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A Court Tilting against Religious Liberty

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The First Amendment provides in part, "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." The amendment became part of the Constitution in 1791, but not until 1940, in *Cantwell v. Connecticut*, did the Supreme Court declare that the states are "as incompetent as Congress to enact" laws establishing religion or prohibiting its free exercise.[1] Citing the Fourteenth Amendment's provision that no state may deprive a person of liberty without due process of law, the Court held that "this fundamental concept of liberty . . . embraces the liberties guaranteed by the First Amendment." Before *Cantwell*, the states had passed plenty of laws touching on religion—far more than Congress. *Cantwell* meant that state laws involving religion could be challenged under the First Amendment. With the necessary plaintiffs quickly emerging, the Court has now decided a long list of cases concerning a wide range of issues, most of them arising from the states.

1. 310 U.S. 296 (1940).

The Court's religion jurisprudence is almost entirely a product of the cases since *Cantwell*. Legal scholars agree that it is an intellectual mess. Unfortunately, that is not the worst that can be said about it. The truth is that the Court's religion decisions have done serious damage to the country.

Religious liberty is a core American value. Indeed, some scholars call it our "first liberty." The purpose of the treatment of religion in the First Amendment was to protect religious liberty. Yet rather than understanding the First Amendment as containing a single clause with that purpose, the Court has persisted in finding two religion clauses in the amendment—the establishment clause and the free exercise clause—and in reading them independently of one another. Through the establishment clause the Court has insisted on a stricter "separation of church and state" than the original intent of the First Amendment demands. The Court has used the clause to push religion from the public schools and to inhibit efforts to provide public aid for church-related schools. Meanwhile, the Court has had little to say about "free exercise" and in recent years has treated it as a subset of free speech, lacking any independent value. Thanks to the Court, Americans are not as free to exercise religion as the Constitution, properly interpreted, allows.

The Court is a major reason that the country today is far more secular than the one a dwindling number of Americans grew up in. The secularizing influence of the Court's decisions can be seen in many areas, not least our public schools.

Early Cases

In *Minersville (Pa.) School District v. Gobitis* (1940), public school authorities required students to salute and pledge allegiance to the flag as part of a daily exercise.[2] Two students, both Jehovah's

2. 310 U.S. 586 (1940).

Witnesses, refused to participate on the ground of religious conscience. For them, saluting the flag "of any earthly government" was idolatrous. The students were expelled. Their father, Walter Gobitis, filed a lawsuit alleging a violation of "free exercise." Gobitis won in the lower courts, but the Supreme Court ruled in favor of the school district, holding that the First Amendment did not exempt the students from the compulsory exercise.

Citing the decision in *Gobitis*, the West Virginia State Board of Education voted to require all public school students to participate in a flag-salute ceremony. Expulsion was the penalty for anyone who refused, and the parents of children so expelled were subject to criminal prosecution. Once again students who were Jehovah's Witnesses objected on the ground of religious conscience. But in deciding *West Virginia State Board of Education v. Barnette* (1943), the Court took the broader First Amendment position that no one should be forced to salute and pledge allegiance to the flag.[3] At stake, wrote Justice Robert Jackson, was "the constitutional liberty of the individual."

Neither *Gobitis* nor *Barnette* concerned the First Amendment's ban on establishing religion. But soon enough the Court had before it a case—*Everson v. Board of Education* (1947)—in which it would, for the first time, declare the meaning of that provision.[4] Between 1937 and 1941 the New Jersey legislature debated whether the state, which had a substantial Catholic population, should fund the transportation costs of parochial school students. In 1941 the state passed a law authorizing local school boards to make rules and contracts for transporting children "to and from school other than a public school." Ewing Township, like other jurisdictions, proceeded to implement the law. Previously it had reimbursed the fares paid to public carriers by parents of students

3. 319 U.S. 624 (1943).
4. 330 U.S. 1 (1947).

attending public schools. Now it decided to reimburse as well the fares paid by the parents of students going to parochial schools.

Arch Everson, a resident of Ewing Township and executive director of the New Jersey Taxpayers Association, sued the state. As it happened, Everson was a nominal plaintiff. The lawsuit was initiated and paid for by the Junior Order of United American Mechanics. The JOUAM was a century-old organization with a nativist, anti-Catholic past. It was a vigorous supporter of public schools, including their lingering Protestant orientation. A leading opponent of the parochial school bus bill, the JOUAM was now continuing the same battle in the courts.

Everson and his allies succeeded in persuading the Court to interpret the establishment clause as Thomas Jefferson had said the First Amendment should be interpreted—as mandating a "wall of separation between church & State." In his opinion for the Court, Justice Hugo Black spelled out what this "wall of separation" meant—among other things, that no government can pass laws which "aid all religions" and that "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." Surely, on those terms, New Jersey had violated the clause. But Black reached the opposite conclusion by maintaining that the transportation subsidy benefited not the parochial schools themselves but the children attending them.

The four dissenting justices, all of whom voted to strike down the reimbursement scheme, were incredulous. "The undertones of the opinion, advocating complete and uncompromising separation of Church from State," wrote Justice Robert Jackson in dissent, "seem utterly discordant with its conclusion yielding support to their commingling in educational matters. The case which irresistibly comes to mind as the most fitting precedent is that of Julia who, according to Byron's reports, 'whispering "I will ne'er consent,"—consented.'" In a case decided sixteen years later, *Abington*

v. Schempp (1963), Justice William O. Douglas, a member of Black's majority, confessed to a change of mind about *Everson*.[5] Had Douglas voted as he later came to believe he should have, a majority would have found the bus subsidy unconstitutional.

Everson's importance lay less in the result, which happened to be correct, than in the separationist doctrine it embraced. Agreed to by all nine justices, the doctrine provided the foundation for many of the religion decisions the Court would hand down over the next several decades. Yet, as some later justices have realized, the doctrine was grounded in dubious history. Thirty-eight years after *Everson*, in *Wallace v. Jaffree* (1985), Justice William Rehnquist carefully examined the actual framing of the establishment clause—a task no justice in *Everson* or since had undertaken—in concluding that it "forbade establishment of a national religion and . . . preference among religious sects or denominations."[6] In pointed disagreement with the justices in *Everson*, Rehnquist added that "the establishment clause did not require government neutrality between religion and irreligion nor did it prohibit the Federal Government from providing nondiscriminatory aid to religion." Rehnquist's withering judgment was this: "There is simply no historical foundation for the proposition that the Framers intended to build the 'wall of separation' that was constitutionalized in *Everson*." Jefferson's letter to the Danbury Baptists did not express the intent of the First Amendment.

It will be noted that in the *Jaffree* case Justice Rehnquist wrote in dissent. The Court has yet to repudiate *Everson*'s wrong history and the wrong doctrine it yielded. Nor has the Court attempted to read the ban on establishing religion in conjunction with the prohibition on free exercise, although the latter is the more fundamental value. Indeed, as political scientist Vincent Phillip Munoz

5. 374 U.S. 203 (1963).
6. 472 U.S. 38 (1985).

has pointed out, Congress in 1791 was prohibited from making an establishment of religion because religious establishments tended to abridge religious liberty.[7]

Religion and the Public Schools

The first schools founded in the colonies had as one of their purposes religious education. The founding generation assumed that religion would be part of education. The Northwest Ordinance, passed in 1787 and then again by the First Congress in 1789, explicitly identified religion as one of the values that schools established in the territory would advance. Public schools, which emerged in the first half of the nineteenth century, retained religious instruction, though less of it was included in the everyday lesson plan as communities became more religiously diverse. During the first decades of the twentieth century, many schools opted for programs in which children were "released" from their classroom schools for an hour during which clergy of their parents' choice would provide religious instruction. Meanwhile, the school day in many parts of the country began with prayer or Bible reading or both.

Everson's separationist doctrine called into question the public schools' various involvements with religion. In *McCollum v. Board of Education* (1948), the Court struck down a released-time program initiated in 1940 in Champaign, Illinois.[8] Teachers from all religious groups choosing to participate were allowed to offer religious instruction in school buildings for one hour once a week. Students in grades four to nine had the option of attending religion classes of their choice (as approved by parents) or continuing their regular studies. The religion teachers weren't paid by the state but

7. Vincent Phillip Munoz, "Establishing Free Exercise," *First Things* 138 (December 2003): 14–20.

8. 333 U.S. 203 (1948).

were subject to the approval and supervision of the school superintendent. Defending itself against Vashti McCollum's contention that the program established religion, the school board argued that the meaning of the establishment clause was not to be found in Jefferson's metaphorical wall of separation. This was a brave argument, since all the Justices who had decided *Everson* only a year earlier still sat on the Court. The argument was rejected, as was the board's actual (and correct) interpretation of the clause—that it forbids only the government's preference of one religion over another, and not impartial government assistance to all religions. Black, again writing for the Court, was unwilling to back away from his *Everson* statement that government may not "aid all religions." A state, he opined, may not "utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals."

In his recent book, *Separation of Church and State*, University of Chicago law professor Philip Hamburger points out that by the time *Everson* was decided many Protestants had accepted a "Protestant" version of separation of church and state. Indeed, Arch Everson had pressed this version of separation in his case, hoping to deny state aid to children attending Catholic schools. *McCollum* stunned Protestants around the country, however, because the students typically taking advantage of released-time programs were Protestant. Protestants, writes Hamburger, "now suddenly found themselves confronted with a secular version [of separation], which threatened the nonsectarian religiosity of America's public institutions. It was an experience they would feel even more profoundly in the wake of later Supreme Court cases and that would gradually bring many Protestants to recognize that they faced a greater threat from secularism and separation than from Catholicism."[9]

9. Philip Hamburger, *Separation of Church and State*, 376–377 (Cambridge: Harvard University Press, 2002).

Zorach v. Clauson (1952) was not one of those later cases.[10] Here the Court sustained a released-time program from New York City that differed from the one in *McCollum* in that the religious instruction it permitted was provided off campus. That fact impressed Douglas, who in his opinion for the Court said that the First Amendment does not command a "separation of church and state" in "all respects." The Court would have to press the concept to "extremes," he said, to condemn the New York program. And in that event, the Court would be insisting on a "constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence." Because *McCollum* had drawn criticism from a wide variety of clergy, Douglas might have felt compelled to reassure Americans that the Court was not really hostile to religion. Douglas famously declared, "We are a religious people whose institutions presuppose a Supreme Being." Black, along with Frankfurter and Jackson, voted to strike down the program, arguing that church and state must be kept "completely separate."

Douglas later recanted his "accommodationist" view of the First Amendment and became the Court's most ardent separationist. But at least he voted the right way in *Zorach*. Unfortunately, the Court did not use *Zorach* to overrule *McCollum*. And soon enough the Court resumed its project of pushing religion from the public schools.

In *Engel v. Vitale* (1962) the Court struck down state-sponsored school prayer.[11] In 1951 the New York State Board of Regents, in consultation with area clergy, composed and recommended for daily use in public schools a nondenominational prayer of twenty-two words: "Almighty God, we acknowledge our dependence upon

10. 343 U.S. 306 (1952).
11. 370 U.S. 421 (1962).

Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." Officials justified the prayer as a part of a child's moral and spiritual training. Student participation was voluntary. New York courts said that the Regents prayer passed muster because students weren't compelled to join in. But the Supreme Court sided with the separationists who brought the case. Writing for the majority, Justice Black said it was beside the point that students weren't forced to participate, because the ban on establishing religion "does not depend on any showing of direct government compulsion." What offended the First Amendment, he continued, was that the state had engaged in religious activity by writing a prayer. And under the establishment clause, government is "without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity." Only Justice Potter Stewart dissented.

Evidently worried about negative public reaction, Black said that the decision did not evince "hostility to religion." He wrote that the framers of the First Amendment wanted to get government out of the business of "writing or sanctioning official prayers." But Black did not address the fact that the First Congress, which proposed the Bill of Rights, also elected a chaplain who was surely expected to say prayers. Or that it passed a resolution asking the president "to recommend to the people of the United States a day of public thanksgiving and prayer, to be observed by acknowledging, with grateful hearts, the many signal favors of Almighty God." The resolution didn't include an actual prayer but stated what its substance should be—substance strikingly similar to that found more than 170 years later in the Regents prayer.

Though supportive of the decision, the *New Republic* was puzzled that the Court accepted *Engel* for review, since school prayer was not an issue being pressed in the lower courts. Yet the magazine conceded the effect of the ruling, which was to "give rec-

ognition to the relatively recent phenomenon of a widespread secular humanism in the country which constitutes, as it were, a new religion of its own."

A year later the Court reaffirmed *Engel* when it struck down Bible reading and recitation of the Lord's Prayer in cases from Pennsylvania and Maryland that were decided together as *Abington v. Schempp* (1963).[12] Neither state required student participation in the activities—a fact of no importance to the Court. Justice Tom Clark said that the establishment clause requires "neutrality" between government and religion and explained that for a law to pass constitutional muster, it must have "a secular legislative purpose and a primary effect that neither advances nor inhibits religion." That twofold requirement, by the way, soon mutated into the so-called *Lemon* test (discussed below) for determining whether a state action violates the establishment clause.

In dissent Justice Stewart took issue with Clark's understanding of neutrality, contending that "permission of such exercises for those who want them is necessary if the schools are truly to be neutral in the matter of religion." Moreover, he said, "a refusal to permit religious exercises" constitutes "the establishment of a religion of secularism." A defensive Clark responded: "We do not agree . . . that this decision in any sense has that effect." Yet Clark declined to explain why that was so. In a lengthy concurrence Justice William Brennan elaborated his view that government acts unconstitutionally if it "uses religious means to serve secular ends when secular means would suffice." For Brennan, "strict neutrality" must operate strictly—against religion.

Justice Stewart noticed that the majority's "doctrinaire reading of the establishment clause" had led to "irreconcilable conflict with the free exercise clause." He reminded his brethren of the Court's oft-stated duty "to render [challenged activities] constitutional if

12. 374 U.S. 203 (1963).

reasonably possible." He pointed out that the Court could have held the activities constitutional on the understanding that public schools in the two states would have to accommodate requests for other religious exercises. "It is conceivable," he wrote, "that these school boards, or even all school boards, might eventually find it impossible to administer a system of religious exercises during school hours in such a way as to meet this constitutional standard—in such a way as to completely free from any kind of official coercion those who do not affirmatively want to participate. But I think we must not assume that school boards so lack the qualities of inventiveness and good will as to make impossible the achievement of that goal."

In *Stone v. Graham* (1980) the Court held unconstitutional a Kentucky law requiring the posting of the Ten Commandments in the state's public schools.[13] For the Court, it didn't matter that voluntary, private contributions underwrote the posted copies of the Ten Commandments, nor that the Bible verses were not read aloud, as in the Maryland case reviewed in *Schempp*, since, of course, they were simply posted on walls. Concluding that the law had not a secular but a religious purpose, the Court worried that students might read, even "meditate upon, perhaps . . . venerate and obey" the Ten Commandments.

In *Wallace v. Jaffree* (1985), the Court struck down an Alabama law authorizing public schools to set aside a one-minute period of silence "for meditation or voluntary prayer."[14] The Court cited the intent of the law's chief sponsor in the legislature to "return voluntary prayer" to the public schools as evidence that the law lacked a secular purpose. Such an intent, declared the Court, is "quite different from [the intent] merely [to protect] every student's right to engage in voluntary prayer during an appropriate

13. 449 U.S. 39 (1980).
14. 472 U.S. 38 (1985).

moment of silence during the school day." Presumably, a moment-of-silence law drafted without "bad intent" is constitutional.

In *Lee v. Weisman* (1992), a case from Providence, Rhode Island, the Court extended its school prayer decisions to hold that the state may not direct "the performance of religious activity" at school promotional and graduation ceremonies.[15] The "religious activity" happened to be the sort of prayers traditionally offered at such ceremonies—an invocation and a benediction. And the performance of that activity was carried out by area clergy of diverse faiths. The Court found that the school district's supervision of such ceremonies created pressure, albeit "subtle and indirect," on "attending students to stand as a group or, at least, maintain respectful silence" while the prayers were said. In the creation of that pressure the Court discerned an establishment of religion. "The state may not," the justices concluded, "place primary and secondary school children in this position."

Eight years later the Court invoked *Lee* in striking down student-led prayers before high school football games.[16] Under rules established by the school district in Sante Fe, Texas, student elections were used to decide whether pregame prayers should be said and, if so, which students would offer the prayers. Writing for the Court, Justice John Paul Stevens found in those arrangements "state sponsorship of a religious message" that is impermissible because "it sends the ancillary message to members of the audience who are non-adherents 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." Sante Fe was guilty of coercing football fans readying themselves for the kickoff "to participate in an act of religious worship" that they might find "personally offensive." In dissent Justice Rehn-

15. 505 U.S. 577 (1992).
16. *Sante Fe Independent School District v. Jane Doe*, 530 U.S. 290 (2000).

quist wrote that the majority opinion "bristles with hostility to all things religious in public life."

The banishing of religion from the public schools hasn't pleased most Americans, to judge by surveys of public opinion taken down through the years. *Engel* and *Schempp* in particular have drawn the most sustained objection. Many efforts have been made either to amend the Constitution or to enact statutory law that would allow room for voluntary prayers or other religious activities in the public schools. Consider, for example, the "moment of silence" statutes passed in many states (constitutional so long as they conform to *Jaffree*). But the only successful effort at the federal level came in 1984, with the passage of the Equal Access Act, which requires public high schools receiving federal funds to allow student-led religious groups to meet (and engage in religious activity such as prayer and Bible study) on the same basis and under the same conditions as any other student-led group. When a Nebraska public high school refused "equal access" to a student-led religious group, a lawsuit ensued, alleging that the school had violated the new law. In *Westside v. Mergens* (1990), the Court rejected the argument that permitting access would amount to an establishment of religion.[17] The Court was persuaded that because individual students chose to participate in a fellowship of religious believers who were also students, the school itself was not endorsing religion.

Public Aid to Church-Related Schools

Twenty-one years after the *Everson* case, the Court returned to the issue of school aid in *Board of Education v. Allen* (1968).[18] Here the Court sustained a New York statute requiring local schools to lend textbooks free of charge to students in grades seven to twelve.

17. 496 U.S. 226 (1990).
18. 392 U.S. 236 (1968).

It did not matter which schools—public or private, including religious—the students attended. The books dealt with secular subjects only, had to be approved by public school authorities, and were lent directly to the students. The Court found that the law was not unconstitutional because it passed the test devised in *Abington v. Schempp* (1963) for determining an establishment-clause violation. That test was understood by the Schempp Court in 1963 as a way of effectuating the separationist doctrine of *Everson*. Writing for the Court in *Allen*, Justice Byron White said that the parochial school bus law upheld in *Everson* and the textbook-lending law now under review met the two parts of the test, for both statutes had "a secular legislative purpose and a primary effect that neither advances nor inhibits religion." Justice Black disagreed, finding the law "a flat, flagrant, open violation" of the Constitution.

Three years after *Allen* the Court decided *Lemon v. Kurtzman* (1971).[19] At issue were state laws that paid the salaries of teachers of secular subjects in church-related schools. The Court did not find that the laws lacked a secular purpose or that their primary effect was to advance or inhibit religion. But the Court added a third element to its analysis—whether a given law fosters an "excessive government entanglement" with religion. Thus was born the *Lemon* test, and the laws challenged in *Lemon* were the first to fail it. The Court said the states would have to monitor what the teachers they paid were doing, since they might teach not only math, say, but also faith and morals, and yet such monitoring would entangle public authorities excessively with religious matters.

For more than a decade, the Court continued to apply the *Lemon* test, or variants thereof, in school aid cases. The Court ruled against public aid provided directly to church-related elementary and secondary schools, even when the purpose of the aid was secular and its use carefully monitored. Citing the religious dimension

19. 403 U.S. 602 (1970).

of the schools' mission, the Court saw the schools as "pervasively sectarian" and concluded that the primary effect of public aid given to them directly would be to advance religion. When states designed grants so that the money could be spent only for specific educational purposes unrelated to the schools' religious goals, the Court said that the monitoring needed to keep track of how the money was being spent excessively entangled the state with religion.

In 1985 the Court again applied the *Lemon* test in *Aguilar v. Felton*.[20] Under review was Title I of the Elementary and Secondary Education Act of 1965, which provided funds to public schools for remedial education. Children with learning disabilities were eligible for the assistance regardless of whether they attended public or private (including religious) schools. To implement Title I, public school teachers had for years entered the parochial schools to teach eligible children. That fact doomed the program for a majority of the justices. As they saw it, having public school teachers actually inside parochial schools constituted an excessive state entanglement with religion.

Legal scholar Kermit Hall has called *Aguilar* "something of a high-water mark" in the Court's effort "to drive a clear constitutional wedge" between church and state.[21] Yet in time *Aguilar* would be overruled. Unable to send their teachers into church-related schools, public school authorities responded to *Aguilar* by resorting to expensive and awkward alternatives. New York City, where *Aguilar* was litigated, wound up spending most of its federal education aid to lease vans that, parked near the parochial schools, served as mobile classrooms for more than twenty thousand students attending those schools. The Reagan, Bush, and Clinton administrations objected to the practical difficulties that *Aguilar*

20. 473 U.S. 402 (1985).

21. Kermit Hall, ed., *The Oxford Guide to United States Supreme Court Decisions* (New York: Oxford University Press, 1999), 7.

had created for the implementation of Title I—as did many school districts across the nation. Eventually the New York City school board decided to challenge the court order in *Aguilar* under which it still labored. The case was litigated at a propitious moment, for since *Aguilar* the Court had repudiated the notion that all aid underwriting secular education in church-related schools is unconstitutional. In *Agostini v. Felton* (1997), the Court abandoned its previous view that "the placement of public employees on parochial school grounds inevitably results" in a violation of the First Amendment.[22] *Agostini* thus permitted the very arrangement that *Aguilar* had condemned.

In *Mitchell v. Helms* (2000), the Court refused to follow separationist precedents as it sustained a federal law authorizing the subsidization of library, media, and computer materials for public and private (including religious) schools.[23] Decisions from the mid-1970s counseled the opposite result, and in previous cases as many as six different justices had expressed a willingness to overrule them. Yet in *Mitchell*, Justice Clarence Thomas, who wrote for three other justices, was unable to gain a fifth vote for repudiating the proposition that, to satisfy the establishment clause, "pervasively sectarian schools" must by reason of their character be excluded from otherwise valid aid programs.

The Court also has approved public assistance provided *directly* to students attending church-related schools. In *Mueller v. Allen* (1983), the Court sustained a Minnesota law allowing taxpayers to deduct from their state taxable income up to $700 per child for tuition, textbook, and school transportation expenses, regardless of whether they attended public or private schools.[24] Almost all of those taking the deduction were parents of children enrolled in church-related schools. In *Zelman v. Simmons-Harris* (2002), the

22. 117 S. Ct. 1332 (1997).
23. 530 U.S. 793 (2000).
24. 463 U.S. 388 (1983).

Court upheld an Ohio program authorizing publicly financed vouchers for use in sending students to church-related elementary and secondary schools.[25] The vouchers were designed to help children in low-income families living in Cleveland and could be used at public or private—including church-related—schools. The vouchers were provided directly to eligible parents, who were able, as Chief Justice Rehnquist wrote in his opinion for the Court, "to exercise genuine choice among options public and private, secular and religious." Rehnquist concluded that the program was "neutral" and did not unconstitutionally advance religion. It was left to Justice Stevens, author of the Court's opinions in *Jaffree* and *Sante Fe*, to complain in dissent that "whenever we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of democracy."

Over the years the Court has regarded church-related colleges and universities as not only inculcating religious beliefs but also teaching critical thinking skills, and it has viewed college-age students as less "impressionable" than younger students. For these reasons, the Court has been willing to uphold state aid directly given to religious colleges. Nor has the Court found a violation of the establishment clause when a college-age student uses state-provided vocational education funds to attend a Bible college and prepare for the ministry. In *Witters v. Washington* (1986), the Court unanimously embraced the principle of neutrality: How college-age students might use public educational funds for which they are eligible should be of no concern to the state. Choice of school and career goals—religious or secular—must be left entirely to the students.

25. 536 U.S. 639 (2002).

Other "Establishments" of Religion

From the nation's founding our public life has included various acknowledgments and accommodations of religious belief. Once the Court began deciding religion cases in the way it did, its separationist doctrine fraught with far-reaching implications, it was inevitable that plaintiffs would emerge seeking to effect what Richard Neuhaus has called "a public square naked of religious symbol and substance."[26]

One of the first cases concerned state and local laws requiring the closing on Sunday of all but the most essential businesses. The so-called "blue laws" dated from the colonial period and had undeniable religious origins, inasmuch as they were intended both to recognize the Sabbath and to encourage church attendance. But in *McGowan v. Maryland* (1961) the Court, declining to condemn such laws on account of their religious origins, sustained them because of the secular purpose they now served—that they provided a day of rest that anyone could take advantage of, in whatever way the person wanted.[27]

Nine years later in *Walz v. Tax Commission* (1970) the Court upheld tax exemptions for churches, a policy dating from the colonial period and adhered to by all fifty states and the federal government.[28] If it now seems hard to imagine that the Court might have struck down a policy of such vintage and universal acceptance, bear in mind that in *Everson* the Court did say that "neither a state nor the federal government can . . . pass laws which . . . aid all religions." Tax exemptions for churches plainly aided "all religions," a point the majority opinion didn't deny. Tax exemptions were unconstitutional, if that part of *Everson* controlled. But

26. See Richard John Neuhaus, *The Naked Public Square* (Grand Rapids: Wm. B. Erdmans, 1984).

27. 336 U.S. 470 (1961).

28. 397 U.S. 664 (1970).

not even Justice Black was willing to apply the case in that way. Only Justice Douglas, who in *Zorach* had declared that "we are a religious people whose institutions presuppose a Supreme Being," said that tax exemptions constituted an unconstitutional "subsidy" of religion.

In *Marsh v. Chambers* (1983), the Court sustained another practice of two centuries' standing—the legislative chaplaincy.[29] The U.S. Court of Appeals for the Eighth Circuit had duly applied the *Lemon* test in striking down Nebraska's chaplaincy. Justice Brennan, had he commanded a majority, would have found the chaplaincy in violation of all three parts of the test. Presumably, Chief Justice Burger would also have been compelled to vote against the chaplaincy had he applied the test—of which he had been the author. Writing for the majority, Burger declined to use the test and instead argued from the "unambiguous and unbroken history of more than 200 years" of federal and state chaplaincies to uphold the Nebraska arrangement.

In *Lynch v. Donnelly* (1984) and *County of Allegheny v. ACLU* (1989), the Court addressed the constitutionality of holiday displays.[30] In *Lynch*, the city of Pawtucket, Rhode Island, erected a Christmas display that included a Santa Claus house, reindeer pulling Santa's sleigh, a Christmas tree, and a clown, as well as a crèche consisting of the baby Jesus, Mary and Joseph, angels, shepherds and kings, and animals. The Court applied the *Lemon* test (not used the year before in *Marsh*) in concluding that in the context of the display, the crèche was constitutional since it had a secular purpose, didn't advance or inhibit religion, and didn't excessively entangle the state in religion. Five years later in *Allegheny*, the Court said that a crèche not surrounded by other, more secular, objects could not be placed in a public building without

29. 463 U.S. 783 (1983).
30. 465 U.S. 668 (1984); 492 U.S. 573 (1989).

violating the establishment clause. A menorah, however, won the approval of the Court—because secular symbols were placed close to it.

In *Elk Grove Unified School District v. Newdow* (2004), Michael Newdow, an atheist opposed to any trace of religion in the public square, took aim at the words "under God" in the Pledge of Allegiance. Congress had added the two words to the Pledge in 1954, and his daughter attended a California public school where students were given the opportunity (but not required) to recite the pledge each day. Newdow sued Congress and the school district, alleging that both governments were in violation of the establishment clause. The Ninth Circuit agreed with both claims. Reviewing only the challenge to the school district, the Supreme Court concluded that Newdow lacked standing to bring his lawsuit.[31] The Court thus did not reach the merits of the constitutional issue. Still, what's notable about the *Newdow* case is its inevitability, for under the Court's various establishment-clause tests (*Lemon*, "endorsement of religion," "coercion") the 1954 Pledge would seem clearly in violation of the First Amendment. Someone committed to a completely secular public square was going to pursue a case based on the Court's precedents, and Newdow did. Someone else will follow him, and someday the Court might decide the "under God" question. Because of the precedents, the only way the Pledge might be saved is for a majority to disregard the law and to construe "under God" (disingenuously) as lacking any serious religious meaning. Thus did Justice Sandra Day O'Connor write separately in *Newdow* to say that she would have upheld "under God" as "ceremonial deism." Likewise, in his separate opinion, Justice Rehnquist said he would have upheld the words as "a patriotic observance."

31. No. 02-1624 (2004).

"No Law . . . Prohibiting the Free Exercise Thereof"

One of the few religion cases decided before *Cantwell v. Connecticut* (1940) was *Reynolds v. United States* (1879).[32] Acting under a federal antibigamy statute, the government sought to end Mormon polygamy in what was then the territory of Utah. George Reynolds, secretary to Brigham Young, was convicted of bigamy. The Supreme Court declined to reverse, rejecting Reynolds's argument that he should be exempted from the law because his faith taught that he could take more than one wife. The Court distinguished between belief and action: government may not punish citizens for their religious beliefs but may regulate religiously motivated actions—in this case Reynolds's bigamy—if it has a rational basis for doing so. Rare is the government unable to demonstrate a "rational" basis for what it does.

Reynolds remained the law until *Sherbert v. Verner* (1963).[33] Adell Sherbert, a Seventh-Day Adventist, was fired by her South Carolina employer because she refused to work on Saturday, the Sabbath of her faith. Unable to find a job where she wouldn't have to work on Saturday, she filed for unemployment compensation. South Carolina rejected her claim on the ground that she was ineligible for such benefits because she had refused to accept suitable work that included Saturday employment. Sherbert went to court, alleging a violation of the free exercise clause. Not surprisingly, given the law of *Reynolds*, the South Carolina Supreme Court held for the state. But the U.S. Supreme Court reversed, holding that South Carolina had forced Sherbert to "choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to

32. 98 U.S. 145 (1979).
33. 374 U.S. 398 (1963).

accept work, on the other." The Court asked whether the state had some "compelling interest" that might sustain its action and concluded that it had none. *Sherbert* produced new doctrine: Government actions that substantially burden a religious practice must be justified by a compelling governmental interest. If government has no such interest, then it must create an exemption for the conduct.

Sherbert was followed by *Wisconsin v. Yoder* (1972).[34] At issue was a Wisconsin law requiring parents of all children to send them to private or public schools until they reached age sixteen. Some Amish parents refused to send their children, ages fourteen and fifteen, beyond the eighth grade. They justified their action through their faith. Convicted of violating the compulsory-attendance law, the parents sued on free exercise grounds. The Court, unable to credit Wisconsin with a compelling interest, agreed with them. The irony of the case was that the exemption the Court demanded for the Amish might well have been declared an unconstitutional establishment of religion had the Wisconsin legislature enacted it.

The Court limited the reach of *Sherbert* in *Employment Division v. Smith* (1990).[35] Alfred Smith and Galen Black ingested the hallucinogenic drug peyote during an American Indian church ceremony in which the drug was sacramentally used. Smith and Black, who worked with a private drug-rehabilitation organization, were then fired from their jobs for using the drug. When they filed for unemployment compensation, Oregon judged them ineligible for benefits because they had been fired for work-related "misconduct"—ingestion of peyote, possession of which is a felony in that state. Smith and Black challenged the state's decision on free exercise grounds, seeking an exemption from otherwise valid law. But a five-justice majority held for Oregon. "[A]n individual's religious

34. 406 U.S. 205 (1972).
35. 494 U.S. 872 (1990).

beliefs," wrote Justice Antonin Scalia for the Court, "[do not] excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate."

Scalia declined to apply *Sherbert*'s demand that Oregon produce a compelling interest in support of its denial to Smith and Black of unemployment compensation. Scalia expressed concern that requiring a compelling interest in a case like *Smith* would produce "a private right to ignore generally applicable law." Scalia's position—that "generally applicable, religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest"—meant that legislatures, not courts, would mainly decide whether conduct exemptions might be warranted. Central to Scalia's objection to the compelling interest standard was that courts would "constantly be in the business" of deciding which conduct exemptions might be warranted. In 1991—as the legislatures of Arizona, Colorado, and New Mexico had done earlier—the Oregon legislature voted to make an exception to its drug law for sacramental peyote use.

Smith led to federal legislation creating a more stringent test in evaluating free exercise claims. The Religious Freedom Restoration Act of 1993 was passed by unanimous vote in the House and with only three votes against in the Senate. A Catholic church in Boerne, Texas, reached for the help of the new law when city officials denied it permission to enlarge its building in a neighborhood zoned for historic preservation. In *City of Boerne v. Flores* (1997) the Supreme Court found that Congress had exceeded its constitutional authority in passing the statute.[36] *Smith* remained good law, and the task of carving out exemptions for religiously based conduct remained with legislatures.

Smith, of course, did not say what the free exercise clause actually demands of government. In 1993 the Court began to fill in that

36. 521 U.S. 507 (1997).

blank. At issue in *Church of the Lukumi Babalu Aye, Inc. v. Hialeah* was a Florida city's effort to render illegal the practice of the Santería religion.[37] The Court unanimously struck down regulations that did not mention the religion as such but were clearly aimed at outlawing its rituals, which involve animal sacrifice. The free exercise clause, said the Court, means that government may not suppress specific religious practices.

Also in 1993 the Court reviewed another free exercise question in *Lamb's Chapel v. Center Moriches Union Free School District*.[38] Lamb's Chapel applied for after-hour use of school facilities to show the James Dobson videos on raising Christian families. The school district denied the application, whereupon Lamb's Chapel challenged the regulations, which allowed social, civic, and recreational uses but forbade those for religious purposes. The Court unanimously held for Lamb's Chapel, but the majority relied on the First Amendment's free speech clause, not the free exercise clause: the school district had engaged in unconstitutional viewpoint discrimination by treating Lamb's Chapel differently because of its religious point of view. Given the success of Lamb's Chapel, other religious groups successfully brought cases in the 1990s claiming viewpoint discrimination.[39] Although the Court reached the right results in these cases, they have had, as Vincent Phillip Munoz points out, "a devastating effect on free exercise. Aside from the rare case in which a specific religious practice is suppressed directly"—as occurred in the *Hialeah* case—"religious free exercise has lost its independent value."[40]

In 2004 the Court had before it a new free exercise claim in

37. 508 U.S. 520 (1993).

38. 508 U.S. 384 (1993).

39. See *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995) and *Good News Club v. Milford Central School*, 533 U.S. 98 (2001).

40. Munoz, "Establishing Free Exercise," 18.

Locke v. Davey (2004).[41] Joshua Davey, a high school senior in the state of Washington, won a state-funded college scholarship that could be used at any public or private college. Enrolling at Northwest College, which is affiliated with the Assemblies of God, Davey decided on a double major in business and pastoral ministries. He then received a letter from state authorities advising that by choosing the pastoral major—an exercise of faith, not a speech act, by the way—he would have to give up his scholarship. The statute authorizing the scholarship program denied the award of the aid to "any student who is pursuing a degree in theology." The statute thus sought to ensure agreement with the state constitution, which forbids public funding of "any religious worship, exercise or instruction" and declares that "all schools maintained or supported wholly or in part by the public funds shall be forever free of sectarian control." Davey sued, contending that the state violated the free exercise clause by denying theology students a benefit available to all others. By a vote of seven to two, and with Chief Justice Rehnquist writing, the Court rejected Davey's free exercise argument. Yet as Justice Scalia wrote in dissent, there can be no doubt that "this case is about discrimination against a religious minority. Most citizens of this country identify themselves as professing some religious belief, but the state's policy poses no obstacles to practitioners of only a tepid, civic version of faith. Those the statutory exclusion actually affects—those whose belief in their religion is so strong that they dedicate their study and their lives to its ministry—are a far narrower set."

No Longer the "First" Political Institution

In the *Newdow* and *Davey* cases, the Court had an opportunity to correct the egregious errors of its predecessors and finally make

41. No. 02-1315.

sense of "establishment" and "free exercise." But of course the Court did not do that. The various tests for determining an establishment of religion—the *Lemon* test, endorsement, and coercion—still remain in the Court's toolbox. So they still can be used to discriminate against religion. And the Court has yet to read the ban on establishing religion in conjunction with the prohibition of its free exercise. Perhaps it feels it does not have to, since in the Court's decisions free exercise has so little substance. But the major surgery needed to correct the Court's religion jurisprudence seems unlikely unless the Court finally decides to take free exercise seriously. Toward that end, the Court will have to inquire into its original meaning. And here a good case can be made that James Madison best captured that meaning when he wrote that no one should be extended privileges because of religion, nor subjected to penalties or disabilities. One despairs, however, of calling yet again for the Court to get the First Amendment right. The Court prefers to nibble at the edges of its jurisprudence, to revise only here and there. And meanwhile the more secular America that the Court's decisions have helped bring about remains as close to any citizen as the nearest public school.

Doubtless there are many Americans who applaud the new America, but the founders would have regarded it with grave concern. They were persuaded that the liberal state they had fashioned would be unable to produce in the people the virtues that it needed to survive, and they knew from history that most people most of the time draw their ethics, their sense of morality and justice, from their religion. Thus, in his Farewell Address George Washington reminded the young nation that religion and morality are "indispensable" to "political prosperity" and cautioned against indulging "the supposition that morality can be maintained without religion." Washington implored "the mere politician, equally with the pious man, . . . to respect and cherish" religion. Several decades later Alexis de Tocqueville captured the founders' sentiments when he

described religion as "the first of [the Americans'] political institutions" because it was "indispensable to the maintenance of [our] republican institutions." It is not apparent that as many as five justices now sitting on the Court would agree with this view of the role of religion in American life. We are still embarked in a new direction, destination unknown.