[119] Marsh v. Chambers, 465 U.S. at 807 (Brennan, J., dissenting).

[120] *Id.* at 815-16.

[121] *Id.* at 816, quoting Abington School District v. Schempp, 374 U.S. at 241 (Brennan, J., concurring).

[122] *See* Wallace v. Jaffree, *supra*, at 52, and Allegheny County v. Greater Pittsburgh ACLU, 492 U.S. at 590.

[123] Allegheny County v. Greater Pittsburgh ACLU, *supra*, at 646-47 (Stevens, J., concurring in part and dissenting in part). In so doing Justice Stevens generally followed the historical analysis set forth in LEONARD LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT (1986).

> The House rejected the Select Committee's version, which arguably ensured only that "no religion" enjoyed an official preference over others, and deliberately chose instead a prohibition extending to laws establishing "religion" in general. The sequence of the Senate's treatment of this House proposal, and the House's response to the Senate, confirm that the Framers meant the Establishment Clause's prohibition to encompass nonpreferential aid to religion .... What is remarkable is that, unlike the earliest House drafts or the final Senate proposal, the prevailing language is not limited to laws respecting an establishment of "a religion," "a national religion," "one religious sect," or specific "articles of faith. The Framers repeatedly considered and deliberately rejected such narrow language and instead extended their prohibition to state support for "religion" in general.[124]

He concluded as well that the language of the establishment clause prohibits more than just governmental coercion of religious belief or of support for religion. The free exercise clause, he noted, also prohibits such coercion and, thus, "a literal application of the coercion test would render the Establishment Clause a virtual nullity."[125]

Justice Blackmun in the opinion of the Court in *Allegheny County v. ACLU, Pittsburgh Chapter* termed the charge of "hostility" to religion leveled against the separationist construction of the establishment clause to be both "offensive" and "absurd":

> Justice Kennedy apparently has misperceived a respect for religious pluralism, a respect commanded by the Constitution, as hostility or indifference to religion. No misperception could be more antithetical to the values embodied in the Establishment Clause .... A secular state ... is not the same as an atheistic or antireligious state. A secular state establishes neither atheism nor religion as its official creed .... It follows directly from the Constitution's proscription against government affiliation with religious beliefs or institutions that there is no orthodoxy on religious matters in the secular state.[126]

Thus, he asserted, denying government the power to display a creche on public property at Christmastime "does not represent a hostility or indifference to religion but, instead, the respect for religious diversity that the Constitution requires."[127] "The Constitution," he said, "mandates that the government remain secular, rather than affiliate itself with religious beliefs or institutions, precisely in order to avoid discriminating among citizens on the basis of their religious faiths."[128]

More recently, in an opinion joined by Justices Stevens, Ginsburg, and Breyer, Justice Souter in a dissenting opinion in *Rosenberger v. The Rector and Visitors of the University of Virginia* recapitulated the separationist understanding of the

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[124] Lee v. Weisman, 505 U.S. at 609, 613-15 (Souter, J., concurring).

[125] *Id.* at 618-26.

[126] County of Allegheny v. ACLU, Greater Pittsburgh Chapter, 492 U.S. at 610-11.

[127] *Id.* at 613.

[128] *Id.* at 610.

historical underpinnings of the establishment clause and reiterated as well the authority of Madison and Jefferson on its meaning. In response to Justice Thomas' interpretation of Madison's views, he said that "nowhere in the Remonstrance ... did Madison advance the view that Virginia should be able to provide financial support for religion as part of a generally available subsidy program" and noted as well that the outgrowth of the Remonstrance "was not such a bill [but Jefferson'] Bill for Establishing Religious Freedom, which ... proscribed the use of tax dollars for religious purposes."[129] Of the contention that the acts of Congress showed that the establishment clause allows nondiscriminatory aid, Justice Souter rejoined that "individual acts of Congress, especially when they are few and far between, scarcely serve as an authoritative guide to the meaning of the Religion Clauses ... [and are] no more dispositive than the Alien and Sedition Acts in interpreting the First Amendment."[130]

In the Court's most recent decision, Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, asserted that the no-aid construction of the establishment clause first articulated in *Everson* serves three fundamental objectives.[131] First, he said, it protects freedom of conscience by ensuring that, in Jefferson's words, no one "shall be compelled to ... support any religious worship, place, or ministry whatsoever." Second, he said, it protects religion from the "corruption" of its mission that can come in the wake of government regulation and its own eagerness for more public funding. Third, he said, it protects society from the threat of conflict along religious lines as sect competes against sect for limited public funds.

**(d) Modifications of the *Lemon* Test.** As noted above, much of the debate about the meaning of the establishment clause has focused on the utility and adequacy of the tripartite *Lemon* test. Nonetheless, that test continues to be the one most often employed by the Court. But the debate has caused the Court to make significant modifications in the tripartite test, and in a recent church-state decision the Justices argued vigorously over whether neutrality ought to be the essential meaning of the test. The following subsections detail the modifications in the test and the recent contentions:

***(1) Endorsement.*** Justice O'Connor, appointed to the Court in 1981, authored a concurring opinion in *Lynch v. Donnelly* to suggest not a rejection but a "clarification" of the *Lemon* test.[132] The essential meaning of the establishment clause, she asserted, is that it "prohibits government from making adherence to a religion relevant in any way to a person's standing in the political community." Thus, she said, the clause is violated when government becomes excessively entangled with religious institutions, because that may threaten the independence of such institutions, give favored institutions access to governmental powers or benefits not fully available to nonadherents of the favored religion, and create "political

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[129] Rosenberger v. Rector and Board of Visitors of the University of Virginia, 515 U.S. 819, 869-71 (1995), n. 1 (Souter, J., dissenting).

[130] *Id.* at 872, n. 2.

[131] Zelman v. Simmons-Harris, 122 S.Ct. 2460 (2002) (Souter, J., dissenting).

[132] Lynch v. Donnelly, 465 U.S. at 687 (O'Connor, J., concurring).

constituencies defined along religious lines." More importantly, she said, the establishment 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.[133]

Thus, the secular purpose prong of the tripartite test, she averred, should be construed to ask whether "government's actual purpose is to endorse or disapprove of religion."[134] The primary effect prong, in turn, should be construed to ask "whether, irrespective of purpose, the practice under review in fact conveys a message of endorsement or disapproval." The entanglement prong, she asserted, should be limited to institutional entanglement, not political entanglement.

In *County of Allegheny v. ACLU, Pittsburgh Chapter*, *supra*, Justice Kennedy termed Justice O'Connor's endorsement test an "unwelcome addition to our tangled Establishment Clause jurisprudence" and said it was "flawed in its fundamentals and unworkable in practice." The test, he charged, would invalidate "scores of traditional practices recognizing the place religion holds in our culture," would "trivialize constitutional adjudication," and would require the Court to "sit as a national theology board" and decide "what every religious symbol means."[135] Justice Scalia in *Capitol Square Review and Advisory Board v. Pinette*, *supra*, said that in the context of the display of religious symbols the endorsement principle requires officials to "guess" when they might be perceived to be advocating a religious viewpoint and forces them "to weigh a host of imponderables." The endorsement test, he said, provides "no standard whatsoever" for determining when the establishment clause is violated and creates a "minefield" for public officials.

Nonetheless, the Court has employed this revision of the *Lemon* test in several cases.[136]

***(2) Modification of the primary effect and entanglement criteria.*** The Court still requires, apparently without dissent, that government programs and actions benefiting religion serve a secular purpose. But in the context of public aid programs benefiting sectarian institutions, it has significantly loosened the strictures

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[133] *Id.* at 688.

[134] *Id.* at 690.

[135] County of Allegheny v. ACLU, Pittsburgh Chapter, 492 U.S. at 3134 (Kennedy, J., concurring in part and dissenting in part).

[136] See Wallace v. Jaffree, 472 U.S. 38 (1985); Grand Rapids School District v. Ball, 473 U.S. 373 (1985); County of Allegheny v. American Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573 (1989); Capitol Square Review and Advisory Board v. Pinette, 515 U.S. 753 (1995); Mitchell v. Helms, 530 U.S. 793 (2002); Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000); and Zelman v. Simmons-Harris, 122 S.Ct. 2460 (2002).

of both the primary effect and excessive entanglement prongs of the tripartite *Lemon* test.

With respect to direct aid, the Court formerly construed the primary effect prong to mean that such aid must be limited to secular use. Thus, a direct aid program could founder on this aspect of the *Lemon* test if the aid was not limited to secular use either by its nature or by statutory or regulatory constraint. In addition, a direct aid program could be held unconstitutional if it flowed to institutions that the Court deemed to be pervasively sectarian, *i.e.*, entities whose religious and secular functions were so "inextricably intertwined" that the aid could not be limited just to secular use.[137] As the Court summarized in one case:

> Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting.[138]

Moreover, even if an aid program was limited to secular use, it could still founder on the excessive entanglement test if it flowed to pervasively sectarian institutions. In such institutions, the Court said, the government could not simply assume that the limitation to secular use would be honored. Instead, it had to engage in "a comprehensive, discriminating, and continuing ... surveillance" to ensure that the limitation was observed. But, the Court held, "these prophylactic contacts will involve excessive and enduring entanglement between state and church"[139]; and as a consequence, it would hold the aid program to be unconstitutional.

In its recent decisions the Court has now modified both the primary effect and excessive entanglement prongs of the tripartite test.[140] In addition to the secular purpose requirement, the Court now construes the criteria of whether public aid has a primary effect of advancing religion to be

> (a) whether the aid results in government indoctrination, (b) whether the aid program defines its recipients by reference to religion, and (c) whether the aid creates an excessive entanglement between government and religion.[141]

Most critically, the Court has abandoned the presumption that some religious entities are so pervasively sectarian that most forms of direct public aid to them are unconstitutional. It now presumes, absent proof to the contrary, that direct aid to such entities will be used for the secular purposes intended.[142] As a consequence, it has also modified the assumption that government must engage in an excessively

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[137] Wolman v. Walter, 433 U.S. 229 (1977) and Bowen v. Kendrick, 487 U.S. 589 (1988).

[138] Hunt v. McNair, 413 U.S. 734, 743 (1973).

[139] Lemon v. Kurtzman, 403 U.S. 602, 619 (1971).

[140] Agostini v. Felton, 521 U.S. 203 (1997).

[141] Mitchell v. Helms, 530 U.S. 793, 845 (2000) (O'Connor, J., concurring).

[142] Mitchell v. Helms, *supra*. Four Justices (Chief Justice Rehnquist and Justices Scalia, Kennedy, and Thomas) would go even farther and allow public aid to be used for religious purposes by the recipient institutions; but that is not yet the majority view.

entangling policing of such institutions' use of direct aid. The Court still deems some monitoring to be necessary, but it no longer views such monitoring to be constitutionally fatal.[143] Reflecting the diminished rigor of the entanglement test, the Court, in the context of direct public aid to sectarian entities, has made the entanglement test part of the primary effect test.[144]

In the context of voucher or other aid programs indirectly benefiting sectarian schools, the Court has never used the full *Lemon* test. It has required such programs to serve a secular purpose and not to have a primary effect of advancing religion. But the critical inquiries on the primary effect test have been whether the vouchers or other aid are distributed to the initial beneficiaries on a religiously neutral basis and whether the initial beneficiaries have a genuinely independent choice about whether to use the assistance at secular or religious schools.[145] In its most recent decision the Court continued to ask, as it also does for direct aid, whether there was any religious bias in the initial distribution of the education vouchers; and it also examined whether the parents receiving the vouchers had a "true private choice" between secular and religious options in using the aid.[146] But it significantly broadened the choices deemed to be relevant. In evaluating whether the parents had a true private choice, the Court held, **all** educational options open to them needed to be considered, not just the private secular or religious schools where the vouchers themselves could be used. Thus, it said, the range of choices available in the program before it included not only the private schools but also enrollment in public schools, magnet schools, and community schools and the option of receiving special tutoring assistance. In short, the Court altered the "true private choice" criterion of the primary effect test in such a way that most voucher programs ought to be able to satisfy it.

***(3) Neutrality as the governing principle.*** The concept of neutrality has been a continuing component of the Court's establishment clause jurisprudence. In its first establishment clause decision of the modern era, the Court used a principle

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[143] Agostini v. Felton, *supra*, and Mitchell v. Helms, *supra*.

[144] In Agostini v. Felton, *supra*, at 232-33, the Court stated:

> ...[T]he factors we use to assess whether an entanglement is "excessive" are similar to the factors we use to examine "effect." That is, to assess entanglement, we have looked to "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority .... Similarly, we have assessed a law's "effect" by examining the character of the institutions benefited (*e.g.*, whether the religious institutions were "predominantly religious") ... and the nature of the aid that the State provided (*e.g.*, whether it was neutral and nonideological) .... Thus, it is simplest to recognize why entanglement is significant and treat it — as we did in *Walz* — as an aspect of the inquiry into a statute's effect.

[145] Committee for Public Education v. Nyquist, 413 U.S. 756 (1973); Mueller v. Allen, 463 U.S. 388 (1983); Witters v. Washington Department of Social Services, 474 U.S. 481 (1986); Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993).

[146] Zelman v. Simmons-Harris, 122 S.Ct. 2460 (2002).

of neutrality to uphold a public subsidy of the costs of transporting children to and from school, including parochial school, stating

> [t]he First Amendment ... requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary.[147]

At times the test has been described by the Court as one of "benevolent neutrality"[148] and at other times as one of "strict neutrality."[149] But the concept has often found expression in the second prong of the *Lemon* test, which requires government action affecting religion to have a primary effect that neither advances nor inhibits religion. Thus, it has sometimes been used by the Court to uphold programs in which public aid is made available on a religiously neutral basis, *i.e.*, without regard to whether the beneficiary is religious or nonreligious:

> ... [G]overnment programs that neutrally provide benefits to a broad class of citizens defined without reference to religion are not readily subject to an Establishment Clause challenge just because sectarian institutions may also receive an attenuated benefit."[150]

As noted in the preceding section, the concept of neutrality is an element of the primary effect test for both direct and indirect aid programs.

In one of the Court's recent decisions, however, a plurality of four Justices argued that the *Lemon* test ought to be conceived almost entirely in neutrality terms for programs directly aiding sectarian institutions. Justice Thomas, in a plurality opinion in *Mitchell v. Helms, supra*, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, argued that so long as an aid program is religiously neutral in the manner in which it provides its benefits and the aid itself is secular in nature, the

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[147] Everson v. Board of Education, 330 U.S. 1, 18 (1947).

[148] In upholding the tax exemption accorded property owned by religious and other nonprofit organizations in Walz v. Tax Commission of New York, 397 U.S. 664, 669 (1970) the Court asserted:

> The general principle deducible from the First Amendment and all that has been said by this 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.

[149] In holding state sponsorship of Bible reading and unison prayer in the public schools unconstitutional in Abington School District v. Schempp, 374 U.S. 203, 225 (1963), the Court stated:

> They 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.

[150] Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993).

program passes muster under the establishment clause even if the aid is subsequently diverted by the recipient to religious use:

> In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, we have consistently turned to the principle of neutrality, upholding aid that is offered to a broad range of groups or persons without regard to their religion. If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude that any indoctrination that any particular recipient conducts has been done at the behest of the government.[151]

But the other five Justices criticized this elevation of the neutrality test. Justice O'Connor, joined by Justice Breyer, termed this use of neutrality "unprecedented," "expansive," "in tension with our precedents," and "unnecessary." Neutrality, she said, is "important" and "relevant" in determining whether an aid program advances religion, but it is not alone "sufficient." "[T]he plurality opinion," she said, "foreshadows the approval of direct monetary subsidies to religious organizations, even when they use the money to advance their religious objectives."

Justice Souter, in turn, joined by Justices Stevens and Ginsburg, argued that the plurality's use of neutrality had "manifold errors," represented a "sharp break with the Framers' consistent understanding of establishment and this Court's consistent interpretive course," and would "be the end of the principle of no aid to the [sectarian] schools' religious mission." The plurality ignored the fact that neutrality had been used in several different senses by the Court in the past, he said. It had been used to describe (1) "the state of balance between government as ally and as adversary to religion" required by the two religion clauses, (2) the nonreligious and secular nature of the aid provided, and (3) evenhandedness in making aid available to the religious and nonreligious alike. Using evenhandedness alone in determining an aid program's constitutionality, he said, disregarded the Court's precedents and would mean that "religious schools could be blessed with government funding as massive as expenditures made for the benefit of their public school counterparts, and religious missions would thrive on public money."

Thus, for now at least, the concept of neutrality remains an essential element of the Court's determination of whether an establishment clause violation has occurred, but it is not the only element.

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[151] Mitchell v. Helms, *supra*, at 10 (Thomas, J.). This contention is not wholly new, but in Mitchell it was expressed with particular force. Then-Justice Rehnquist contended in *Wallace v. Jaffree*, 472 U.S. 38, 106 (1985) (Rehnquist, J., dissenting) that the original meaning of the establishment clause "forbade establishment of a national church, and forbade preference among religious sects or denominations .... [I]t did not require government neutrality between religion and irreligion nor did it prohibit the Federal Government from providing nondiscriminatory aid to religion." In this view religious organizations should be eligible to participate in public aid programs without giving up their religiosity.

**(e) Other establishment clause tests – coercion and tradition.** As noted, *Lemon* is no longer the sole test the Court uses.[152] The Court has also, on one occasion, proffered and used coercion as the touchstone of an establishment clause violation. In *Lee v. Weisman, supra*, Justice Kennedy opined for the Court that "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which `establishes a [state] religion, or religious faith, or tends to do so."[153] In that case the Court held that a high school's inclusion of an invocation and benediction by a rabbi in its commencement ceremony had the unconstitutional effect of coercing some students into participating in a religious activity.

Justice O'Connor has criticized coercion as an exclusive test of an establishment clause violation as failing "to take account of the numerous more subtle ways that government can show favoritism to particular beliefs or convey a message of disapproval to others" and thus as failing to "adequately protect the religious liberty or respect the religious diversity of the members of our pluralistic political community." Moreover, she has said, to make coercion the touchstone of an establishment clause violation "would make the Free Exercise Clause a redundancy."[154] Justice Souter has made a similar criticism of the coercion test, contending that it would make the establishment clause a "virtual nullity."

Nonetheless, the Court has used the coercion test as a rule of decision in at least two school prayer cases.[155]

Various Justices have also proffered the historicity and ubiquity of a given practice as a test of its constitutionality. In *Marsh v. Chambers*,[156] for instance, Chief Justice Burger stated for the Court that the practice of a legislature hiring a chaplain was constitutionally permissible in part because the practice was "deeply embedded in the history and tradition of this country" and had become "part of the fabric of our society." Justice Kennedy, joined by Chief Justice Rehnquist and Justices White and Scalia, contended in *Allegheny County v. Greater Pittsburgh Chapter of the American Civil Liberties Union*[157] that the display of a creche by itself in the county courthouse ought to be permitted because "[g]overnment policies of accommodation, acknowledgment, and support for religion are an accepted part of our political and cultural heritage." "The meaning of the [Establishment] Clause," he said, "is to be determined by reference to historical practices and understandings." In *Lee v.*

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[152] In several decisions in the past decade the Court has eschewed use of the *Lemon* test entirely. *See* Lee v. Weisman, 505 U.S. 577 (1992); Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993); Board of Education of the Kiryas Joel Village School District v. Grumet, 512 U.S. 687 (1994); and Rosenberger v. The Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995).

[153] Quoting Lynch v. Donnelly, *supra*, at 678.

[154] *Id.* at 3117 (O'Connor, J., concurring in part and concurring in the judgment).

[155] Lee v. Weisman, *supra*, and Santa Fe Independent School District v. Doe, *supra*. In the latter decision coercion was one of several bases for the Court's decision.

[156] 463 U.S. 783, 786, 792 (1983).

[157] 492 U.S. 573, 657, 670 (1989) (Kennedy, J., dissenting).

*Weisman*[158] Justice Scalia, joined by Chief Justice Rehnquist and Justices White and Thomas, argued that commencement prayer by a clergyman ought to allowed because it was "a tradition that is as old as public school graduation ceremonies themselves and ... a component of an even more longstanding American tradition of nonsectarian prayer to God at public celebrations generally."

As noted, the Court relied in part on this test in upholding the constitutionality of a legislative chaplaincy in *Marsh v. Chambers, supra.*

**(f) Conclusion.** In sum, then, the period since 1980 has witnessed profound discontent by a number of Justices with the historical justifications previously used by the Court for its interpretation of the establishment clause, the "wall of separation" metaphor, and the tripartite *Lemon* test. All of the Justices continue to agree that the meaning and scope of the clause are informed by history, but they sharply disagree on what history is most relevant.

The critique of the separationist understanding of the establishment clause has had a substantial effect, albeit not one as sweeping as the alteration of the interpretation of the free exercise clause. Since 1980 the Court has rendered a number of decisions upholding government actions protecting or benefiting religion; the metaphor "wall of separation" has not been used as a guiding principle in any majority opinion by the Court[159]; the *Lemon* test has been modified, supplemented, and sometimes replaced by other tests; the Court has overturned several of its prior establishment clause decisions involving direct aid to sectarian institutions; and it has made it considerably easier for voucher programs to pass constitutional muster.[160]

But the debate about the meaning of the establishment clause continues to be intense and can be expected to persist for years to come. The Court's establishment clause jurisprudence has shifted to allow government more discretion to take actions protecting or benefiting religion; but its decisions on particular issues remain, to a great extent, unpredictable.

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[158] 505 U.S. 577, 631, 632 (1992).

[159] The phrase was last used as a guiding principle in a majority opinion in Committee for Public Education v. Nyquist, 413 U.S. 790 (1973). It was used most recently by Justice Souter in dissent in Mitchell v. Helms, *supra*, in 2000.

[160] In Agostini v. Felton, 521 U.S. 203 (1977)(1997), the Court upheld as constitutional the provision of remedial educational services by public school teachers to private schoolchildren on the premises of sectarian schools. In the process the Court overturned Aguilar v. Felton, 473 U.S. 402 (1985) and parts of School District of the City of Grand Rapids v. Ball, 473 U.S. 373 (1985) and Meek v. Pittenger, 421 U.S. 349 (1975), and Wolman v. Walter, 433 U.S. 229 (1977). In Mitchell v. Helms, 530 U.S. 793 (2000), the Court upheld as constitutional a program providing instructional materials and equipment to both public and sectarian schools. In the process it overturned parts of Meek v. Pittenger, *supra*, and Wolman v. Walter, 433 U.S. 229 (1977). In Zelman v. Simmons-Harris, 122 S.Ct. 2460 (2002) the Court upheld as constitutional a school voucher program, notwithstanding that more than 80 percent of the participating private schools were sectarian in nature. The decision did not overturn Committee for Public Education v. Nyquist, 413 U.S. 790 (1973), but it did cabin its scope.

## Particular Issues

The tumult on the Court over the meaning of the religion clauses has meant that it has faced few easy cases in this area since 1980. As noted earlier, nearly 30 percent of its decisions during this time have been by a 5-4 margin, and concurring and dissenting opinions have abounded (*see* Appendix). The Court's narrowing of the scope of the free exercise clause has been recounted above, and that discussion of the fourteen free exercise decisions rendered by the Court since 1980 (with the exception of the tax cases) will not be repeated here. With respect to the establishment clause, the Court in its decisions since 1980 has:

> (a) reaffirmed and extended its past decisions prohibiting government promotion or sponsorship of religious exercises in the public schools, established the constitutional parameters for silent meditation, and held equal access policies for student religious groups at the college and secondary school levels to be constitutional;
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> (b) expanded the permissible scope of religious speech in the public square, whether spoken or symbolic;
>
> (c) reaffirmed some of its precedents concerning direct public aid to sectarian schools and religious social welfare organizations but overturned a line of cases that had prohibited public school teachers from providing educational services to sectarian schoolchildren on the premises of their sectarian schools as well as one barring the provision of instructional materials and equipment to such schools;
>
> (d) broken new ground with respect to indirect assistance to religious enterprises and activities and loosened the constitutional strictures to the point that most educational voucher programs can pass constitutional muster;
>
> (e) set limits on the extent to which government can provide special benefits and protections for religious practices and organizations;
>
> (f) accorded government substantial discretion to impose general taxes on religious entities and individuals;
>
> (g) generally found no constitutional problem in the application of governmental regulations to religious organizations; and
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> (h) refused to broaden the doctrine of standing to permit wider challenges to the provision of public benefits to religious organizations.

This section summarizes the Court's decisions in each of these areas and examines their effect on its church-state jurisprudence.

**(a) Religious Activities in the Public Schools.** Perhaps the most controversial area of the Court's church-state jurisprudence in the last half century has been its decisions concerning religion in the public schools. Its rulings in this area have precipitated hundreds of proposals for constitutional amendments, recurrent Congressional debates, and passionate public disputes. Indeed, few issues in American public life have been as persistent or as contentious. But in seven

decisions and two summary affirmances since 1980 the Court has made clear the continuing vitality of its precedents in this area. Yet it has also broken new ground by making explicit a constitutional distinction between the **sponsorship** of religious activities in the schools by government and the conduct of such activities by students **at their own initiative**.

In five decisions prior to the beginning of the decade the Court had construed the establishment clause to prohibit government from sponsoring or promoting religious activities or doctrines in the public schools. Struck down by the Court had been state sponsorship of regular devotional activities such as prayer and Bible reading,[161] privately sponsored religious instruction on public school premises during the school day,[162] and state prohibitions on the teaching of evolution.[163] "A State cannot consistently with the First and Fourteenth Amendments," the Court had said, "utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals."[164]

On the other hand, the Court had, prior to 1980, found the establishment clause **not** to be violated by a released time program that permitted public school children to repair to nearby religious centers during the school day for purposes of receiving religious instruction from private teachers.[165] It had in *dicta* repeatedly affirmed the constitutionality of the public schools teaching **about** religion. And it had in two cases held the free speech and free exercise clauses to mandate exemptions for religious reasons from the otherwise compulsory practices of saluting the flag and attending school until the age of sixteen.[166] In the public schools, the Court had said, "[t]he First Amendment mandates government neutrality between religion and religion, and between religion and nonreligion."[167]

All of these precedents have remained intact since 1980. The Court has reaffirmed its school prayer and curriculum decisions and extended them to school-sponsored prayer at commencement ceremonies and extracurricular activities such as football games, displays of the Ten Commandments, and the teaching of creationism. But it has also found broad constitutional protection for private religious speech in decisions concerning moments of silence and equal access policies for student religious groups at the secondary school and college levels and for student religious publications in a university setting.

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[161] Engel v. Vitale, 370 U.S. 421 (1962); Abington School District v. Schempp, 374 U.S. 203 (1963); and Chamberlin v. Dade County Board of Public Instruction, 377 U.S. 402 (1964).

[162] McCollum v. Board of Education, 333 U.S. 203 (1948).

[163] Epperson v. Arkansas, 393 U.S. 97 (1968).

[164] McCollum v. Board of Education, 333 U.S. at 211.

[165] Zorach v. Clauson, 343 U.S. 306 (1952).

[166] See West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943), and Wisconsin v. Yoder, 406 U.S. 205 (1972), respectively.

[167] Epperson v. Arkansas, 393 U.S. at 103-04.

***(1) Government sponsorship of religion.*** In cases involving school-sponsored prayer since 1980, the Court summarily affirmed two lower court decisions which struck down state laws and practices that permitted teachers to open the school day with prayers composed by themselves or by the state legislature.[168] In a third decision the Court in *Lee v. Weisman*[169] held unconstitutional, 5-4, a local school district's policy of permitting clergy to offer invocations and benedictions at graduation ceremonies. A fourth decision, *Santa Fe Independent School District v. Doe*,[170] struck down a school district policy permitting students to vote on whether to have prayers at football games and to select a student to deliver those prayers.

The two summary affirmances, of course, involved no written opinions. With respect to the issue of whether a public high school can invite a clergyman to deliver an invocation and benediction at a graduation ceremony, Justice Kennedy, writing for the Court in *Lee v. Weisman*, eschewed use of the *Lemon* test and employed instead the principle that "at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise ...."[171] "The injury caused by the government's action" in this instance, he said, "is that the State, in a school setting, in effect required participation in a religious exercise."[172] But "[t]he First Amendment's Religion Clauses," he asserted, "mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State."[173] Rejecting the notion that government could sponsor the rabbi's prayer as a form of "civic" religion in the schools, he said "[t]he Constitution forbids the State to exact religious conformity from a student as the price of attending her own high school graduation."[174]

*Santa Fe* involved a policy that permitted high school students to vote on whether to have a student volunteer deliver an invocation or message before home

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[168] Karen B. v. Treen, 455 U.S. 913 (1982), *aff'g mem.*, 653 F.2d 897 (5th Cir. 1981) (affirming a lower federal court decision holding unconstitutional a Louisiana statute and a local school board's implementing regulation which permitted teachers to ask for student volunteers to offer a prayer at the beginning of each school day and, if no student volunteered, to offer a prayer themselves) and Wallace v. Jaffree, 466 U.S. 924 (1984), *aff'g mem.*, 705 F.2d 1526 (11th Cir. 1983) (affirming that part of a lower federal court decision holding unconstitutional an Alabama statute which permitted teachers to pray, to lead willing students in prayer, or to lead willing students in the following prayer set forth in the statute:

> Almighty God, You alone are our God. We acknowledge You as the Creator and Supreme Judge of the World. May Your justice, Your truth, and Your peace abound this day in the hearts of our government, in the sanctity of our homes and in the classrooms of our schools. In the name of our Lord. Amen.

[169] 505 U.S. 577 (1992).

[170] 530 U.S. 290 (2000).

[171] Lee v. Weisman, *supra*, at

[172] *Id.* at .

[173] *Id.* at .

[174] *Id.* at .

football games over the public-address system. The Court held, 6-3, that the "policy is invalid ... because it establishes an improper majoritarian election on religion, and unquestionably has the purpose and creates the perception of encouraging the delivery of prayer at a series of important school events." The policy, Justice Stevens wrote for the majority, inevitably discriminated against minority views and perpetuated a majoritarian viewpoint. It coerced some students into participating in a religious exercise at the football games, he said, and encouraged divisiveness along religious lines. Moreover, he stated for the Court, the policy in this instance failed to divorce the school from the religious content of the invocation. Not only did "the policy, by its terms, invite and encourage religious messages," but the invocation was to be broadcast over the school's public address systems to "a large audience assembled as part of a regularly scheduled school-sponsored function conducted on school property." In this context, the Court said, an objective observer would "unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval." Finally, Justice Stevens asserted, given the long history of pre-game prayer in the school district and the evolution of the policy, it was clear that "the District intended to preserve the practice of prayer before football games."

In two additional cases the Court held unconstitutional state statutes mandating the display of the Ten Commandments on the walls of the public schools and the teaching of creationism. In *Stone v. Graham*[175] the Court, without briefing or oral argument, struck down, 5-4, a Kentucky statute which required that a copy of the Ten Commandments, purchased with private funds, be posted on the wall of each public classroom in the state. Notwithstanding contrary declarations by the state legislature, the Court found the Ten Commandments to be "undeniably a sacred text" and the "pre-eminent purpose" of the posting requirement to be "plainly religious in nature." As a consequence, it held the posting requirement to be in violation of the first prong of the *Lemon* test and a violation of the establishment clause.

In *Edwards v. Aguillard*[176] the Court reaffirmed and extended its previous ruling in *Epperson v. Arkansas*[177] which had held unconstitutional a state's ban on the teaching of evolution in the public schools. *Aguillard* involved a Louisiana statute that, instead of barring the teaching of evolution, required teachers to give "balanced treatment" to evolution and creationism, *i.e.*, to teach both doctrines. Like the statute involved in *Epperson*, the Court held this statute to violate the purpose prong of the tripartite test, 7-2. In enacting the statute, Justice Brennan wrote for the Court, "the pre-eminent purpose of the Louisiana legislature was clearly to advance the religious viewpoint that a supernatural being created mankind." Noting the "historic and contemporaneous antagonisms between the teachings of certain religious denominations and the teaching of evolution," he concluded that it was not "happenstance that the legislature required the teaching of a theory which coincided with [a] religious view."[178] The purpose of the Act, the Court found, was "to endorse a particular religious doctrine"; as a consequence, it held that the Act violated the

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[175] 449 U.S. 39 (1980) (*per curiam*).

[176] 482 U.S. 578 (1987).

[177] 393 U.S. 97 (1968).

[178] *Id.* at 591-92.

establishment clause. Thus, unless creationism can gain acceptance in the scientific community as a scientific theory, *Aguillard* appears to close the constitutional door on further efforts to excise or rebut the teaching of evolution in the public schools.

***(2) Private religious expression.*** In four other decisions since 1980 involving religion in the public schools, however, the Court broke new constitutional ground. In each case it affirmed the constitutionality of private religious expression, and in one case in the college context even upheld the public subsidy of religious expression.

In *Wallace v. Jaffree*[179] the Court for the first time addressed the constitutionality of provisions mandating moments of silence at the beginning of each school day.[180] Again relying on the first prong of the *Lemon* test, the Court in *Wallace* struck down an Alabama statute mandating a daily moment of silence in the public schools for purposes of "meditation or voluntary prayer" on the grounds it had been adopted with an illegitimate legislative purpose. By a 6-3 margin the Court found that the Alabama legislature had enacted the statute in question "for the sole purpose of expressing the State's endorsement of prayer activities for one minute at the beginning of each school day." Another statute previously adopted by Alabama, Justice Stevens noted for the Court, already provided for a moment of silence at the beginning of each school day for purposes of meditation. The legislative history of the addition of the phrase "or voluntary prayer" in the later statute, the Court concluded, clearly showed that the statute was intended to serve no secular purpose and was of a "wholly religious character."[181] Justice Stevens stressed, however, that the Court was not holding all moment of silence provisions to be unconstitutional:

> The legislative intent to return prayer to the public schools is, of course, quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the schoolday. The 1978 statute already protected that right ....[182]

Thus, it appears likely that statutes or regulations mandating a moment of silence can pass constitutional muster, provided that they are not adopted for the purpose of promoting prayer and are not implemented to give governmental encouragement or preference to prayer.[183]

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[179] 472 U.S. 38 (1985).

[180] Justice Brennan had previously opined that a moment of silence at the beginning of the school day would be constitutional. See Abington School District v. Schempp, 374 U.S. at 280-81 (Brennan, J., concurring).

[181] Wallace v. Jaffree, 472 U.S. at 58.

[182] 472 U.S. at 59. See also the concurring opinions of Justices Powell and O'Connor, *id*., at 62 and 67, respectively.

[183] A subsequent attempt to obtain clarification from the Court on what kind of moment of silence statute might pass constitutional muster foundered when the Court found that the parties who brought the case to it had no standing to do so. See May v. Cooperman, 572 F.Supp. 1561 (D. N.J. 1983), *aff'd*, 780 F.2d 240 (3d Cir. 1985), *appeal dismissed for want of jurisdiction*, 484 U.S. 72 (1987).

In two other decisions the Court construed the First Amendment to require or, at least, to permit public universities and public secondary schools to allow student-initiated religious groups to use school facilities during the school day. In *Widmar v. Vincent*[184] the Court held, 8-1, that the freedom of speech clause of the First Amendment bars a public university which permits some student groups to meet in its facilities from denying such use to student groups wanting to engage in religious worship and discussion. Once a university opens its facilities for use by student organizations, Justice Powell wrote for the Court, it may not "enforce a content-based exclusion of religious speech" unless there is a compelling public purpose to be served. The University argued that conformance with the establishment clause and with Missouri's history of strict church-state separation constituted sufficient justification for its ban. But the Court disagreed. Permitting student groups to use campus facilities for religious purposes, it said, would neither place the imprimatur of University sponsorship on any sectarian belief or practice nor single out religious groups for special benefits. Thus, the Court held, the University's "exclusionary policy violates the fundamental principle that a state regulation of speech should be content-neutral ...."[185]

Before and after *Widmar* the same constitutional question arose in the context of student-initiated religious groups in public **secondary** schools. All but one of the state and lower federal courts that examined that question held permission for such groups to meet on the premises of public secondary schools to violate the establishment clause.[186] Congress, however, found the courts' reasoning unpersuasive and in 1984, after a vigorous debate, created a **statutory** right at the public secondary school level that replicated the constitutional right at universities articulated in *Widmar*. The Equal Access Act[187] bars public secondary schools that receive federal assistance and that have a limited open forum from discriminating against any student group wishing to meet on the basis of the religious, political, philosophical, or other content of the speech at such meetings. The Act defines "limited open forum" to mean the "opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time."

In *Board of Education of Westside Community Schools v. Mergens*[188] the Court held the Equal Access Act to be constitutional, 8-1. The Court construed the Act

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[184] 454 U.S. 263 (1981).

[185] *Id.* at 277.

[186] See Brandon v. Board of Education of the Guilderland Central School District, 635 F.2d 971 (1st Cir. 1980), *cert. den.*, 454 U.S. 1123 (1981); Lubbock Civil Liberties Union v. Lubbock Independent School District, 659 F.2d 1038 (5th Cir. 1982), *cert. den.*, 459 U.S. 1156 (1983); Bell v. Little Axe Independent School District, 766 F.2d 1391 (10th Cir. 1985); Johnson v. Huntington Beach Union High School District, 137 Cal.Rptr. 43, 68 Cal.App.3d 1 (Ct. App.), *cert. den.*, 434 U.S. 877 (1977); and Trietley v. Board of Education of the City of Buffalo, 65 A.D.2d 1, 409 N.Y.S.2d 912 (App. Div. 1978). *Contra* Bender v. Williamsport Area School District, 563 F.Supp. 697 (M.D. Pa. 1983), *reversed*, 741 F.2d 538 (3d Cir.), *vacated for want of jurisdiction*, 475 U.S. 534 (1986).

[187] 20 U.S.C. 4071-74 (1988).

[188] 496 U.S. 226 (1990).

broadly as a remedy against "perceived widespread discrimination against religious speech in public schools" and said it applied any time a school permitted even one noncurriculum related student group to meet. The Court further found the Act not to promote religion or to place the imprimatur of government on the religious speech that would occur at such meetings. Justice O'Connor, joined by three other Justices,[189] stressed that

> [t]here is a crucial difference between *government* speech endorsing religion and *private* speech endorsing religion. We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis.[190]

Justices Brennan and Marshall agreed with that reasoning but said that Westside needed to take additional steps to make clear that its recognition of a student Bible club did not constitute an endorsement of their views. However, Justices Scalia and Kennedy emphasized the absence of any coercive effect in permitting such meetings to occur. Despite these differing approaches to the issue, the decision clearly ratified the extension of the reasoning of *Widmar* to the public secondary school setting.

Finally, in *Rosenberger v. The Rector and Visitors of the University of Virginia*[191] the Court held, 5-4, that when a public university creates a forum for the expression of student opinions, it cannot exclude student religious opinions. In this instance the University of Virginia fostered the creation of publications by student organizations by paying their printing bills out of the student activities fund (SAF). However, it excluded religious publications, among others, from the subsidy, arguing that the establishment clause prohibits the funding of such a religious activity. But the Court rejected the argument. It held the object of the SAF to be "to open a forum for speech" and the University's exclusion of the religious publication, as a consequence, to constitute viewpoint discrimination violative of the free speech clause of the First Amendment. The SAF was not a tax used to support a church, the Court said, but essentially amounted to a religiously neutral fund to promote private student speech. The Court said the University's policy of exclusion itself threatened to violate the establishment clause because the University would then have to scrutinize every publication and determine when its religious content was too great. Justice O'Connor, the decisive vote in the case, stressed in a concurring opinion the factors that the publications were genuinely independent of the University, that the payments were made not directly to the sponsoring student organizations but to the printer, that numerous publications were subsidized, and that students could, at least hypothetically, seek a refund for any portion of their fees used for speech with which they disagreed. These factors convinced her, she said, that "providing ... assistance in this case would not carry the danger of impermissible use of public funds to endorse Wide Awake's religious message."

In short, since 1980 the Court has reaffirmed that the establishment clause prohibits government from promoting religious faith in the public schools. But it has

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[189] Chief Justice Rehnquist and Justices White and Blackmun.

[190] 496 U.S. at 242.

[191] 515 U.S. 819 (1995).

also made clear that students possess both constitutional and statutory rights to engage in religious activity which they initiate themselves on public school premises and that the establishment clause does not trump the free speech clause with respect to religious speech in a public forum created by a university.

**(b) Religion in the Public Square.** Prior to 1980 the Court had rendered several decisions involving religious expression in settings other than the public schools. In a series of cases in the 1940s largely involving the Jehovah's Witnesses, the Court established that the free speech clause of the First Amendment provides broad protection for religious solicitation and proselytizing. Held unconstitutional were ordinances and policies that gave local officials unfettered discretion to grant or deny permits to speak in public parks,[192] taxed the sale of religious literature by itinerant evangelists[193] and resident booksellers,[194] and barred the door-to-door distribution of religious handbills.[195] The Court did affirm the legitimacy of neutral time, place, and manner restrictions on speech in public places where the restrictions were genuinely unrelated to the content of the speech involved.[196] And it affirmed as well the legitimacy of restrictions on the use of children in religious solicitations under a state's labor laws.[197] But it generally established the principle that government is constitutionally barred from restricting speech in public places, whether religious or nonreligious, because of its content.

In these and other cases, the Court also developed the notion of the "public forum," *i.e.*, that certain sites are by their nature and history particularly appropriate for speech activities.[198] It also posited that not all public properties are public forums: "The crucial question is whether the manner of expression is basically compatible with the normal activity of a particular place at a particular time."[199]

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[192] Cantwell v. Connecticut, 310 U.S. 296 (1941); Niemotko v. Maryland, 340 U.S. 268 (1951); Kunz v. New York, 340 U.S. 290 (1951).

[193] Jones v. Opelika, 319 U.S. 103 (1943); Murdock v. Pennsylvania, 319 U.S. 105 (1943).

[194] Follett v. McCormick, 321 U.S. 573 (1944).

[195] Martin v. Struthers, 319 U.S. 141 (1943).

[196] Fowler v. Rhode Island, 345 U.S. 67 (1953); Poulos v. New Hampshire, 345 U.S. 395 (1953).

[197] Prince v. Massachusetts, 321 U.S. 158 (1944).

[198] Justice Roberts described the concept in Hague v. CIO, 307 U.S. 496, 515 (1939) (concurring):

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.

See also Schneider v. State, 308 U.S. 147 (1939).

[199] Grayned v. City of Rockford, 408 U.S. 104, 116 (1972).

Since 1980 the Court has elaborated on its public forum doctrine and made clear that in traditional or designated public fora, government cannot censor speech because of its content without compelling reason. In nonpublic fora, however, government has greater latitude: it can impose regulations that are reasonable so long as the regulations are "not an effort to suppress expression merely because public officials oppose the speaker's view."[200] The Court has applied this framework of analysis in six cases relating to religious speech and solicitation in such public fora as a state fair, an airport terminal, a school auditorium, and other school facilities. It has also addressed whether a municipality can require door-to-door religious canvassers to first obtain a license. In addition, it has, in three cases, attempted for the first time to delineate what government can and cannot do with respect to the public display of religious symbols. Finally, in a case of first impression, it resolved the constitutionality of government sponsorship of religious speech in the form of the legislative chaplaincy.

***(1) Government regulation of religious speech and solicitation.*** In five decisions since 1980 the Court has affirmed that in places that traditionally or by designation are devoted to expression, government may not prohibit or censor religious speech without compelling reason or under regulations that are not viewpoint neutral. In a sixth case it has held that door-to-door canvassing by religious groups cannot be subjected to municipal licensing; and it has also held that in regulating charitable solicitations, government must act in an evenhanded manner, *i.e.*, it cannot favor some religious solicitations over others. But the Court has also reaffirmed that government can impose reasonable time, place, and manner restrictions.

*Heffron v. International Society for Krishna Consciousness, Inc. (ISKCON)*[201] involved a state regulation imposed on the distribution and sale of literature and the solicitation of donations at the Minnesota State Fair. The regulation required such activities to be done only from fixed locations, *i.e.*, pre-assigned rented booths. ISKCON claimed that its religious ritual of Sankirtan requires the faithful to go into public places to distribute or sell religious literature and to solicit donations to support the Krishna religion. But the Court unanimously held Minnesota's "booth rule" to be constitutional with respect to the sale of literature and the solicitation of donations, and by a 5-4 margin upheld it as well with respect to the distribution of literature. The Fair, the Court said, was a limited public forum, and the regulation was a reasonable time, place, and manner restriction. It was applied in a nondiscriminatory manner; was unrelated to the content or the subject matter of the speech involved; did not vest arbitrary discretion in any governmental authority; served the "substantial state interest" of ensuring the orderly movement of the crowds attending the Fair and of avoiding congestion; and left ISKCON and other organizations at the Fair ample opportunity to engage in protected speech.

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[200] Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37, 46 (1983).

[201] 452 U.S. 640 (1981).

In *Board of Airport Commissioners of the City of Los Angeles v. Jews for Jesus, Inc.*,[202] in contrast, the Court unanimously struck down a regulation that banned **all** First Amendment activities in the Central Terminal Area of Los Angeles International Airport. The regulation had been applied to bar a minister of the Gospel for Jews for Jesus from distributing free religious literature on a pedestrian walkway in the Airport. The Court, without deciding whether the Terminal constituted a traditional public forum, a limited public forum, or a nonpublic forum, held the regulation to be overbroad and facially unconstitutional. By its terms, Justice O'Connor wrote for the Court, the regulation created "a virtual `First Amendment Free Zone'" at the Airport. It was not limited to expressive activity that might be disruptive or create congestion, but prohibited "even talking and reading, or the wearing of campaign buttons or symbolic clothing." "No conceivable governmental interest," she stated, "could justify such an absolute prohibition of speech."[203]

In *International Society for Krishna Consciousness, Inc. v. Lee*[204] the Court did reach the question of whether public airport terminals are traditional or designated public fora for free speech purposes, and it held that they are not. As a consequence, the Court held that the airport authority in this instance needed only a rational basis for its regulations. Thus, it held, 6-3, that the authority could constitutionally ban the solicitation of funds in the terminals, because it was reasonable to surmise that the in-person solicitation of funds would be disruptive, pose risks of duress and fraud, and foster congestion. But a different majority of the Justices held, 5-4, that the airport authority could **not** prohibit religious groups from distributing literature in the airport terminals. Justices Kennedy, Blackmun, Stevens, and Souter asserted that the terminals were public fora and that the ban on literature distribution was unconstitutional because it was "not drawn in narrow terms" and did not leave open "ample alternative channels of communication." However, Justice O'Connor, casting the deciding vote, reasoned that the terminals were not public fora but that leafletting was inherently less disruptive than solicitation and was compatible with the "multipurpose environment of the ... airports."

In *Lamb's Chapel v. Center Moriches School District*[205] the Court unanimously held unconstitutional a school's refusal to permit a religious group to use its school auditorium during non-instructional hours to show a film on family life. The Court noted that the school district generally permitted its schools to be used for social, civic, and recreational purposes after school hours, and concluded that to deny a group the right to use the facilities simply because it was religious discriminated on the basis of viewpoint in violation of the free speech clause. "[T]he government violates the First Amendment," the Court quoted from another case,[206] "when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject." The school district claimed it denied permission to

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[202] 482 U.S. 569 (1987).

[203] *Id.* at 575.

[204] 506 U.S. 805 (1992).

[205] 508 U.S. 384 (1993).

[206] Cornelius v. NAACP Legal Defense and Education Fund, Inc., 473 U.S. 788, 806 (1985).

avoid violating the establishment clause, but the Court rejected that claim. In light of the facts that there was no school sponsorship involved, that the event would have been open to the public, that it would not have taken place during school hours, and that the school property was repeatedly used by a wide variety of private organizations, the Court said, "there was no realistic danger that the community would think that the District was endorsing religion or any particular creed, and any benefit to religion or to the Church would have been no more than incidental."[207]

Similarly, in *Good News Club v. Milford Central School*[208] the Court reiterated that a public school district cannot, consistent with the free speech clause, open its facilities for general community use after school hours but deny their use for religious worship and discussion by a religious club. In this instance the school district had adopted a policy allowing general community use but barred their use for "religious purposes; and pursuant to that policy it had refused permission to a religious club open to elementary school children that wanted to meet on school property after the end of the school day. The Court held that refusal to violate the free speech clause, 6-3. There was no significant distinction, it said, from the facts of *Lamb's Chapel*; and there was no logical distinction between the religiously based moral instruction offered by the Good News Club and the teachings of other groups allowed to use the facilities, such as the Boy Scouts, the Girl Scouts, and the 4-H Club. The Court also rejected the argument that use of the school's facilities by the Club would violate the establishment clause. It said that allowing such use would simply treaty the Club neutrally, the religious conduct involved was wholly private and not school-sponsored, and there was no more risk that the elementary school children would perceive such use to constitute school endorsement of religion "than the danger that they would perceive hostility toward the religious viewpoint if the Club were excluded from the public forum."

In *Watchtower Bible & Tract Society of New York, Inc. v. Stratton, Ohio*[209] the Court held the free speech clause to be violated by a village ordinance that barred individuals and organizations, including religious proselytizers, from going door-to-door in the community unless they first obtained a permit from the mayor's office. The Court said that if the ordinance had applied only to commercial activities and the solicitation of funds, it "arguably ... would have been tailored to the Village's interests in protecting the privacy of its residents and preventing fraud." But, it asserted, the fact that it applied to religious and political causes as well made it "offensive – not only to the values protected by the First Amendment, but to the very notion of a free society." The Village's claimed interests in preventing fraud, protecting the privacy of its residents, and preventing crime, it concluded, could not justify such a sweeping requirement on speech. The decision was 8-1.

Finally, in *Larson v. Valente*[210] the Court made clear that government cannot favor some religious organizations and disfavor others in regulating solicitations for

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[207] Lamb's Chapel v. Center Moriches School District, *supra*, at 397.

[208] 533 U.S. 98 (2001).

[209] 122 S.Ct. 2080 (2002).

[210] 456 U.S. 228 (1982).

contributions. A Minnesota statute required charitable organizations to register and file annual reports with the state as a condition of soliciting funds within the state but exempted religious organizations from these requirements if they received more than 50 percent of their contributions from their own members. The Court, stating that "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another,"[211] held this 50 percent rule to constitute a denominational preference. The statute, Justice Brennan asserted for the Court, distinguished between well-established churches supported largely by their own members and new religious organizations that for practical or policy reasons sought support from the public at large. Because the statute involved such a preference, the Court analyzed its constitutionality not only under the tripartite test but under a strict scrutiny test. The tripartite test was violated, Justice Brennan wrote, because the measure involved "religious gerrymandering" by the legislature. The legislative debate on the measure, he said, showed an intent that certain religions were to be favored, others disfavored. In addition, the Court held the measure to violate the strict scrutiny test. The protection of the state's citizens from abusive practices in the solicitation of funds for charity, Justice Brennan wrote, constituted a sufficiently compelling governmental interest under the strict scrutiny test, but the means chosen to effectuate that interest were not "closely fitted" to that purpose. Nothing validated the assumptions that organizations receiving more than 50 percent of their funds from their own members would be closely supervised by those members, that such membership control was an adequate safeguard against abusive or fraudulent solicitations of the public, or that the need for public disclosure rises in proportion to the percentage of nonmember contributions. Thus, the Court held, the measure failed to meet the requirements of the strict scrutiny test. The decision was by a 5-4 margin.

***(2) Display of religious symbols.*** None of the decisions recounted in the preceding subsection was particularly surprising. But since 1980 the Court has broken new ground in addressing the constitutional parameters governing the display of religious symbols on public property. In two decisions the Court held that government cannot itself display or give preference to the display by others of particular religious symbols on public property but that it can include religious symbols in generally secular holiday displays. In a third decision the Court made clear that private sponsors of religious symbols have a constitutional right to display the symbols in traditional public fora, so long as the circumstances of the display do not connote governmental endorsement.

In *Lynch v. Donnelly*[212] the issue was the constitutionality of a municipality's inclusion of a creche as part of a seasonal Christmas display in a local park. The display included not only the creche but also such items as a "talking" wishing well, a Santa's house, a small village, candy-striped poles, a grouping of carolers and musicians, reindeer pulling Santa's sleigh, hundreds of colored lights, and a large banner reading "Season's Greetings." All of the items in the display, including the creche, had been purchased by the city and were maintained and erected each year by city workers. In a 5-4 decision holding the inclusion of the creche in the display to

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[211] *Id.* at 244.

[212] 465 U.S. 668 (1984).

be constitutional, the Court said the critical fact was that there was "an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life ...." Such items as the designation of Thanksgiving and Christmas as national holidays, the hiring of chaplains by the Congress, the designation of the phrase "In God We Trust" as the nation's motto and its inscription on our coins and currency, the annual National Day of Prayer, the display of religious paintings in public museums — all gave evidence, Chief Justice Burger wrote for the Court, of government's "accommodation of all faiths and all forms of religious expression and hostility toward none." The creche, he said, was simply another permissible accommodation. In the context of the Christmas season, he stated, the creche was an essentially "passive" symbol that promoted Christianity or religion generally no more than numerous other instances of government acknowledgment of religion. Although the creche had religious significance, he concluded, its essential purpose in the display was simply to "depict the historical origins of this traditional event long recognized as a National Holiday."

Similarly, the Court in *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*[213] upheld as constitutional Pittsburgh's display of a large Christmas tree, an 18-foot high menorah, and a sign designating the display to be a "Salute to Liberty" in front of the City-County Building during the Christmas season. The case produced numerous concurrences and dissents, and on this issue there was no majority opinion. But Justice Kennedy, for four members of the Court,[214] reiterated the *Lynch* rationale that the tree and menorah were "purely passive symbols of religious holidays" and that by using them the City simply acknowledged "the historical background and the religious as well as secular nature of the Chanukah and Christmas holidays." The display, he asserted, did not use "the government's power to coerce ... to further the interests of Christianity or Judaism in any way." Justices Blackmun and O'Connor concurred in separate opinions that this display was constitutional on the grounds that the display as a whole did not convey a government endorsement of either Christianity or Judaism but instead communicated a message of "pluralism and freedom of belief."

But in *County of Allegheny* the Court also, in a bitterly disputed holding, held **un**constitutional a county's display of a creche by itself on the grand staircase of the County Courthouse during the Christmas season. The creche bore an angel at its crest proclaiming "Gloria in Excelsis Deo!" and was erected each year by a private Catholic men's organization. The county decorated the area around the creche each year with poinsettias, evergreen trees, and Christmas wreaths, and invited choirs to participate in a daily program of Christmas carols performed with the creche in the foreground. Justice Blackmun, writing for the Court on this issue, employed Justice O'Connor's endorsement test as the applicable principle in the case and found that the creche communicated an "indisputably religious" message. Moreover, he said, "unlike in *Lynch*, nothing in the context of the display detracts from the creche's religious message." Its display by itself in the "main" and "most beautiful part" of the building that was the seat of county government, he stated, sent "an unmistakable message that [the government] supports and promotes the Christian praise to God

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[213] 492 U.S. 573 (1989).

[214] Chief Justice Rehnquist and Justices White, Scalia, and Kennedy.

that is the creche's religious message." By endorsing a "patently Christian message," he concluded, the display violated the establishment clause.

The third case in this area involved the display of a private religious symbol in a public park adjacent to an important government building. The Ku Klux Klan sought to erect a cross in the public square in front of Ohio's State Capitol Building during the Christmas season but had been rebuffed for the alleged reason its placement in that location would communicate a governmental endorsement of religion. But in *Capitol Square Review and Advisory Board v. Pinette*[215] the Court, by a 7-2 margin held the public square to be a public forum traditionally available for all kinds of expression and held the establishment clause not to justify the state's prohibition on the erection of the cross. Government can censor speech in a traditional public forum only if it has a compelling reason for doing so, Justice Scalia wrote for the Court, but the establishment clause is not such a reason in this context. "(O)ur precedent," he stated, "establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." Five Justices further examined whether the placement of the cross in proximity to the State Capitol might communicate a governmental endorsement of religion but, given the history of the square's use for expressive purposes and the presence of a sign disclaiming governmental endorsement, concluded that it would not.

In sum, these cases confirm that the establishment clause permits government to include a religious symbol in a predominantly secular holiday display but also that the clause prohibits government from displaying, or permitting others to display, quintessential religious symbols by themselves at governmental sites that are not public forums. The cases further establish that in forums that are traditional sites of free expression, the display of religious symbols by private parties is fully protected by the free speech clause unless the circumstances communicate a message of governmental endorsement of religion to a reasonable observer. But these principles are tenuous. These three cases have been among the most bitterly disputed establishment clause decisions on the Court, and as a consequence, it seems possible that the issue of the constitutional parameters governing the display of religious symbols might be revisited by the Court in the future.

***(3) Legislative chaplaincies.*** Despite the long history of chaplains and prayers in legislative assemblies, the Court did not have occasion to address the constitutionality of the practice until 1983. In *Marsh v. Chambers*[216] the Court, by a 6-3 margin, held a legislative chaplaincy sponsored and funded by the state of Nebraska not to violate the establishment clause. As previously noted, in deciding this case the Court for the first time eschewed use of the tripartite test, relying instead on two aspects of the history of the practice. Stating that "[t]he opening of sessions of legislative and other public bodies with prayer is deeply embedded in the history

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[215] 515 U.S. 753 (1995).

[216] 463 U.S. 783 (1983).

and tradition of this country,"[217] the Court first observed that legislative sessions had been opened with prayer for more than two centuries on the national level and more than a century in Nebraska. But secondly, and more importantly, the Court relied upon the acts of the First Congress in concluding that the establishment clause does not proscribe legislative prayer: Only three days prior to giving final approval to the Bill of Rights, Chief Justice Burger wrote for the Court, both houses of the First Congress authorized the appointment of paid chaplains. Thus, he concluded, "clearly the men who wrote the First Amendment did not view paid legislative chaplains and opening prayers as a violation of that Amendment."[218] "To invoke Divine guidance on a public body entrusted with making the laws ...," the Court found, "is simply a tolerable acknowledgment of beliefs widely held among the people of this country."[219]

**(c) Public Aid to Religious Organizations.** Among the establishment clause issues that have stirred passionate political and legal controversy, the constitutionality of public aid to religious organizations has been the subject of more Supreme Court decisions than any other. Yet the issue persists, and it is one area in which a loosened construction of the establishment clause could have profound effects. That reinterpretation clearly is occurring. The Court's ten decisions in this area since 1980 have expanded the extent to which government can assist religious enterprises, both directly and indirectly; and, in two of its most recent decision, the Court for the first time overturned some of its prior establishment clause cases which had limited particular forms of direct aid.

Prior to the 1980s the Court had construed the establishment clause to impose substantial, although not absolute, constraints on public aid to religious institutions. **Direct** public aid, the Court had said, must be limited to "secular, neutral, and nonideological purposes."[220] Direct support could be provided to the **secular** programs and services sponsored or provided by religious organizations but not to such organizations' **religious** activities or proselytizing. As a consequence, the Court struck down numerous aid programs benefitting sectarian elementary and secondary schools, because the Court found these institutions to be "pervasively sectarian," *i.e.*, so permeated by a religious purpose and character that their secular functions and religious functions were "inextricably intertwined." Under the tripartite *Lemon* test direct aid to such institutions was found either to have an inevitable effect of advancing religion or, if the government attempted to limit the aid to secular use only, to result in the excessive entanglement of government and the assisted institutions as the government monitored the institutions' use of the aid to be sure the secular use limitation was honored.[221] On the other hand, the Court had found direct public aid to religious institutions that were **not** pervasively sectarian, such as

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[217] *Id.* at 786.

[218] *Id.* at 788.

[219] *Id.* at 792.

[220] Committee for Public Education v. Nyquist, 413 U.S. 756, 780 (1973).

[221] *Id.*; Lemon v. Kurtzman, 403 U.S. 602 (1971); Meek v. Pittenger, 421 U.S. 349 (1975); Wolman v. Walter, 433 U.S. 229 (1977).

religious hospitals and colleges, to be constitutionally permissible. The Court's rationale was that such institutions were essentially secular in nature and thus the public aid did not resulted in the advancement of religion and did not lead to the excessively entangling monitoring required of direct aid to pervasively sectarian entities.[222]

**Indirect** aid benefitting sectarian elementary and secondary schools had also been held unconstitutional by the Court prior to the 1980s. In *Committee for Public Education v. Nyquist* and *Sloan v. Lemon*[223] programs providing both tax benefits and tuition grants were held unconstitutional by the Court because they were designed to benefit only the parents of private schoolchildren and most of the institutions that ultimately benefited from the assistance were pervasively sectarian.[224] Significantly, however, the Court in these cases specifically reserved the question of the constitutionality of "public assistance ... made available generally without regard to the sectarian-nonsectarian or public-nonpublic nature of the institution benefitted."[225]

The Court's indirect aid decisions since 1980 have addressed this reserved question and upheld as constitutional tuition grant, tax benefit, and education assistance programs that indirectly provide economic benefits to pervasively sectarian schools but that have been "made available without regard to the sectarian-nonsectarian or public-nonpublic nature of the institution benefitted." Moreover, in its most recent decision, the Court in *Zelman v. Simmons-Harris* loosened the constitutional strictures on education voucher programs in such a manner that most such programs appear likely to be able to pass constitutional muster.

In addition, the Court has substantially revised its prior establishment clause jurisprudence concerning direct aid to sectarian schools. It has held it to be constitutional for public school teachers to provide remedial educational services to sectarian school children on the premises of the schools they attended and for instructional materials and equipment to be loaned to sectarian schools. In both instances the Court overturned prior conflicting decisions. The Court has also virtually eliminated pervasive sectarianism as a constitutional criterion.

***(1) Direct assistance programs.*** In *School District of the City of Grand Rapids v. Ball*[226] and *Aguilar v. Felton*[227] the Court in 1985 held unconstitutional programs in which public school districts sent public school teachers into private sectarian schools to provide remedial and/or enrichment instruction to eligible

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[222] Bradfield v. Roberts, 175 U.S. 291 (1899); Tilton v. Richardson, 403 U.S. 672 (1971); Roemer v. Maryland Board of Public Works, 426 U.S. 736 (1976).

[223] 413 U.S. 790 (1973) and 413 U.S. 826 (1973), respectively.

[224] *Id.*

[225] Committee for Public Education v. Nyquist, 413 U.S. at 783, n. 38.

[226] 473 U.S. 373 (1985).

[227] 473 U.S. 402 (1985).

children attending those schools. But twelve years later in *Agostini v. Felton*[228] the Court overturned *Aguilar* and this part of *Ball*, as well as the related parts of the earlier decisions of *Meek v. Pittenger*[229] and *Wolman v. Walter*.[230] As a result, it is once again constitutionally permissible for public school teachers to provide remedial and enrichment educational services to sectarian school children on the premises of the schools they attend. Prior to 1980 in *Meek v. Pittenger*, *supra*, and *Wolman v. Walter*, *supra*, the Court had also held unconstitutional direct aid programs that provided instructional materials (other than textbooks) and equipment directly to sectarian elementary and secondary schools. But in *Mitchell v. Helms*[231] the Court overturned those decisions and held such a program to be constitutional.

The program in *Ball* was locally funded, but *Aguilar* involved New York City's implementation of the federal Title I program for educationally disadvantaged children.[232] In both programs the teachers were public school employees, the services were provided on the premises of the private schools, and the schools involved were almost all pervasively sectarian. But New York City's program included as well an extensive system of controls, including on-site monitoring, to ensure that the teachers did not engage in religious activities or religious instruction.

The Court, by identical margins of 5-4, struck down the Grand Rapids program on the grounds it had a primary effect of advancing religion and the New York City program for the reason it precipitated excessive entanglement between church and state. The establishment clause, Justice Brennan wrote for the Court, "absolutely prohibit[s] government-financed or government-sponsored indoctrination into the beliefs of a particular religious faith."[233] The Grand Rapids program, he said, posed "a substantial risk of state-sponsored indoctrination" in three ways. The pervasively religious nature of the schools, he asserted, might cause the teachers "to conform their instruction to the environment in which they teach"[234]; the program created a "symbolic union of government and religion" that conveyed a message of government endorsement of the religious faith of the aided institutions; and the program subsidized the religious functions of the aided schools "by taking over a substantial portion of their responsibility for teaching secular subjects."[235] New York City argued in *Aguilar* that its system of controls ensured that its Title I program did not have these unconstitutional effects. But without addressing that issue, the Court held that the system of monitoring and controls itself unconstitutionally entangled the city with the religious schools. Justice Brennan, again writing for the Court, said the "detailed monitoring and close administrative contact" involved in the City's

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[228] 521 U.S. 203 (1997).

[229] 421 U.S. 349 (1975).

[230] 433 U.S. 229 (1977).

[231] 120 S.Ct. 2530 (2000).

[232] 20 U.S.C. 3801 et seq. (1988).

[233] 473 U.S. at 385.

[234] *Id.* at 388.

[235] *Id.* at 397.

program violated an underlying objective of the establishment clause "to prevent, as far as possible, the intrusion of either [church or state] into the precincts of the other."[236] Notwithstanding the worthwhile social purpose of the program, he said, it created the specter of government agents prowling the halls of religious schools to ward off the "infiltration of religious thought."

Subsequently, a majority of the Justices on the Court expressed a desire to reconsider these decisions,[237] and in 1997 in *Agostini v. Felton, supra*, the Court did so, along with its earlier rulings on similar programs in *Meek v. Pittenger, supra,* and *Wolman v. Walter, supra*. Each of the assumptions on which those decisions had been based, Justice O'Connor wrote for the Court, had been "undermined" by more recent decisions. In *Zobrest v. Catalina Foothills School District,*[238] she said, the Court repudiated the notion that the placement of public employees on parochial school grounds inevitably leads to religious indoctrination as well as the assumption that such a placement creates an "impermissible symbolic link" between government and religion. In *Zobrest* and *Witters v. Washington Department of Services for the Blind,*[239] she asserted, the Court rejected the notion that "all government aid that directly aids the educational function of religious schools" is unconstitutional. Finally, she said, absent the assumption that public teachers in a sectarian school necessarily pose a serious risk of inculcating religion, "the assumption that *pervasive* monitoring of [such] teachers is required" is also no longer valid. Thus, she concluded, the constitutionality of the programs should be evaluated under the criterion of neutrality, *i.e.*, whether "aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." Finding the Title I program to meet that test, she stated, "accordingly, we must acknowledge that *Aguilar*, as well as the portion of *Ball* addressing Grand Rapids' Shared Time program, are no longer good law."

*Grand Rapids* had also held a second program funded and operated by the city to be unconstitutional, and that ruling was not disturbed by the *Agostini* decision. In that program (the Community Education program) the city paid parochial school teachers to provide an array of before and after school programs to the students who attended their schools and imposed no restrictions regarding religious content. The Court found the program to constitute aid to the institution rather than to the students and held it to "inescapably [have] the primary effect of providing a direct and substantial advancement of the sectarian enterprise."

In *Mitchell v. Helms, supra*, the Court also overturned some of its prior jurisprudence in the process of upholding as constitutional a federal program subsidizing the provision of instructional materials and equipment to public and

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[236] 473 U.S. at 413.

[237] *See* the concurring opinions of Justices O'Connor and Kennedy and the dissenting opinion of Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, in Board of Education of the Kiryas Joel Village School District v. Grumet, 512 U.S. 687 (1994).

[238] 509 U.S. 1 (1993).

[239] 474 U.S. 481 (1986).

private schools, 6-3. The aid at issue included such items as computers, computer software, library books, filmstrip projectors, overhead projectors, television sets, VCRs, maps, globes, and printers. The Court issued no majority opinion in the case, however. Instead, Justice Thomas, joined by Chief Justice Rehnquist and Justices Scalia and Kennedy, held the program not to violate the establishment of religion clause because the aid was made available to public and private schools alike on a religiously neutral basis and was secular in content. Justice O'Connor, joined by Justice Breyer, concurred that the program was constitutional but on the grounds not only that eligibility for assistance was determined on a religiously neutral basis but also that the use of the assistance was subject to a number of statutory and regulatory restrictions to secular use and there was no evidence the aid had been diverted for religious purposes. Justices Souter, Ginsberg, and Stevens dissented on the grounds the schools were pervasively sectarian and the aid, consequently, materially advanced the religious mission of the sectarian schools.

In so ruling the Court overturned parts of its prior decisions in *Meek v. Pittenger, supra*, and *Wolman v. Walter, supra*. The reasoning of the Justices in the two opinions comprising the majority in *Mitchell* also made clear that pervasive sectarianism is no longer deemed to be fatal to an aid program's constitutionality. Justice Thomas opined that so long as aid is dispensed on a religiously neutral basis and is secular in nature, nothing in the establishment clause bars the recipient institution from using it for religious purposes. Justice O'Connor asserted that public aid still had to be limited to secular use in the recipient institutions but that there was no reason to assume that such a limitation could not be honored in religious elementary and secondary schools. Thus, as in *Agostini*, she saw no reason for close government monitoring of the institutions' use of the aid that might be excessively entangling.

At the college level the Court, by a 5-4 margin, held in *Rosenberger v. The Rector and Visitors of the University of Virginia*[240] that when a public university creates a forum for the expression of student opinions, it cannot exclude student religious opinions. In this instance the University of Virginia fostered the creation of publications by student organizations by paying their printing bills out of the student activities fund (SAF). However, it excluded religious publications, among others, from the subsidy, arguing that the establishment clause prohibits the funding of such a religious activity. But the Court rejected the argument. It held the object of the SAF to be "to open a forum for speech" and the University's exclusion of the religious publication, as a consequence, to constitute viewpoint discrimination violative of the free speech clause of the First Amendment. The SAF was not a tax used to support a church, the Court said, but essentially amounted to a religiously neutral fund to promote private student speech. The Court said the University's policy of exclusion itself threatened to violate the establishment clause because the University would then have to scrutinize every publication and determine when its religious content was too great. Justice O'Connor, the decisive vote in the case, stressed in a concurring opinion the factors that the publications were genuinely independent of the University, that the payments were made not directly to the sponsoring student organizations but to the printer, that numerous publications were

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[240] 515 U.S. 819 (1995).

subsidized, and that students could, at least hypothetically, seek a refund for any portion of their fees used for speech with which they disagreed. These factors convinced her, she said, that "providing ... assistance in this case would not carry the danger of impermissible use of public funds to endorse Wide Awake's religious message."

Finally, outside the school context the Court in *Bowen v. Kendrick*[241] upheld as facially constitutional, 5-4, provisions of the Adolescent Family Life Act[242] (AFLA) which permitted grants for pregnancy prevention and care services to adolescents to be made to religious organizations and which mandated that all grantees devise ways of involving other organizations, including religious ones, in the delivery of such services. The Court applied the same principles under the tripartite test as it had in past school aid cases and held the establishment clause not to automatically foreclose all religious organizations from participating in a publicly funded program such as AFLA. Chief Justice Rehnquist, writing for the Court, reiterated that direct public grants cannot be given to pervasively sectarian organizations or otherwise used for religious purposes, but he rejected the contention that "no grants whatsoever can be given under the statute to religious organizations."[243] Although holding the statute facially constitutional, the Court remanded the case back to the district court for further fact-finding on whether particular grantees might have been pervasively sectarian and whether particular grants might have been used for religious purposes.[244]

***(2) Indirect assistance programs.*** In four other decisions involving sectarian elementary and secondary schools, however, the Court has, since 1980, opened the constitutional door to indirect subsidies. In *Mueller v. Allen*,[245] *Witters v. Washington Department of Services for the Blind*,[246] *Zobrest v. Catalina Foothills School District*,[247] and *Zelman v. Simmons-Harris*,[248]the Court upheld the provision of various forms of educational assistance to individuals on the grounds they possessed a genuinely free choice about whether to use the assistance at sectarian or nonsectarian schools. *Mueller* involved a Minnesota program permitting taxpayers to deduct from their gross income, up to a pre-set maximum, the expenses incurred in sending their children to elementary or secondary school. The deduction could be taken regardless of whether the children attended public or private school and applied to such expenses as tuition, textbooks, fees, and transportation. Then-Justice Rehnquist, writing for the Court, stressed that, in contrast to the earlier indirect

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[241] 487 U.S. 589 (1988).

[242] 42 U.S.C. 300z et seq. (1988).

[243] 487 U.S. at 611.

[244] Subsequently the parties entered into a settlement agreement and the case was dismissed. *See Kendrick v. Sullivan*, Civil Action No. 83-3175 (D.D.C. Jan. 19, 1993) (order granting joint motion to dismiss with prejudice).

[245] 463 U.S. 388 (1983).

[246] 474 U.S. 481 (1986).

[247] 509 U.S. 1 (1993).

[248] 122 S.Ct. 2460 (2002).

assistance programs struck down by the Court,[249] the Minnesota deduction was "available for educational expenses incurred by *all* parents, including those whose children attend public schools and those whose children attend nonsectarian private schools or sectarian private schools."[250] "[A] program ... that neutrally provides state assistance to a broad spectrum of citizens," he concluded, "is not readily subject to challenge under the Establishment Clause." He stressed as well that the assistance was extended to parents rather than directly to sectarian schools, because "[w]here ... aid to parochial schools is available only as a result of decisions of individual parents no `imprimatur of state approval' can be deemed to have been conferred on any particular religion, or on religion generally."[251]

The Court's decision in *Mueller* was 5-4. But in *Witters v. Washington Department of Services for the Blind* the Court was unanimous in upholding as constitutional a state vocational rehabilitation grant to a blind person who wanted to use the grant to train for a religious ministry. Justice Marshall, who had dissented in *Mueller*, made no reference to *Mueller* in his opinion for the Court. But he emphasized, as had *Mueller*, that "[a]ny aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients."[252] "[T]he fact that aid goes to individuals," he said, "means that the decision to support religious education is made by the individual, not by the State."[253] He also emphasized that there was no likelihood that any substantial portion of the vocational rehabilitation grants would be used for such religious purposes, but five Justices filed concurring opinions making clear that they did not regard the substantiality of aid that might go for religious purposes to be a constitutionally significant issue.

In *Zobrest v. Catalina Foothills School District* the Court was again sharply divided, 5-4. The case involved the provision of a sign language interpreter pursuant to the Individuals with Disabilities Education Act (IDEA)[254] to a deaf high school student who wanted to attend a Catholic school. Using the reasoning of *Mueller* and *Witters*, the Court held the assistance not to violate the establishment clause. "The service at issue in this case," the Court said, "is part of a general government program that distributes benefits neutrally to any child qualifying as `handicapped' under the IDEA, without regard to the `sectarian-nonsectarian, or public-nonpublic nature' of the school the child attends." Thus, it asserted, the presence of a sign-language interpreter in a sectarian school is the result not of state decision-making but stems

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[249] Committee for Public Education v. Nyquist, 413 U.S. 356 (1973) and Sloan v. Lemon, 413 U.S. 388 (1973).

[250] 463 U.S. at 397.

[251] *Id.* at 399.

[252] 474 U.S. at 487.

[253] *Id.* at 488. It might be noted that although Witters won this constitutional battle, he eventually lost the war. The Washington Supreme Court held the Washington Constitution to prohibit the use of a vocational rehabilitation grant for religious training. See Witters v. Washington Department of Services for the Blind, 112 Wash.2d 363, 771 P.2d 1119, cert. den., 493 U.S. 850 (1989).

[254] 20 U.S.C. 1400 *et seq.*

from the "private decision of individual parents." The provision of "a neutral service on the premises of a sectarian school as part of a general program that `is in no way skewed towards religion,'" the Court concluded, "does not offend the Establishment Clause."

*Mueller* and *Witters*, it should be noted, did not overturn the Court's earlier decisions holding unconstitutional indirect aid to a universe of private elementary and secondary schools that was predominantly sectarian. As noted above,[255] *Committee for Public Education v. Nyquist* and *Sloan v. Lemon* had specifically reserved the question addressed in *Mueller* and *Witters*, *i.e.*, the constitutionality of assistance made available without regard to the sectarian-nonsectarian or public-nonpublic nature of the institutions ultimately benefitted. The critical distinction between *Nyquist* and *Sloan*, on the one hand, and *Mueller* and *Witters*, on the other, was whether the initial beneficiaries of the government's assistance possessed a genuinely free choice about whether to use the assistance at a sectarian or nonsectarian institution. If the government had shaped that decision by limiting the universe of choice to institutions that were predominantly sectarian (as in *Nyquist* and *Sloan*), the assistance, even though indirect, was found unconstitutional. If the universe of choice was genuinely unfettered and independent, however, the assistance was upheld, even though sectarian institutions received some, or even substantial, economic benefit from it.

Nonetheless, in its most recent decision in *Zelman v. Simmons-Harris*[256] the Court narrowed the precedential scope of *Nyquist* and *Sloan* and made it significantly easier for voucher programs to pass constitutional muster. Again by a 5-4 margin, the Court in *Zelman* upheld as constitutional a program that gave low-income children in failing public schools in Cleveland, Ohio, a voucher that they could use to attend private schools in the city. More than 80 percent of the schools participating were religious in nature, however, and as a result 96 percent of the eligible children chose to attend such schools. But notwithstanding the predominance of religious schools in the universe of private schools open to the voucher children, the Court still found that the program gave the parents and their children a "true private choice." In contrast to its previous decisions, the Court said the universe of choices available to voucher children was not limited to the private schools where the vouchers could be redeemed but included all of the educational choices available to them in Cleveland, including various public school options. Chief Justice Rehnquist stated for the Court:

> Cleveland schoolchildren enjoy a range of educational choices: They may remain in public school as before, remain in public school with publicly funded tutoring aid, obtain a scholarship and choose a religious school, obtain a scholarship and choose a nonreligious private school, enroll in a community school, or enroll in a magnet school. That 46 of the 56 private schools now participating in the program are religious schools does not condemn it as a violation of the Establishment Clause. The Establishment Clause question is whether Ohio is coercing parents into sending their children to religious schools, and that

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[255] See p. 52.

[256] 122 S.Ct. 2460 (2002).

> question must be answered by evaluating *all* of the options Ohio provides Cleveland schoolchildren, only one of which is to obtain a program scholarship and then choose a religious school.[257]

Thus, he concluded, the voucher program satisfied the requirements of the establishment clause. The program served the "valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system." The aid was distributed to the initial recipients on a religion-neutral basis, *i.e.*, vouchers were available to all children in failing public schools. Finally, the initial recipients had a "genuine choice among options public and private, secular and religious."

In sum, then, the Court since 1980 has validated a broader range of both direct and indirect assistance than was thought to be constitutionally permissible prior to 1980.

**(d) Governmental Solicitude for Religion.** The Court's diminution of the protection afforded religious practices by the free exercise of religion clause has been detailed in the first section above, and will not be reiterated here. As noted there, except with respect to eligibility for unemployment benefits when there is a conflict between the requirements of a job and an individual's religious precepts, an as-yet undefined area of "hybrid" claims, and government actions that intentionally discriminate against religion, the Court's decisions on free exercise since 1980 seem to mean that the free exercise clause interposes no barrier to governmental restriction of religious practices through evenhanded regulations.

But seven cases during the 1980s concerned a related dimension of the religion clauses, *i.e.*, deliberate government efforts to **protect** individual and institutional religious practices. If the free exercise clause does not mandate special protection for religious practices, may government nonetheless give religion special privileges or require private entities in society to accommodate religious practices? In its seven decisions the Court upheld government policies that prohibit employers from discriminating on religious grounds as well as policies that exempt religious employers from such prohibitions. But the Court also made clear that government cannot, in the guise of protecting religion, give religious practices an absolute preference over other individual and societal concerns; nor may it give particular religious groups special accommodations that may not be available to nonreligious groups in similar circumstances.

Four cases, in particular, illuminated the limits on what government can do to protect religion. In *Larkin v. Grendel's Den*[258] the Court held unconstitutional, 8-1, a Massachusetts statute that gave churches a veto power over the issuance of liquor licenses to nearby enterprises. The statute provided that liquor licenses could not be issued for enterprises located within 500 feet of a church or school "if the governing body of such church or school files written objection thereto." In this particular case a church near Harvard Square in Cambridge had objected to the issuance of a liquor

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[257] *Id.* at 4688.

[258] 459 U.S. 116 (1982).

license to an adjacent restaurant; and the Cambridge License Commission had, in conformity with the statute, denied the restaurant's application, despite the fact that 25 establishments within 500 feet of the church already were so licensed. Chief Justice Burger, writing for the Court, conceded that the state had a valid secular interest in using its zoning powers to "protect spiritual, cultural, and educational centers from the `hurly-burly' associated with liquor outlets." But the means used in this instance, he said, "enmeshe[d] churches in the exercise of substantial governmental powers contrary to our consistent interpretation of the Establishment Clause." The "core rationale" of the establishment clause, he said, was to prevent "the fusion of governmental and religious functions." But the statute in this case symbolically joined church and state in a joint exercise of legislative authority, failed to require that churches exercise their veto power in a religiously neutral way, permitted religious institutions to exercise important discretionary governmental powers, and created the danger of political fragmentation along religious lines. For those reasons, he concluded, the statute breached the figurative "wall of separation" that insulates religion and government from each other.

Similarly, in *Estate of Thornton v. Caldor, Inc.*[259] the Court struck down, 8-1, a Connecticut statute which gave every employee an absolute right not to work on whatever day of the week the employee designated as the Sabbath. Chief Justice Burger, writing for the Court, said that the statute "imposes on employers and employees an absolute duty to conform their business practices to the particular religious practices of the employee" and "commands that Sabbath religious concerns automatically control over all secular interests at the workplace." Because of the absolute nature of that preference, he concluded, the statute had a primary effect of advancing the religious practice of Sabbath observance in violation of the establishment clause.

Again, in *Texas Monthly, Inc. v. Bullock*[260] the Court struck down, 6-3, a Texas statute that exempted only publications published or distributed by a religious faith and advancing the tenets of that faith from the state's sales tax. Although none of the four opinions issued on the matter had the support of a majority of the Court, five of the Justices held the establishment clause to forbid such an exclusive preference for religious publications. Justices Brennan, Marshall, and Stevens found the narrowness of the exemption to constitute "state sponsorship of religious belief" and to be "a blatant endorsement of religion." Justices Blackmun and O'Connor said that "by confining the tax exemption exclusively to the sale of religious publications, Texas engaged in preferential support for the communication of religious messages." Such a statutory preference, they said, was "constitutionally intolerable."

Finally, in *Board of Education of the Kiryas Joel Village School District v. Grumet*[261] the Court held unconstitutional a New York statute which sought to accommodate the special education needs of children belonging to the Satmar Hasidic sect by creating a public education district whose boundaries coincided with

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[259] 472 U.S. 703 (1985).

[260] 489 U.S. 1 (1989).

[261] 512 U.S. 687 (1994).

the boundaries of the village inhabited by the sect. The Satmar had refused to send their special needs children to sites outside the village because of the "panic, fear, and trauma" that resulted from leaving their insular community and associating with people "whose ways were so different." So the New York legislature adopted a special statute creating a public school district with boundaries identical to the Satmar village in order to make them eligible for special education funds to subsidize services for their special needs children within the village. But the Supreme Court said, 6-3, that the statute "crosses the line from permissible accommodation to impermissible establishment" and "violates the test of neutrality." There was no assurance, Justice Souter wrote for the Court, that a similar group would be similarly treated in the future. The constitutional vice of the statute, he said, was that it "single(d) out a particular religious sect for special treatment" and delegated a significant governmental power "to an electorate defined by common religious belief and practice, in a manner that fails to foreclose religious favoritism."

But in *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*[262] the Court unanimously upheld the exemption of religious institutions from the religious nondiscrimination in employment requirements of Title VII of the Civil Rights Act of 1964. Title VII prohibits most public and private employers from discriminating in their employment practices on the grounds of race, color, national origin, sex, and religion.[263] Section 702 of that statute, however, exempts religious institutions from the religious nondiscrimination requirement, *i.e.*, such institutions can discriminate in their employment practices on religious grounds, although not on the other prohibited grounds.[264] In this case an employee dismissed for religious reasons from a job with a nonprofit health facility run by the Mormon Church challenged the constitutionality of the exemption. But the Court held it to be permissible for government "to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." Even though the exemption applied to all the activities of religious organizations and not just their religious ones, and even though it applied only to religious organizations, Justice White wrote for the Court, it met the requirements of the tripartite test.

Two other cases involving religious discrimination in employment were resolved on statutory grounds. In *Ansonia Board of Education v. Philbrook*[265] the Court construed the reasonable accommodation requirement of Title VII not to require an employer to accede to an employee's preferred accommodation but simply to require a proffer of a "reasonable resolution of the conflict." To effectuate its ban on religious discrimination in employment, Title VII requires employers to "reasonably accommodate" their employees' religious observances and practices unless to do so causes "undue hardship on the conduct of the employer's business."[266]

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[262] 483 U.S. 327 (1987).

[263] 42 U.S.C. 2000e *et seq.*

[264] *Id.* § 2000e-1.

[265] 479 U.S. 60 (1986).

[266] 42 U.S.C. 2000e(j) (1988).

At issue in this case was whether the employer had to accept an employee's preferred accommodation unless it could show that the accommodation would impose an undue hardship. The Court held that it did not, 7-2. "By its very terms," Chief Justice Rehnquist wrote for the Court, "the statute directs that any reasonable accommodation by the employer is sufficient to meet its accommodation obligation."[267]

Finally, in *Shaare Tefila Congregation v. Cobb*[268] the Court unanimously construed a federal statute to permit a Jewish congregation to seek civil damages from persons who had desecrated its synagogue with anti-Semitic slogans, phrases, and symbols. The statute in question, adopted shortly after the Civil War, guarantees all citizens "the same right ... as is enjoyed by white citizens ... to inherit, purchase, lease, sell, hold, and convey real and personal property"[269] and has been construed by the Court to prohibit private racially motivated interference with property rights.[270] Although Jews today are not considered a distinct race, Justice White concluded for the Court that they are within the protection of the statute, because at the time the statute was adopted "Jews and Arabs were among the peoples then considered to be distinct races." Thus, he said, Jews can bring suit for civil damages under Section 1982 against persons who interfere with their property rights and are motivated by racial animus against Jews.

**(e) Taxation of Religious Entities.** A number of cases since 1980 have concerned the constitutionality of various taxes imposed on religious organizations and individuals, and in its decisions the Court has made clear that government possesses substantial discretion in this area of the law. The Court previously had made few forays into this subject. In the 1940s cases of *Murdock v. Pennsylvania*[271] and *Follett v. McCormick*[272] the Court had struck down as unconstitutional the imposition of license and occupation taxes on itinerant evangelists. The Court found such taxes to operate as a prior restraint on religious proselytizing and thus to "tend to suppress" such evangelizing, in violation of the First Amendment. Moreover, in 1970 in *Walz v. Tax Commission of New York*[273] the Court upheld as constitutional a property tax exemption afforded by New York City to religious organizations, 8-1. Without quite saying that the exemption was constitutionally mandated, the Court emphasized that the tax exemption of churches from property taxes created a lesser degree of government entanglement with religion than would the contrary policy. While a direct money subsidy might precipitate "a relationship pregnant with involvement and ... encompass sustained and detailed administrative relationships for enforcement of statutory and administrative standards," the Court said, a tax exemption simply means that government "abstains from demanding that the church

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[267] 479 U.S. at 68.

[268] 481 U.S. 615 (1987).

[269] 42 U.S.C. 1981 (1988).

[270] Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968).

[271] 319 U.S. 105 (1943).

[272] 321 U.S. 573 (1944).

[273] 397 U.S. 664 (1970).

support the state."[274] The Court also stressed that the exemption was available not just to religious organizations but also to property owned by hospitals, libraries, playgrounds, scientific, professional, historical and patriotic groups, and that the tax exemption of churches has been part of our national life since colonial times. It concluded that "if tax exemption can be seen as th[e] first step toward "establishment" of religion ..., the second step has been long in coming."[275]

In its more recent decisions the Court, while generally reaffirming these precedents, has not erected any other constitutional barriers to the imposition of general taxes on religious individuals and organizations. In *United States v. Lee*[276] the Court unanimously upheld the imposition of the employer's portion of the Social Security tax on an Amish employer, notwithstanding the Amish' specific religious belief against contributing to a public social insurance system. Congress had by statute exempted self-employed Amish from paying such taxes,[277] but the Court still held the extension of the exemption to Amish employers holding such beliefs not to be constitutionally mandated. "The tax imposed on employers to support the social security system," the Court said, "must be uniformly applicable to all, except as Congress provides explicitly otherwise."[278]

Similarly, in *Bob Jones University v. United States*[279] the Court upheld the IRS' revocation of the income tax exemption of a religious university that, on the basis of its religious beliefs, discriminated on the basis of race. The government has a "fundamental, overriding interest in eradicating racial discrimination in education," the Court stated, and that interest "substantially outweighs whatever burden denial of tax benefits places on petitioners' exercise of their religious beliefs."[280]

Again, in *The Jimmy Swaggart Ministries v. Board of Equalization of California*[281] the Court upheld California's imposition of general sales and use taxes on a religious organization's direct and mail order sales of religious literature. The Ministries argued that the taxes unduly burdened its ability to carry out its religious ministry and created excessive administrative entanglement between government and itself. But the Court asserted that the taxes were imposed neutrally on all retail sales and did not single out religious activity for special and burdensome treatment. It further asserted that any administrative burden involved in collecting and remitting the taxes was not "constitutionally significant."

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[274] *Id.* at 673.

[275] *Id.* at 676.

[276] 455 U.S. 252 (1981).

[277] 26 U.S.C. 1402(g) (1988).

[278] 455 U.S. at 260.

[279] 461 U.S. 574 (1983).

[280] *Id.* at 574. Then-Justice Rehnquist dissented from the Court's ruling that the IRS properly imposed a racial nondiscrimination condition on the tax exemption of private schools but agreed that such a condition did not infringe the schools' free exercise rights. See *id*. at 622, n. 3.

[281] 493 U.S. 378 (1990).

And in *Hernandez v. Commissioner of Internal Revenue*[282] the Court upheld as constitutional IRS' denial of a charitable tax deduction to members of the Church of Scientology for payments they had made for the Church "sacraments" of auditing and training. The charitable deduction, the Court said, was only available for genuine gifts, not for "payments made in return for goods or services" such as the payments for auditing and training. It said the tax code provision was neutral on its face, was not "born of animus to religion in general or Scientology in particular," did not have a primary effect of either advancing or inhibiting religion, and required only "routine regulatory interaction" between government and religious organizations.

Moreover, while finding no constitutional barriers to the imposition of taxes on religious organizations and individuals, the Court in one decision found the establishment clause to bar an exemption from taxation for a religious entity. In *Texas v. Bullock*[283] the Court held unconstitutional, 6-3, a Texas statute that exempted from the state's sales and use taxes only those periodicals and books that promoted the teachings of a religious faith. Although the Justices articulated several different rationales for this conclusion, a majority appeared to agree that the establishment clause means "not only that government may not be overtly hostile to religion but also that it may not place its prestige, coercive authority, or resources behind a single religious faith or behind religious belief in general, compelling nonadherents to support the practices or proselytizing of favored religious organizations and conveying the message that those who do not contribute gladly are less than full members of the community."[284] To avoid the establishment clause flaw of appearing to sponsor or give preferential support to religious belief, a majority held, a tax benefit cannot be confined just to religious organizations but must flow to a broad class of beneficiaries.

Three other tax cases the Court resolved on statutory grounds without addressing any constitutional issues. Two involved the Federal Unemployment Tax Act (FUTA),[285] which requires employers to contribute to state unemployment insurance funds; and both involved a provision of the Act which exempts from coverage "(A) a church or convention or association of churches, or (B) an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches."[286] The Secretary of Labor construed the legislative history of recent amendments to FUTA to mean that church-related primary and secondary schools were no longer exempted from FUTA by that provision and thus were subject to the FUTA tax. But in *St. Martin Evangelical Lutheran Church v. South Dakota*[287] the Court held that construction of the Act and its legislative history to be invalid. "The only reasonable construction of 26 U.S.C. §3309(b)(1)," the

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[282] 490 U.S. 680 (1989).

[283] 489 U.S. 1 (1989).

[284] *Id.* at 9.

[285] 26 U.S.C. 3301-3311 (1988).

[286] 26 U.S.C. 3309(b) (1988).

[287] 451 U.S. 772 (1981).

Court stated, "is one that exempts petitioners' church-run schools, and others similarly operated, from mandatory state coverage."[288] Subsequently, in *California v. Grace Brethren Church*[289] the Court refused to reach the question of whether the imposition of FUTA taxes on religious schools **not** affiliated with any church violated the establishment clause, for the reason that the federal district court lacked jurisdiction to decide that issue. The Court held that the Tax Injunction Act,[290] which generally bars the federal courts from enjoining the collection of state taxes where "a plain, speedy, and efficient remedy may be had in the courts of such State," applied to the case, and that therefore the lower court should not have reached the constitutional issue.

Finally, in *Davis v. United States*[291] the Court unanimously construed the tax code not to permit the parents of two Mormon missionaries to deduct the support they provided their sons to enable them to serve as missionaries. The parents argued that their support constituted either charitable contributions in themselves or unreimbursed expenditures incurred in the course of their sons' contributions of services to the Mormon Church and thus should be deductible under § 170 of the Internal Revenue Code.[292] But the Court held that their support did not constitute a charitable contribution, because it was not given in any legally enforceable way for the benefit of the Church, and that they could not claim a deduction for expenses incurred in the course of a third party's contribution of services.

**(f) Other Decisions.** Of the remaining five church-state decisions by the Court since 1980, only one was decided on the merits. In that case, *Tony and Susan Alamo Foundation v. Secretary of Labor*,[293] the Court unanimously upheld as constitutional the application of the minimum wage and overtime provisions of the Fair Labor Standards Act[294] to employees who worked in various commercial enterprises operated by a religious organization. The Court found no exception in the Act for the commercial activities of religious or other nonprofit organizations and held the application of the FLSA to be "fully consistent with the requirements of the First Amendment." Application of the FLSA neither infringed on the employees' religious convictions that they should not be paid wages for their work, the Court said, nor did its record keeping requirements foster any excessive entanglement. "[T]he routine and factual inquiries required by §211(c) bear no resemblance," the Court stated, "to the kind of government surveillance the Court has previously held to pose an intolerable risk of government entanglement with religion."[295]

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[288] *Id.* at 781.

[289] 457 U.S. 393 (1982).

[290] 28 U.S.C. 1341 (1988).

[291] 495 U.S. 472 (1990).

[292] 26 U.S.C. 170 (1988).

[293] 471 U.S. 290 (1985).

[294] 29 U.S.C. 201 et seq. (1988).

[295] 471 U.S. at 305.

Two of the other cases were decided on standing grounds. In a critically important decision for the Catholic Church, the Court in *United States Catholic Conference v. Abortion Rights Mobilization, Inc.*[296] held that two institutions of the Church that had been held in civil contempt for refusing to comply with discovery orders in a suit challenging their tax-exempt status could, even though they were non-parties to the suit, challenge the plaintiffs' standing to institute the suit. Originally filed in 1981, the suit sought an injunction directing the IRS to revoke the tax exempt status of the United States Catholic Conference and the National Conference of Catholic Bishops on the grounds their political activities with respect to abortion violated § 501(c)(3) of the Internal Revenue Code.[297] The two bodies had been held in civil contempt by the district court when they refused to comply with subpoenas from ARM seeking evidence of their activities regarding abortion, and the lower courts had refused to allow them to challenge ARM's standing to institute the suit in contesting the contempt citation. The Supreme Court reversed and held, 8-1, that they could do so, stating that "the subpoena power of a court cannot be more extensive than its jurisdiction." (On remand, a federal appellate court brought this threat to the tax-exempt status of the Catholic Church to an end by holding that ARM did not have standing and dismissing the suit.[298])

In *Valley Forge Christian College v. Americans United for Separation of Church and State*[299] the Court refused, 5-4, to broaden the doctrine of standing to permit the disposition of surplus government property to a sectarian institution to be challenged on establishment clause grounds. The transaction of concern in this case was the disposition by the Department of Education of land and buildings worth more than a half million dollars to an avowedly sectarian college, without charge. The Court had previously held that taxpayers have standing to challenge exercises of Congressional power under the taxing and spending clause of Article I, § 8, of the Constitution that allegedly violate the establishment clause.[300] But in this case it described that exception to the general rule against taxpayer suits as a narrow one and said it did not apply in this instance, because the action in question was an executive one rather than a Congressional one and because the authorizing legislation was an exercise of Congress' power under the property clause of Article IV of the Constitution rather than of the taxing and spending power of Article I.

The final two cases both involved civil rights but were dismissed for jurisdictional reasons. In *Ohio Civil Rights Commission v. Dayton Christian*

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[296] 487 U.S. 72 (1988).

[297] 26 U.S.C. 501(c)(3) exempts from taxation groups "organized and operated exclusively for religious, charitable,...or educational purposes, ...no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation..., and which does not participate in, or intervene in..., any political campaign on behalf of any candidate for public office."

[298] Abortion Rights Mobilization, Inc. v. United States Catholic Conference, 885 F.2d 1020 (2d Cir., 1989), *cert. den.*, 495 U.S. 918 (1990).

[299] 454 U.S. 464 (1982).

[300] Flast v. Cohen, 392 U.S. 83 (1968).

*Schools, Inc*.[301] the Court unanimously held that the federal courts could not adjudicate a conflict between a state civil rights statute and a private school's religious belief and practice prior to the resolution of that conflict by the state civil rights agency. At issue was a conflict between the sex nondiscrimination requirements of an Ohio statute[302] and the nonrenewal by a private Christian school of the contract of a teacher who had become pregnant, pursuant to the school's religious belief that mothers of preschool children should remain at home. A lower federal appellate court had enjoined the investigation and resolution of the matter by the Ohio Civil Rights Commission on the grounds that the Commission's efforts would violate the First Amendment. But the Supreme Court held that the lower courts should have abstained from deciding that issue. *Younger v. Harris*,[303] the Court said, established the rule that federal courts should not enjoin pending state proceedings except in "extraordinary circumstances," both as a matter of comity and out of a "proper respect for the fundamental role of States in our federal system." The school would have ample opportunity to air its constitutional concerns, the Court said, in the judicial review of the Commission's decisions authorized by the Ohio statute.

Finally, in *Equal Employment Opportunity Commission v. Arabian American Oil Company*[304] the Court held that the employment nondiscrimination requirements of Title VII of the Civil Rights Act of 1964 do not apply to United States employers outside the United States. A naturalized U.S. citizen claimed that he had been fired by the Arabian American Oil Company in Saudi Arabia for reasons of race, religion, and national origin, in violation of Title VII. But the Court held that Title VII could apply extraterritorially only if Congress had affirmatively expressed its intention that it do so, and it found the evidence that Congress had so intended "insufficient." As a consequence, it affirmed the lower courts' rulings dismissing the case for lack of jurisdiction.

## Conclusion

In his *Memorial and Remonstrance Against Religious Assessments*, James Madison in 1785 warned of the danger that lurked if questions of religious liberty became "entangled ... in precedents."[305] Yet in the modern United States, where the expansive claims and powers of government conflict virtually daily with the requirements and expectations of one or another religious faith, that is exactly what has happened. The religion clauses, perhaps inevitably, have become the subject of thousands of judicial precedents.

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[301] 477 U.S. 619 (1986).

[302] Ohio Rev. Code Ann. 4112.01(A) (Supp. 1985).

[303] 401 U.S. 37 (1971).

[304] 499 U.S. 244 (1991).

[305] Madison, James, Memorial and Remonstrance Against Religious Assessments, par. 3, reprinted as an Appendix to Everson v. Board of Education, 330 U.S. at 63.

Whether that fact poses a danger to religious liberty is a matter of opinion. What is clear is that on the Supreme Court the struggle over the meaning and scope of the religion clauses has become both persistent and intense. On the one hand stands the view that "a union of government and religion tends to destroy government and to degrade religion,"[306] and that a "wall of separation" best serves the interests of both. On the other hand stands the perspective that the relationship of government and religion should be predominantly a legislative matter rather than one subject to sweeping constitutional constraints and that government should be able, in a neutral and nondiscriminatory manner, both to regulate religious practices and to accommodate and even assist religious groups. Since 1980 the latter perspective has come to predominate with respect to the free exercise clause, and it has made substantial inroads with respect to the Court's establishment clause jurisprudence as well.

It seems likely that the ferment on the Court over the religion clauses will persist for some time. Only two of the Justices that sat on the Court at the beginning of the 1980s remain — Chief Justice Rehnquist and Justice Stevens, and they are polar opposites on the interpretation of the religion clauses. But the new Justices, like many of their predecessors, either have, or are developing, strong views on the meaning of the clauses. Thus, the debate seems certain to continue, and likely with vigor.

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[306] Engel v. Vitale, 370 U.S. at 431.

# APPENDIX
# SUPREME COURT DECISIONS ON CHURCH AND STATE, 1980-2002

**Legend: C—constitutional (m)—authored majority opinion**
**U—unconstitutional (d)—authored dissenting opinion**
**(c)—authored concurring opinion**

| Case Name | Stewart | Burger | Powell | Brennan | Marshall | White | Blackmun | Rehnquist | Stevens |
|---|---|---|---|---|---|---|---|---|---|
| **1980 TERM** | | | | | | | | | |
| *Stone v. Graham*, 449 U.S.39 (1980) (*per curiam*) (posting of Ten Commandments in public schools struck down) | C | — | U | U | U | U | — | C | U |
| *Thomas v. Review Board of the Indiana Employment Security Div.*, 450 U.S. 707 (1981) (state denial of unemployment benefits held to violate the free exercise clause) | U | U (m) | U | U | U | U | U (c) | C (d) | U |

| Case Name | Stewart | Burger | Powell | Brennan | Marshall | White | Blackmun | Rehnquist | Stevens |
|---|---|---|---|---|---|---|---|---|---|
| **1980 TERM (cont.)** | | | | | | | | | |
| *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772 (1981) (whether statute exempted rel. schools from unemployment taxes) | Exempt from FUTA taxes | Exempt | Exempt | Exempt | Exempt | Exempt | Exempt (m) | Exempt | Exempt (c) |
| *Heffron v. ISKCON*, 452 U.S. 640 (1981) (limitation of (1) sale of literature and solicitation of donations and (2) distribution of literature to booths at state fair upheld) | C<br>C | C<br>C | C<br>C | C (c)<br>U (d) | C<br>U | C (m)<br>C (m) | C (c)<br>U (d) | C<br>C | C<br>U |

| Case Name | Burger | Powell | Brennan | Marshall | White | Blackmun | Rehnquist | Stevens | O'Connor |
|---|---|---|---|---|---|---|---|---|---|
| **1981 TERM** | | | | | | | | | |
| *Widmar v. Vincent*, 454 U.S. 263 (1981) (prohibition on student religious use of college meeting space struck down) | U | U (m) | U | U | C (d) | U | U | U (c) | U |
| *Valley Forge Christian College v. Americans United*, 454 U.S. 464 (1981) (no standing to sue for gov. transfer of property to religious entity) | No standing | No standing | Standing (d) | Standing | No standing | Standing | No standing (m) | Standing (d) | No standing |
| *Karen B. v. Treen*, 455 U.S. 913 (1982), *aff'g mem.*, 653 F.2d 897 (5th Cir. 1981) (student and teacher-led classroom prayer held unconstitutional) | U | U | U | U | U | U | U | U | U |

| Case Name | Burger | Powell | Brennan | Marshall | White | Blackmun | Rehnquist | Stevens | O'Connor |
|---|---|---|---|---|---|---|---|---|---|
| **1981 TERM (cont.)** | | | | | | | | | |
| *United States v. Lee*, 455 U.S. 252 (1981) (imposition of Social Security taxes on Amish employer upheld) | C (m) | C | C | C | C | C | C | C (c) | C |
| *Larson v. Valente*, 456 U.S. 228 (1982) (regulation of religious fund-raising struck down) | C | U | U (m) | U | C (d) | U | C (d) | U (c) | C |
| *California v. Grace Brethren Church*, 457 U.S. 393 (1982) (court should not have reached issue of constitutionality of imposing FUTA taxes on religious schools) | No fed. jur. | No fed. juris. | No fed. juris. | No fed. juris. | No fed. juris. | Fed. juris. | No fed. juris. | Fed. juris. (d) | No fed. juris. (m) |

| Case Name | Burger | Powell | Brennan | Marshall | White | Blackmun | Rehnquist | Stevens | O'Connor |
|---|---|---|---|---|---|---|---|---|---|
| **1982 TERM** | | | | | | | | | |
| *Larkin v. Grendel's Den*, 459 U.S. 116 (1982) (church veto over liquor license struck down) | U (m) | U | U | U | U | U | C (d) | U | U |
| *Bob Jones University v. United States*, 461 U.S. 574 (1983) (revocation of tax exemption of racially discriminatory school upheld) | C (m) | C (c) | C | C | C | C | C (d) | C | C |
| *Mueller v. Allen*, 463 U.S. 388 (1983) (tax deduction for educational expenses upheld) | C | C | U | U (d) | C | U | C (m) | U | C |

| Case Name | Burger | Powell | Brennan | Marshall | White | Blackmun | Rehnquist | Stevens | O'Connor |
|---|---|---|---|---|---|---|---|---|---|
| **1982 TERM** | | | | | | | | | |
| *Marsh v. Chambers*, 463 U.S. 783 (1983) (legislative chaplaincy upheld) | C (m) | C | U (d) | U | C | C | C | U (d) | C |
| **1983 TERM** | | | | | | | | | |
| *Lynch v. Donnelly*, 465 U.S. 668 (1984) (holiday display containing a creche upheld) | C (m) | C | U (d) | U | C | U (d) | C | U | C (c) |
| *Wallace v. Jaffree*, 466 U.S. 924 (1984), *aff'g mem.*, 705 F.2d 1526 (11th Cir. 1983) (state-composed prayer held unconstitutional) | U | U | U | U | U | U | U | U | U |

| Case Name | Burger | Powell | Brennan | Marshall | White | Blackmun | Rehnquist | Stevens | O'Connor |
|---|---|---|---|---|---|---|---|---|---|
| **1984 TERM** | | | | | | | | | |
| *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985) (enforcement of minimum wage/maximum hour requirements on religious employer upheld) | C | C | C | C | C (m) | C | C | C | C |
| *Wallace v. Jaffree*, 472 U.S. 38 (1985) (moment of silence) | C (d) | U (c) | U | U | C (d) | U | C (d) | U (m) | U (c) |
| *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985) (statute mandating Sabbath observance held unconstitutional) | U (m) | U | U | U | U | U | C | U | U (c) |

| Case Name | Burger | Powell | Brennan | Marshall | White | Blackmun | Rehnquist | Stevens | O'Connor |
|---|---|---|---|---|---|---|---|---|---|
| **1984 TERM (cont.)** | | | | | | | | | |
| *School District of the City of Grand Rapids v. Ball*, 473 U.S. 373 (1985) (public subsidy of community education and shared time programs at sectarian schools struck down) | U (c)<br>C (d) | U<br>U | U (m)<br>U (m) | U<br>U | C (d)<br>C (d) | U<br>U | C (d)<br>C (d) | U<br>U | U (c)<br>C (d) |
| *Aguilar v. Felton*, 473 U.S. 402 (1985) (Title I services on the premises of sectarian schools held unconstitutional) | C (d) | U (c) | U (m) | U | C (d) | U | C (d) | U | C (d) |

| Case Name | Burger | Powell | Brennan | Marshall | White | Blackmun | Rehnquist | Stevens | O'Connor |
|---|---|---|---|---|---|---|---|---|---|
| **1985 TERM** | | | | | | | | | |
| *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986) (vocational rehabilitation grant for study at Bible college upheld) | C | C (c) | C | C (m) | C (c) | C | C | C | C (c) |
| *Goldman v. Weinberger*, 475 U.S. 503 (1986) (military regulation barring wearing yarmulke while on duty upheld) | C | C | U (d) | U | C | U (d) | C (m) | C (c) | U (d) |
| *Bowen v. Roy*, 476 U.S. 693 (1986) (government use of Social Security numbers upheld) | C (m) | C | C | C | U (d) | C (c) | C | C (c) | C (c/d) |

| Case Name | Burger | Powell | Brennan | Marshall | White | Blackmun | Rehnquist | Stevens | O'Connor |
|---|---|---|---|---|---|---|---|---|---|
| **1985 TERM (cont.)** | | | | | | | | | |
| *Ohio Civil Rights Comm. v. Dayton Chrstn. Schools*, 477 U.S. 619 (1986) (Commission's investigation of Christian school's nonrenewal of contract of pregnant teacher held not to violate free exercise clause but federal court abstention deemed appropriate) | C, but fed. court should have abstained | C, but fed. court should have abstained | C, but school's const. challenge to Comm. proceeding not ripe for review (c) | C, but school's const. challenge to Comm. proceeding not ripe for review (c) | C, but fed. court should have abstained | C, but school's const. challenge to Comm. proceeding not ripe for review (c) | C, but fed. court should have abstained (m) | C, but school's const. challenge to Comm. proceeding not ripe for review (c) | C, but fed. court should have abstained |

| Case Name | Powell | Brennan | Marshall | White | Blackmun | Rehnquist | Stevens | O'Connor | Scalia |
|---|---|---|---|---|---|---|---|---|---|
| **1986 TERM** | | | | | | | | | |
| *Ansonia Board of Education v. Philbrook*, 479 U.S. 60 (1986) (under Title VII employee's preferred accommodation not required) | ditto | ditto | ditto (c/d) | ditto | ditto | Need not select employee's preferred accommo-dation (m) | ditto (c/d) | ditto | ditto |

| Case Name | Powell | Brennan | Marshall | White | Blackmun | Rehnquist | Stevens | O'Connor | Scalia |
|---|---|---|---|---|---|---|---|---|---|
| *Hobbie v. Unemployment Appeals Commission of Florida*, 480 U.S. 136 (1987) (denial of unemployment benefits held unconstitutional) | U (c) | U (m) | U | U | U | C (d) | U (c) | U | U |
| *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987) (ability to sue under 42 USC 1981 upheld) | ditto | ditto | ditto | Can sue for desecration of synagogue (m) | ditto | ditto | ditto | ditto | ditto |
| *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987) (denial of prison worship opportunity upheld) | C | U (d) | U | C | U | C (m) | U | C | C |

| Case Name | Powell | Brennan | Marshall | White | Blackmun | Rehnquist | Stevens | O'Connor | Scalia |
|---|---|---|---|---|---|---|---|---|---|
| **1986 TERM (cont.)** | | | | | | | | | |
| *Board of Airport Commissioners of City of Los Angeles v. Jews for Jesus*, 482 U.S. 569 (1987) (total prohibition of religious solicitation at airport held unconstitutional) | U | U | U | U (c) | U | U | U | U (m) | U |
| *Edwards v. Aguillard*, 482 U.S. 578 (1987) (equal time requirement for evolution and creationism held unconstitutional) | U (c) | U (m) | U | U (c) | U | C | U | U | C (d) |

| Case Name | Powell | Brennan | Marshall | White | Blackmun | Rehnquist | Stevens | O'Connor | Scalia |
|---|---|---|---|---|---|---|---|---|---|
| **1986 TERM (cont.)** | | | | | | | | | |
| *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter Day Saints v. Amos*, 483 U.S. 327 (1987) (Title VII exemption for religious entities from religious nondiscrimination requirement upheld) | C | C (c) | C | C (m) | C (c) | C | C | C (c) | C |

| Case Name | Brennan | Marshall | White | Blackmun | Rehnquist | Stevens | O'Connor | Scalia | Kennedy |
|---|---|---|---|---|---|---|---|---|---|
| **1987 TERM** | | | | | | | | | |
| *Lyng v. North-West Indian Cemetery Protective Association*, 485 U.S. 439 (1988) (building of federal road in federal forest sacred to Native Americans upheld) | U (d) | U | C | U | C | C | C (m) | C | |
| *United States Catholic Conference v. Abortion Rights Mobilization*, 487 U.S. 72 (1988) (challenge to standing in case questioning Catholic tax exemption upheld) | Can challenge | Cannot challenge (d) | Can challenge | Can challenge | Can challenge | Can challenge | Can challenge | Can challenge | USCC can challenge ARM's standing (m) |

| Case Name | Brennan | Marshall | White | Blackmun | Rehnquist | Stevens | O'Connor | Scalia | Kennedy |
|---|---|---|---|---|---|---|---|---|---|
| **1987 TERM (cont.)** | | | | | | | | | |
| *Bowen v. Kendrick*, 487 U.S. 589 (1988) (grants to religious organizations for pregnancy prevention and care services upheld) | U | U | C | U (d) | C (m) | U | C (c) | C | C (c) |
| **1988 TERM** | | | | | | | | | |
| *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989) (sales tax exemption just for religious publications held unconstitutional) | U (c) | U | U (c) | U (c) | C | U | U | C (d) | C |

| Case Name | Brennan | Marshall | White | Blackmun | Rehnquist | Stevens | O'Connor | Scalia | Kennedy |
|---|---|---|---|---|---|---|---|---|---|
| **1988 TERM (cont.)** | | | | | | | | | |
| *Frazee v. Illinois Department of Employment Security*, 489 U.S. 829 (1989) (denial of unemployment benefits held to violate free exercise clause) | U | U | U (m) | U | U | U | U | U | U |
| *Hernandez v. Commissioner of Internal Revenue*, 490 U.S. 680 (1989) (denial of tax deduction to Scientologists upheld) | — | C (m) | C | C | C | C | U (d) | U | — |

| Case Name | Brennan | Marshall | White | Blackmun | Rehnquist | Stevens | O'Connor | Scalia | Kennedy |
|---|---|---|---|---|---|---|---|---|---|
| **1988 TERM (cont.)** | | | | | | | | | |
| *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573 (1989) (holiday display of creche in public building struck down but display of menorah, Christmas tree, and sign upheld) | U (c)<br>U (d) | U<br>U | C<br>C | U (m)<br>C (c) | C<br>C | U (c)<br>U (d) | U (c)<br>C (c) | C<br>C | C (d)<br>C (c) |
| **1989 TERM** | | | | | | | | | |
| *Jimmy Swaggart Ministries v. Board of Equalization of California*, 493 U.S. 378 (1990) (sales tax on religious products upheld) | C | C | C | C | C | C | C (m) | C | C |

| Case Name | Brennan | Marshall | White | Blackmun | Rehnquist | Stevens | O'Connor | Scalia | Kennedy |
|---|---|---|---|---|---|---|---|---|---|
| **1989 TERM (cont.)** | | | | | | | | | |
| *Employment Division,Ore. Department of Human Res. v. Smith*, 494 U.S. 872 (1990) (denial of unemployment benefits upheld / strict scrutiny test limited) | U | U | C | U (d) | C | C | C (c) | C (m) | C |
| *Davis v. United States* 495 U.S. 472 (1990) (denial of tax deduction for costs of supporting son's overseas missionary work upheld) | ditto | ditto | ditto | ditto | ditto | ditto | No statutory entitlement to a tax deduction (m) | ditto | ditto |

| Case Name | Brennan | Marshall | White | Blackmun | Rehnquist | Stevens | O'Connor | Scalia | Kennedy |
|---|---|---|---|---|---|---|---|---|---|
| **1989 TERM (cont.)** | | | | | | | | | |
| *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 1990) (Equal Access Act upheld) | C | C (c) | C | C | C | U (d) | C (m) | C | C (c) |

| Case Name | Marshall | White | Blackmun | Rehnquist | Stevens | O'Connor | Scalia | Kennedy | Souter |
|---|---|---|---|---|---|---|---|---|---|
| **1990 TERM** | | | | | | | | | |
| *EEOC v. Arabian American Oil Company*, 499 U.S. 244 (1991) (Title VII held not to apply to event in Saudi Arabia) | Applies extraterritorially (d) | No extraterritorial application | Applies extraterritorially | No extraterritorial application (m) | Applies extraterritorially | No extraterritorial application | No extraterritorial application (c) | No extraterritorial application | No extraterritorial application |

| Case Name | White | Blackmun | Rehnquist | Stevens | O'Connor | Scalia | Kennedy | Souter | Thomas |
|---|---|---|---|---|---|---|---|---|---|
| **1991 TERM** | | | | | | | | | |
| *Lee v. Weisman*, 505 U.S. 577 (1992) (commencement prayer by clergyman held unconstitutional) | C | U (c) | C | U | U | C (d) | U (m) | U (c) | C |
| *International Society for Krishna Consciousness, Inc. v. Lee*, 506 U.S. 805 (1992) (denial to religious group of permission to solicit funds in airport terminal upheld but prohibition of distribution of religious literature held to violate free speech clause) (*per curiam*) | C<br>C | U<br>U | C (m)<br>C (d) | U<br>U | C (c)<br>U (c) | C<br>C | C (c)<br>U (c) | U (d)<br>U (c) | C<br>C |
| **1992 TERM** | | | | | | | | | |
| *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993) (denial of use of gymnasium to show religious film struck down) | U(m) | U | U | U | U | U(c) | U(c) | U | U |
| *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (prohibition of killing of animals for religious purposes struck down) | U | U (c) | U | U | U | U (c) | U (m) | U (c) | U |

| Case Name | White | Blackmun | Rehnquist | Stevens | O'Connor | Scalia | Kennedy | Souter | Thomas |
|---|---|---|---|---|---|---|---|---|---|
| | C | U (d) | C (m) | U | U (d) | C | C | U | C |
| *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993) (provision of sign-language interpreter to student in sectarian school upheld) | | | | | | | | | |

| Case Name | Blackmun | Rehnquist | Stevens | O'Connor | Scalia | Kennedy | Souter | Thomas | Ginsburg |
|---|---|---|---|---|---|---|---|---|---|
| **1993 TERM** | | | | | | | | | |
| *Board of Education of the Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994) (statute allowing Hasidic special education district struck down) | U (c) | C | U (c) | U (c) | C (d) | U (c) | U (m) | C | U |

| Case Name | Rehnquist | Stevens | O'Connor | Scalia | Kennedy | Souter | Thomas | Ginsburg | Breyer |
|---|---|---|---|---|---|---|---|---|---|
| **1994 TERM** | | | | | | | | | |
| *Capitol Square Review and Advisory Board v. Pinette*, 515 U.S. 753 (1995) (display of cross by private group in public park upheld) | C | U (d) | C (c) | C (m) | C | C (c) | C | U (d) | C |

| Case Name | Rehnquist | Stevens | O'Connor | Scalia | Kennedy | Souter | Thomas | Ginsburg | Breyer |
|---|---|---|---|---|---|---|---|---|---|

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| *Rosenberger v. The Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995) (exclusion of student religious publication from school subsidy held unconstitutional) | C | U | C (c) | C | C (m) | U (d) | C | U | U |
| **1996 TERM** | | | | | | | | | |
| *Agostini v. Felton*, 521 U.S. 203 (1997) (provision of Title I services on premises of sectarian schools upheld) | C | U | C (m) | C | C | U (d) | C | U (d) | U |
| *City of Boerne, Texas v. Flores*, 521 U.S. 407 (1997) (Congress held to lack power to enact the Religious Freedom Restoration Act) | U | U (c) | C (d) | U (c) | U (m) | C (d) | U | U | C (d) |

| Case Name | Rehnquist | Stevens | O'Connor | Scalia | Kennedy | Souter | Thomas | Ginsburg | Breyer |
|---|---|---|---|---|---|---|---|---|---|
| **1999 TERM** | | | | | | | | | |
| *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000) (policy allowing student elections on having prayer at football games struck down) | C (d) | U (m) | U | C | U | U | C | U | U |
| *Mitchell v. Helms*, 530 U.S. 793 (2000) (loan of instructional materials and equipment to sectarian schools upheld) | C | U | C (c) | C | C | U (d) | C (c) | U | C |
| **2000 TERM** | | | | | | | | | |
| *Good News Club v. Milford Central School*, 533 U.S. 98 (2001) (denial of permission to minister to use school facilities after the close of school for meetings of student religious club held unconstitutional) | U | C (d) | U | U (c) | U | C (u) | U (m) | C | U (c) |

| Case Name | Rehnquist | Stevens | O'Connor | Scalia | Kennedy | Souter | Thomas | Ginsburg | Breyer |
|---|---|---|---|---|---|---|---|---|---|
| **2001 TERM** | | | | | | | | | |
| *Watchtower Bible & Tract Society of New York, Inc. v. Stratton, Ohio*, 122 S.Ct. 2080 (2002) (municipal permit requirement for religious door-to-door solicitation held unconstitutional) | C (d) | U (m) | U | U (c) | U | U | U | U | U (c) |
| *Zelman v. Simmons-Harris*, 122 S.Ct. 2460 (2002) (education voucher program for students in failing public schools upheld) | C (m) | U (d) | C (c) | C | C | U (d) | C (c) | U | U (d) |